

Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa

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Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa

Nsongurua J. Udombana†

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Introduction

[C]omprehensive development cannot be fully achieved until the impoverished have gained access to the essential attributes of dignity; a goal that can be achieved only by combatting [sic] all forms of destitution and marginalization and making enhanced solidarity among all members of the national

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community an essential basis for all the reforms introduced.¹

The African Charter on Human and Peoples' Rights² was, arguably, Africa's premier human rights treaty, "arguably" because the Charter was not the first treaty with human rights flavor. Its closest analogy was the Convention Governing the Specific Aspects of Refugee Problems in Africa,³ adopted to address Africa's peculiar refugee problems, as the United Nations Convention on the Status of Refugees⁴ was restrictive.⁵ Other treaties with human rights flavors that preceded the African Charter included the African Convention on the Conservation of Nature and Natural Resources⁶ and the Cultural Charter for Africa.⁷ The Cultural Charter, in particular, asserts the dignity of the African and of the popular foundations of his culture and seeks to combat and eliminate all forms of alienation and cultural suppression and oppression everywhere in Africa.⁸ It enjoins respect for the freedom to create and the liberation of the creative genius of Africa's peoples and respect for national authenticities and specificities in the field of culture.⁹ Africa's inter-governmental organizations—

1. U.N. Econ. & Soc. Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Tunisia*, ¶ 5, U.N. Doc. E/1990/Add.14 (Oct. 8, 1996) [hereinafter ECOSOC, *Second Periodic Reports*].

2. See Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, reprinted in 21 I.L.M. 59 (1982), entered into force Oct. 21, 1986 [hereinafter African Charter or Charter]. This and other treaties adopted in Africa are available on the African Union (AU) website, <http://www.africa-union.org> (last visited Apr. 16, 2006) [hereinafter AU website]. For literature on the African Charter, see generally FATSAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* (2003); U. OJI UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* (1997); Philip Amoah, *The African Charter on Human and Peoples' Rights—An Effective Weapon for Human Rights?* 4 AFR. J. INT'L & COMP. L. 226 (1992); Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667 (1982).

3. See Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, 1001 U.N.T.S. 45, available at AU website, *supra* note 2 [hereinafter OAU Refugee Convention].

4. See Convention on the Status of Refugees 1951, adopted July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter U.N. Refugee Convention].

5. The OAU Refugee Convention defines "refugee" to cover not only those unwilling to return to their country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (as in the U.N. Refugee Convention) but also those compelled to leave their country of origin on account of external aggression, occupation, foreign domination, or events seriously disturbing public order (which was missing in the U.N. Convention). See OAU Refugee Convention, *supra* note 3, art. 1(2).

6. See OAU, African Convention on the Conservation of Nature and Natural Resources, opened for signature Sept. 15, 1968, OAU Doc. CAB/LEG/24.1 (entered into force June 16, 1969), available at AU website, *supra* note 2 [hereinafter African Conservation Convention].

7. See Cultural Charter for Africa, adopted July 5, 1976 (entered into force Sept. 19, 1990), available at AU website, *supra* note 2 [hereinafter Cultural Charter].

8. *Id.* art. 1(c) & (d).

9. *Id.* art. 2(b) & (c).

formerly the Organization of African Unity (OAU)¹⁰ and currently the African Union (AU)¹¹—have adopted other treaties to broaden the contours of human rights in the continent, including those on children,¹² women,¹³ and human rights' court.¹⁴

Some commentators conclude, on the basis of the pre-1981 treaties, that what is new in the African Charter is its establishing an institutional mechanism—the African Commission on Human and Peoples' Rights¹⁵—to enforce its provisions.¹⁶ According to Chidi Odinkalu, “[t]he distinctive contribution of the African Charter to the African regional human rights system was for the first time to break through the resistance of African countries to supra-national human rights oversight, albeit through the creation of a quasi-judicial regional human rights commission.”¹⁷ This conclusion represents only a partial truth, given the uniqueness of the African Charter normative architecture. Unlike these earlier instruments—includ-

10. The OAU was the first continental umbrella of all independent states in Africa and was established in 1963 to promote inter-African cooperation in the fields of economics, culture, science, and technology. See Charter of the Organization of African Unity art. 2, *adopted* May 25, 1963, 479 U.N.T.S. 39 (*entered into force* Sept. 13, 1963) [hereinafter OAU Charter].

11. The AU replaced the OAU in July 2002, pursuant to its Constitutive Act art. 33(1), *adopted* July 11, 2000, AU Doc. CAB/LEG/23.15, 479 (*entered into force* May 26, 2001, *amended* by the Protocol on Amendments to the Constitutive Act of the AU, July 11, 2003), *available at* AU website, *supra* note 2 [hereinafter AU Act].

12. See OAU, African Charter on the Rights and Welfare of the Child, *adopted* July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (*entered into force* Nov. 29, 1999), *available at* AU website, *supra* note 2 [hereinafter African Child Charter].

13. See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 11, 2003, *available at* AU website, *supra* note 2 [hereinafter Women Protocol or Protocol].

14. See OAU, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted* June 10, 1998, OAU Doc. LEG/MIN/AFCHPR/PROT/III (*entered into force* Jan. 25, 2004), [hereinafter African Court Protocol], *available at* AU website, *supra* note 2. For commentaries on the normative and institutional structure of the court, see Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000) (concluding that the establishment of an African Court of Human Rights is necessary and a step in the right direction, though the Court will not end human rights abuses over night); Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342 (1999) (evaluating the Court's effectiveness in developing human rights law in Africa, filling the gap created by the African Commission, and ensuring the internalization of human rights in Africa).

15. See African Charter, *supra* note 2, art. 30 (establishing an African Commission “to promote human and peoples' rights and ensure their protection in Africa”).

16. For a detailed mandate of the Commission, see *id.* art. 45. See generally INGER OSTERDAHL, IMPLEMENTING HUMAN RIGHTS IN AFRICA: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INDIVIDUAL COMMUNICATIONS (2002) (discussing the execution of the Commission's mandate in Africa); RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW (2000) (discussing the interaction of the Commission, African States, and individuals in various contexts); EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS: PRACTICE AND PROCEDURES 108–09 (1996).

17. Chidi Anselm Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa*, 47 J. AFR. L. 1, 19 (2003).

ing Western regional human rights instruments before it,¹⁸ the African Charter integrates three “generations” of human rights, affirms their universality, indivisibility, and interdependence,¹⁹ commits states to recognize, promote, and realize all rights,²⁰ and provides for autonomous duties without requiring that they trump rights.²¹ The Charter guarantees, more particularly, libertarian (civil and political) rights,²² egalitarian (economic, social and cultural) rights,²³ and solidarity (peoples’ rights).²⁴

18. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, *as amended* by Protocol No. 11, E.T.S. No. 155, 33 I.L.M. 960 (1994) (*entered into force* Nov. 1, 1998) [hereinafter European Convention or ECHR]; American Convention on Human Rights: “Pact of San Jose, Costa Rica,” *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978) [hereinafter American Convention or ACHR]. For comparative analysis between the African system and these other systems, see Makau Mutua, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM’N HUM. & PEOPLES’ RTS. 5 (1993) and Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984).

19. See African Charter, *supra* note 2, pmb1. (“Convinced it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights” (emphasis added)). Cf. OAU, Declaration on Social Development pmb1., OAU Doc. AHG/Decl.5 (XXX) (1994) (noting that “human rights are an indivisible whole encompassing political, economic, social, cultural and environmental dimensions”), *reprinted in* 1 HUMAN RIGHTS LAW IN AFRICA 247 (Christof Heyns ed., 2004); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Program of Action*, art. 1(1), U.N. Doc. A/CONF.157/24 (July 12, 1993), (emphasizing the universality, indivisibility, and interconnectedness of all human rights); U.N. ESCOR, 7th Sess., Supp. 2, at 82, U.N. Doc. E/1993/22 (1992) (criticizing the emphasis placed upon civil and political rights over economic, social, and cultural rights); Opinion of the Economic and Social Committee on the Citizens’ Europe (Opinion No. 1037), § 1.2.3 (Sept. 23 1992), *available at* <http://www.esc.eu.int/scripts/avis.asp?type=en> (search for “opinion nr.” 1037) (stressing that economic and social rights are “indissolubly linked to civil and political rights: together these citizens’ rights and accompanying duties constitute the cornerstone of a free, democratic society founded on respect for human rights”).

20. See African Charter, *supra* note 2, arts. 1, 25, 26.

21. See *id.* arts. 27–29.

22. See *id.* arts. 3–13. Libertarian rights relate to the exercise of free will.

23. See *id.* arts. 14–18. Egalitarian rights relate to social equality. The notion of libertarian freedom is associated with the classical political philosophers—Locke, Hobbes, Smith, and Mill—while its egalitarian counterpart is associated with such thinkers as Hegel, Rousseau, Herder, and Marx. For a modern analysis of these two concepts of liberties, see ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* ch. 2 (1969) (distinguishing between negative and positive liberties; defining negative liberty as the absence of constraints on, or interference with, agents’ possible action, and positive liberty as self-mastery or the capacity to determine oneself, that is, to be in control of one’s destiny).

24. See African Charter, *supra* note 2, arts. 19–24. Solidarity rights relate to groups or collectives. See Rachel Murray & Steven Wheatley, *Groups and the African Charter on Human and Peoples’ Rights*, 25(1) HUM. RTS. Q. 213 (2003) (examining the position of groups under the African Charter); Theo van Boven, *The Relations Between Peoples’ Rights and Human Rights in the African Charter*, 7 HUM. RTS. L.J. 183, 194 (1986) (arguing that the African Charter “places individual human rights in the contextual setting of peoples’ rights, with due respect for the human person as the central subject of development”).

Surely, the African Charter provides the benchmark for measuring states' commitments to human rights protection in Africa.

This article—largely a descriptive and prescriptive, but also a comparative, piece—examines the rights to work and social security (collectively “social rights”²⁵) under the African regional human rights system and calls on the AU and its member states to adopt concrete and positive measures for their realization. It also urges judicial and non-judicial institutions in Africa to keep faith with the principle of indivisibility of all rights, both in their interpretative mandates and in their advocacies, respectively. The article first examines the contours of social rights under the African regional human rights system, with a focus on the rights to work and social security (Part I). Next, the article examines states' obligations in relation to these rights (Part II) and assesses the extent to which African states have fulfilled these obligations (Part III). The article then explores the options that are available to the African international community in realizing social rights in Africa (Part IV).

While the African Charter serves as a template, the analysis in this article will be conducted in light of comparative jurisprudence, including instruments of the International Labor Organization (ILO). The Charter itself recognizes regional and international human rights instruments, as well as African practices consistent with international norms on human and peoples' rights, as important reference points for the interpretation and application of the Charter.²⁶ This article will also rely on aspects of political economy, since it prescribes an integrated approach for the advancement of social rights.

I. Examining the Legal Regime on Social Rights in Africa

Civil and political rights have demonstrably been shown to demand positive state action and interference for their realization—*le droit a la resistance et a la defense*, as opposed to *le droit a l'obtention et a l'exigence*. In practice, this positive obligation has primarily been limited to inhuman treatment and health conditions in prisons under articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR).²⁷ Among the

25. “Social rights” may be defined restrictively as rights that give people security, as they live together and learn together; while “social and economic rights” may be defined broadly as rights that give people social and economic security, including the right to food, shelter, and health. This Article deliberately classifies the rights to work and social security as social rights, though aspects of these rights also fall under the rubrics of “economic rights.”

26. See African Charter, *supra* note 2, arts. 60–61. Cf. MURRAY, *supra* note 16, at 25 (noting that article 60 is “unusual in its inclusion of non-binding concepts and jurisprudence of other bodies”). See, e.g., Soc. & Econ. Rights Action Ctr. v. Nigeria, Comm. No. 155/96, ¶ 49 (Afr. Comm'n Hum. & Peoples' Rts. 2001), reprinted in FIFTEENTH ANN. ACTIVITY REP. OF THE AFR. COMM'N ON HUM. AND PEOPLES' RTS., 2001–2002, Annex V [hereinafter SERAC case] (where the Commission invoked articles 60 and 61 to import comparative international human rights law into its interpretation of the Charter).

27. International Covenant on Civil and Political Rights arts. 7, 10, opened for signature Dec. 19, 1966, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

positive obligations engendered by those two articles is the duty to train appropriate personnel: enforcement personnel, medical personnel, police officers, in short, “any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention, or imprisonment.”²⁸ There is, however, no sound reason to exclude life, dignity, non-discrimination, equality before the law, and fair trial from the list of “cross-cutting rights.”²⁹ A state that fails to adequately fund its judiciary in order to provide effective remedy to complainants violates rights, just as if the state tortures its citizens.³⁰ In commenting on the right to life in the ICCPR, the Human Rights Committee (HRC) has said that:

The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.³¹

Notwithstanding these “cross-cutting rights,” some human rights treaties make a point of enshrining “core” egalitarian rights and the African Charter provides the point of departure in this regard. The Charter guarantees the rights to property,³² to work and equal remuneration for equal work;³³ to “the best attainable state of physical and mental health,” including medical care for the sick,³⁴ to education, including the free participation in the cultural life of one’s community,³⁵ and the protection of the family, its morals, women, children, and the disabled.³⁶ The Charter conspicuously omits other egalitarian rights, such as housing, an omission that has been attributed to “an endeavour not to guarantee rights which

28. U.N. Hum. Rts. Comm., General Comment No. 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment (art. 7), at ¶ 10 (Apr. 10, 1992), available at <http://ap.ohchr.org/search/maine.htm> (search for “general comment no. 20”) [hereinafter General Comment No. 20]. A similar obligation is engendered under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 10, opened for signature Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

29. For a brief discussion on “cross-cutting rights” in the African Charter, see Chidi Anselm 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. 327, 337-39 (2001).

30. Cf. PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 126 (1983) (“[L]iberty and security, arrest and detention, the rights of accused persons and the provision of fair trials all require substantial expenditure by the State in training and maintaining competent police forces, a responsible public prosecution service, and a competent, independent, and impartial judiciary - as well as providing, where necessary, free legal assistance and court interpreters.”).

31. U.N. Hum. Rts. Comm., General Comment No. 6: The Right to Life (art. 6), at ¶ 5, (Apr. 30, 1982), available at <http://ap.ohchr.org/search/maine.htm> (search for “general comment no. 6”).

32. See African Charter, *supra* note 2, art. 14.

33. See *id.* art. 15.

34. See *id.* art. 16.

35. See *id.* art. 17.

36. See *id.* art. 18.

have no chance of being realized.”³⁷ A more plausible explanation for the omission might have been the bad faith of the then authoritarian rulers in Africa,³⁸ who, one might add, were interested in politics of patronage and social fragmentation than in the equitable distribution of national wealth. Fortunately, the African Commission has found a right to housing through an integrative interpretation of the Charter; in the *SERAC* case, the Commission inferred a right to shelter or housing from the combined effect of the right to enjoy the “best attainable state of mental and physical health,” the right to property, and the protection accorded to families, which forbids the destruction of property.³⁹

This part focuses on two social rights—the rights to work and social security—as templates for analysis.

A. The Right to Work in Texts and Contexts

Work is a human right because it is a means to an end—human survival. By creating the material wealth in society, work makes human flourishing possible and is the measure of human dignity. It enhances social solidarity, which is vital for a society’s survival. Employment, which is integral to the right to work, ensures income for people and plays a positive role in economic growth; it stimulates consumption and production and ensures the viability and expansion of the domestic market. The right to work, thus, is both an inherent and instrumental freedom; as an instrumental freedom, it promotes development and contributes to the expansion of human freedom in general.⁴⁰ Recognizing the importance of work, the African Charter guarantees it as a right in the following words: “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”⁴¹

The African Charter is unique in seeing work not only as a right but also as a duty; it provides that every individual has a duty “[t]o work to the best of his abilities and competence”⁴² Commenting on this provision, Paul Sieghart notes: “This is how it in fact appears to many millions of subsistence farmers and their families [in Africa], who claim no ‘right’ to tend their crops, but would rapidly starve if they did not.”⁴³ Many domestic constitutions in Africa appear to support Sieghart’s conclusion, by also

37. Philip Kunig, *Regional Protection of Human Rights: A Comparative Introduction*, in *REGIONAL PROTECTION OF HUMAN RIGHTS BY INTERNATIONAL LAW: THE EMERGING AFRICAN SYSTEM* 45 (Philip Kunig et al., eds., 1985).

38. See EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* 127 (2001).

39. See *SERAC* case, *supra* note 26, ¶ 60.

40. Cf. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 37 (1999) (“The effectiveness of freedom as an instrument lies in the fact that different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of other types. The two roles are thus linked by empirical connections, relating freedom of one kind to freedom of other kinds.”).

41. African Charter, *supra* note 2, art. 15.

42. *Id.* art. 29(6).

43. SIEGHART, *supra* note 30, at 216 n.1.

classifying work as a duty,⁴⁴ including those of Angola,⁴⁵ Cape Verde,⁴⁶ Egypt,⁴⁷ Equatorial Guinea,⁴⁸ Libya,⁴⁹ Mali,⁵⁰ Mozambique,⁵¹ Sao Tome and Principe,⁵² and Tanzania.⁵³

Is article 15 of the African Charter a noun or a verb? Does it vest a duty on the government to provide work, or is it merely a negative obligation to secure "equitable and satisfactory conditions" for work? Obviously, the Charter's provision is vaguely phrased, making its scope from the text alone unclear. The present writer asserts that the Charter's provision is not merely a verb, asserting something about a subject, but that it commits states to realize this right through a national employment policy that provides opportunities for work, with institutions and techniques to achieve that objective.⁵⁴ One of the objects of the Charter, as stated in its preamble, is the satisfaction of economic, social, and cultural rights.⁵⁵ The primary responsibility of a state is the welfare of its citizens, though non-state actors have complimentary obligations. The legitimacy of a government depends on whether it meets the basic needs of its citizens.

The UDHR's provisions on the right to work include the right "to free choice of employment."⁵⁶ Though the UDHR is not a treaty law, its provisions may be said to form parts of customary law or general principles of law.⁵⁷ Egon Schwelb even declares that the UDHR "no longer fits into the dichotomy of 'binding treaty' against 'non-binding' pronouncement," but is

44. See generally 2 HUMAN RIGHTS LAW IN AFRICA (Christof Heyns ed., 2004) (citing right to work provisions in the constitutions of African Countries).

45. See ANGL. CONST. § 46(1).

46. See CAPE VERDE CONST. § 60(2).

47. See EGYPT CONST. § 13.

48. See EQ. GUINEA CONST. § 25.

49. See LIBYA CONST. § 4.

50. See MALI CONST. § 19.

51. See MOZAM. CONST. § 88(1).

52. See SAO TOME & PRINCIPE CONST. § 41(1).

53. See TANZ. CONST. § 25(1).

54. For a discussion on states' obligations in relation to this right, see *infra* Part III.

55. Although the preamble is not part of a treaty's substantive provisions, it can be taken into consideration when interpreting the treaty; in fact, consideration of the preamble is normally necessary in cases of doubt. See Vienna Convention on the Law of Treaties art. 31, adopted May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention] (providing that "the context for the purpose of the interpretation of a treaty shall . . . includ[e] its preamble").

56. Universal Declaration of Human Rights, G.A. Res. 217A, art. 23(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

57. John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 29 (B.G. Ramcharan ed., 1979) (noting that "in addition to their admitted moral and political authority, the justiciable provisions of the Declaration, including certainly, those enunciated in articles two to twenty-one inclusive, have now acquired the force of law as part of the customary law of nations"). Cf. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998) (noting that the UDHR "is already showing signs of having achieved the status of holy writ within the human rights movement" and that "[c]ults have formed around selected provisions [of the UDHR]"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (noting that provisions of the UDHR constitute basic principles of international law).

rather an authoritative statement of the international community.⁵⁸ Regardless of the status of the UDHR, there is no controversy that the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁹ is legally binding on States Parties.⁶⁰ The ICESCR extends the right to work to include “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”⁶¹ The Women Protocol requires States Parties to “guarantee women equal opportunities in work and career advancement and other economic opportunities”⁶² such as “equality of access to employment,”⁶³ “equal remuneration for jobs of equal value for women and men,”⁶⁴ and “freedom to choose their occupation.”⁶⁵

The phrase “equitable and satisfactory conditions,” as used in the African Charter,⁶⁶ is “highly subjective” and lacks any precise definition.⁶⁷ Its equivalent provisions in the UDHR and ICESCR are not helpful either, as they simply refer to “just and favourable” conditions.⁶⁸ Further, none of these instruments prescribe the means for achieving these “equitable and satisfactory” or “just and favorable” ends. The European Social Charter (ESC)⁶⁹ obligates its Contracting Parties to “issue safety and health regulations [for employers and workers];” “provide for the enforcement of such regulations by measures of supervision;” and “consult, as appropriate, employers’ and workers’ organisations on measures intended to improve industrial safety and health.”⁷⁰ Though not binding on African states, the ESC could provide some guidance on the interpretation of the African Charter’s provision especially as the African Charter enjoins extraterritorial interpretation of rights.⁷¹

The right to work includes the corollary right to equal pay for equal work, which is an aspect of economic justice demanding fair compensation for a person’s labor in relation to others. This right is “precisely drafted”

58. EGON SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY: THE ROOTS AND GROWTH OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948-1963*, at 70 (1964).

59. Cf. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Mar. 23, 1976) [hereinafter ICESCR].

60. LOUIS HENKIN ET AL., *HUMAN RIGHTS* 329 (1999).

61. ICESCR, *supra* note 59, art. 6(1).

62. See Women Protocol, *supra* note 13, art. 13.

63. *Id.* art. 13(a).

64. *Id.* art. 13(b).

65. *Id.* art. 13(d).

66. See African Charter, *supra* note 2, art. 15.

67. OUGUERGOUZ, *supra* note 2, at 184 (arguing that “it would have been preferable to define [the phrase] more precisely”).

68. UDHR, *supra* note 56, art. 23(1); ICESCR, *supra* note 59, art. 7.

69. European Social Charter, *adopted* Oct. 18, 1961, 529 U.N.T.S. 89 (*entered into force* Feb. 26, 1965) [hereinafter ESC].

70. *Id.* art. 3.

71. See African Charter, *supra* note 2, art. 60. On possibilities of a comparative interpretation of rights, see Nsongurua J. Udombana, *Interpreting Rights Globally: Courts and Constitutional Rights in Emergent Democracies*, 5 *AFR. HUM. RTS. L.J.* 47 (2005); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1288 (1999).

and defined in international treaties to be judicially enforceable.⁷² The African Charter provides that every individual “shall receive equal pay for equal work,”⁷³ the Women Protocol’s “equal remuneration for jobs of equal value,”⁷⁴ the UDHR’s “just and favourable remuneration,”⁷⁵ and the ICESCR’s “[f]air wages and equal remuneration for work of equal value.”⁷⁶ In each case, the test is the standard of living the pay provides for the worker and his family. Living standards relate to the richness of a person’s life⁷⁷ and the UDHR links this “standard” not only to factors of food, clothing, and housing—which form a specific subject-matter in article 11 of the ICESCR—but also to health, medical care, social service, and security.⁷⁸ Thus, the pay must be one “worthy of human dignity,”⁷⁹ or “suitable” and “in proportion to his capacity and skill,”⁸⁰ or “a decent living.”⁸¹ In *Malawi African Association v. Mauritania*,⁸² the African Commission held that “unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being.”⁸³ This decision also further illustrates the indivisibility and interconnectedness of all rights.

The African Charter does not provide for the right to rest and leisure; but the African Child Charter understandably guarantees this right to children, including the right “to engage in play and recreational activities appropriate to the age of the child.”⁸⁴ Universal instruments guarantee to workers the right to rest and leisure, starting with the UDHR, which guarantee includes “reasonable limitations of working hours” and “holidays with pay.”⁸⁵ The ICESCR treats rest and leisure as part of “just and favourable conditions of work” and includes the right to “remuneration for public holidays.”⁸⁶ These other instruments may have influenced the African Commission in integrating the right to rest and leisure in its guidelines for states’ reports on egalitarian rights. The guidelines enjoin states to report on “the legislative or other measures taken with a view to giving effect to

72. See Robin R. Churchill & Urfan Khaliq, *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?* 15 EUR. J. INT’L. L. 417, 420 (2004) (arguing also that for rights such as equal pay or consultation rights in the workplace, a judicial remedy could be suitable).

73. African Charter, *supra* note 2, art. 15.

74. Women Protocol, *supra* note 13, art. 13(b).

75. UDHR, *supra* note 56, art. 23(3).

76. ICESCR, *supra* note 59, art. 7(a)(i).

77. See JEAN DREZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 12 (1989).

78. See UDHR, *supra* note 56, art. 25(1).

79. *Id.* art. 23(3).

80. American Declaration of the Rights and Duties of Man art. XIV, AG/RES. 1591 (XXVIII-O/98) (May 2, 1948), available at <http://www.oas.org/juridico/English/ga-Res98/Eres1591.htm> [hereinafter American Declaration].

81. ICESCR, *supra* note 59, art. 7(a)(ii).

82. *Malawi Afr. Ass’n v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 & 210/98 (Afr. Comm’n Hum. & Peoples’ Rts. 2000), reprinted in THIRTEENTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS., 1999–2000, Annex VII.

83. *Id.* ¶ 135.

84. See African Child Charter, *supra* note 12, art. 12.

85. UDHR, *supra* note 56, art. 24.

86. See ICESCR, *supra* note 59, art. 7(d).

the rights and freedoms recognised and guaranteed by the present Charter," including the rights to rest, leisure, limitation of workers hours, and periodic holidays with pay.⁸⁷

The African Charter also contains no provision protecting vulnerable groups from forced or exploitative labor, which is surprising, considering that forced and exploitative labor, in particular of children, had been in practice long before the adoption of the Charter.⁸⁸ One of the shortcomings of the African Charter was its failure to specially guarantee the rights of vulnerable groups such as women and children, an omission that is now being addressed through separate treaties or "special protocols."⁸⁹ The African Child Charter, on its part, protects every child "from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development."⁹⁰ The relevant judicial institutions in Africa should interpret provisions of instruments abolishing child labor as including the right to compensation for work performed, as this is a necessary condition for abolishing forced labor. Meanwhile, the Women Protocol guarantees to African women the right to protection from exploitation by their employers;⁹¹ the equal application of taxation laws to women and men;⁹² and the "right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children."⁹³

Although the African Charter does not expressly provide for the right to form and join trade unions, this right could be imputed from the Charter's guarantee of the right to freedom of association,⁹⁴ since the right to work implies the corollary right to organize or unionize in pursuit of workers' common interests, including the right to strike. Comparative law and jurisprudence support this conclusion. The European Convention guarantees the right to freedom of association and links it with an individual's "right to form and to join trade unions for the protection of his interests."⁹⁵ Some scholars regard the Convention's article 11 as "unhelpful in its vague-

87. See AFRICAN COMM'N ON HUMAN AND PEOPLES' RIGHTS, STATE REPORTING PROCEDURE: INFORMATION SHEET NO. 4 [hereinafter STATE REPORTING PROCEDURE], available at African Commission on Human and Peoples' Rights, http://www.achpr.org/english/_info/news_en.html (follow "State Reporting: Procedure" hyperlink, under "Documentation" menu) (last visited Apr. 16, 2006) [hereinafter African Commission website].

88. See, e.g., Nsongurua J. Udombana, *Child Labour and the Challenges of Human Rights in Nigeria*, 11(2) *Lesotho L.J.* 269 (1998).

89. See African Charter, *supra* note 2, art. 66 (providing "special protocols or agreements may, if necessary, supplement" the Charter's provisions).

90. African Child Charter, *supra* note 12, art. 15(1).

91. See Women Protocol, *supra* note 13, art. 13(d).

92. *Id.* art. 13(j).

93. *Id.* art. 13(k).

94. African Charter, *supra* note 2, art. 10. Cf. UDHR, *supra* note 56, arts. 20, 23 (guaranteeing the right to freedom of peaceful assembly and association as well as the "right to form and to join trade unions"); ICCPR, *supra* note 27, art. 22 (assuring that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions").

95. ECHR, *supra* note 18, art. 11(1). Cf. ESC, *supra* note 69, art. 5.

ness;⁹⁶ that is to say, “[t]he protection offered by Article 11 to the rights to freedom of assembly and association, is what might be described as bottom line protection.”⁹⁷ In *National Union of Belgian Police v. Belgium*,⁹⁸ the European Court of Human Rights held that the right to form and join trade unions is not a separate right but a part of the general right to freedom of association.⁹⁹

The European Court has, according to Alaister Mowbray, been “reluctan[t] to recognise the existence [of] unqualified substantive trade union rights, such as the right to strike,” arguably, because of “the Court’s desire not to encroach upon the regime of economic and social rights created by the European Social Charter.”¹⁰⁰ However, in *Swedish Engine Drivers’ Union v. Sweden*,¹⁰¹ the Court held that the right to form and join trade unions applies to a state in its capacity as an employer, whether the state’s relations with its employees is governed by public or private law.¹⁰² The Court reasoned that “[t]he [European] Convention nowhere makes an express distinction between the function of a Contracting State as holder of public power and its responsibilities as employer.”¹⁰³ Furthermore, the phrase “for the protection of his interests,” as used in the European Convention, is not redundant: it denotes purpose and shows that “the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible.”¹⁰⁴

The ICESCR expressly guarantees “the right of everyone to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests.”¹⁰⁵ It guarantees to trade unions the right “to establish national federations or confederations” and the latter’s right “to form or join international trade-union organizations,”¹⁰⁶ obviously envisaging such organizations as the ILO. The ICESCR also guarantees to trade unions the right “to function freely subject to no limitations other than those prescribed by law and which are neces-

96. Sian Lewis-Anthony, *Case Law of Article 11 of the European Convention on Human Rights*, 34A Y.B. Eur. Conv. Hum. Rts. 27, 37, 43 (1994).

97. *Id.*

98. *Nat’l Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) (1975).

99. *Id.* ¶¶ 37–38. *Cf.* Bob Hepple, *Freedom to Form and Join or Not to Join Trade Unions*, 34A Y.B. Eur. Conv. Hum. Rts. 162, 168 (1994) (arguing that the specific reference to trade unions in article 11 of the ECHR was designed to ensure that they would be treated as “associations” under the Convention, irrespective of their categorization and status under the domestic law of member states).

100. ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 563 (2001).

101. *Swedish Engine Drivers’ Union v. Sweden*, 20 Eur. Ct. H.R. (Ser. A) 617 (1976).

102. *Id.* ¶ 37.

103. *Id.*

104. *Id.* ¶ 40. *Contra* *Nat’l Union of Belgian Police*, 19 Eur. Ct. H.R. (ser. A) at ¶ 13 (Fitzmaurice, J., concurring) (arguing that the phrase “for the protection of his interests” may have made “certainty more certain,” but that it “does not strictly add anything of substance that would not already be there”).

105. *See* ICESCR, *supra* note 59, art. 8(1)(a).

106. *See id.* art. 8(1)(b).

sary . . . for the protection of the rights and freedoms of others.”¹⁰⁷ Lastly, but more significantly, it guarantees the right to strike.¹⁰⁸

These treaties subject the right to freedom of association (including trade union rights) to “claw-back clauses,” which permit, “in normal circumstances, breach of an obligation for a specified number of public reasons.”¹⁰⁹ Under the ICESCR, the right to strike must be “exercised in conformity with the laws of the particular country,”¹¹⁰ while the exercise of the right to freedom of association under the African Charter is predicated on the beneficiary “abid[ing] by the law.”¹¹¹ The European Convention, for its part, prohibits any restriction on the exercise of the right to freedom of association, “other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”¹¹² Furthermore, the African Charter subjects the right to freedom of association to the obligation to “preserve and strengthen social and national solidarity” imposed by article 29,¹¹³ though the Charter fails to define the terms “social and national solidarity.” Depending on the context, such apparently harmless phraseology could be abused through subjective interpretations by states. Duties and ideals of solidarity may impinge, in clear and serious ways, on the Charter’s definitions of rights themselves; and the idea of solidarity, once threatened, may allow forced participation in an organization.

Fortunately, the African Commission does not treat “claw-back clauses” as ghosts to be dreaded. *A contrario*, the Commission has held that the mention of a “claw-back clause” is not a license for states to use domestic laws to justify deprivation of a person’s freedom.¹¹⁴ The Commission has also stated that “[t]he regulation of the exercise of the right to freedom of association should be consistent with States’ obligations under the African Charter”¹¹⁵ And, in *Civil Liberties Organization (in respect of Bar Association) v. Nigeria*,¹¹⁶ the Commission stressed that, “competent authorities should not enact provisions which would limit the exercise of

107. See *id.* art. 8(1)(c).

108. See *id.* art. 8(1)(d).

109. Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT’L L. 281, 281 (1978).

110. ICESCR, *supra* note 59, art. 8(1)(d).

111. African Charter, *supra* note 2, art. 10(1).

112. ECHR, *supra* note 18, art. 11(2).

113. African Charter, *supra* note 2, arts. 10(2), 29(4).

114. See *Purohit v. Gambia*, Comm. No. 241/2001, ¶ 64 (Afr. Comm’n Hum. & Peoples’ Rts. 2003), reprinted in SIXTEENTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS., 2002-2003, Annex VII.

115. ACHPR, *Resolution on the Right to Freedom of Association*, FIFTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS., 1991-1992, Annex VII, ¶ 3 [hereinafter *Resolution on Freedom of Association*].

116. Civil Liberties Org. v. Nigeria, Comm. No. 101/93, (Afr. Comm’n Hum. & Peoples’ Rts. 1995), reprinted in SEVENTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS., 1994-1995, Annex VI [hereinafter *CLO v. Nigeria*].

this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.”¹¹⁷

B. The Right to Social Security in Texts and Contexts

Social security could be defined as the set of policy instruments implemented to compensate for the financial consequences of a number of risks should they occur.¹¹⁸ Sandra Liebenberg defines it as “those measures that aim at guaranteeing a certain minimum subsistence level, as well as protecting the income of people in situations where it is imperilled [sic] owing to various contingencies.”¹¹⁹ These definitions are somewhat restrictive in that they are concerned more with replacing redistributive mechanisms that break down in the process of socioeconomic change. In truth, social security is the employment of social means to prevent deprivation or vulnerability to deprivation.¹²⁰ It includes formal (government regulated, public) and informal arrangements. Its two strands are social insurance and social assistance. The former is financed by contributions from employers and employees, with benefits accruing to contributors; the latter is financed by government revenue and targeted at those mostly in need.¹²¹

In Africa, social security is often thought of in terms of pension funds, medical insurance, and disability schemes.¹²² Either way, social security, like work, is important for the well-being of workers, their families, and the community as a whole. If properly managed, social security enhances national productivity and supports economic development. Empirical research has shown that countries with the best social protection systems have extremely high levels of productivity.¹²³ An ILO report suggests that by offering good protection to their workforce, countries will further enhance the productive potential of their economies.¹²⁴ This explains why, as this article will later illustrate, most Western societies place a high pre-

117. *Id.* ¶ 15; *accord Resolution on Freedom of Association*, *supra* note 115, ¶ 2.

118. See V. Moore et al., *The Concept of Social Security*, in *SOCIAL SECURITY LAW: GENERAL PRINCIPLES* 7 (M.P. Olivier et al. eds., 1999).

119. Sandra Liebenberg, *The Right to Social Security: Response from a South African Perspective*, in *EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES* 147, 155 (Danie Brand & Sage Russell eds., 2002) [hereinafter *EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS*].

120. See Jean Dreze & Amartya Sen, *Public Action for Social Security: Foundations and Strategy*, in *SOCIAL SECURITY IN DEVELOPING COUNTRIES* 3, 5 (Ehtisham Ahmad et al. eds., 1991) [hereinafter *SOCIAL SECURITY IN DEVELOPING COUNTRIES*].

121. See INT’L LABOUR OFFICE, ILO, *INTRODUCTION TO SOCIAL SECURITY* 3-5 (1984). See generally ILO Constitution, Annex III(f) (2004) (recognizing the ILO’s obligation regarding “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”).

122. See Joachim von Braun, *Social Security in Sub-Saharan Africa: Reflections on Policy Challenges*, in *SOCIAL SECURITY IN DEVELOPING COUNTRIES*, *supra* note 120, 395, 396.

123. See, e.g., Roman Arjona et al., *Growth, Inequality and Social Protection*, 29 *CAN. PUB. POL’Y* 119 (2003).

124. See ILO, *WORLD LABOUR REPORT 2000: INCOME SECURITY AND SOCIAL PROTECTION IN A CHANGING WORLD* 51-72 (2000) [hereinafter *ILO, WORLD LABOUR REPORT 2000*].

mium on social security, though they deceive their African counterparts into adopting phony austerity measures, downsizing their work force and leaving citizens to their own fate.¹²⁵

Mainstream international human rights instruments recognize social security as a basic human right; among these are the ICESCR,¹²⁶ ESC,¹²⁷ American Declaration,¹²⁸ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.¹²⁹ The ESC's provisions is more expansive and covers four category of persons: "[a]ll workers and their dependents," who are entitled to "social security;"¹³⁰ "[a]nyone without adequate resources," who is entitled to "social and medical assistance;"¹³¹ "[e]veryone," who is entitled to "social welfare services;"¹³² and "[d]isabled persons," who are entitled to "vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability."¹³³ The UDHR guarantees to "[e]veryone, as a member of society, . . . the right to social security"¹³⁴ and expands security in six specified eventualities: "unemployment, sickness, disability, widowhood, old age, [and] other lack of livelihood in circumstances beyond his control."¹³⁵ The ICESCR similarly recognizes "the right of everyone to social security, including social insurance,"¹³⁶ though it fails to specify eventualities that could give rise to social security and insurance.

Like general international human rights law, the African human rights normative structure guarantees the right to social security, though some of the regional treaties are vaguely worded. The African Charter seemingly limits social security right to "[t]he aged and the disabled" who are entitled to "special measures of protection in keeping with their physical or moral needs."¹³⁷ The Women Protocol guarantees social insurance, *inter alia*, to women working in the informal sector¹³⁸ and to "poor women and women heads of families including women from marginalized population groups."¹³⁹ The African Child Charter also guarantees to children the right to social security, including basic nutrition, shelter, basic health care services, and social services.¹⁴⁰ For handicapped children, it includes the right to "special measures of protection in keeping with [their] physical and

125. *Infra* Part III.

126. See ICESCR, *supra* note 59, art. 9.

127. See ESC, *supra* note 69, pts. I, II.

128. See American Declaration, *supra* note 80, art. 16.

129. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 9, *adopted* Nov. 17, 1988, O.A.S.T.S. No. 69 (*entered into force* Nov. 16, 1999).

130. ESC, *supra* note 69, pt. I(12).

131. *Id.* pt. I(14).

132. *Id.* pt. I(13).

133. *Id.* pt. I(14).

134. UDHR, *supra* note 56, art. 22.

135. *Id.* art. 25.

136. ICESCR, *supra* note 59, art. 9.

137. African Charter, *supra* note 2, art. 18(4).

138. See Women Protocol, *supra* note 13, art. 13(f).

139. *Id.* art. 24(a).

140. See African Child Charter, *supra* note 12, art. 1.

moral needs and under conditions which ensure [] dignity, promote [] self-reliance and active participation in the community."¹⁴¹

The ILO has taken pains to elaborate standards on social security, including the Social Security (Minimum Standards) Convention;¹⁴² Equality of Treatment (Social Security) Convention;¹⁴³ Employment Injury Benefits Convention;¹⁴⁴ and Invalidity, Old-Age and Survivors' Benefits Convention.¹⁴⁵ Others are the Medical Care and Sickness Benefits Convention;¹⁴⁶ Maintenance of Social Security Rights Convention;¹⁴⁷ Employment Promotion and Protection Against Unemployment Convention;¹⁴⁸ Home Work Convention;¹⁴⁹ and Maternity Protection Convention.¹⁵⁰ As an illustration, Convention 102 obligates ILO Member States to comply, at the time of ratification, with at least three of the following parts of the Convention: medical care ("of a preventive or curative nature"¹⁵¹), sickness benefits, unemployment benefits, old age benefits, worker's compensation, family, disability, maternity, and survivor's benefits.¹⁵² Of the enumerated risks, States must also accept at least one provision concerning unemployment, old-age, workers' compensation, disability, or survivors' benefits.¹⁵³ For medical benefits, for example, the protected persons shall comprise:

- (a) prescribed classes of employees, constituting not less than [fifty percent] of all employees, and also their wives and children; or
- (b) prescribed classes of economically active population, constituting not less than [twenty percent] of all residents, and also their wives and children; or
- (c) prescribed classes of residents, constituting not less than [fifty percent] of all residents; or

141. *Id.* art. 13.

142. See Social Security (Minimum Standards) Convention, No. 102, adopted June 28, 1952 [hereinafter Convention 102]. This and other ILO conventions listed hereunder are available at ILO, Database of International Labour Standards: Conventions, <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Apr. 16, 2006) [hereinafter ILO Database].

143. See Equality of Treatment (Social Security) Convention, No. 118, adopted June 28, 1962, available at ILO Database, *supra* note 142 [hereinafter Convention 118].

144. See Employment Injury Benefits Convention, No. 121, adopted July 8, 1964, available at ILO Database, *supra* note 142 [hereinafter Convention 121].

145. See Invalidity, Old-Age and Survivors' Benefits Convention, No. 128, adopted June 29, 1967, available at ILO Database, *supra* note 142 [hereinafter Convention 128].

146. See Medical Care and Sickness Benefits Convention, No. 130, adopted June 25, 1969, available at ILO Database, *supra* note 142 [hereinafter Convention 130].

147. See Maintenance of Social Security Rights Convention, No. 157, adopted June 21, 1982, available at ILO Database, *supra* note 142 [hereinafter Convention 157].

148. See Employment Promotion and Protection Against Unemployment Convention, No. 168, adopted June 21, 1988, available at ILO Database, *supra* note 142 [hereinafter Convention 168].

149. See Home Work Convention, No. 177, adopted June 20, 1996, available at ILO Database, *supra* note 142 [hereinafter Convention 177].

150. See Maternity Protection Convention, No. 183, adopted June 15, 2000 [hereinafter Convention 183].

151. See Convention 102, *supra* note 142, art. 7.

152. See *id.* art. 2.

153. See *id.*

(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees constituting not less than [fifty percent] of all employees in industrial workplaces employing 20 persons or more, and also their wives and children.¹⁵⁴

Some ILO conventions seek to promote social security coverage for persons outside regular wage employment. An example is the Home Work Convention, which provides that “national policy on home work shall promote, as far as possible, equality of treatment between homeworkers and other wage earners” in areas including statutory social security protection and maternity protection.¹⁵⁵ Its accompanying Recommendation 184 proposes that social protection for home workers can be achieved through the extension and adaptation of existing social security schemes and/or through the development of special schemes or funds.¹⁵⁶ The ILO has equally elaborated soft laws on social security, including the Income Security Recommendation of 1944.¹⁵⁷ The Recommendation provides: “Social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants.”¹⁵⁸ Another is the Job Creation in Small and Medium-Sized Enterprises Recommendation of 1998, which calls on states to “review labour and social legislation” to, *inter alia*, determine whether social protection extends to workers in these enterprises, whether there are adequate provisions to ensure compliance with social security regulations covering the standard contingencies, and whether there is a need for supplementary social protection measures for workers in these categories.¹⁵⁹

II. States’ Obligations, General and Particular

States’ obligations under international (human rights) law are based on the fundamental principle *pacta sunt servanda*, the principle that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁶⁰ *Pacta sunt servanda* manifests itself in various forms and this Part examines the nature of states’ obligations and state practice in Africa *vis-à-vis* social rights.¹⁶¹

154. *Id.* art. 9.

155. Convention 177, *supra* note 149, art. 4.

156. ILO, Recommendation Concerning Home Work, No. 184, ¶ 25, *adopted* June 20, 1996, *available at* <http://www.ilo.org/ilolex/english/recdisp1.htm>.

157. ILO, Income Security Recommendation, No. 67, *adopted* May 12, 1944, *available at* <http://www.ilo.org/ilolex/english/recdisp1.htm>.

158. *Id.* ¶ 17.

159. See ILO, Job Creation in Small and Medium-Sized Enterprises Recommendation, No. 189, ¶ 7, *adopted* June 17, 1998, *available at* <http://www.ilo.org/ilolex/english/recdisp1.htm> (last visited Nov. 21, 2005).

160. Vienna Convention, *supra* note 55, art. 26.

161. See generally Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States’ Obligations Under the African Human Rights Charter*, 40 *STAN. J. INT’L L.* 105 (2004).

A. Nature of States' Obligations in Relation to Social Rights

The African Charter again provides the point of departure and states: "The Member States of the [AU] parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."¹⁶² According to the African Commission:

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.¹⁶³

The obligation to *respect* human rights requires states to "refrain from interfering in the enjoyment of all fundamental rights; [the state] should respect right-holders, their freedoms, autonomy, resources, and liberty of their action."¹⁶⁴ The obligation to *protect* human rights is a positive duty requiring a state to "take measures to protect beneficiaries of the protected rights against political, economic and social interferences."¹⁶⁵ According to the Commission, this "generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms."¹⁶⁶ The obligation to *promote* human rights requires a state to ensure "that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures."¹⁶⁷ And the obligation to *fulfill* human rights is, according to the Commission, "a positive expectation" that the Member State will "move its machinery towards the actual realisation of the rights."¹⁶⁸ Or, to use the language of The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,¹⁶⁹ it "requires [a] State[] to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights."¹⁷⁰ This obligation attaches "even where the available resources [of the state] are demonstrably inadequate."¹⁷¹

States' obligations under the African human rights system, like elsewhere, can generally be said to be obligations of *conduct* and *result*. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. With regards to the right to health, for

162. African Charter, *supra* note 2, art. 1.

163. SERAC case, *supra* note 26, ¶ 44.

164. *Id.* ¶ 45.

165. *Id.* ¶ 46.

166. *Id.*

167. *Id.*

168. *Id.* ¶ 47.

169. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998) [hereinafter *Maastricht Guidelines*].

170. *Id.* at 694.

171. Comm. on Econ., Soc., & Cultural Rts., *General Comment 3: The Nature of States Parties' Obligations*, ¶ 11, U.N. Doc. E/1991/23 Annex III (1990).

example, this could involve “the adoption and implementation of a plan of action to reduce maternal mortality.”¹⁷² The obligation of result requires states to achieve specific targets to satisfy a detailed substantive standard. In relation to the right to health, for example, this obligation requires, *inter alia*, the reduction of maternal mortality levels.¹⁷³

States’ obligations under the African system are peremptory because they command and permit no refusal: “States ‘shall undertake’” the obligation.¹⁷⁴ Indeed, the African human rights treaty system is unique for enjoining immediate, as opposed to progressive, obligations. This means that each state is bound to take the necessary steps to secure the human rights concerned from the moment the treaty enters into force for that state.¹⁷⁵ The obligations are also durable, meaning that a state is constrained by norms prescribed in a treaty and must discharge the duties established in international human rights law, irrespective of the system of governance that is in place,¹⁷⁶ whether it is a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy. Finally, they are constant obligations,¹⁷⁷ meaning that a change of government does not absolve the successor of the obligations entered into by a previous government.¹⁷⁸ Constancy of obligations also means that a state may not invoke the provisions of its domestic legislation, including its constitution, to evade its treaty obligations.¹⁷⁹

The fulfillment of social rights requires the existence of a planned policy of employment as well as special measures to help those who are disad-

172. See *Maastricht Guidelines*, *supra* note 169, at 694, ¶ 7.

173. See *id.*; cf. Sage Russel, *Minimum State Obligations: International Dimensions*, in *EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS*, *supra* note 119, at 11, 20 (noting “[o]bligations of result introduce some difficult issues of measurement and monitoring, and they are likely to be more expensive than obligations of conduct”).

174. *Legal Res. Found. v. Zambia*, Comm. No. 211/98, ¶ 62 (Afr. Comm’n Hum. & Peoples’ Rts. 2001), reprinted in *FOURTEENTH ANN. ACTIVITY REP. OF THE Afr. Comm’n on Hum. and Peoples’ Rts. 2000–2001*, Annex V [hereinafter *FOURTEENTH ANN. ACTIVITY REP.*] (quoting African Charter, *supra* note 2, art. 1).

175. Cf. SIEGHART, *supra* note 30, at 57.

176. *Civil Liberties Org. v. Nigeria*, Comm. No. 218/98, ¶ 26 (Afr. Comm’n Hum. & Peoples’ Rts. 1998), reprinted in *FOURTEENTH ANN. ACTIVITY REP.*, *supra* note 174.

177. *Constitutional Rights Project v. Nigeria*, Comm. Nos. 140/94, 141/94, 145/95, ¶ 39 (Afr. Comm’n Hum. & Peoples’ Rts. 1999), reprinted in *THIRTEENTH ANN. ACTIVITY REP. OF THE Afr. Comm’n on Hum. and Peoples’ Rts. 1999–2000*, Annex V.

178. See, e.g., *Achutan v. Malawi*, Comm. Nos. 64/92, 68/92 & 78/92, ¶ 12 (Afr. Comm’n Hum. & Peoples’ Rts. 1995), reprinted in *SEVENTH ANN. ACTIVITY REP. OF THE Afr. Comm’n on Hum. and Peoples’ Rts. 1994–1995*, Annex VI (“Principles of international law stipulate . . . that a new government inherits the previous government’s international obligations, including the responsibility for the previous government’s mismanagement. The change of [g]overnment in Malawi does not extinguish the present claim before the Commission.”).

179. See *Vienna Convention*, *supra* note 55, art. 27. See also *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (“[I]t is certain that France cannot rely on her own legislation to limit the scope of her international obligations.”); *Application of the Convention of 1902 Governing the Guardianship of Infants* (Neth. v. Swed.), 1958 I.C.J. 55, 67 (Nov. 28); *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 20–21 (Apr. 6); *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 132 (Dec. 18).

vantaged in seeking jobs due, especially, to disparities based on sex or age. It involves measures designed to promote, in the language of the South Africa's 1993 interim Constitution, "the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all."¹⁸⁰ It includes the provision of "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."¹⁸¹

Social rights obligations also include making appropriate means of redress or remedies available to any aggrieved individual or group and putting in place appropriate means of ensuring governmental accountability.¹⁸² This is often a difficult measure to take because, unlike ordinary legal rights, "human rights" are primarily claims against the state itself and their enjoyments are made possible because of limitations on sovereignty. In relation to trade union rights, the state must create, through national laws, conditions that enable trade unions to strive to protect their members' interests.¹⁸³ A state's failure to enforce private employers' compliance with basic labor standards will obviously be a violation of its obligation to protect human rights; in particular, it may be a violation of the right to work or to just and reasonable conditions of work.¹⁸⁴ Likewise a state's failure to ensure that there is no work-related harassment on account of sex, race, ethnicity or opinions also violates its obligation to protect human rights.¹⁸⁵

The African Charter requires states to submit periodic reports "on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."¹⁸⁶ Under the African Commission's guidelines on reports, states are expected to report, *inter alia*, on social security, particularly on the main features in force for each branch of social security, including benefits for medical, cash sickness, maternity, invalidity, old-age, survivor, employment injury, unemployment, and family.¹⁸⁷ Additionally, states should report on fac-

180. S. AFR. (INTERIM) CONST. 1993, § 26(2). *Accord Declaration on the Right to Development*, G.A. Res. 41/128, art. 8(1), U.N. Doc. A/RES/41/128 (Dec. 4, 1986) [hereinafter DRD] (urging states to "ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income").

181. ICESCR, *supra* note 59, art. 6(2) (referring to the steps necessary to achieve realization of the right to work).

182. See Comm. on Econ., Soc., & Cultural Rts., *General Comment 9: Domestic Application of the Covenant*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.7, at 55 (May 12, 2004).

183. See *Nat'l Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) at ¶ 39 (1975). Cf. *Schmidt and Dahlstrom v. Sweden* 21 Eur. Ct. H.R. (ser. A) at ¶ 36 (1976) (stating that the state is at liberty to choose the means to be used towards this end).

184. See *Maastricht Guidelines*, *supra* note 169, at 694.

185. *Id.* at 695.

186. African Charter, *supra* note 2, art. 62.

187. See generally STATE REPORTING PROCEDURE, *supra* note 87.

tors and difficulties in realizing the right to social security, the progress achieved on new forms of social security, the extension of existing schemes to further groups of the population, and the improvements in the nature and level of benefits.¹⁸⁸

Unlike the African Charter, the Women Protocol clearly specifies states' obligations regarding social rights, obligating states to "adopt and enforce legislative and other measures to guarantee women equal opportunities in work, career advancement, and other economic opportunities."¹⁸⁹ It also obligates states to "ensure transparency in recruitment, promotion and dismissal of women and [to] combat and punish sexual harassment in the workplace,"¹⁹⁰ to "create conditions [that] promote and support the occupations and economic activities of women, in particular, within the informal sector,"¹⁹¹ and to "establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it."¹⁹² The Protocol further commits states to "introduce a minimum age for work and to prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially [that of girls]";¹⁹³ to "take the necessary measures to recognise the economic value of the work of women in the home;"¹⁹⁴ and to "guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors."¹⁹⁵ For women in distress, the Protocol commits states to ensure their protection and to provide an environment suitable to their condition and their special physical, economic and social needs.¹⁹⁶ These are revolutionary provisions, if one realizes that majority of African women work in the informal sector where existing laws do not always recognize or remunerate such activities.¹⁹⁷

In the area of social rights, states' obligations must be read in conjunction with specific obligations as laid down under relevant ILO conventions and recommendations, since almost all African states' have membership in the Organization.¹⁹⁸ The 1998 ILO Declaration of Fundamental Principles and Rights at Work is one response with particular emphasis on Core Labor Standards.¹⁹⁹ The Declaration, which is a promotional instrument,

188. *See id.*

189. Women Protocol, *supra* note 13, art. 13.

190. *Id.* art. 13(c).

191. *Id.* art. 13(e).

192. *Id.* art. 13(f).

193. *Id.* art. 13(g).

194. *Id.* art. 13(h).

195. *Id.* art. 13(i).

196. *Id.* art. 24(a).

197. *See generally* C.K. OMARI, *WOMEN IN THE INFORMAL SECTOR* (1995) (arguing "women's participation in the informal business sector . . . cannot be thoroughly understood outside the framework . . . of the capitalist mode of production [and] the impact of international capital on the household economy").

198. ILO, *Alphabetical List of ILO Member Countries*, <http://www.ilo.org/public/english/standards/relm/country.htm> (last updated Nov. 10, 2005).

199. *See* International Labour Conference, Geneva, Switz., June 2-18, 1998, *Declaration on Fundamental Principles and Rights at Work*, available at <http://www.ilo.org/dyn/declaris/> [hereinafter ILO, Declaration on Fundamental Principles].

declares, *inter alia*,

that all Members, even if they have not ratified the Conventions . . . have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced or compulsory labour;
- c) the effective abolition of child labour; and
- d) the elimination of discrimination in respect of employment and occupation.²⁰⁰

The Declaration on Fundamental Principles has been described as “a common vision of the necessary social dimension of progress”²⁰¹ and its application to all ILO Member States regardless of ratification or relevant conventions as “nothing short of a revolution in legal terms.”²⁰² It is within this context that such ILO conventions as the Employment Policy Convention²⁰³ make inordinately good sense for Africa. The Convention provides that its State Parties shall “declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.”²⁰⁴ Such a policy should be aimed at ensuring that “there is work for all who are available for and seeking work;” that “such work is as productive as possible;” and that “there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.”²⁰⁵

The ILO’s Committee of Experts on the Application of Conventions and Recommendations has given further indications of relevant matters to consider in determining whether or not a state is implementing its obligations on the right to work.²⁰⁶ The relevant considerations, in relation to

200. *Id.* ¶ 2.

201. Francis Maupain, *The Liberalization of International Trade and the Universal Recognition of Worker’s Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, in SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT AND HUMAN RIGHTS 35, 44 (L.A. Sicilianos & M. Gavouneli eds., 2001).

202. *Id.* at 47. For a critique of the Declaration and a call for reforms of international labor rights generally, see Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004) (positing that ILO Declaration may undermine the international labor regime). *Contra*, Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Worker’s Rights*, 16 EUR. J. INT’L L. 439 (2005) (assessing the impact of the ILO Declaration on fundamental rights in general and workers rights in particular and asserting that Alston’s thesis lacks a clear and coherent methodological framework). For a reply, see Philip Alston, *Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda*, 16 EUR. J. INT’L L. 467 (2005).

203. ILO, Employment Policy Convention, No. 122, adopted July 9, 1964, 569 U.N.T.S. 65 (entered into force July 9, 1965), available at ILO Database, *supra* note 142.

204. *Id.* art. 1(1).

205. *See id.* art. 1(2).

206. SIEGHART, *supra* note 30, at 216.

the ICESCR, include the “existence of discrimination in employment, on the grounds of political activity which neither constitutes an activity against the security of the State nor is incompatible with the requirements of the forms of the employment concerned; the existence of a penal offence of ‘leading a parasitic form of life,’ without any express limit to the scope of that offence; the existence of model collective farm rules under which a member may terminate his membership only with the consent of the management committee; and the existence of special labour services in construction or agriculture in lieu of military service.”²⁰⁷ These criteria are relevant in explaining and determining states’ obligations on social rights under the African human rights system.

Overall, African states have the obligation to “promot[e] a coherent and dynamic employment policy” and to “attenuat[e], moderat[e] and correct[] labour market trends;” they must “orient[] manpower and control[] the recruitment and laying-off of workers;” they must “protect people in the workplace: ensur[e to] workers the right to enjoy just and favourable conditions of work;” and they must “enhance[e] public and trade-union freedoms” realizing that the right to work means “participation by workers in the life of the enterprise,” which, in turn, provides “a forum for citizenship and realization of the democratic ideal.”²⁰⁸

The jurisprudence of the African Commission shows integrative and imaginative approaches in explaining the nature of states’ obligations on social rights. In the SERAC case, for example, the Commission held, *inter alia*, that “[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.”²⁰⁹ Earlier, the Commission held, in *Union Interafricaine des Droits de l’Homme v. Angola*,²¹⁰ that mass expulsion of certain West African nationals by the Angolan government threatens violation of certain egalitarian rights, including the right to work.²¹¹ And in *Pagnouille v. Cameroon*,²¹² the Commission held that a denial of reinstatement to former professional capacity, despite amnesty to that effect, constituted a violation of the right to work under the Charter. According to the Commission,

by not reinstating Mr. Mazou in his former position after the Amnesty Law, the government has violated Article 15 of the African Charter, because it has prevented Mr. Mazou to work in his capacity of a magistrate even though

207. *Id.* (citations omitted).

208. ECOSOC, *Second Periodic Reports*, *supra* note 1, ¶¶ 45-46 (discussing Tunisia’s efforts to implement the ICESCR).

209. SERAC case, *supra* note 26, ¶¶ 65-66 (holding the Nigerian government liable for breaching the minimum core duties of the right to food under the African Charter).

210. *Union Interafricaine des Droits de l’Homme v. Angola*, Comm. No. 159/96 (Afr. Comm’n Hum. & Peoples’ Rts. 1997), *reprinted in* ELEVENTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS 1997-1998, Annex II.

211. *Id.* ¶ 17.

212. *Pagnouille v. Cameroon*, Comm. No. 39/90, (Afr. Comm’n Hum. & Peoples’ Rts. 1997), *reprinted in* TENTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS. 1996-1997, Annex X.

others who have been condemned under similar conditions have been reinstated.²¹³

Domestic courts should emulate the African Commission's example when interpreting and applying relevant human rights instruments in their courts. An integrative interpretive methodology will greatly enhance the development of human rights jurisprudence in Africa. It will especially help governments to understand their legal obligations, the negative consequences of noncompliance with these obligations, and the positive benefits of implementation.²¹⁴

B. States' Obligations in State Practice

According to Louis Henkin, "[t]he purpose of international [human rights] law is to influence states to recognize and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions, and to incorporate them into national ways of life."²¹⁵ Given the nature of states' obligation in relation to social rights in Africa, this segment examines these obligations in state practice, noting the general acceptance of regional and universal human rights instruments guaranteeing social rights by African states and their constitutionalization of these rights. Constitutionalization of rights means the enshrinement of rights in a constitution and their protection by institutions, such as the judiciary, by way of judicial review and/or preview.

1. General Acceptance of Universal and Regional Human Rights Standards

Majority of African states are parties to several universal human rights instruments.²¹⁶ The ICESCR has 46 African States Parties, representing 30.8 percent of 149 States Parties worldwide.²¹⁷ Almost all African states have ratified the African Charter;²¹⁸ Morocco is the only exception.²¹⁹ Many African countries are also parties to the African Child Charter and a

213. *Id.* ¶ 29.

214. See Mary Robinson, *Making Human Rights Matter: Eleanor Roosevelt's Time Has Come*, 16 HARV. HUM. RTS. J. 1 (2003) (arguing that recognition of the normative and imperative aspects of human rights by governments is essential to progress).

215. Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 25 (Theodor Meron ed., 1984).

216. For status of ratifications of universal human rights treaties, see Office of the U.N. High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (Apr. 10, 2006), <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (providing status of ratification as of April 10, 2006).

217. See *id.* Three African states—Liberia, Sao Tome and Principe, and South Africa—have signed the ICESCR but have not yet ratified. Six African countries—Botswana, Comoros, Mauritania, Mozambique, and United Arab Emirates—have neither signed nor ratified. *Id.*

218. The list of ratifying states is available at the AU website, *supra* note 2.

219. Morocco withdrew from the OAU in 1984 after the latter recognized the Sahrawi Arab Democratic Republic, which Morocco claimed and administered. Clifford D. May, *Morocco Quits O.A.U. Over Polisario*, N.Y. TIMES, Nov. 13, 1984, at A12.

few have already ratified the Women Protocol.²²⁰ Many African states have signed and/or ratified ILO instruments. To illustrate, there are 48 African ratifications of ILO Convention 87; 52 ratifications of Convention 98 on Freedom of Association and Collective Bargaining; 53 ratifications of Convention 29; 52 ratifications of Convention 105 on the Elimination of Forced and Compulsory Labor; 50 ratifications of Convention 100; 53 ratifications of Convention 111 on the Elimination of Discrimination in Respect of Employment and Occupation; 46 ratifications of Convention 138; and 49 ratifications of Convention 182 on the Abolition of Child Labor.²²¹

The African Charter is silent on what should be done to those countries that have ratified it but never showed commitment to put in place appropriate domestic mechanisms. The African Commission also has not specifically required that the Charter be incorporated in a particular way, perhaps mindful of the fact that there is no uniformity in the reception of international law in Africa. In 1989, however, the Commission recommended that Member States “introduce[] the provisions of Articles 1 to 29 of the African Charter . . . in their Constitutions, laws, rules and regulations and other acts relating to Human and Peoples’ Rights.”²²² When Nigeria incorporated the Charter after its ratification,²²³ the Commission expressed its approval and hoped that such gesture should “set a standard for all Africa.”²²⁴

The widespread ratification of the African Charter and other instruments indicates a willingness on the part of governments to accept binding obligations²²⁵ that will subject their policies to increasing external scrutiny. It also “suggests at least a formal commitment by African States to conform their national law and practice to international standards.”²²⁶

2. Constitutionalization of Social Rights

The constitutionalization of social rights, has become a common feature in many African states. This may not be the only means of protecting social rights, but it is, in Diamond Ashiagbor’s words, an “important mech-

220. For status of ratifications of all regional human rights instruments in Africa, see AU website, *supra* note 2.

221. See ILO, Ratifications of the Fundamental Human Rights Conventions by Country in Africa, <http://www.ilo.org/ilolex/english/docs/declAF.htm> (last visited Apr. 17, 2005).

222. ACHPR, *Resolution on the Integration of the Provisions of the African Charter on Human and Peoples’ Rights into National Laws of States*, in SECOND ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS., 1988-1989, Annex XI.

223. See African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, (1990) Cap. 10, § 1 (Nigeria).

224. See *Civil Liberties Organization v. Nigeria*, Comm. No. 129/94, ¶ 17 (Afr. Comm’n Hum. & Peoples’ Rts. 1995), reprinted in NINTH ANN. ACTIVITY REP. OF THE AFR. COMM’N ON HUM. AND PEOPLES’ RTS. 1995-1996, Annex VI.

225. See Vienna Convention, *supra* note 55, art. 14(1) (“The consent of a State to be bound by a treaty is expressed by ratification . . .”).

226. Carlson Anyangwe, *Obligations of States Parties to the African Charter on Human and Peoples’ Rights*, 10 AFR. J. INT’L & COMP. L. 625, 626 (1998).

anism for 'mainstreaming' respect for the values associated with these rights in the law and policy-making."²²⁷ More than half of African states guarantee the right to work,²²⁸ including the rights to equal opportunity to gain a living by work which one freely chooses,²²⁹ to a healthy and safe working environment,²³⁰ to fair and equal wages,²³¹ to rest and leisure,²³² and to holidays with pay.²³³ These constitutions also guarantee to workers the right to unionize²³⁴ and to strike in protection of their economic and social interests.²³⁵ They protect workers against unfair dismissals²³⁶ and

227. Diamond Ashiagbor, *Economic and Social Rights in the European Charter of Fundamental Rights*, 2004 EUR. HUM. RTS. L. REV. 62, 72.

228. See, e.g., ALG. CONST. art. 55; ANGL. CONST. art. 46(1); BENIN CONST. art. 30; BURK. FASO CONST. arts. 18-19; BURUNDI CONST. art. 45; CAPE VERDE CONST. art. 60; CENT. AFR. REP. CONST. art. 9; CHAD CONST. art. 32; CONGO CONST. art. 24; COTE D'IVOIRE CONST. arts. 16-17; EGYPT CONST. art. 13; EQ. GUINEA CONST. art. 25; ETH. CONST. art. 41(1); GABON CONST. art. 1(7); GHANA CONST. art. 24(1); GUINEA CONST. art. 18; LIBYA CONST. art. 4; MADAG. CONST. art. 27; MALAWI CONST. art. 29; MALI CONST. art. 19; MAURITANIA CONST. art. 12; MOROCCO CONST. art. 13; MOZAM. CONST. art. 88(1); NIGER CONST. art. 25; RWANDA CONST. art. 30; SAO TOMÉ & PRÍNCIPE CONST. art. 41(1); SEN. CONST. arts. 8, 25; SEY. CONST. art. 35; TANZ. CONST. arts. 11(1), 22(1); TOGO CONST. art. 37; UGANDA CONST. art. 14(b).

229. See, e.g., CÔTE D'IVOIRE CONST. art. 17; ETH. CONST. art. 41(2); LESOTHO CONST. art. 29(1); LIBER. CONST. arts. 8, 18; MOROCCO CONST. art. 12; MOZAM. CONST. art. 88(2); NAMIB. CONST. art. 21(1)(j); NIG. CONST. art. 17(3)(a); RWANDA CONST. art. 30; SAO TOMÉ & PRÍNCIPE CONST. art. 41(3); SIERRA LEONE CONST. art. 8(3)(a); S. AFR. CONST. art. 22; TANZ. CONST. art. 22(2).

230. See, e.g., ANGL. CONST. art. 46(2); CAPE VERDE CONST. art. 62(1)(a); CENT. AFR. REP. CONST. art. 9; COTE D'IVOIRE CONST. art. 19; ETH. CONST. art. 42(2); GHANA CONST. art. 24(1); GUINEA-BISSAU CONST. art. 46(1); LESOTHO CONST. art. 30(b); LIBER. CONST. art. 8; MOZAM. CONST. art. 89(2); NIG. CONST. art. 17(3)(c); SAO TOMÉ & PRÍNCIPE CONST. 42(1)(d); SEN. CONST. art. 25; SEY. CONST. art. 35(d); SIERRA LEONE CONST. art. 8(3)(c); UGANDA CONST. art. 40(1)(a).

231. See, e.g., ANGL. CONST. art. 46(2); BENIN CONST. art. 30; BURUNDI CONST. arts. 45-46; CAPE VERDE CONST. art. 61(1)-(2); CHAD CONST. art. 32; GHANA CONST. art. 24(1); LESOTHO CONST. art. 30(a)(i); LIBER. CONST. art. 18; MADAG. CONST. art. 29; MALAWI CONST. art. 31(1),(3); MOZAM. CONST. art. 89(1); NIGER CONST. art. 25; NIG. CONST. art. 17(3)(e); SAO TOMÉ & PRÍNCIPE CONST. art. 42(1)(a); SEN. CONST. art. 25; SEY. CONST. art. 35(d); SIERRA LEONE CONST. art. 8(3)(e); TANZ. CONST. art. 23; TOGO CONST. art. 37; UGANDA CONST. art. 40(1)(b).

232. See, e.g., ANGL. CONST. art. 46(2); CAPE VERDE CONST. art. 62(1)(e); CENT. AFR. REP. CONST. art. 9; CONGO CONST. art. 28; ETH. CONST. art. 42(2); GHANA CONST. art. 24(2); LESOTHO CONST. art. 30(e); MALI CONST. art. 19; MOZAM. CONST. art. 89(1); NIG. CONST. art. 17(3)(b); SAO TOMÉ & PRÍNCIPE CONST. art. 42(1)(e); SEY. CONST. art. 35(d); SIERRA LEONE CONST. art. 8(3)(b); UGANDA CONST. art. 40(1)(c).

233. See, e.g., CONGO CONST. art. 28; ETH. CONST. art. 42(2); GHANA CONST. art. 24(2); LESOTHO CONST. art. 30(e); SAO TOMÉ & PRÍNCIPE CONST. art. 42(1)(e); SEY. CONST. art. 35(d); UGANDA CONST. art. 40(1)(c).

234. See, e.g., ALG. CONST. art. 56; BENIN CONST. art. 31; BURUNDI CONST. art. 47; CAPE VERDE CONST. art. 63(1); CENT. AFR. REP. CONST. art. 10; CONGO CONST. art. 25; COTE D'IVOIRE CONST. art. 18; DJIB. CONST. art. 15; ETH. CONST. art. 42(1)(a); GHANA CONST. art. 24(3); GUINEA CONST. art. 18; GUINEA-BISSAU CONST. art. 45(1); LESOTHO CONST. art. 31; MADAG. CONST. art. 31; MALAWI CONST. art. 31(2); MALI CONST. art. 20; MOZAM. CONST. art. 90(1); NAMIB. CONST. art. 21(1)(e); NIGER CONST. art. 26; RWANDA CONST. art. 31; SAO TOMÉ & PRÍNCIPE CONST. art. 42(1)(b); SEN. CONST. art. 25; SEY. CONST. art. 35(g); S. AFR. CONST. art. 23(2)(a); TOGO CONST. art. 39; UGANDA CONST. art. 40(3)(a).

235. See, e.g., ALG. CONST. art. 57; BENIN CONST. art. 31; BURUNDI CONST. art. 47); CAPE VERDE CONST. art. 66; CENT. AFR. REP. CONST. art. 10; CONGO CONST. art. 25; COTE

some constitutions specifically provide protection for women during maternity.²³⁷ Most African constitutions also guarantee the right to social security,²³⁸ including unemployment benefits,²³⁹ childhood and old age care,²⁴⁰ retirement benefits and pension schemes,²⁴¹ sickness and incapacity or disability protections,²⁴² medical and health care,²⁴³ and widowhood and orphanhood protection.²⁴⁴ All national constitutions—with the exceptions of DR Congo, Libya, and Somalia—guarantee the right to freedom of association.²⁴⁵

These constitutions obligate states to create conditions that render effective the enjoyment of social rights. For example, the Constitution of Eritrea urges the government, in particular the National Assembly, to “enact laws guaranteeing and securing the social welfare of citizens, the rights and conditions of labour and other rights and responsibilities.²⁴⁶ Others urge governments, *inter alia*, to achieve and maintain a high and stable level of employment and to provide technical and vocational guidance and training programs.²⁴⁷ Still, others urge governments to “[g]uarantee the existence and efficient functioning of a national system of social security, with participation of contributors” as well as supporting,

D’IVOIRE CONST. art. 18; DJIB. CONST. art. 15; ETH. CONST. art. 42(1)(b); GUINEA CONST. art. 18; MADAG. CONST. art. 33; MALAWI CONST. art. 31(4); MALI CONST. art. 21; MAURITANIA CONST. art. 14; MOROCCO CONST. art. 14; MOZAM. CONST. art. 91(1); NAMIB. CONST. art. 21(1)(f); NIGER CONST. art. 26; RWANDA CONST. art. 32; SAO TOME & PRINCIPE CONST. art. 42(1)(f); SEN. CONST. art. 25; SEY. CONST. art. 25(g); S. AFR. CONST. art. 23(2)(c); TOGO CONST. art. 39; UGANDA CONST. art. 40(3)(c) (providing, in general, that the right to strike shall be exercised within the framework of the law and that the law may limit its exercise in the interest of national defense and security, or for services and public activities or vital interest to the community).

236. See, e.g., CAPE VERDE CONST. art. 62(2)–(3); GUINEA-BISSAU CONST. art. 46(2); MOZAM. CONST. art. 89(3).

237. See, e.g., LESOTHO CONST. art. 30(d); UGANDA CONST. art. 40(4).

238. See, e.g., BURK. FASO CONST. art. 18; CAPE VERDE CONST. arts. 62(1)(d), 69; CHAD CONST. art. 40; EGYPT CONST. arts. 16–17; ERI. CONST. art. 21(2); ETH. CONST. art. 90; MADAG. CONST. art. 30; MALAWI CONST. art. 13; NIG. CONST. arts. 16(2)(d), 17(3)(g); SEY. CONST. art. 37.

239. See, e.g., ALG. CONST. art. 59; CAPE VERDE CONST. art. 69(1); EGYPT CONST. art. 17; SEY. CONST. art. 37; S. AFR. CONST. art. 27(1)(c).

240. See, e.g., ANGL. CONST. art. 47(1); BENIN CONST. art. 26; BURK. FASO CONST. art. 18; CAPE VERDE CONST. art. 69(1); CHAD CONST. art. 40; CONGO CONST. arts. 30, 33; COTE D’IVOIRE CONST. art. 6; EGYPT CONST. art. 17; MALAWI CONST. art. 13; NIG. CONST. arts. 16(2)(d), 17(3)(f); SEY. CONST. arts. 29(c), 36; SIERRA LEONE CONST. art. 8(3)(f); TANZ. CONST. art. 11(1); TOGO CONST. art. 33; UGANDA CONST. VII, art. 34(7).

241. See, e.g., EGYPT CONST. art. 17; GUINEA-BISSAU CONST. art. 46(3); LESOTHO CONST. art. 30(a); NIG. CONST. art. 16(2)(d).

242. See, e.g., ANGL. CONST. arts. 47(1), 48; BENIN CONST. art. 26; CAPE VERDE CONST. art. 69(1); GUINEA-BISSAU CONST. art. 46(3); MOZAM. CONST. art. 95(1); NIG. CONST. art. 16(2)(d); SIERRA LEONE CONST. art. 8(3)(f); TANZ. CONST. art. 11(1); TOGO CONST. art. 33.

243. See, e.g., ANGL. CONST. art. 47(1); CONGO CONST. art. 30; EGYPT CONST. arts. 16–17; LIBYA CONST. art. 15; MALAWI CONST. art. 13; UGANDA CONST. art. 20.

244. See, e.g., Sao Tome & Principe Const. art. 43(1).

245. 2 HUMAN RIGHTS LAWS IN AFRICA, *supra* note 44, at 856.

246. ERI. CONST. art. 21(5).

247. LESOTHO CONST. art. 29(2). See also BURK. FASO CONST. art. 20 (“The state sees to the constant amelioration of conditions of work and to the protection of the worker.”).

motivating, regulating, and supervising private systems of social security.²⁴⁸ The Constitution of Seychelles is emblematic of these types of obligations. It obligates the state, *inter alia*,

- a) to take necessary measures to achieve and maintain a high and stable level of employment, as is practicable, with a view to attaining full employment;
- b) . . . to protect effectively the right of a citizen to earn a dignified living . . . ;
- c) to promote vocational guidance and training;
- d) to make and enforce statutory provisions for safe, healthy and fair conditions of work . . . ;
- e) to promote machinery for voluntary negotiations between employers and workers or their organisations with a view to the regulation of conditions of employment by means of collective agreements;
- f) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitrations for the settlement of labour disputes; [and]
- g) . . . to ensure the right of workers to organise trade unions and to guarantee the right to strike.²⁴⁹

Many African states have also enacted labor legislations which, *inter alia*, define the rights of unions and professional associations; establish procedures for the creation, coalition, federation, and disbanding of trade unions; define permissible areas of activities for workers; and regulate collective bargaining processes. The post-apartheid South Africa has been particularly forceful in adopting legislative measures on social rights, understandably because it “inherited from apartheid conditions of extreme poverty and inequality accompanied by high levels of unemployment, a highly skewed income pattern, low wages and a severe lack of skills among the African population.”²⁵⁰ Among the new legal standards on labor and social security in South Africa are the Labor Relations Act;²⁵¹ Basic Conditions of Employment Act (BCEA);²⁵² Employment Equity Act;²⁵³ and Unemployment Insurance Act.²⁵⁴ The Labor Relations Act seeks to strike a balance between the demand of international competitiveness and the protection of fundamental labor rights. It promotes collective bargaining as the preferred method of labor relations and sets terms and conditions of employment. The BCEA, on its part, seeks to balance the protection of rights of employees against the demands of higher productivity, improved

248. CAPE VERDE CONST. art. 69(2). See also MOZAM. CONST. art. 95(2) (urging the Government of Mozambique to “promote and encourage the creation of conditions for achieving [social security]”).

249. SEY. CONST. art. 35.

250. Carole Cooper, *Globalisation, Labour Law and Unemployment: The South African Case*, in *JOB CREATION AND LABOUR LAW: FROM PROTECTION TO PRO-ACTION* 233, 233 (Marco Biagi ed., 2000).

251. See Labor Relations Act 66 of 1995 (as amended by the Labor Relations Amendment Act 12 of 2002).

252. See Basic Conditions of Employment Act 75 of 1997 (as amended by the Basic Conditions of Employment Amendment Act 11 of 2002).

253. See Employment Equity Act 55 of 1998.

254. See Unemployment Insurance Act 63 of 2001. See also 2 HUMAN RIGHTS LAW IN AFRICA, *supra* note 44, at 1511 (highlighting these enactments).

efficiency, and the promotion of flexibility. It extends employment, work, and income securities to unorganized and vulnerable workers by setting a floor minimum rights covering workplace issues—hours of work, overtime, leave, termination, health, et cetera.

Remedies are at the heart of human rights protection regimes and most constitutions in Africa vest the civil courts with powers to protect guaranteed rights, including social rights, and to provide remedies for violations.²⁵⁵ The Constitution of Ghana provides:

Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.²⁵⁶

The Constitution of Ghana also authorizes the High Court to issue such directions or orders, as it may consider appropriate, for purposes of enforcing or securing the enforcement of human rights.²⁵⁷ Many states have also established arbitration agencies and policy-making institutions of social security and other institutions to promote the protection and defense of the interests of workers.

There is still debate on the justiciability of social rights²⁵⁸ and, indeed, some of the constitutional provisions considered herein appear to render social rights non-justiciable. The Nigerian Constitution, for example, provides excludes the judiciary from entertaining any issue or question covered by Chapter II of the Constitution, which includes social entitlements.²⁵⁹ However, the Indian Supreme Court has demonstrated that considerations of economic complexities should not necessarily excuse judges from addressing questions of social justice. In *Paschim Banga Khet Mazdoor Samity v. West Bengal*,²⁶⁰ the Court held that the provision of medical facilities for citizen is an obligation of the state; though acknowl-

255. See, e.g., ALG. CONST. art. 139 (guaranteeing that the judicial power will safeguard fundamental rights); ANGL. CONST. arts. 120–21 (requiring courts to guarantee protection of the rights of citizens).

256. GHANA CONST. art. 33(1).

257. *Id.* art. 33(2). Such orders may include habeas corpus, certiorari, mandamus, prohibition, and quo warranto. *Id.*

258. The literature on the justiciability debate has been growing over the years. See, e.g., Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004) (reviewing reasons for the judicial non-recognition of social welfare rights); M. Craven, *The Justiciability of Economic, Social and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEIR IMPLEMENTATION IN UK LAW 1 (R. Burchill, D. Harris & A. Owers eds., 1999); P. de Vos, *Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution*, 13 S.A. J. HUM. RTS 67 (1997); M. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (1995); C. Scott & P. Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992); E. W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69 (1978).

259. See, e.g., NIG. CONST. art. 6(6)(c).

260. See, e.g., *Paschim Banga Khet Mazdoor Samity v. West Bengal*, (1996) 4 S.C.C. 37.

edging the existence of financial constraints, the Court insisted that the state is not discharged from its obligation merely by pleading such constraints. Judicial creativity is similarly needed from African courts in order to give meaning and hope to the many Africans who struggle “between wine and starvation.”

III. Africa’s Scorecard on Social Rights

In 1990, the Assembly of Heads of State and Government of the then-OAU took stock of the political and socioeconomic situation in Africa and concluded that the situation was “precarious,” despite many efforts deployed by its Member States to move the continent forward.²⁶¹ Among other things, the Assembly found: “There has been [a] sharp decline in the quality of life in our countries as spending on public health, housing and education and other social services had to be severely curtailed. Food production has also fallen, in promotion [sic] to the expanding population.”²⁶² Fifteen years after the OAU Declaration, it is not clear if much has changed in Africa. Available evidence shows that Africa is unlikely to eliminate absolute poverty by the Millennium Development Goals (MDGs) target of 2015.²⁶³

This part examines Africa’s scorecard in terms of practical measures adopted by African states towards realizing the rights to work and social security and the actual effects of these measures on the living standards of Africans. It asserts that though the various schemes represent, in principle, steps towards fulfilling states’ obligations to respect, protect, promote, and fulfil the rights to work and social security, their effects are yet to be felt in a number of places. The reasons for the dissonance between promise and performance are varied but they include the neo-liberal economic reforms in Africa, globalization pressures, and authoritarianism leading to anti-labor policies.

A. Progressive Realization Policies and Programs

African states have been actively involved in the elaboration and adoption of soft laws, including resolutions and declarations of the U.N. aimed at poverty reduction and its eventual eradication. The Millennium Declaration adopted during the Millennium Summit of September 2000 and, later,

261. OAU, *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World*, ¶ 5, OAU Doc. AHG/Decl.1 (XXVI) (July 1990) (addressing the threat of the “marginalization” of Africa in light of the progress of Eastern and Western Europe and the Americas in the 1990’s).

262. *Id.* ¶ 6.

263. See, e.g., WORLD BANK, *GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA* 43 (2003) (concluding that even if Sub-Saharan Africa were to achieve a projected growth rate of 1.6 percent per capita, it would still be at the low end of the developing-country growth spectrum, “inadequate to make much of a dent in poverty and other MDGs”).

the MDGs are examples of such soft laws.²⁶⁴ The Millennium Declaration commits U.N. Member States, including African countries, “[t]o promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.”²⁶⁵ The MDGs represent the standard for identifying and measuring global development objectives in the period up to 2015.²⁶⁶ The MDGs call for international cooperation to eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empowerment of women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development.²⁶⁷ Attaining these lofty goals is expected to lead to a more peaceful, just, and prosperous world.

Since employment generation remains “possibly the most pressing problem in Africa,”²⁶⁸ many African governments have, in response to their constitutional and other legal order,²⁶⁹ launched a wide range of public works programs aimed at reducing and, eventually, eradicating poverty. In Ghana, youths are employed in afforestation and urban sanitation programs.²⁷⁰ Kenya has also launched a poverty reduction strategy outlined in the short-term Poverty Reduction Strategy Paper and the long-term National Poverty Eradication Plan.²⁷¹ The strategy seeks to reduce the incidence of poverty by fifty percent by 2015; empower the poor to earn income; reduce most major forms of inequalities; and increase productivity through human capital development, by investing in education and health.²⁷²

Mozambique also launched its 1999 Plan of Action for the Reduction of Absolute Poverty for the period 2000–2004.²⁷³ The plan sought to fight poverty by addressing the political, economic, social, and cultural factors

264. U.N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) [hereinafter Millennium Declaration]; Millennium Development Goals, <http://www.un.org/millenniumgoals/> [hereinafter MDGs].

265. Millennium Declaration, *supra* note 264, ¶ 20.

266. MDGs, *supra* note 264.

267. *Id.*

268. U.N. Econ. & Soc. Council [ECOSOC], *Economic Report on Africa 2004: Unlocking Africa's Potential in the Global Economy*, ¶ 32, U.N. Doc. E/2004/17 (May 12, 2004) [hereinafter ECOSOC, *Economic Report on Africa 2004*].

269. See, e.g., ETH. CONST. art. 41(6) (urging the government to “expand job opportunities for the unemployed and the poor” and, in particular, to undertake programs and public works projects).

270. See Youth Employment Summit, Economic Commission for Africa, Sept. 7–11, 2002, *Youth and Employment in Africa*, ¶ 47, available at http://www.uneca.org/eca_resources/Conference_Reports_and_Other_Documents/espd/2002/YouthandEmployment.pdf.

271. See MINISTRY OF FINANCE AND PLANNING, GOVERNMENT OF KENYA, INTERIM POVERTY REDUCTION STRATEGY PAPER (2000).

272. See *id.* ¶¶ 5.1–7.2.

273. GEORGE SAITOTI, THE CHALLENGES OF ECONOMIC AND INSTITUTIONAL REFORMS IN AFRICA 85 (2002); REPUBLIC OF MOZAMBIQUE, INTERIM POVERTY REDUCTION AND STRATEGY PAPER (2000).

that have bearing on poverty.²⁷⁴ Under the plan, the government committed itself to launching programs and projects at the national, provincial, and district levels, which were in line with its development goals.²⁷⁵ It also commits itself to addressing the country's population growth rate and food security.²⁷⁶ In January 2002, Tunisia undertook a range of measures to tackle unemployment by launching, *inter alia*, the National Employment Fund (also known as the "21-21 Fund").²⁷⁷ The aim of the Fund is to "facilitate[e] the integration of job seekers, particularly the young, into the labour market."²⁷⁸

There are also few motions at the continental level. The New Partnership for Africa's Development (NEPAD) represents Africa's current effort to redress the continent's underdevelopment and poverty.²⁷⁹ As a Strategic Policy Framework and socioeconomic development program of the AU, NEPAD is frighteningly described as "the last hope for Africa."²⁸⁰ NEPAD makes poverty eradication in Africa "a pressing duty"²⁸¹ and notes, somewhat solemnly, that "African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries and subregions and on the continent."²⁸² The document seeks to arrest and reverse the steady decline in Africa's economic performance and develops a strategy for poverty eradication.²⁸³ The strategy includes working with some international financial institutions (IFIs)—the World Bank, International Monetary Fund (IMF), African Development Bank (ADB)—and U.N. agencies "to accelerate the implementation and adoption of the Comprehensive Development Framework, the Poverty Reduction Strategy and related approaches."²⁸⁴

In September 2004, the AU Assembly convened an Extraordinary Summit on Employment and Poverty Alleviation in Africa in Ouagadougou in Burkina. The summit focused, *inter alia*, on how to empower Africans, open opportunities, and create social protection and security for workers through building a people-oriented environment for development and national growth based mobilization of resources for implementation of

274. See SAITOTI, *supra* note 273, at 85.

275. *See id.*

276. *Id.*

277. ECOSOC, *Economic Report on Africa 2004*, *supra* note 268, at 15.

278. *Id.*

279. See OAU, THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT (2001), available at <http://www.nepad.org/2005/files/documents/inbrief.pdf> [hereinafter NEPAD].

280. Simon Mwanza, *NEPAD is Last Hope for Africa—Magande*, TIMES OF ZAMBIA, Sept. 14, 2004, available at <http://www.times.co.zm/> (search "Search the Site" for "nepad is last hope") (last visited Dec. 4, 2004) (quoting Ng'andu Magande, Zambia's Finance and National Planning Minister).

281. NEPAD, *supra* note 279, ¶ 1.

282. *Id.* ¶ 71.

283. *Id.* ¶¶ 4-5.

284. *Id.* ¶ 119.

adopted plans of action.²⁸⁵ The summit is expected to produce a Plan of Action, which will lead to successive Declarations and Plans of Action against poverty, increasing unemployment and decreasing under-employment.²⁸⁶ The present writer commends the AU for these initiatives, though more obviously is required to translate preaching into practice.

B. Between Promise and Performance

Africa appears to be on the path of sustainable development even if, as the evidence shows, that path is a zigzag, one step forward, two steps backward. Africa achieved a Gross Domestic Product (GDP) growth of 4.6% in 2004²⁸⁷—the highest in almost a decade. The continent's economy is expected to remain "solidly above 5%" in 2006, with the least developed countries (LDCs) "faring even better."²⁸⁸ Strangely, these seemingly positive developments have not broken the cycles of unemployment and poverty in Africa. There is a wide gap between those who are employed and those who are unemployed though employable, and between those who have and those who suffer. Life is brutish, nasty, and short in most of Africa, most of the time; the future is still uncertain and nothing paralyzes as uncertainty.

Average unemployment rates in Africa have remained at around ten percent since 1995, the second highest in the world after the Middle East.²⁸⁹ A 2004 ILO Report similarly indicates that sub-Saharan Africa "has neither reduced its unemployment rate nor improved its high incidence of working poverty."²⁹⁰ The most visible consequence of growing unemployment in Africa is growing poverty; the majority of citizens still lack elementary capabilities—"to be adequately nourished, to be comfortably clothed, to avoid escapable morbidity and preventable mortality."²⁹¹ According to the ECA Report, at least sixty-one million more Africans go hungry today than in 1990.²⁹² Africa's poverty is the highest among all regions;²⁹³ and it is "pervasive, intensive, chronic, gender-biased."²⁹⁴

285. For reports on the summit, see the AU website, *supra* note 2.

286. Earlier continental efforts include the OAU, *Declaration of the Twenty-Seventh Ordinary Session of the Assembly of Heads of State and Government on Employment in Africa*, OAU Doc. AHG/Decl.1 (XXVII) (1991) and the African Common Position on Human and Social Development in Africa, partially adopted by the OAU in its *Declaration on Social Development*, OAU Doc. AHG/Decl.5 (XXX) (1994).

287. See ECONOMIC COMMISSION FOR AFRICA (ECA), *ECONOMIC REPORT ON AFRICA 2005: MEETING THE CHALLENGES OF UNEMPLOYMENT AND POVERTY IN AFRICA 34* (2005) [hereinafter ERA 2005] (attributing the growth to governments' improved economic management, better performance of the agricultural sector and more stable political conditions in many countries).

288. See U.N., *WORLD ECONOMIC SITUATION AND PROSPECTS 2006*, at iii (2006) [hereinafter *WORLD ECONOMY 2006*], available at <http://www.un.org/esa/policy/wesp/wesp2006files/wesp2006.pdf>.

289. See ERA 2005, *supra* note 287, at 61.

290. *Global Employment Trends 3* (2004), available at <http://www.ilo.org/public/english/employment/strat/download/trends.pdf>.

291. Dreze & Sen, *Public Action for Social Security*, *supra* note 120, at 8.

292. See ERA 2005, *supra* note 287, at xiii.

293. See *id.* at 91.

Women are particularly vulnerable because the existing social norms limit their access to and control of productive assets.²⁹⁵ Available statistics indicate that Africa is unlikely to meet any of the MDGs by 2015 or even in a decade thereafter. The World Bank maintains that even if Africa were to achieve a projected growth rate of 1.6% per capita, it would still be at the low end of the developing-country growth spectrum, “inadequate to make much of a dent in poverty and other MDGs.”²⁹⁶

Even for the majority of Africans who are employed, their “take home” pay hardly takes them home because of the slave wages that they earn! The national minimum wage in Nigeria is N5,500 per month;²⁹⁷ that is the equivalent of U.S. \$42.80,²⁹⁸ hardly enough to maintain a household pet for three days in the United States or Europe. In recent years, Nigeria’s external reserves have increased tremendously, due to the political ferment in the Middle East and the consequent rise in oil prices across the globe; but it is as if the more the external reserves increase, the more poverty increases in the country. In South Africa, the income distribution is highly skewed because of the slave wages being paid to black Africans. The bottom 20% of income earners in South Africa earn 1.5% of the national income, while the top 10% of income earners earn 50% of the national income.²⁹⁹

The negative impact of HIV/AIDS on labor markets compounds Africa’s predicament. According to the ECA: “Young people who are HIV-positive eventually become ill with HIV-related diseases, increasing their absence from work, reducing their productivity and lowering their chances of employment.”³⁰⁰ The continuing “brain drain” equally compounds the problem, as thousands of Africans migrate to Western countries, in search of jobs, food, and freedom, at huge cost to Africa’s human resources and cultural identity.³⁰¹ The crisis of brain drain is grave enough to justify the declaration of a state of intellectual emergency in Africa, a view that Rotimi Sankore reinforces:

294. *Id.* at 93.

295. *See id.*

296. WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA 43 (2003) [hereinafter GLOBAL ECONOMIC PROSPECTS 2004].

297. *See* National Minimum Wage (Amendment) Act No. 1 (2000), § 2 (Nigeria), available at <http://www.nigeria-law.org/LFN-2000.htm> (providing, “as from the commencement of this Act, it shall be the duty of every employer (except as provided for under this Act) to pay a wage not less than National Minimum Wage of N5,500.00 per month to every worker under his establishment”).

298. Based on the international exchange rate as at Mar. 23, 2006.

299. *See* Cooper, *supra* note 250, at 233.

300. *See* ERA 2005, *supra* note 287, at 176.

301. *See* OAU, *Yaounde Declaration (Africa: Preparing for the 21st Century)*, ¶ 6, OAU Doc. AHG/Decl.3 (XXXII) (July 1996) [hereinafter *Yaounde Declaration*] (lamenting the “real brain-drain which, each year, strips Africa of tens of thousands of its sons and daughters, professors, scientists and other highly qualified human resources, which escape to the North as the continent progressively loses its cultural identity in the face of dominant foreign cultures”).

If a key factor for anticipating the future development and productivity of any modern society is the number of intellectuals, thinkers, visionaries, professionals and skilled workers it produces, then Africa had better beware. The problem is not that the continent cannot produce highly trained and skilled human resources, the problem is that today they are being taken away faster than Africa can replenish them.³⁰²

Africa's low scorecard on employment generation and social security is due to a combination of external and internal factors, some of which are noted below.

1. Neoliberal Economic Reforms

Since the late 1980s and in breach of their treaty obligations,³⁰³ Africa's Governments have abandoned the objectives of full employment for their citizens in favor of economic systems that provided for permanent pools of unemployment. They did so when they adopted multiple survival mechanisms, which included surrendering decision-making autonomy to Western IFIs—the IMF and World Bank. These IFIs subsequently imposed Structural Adjustment Programs (SAPs) purportedly to deal with Africa's economic fragility and nonresponse to previous development strategies. The reforms were aimed at stabilizing Africa's external and internal balances, thereby promoting their growth.³⁰⁴ Under SAPs, African countries were required, *inter alia*, to liberalize their trade sector and eliminate distortions in price; devalue their currencies and remove government subsidies; reduce budget deficit and the size of the public sector; and privatize governmental parastatals.³⁰⁵ Such interventions were justified on the ideological but illogical grounds of economic neoliberalism or what has come to be known as “the Washington consensus.”³⁰⁶ SAPs made the implementation of such policies a pre-condition for debt rescheduling, new loan facilities, and other concessions.³⁰⁷

The IMF-supported SAPs in Africa were flawed by a lack of distributional analysis and by poor sequencing of reforms, notably premature financial liberalization.³⁰⁸ The IMF sought to apply the same prescriptions across board, notwithstanding that the march of Africans into the world economy does not follow a strait line. Besides, non-capitalist modes of production are still norms in Africa and national financial, banking and monetary systems are quite unsophisticated, not to mention transportation and communications infrastructure, which, already weak, have disintegrated in

302. Cf. Rotimi Sankore, *Africa: Killing Us Softly*, NEW AFRICAN, Nov. 2005, at 9.

303. “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” G.A. Res. 56/83, at 4, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

304. LIMITS OF ADJUSTMENT IN AFRICA: THE EFFECTS OF ECONOMIC LIBERALIZATION, 1986–94, at ix (Poul Engberg-Pedersen et al. eds., 1996) [hereinafter THE LIMITS OF ADJUSTMENT IN AFRICA].

305. See *id.* at 7.

306. RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 1 (1999).

307. See LIMITS OF ADJUSTMENT IN AFRICA, *supra* note 304, at ix.

308. For a critique, see Paul Collier & Jan Willem Gunning, *The IMF's Role in Structural Adjustment*, 109 ECON. J. 634 (1999).

many states.³⁰⁹ SAPs “provided only a partial solution [and] promoted reforms that tended to remove serious price distortions, but gave inadequate attention to the provision of social services. Consequently, only a few countries managed to achieve sustainable higher growth under these programmes.”³¹⁰

“Regardless of the merits of policies of trade liberalization,” the U.N. Economic and Social Council perceptively observed, “the fact remains that in many African countries the reduction of tariff and non-tariff barriers has been associated with a sharp fall in employment, as consumers have switched from non-traded goods to imports.”³¹¹ SAPs, in particular, further deprived already impoverished Africans—many of who were already working for the equivalent of slave labor wages—and subjected the population to the whims and caprices of private entrepreneurs.³¹² SAPs reinforced authoritarianism in Africa, as most governments were intolerant of opposition to adjustment measures, like Babangida’s Nigeria.³¹³ Even Ghana, the IMF’s showpiece of adjustment in Africa, repressed demands of significant sections of civil societies.³¹⁴

Many public servants were retrenched during the periods under review because achieving macroeconomic balance required reducing the budget deficit, which in turn required downsizing the civil service system.³¹⁵ Ghana reportedly retrenched 10,500 civil servants in 1987, 11,000 in 1988, and 12,000 in 1989.³¹⁶ Of an estimated 320,000 employees of approximately 200 state-owned enterprises, at least 39,800 were redeployed between 1988 and 1989³¹⁷—a sizeable proportion of those

309. See Thomas M. Callaghy, *The State and the Development of Capitalism in Africa: Theoretical, Historical, and Comparative Reflections*, in *THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA* 67, 78 (Donald Rothchild & Naomi Chazan eds., 1988) [hereinafter *THE PRECARIOUS BALANCE*] (arguing that Africa is unlikely to become significantly capitalist in the near future given that the factors that could facilitate its development remain weak or nonexistent).

310. NEPAD, *supra* note 279, ¶ 24.

311. ECOSOC, *Economic Report on Africa 2004*, *supra* note 268, ¶ 32.

312. See generally Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L & CONTEMP. PROBS.* 47, 56 (1996); Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 *B.U. INT'L L.J.* 81, 90, 95–96 (1993).

313. *AFRICA, HUMAN RIGHTS, AND THE GLOBAL SYSTEM: THE POLITICAL ECONOMY OF HUMAN RIGHTS IN A CHANGING WORLD* 147–52 (Eileen McCarthy-Arnolds et al. eds., 1994).

314. See generally *BETWEEN LIBERALISATION AND OPPRESSION: THE POLITICS OF STRUCTURAL ADJUSTMENT IN AFRICA* (Thandika Mkandawire & Adebayo Olukoshi eds., 1995) (analyzing the social, cultural, and political effects of African structural adjustment programs).

315. See generally J. HEALEY & M. ROBINSON, *THE DESIGN OF ECONOMIC REFORMS IN THE CONTEXT OF POLITICAL LIBERALIZATION* (1995); see also Bradlow, *supra* note 312, at 69; Rajagopal, *supra* note 312, at 90.

316. ILO, *FROM REDEPLOYMENT TO SUSTAINED EMPLOYMENT GENERATION: CHALLENGES FOR GHANA'S PROGRAMME OF ECONOMIC RECOVERY AND DEVELOPMENT* 35 (1989).

317. *Id.* at 37.

affected were women,³¹⁸ who often are the dis-empowered group. In some countries, retrenched workers suffered long-lived and deep losses of income. In Guinea, researchers found that the average unemployment duration of public-sector workers laid off between 1985 and 1988 exceeded two years and thirty percent were still unemployed in 1992.³¹⁹

African states have not exactly learned from these bitter lessons of history, as Bretton Woods' institutions continue to bulldoze their ways and impose their will on the continent, "without outsiders asking too many questions."³²⁰ Many states are embarking on fresh rounds of market-centered economic reforms, which "equate[] development primarily with economic growth by giving the private sector maximum freedom as the engine of growth," and "growth is often measured to exclude attainment of social objectives like [work, social security,] education and health."³²¹ Privatization, commercialization, downsizing, outsourcing, mergers and acquisitions, these and other emergent economic jargons have the hallmarks of earlier reform processes: There are new massive job losses, with consequent increase in spatial and temporal poverty of citizens. As James Gathii explains, "by allocating resources away from supporting social services, market-centered development postulates that economic growth will follow since resources will be allocated to the most efficient members of a society—the captains of industry."³²²

It is pretty clear that Africa's governments are sailing by dead reckoning, as results cannot be checked by facts. At best, these new rounds of reforms "protect elites more than the lower rungs of the state apparatus"³²³ and enable Africa's leaders to recentralize power and intensify the presidential tendencies of their regimes. The bleak situation is compounded by governments' failure to put in place viable programs to cushion the effects of their phony reforms,³²⁴ beyond merely preaching to citizens to wait and hope for better days.³²⁵ Most Western countries, including China, have made considerable improvements in their social security systems; "social

318. Takyiwaa Manuh, *Ghana: Women in the Public and Informal Sectors under the Economic Recovery Programme*, in *MORTGAGING WOMEN'S LIVES: FEMINIST CRITIQUES OF STRUCTURAL ADJUSTMENT* 61, 68 (Pamela Sparr ed., 1994).

319. NEIL McCULLOCH ET AL., *TRADE LIBERALIZATION AND POVERTY: A HANDBOOK* 147 (2001).

320. Joseph Stiglitz, *The Insider: What I Learned at the World Economic Crisis*, *THE NEW REPUBLIC*, Apr. 17, 2000, at 57 (noting that the IMF "rarely allows sufficient time for broad consensus-building or even widespread consultations" in its "negotiations" with receiver nations); see Rajagopal, *supra* note 312, at 87 ("The Articles of Agreement of the IMF . . . were concluded at the Bretton Woods Conference in July 1944.").

321. James Gathii, *A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 179, 183, 187 (2003).

322. *Id.* at 187.

323. See NICOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979-1999*, at 275 (2001).

324. See ERA 2005, *supra* note 287, at 92 (stating that only "very few [African] countries provide specific measures to counter the adverse employment effects of globalization, liberalization and privatization").

325. See *Yaounde Declaration*, *supra* note 301, ¶ 7.

security [—including social assistance and unemployment benefits—] expenditure as a percentage of GDP has risen” in the last decade.³²⁶ In 1990, social security expenditure expressed as a percentage of GDP was between twenty and thirty percent in most European countries.³²⁷ In Africa, “protection against the risk of unemployment is non-existent and there is little or no social assistance.”³²⁸

2. Globalization Pressures

Globalization and the lopsided implementation of free trade have further complicated the feeble attempts of African states in realizing social rights. The rapid dismantling of trade protection, deregulation of the capital and financial market, outsourcing of work,³²⁹ relocation of plants, and technological and other developments have brought adverse economic and social consequences in many countries. The liberalization of market has allowed cheaper imports to flood Africa, leading to many job losses especially in industries such as clothing and textiles. In order to stay competitive, local industries have downsized their export sector and introduced labor saving technologies. Massive retrenchment has ensued and those affected have often been left in the cold particularly as there are no comprehensive and effective social insurance schemes in Africa.³³⁰ Motivated by market-oriented economic doctrine and a perception of unions as being obstructive to economic efficiency, many states have enacted labor laws that are incompatible with ILO standards.³³¹

The WTO has, as one of its goals, “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.”³³² Yet, the multilateral system has failed to live up to its potential. Thus, while the frontiers of globalization have opened to capital, goods, and services, they have sadly closed to human beings.³³³ Yet the human person ought to be the central subject, the main participant,

326. ILO, *WORLD LABOUR REPORT 2000*, *supra* note 124, at 51; *China's Social Security System Framework Takes Shape*, PEOPLE'S DAILY, Sept. 14, 2004, available at http://english.people.com.cn/200409/14/eng20040914_156987.html.

327. ILO, *WORLD LABOUR REPORT 2000*, *supra* note 124, at 56.

328. *Id.* at 53.

329. About sixty-eight percent of companies surveyed in South Africa outsourced labor during 1994-98, with the majority of them coming from the blue-collar sector. See Cooper, *supra* note 250, at 235 (referencing J. Kelly, *The Wage Settlement Survey*, QUARTERLY REPORT, Mar. 1999).

330. See *id.*

331. See generally Gudrun Biffl & Joe Isaac, *How Effective are the ILO's Labour Standards Under Globalisation?* (paper presented at the IIRA/CIRA 4th Regional Congress of the Americas Centre for Industrial Relations, University of Toronto, June 25-29, 2002), available at http://www.cira-acri.ca/IIRA_CIRA_docs/Isaac_and_Biffl.pdf (last visited Dec. 5, 2005).

332. Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

333. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 16 (Sept. 17) (Cancado, J., concurring), available at http://www.corteidh.or.cr/serieapdf_ing/seriea_18_ing.pdf.

and the beneficiary of the development process.³³⁴ Africa is not only being marginalized in the globalized world—though some commentators insists that its marginalization is a perception rather than a process³³⁵—but it is increasingly becoming a mere source of cheap labor for transnationals.

The WTO “remains overwhelmingly oriented toward trade concerns,” notwithstanding that its influence “extends well beyond the trade arena.”³³⁶ It rejects a formal linkage between workers’ rights and trade liberalization³³⁷ and considers policies that promote workers’ rights as barriers to trade. The 1996 WTO Singapore Ministerial Declaration invites challenges to laws that seek to enforce labor rights: “We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question.”³³⁸ These anti-human, anti-labor, rights stance is based on the faulty logic that national “aberrations,” such as domestic laws permitting strikes, affect international trade and profits of foreign investors.³³⁹ With states abdicating their roles as primary sources of labor rights protection, the majority of workers in Africa and other parts of the developing world have been left to face multinational capacities directly,³⁴⁰ and the results of such unequal contests are predictable!

334. DRD, *supra* note 180, pmb. & art. 2(1) (providing that development should aim “at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”).

335. See Pascal Gayama, *Africa’s Marginalization: A Perception, Not a Process*, in AFRICA WITHIN THE WORLD: BEYOND DISPOSSESSION AND DEPENDENCE 73, 75 (Adebayo Adedeji ed., 1993) [hereinafter AFRICA WITHIN THE WORLD] (stressing, “Africa can be marginalised only if it allows itself to be”).

336. Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303, 305 (2004) (“This interaction between trade and non-trade issues will only grow stronger over time, and the pressure to address the conflicting priorities that result will continue to rise.”).

337. On the impact of WTO on labor rights, see generally Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT’L L. 11 (1998) (exploring the linkage between workers rights and a liberalized international trade regime); Helene Cooper et al., *Up in Smoke: WTO’s Failure in Bid to Launch Trade Talks Emboldens Protesters*, WALL ST. J., Dec. 6, 1999, at A1 (discussing the resistance of developing countries to the incorporation of labor standards in WTO agreements); Robert Howse, *The World Trade Organization and the Protection of Worker’s Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999) (examining the role of the WTO in protecting workers’ rights).

338. WTO, Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, at 4, available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

339. See Ashwini Sukthankar & Scott Nova, *Human and Labor Rights Under the WTO, in WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO* 219, 219–20 (Lori Wallach & Patrick Woodall eds., 2004).

340. See *id.*

3. Authoritarianism and Anti-labor Policies

Anti-labor and anti-workers legislation still exists and persists in many parts of Africa. Though some of these legislations were enacted during the era of authoritarianism and totalitarianism in Africa, they still govern Africans from the grave, long after the enacting regimes have gone. In other countries, existing constitutional provisions on the right to work have been weakened or significantly changed. Nigeria's controversial Labour Bill, which sought to amend the Trade Union Act of 1990—resulting in a 2005 Amendment—is emblematic of the emerging anti-unionism in the continent.³⁴¹ The bill gives the Nigerian Minister of Labour exclusive power to decide who should belong to a trade union and which union should be registered.³⁴² It bars workers in certain sectors of the economy—aviation, health, electricity, and even education—from engaging in strike actions.³⁴³ It replaces labor centers with federating units.³⁴⁴ Government apologists see the bill as aiming at democratizing and strengthening labor in the country as well as enhancing fundamental choices for Nigerian workers.³⁴⁵ The Nigerian Labour Congress (NLC), on the other hand, believes that the bill, which is now at the committee stage in Nigeria's Senate, would do violence to the freedom of workers if passed into law. For the NLC President, the bill “is vindictive, punitive and calculated to destroy the labour movement.”³⁴⁶

Notwithstanding the trumpets of democratization that appears to be blowing across Africa, authoritarianism and personalization of power is still the norm. Authoritarianism makes the realization of human, including social, rights difficult, if not utterly impossible. There is generally a curious double feeling of trust and distrust between states and their judicial institutions in Africa such that these institutions, which are regarded bastions of individuals' rights,³⁴⁷ are being weakened in their efforts to check abuses of state power. The African Commission confirms that many governments deliberately work to weaken domestic courts, thereby hampering the smooth administration of justice.³⁴⁸ This weakening sometimes

341. Trade Union (Amendment) Act (2005) (Nigeria), available at [http://www.nigeria-law.org/TradeUnion\(Amendment\)Act2005.htm](http://www.nigeria-law.org/TradeUnion(Amendment)Act2005.htm). For commentary on the legislation, see Sam Olukoya, *Modified, a Union Bill Still Gives Cause for Concern*, ASHEVILLE GLOBAL REPORT, Sept. 16–22, 2004, <http://www.agrnews.org/issues/296/labor.html#3>.

342. Trade Union (Amendment) Act (2005), *supra* note 341, art. 8.

343. See *id.* art. 6(6).

344. See *id.* art. 7(2).

345. See John-Abba Ogbodo, *Reps Split Over Labour Bill*, GUARDIAN NEWS (Nigeria), Sept. 8, 2004, available at <http://www.guardiannewsngr.com/news/article01/080904> (last visited Dec. 4, 2005).

346. *Labour Bill: Govt, NLC Trade Words*, THISDAY NEWS, Aug. 26, 2004, available at <http://news.biafranigeriaworld.com/archive/2004/aug/26/004.html>.

347. The constitutions of many African countries refer to courts as guardians of fundamental freedoms. These include BURUNDI CONST. art. 52; CENT. AFR. REP. CONST. art. 78; CHAD CONST. art. 148; COMOROS CONST. art. 31; CONGO CONST. art. 135; DJIB. CONST. art. 71; EQ. GUINEA CONST. art. 95(b); GABON CONST. art. 83; GAM. CONST. art. 132(1)(b); GHANA CONST. art. 33(1); MALI CONST. art. 85; TOGO CONST. art. 99.

348. See *CLO v. Nigeria*, *supra* note 116, ¶ 14.

takes the shape of inadequate funding, understaffing, and poor training of judicial personnel. The independence of the judiciary has been seriously eroded in many states, due to executive and legislative lawlessness.

In Zimbabwe, President Robert Mugabe frequently uses constitutional amendments to reverse unwelcome Supreme Court decisions and weaken constitutionally guaranteed human rights and the rule of law.³⁴⁹ In Nigeria, some judges have been pressurized to recant after giving unequivocal orders. In March 2006, Justice Olasunmbo Goodluck of the Abuja High Court recanted two days after giving a clear interim order, “protesting that what was indubitably an order was an obiter dictum.”³⁵⁰ On January 12, 2006, Justice Bolaji Yusuf of the Oyo State High Court declared the constitution of a seven-man impeachment panel as illegal but later withdraw from the case, “willy-nilly, without adducing reasons for her decision to do so.”³⁵¹ All of this is “a metaphor for the depth to which a section of the Judiciary has sunk, in a democratic dispensation.”³⁵² To protest the serial disobedience of court orders by the Obasanjo Administration, the Nigerian Bar Association (NBA)—the umbrella body for lawyers—embarked on a two-day boycott of courts throughout the country in March 2006.³⁵³ The boycott was a landmark: it was “the first time in a democracy and the second time in the history of Nigeria.”³⁵⁴

The present writer submits that a government that chooses which section of the law to respect and that routinely violates the constitution and court rulings lacks the moral strength to insist on either due process or the rule of law. Justice Brandeis of the U.S. Supreme Court underscored the point more elegantly when, in *Olmstead v. United States*,³⁵⁵ he declared:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.³⁵⁶

IV. Options for Africa

The last part of this article established that the realization of social rights in many African countries remains largely a fiction, more aspiration

349. Lord Lester, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, in 4 EUR. HUM. RTS. L. REV. 273, 277 (Ben Emmerson ed., 1999).

350. See Editorial, *Conflicts and Intrigues in the Realm*, THE GUARDIAN (Nigeria), Mar. 21, 2006.

351. *Id.*

352. *Id.* (noting that the development is “a dangerous erosion of the independence of th[e] judicial] arm of government”).

353. See Editorial, *NBA Boycott of Courts*, DAILY CHAMPION (Nigeria), Mar. 17, 2006, available at <http://allafrica.com/stories/200603170170.html> (reporting that the NBA stayed away from courts across the nation “to protest the non-adherence to the rule of law by all tiers of government”).

354. *Id.*

355. *Olmstead v. United States*, 277 U.S. 438 (1928).

356. *Id.* at 485 (Brandeis, J., dissenting).

than actuality, and that poverty still defines most of Africa. Oddly, Africa's poverty has occurred in the context of a seemingly positive economic growth.³⁵⁷ The reason for this anomaly is that most countries view development solely as the growth of GDP or the promotion of industrialization. Yet, as Aristotle noted at the very beginning of the *Nicomachean Ethics*, "wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else."³⁵⁸ For Aristotle, "the good of human beings" is the richness of "life in the sense of activity."³⁵⁹ Since a state's prosperity is a function of its citizens' prosperity, it follows that the real index for measuring the success of a given society is the substantive freedoms that its members enjoy rather than its GDP.³⁶⁰ "Development," says Amartya Sen, "has to be more concerned with enhancing the lives we lead and the freedoms we enjoy."³⁶¹

The failure of Africa's seeming economic growth to reduce incidences of general and working poverty suggests that the current development mythologies and, in particular, "the nexus of growth, employment and poverty reduction" should be reexamined.³⁶² This Part looks at the options available to Africa's governmental, inter-governmental and non-governmental institutions towards realizing social rights. It deliberately adopts a holistic approach in its prescriptions, since the diagnosis is not merely legal. Changes aimed at the effective implementation of social and other egalitarian rights will not come solely from the formal framework of the African Charter or from the Charter bodies; they will come largely from political mobilization and community participation in campaigns to protect these rights.

A. Options for the African Union

The reformation of Africa's continental organization was long overdue, as the OAU Charter, which established the OAU, had become "a dated

357. See ERA 2005, *supra* note 287, at 92; cf. WORLD ECONOMY 2006, *supra* note 288, at iii ("Despite strong growth performance, many developing countries continue to face high levels of structural unemployment and underemployment which limit the impact of growth on poverty reduction.").

358. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, § 5, para. 7 (D. Ross trans., 1980).

359. *Id.* bk. I § 7. Cf. KARL MARX, *THE ECONOMIC AND PHILOSOPHIC MANUSCRIPT* (1884) (arguing for a reorientation of economic preoccupations).

360. See SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 40, at 18.

361. *Id.* at 14. Cf. DREZE & SEN, *supra* note 77, at 12 (stating that the object of public action should be the enhancement of the capability of people to undertake valuable and valued "doings and beings"). The authors define a person's (formal) capability as "a set of functioning bundles, representing the various alternative 'beings and doings' that a person can achieve with his or her economic, social, and personal characteristics" but they admit that there are obvious problems in characterizing and analyzing capabilities. See *id.* See also Nsongurua J. Udombana, *A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations*, 38 J. MARSHALL L. REV. 1153, 1202 (2005) ("Life is primarily about promoting human dignity, happiness, and values; profit and GDP are means to these ends.").

362. ERA 2005, *supra* note 287, at 92.

instrument bearing very little likeness to today's reality."³⁶³ It was not surprising, therefore, that the AU Act sets for the AU the obviously difficult task of taking up the multifaceted challenges confronting Africa and its peoples, "in the light of the social, economic and political changes taking place in the world."³⁶⁴ Some of the specific challenges that the AU Act identifies include the socioeconomic development of Africa;³⁶⁵ promotion of peace, security and stability, as a prerequisite for the implementation of development;³⁶⁶ and promotion and protection of human and peoples' rights, consolidation of democratic institutions and culture, and ensuring good governance and the rule of law.³⁶⁷ More significantly, the Act sets, as one of its goals, the promotion of cooperation in all fields of human activity in order to raise the living standards of Africans.³⁶⁸

The AU should serve as pivot and catalyst for the promotion of social rights in Africa. Prioritization is imperative for the advancement of social rights and tackling unemployment, poverty, and social exclusion must be at the heart of the AU's present concerns, given that the wounds that these evils inflict are deep and continuous. Happily, the AU Act has reinvigorated some of the almost moribund organs of the OAU in ways that could promote the realization of social rights in Africa.³⁶⁹ The AU Assembly determines the common policies of the AU and "receive[s], consider[s,] and take[s] decisions on reports and recommendations from the other organs" of the AU," among other things.³⁷⁰ Another relevant organ is the Economic, Social and Cultural Council, which is "an advisory organ composed of different social and professional groups of the Member States of the Union."³⁷¹

A key organ that should continually feed the AU Assembly with sound recommendations should be the AU Executive Council, which replaced the OAU Council of Ministers. The Council, which is "composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are desig-

363. Editorial, *Sirte and the Rest of Us*, AFR. TOPICS (Nov.-Dec. 1999), at 3 (noting that the compromises were necessary to reach an agreement and produced an internal inertia that hampered reforms).

364. AU Act, *supra* note 11, pmbl.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* art. 3(k).

369. See generally Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. WEST. INT'L L.J. 69 (2002) (discussing the AU organs from an international institutional perspective).

370. *Id.* art. 9(1). Other functions include considering requests for membership; establishing AU organs; monitoring the implementation of policies and decisions and ensuring all Member States' compliance; adopting the budget; giving directives to the Executive Council on the management of conflicts, war, and other emergency situations as well as the restoration of peace; appointing and terminating judges of the AU Court of Justice; and appointing the Chairman of the AU Commission and his or her deputy or deputies and other commissioners and determining their functions and terms of office. *Id.*

371. *Id.* art. 22(1).

nated by the Governments of Member States,"³⁷² is vested with wide variety of responsibilities, some of which are relevant to the realization of social rights in Africa.³⁷³ It coordinates and makes decisions on policies in areas of common interest to the Member States. These include foreign trade; energy, industry and mineral resources; food, agricultural and animal resources, livestock production and forestry; water resources and irrigation; environmental protection, humanitarian action and disaster response and relief; and transport and communications.³⁷⁴ Other areas over which the Council has jurisdiction are insurance; education, culture, health, and human resources development; science and technology; nationality, residency, and immigration matters; social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped; and the establishment of a system of African awards, medals, and prizes.³⁷⁵

It is important for all these key organs to pay greater attention to problems of unemployment and poverty in Africa and to offer pragmatic recommendations to Member States towards ameliorating these problems. The majority of Africans, particularly the poor, have grown cynical of the various poverty reduction strategies and now adopts a "wait-and-see" attitude. Africans cannot be blamed for being cynical, given the failure of previous experiments to deliver the expected results. Poverty reduction and eradication require more than pious Declarations and Plans of Action; it requires even more than NEPAD, which is still donor-driven and emphasizes massive flows of capital as the primary pre-condition for its success. According to NEPAD agenda, Africa will require \$64 billion annually to achieve a seven percent annual growth rate. Part of this amount will come from domestic savings, given improved political and economic governance—particularly in revenue collection, but the "bulk of the needed resources will have to be obtained from outside the continent."³⁷⁶

If the AU and its Member States want Africans to take them seriously over their poverty reduction mission, then they must look inward and take immediate and real action that will have positive effects on the standard of living of Africans. A starting point in this mission should be to establish a Social Fund, which should be geared towards improving employment opportunities for workers in the internal markets of Member States. The Fund could increase the mobility of citizens and facilitate their adaptation to industrial changes, in particular through vocational training and retraining, and contribute to raising the standard of living of Africans. It could, more importantly, contribute to strengthening integration efforts in the continent. A similar scheme in Europe—the European Social Fund (ESF)—has become the EU's most important instrument for combating unemploy-

372. *Id.* art. 10(1).

373. *Id.* art. 13(1).

374. *Id.* art. 13(1)(a-f).

375. *Id.* art. 13(1)(g-l).

376. *Id.* ¶ 144.

ment.³⁷⁷ The ESF has the primary task of combating long-term unemployment and facilitating the entry into working life of young people and of people exposed to exclusion from the labour market and of facilitating the adaptation of workers to industrial change and to changes in production systems.³⁷⁸ Since Africa did not feel embarrassed in patterning its integration agenda almost wholly on the European model, it should equally not feel embarrassed in taking precedents from programs that have impacted positively on the EU's citizens.

The AU should adopt a common policy on employment, social security and related issues to guide domestic policies and programs of Member States. Africa is still a jigsaw, with no common social and employment policies, other than general and vague objectives in some regional instruments like the AU Act and NEPAD. A continent that is moving towards economic and political integration must adopt common positions on issues that are vital to integration and sustainable development. Certain matters cannot be left to the discretion of individual Member States. It is perfectly reasonable, for example, for the AU to adopt a charter on small and medium enterprises (SMEs) as a way of creating jobs and improving the living conditions of Africans. SMEs are critical factors in economic growth; they are increasingly responsible for the creation of the majority of jobs throughout the world; they are potential seedbeds for technological acquisition and innovation; and they could help create an environment for innovation and entrepreneurship.

Again, the European Charter for Small Enterprises (ECSE)³⁷⁹ could serve as a template for such a scheme in Africa. The ECSE enjoins governments to focus their strategic efforts on ten action lines, which are vital to the environment in which SMEs operate. These action lines include: education and training for entrepreneurship; better legislation and regulation; taxation and financial matters; and strengthening of technological capacity of SMEs.³⁸⁰ Some of these action lines certainly are relevant to Africa. The suggested African Charter on SMEs should commit governments to providing incentives and equal opportunity for access to credit and foreign

377. Commission of the European Communities, *Communication on European Social Fund Support for the European Employment Strategy*, at 2, ESF Doc. COM(2001) 16 final/2 (Jan. 23, 2001), available at http://europa.eu.int/comm/employment_social/esf2000/regulations/esf_ees/en.pdf.

378. The ESF has its legal basis on European Community law, as embodied in the Single European Act of 1986, the Treaty of the European Union (EU), and the Treaty of Amsterdam. Single European Act, Feb. 17, 1986 (Luxembourg) & Feb. 28, 1986 (The Hague), 1987 O.J. (L 169) 1; Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter EU Treaty]; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

379. European Charter for Small Enterprises (ECSE), adopted June 13, 2000, available at http://europa.eu.int/comm/enterprise/enterprise_policy/charter/index_en.htm [hereinafter ECSE].

380. Others are cheaper and faster start-up; availability of skills; improving online access; getting more out of the single market; successful e-business models and top-class small business support; and developing stronger, more effective representation of SMEs' interests at the EU and national levels. *Id.*

exchange for all SMEs. It should commit governments to simplifying and decentralizing business registration in order to eliminate the link between high administrative burdens and corruption; this will facilitate enterprise creation. It should, moreover, commit governments to removing constraints to the development and growth of SMEs, in line with the ILO's recommendations.³⁸¹ The Charter should contain obligations for periodic reports by states on their implementation of the policies contained therein. The Pan-African Parliament (PAP),³⁸² inaugurated in South Africa in 2004, could receive and consider such reports. The establishment of the PAP "is informed by a vision to provide a common platform for African peoples and their grass-roots organizations to be more involved in discussions and decision-making on the problems and challenges facing the Continent."³⁸³ Though the PAP presently has mere "consultative and advisory powers,"³⁸⁴ its "ultimate aim" is "to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage."³⁸⁵

The AU should also adopt special policies and common strategies that target small scale and traditional farmers in rural areas in Africa and create enabling conditions for private sector participation. Emphasis should be on "human capacity development and the removal of constraints to agricultural production and marketing, including soil fertility, poor water management, inadequate infrastructure, pests and diseases."³⁸⁶ The African Investment Bank should, when established,³⁸⁷ give priority to investment in agricultural production. "Technological innovation and technology dif-

381. ILO, *Job Creation in Small and Medium-Sized Enterprises Recommendation*, *supra* note 159. Constraints in the way of SMEs could arise from a number of situations. It could arise from: difficulties of access to credit and capital markets; low levels of technical and managerial skills; inadequate information; low levels of productivity and quality; insufficient access to markets; difficulties of access to new technologies; and lack of transport and communications infrastructure. *Id.* ¶ 6(2)(a-g). Constraints could also arise from inappropriate, inadequate, or overly burdensome registration, licensing, reporting, and other administrative requirements, including those which are disincentives to the hiring of personnel, without prejudicing the level of conditions of employment, effectiveness of labor inspection, or the system of supervision of working conditions and related issues. *Id.* ¶ 6(2)(h). It could arise from insufficient support for research and development and from difficulties in access to public and private procurement opportunities. *Id.* ¶ 6(2)(i-j).

382. The Pan-African Parliament (PAP) is one of the principal organs of the AU. See AU Act, *supra* note 11, art. 5.

383. OAU, Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament *pmbl.*, Mar. 2, 2001, OAU Doc. EAHG/3 (V), available at AU website, *supra* note 2. The PAP is mandated, *inter alia*, "to (1) facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union; (2) promote the principles of human rights and democracy in Africa; [and] (3) encourage good governance, transparency and accountability in Member States." *Id.* art. 3(1-3).

384. *Id.* art. 2(3)(i).

385. *Id.* art. 2(3).

386. AU, Declaration on Agriculture and Food Security in Africa, ¶ 1, AU Doc. Assembly/AU/Decl.7 (II) (July 2003), available at AU website, *supra* note 2.

387. See AU Act, *supra* note 11, art. 19 (providing for the establishment of financial institutions, including the African Investment Bank). The rules and regulations of the Financial Institutions are to be defined in subsequent protocols. *Id.*

fusion [also] hold enormous potential for accelerating agricultural output and productivity," though, as NEPAD acknowledges, most African countries, let alone small-scale farmers, lack the research capacity necessary for major breakthroughs.³⁸⁸ The AU should facilitate such research,³⁸⁹ by collaborating with relevant international institutions, including the Food and Agricultural Organization.

The adoption of the Treaty Establishing the African Economic Community (AEC) in 1991³⁹⁰ was a bold and imaginative step by collective Africa to achieve economic integration and sustainable development.³⁹¹ Among other things,³⁹² Member States undertook to progressively secure for their nationals the rights of free movement, residence, and establishment within the Community.³⁹³ These rights include rights of entry and residence, seeking, and taking up offers of employment; it includes rights that are associated with employment, including equality in employment, unemployment, and incapacity to work, and the right to remain after employment; it includes family rights, and the rights of non-AEC national dependents; it also includes entitlement to social security and access to public sector employment; and it includes the mutual recognition of qualifications.³⁹⁴ More specifically, member States undertook, *inter alia*, to harmonize gradually their labour and social security legislation with a view to eliminating poverty³⁹⁵ and to adopt, coordinate and harmonize their policies with a view to ensuring a decent life for the aged.³⁹⁶ The defunct OAU, regrettably, could not get its members to implement their set agenda under the AEC Treaty; that task now falls on the AU.

The AU should stop brooding over marginalization in globalization and should urge its Member State to pool their sovereignties in order to gain strength in a globalized world. Some sacrifices are needed to realize the objectives in the AEC Treaty in order to maximize potentials of regional economic cooperation. At the risk of sounding apocalyptic, the present

388. NEPAD, *supra* note 279, ¶ 191.

389. AU Act, *supra* note 11, art. 3(m) (stating, as one of the objectives of AU, the "promot[ion of] research in all fields, in particular in science and technology").

390. OAU, Treaty Establishing the African Economic Community, *adopted* June 3, 1991, 30 I.L.M. 1241 (*entered into force* May 11, 1994) [hereinafter AEC Treaty].

391. *Id.* art. 4(1) (listing the objectives of the AEC).

392. The AEC Treaty is to achieve its aims of, *inter alia*, trade liberalization through the abolition of Customs Duties and non-tariff barriers among Member States in order to establish a free trade area; the adoption of a common trade policy *vis-à-vis* third States; and the harmonization of national policies in agriculture, industry, transport, and communications, energy, trade, money and finance, and science and technology. *Id.* art. 4(2).

393. See *id.* art. 43. For commentaries on the AEC Treaty, see Nsongurua J. Udombana, *A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 *IND. INT'L & COMP. L. REV.* 185, 197-99 (2002); Gino J. Naldi & Konstantinos D. Magliveras, *The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?*, 24 *N.C. J. INT'L L. & COM. REG.* 601 (1999); Bankole Thompson, *Economic Integration Efforts in Africa: A Milestone—The Abuja Treaty*, 5 *AFR. J. INT'L & COMP. L.* 743, 753-54 (1993).

394. See AEC Treaty, *supra* note 390, arts. 71-72.

395. See *id.* art. 72(2)(b).

396. See *id.* art. 72(2)(f).

writer does not believe that the current international economic order (IEO) will be less unjust or unfair in the immediate future. Globalization, as conceived by the North and delivered in the South, is not a bowl of cherries but a rat race in which the end justifies the means.³⁹⁷ One of the critical issues that the AU should address is free movement of persons, which is an essential element of economic integration³⁹⁸ and an imperative for the accomplishment of the AEC's goals.³⁹⁹ Its importance lies both in its content and in the promise it holds out for the future.⁴⁰⁰ "Community citizenship" is one of the fundamental freedoms of EU Law⁴⁰¹ and the EU has promoted citizenship through many regulations⁴⁰² and directives⁴⁰³ and these secondary legislations have created further categories of persons who are entitled to free movement, such as retirees, students and persons of independent means.⁴⁰⁴

The AU should pressure its Member States to make genuine efforts towards removing roadblocks to the free movement of persons. For Africa, especially, the mobility of workers could stimulate the human resource response to the requirements of employment market, promote mutual understanding, and create the social fabric essential to the emergence of a real, as opposed to an imaginary, "African Union." The AU should put in place must appropriate measures to penalize any Member State that fails to implement commitments under the AEC Treaty and thereby causing a serious breach of AEC's functioning. Barriers against free movement of goods, labor, capital and payments, services and the right of enterprises to establish themselves in another Member State are inimical to sustainable development and poverty eradication. It is no use preaching pan-Africanism if it is easier, as is presently the case, for an African to travel to Europe from his country than to cross the border of his country to a neighboring African state for legitimate transactions. It takes a Nigerian a minimum of six

397. See Udombana, *A Question of Justice*, *supra* note 361, at 1203.

398. Free movement of persons entails the right of "community citizens" to be treated in the host member state free from discrimination on the grounds of nationality. See JOSEPHINE STEINER & LORNA WOODS, *TEXTBOOK ON EC LAW* 189 (2003).

399. See Thompson, *supra* note 393, at 753-54.

400. *Contra* David O'Keeffe, *Union Citizenship*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 87, 106 (David O'Keeffe & Patrick Twomey eds., 1994).

401. See, e.g., Case C-85/96, *Maria Martínez Sala v. Freistaat Bayern* 1998 E.C.R. I-2691 (ruling that EU-citizens have a right to equal treatment); Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1982 E.C.R. 1035. See generally Carlos Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 *COMMON MKT. L. REV.* 1137 (1992) (evaluating, from a political point of view, the condition of citizenship created by the EU Treaty).

402. See, e.g., Council Regulation 1612/68, *Freedom of Movement for Workers Within the Community*, 1968 O.J. (L 257) 2 (EC), as amended by Council Regulation 2434/92, 1992 O.J. 1992 (L 245) 1.

403. See, e.g., Council Directive 73/148, *Abolition of Restrictions on Movement and Residence Within the Community for Nationals of Member States with Regard to Establishment and the Provision of Services*, 1973 O.J. (L 172) 14 (EC); Council Directive 75/34, *Concerning the Right of Nationals of a Member State to Remain in the Territory of Another Member State After Having Pursued Therein an Activity in a Self-employed Capacity*, 1975 O.J. (L 14) 10 (EC).

404. See Trevor C. Hartley, *European Union Law in a Global Context* 408 (2004).

months to obtain an exit visa to Kenya, all things being equal;⁴⁰⁵ whereas it will take the same Nigerian not more than *one week* to obtain an exit visa to Switzerland, again all things being equal.⁴⁰⁶ What manner of African unity or union is this? It is the absence of free movement of persons between Africa's sub-regions that forces Africans to look outwards.⁴⁰⁷

The solution to these constraints is not to pretend that they do not exist; the solution lies in admitting and confronting them. Of course, states have inherent rights to take restrictive measures that derogate on the right of entry and residence, on such grounds as public policy, public security or public health; but an African ought not to be refused entry or residence based on economic grounds but solely on the personal conduct of the individual concerned. Restrictive measures should not be collective or reflect a wish to achieve general exclusion. Besides, the conduct that should justify denial of entry should be such that nationals are also punishable when they exhibit them, based on the principle of equality of treatment. The AU should also give priority to measures that facilitate mutual recognition and acceptance of workers by Member States and should harmonize educational and vocational training manuals for the continent. Vocational training policies will promote the mobility of labor while also enabling workers to adapt to any negative consequences arising from integration.

Finally, the AU should sufficiently and adequately fund the African Commission and, in future, the African Court, in order to enhance human rights promotion and protection in Africa. The Commission still suffers from acute financial problems almost two decades after its establishment;⁴⁰⁸ and this has often forced it to prioritize its activities, with adverse consequences on the promotion of social rights. It appears that the AU and its Member States presently use the African Commission and similar institutions largely as public relations outfits to enhance their human rights and democratic credentials before the international community. Hypocrisy is the only evil that walks invisible; but the AU should set a new paradigm by funding the cost of rights at the continental level.

B. Options for Africa's Governments

The full implementation of social rights involves both the internal and external elements of a State's governance.⁴⁰⁹ The right to work, in particular, "involves political imperatives that match or exceed those derived from

405. Based on experiences of Nigerians whom this author interviewed. Cf. Sankore, *supra* note 302, at 12 ("Africans from some countries have to wait for over a month for a mere visitor's visa to other parts of Africa In practice many are even completely excluded.")

406. Based on author's personal experiences.

407. Sankore, *supra* note 302, at 12 (quoting Chidi Odinkalu).

408. See, e.g., SIXTEENTH ANN. ACTIVITY REP. OF THE AFR. COMM'N ON HUM. AND PEOPLES' RTS., 2002-2003, at 2.

409. See Nsongurua J. Udombana, *Socio-Economic Rights and the Nigerian Worker*, 3 MOD. PRACT. J. FIN. & INVEST. L. 397, 408 (1999).

other economic and social rights.”⁴¹⁰ African governments must dismantle many of their domestic laws that undermine workers’ rights if their avowed human rights posturing are to be taken seriously. They must not inhibit voluntary unionisms and that pursues worker’s interests. As Francis Fukuyama rightly maintains, “there is a natural, universal impulse towards sociability, which if blocked from expressing itself through legitimate social structures like the family or voluntary associations, appears in pathological forms like criminal gangs.”⁴¹¹ Those states that have not yet ratified the relevant ILO conventions should do so, since these conventions are vital to the enjoyment of social rights in Africa. Even states that have comprehensive legal regimes to secure social rights must implement strong, well-financed public policies to realize these goals. All states must place decent work at the heart of macroeconomic and social policies rather than treat employment as, to borrow Robert Howse’s interesting phrase, “a kind of gratification to be postponed until unrestrained industrial or postindustrial capitalism produces high real incomes.”⁴¹²

Improving nationwide employment requires focusing on employability, employment creation, equity, entrepreneurship, environmental sustainability, education, and development. States must also safeguard and develop available natural and material resources for the benefit of their citizens. Employment generation can help to prevent the morbidities and mortalities that regularly afflict Africa; it can be a positive part of famine prevention efforts in a number of countries. During the prolonged draught in Cape Verde in the middle of 1970s, the government and other agencies provided relief almost exclusively in the form of employment for cash wages in makeshift work. “These preventive measures,” according to Dreze and Sen, “succeeded to a great extent in averting a severe famine. There were no reports of large-scale starvation deaths, and the overall increase in mortality seems to have been moderate.”⁴¹³

There is symmetry between education and work. Investments in education and training are fruitless in the absence of job opportunities; yet, poor people cannot maximize their potentials to lift themselves and their families out of poverty, due to lack of education. Africa’s governments should not merely invest in human capital through education but should also focus energies on creating productive and remunerative work for the poorest citizens, with conditions of freedom, security and human dignity.

410. Richard L. Siegel, *The Right to Work: South Africa’s Core Minimum Obligations*, in *EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS*, *supra* note 119, at 209 (stressing, “prolonged neglect of obligations to create and secure work can shift political support from one party or leader to another and bring down national governments and political orders”).

411. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 337-38 (1995) (stressing that it is the suppression of legitimate associations that allows “mafias” to appear “in places like southern Italy, the American inner city, Russia, and many sub-Saharan African cities”).

412. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 104 (2002).

413. DREZE & SEN, *supra* note 77, at 135.

They should enact regulations to compel public and private employers to pay special allowances to employees to reduce the impact of devaluation on employees' incomes. Such allowances should not be considered as a ratio or basis for the quantitative determination of any legal or contractual right or any right derived from a collective bargaining agreement. Argentina has adopted regulations requiring employers to provide a monthly, non-remunerative allowance in addition to employees' normal wages.⁴¹⁴ The allowance is included in the basic salary, on a staggered and progressive basis, and subject to withholdings and contributions to social security and included in the calculation of income taxes, vacations, bonuses, severance payments, etc.⁴¹⁵

Free enterprise may be inevitable in an age of globalization; however, "[m]arkets, free or otherwise, are not a product of nature [but] are legally constructed instruments, created by human beings hoping to produce a successful system of social ordering."⁴¹⁶ Adaptability to globalization imperatives should be balanced against the protection and security of the labor force.⁴¹⁷ Africa's governments should regulate the exercise of free enterprise in order to meet the demands of sustainable development and prevent the social apartheid and exclusion that inevitably accompanies the liberalization of trade. They should curb imports to protect local production, enable farmers and pastoralists to receive fair prices for their products, and, ultimately, create jobs. Most industrialized nations offer financial and technical support to their SMEs;⁴¹⁸ and many European countries, in particular Japan and Germany, jump-started their economies after World War II by deploying public money to develop infrastructure and assisting their SMEs.

The patrimonial state structures and their pathological dysfunctions—repression and extraction, massive corruption, administrative bureaucracy, enormous waste, clientelism, institutional collapse, poor policy performance, debt and infrastructure crisis⁴¹⁹—these and other pathologies make it imperative for Africa to embark on political, economic, and institutional reforms. It is, however, outrageous for Africa to insist that the Bretton Woods' institutions offer the only good economic reform ideas and that

414. Erika C. Collins, *Labor and Employment Developments From Around the World*, 38 INT'L L. 149, 149 (2004).

415. *Id.* at 150.

416. CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 384 (1997).

417. See Cooper, *supra* note 250, at 234 ("It is imperative in South Africa that whatever policies are followed address not only growth but a strategy for development which encourages job creation, and the alleviation of inequality and poverty.").

418. ECOSOC, *Economic Report on Africa 2004*, *supra* note 268, ¶ 32.

419. On problems associated with post-colonial states in Africa, see generally CHRISTOPHER CLAPHAM, *AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL* (1996); BASIL DAVIDSON, *THE BLACKMAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* (1992); Naomi Chazan, *State and Society in Africa: Images and Challenges*, in *THE PRECARIOUS BALANCE*, *supra* note 309, at 325 (discussing the state's problems, societal happenings, political changes, and the challenges faced by the states and society in Africa); Thomas M. Callaghy, *The State as Lame Leviathan: The Patrimonial Administrative State in Africa*, in *THE AFRICAN STATE IN TRANSITION* 87 (Zaki Ergas ed., 1987).

adherence to their recommendations is the most important ingredient for success. Painfully, Africa's increasing embrace of neoliberalism—the notion that market forces, not governments, should regulate the global economy—does not indicate that the continent has an exit strategy. Africa must create its own development agenda, “based on the vision of what development should be and what it takes to bring it about—courage, diligence and confidence.”⁴²⁰ A dogmatic adherence to the Bretton Woods' traditional but questionable prescriptions—devaluation, reduction of the public sector, and removal of price controls—will only accelerate the slide to ruin. They have proved in the past to be nothing but bumpy rides to anomie, partly because of the weak political and economic infrastructures and superstructures of many African states. The Western notion of development, as Claude Ake astutely observed,

does not encourage attention to the revolutionising of existing social relations of production as a likely or even possible stimulant of development. It does not encourage the disengagement of African economies from the exploitative structural links with Western capitalist economies. It encourages the perception of the process of development as the gradual solution of limited and technical problems within the context of the existing order. That is the sense in which the notion of development . . . limits the scale of change of African economies.⁴²¹

Even the IMF now acknowledges that there are social dimensions of the economic reform process that have to be addressed and that “[m]itigating the adverse effects of reform programs on poor groups should be an important aspect of the IMF's policy advice and program design.”⁴²² The basic policies that promote economic growth and reduce poverty include the absence of high inflation, functioning foreign exchange and financial markets, openness to foreign trade, effective rule of law, and delivery of key services such as education and health care.⁴²³ What Africa needs to put in place these policies are genuine statesmanship and political will, ingredients that have hitherto been in short supply in the continent.⁴²⁴

Africa's governments should do more to honor their obligations in relation to social rights guaranteed in the relevant instruments considered in this article. Contemporary international law sees sovereignty as a normative concept of responsibility, requiring “a system of governance that is based on democratic and popular citizen participation, constructive man-

420. Adebayo Adedeji, *Africa's Strategic Outlook*, in *AFRICA WITHIN THE WORLD*, *supra* note 335, 207, 207.

421. CLAUDE AKE, *A POLITICAL ECONOMY OF AFRICA* 143 (1981).

422. FOREIGN AFFAIRS & POLICY DEV. & REVIEW DEPTS., IMF, *REVIEW OF SOCIAL ISSUES AND POLICIES IN IMF-SUPPORTED PROGRAMS* 8-9 (1999).

423. For an overview, see AID AND REFORM IN AFRICA: LESSONS FROM TEN CASE STUDIES 1-7 (Shantayanan Devarajan et al. eds., 2001).

424. Cf. Nsongurua J. Udombana, *The Summer Has Ended and We Are Not Saved! Towards a Transformative Agenda for Africa's Development*, 7 *SAN DIEGO INT'L L.J.* 5, 60 (2005) [hereinafter Udombana, *The Summer Has Ended*] (“It is the lack of visionary leadership or the pursuit of an alien vision that accounts for Africa's inability to harness its abundant human and material resources to lift its citizens out of economic scarcity.”).

agement of social diversities, respect for fundamental human rights, an equitable distribution of national wealth, and opportunities for development."⁴²⁵ Employment generation is "a major route out of poverty [and it] should be placed at the heart of the poverty battle in Africa."⁴²⁶ No state can sustain growing unemployment rates for long, because diminishing demand will, at some point, limit economic growth. On the other hand, the creation of decent work implies decreased poverty and provides the essential precondition for future economic growth. Reducing youth unemployment and utilizing their high potential avoids what the ILO calls "the creation of a huge cadre of frustrated, uneducated or unemployable young people, which could have a devastating impact on long-term development prospects."⁴²⁷

C. Options for the African Commission

The African Commission has come a long way since its inauguration in 1987. In its early years, the Commission was more careful than courageous and appeared to have been overwhelmed by the sheer width and breadth of its mandate.⁴²⁸ Its decisions were crude and queer, much like the early drawings of children. From these faltering steps, however, the Commission has walked and worked to firmly establish itself as a respectable human rights institution. It now interprets its mandate boldly and creatively. It has created a fairly accessible procedure for consideration of individual communications and has solved many of the initial procedural issues sensibly, such as those relating to admissibility.⁴²⁹ Its jurisprudence on local remedies is comparable to those developed by international tribunals elsewhere.⁴³⁰ Its framework for states reports on social rights appears generally comprehensive, though it could be improved upon to take account of changing needs.

425. JAKKIE CILLIERS, *HUMAN SECURITY IN AFRICA: A CONCEPTUAL FRAMEWORK FOR REVIEW* 39 (2004). Cf. Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209, 1212 (2003) ("International law is no longer the power base of a tyrant who rules directly by naked power or through the apparatus of a totalitarian political order. Its object of protection, in modern times, is the continuing capacity of a population to express and affect choices freely about the identities and policies of its governors."). See generally WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

426. ERA 2005, *supra* note 287, at 92.

427. ILO, *Global Employment Trends 2004: Record Joblessness, But Relief May Be on the Way*, WORLD OF WORK MAGAZINE, Apr. 27, 2004, available at <http://www.ilo.org/public/english/bureau/inf/magazine/50/get2003.htm>.

428. See, e.g., J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 912 (2003) (noting that the Commission initially lacked the "creative intellectual flair that is always essential to turn the black letter of the law into an effective instrument to address the lived reality of the dispossessed").

429. OSTERDAHL, *supra* note 16, at 189.

430. For an analysis of the local remedies rule under the African Charter, see Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1 (2003).

The problem that remains is the old one: states' unwillingness to take seriously a Commission they voluntarily created. African states' record in implementing decisions of the Commission is abysmal, except for very limited exceptions. At each yearly summit of the OAU/AU Assembly, African leaders adopt the "Annual Activity Report" of the Commission, "commend[] it for the excellent work accomplished during the past year," and authorize its publication;⁴³¹ in short, they do everything to flatter the Commission except to respect its recommendations. States' reporting obligations are anything but satisfactory;⁴³² no state has been regular in submitting periodic reports. Most states have several overdue reports, in spite of the Commission's concession allowing states to submit combined reports. Some states forward their reports but fail to show up for presentations.⁴³³ Sadly, the Commission is normatively deficient in sanctioning recalcitrant states.⁴³⁴

Everyone hopes that the African Human Rights Court, established to "complement the protective mandate of the African Commission,"⁴³⁵ will make a positive contribution to the present unsatisfactory state of affairs. This optimism rests on the enhanced normative and structural framework of the Court, which, in principle, is not handicapped with the same deficiencies and weaknesses that beset the Commission. The Court is empowered to offer remedies to victims of human rights violations. Its protocol provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."⁴³⁶ States Parties to the Court's protocol have also undertaken "to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."⁴³⁷ The AU Executive Council, which replaces the OAU Council of Ministers, will monitor execution of the Court's judgment on behalf of the AU Assembly.⁴³⁸ The protocol enjoins the Court, in its annual report to the Assembly, to "specify, in particular, the cases in which a State has not complied with the Court's judgment,"⁴³⁹ presumably to enable the Assembly to apply political and economic pressure on the recalcitrant state. These and similar provisions are intended to brighten the human rights landscape in Africa, though the effectiveness of the Court will equally depend on states' attitudes toward it.

Pending the establishment of the Human Rights Court,⁴⁴⁰ or in spite

431. See, e.g., AU, Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, ¶ 1, AU Doc. Assembly/AU/7 (II) (July 2003).

432. For status of current reports, see African Commission website, *supra* note 87.

433. See Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L L. REV. 1177, 1240-41 (2002).

434. See ANKUMAH, *supra* note 16, at 108-09.

435. African Court Protocol, *supra* note 14, art. 2.

436. *Id.* art. 27(1).

437. *Id.* art. 30.

438. *Id.* art. 29(2).

439. *Id.* art. 31.

440. The AU took a giant step towards making the human rights court a reality when its Assembly, at its Sixth Ordinary Session in Khartoum, Sudan, in January 2006,

of it, the African Commission should continue to develop human rights jurisprudence in Africa through communications lodged before it. Some commentators believe that advancing human rights jurisprudence in Africa will remain the greatest challenge facing the Commission in the years to come.⁴⁴¹ Given the minimal number of communications on socioeconomic rights, compared to their civil and political counterparts, the Commission should additionally develop general comments on socioeconomic rights; but such comments should not duplicate those of the existing U.N. human rights treaty bodies. The Commission itself accurately noted that the “uniqueness of the African situation and special qualities of the African Charter” impose important tasks on judicial institutions, one of which is to interpret the Charter in a manner that is responsive to African circumstances.⁴⁴² General comments are not hard laws and so are not imperative or obligatory, but they could provide materials for human rights advocacy and mobilization.

The essential first step towards promoting the realization of social rights is diagnosis and knowledge of the existing situation. The Commission should intensify its monitoring of the actual situation with respect to each of the social rights on a regular basis in order to discover the extent to which the various rights are, or are not, being enjoyed by the intended beneficiaries. Such direct evidence will help the Commission to scrutinize government policies with respect to social rights. The Commission should appoint a special rapporteur on socioeconomic rights in Africa without further delay, in order to coordinate activities on socioeconomic rights and liaise with States Parties and other stakeholders on the Commission’s behalf. This is particularly necessary because the Commission does not meet regularly.

The Commission should also work closely with National Human Rights Institutions (NHRIs) to monitor states’ compliance with the Charter’s obligations. The Commission itself acknowledges that—

the mission aimed at promoting human and peoples’ rights . . . would be carried out through the assistance and support of national or regional committees established for that purpose, and composed of eminent personalities, which should also help governments solve their national or local problems relevant to human rights, thus promoting a better awareness of issues related to human rights.⁴⁴³

elected the judges of the Court. The list of the elected judges and their tenure are: Sophia A.B. Akuffo (2-year term); G.W. Kanyiehamba (2-year term); Bernard Makgabo Ngoeppe (2-year term); Jean Emile Somda (2-year term); Hamdi Faraj Fanoush (4-year term); Kelello Justina Mafoso-guni (4-year term); Jean Mutsinzi (6-year term); Fatsah Ougurgouz (4-year term); Modibo Tountry Guindo (6-year term); El Hadji Guisse (4-year term); and Gérard Niyungeko (6-year term). See Decision on the Election of Judges of the African Court on Human and Peoples’ Rights, ¶ 2, AU Doc. Assembly/AU/Dec.100 (VI) (Jan. 2006).

441. See Pityana, *Preface to MURRAY*, *supra* note 16, at vi.

442. See *SERAC case*, *supra* note 26, ¶ 68.

443. ACHPR, Resolution on the Establishment of Committees on Human Rights or Other Similar Organs at National, Regional or Sub-Regional Level, pmbl., ACHPR Doc.

The Commission should work with states that have not yet established NHRIs and encourage them to do so and to fund these institutions in order to fulfil their mandates. NHRIs must be quarantined from executive and legislative controls, a problem that confronts most public, including judicial, institutions in Africa. NHRIs have potentially crucial roles to play in promoting and ensuring the promotion and protection of all human rights in Africa. Unlike the African Commission, NHRIs are grassroots organizations; they are closer to national governments and are best suited, at least in principle, to monitor states' implementation of social rights. NHRIs can take full account of international human rights standards applicable to the country concerned only if they enjoy an important degree of autonomy.

The Committee on Economic, Social and Cultural Rights (CESCR) has indicated the types of activities that can be, and in some instances already have been, undertaken by NHRIs in relation to egalitarian or socioeconomic rights. They include:

[t]he promotion of educational and information programmes designed to enhance awareness and understanding of [egalitarian] rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement; [] [t]he scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the [ICESCR]; [and] [] [p]roviding technical advice, or undertaking surveys in relation to [egalitarian] rights.⁴⁴⁴

Others are

[t]he identification of national-level benchmarks against which the realization of Covenant obligations can be measured; [] [c]onducting research and inquiries designed to ascertain the extent . . . [of] realiz[ation] of particular egalitarian rights], either within the State as a whole or in areas or in relation to communities of particular vulnerability; [] [m]onitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and [] [e]xamining complaints alleging infringements of applicable [egalitarian] rights standards within the State.⁴⁴⁵

Each of these targets is relevant, *mutatis mutandis*, to the African human rights system.

The African Commission should, subject to availability of resources, create opportunities for periodic interactions with national courts. Such interactions will update national judicial officers on the Commission's emerging human rights jurisprudence and those of similar institutions; it will also give these officers the opportunity to compare notes on best practices in the interpretation and application of social rights. Finally, the

ACHPR/Res.2(V)89 (1989), reprinted in SECOND ANN. ACTIVITY REP. OF THE AFR. COMM'N ON HUM. AND PEOPLES' RTS., 1988-1989, Annex VIII.

444. See ECOSOC, Comm. on Econ., Soc. & Cultural Rts, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 3, U.N. Doc. E/C.12/1998/25 (Dec. 10, 1998).

445. *Id.*

Commission should collaborate with relevant civil society organizations to publish and disseminate its decisions in the form of law reports. Agreed, some of the Commission's decisions have been posted on its web site—several others are yet to be posted—but majority of Africans are unable to access these decisions largely because the Internet is still a luxury good in most of Africa, even in urban areas. The Commission must find a more efficient way of circulating its decisions to a larger audience in Africa, including those in the rural areas. Information and documents relating to human rights are too crucial to be accessible only by “experts.” The Commission's decisions on social rights could serve the purpose of domestic litigation as well as providing tools for political mobilization and campaigns. If effectively disseminated, such decisions could revolutionize struggles for a better life in Africa.⁴⁴⁶

D. Options for the Civil Society

The rise in the number of Civil Society Organizations (CSOs) in the last few decades may be “comparable in importance with the rise of the nation state in the nineteenth century.”⁴⁴⁷ Although CSOs could be multifaceted in their many guises,⁴⁴⁸ they are the main analytical paradigms in African politics. CSOs are the forces for societal resistance to state excesses and are organizationally, materially, and ideologically centerpieces of the civil movements and protests for reform and change.⁴⁴⁹ NGOs, in particular, have made tremendous contributions to the development of human rights in Africa, often at huge human and material costs. It is in recognition of the important role of CSOs that the AU has, as one of its visions, building “a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among [African] peoples.”⁴⁵⁰ A reinvigorated civil society certainly holds the key to social transformation in Africa.

In the past, human rights NGOs, as part of CSOs, were preoccupied with libertarian rights, with little attention paid to egalitarian rights. The

446. Cf. R. Kunnemann, *A Coherent Approach to Human Rights*, 17 HUM. RTS. Q. 323, 332 (1995) (arguing that socio-economic rights provide “the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world”).

447. Maurizio Carbone, *The Role of Non-State Actors in Development Policy: Perceptions and Changing Practices*, COURIER ACP-EU, July-Aug. 2003, at 14.

448. See Paul Gifford, 30 J. RELIGION AFR. 494, 495 (2000) (reviewing CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES (Nelson Kasfir ed., 1998)).

449. See Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, 41 WORLD POL. 407, 411-12 (1989). See generally CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA: CRITICAL PERSPECTIVES (John L. Comaroff & Jean Comaroff eds., 1999) (presenting various scholars views on the implications of the civil society movement in Africa); Jean-François Bayart, *Civil Society in Africa*, in POLITICAL DOMINATION IN AFRICA: REFLECTIONS ON THE LIMITS OF POWER 109 (Patrick Chabal ed., 1986) (discussing notions of the state and civil society as they relate to political development in Africa).

450. AU Act, *supra* note 11, pmb1.

neglect of egalitarian rights was both wilful and inadvertent. It was wilful because the leading NGOs at the time were openly hostile to the idea of recognizing egalitarian concerns as legal entitlements.⁴⁵¹ For a long time, Human Rights Watch considered such concerns as “equities;” it advanced what Makau Mutua calls “its own nebulous interpretation of ‘indivisible human rights’ which related civil and political rights to survival, subsistence, and poverty, ‘assertions’ of good that it did not explicitly call rights.”⁴⁵² Other NGOs focused on libertarian rights not by deliberate choice but because of the avalanche of totalitarian and authoritarian regimes that reigned in most third world countries in the 1970s and 1980s.⁴⁵³ These authoritarian regimes created their own antithesis in the form of NGOs; the struggle produced a synthesis of democratization that now sweeps across many third world countries.

Given the dying dynasty of dictators in Africa, NGOs should refocus their advocacy and play a positive role in advancing social rights. Their demonstrated reluctance to focus on these rights in the past has contributed to the under-developed state of these rights. Thankfully, the trend is gradually changing, with many NGOs beginning to pay closer attention to egalitarian rights. For example, the Access to Justice Program is an ongoing initiative of the International Commission of Jurists (ICJ)⁴⁵⁴ that offers financial assistance, skilled legal advice, and information and network support to local organizations and interested groups in order to help individuals and communities in Africa gain access to tribunals and redress social and other egalitarian rights.⁴⁵⁵ These and similar initiatives must both be acknowledged and commended; they inspire hope that NGOs in general, and particularly those in Africa, will emulate these examples.

CSOs should both publicize the economic plights of citizens and positively engage African states towards the implementation of social rights. They should share information and opinions with the various organs of governments and offer advice to legislative committees on issues affecting the welfare of citizens. They should not just think global and act local; they should, in Odinkalu’s apt words, “think economic and act political [and] must be prepared to contemporaneously think global, think regional, think

451. For a critique of NGOs and their restrictive mandates, see James Gathii & Celestine Nyamu, Note, *Reflections on United States-Based Human Rights NGOs’ Work on Africa*, 9 HARV. HUM. RTS. J. 285, 291 (1996).

452. Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 618 (1996).

453. See Udombana, *Articulating the Right to Democratic Governance in Africa*, *supra* note 425, at 1216 (“[B]etween the Egyptian revolution in 1952 until 1998, Africa witnessed eighty-five coups or unconstitutional changes in government, seventy-eight of which took place between 1961 and 1997.”). See also Mornee van der Linde, *Emerging Electoral Trends in the Light of Recent African Elections*, 1 AFR. HUM. RTS. L.J. 127, 128 (2001).

454. The main ICJ website is available at <http://www.icj.org> (last visited Dec. 5, 2005).

455. See, e.g., Kenyan Section of the International Commission of Jurists, <http://www.icj-kenya.org/ahraj.asp> (last visited Dec. 5, 2005).

local and think the people.”⁴⁵⁶ The pace and process of political democratization in Africa have opened up space for labor movements to influence policy-making for the benefit of workers; and they must not allow the opportunity to slip by. They should be resistant and should not passively accept governments’ macroeconomic policies and strategies. They should be prepared to mobilize workers against policies that perpetuate poverty, as is often the case in Africa. They should fight against casualization of work by multinationals, which is increasingly being adopted as a neocolonialist strategy to exploit Africans and perpetuate inequalities. They should also resist the growing privatization and outsourcing of public service works, since the prospects of those retrenched finding alternative jobs are slim in an era of high unemployment.

Labor movements, as stakeholders in Africa’s economy, should also be cooperative in order to improve service deliveries by Africa’s public servants. The patrimonial civil service is defined by absence of professionalism and by apathy, leading to many unauthorized absenteeism, lateness, idleness, and poor output. The mindset of an average civil servant in Africa tends to be: “It is not my father’s work. Work or no work, I must collect my salary.”⁴⁵⁷ Such a hedonistic mindset has significantly contributed to Africa’s development crisis. Africa’s workforce must play an instrumental role in economic growth otherwise it becomes a mere mercenary force.⁴⁵⁸ An ineffectual civil service is self-destructive; it is incapable of supporting economic growth and enhancing higher standards of living; and it is incapable of supporting those institutions that make the effective realization of social rights possible. Labor movements should collaborate with their governments towards improving work ethics in the public service in order to increase productivity, raise private incomes, and enable the state to finance social insurance schemes. Freedom is not merely an individuals’ autonomy, independence, or self-government but includes efforts to realize an individual’s potentials, which sometimes require help from others.⁴⁵⁹

Africa’s labor movements should also join their governments in the continuing campaigns for more debt cancellation by Western countries and their Clubs,⁴⁶⁰ since these unsustainable debts have deleterious effects

456. Chidi Anselm Odinkalu, *Human Rights and Democracy in Africa*, INTERNATIONAL POLICIES, AFRICAN REALITIES: AN ELECTRONIC ROUNDTABLE, Feb. 15, 2000, <http://www.africaaction.org/rttable/chi0002.htm>.

457. Sefiya T. Ajayi, a former Nigerian Civil Service Commissioner, quoted in Mohammed Salisu, *Incentive Structure, Civil Service Efficiency and the Hidden Economy in Nigeria*, in REFORMING AFRICA’S INSTITUTIONS: OWNERSHIP, INCENTIVES, AND CAPABILITIES 170, 170 (Steve Kayizzi-Mugerwa ed., 2003).

458. Cf. FILIP SPAGNOLI, HOMO DEMOCRATICUS: ON THE UNIVERSAL DESIRABILITY AND THE NOT SO UNIVERSAL POSSIBILITY OF DEMOCRACY AND HUMAN RIGHTS 417 (2003) (arguing, “you cannot make the best of your life and you cannot develop your possibilities when you focus on pleasure and desire and when you dislike the efforts necessary to develop.”).

459. See *id.*

460. In July 2005, the Group of Eight (G8) Industrial Countries, meeting in Gleneagles, United Kingdom, agreed to cancel the debt of the eighteen poorest nations,

on prospects for long-term economic growth. The debt overhang is a human rights burden and it is the greatest threat to development and the realization of social rights in Africa. It undermines any marginal gains that aid may have brought to Africa, as the continent's foreign debts are serviced with foreign aid.⁴⁶¹ Increasingly, development funds are being diverted into loan repayments and, of course, to graft; and so long as Africa is laden with the heavy yoke of debt, the enterprise of reducing and eradicating poverty in the continent will remain a mirage.⁴⁶² The struggle for debt cancellation in Africa must be waged from all fronts, and labor movements have a crucial role to play in mobilizing public opinion for this noble cause.

CSOs, in general, should check future reckless lending, borrowing, and spending in Africa and should monitor conditions, policies, and outcomes in both lending and borrowing countries. Eternal vigilance must remain the price of liberty because the hunger for abuse of power is never satisfied.

In the End

This article maintains that the African Charter is a unique instrument for many reasons, not the least of which is its integration of all human rights and making them justiciable. These rights require positive and negative obligations on the part of states, and, no matter how they are phrased, states have obligations to respect, protect, promote, and fulfill social rights. Africa has made commendable progress in ratifying or acceding to regional and international human rights instruments, in constitutionalizing social rights, and in initiating poverty reduction policies and programs. The rapid efforts at integrating human rights into the political and economic policies and discourses of African states, at least *de jure*, is commendable, given their initial reluctance to embrace the culture of respect for human rights. Much, however, remains towards turning these positive statements of hopes into certainties.

The central thesis of this article has been that the deprivations of elementary capabilities that many Africans experience call for public action to

fifteen of which are in Africa. Under the deal brokered by British Prime Minister, Tony Blair, the G8 will fund debts to the World Bank and the ADB, while "existing IMF resources" will cater for debts owed to the IMF. The G8 also promised to boost aid for developing countries by \$50 billion (£28.8 billion), to provide rapid and flexible multilateral and bilateral debt relief for post-conflict countries and to allocate grant financing for reconstruction needs. See G8 Gleneagles 2005 Summit, July 6-8, 2005, *The Gleneagles Communiqué*, available at, http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_Communique,0.pdf [hereinafter *Gleneagles Communiqué*]; G8 Leaders Agree \$50bn Aid Boost, BBC News, July 8, 2005, <http://news.bbc.co.uk/1/hi/business/4662297.stm>. See generally Udombana, *The Summer Has Ended*, *supra* note 424, at 5 *et seq.* (analyzing the debt cancellation in the context of international development law).

461. See Thompson Ayodele et al., *African Perspectives on Aid: Foreign Assistance Will Not Pull Africa Out of Poverty*, CATO INSTITUTE ECONOMIC DEVELOPMENT BULLETIN, Sept. 14, 2005, at 1, available at <http://www.cato.org/pubs/edb/edb2.pdf>.

462. See Udombana, *The Summer Has Ended*, *supra* note 424, at 33-34.

assist the deprived and that social rights are not merely inherent but also instrumental goods. As the African Charter remarks, “the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.”⁴⁶³ The standard of living of a country has a strong positive influence on that country’s propensity to experience and sustain democracy. In Africa, there is no *standard* to measure living, as the continent is still defined by absolute poverty. Poverty is an evil; it “is many things, all of them bad. It is material deprivation and desperation. It is lack of security and dignity. It is exposure to risk and high costs for thin comforts. It is inequality materialized. It diminishes its victims.”⁴⁶⁴ Since poverty is defined largely by official measures, it is also official measures that will redefine it. The problem is that a majority of Africa’s governments have not yet accepted their pivotal role in promoting economic and social conditions needed to reduce, if not eradicate, poverty; if and when they do, they will cease from propaganda and commence the real war against destitution and want. Mere indignation at poverty, though a generous passion, is not enough; poverty must be better managed “lest it steal[s] away patience and humility from those who suffer and plant[s] anger and cynicism in their stead.”⁴⁶⁵

Hunger is the greatest threat to peace, sustainable development, and democracy in Africa. There can be no lasting peace and democracy in a state of permanent hunger, where governments deliberately fail to secure the basic needs of their citizens, whether male or female, children or adults. Security guarantees freedom and freedom generates security. “It is only through a process of empowerment [of the people],” says Julius Ihonvbere, “that the future of a democratic Africa lies.”⁴⁶⁶ Put differently, democracy must aim at human security—“the security of the individual in terms of satisfaction of his/her basic needs.”⁴⁶⁷ The creation of jobs, the development of labor relations, and the securing of social security are essential preconditions for achieving social peace and establishing social democracy, which is an extension of political democracy.

463. African Charter, *supra* note 2, pmb. Cf. ICESCR, *supra* note 59, pmb. (“[T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”).

464. Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in *CULTURE AND PUBLIC ACTION* 59, 64 (Vijayendra Rao & Michael Walton eds., 2004). Cf. C. S. LEWIS, *THE PROBLEM OF PAIN* 96 (1940) (describing poverty as “the affliction which actually or potentially includes all other afflictions”).

465. LEWIS, *supra* note 464, at 96.

466. JULIUS IHONVBERE, *ECONOMIC CRISIS, CIVIL SOCIETY, AND DEMOCRATIZATION: THE CASE OF ZAMBIA* 284-85 (1996).

467. AU Non-Aggression and Common Defence Pact art. 1(k), Jan. 31, 2005, available at AU website, *supra* note 2 (stressing that human security includes “the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development”). See generally CAROLINE THOMAS & PETER WILKIN, *GLOBALIZATION, HUMAN SECURITY AND THE AFRICAN EXPERIENCE* (1999) (generating an alternative debate on understanding security in a global economy).

Social rights, like egalitarian rights generally, cannot be effectuated unless the human rights community takes the indivisible human rights seriously. Judicial and quasi-judicial institutions have parallel obligations with states to advance *all* human rights through integrative and creative interpretations of relevant instruments. The African Commission has lit a candle of integrative and purposive interpretation in some of the recent communications brought before it, including, notably, the *SERAC* case. National judicial institutions should put that candle on a candlestick, and not hide it under a bushel, so that it can give light to all who are in the house.