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Articulating the Right to Democratic Governance in Africa

Nsongurua J. Udombana
University of Lagos, Nigeria

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ARTICULATING THE RIGHT TO DEMOCRATIC GOVERNANCE IN AFRICA

*Nsongurua J. Udombana**

“[G]overnments violate international norms where they do not predicate their rule on popular will”¹

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* Senior Lecturer & Acting Head, Department of Jurisprudence and International Law, University of Lagos, Nigeria; former visiting Research Fellow, The Danish Institute for Human Rights, Copenhagen, Denmark; LL.M., LL.B., University of Lagos, Nigeria; Member of the Nigerian Bar. The author divides his interest and time between international law, human rights, and the judicial process and has published in such journals as the *American Journal of International Law*, *Yale Human Rights and Development Law Journal*, *Human Rights Quarterly*, and *Boston University International Law Journal*. He is also the author of *AFRICAN REGIONAL HUMAN RIGHTS COURT: MODELING ITS RULES OF PROCEDURE* (2002). The author wishes to thank the editors of the *Michigan Journal of International Law* for their meticulous editing, though this does not imply any responsibility on their part for the shortcomings of this Article.

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I. INTRODUCTION

All over the world, the spirit of human rights is moving—as the waters cover the sea. Human rights language has become universal, spoken both by political leaders and ordinary citizens, even if the former sometimes use such language merely to cloak atrocious activities. Thus, it may boldly—and truthfully—be claimed that this is the age of rights,² as human rights have grown historically, geographically, and culturally within the last few decades. Rights now matter to everyone because they are universal, indivisible, and interdependent. Rights are accorded to individuals and groups in order to enable them to realize their self-worth and dignity, and to organize society in such a way that these goals are effectuated and respected. Besides, international law strongly supports

2. See generally LOUIS HENKIN, *THE AGE OF RIGHTS* 13–14 (1990) (explaining that governments only began looking at how other nations treat their people when the rights of their own citizens were violated while abroad).

“the imperative to understand and accept that human rights matter for everyone.”³

Partly, but largely, because of human rights, citizens of nation-states are increasingly becoming aware of the roles they should play in nation building and of the structures they should give to their societies. Citizen silence in matters of governance is no longer golden. In Africa, as indeed elsewhere, individuals and movements are increasingly challenging authoritarian regimes, forcing them to pander to popular demands for political pluralism. All this was not so in the classical, post-Peace of Westphalia international law era, the era of positivism when the sovereign will of a State was the be all and end all. Under classical international law, “[w]hat states actually do was the key, not what states ought to do given basic rules of the law of nature.”⁴

Things are different now, particularly in this age of globalization—“a new context for and a new connectivity among economic actors and activities throughout the world.”⁵ In this brave new world, the character of State sovereignty has been significantly altered.⁶ The international community has jettisoned—or is prepared to jettison—outworn and outmoded doctrines, such as the domain reserve of States. Human rights are no longer solely a matter of domestic concern.⁷

3. See Ronald Wilson, *Why Human Rights Matter for Everyone*, 3 E LAW—MURDOCH U. ELECTRONIC J.L. 3 (1996), available at <http://www.murdoch.edu.au/elaw/issues/v3n3/wilson.html>.

4. MALCOLM SHAW, *INTERNATIONAL LAW* 22 (4th ed. 1997).

5. KOFI ANNAN, ‘WE THE PEOPLES’: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 9 (2000) (“The benefits of globalization are plain to see: faster economic growth, higher living standards, accelerated innovation and diffusion of technology and management skills, new economic opportunities for individuals and countries.”). See generally Nsongurua Udombana, *How Should We Then Live? Globalization and the New Partnership for Africa’s Development*, 20 BOSTON UNIV. INT’L L.J. 293 (2002) (examining the impact of globalization on Africa and arguing for normative and institutional reforms, both at the international and national levels, in order for the goals of the New Partnership for Africa’s Development to succeed); Tony Evans & Jan Hancock, *Doing Something Without Doing Anything: International Human Rights Law and the Challenge of Globalisation*, 2 INT’L J. HUM. RTS., Autumn 1998, at 1. Contra Leo Panitch, *Rethinking the Role of the State*, in *GLOBALIZATION: CRITICAL REFLECTIONS* 83, 85 (James H. Mittelman ed., 1996) (arguing that rather than the central actors in global politics, States are “the authors of a regime that defines and guarantees, through international treaties with constitutional effect, the global and domestic rights of capital.”).

6. See L. ALI KHAN, *THE EXTINCTION OF NATION-STATES: A WORLD WITHOUT BORDERS* (1996) (discussing the demise of the nation-state as the prime organizational unit of society and as the central subject of international law).

7. See, e.g., *Annan Backs Individuals Over State*, BBC NEWS (Dec. 10, 2001), at <http://news.bbc.co.uk/2/hi/world/europe/1701605.stm> (declaring “the sovereignty of states must no longer be used as a shield for gross violations of human rights” and trumpeting the need to concentrate on individual rights); cf. *Report of the Secretary-General on the Work of the Organization: An Agenda for Peace*, U.N. SCOR, 47th Sess., ¶ 17, U.N. Doc. S/24111

Of course, international law is still concerned with the protection of sovereignty. It has to be, for, as Wolfgang Friedmann observed many years ago, “states are the repositories of legitimated authority over peoples and territories. It is only in terms of state powers, prerogatives, jurisdictional limits and law-making capabilities that territorial limits and jurisdiction, responsibility for official actions, and a host of other questions of co-existence between nations can be determined.”⁸

While Friedmann’s observation is still poignantly true today, it could be said, with equal force, that “the realities of international relations are not reducible to a simple formula and the picture is somewhat complex.”⁹ In any case, the object of international law’s protection is now different. 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.

The one fundamental fact that has emerged is the significance of the individual before the international community. This has led States to become their brothers’ keepers, inquiring, for example, into how each is treating its citizens. Therefore, while the powers of national governments are still growing in some respects, their capacity to exercise authority has been considerably reduced in others.

This Article articulates the right to democratic governance in Africa, arguing that democratic entitlement ought to acquire, if indeed it already has not acquired, a degree of legitimacy in the continent. If democratic governance is a fundamental human right, which this Article asserts it is, it follows that any African State that denies its citizens the right to any of the elements of democratic entitlement—such as free and open elections—is violating a fundamental right, which should attract responsibility. The Article begins with an examination of the patrimonial State structure in Africa and its negative impact on governance. It is a chronicle of wasted years. It goes on to discuss the unsettled question of democratic entitlement in modern international law but asserts the existence of such a right. It examines the normative framework of democratic governance in Africa, including United Nations-inspired human rights instruments to which African States are parties. How far have the African intergovernmental organizations, in particular the African Union (AU) (formerly the

(1992) (Boutros Boutros Ghali) (stating that “the time of absolute and exclusive sovereignty . . . has passed”).

8. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 213 (1964).

9. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58 (5th ed. 1998).

Organization of African Unity (OAU))¹⁰ encouraged transitions to democracy? This Article answers this question by examining the various regional instruments and action plans relating to democratic governance in Africa. It also considers the superstructures that the AU should erect on the infrastructures of democratic governance in order to create beautiful democratic edifices in Africa, capable of shielding Africans from the monstrosities and buffooneries of power.

II. STATE STRUCTURE AND GOVERNANCE IN AFRICA

This Part looks at the patrimonial States in Africa and how these have affected the development or lack of development of democratic and other human rights norms in the continent. It, however, offers hope that there is a silver lining in the present dark cloud of imperfect transition to democracy in Africa.

A. Neopatrimonial States

Postcolonial African States have strived to fashion themselves in the image of Western liberalism with little success. Too frequently, they have succumbed to authoritarian, usually military, rule.¹¹ The primary reason for this failure has been that the Western liberal conception of States and democracy does not fit in Africa. The term “Modern State” is usually used to illustrate Western political philosophy that conceives government as comprised of three independent organs—the legislature, the executive, and the judiciary—functioning within a territory that is unambiguously defined.¹² Similarly, the Western multiparty system presumes the existence of a Modern State, a fully functioning civil society, and a free press, with “organic” constitutions grounded on the soil and clearly defining the powers, rights, and responsibilities of all participants.

State creation in Africa differs markedly from this Western prototype. States did not evolve in Africa. Colonial masters imposed them on the population, creating the territories that became modern day Africa.

10. The African Union (AU) was inaugurated in Durban, South Africa on July 9, 2002 replacing the Organization of African Unity (OAU). See Constitutive Act of African Union, July 11, 2000, art. 33(1), 8 AFR. Y.B. INT'L L. 479, 494 (2000) [hereinafter AU Act].

11. See Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 575, 577 (2000) (arguing that “[t]he gyration from democracy to authoritarianism has left most African nations in deep turmoil as no African government has significantly advanced the welfare of its citizens”).

12. See Jackton Ojwang, *Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa*, in LEGAL PLURALISM: PROCEEDINGS OF THE CANBERRA LAW WORKSHOP VII 99 (Peter Sack & Elizabeth Minchin eds., 1986).

The boundaries of most African states do not coincide with the geographic divisions of ethnic groups.¹³ What are today called “Modern States” are nothing but “imagined communities,”¹⁴ where “the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”¹⁵

Colonialism did not endeavor to bring democracy to Africa. Colonialism, was “the cradle of contemporary forms of fragmentation in Africa,” though some have argued that the colonial state weaved these “forms of fragmentation from the material that the pre-existing, pre-colonial sets of identities and relationships” provided.¹⁶ A typical colonial state in Africa was a partisan leviathan,¹⁷ concentrating all the social goods in its hands and establishing a political and administrative structure that was “rooted in authoritarianism and ethnic divisions, widespread illiteracy, and extreme marginalization of African peoples.”¹⁸ It subverted hitherto traditional structures, institutions, and values, or made them subservient to the economic and political needs of the imperial powers.¹⁹ It introduced centrally directed but uneven development.²⁰

The coercive and exploitative character of colonial African states “effectively trumped [their] ability to secure genuine widespread allegiance among the majority African population.”²¹ Unfortunately, when direct colonialism ended, it did not address, let alone resolve, the allocation of power in a multicultural state, pieced together by former colonial rulers. The transition to independence offered African states a rare opportunity for radical restructuring along the democratic path. Unfortunately, the departing colonial overlords left the reins of power in the hands of tiny and educated, but highly egotistic, conceited, and self-

13. See ANTHONY D. SMITH, NATIONAL IDENTITY: ETHNONATIONALISM IN COMPARATIVE PERSPECTIVE 15 (Walker Connor ed., 1991).

14. BENEDICT ANDERSON, IMAGINED COMMUNITIES 16 (1992) (explaining that a nation is always “a deep horizontal comradeship,” notwithstanding the actual inequality and hierarchy that may prevail within it).

15. *Id.* at 6.

16. See OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA 98 (2000).

17. See Crawford Young, *Ethnicity and the Colonial and Post-Colonial State in Africa*, in ETHNIC GROUPS AND THE STATE 61 (P. Brass ed., 1985).

18. *Algiers Declaration*, OAU Assembly of Heads of State and Gov't, 35th Ord. Sess., Res. AHG/Dec.1(XXXV), OAU Doc. DOC/OS(XXVI)INF.17a (1999) [hereinafter *Algiers Declaration*].

19. *E.g., id.* (arguing that colonialism laid an economic infrastructure that was “geared exclusively to satisfying the needs of the colonial metropolis”).

20. See OKWUDIBA NNOLI, ETHNICITY AND DEVELOPMENT IN NIGERIA 20 (1995).

21. OKAFOR, *supra* note 16, at 99 (discussing the historical development of contemporary forms of socio-cultural fragmentation within African States).

seeking elite groups, who inherited the infrastructures that were designed for economic extraction with no tradition of accountability to the governed.²²

The failure to address the postcolonial power structure led to a reverse wave of democratization. Thus, soon after the “first liberation,”²³ Africans discovered that postcolonial states were mere extensions of the old system, with new methods of divide-and-rule. These states constituted realms of “free, arbitrary action and discretion of personally motivated favor and valuation.”²⁴ The inheritance elite controlled the bulk of the resources available in the polity, and distributed it in a manner that, like the colonial government, was anything but even.²⁵ Public officials in these neopatrimonial settings began to serve particular interests rather than the common good.²⁶

Furthermore, Africa’s elites did not have the capacity to maintain the functions associated with national sovereignty in their territories, such as the maintenance of the rule of law, regulation of borders, and provision of social services. These problems were compounded by the fact that these elites, having established and strengthened their desired political kingdoms, began to systematically taunt and look down upon the poor people they were supposed to govern.²⁷ Converts are sometimes more zealous than those brought up in the faith. As states became enemies of their citizens, harsh governments or primitive dictatorships became the norm in Africa, with one dismal tyranny giving way to a worse one.²⁸ Postcolonial African states have remained colonial in their adherence to generally anti-democratic and repressive measures and attitudes. Whether in Uganda, Nigeria, Zaire (now Democratic Republic of

22. Paul Clements, *Challenges for African States*, 36 J. ASIAN & AFR. STUD. 295, 297 (2001) (writing also that struggles for independence did not provide the African political elites with the training to manage economic development).

23. The so-called “first liberation” in Africa was the transition from colonial to independent rule that swept the continent between 1957 and 1964, except in the south.

24. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 979 (1978).

25. See Young, *supra* note 17, at 85.

26. See generally MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* (1997); THOMAS M. CALLAGHY, *THE STATE-SOCIETY STRUGGLE: ZAIRE IN COMPARATIVE PERSPECTIVE* (1984).

27. See CHINUA ACHEBE, *ANTHILLS OF THE SAVANNAH* 38 (1987) (describing the Kangan struggle for a successful form of postcolonial self-government through the experience of three friends who are intricately involved in the Kangan government). Achebe depicts the new native government adopting the imperialist rhetoric for oppression of the poor. *Id.*

28. See BASIL DAVIDSON, *THE BLACK MAN’S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 9 (1992) (presenting an informed and concerned reflection on Africa’s current deep disappointments with the nation-state, exploring, *inter alia*, the wasted years of colonialism).

Congo), Kenya, Liberia, Togo, Malawi, Guinea, Mauritania, Equatorial Guinea, Libya, Egypt, or Zimbabwe, the story has been that of a “decentralized despotism,” in which the subjects are trapped in a non-racial version of apartheid.²⁹ It was as if these rulers were all acting from the same script—a play in which a number of separate characters all turned out to be the same character.

Multiparty systems were consolidated into single-party systems, then into one-man systems and, sometimes, no system at all.³⁰ Although many African rulers justified one-party regimes on the need to maintain unity “in the face of ethnic, linguistic, and cultural differences,”³¹ the truth was that most of these leaders rejected opposition on other, mostly selfish, grounds. “In Malawi, for example, the idea of opposition was rejected on quasi-theological grounds: ‘[t]here is no opposition in Heaven. God Himself does not want opposition—that is why he chased Satan away. Why should Kamuzu (President Banda) have opposition?’”³²

Whatever was left of the balloon of democratic pretense in postcolonial Africa was deflated by military *coup d’etats*, which malignantly began in a few African countries in the early 1960s and, for several years thereafter, metastasized throughout the body of the continent. Indeed, between 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 1997.³³ The instability that these regimes brought on Africa and its peoples is still evident today. For example, military regimes weakened and, in some instances, destroyed institutions needed to build democratic structures, such as the judiciary. The military eroded the rule of law and independence of the judiciary through such mechanisms as ouster clauses in decrees.³⁴ Ouster clauses

29. See generally MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996).

30. See Nsongurua Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. UNIV. INT’L L. REV. 1177, 1218 (2002) [hereinafter *Can the Leopard Change Its Spots?*] (offering a pessimistic assessment of the AU Treaty’s prospect of bringing about a paradigm shift in the poor human rights practices of African States).

31. JOHN KPUNDEH, *DEMOCRATIZATION IN AFRICA: AFRICAN VOICES, AFRICAN VIEWS* 12 (1992). Other grounds used to justify one-party regimes included the alleged tradition of a single unchallenged chief and the idea that a democratic majority is expressed through a single party. See *id.*

32. KPUNDEH, *supra* note 31, at 12–13 (quoting Samuel Decalo, *The Process, Prospects and Constraints of Democratization in Africa*, 91 AFR. AFF. 7, 10 (1992)).

33. See Momee van der Linde, *Emerging Electoral Trends in the Light of Recent African Elections*, 1 AFR. HUM. RTS. L.J. 127, 128 (2001).

34. See generally B.O. NWABUEZE, *MILITARY RULE AND CONSTITUTIONALISM* 18 (1992) (discussing the impact of military rule on civil and political rights, such as the erosion

reflect a lack of confidence of the military in the justifiability of its actions. For example, in a petition of violation of human rights brought before the African Commission on Human and Peoples' Rights against the then military government of Nigeria,³⁵ the Nigerian government offered this stunning defense before the Commission: "[I]t is in the nature of military regimes to provide for ouster clauses," because without such clauses the volume of litigation would make it "too cumbersome for the government to do what it wants to do."³⁶

For many Africans, living under military regimes has been like living in the land of monsters; indeed, African governments have "a great deal in common with a group of gangsters,"³⁷ with minimal exceptions.³⁸ Regrettably, the erstwhile OAU existed in an ecstasy of indifference and, therefore, could not arrest these trends towards omnipotence. Like the biblical Pharisees—who loved sacrifices more than acts of mercy³⁹—the OAU guarded the noninterference principle of the OAU Charter⁴⁰ more than the protection of essential rights of the citizens that were repeatedly being assaulted and violated by its members. Until its dissolution in July

of the rule of law, violations of personal liberty, interference with private property, denial of the community's right to self-government, and restrictions on organized politics and other associational rights).

35. See Communications 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria* [hereinafter *Media Rights Agenda et al v. Nigeria*], in TWELFTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 1998–1999, A.U. Doc. AHG/215 (XXXV), Annex V, available at http://www.achpr.org/12th_Annual_Activity_Report_AHG.pdf (last visited Sept. 8, 2003) [hereinafter TWELFTH ANNUAL ACTIVITY REPORT].

36. *Id.* ¶ 78.

37. Andrew S. Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT'L L. REV. 389, 410 (1995) (quoting Francisco Weffort, *Why Democracy?*, in DEMOCRATIZING BRAZIL 327, 342 (Alfred Stepan ed., 1989)). Ogaga Ifowodo, a civil rights activist in Nigeria, has stated that "[g]overnments in most of Africa . . . are committees of unfeeling beasts who have no respect for the rule of law." N.J. Udombana, *The Rule of Law and the Rule of Man in a Military Dictatorship*, in CURRENT THEMES IN NIGERIAN LAW 73 (I.O. Agbede & E.O. Akanki eds., 1997) [hereinafter *The Rule of Law*] (examining the impact of military rule in Nigeria on the rule of law and human rights).

38. Such as the late Julius Nyerere of Tanzania, former President Kenneth Kaunda of Zambia, and, of course, Nelson Mandela of South Africa—leaders who are not known to have enriched themselves through political office.

39. See Matthew 9:10–13 (recording Jesus' encounter with the Pharisees who had accused the former of eating with publicans and sinners; to which Jesus replied that "[t]hose who are strong and well have no need of a physician, but those who are weak and sick . . . I desire mercy [that is, readiness to help those in trouble] and not sacrifice and sacrificial victims.") (emphasis added).

40. See CHARTER OF THE OAU, May 25, 1963, art. III(2), 479 U.N.T.S. 39, 74 [hereinafter OAU CHARTER] (stating the principles of the OAU to include respect for sovereignty and nonintervention in the internal affairs of Member States).

2002, the OAU was an organization where not rocking the boat seemed to have been genetically engineered into many of its members. The body somewhat validated Reinhold Niebuhr's assertion that groups tend to be more immoral than individuals.⁴¹

In addition to poor leadership, corruption, and bad governance that hampered the development of accountable and responsible governments in Africa, there were also the contractions and contradictions of the Cold War. The workings of the international system, especially the policies of the superpowers during the Cold War era, complicated the process of State making in Africa in two ways. Firstly, it encouraged totalitarian tyrannies of both right and left; and, secondly, it accentuated insecurities and instabilities in the continent. During the Cold War, the "warring" parties were busy exporting superpower rivalry to Africa in the form of interstate and intrastate proxy wars. They transferred weapons to governments and insurgents in fragile polities within volatile environments.⁴² The criteria for the recognition of governments took little account of whether regimes enjoyed a popular mandate. Corrupt and clientelist regimes, like Zaire's Mobutu Sese Seko or Kenya's Daniel Arap Moi, were often able to gain financial aid from major powers—notably the United States—anxious to retain their loyalties. It simply did not bother these "godfathers" that these leaders were suffering from Acute Integrity Deficiency Syndrome (AIDS).

B. A New But Hazy Dawn

The good news is that democracy is gradually supplanting outworn aristocratic and military regimes in Africa.⁴³ The "roaring tide of democracy has drowned the sound of the AK-47 which once announced the arrival of yet another military 'liberator.'"⁴⁴ Of course, regimes still totter and fall; but even there, the wind of change blows where it wishes. Africans can hear the sound of it, though they may not tell from where it

41. See REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* (1932) (arguing that the larger the group within which we operate, the less the power of sympathy, and thus the greater the distance between moral ideal and political reality). According to Niebuhr, international relations, involving interactions among the largest social group, stands at the pinnacle of immorality: "A perennial weakness of the moral life in individuals is simply raised to the *n*th degree in national life." *Id.* at 107.

42. See MOHAMMED AYOUB, *THE THIRD WORLD SECURITY PREDICAMENT: STATE MAKING, REGIONAL CONFLICT, AND THE INTERNATIONAL SYSTEM* 93–95 (1995).

43. See E. Gyimah-Boadi, *The Rebirth of African Liberalism*, *J. DEMOCRACY*, Apr. 1998, at 18.

44. Dominic M. Ayine, *Ballots as Bullets? Compliance with Rules and Norms Providing for the Right to Democratic Governance: An African Perspective*, 10 *AFR. J. INT'L & COMP. L.* 709, 709–10 (1998).

comes and where it goes. In many African countries, “the ballot is increasingly replacing the bullet as a means of attaining political power and maintaining legitimacy.”⁴⁵ This “second liberation” began with an historic multiparty election in Benin in 1991, in which the incumbent president was defeated. It was replicated in Malawi and Zambia the same year.⁴⁶ Since the early 1990s, more than forty of the fifty-four African countries have chosen the road to political pluralism, though, like the parable of the sower,⁴⁷ the fruits of most of these enterprises fell by the wayside and were devoured by the “birds” of *coups d’etat*.

By the end of 2000, only five African countries had failed to hold multiparty elections—Comoros, Congo-Kinshasa, Equatorial Guinea, Rwanda, and Somalia.⁴⁸ Kenya is the latest democratic bride. Its successful conduct of a (largely) free and fair election, on December 29, 2002, ushered Kenyans and, indeed, the entire Africa into a honeymoon. The retirement of Daniel Arap Moi (the self-proclaimed “Professor of Politics”) as President—pursuant to the Kenyan Constitution⁴⁹—paved way for a multiparty election. The election saw a transition of presidential power from the ruling to the opposition party headed by current President Mwai Kibaki.⁵⁰ Ghana had earlier conducted a successful and credible civilian-to-civilian transition in 2000. Meanwhile, Nigeria has an “examination” to take in 2003 and Africans are hoping that it will sail through, like Ghana and Kenya.

The root of this New World Order in Africa could be traced to the events of 1989–1991, including the break-up of the USSR, the fall of the Berlin Wall, and the Gulf War.⁵¹ Before the end of the Cold War, international lawyers rarely used the word “democracy;” and only a few international institutions supported democratic governance. The end of the Cold War, however, profoundly shook old assumptions, leading to international law’s newfound interest in fostering transitions to democracy and its emphasis on good governance. “As the influence and interest of the Soviet Union declined (and later collapsed with its

45. *Id.*

46. See Joel D. Barkan, *The Many Faces of Africa: Democracy Across a Varied Continent*, 25 HARV. INT’L REV. 72 (2002).

47. See *Matthew* 13:1–8.

48. See Barkan, *supra* note 46, at 72.

49. KENYA CONST. ch. II, pt. I, arts. 9(1)–(2) (providing that the term of office of the president shall be five years from the date he is sworn in, and that “no person shall be elected to hold office as President for more than two terms”).

50. See, e.g., Russell Smith, *Profile: Kenya’s New Leader*, BBC WORLD ONLINE, Dec. 29, 2002, at <http://news.bbc.co.uk/2/hi/africa/2612893.stm> (last visited Sept. 10, 2003).

51. Pat Lauderdale & Pietro Toggia, *An Indigenous View of the New World Order: Somalia and the Ostensible Rule of Law*, 34 J. ASIAN & AFR. STUD. 157, 158 (1999).

demise), Western states and the organizations they influenced gained considerably greater leverage over African governments, surpassing the general client-dependent relationship of the 1970s and 1980s.⁵² With the end of the Cold War, international attention changed from the debate on the New International Economic Order (NIEO)⁵³ to the virtues of democratic governance, the rule of law, and pluralism.⁵⁴

A new dawn has, thus, arisen in Africa,⁵⁵ though it is still hazy. While joyful progress has been made in parts of the continent, anxiety has exceeded happiness in others because many transitions to democratic polities have not been smooth. It appears, for example, that notwithstanding the introduction of multiparty rule, most sub-Saharan political systems are still characterized by old patrimonial tendencies, related to underlying political economies and cultures, which were hardly affected by the change in ideological tune. For reasons that are not altruistic, newly established democratic orders have devolved into pseudo-democracies. In other cases, superficial changes have been used as a cosmetic screen for the continuation of (often) brutal regimes.⁵⁶

These patrimonial tendencies have made it difficult to confidently assert that Africa has achieved true democracy that guarantees, even minimally, the rule of law and human rights.⁵⁷ Witness, for example, the following pessimistic assessment of the process of democratization in Africa:

Africa's third wave of democratization is now well into its second half-decade. However uneven its progress, democracy now sets the terms of political discourse in Africa; in this sense, the third wave has already proved more durable than the first two. Yet the euphoria that accompanied the arrival of the third wave in Africa has long since evaporated; even the most

52. KPUNDEH, *supra* note 31, at 31.

53. See, e.g., *Declaration on the Establishment of a New International Economic Order (NIEO)*, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Agenda Item 7, U.N. Doc. A/RES/3201 (1974). Three ingredients comprise the NIEO. First, the elimination of the economic dependence of developing countries on a developed country. Second, the promotion of accelerated development of the economies of the developing countries on the principle of self-reliance. Third, the introduction of appropriate institutional changes for the global management of world resources in the interest of mankind as a whole.

54. See Theo van Boven, *Human Rights and the Emerging Concept of Good Governance*, Paper Presented at the Conference on Good Governance for Africa: Whose Governance? (Nov. 23–24, 1995), available at <http://www.ecdpm.org/pubs/govbov.htm> (last visited Sept. 10, 2003).

55. See Mike Afrani, *A New Order Cometh*, *NEW AFR.*, Feb. 2001, at 16.

56. See, e.g., *DEMOCRATIZATION IN AFRICA* (Larry Diamond & Marc F. Plattner eds., 1999) (examining the state of progress of democracy in Africa at the end of the 1990s).

57. See *Can the Leopard Change Its Spots?*, *supra* note 30, at 1236.

optimistic advocates of democratization would join Larry Diamond in cautioning that democratization is “bound to be gradual, messy, fitful and slow, with many imperfections along the way.” In no other region of the world has the global third wave encountered such a hostile economic and political environment.⁵⁸

Reality emphasizes this precarious situation. In Africa, war, hunger, volatility, insecurity, poverty, lack of credibility and accountability, military juntas, and dictatorships flourish.⁵⁹ Even at the moment, sagging economic performance, backsliding on democracy and other human rights reforms, and increased national and regional tensions menace much of the continent. The sudden introduction of multiparty elections has led to protests, rebellions, and regime-orchestrated violence in such countries as Rwanda, Burundi, Nigeria, Kenya, Zimbabwe, and Ethiopia. Serious irregularities characterize many elections in Africa. Results of free elections have been annulled, as in Algeria and Nigeria, while in others elections have brought little or no change. According to Mohamed Halfani, only about five sitting African Heads of State were defeated in democratic elections in the 1990s.⁶⁰ In Mali, democracy has been a huge disappointment for most of the population, as illustrated by this frustrated comment by Bintou Sanankoua:

Elections are a disappointment to a lot of people. They allow non-democrats to hold on to power under a democratic gloss . . . In my country, the party that won the greatest number of votes in the last election was kept out of power, just by political tricks. People don't have much confidence in that kind of system.⁶¹

Africa is currently suffering from a process of protracted transition—an electoral democracy and political liberalization combined with elements of authoritarian and clientelist rule.⁶² In most young democracies in Africa, the military continues to exert political and economic influence, which ranges “[f]rom significant formal and informal business dealings to constitutional powers to dissolve elected governments to

58. Crawford Young, *Africa: An Interim Balance Sheet*, J. DEMOCRACY, Jul. 1996, at 53, 60.

59. See, e.g., HUMAN RIGHTS WATCH, CONSPICUOUS DESTRUCTION: WAR, FAMINE AND THE REFORM PROCESS IN MOZAMBIQUE (1992).

60. ANDRÉ LACHANCE, THE ROAD TO DEMOCRACY IN SUB-SAHARAN AFRICA, at <http://www.idrc.ca/books/reports/1996/25-01e.html> (last visited Sept. 10, 2003).

61. *Id.*

62. See generally Joel D. Barkan, *Protracted Democratic Transitions in Africa*, 7 DEMOCRATIZATION 227 (2000).

veiled threats to elected leaders who challenge military interests.’⁶³ Having tasted “forbidden fruit,” the military is constantly falling into the temptation of involvement in power politics in Africa.

In Nigeria, for example, retired military officers, now turned politicians—or “militicians”—continue to exert and maintain political and economic influence. Their economic influence, for example, covers major sectors including oil, banking, farming, telecommunications, and air transportation.⁶⁴ They also provide substantial funds to political parties, which place them in vantage positions to dictate the tunes and tones of political and economic activities in the country, often in opposition to popular opinion. Many have now presented themselves as candidates for elected positions, a development that has worried citizens,⁶⁵ because it appears that their main motive is to continue the institutionalization of corruption and regime patronage that has characterized previous military regimes.

The allurements of power in Africa have led to widespread and systematic perversions of the constitutional system. Many African governments still flagrantly disobey the constitution and law that they swore to defend, or that they themselves made. It is largely in Africa that political leaders unilaterally alter constitutions, bully weak legislatures and judiciaries, and openly manipulate and rig elections, “often at devastating effect on human development.”⁶⁶ In Arap Moi’s Kenya, individual freedoms were stifled,⁶⁷ and ethnic differences used to fan embers of conflicts. A return to a multiparty system also resulted in violent clashes

63. U.N. Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* at 88, U.N. Sales No. E.02.III.B.1 (2002) [hereinafter *UNDP Report 2002*].

64. *Id.*

65. In Nigeria, for example, four retired generals—Olusegun Obasanjo (incumbent president), Muhammadu Buhari (who overthrew the civilian government in 1983), Ike Nwachukwu, and Odumegwu Ojukwu (the ex-secessionist Biafran leader)—have, largely through manipulations, won their parties’ nominations to stand as candidates for the 2003 presidential elections. See, e.g., Ademola Olajire & Nduka Uzuakpundu, *2003 Polls: Emergence of Generals Worries Soyinka*, *VANGUARD* (Apapa, Nigeria), Jan. 13, 2003 (reporting on an interview with Wole Soyinka, in which the latter expressed concern over the emergence of army generals as presidential candidates in the 2003 elections). As Soyinka queried: “Is democracy for those who have accumulated wealth through occupying illegal and undemocratic positions in this country, while those who do not have the money to even call a meeting of two to three persons are denied the right to politically associate?” *Id.*

66. *UNDP Report 2002*, *supra* note 63, at v.

67. See Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 *HUM. RTS. Q.* 96 (2001).

among different ethnic groups from 1991 to 1998.⁶⁸ Far from being the spontaneous result of a return to political pluralism, there is clear evidence that the government of Daniel Arap Moi helped to provoke ethnic violence for political purposes. In the least, he did not take adequate steps to prevent such violence from spiraling out of control.⁶⁹

Robert Mugabe of Zimbabwe habitually resorts to constitutional amendments to reverse decisions of the Supreme Court with which he disagrees and “to attenuate the constitutional guarantees of human rights, including the rule of law.”⁷⁰ Similarly, in Côte d’Ivoire, the court system is used as a means to harass political opposition leaders and independent jurists; indeed, the judiciary has become “highly vulnerable” to executive interference.⁷¹

The structural and normative legacy with which most African States still struggle has led some to argue that maybe Africa’s problem is that of State reconstruction, rather than democracy.⁷² This question is far from being settled. What is clear is that the growing problem of democratization has given African leaders concern, which probably explains their collective resolve in the last few years to erect new norms on democratic governance. In the next Part, the Article examines the concept of democratic entitlements in international law and relations, before considering the norms on democratic governance in Africa.

III. DEMOCRATIC GOVERNANCE AS A HUMAN RIGHT

Part III briefly discusses the generations of human rights and the critiques that follow this classification. It asks if the categories are closed or if there are emergent generations of human rights, such as the right to democratic governance. How, if at all, did this right enter the international human rights agenda? What is its relevance to African legal and political discourses?

68. See Laurence Juma, *Ethnic Politics and the Constitutional Review Process in Kenya*, 9 TULSA J. COMP. & INT’L L. 471, 495–97 (2002) (examining how ethnic questions could be addressed in Kenya through constitutional engineering).

69. See, e.g., *Kenya’s Dynastic Politics: Moi and His Band of Young Turks*, ECONOMIST, Dec. 15, 2001, at 40 (describing the way that Daniel Arap Moi has held on to power).

70. See Lord Lester of Herne Hill, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, 3 EUR. HUM. RTS. L. REV. 273, 277 (1999).

71. *Can the Leopard Change Its Spots?*, *supra* note 30, at 1234 (quoting ATTACKS ON JUSTICE: THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS 231 (Mona Rishmawi ed., 2000)) (reporting how a High Court Judge was forced to resign because he made a decision that did not go well with the government in power).

72. See MARINA OTTAWAY, *AFRICA’S NEW LEADERS: DEMOCRACY OR STATE RECONSTRUCTION?* (1999).

A. *The Periodization of Rights*

1. The Concept of Generations

Since 1977, when Karel Vasak introduced the concept of generations into the corpus of human rights discourse, the debate has taken many forms and shapes. Vasak traced the developments of human rights and concluded that, basically, rights are divided into three generations. The first, he called *liberté* (liberty), which applies to civil and political rights; the second, he termed *égalité* (equality), which relates to economic, social, and cultural rights; and the third, he termed *fraternité* (solidarity), referring to those rights that are held by the collectives, in other words, “group” or “people’s” rights.⁷³ These classifications, sometimes declared by a color scheme of “blue,” “red,” and “green,”⁷⁴ are based on three different philosophies. Each generation has its distinctive characteristics, each presumably more developed and sophisticated than its predecessor.⁷⁵

This Article will not go into detailed discussions of the generations metaphor. Suffice it to note that the first-generation rights are negative rights,⁷⁶ or “immunity claims” by citizens toward the State, in the sense that they limit the power of a government to protect peoples’ rights against its power. They relate to the sanctity of the individual and his rights within the socio-political milieu in which he is located. They imply that no government or society should act against individuals in certain ways that would deprive them of inherent political or personal rights, such as the rights to life, liberty, and security of person, freedom of speech, press, assembly, and religion.⁷⁷

The second-generation rights are claims to social equality, consisting of economic, social, and cultural rights. They are positive rights in that they enhance the power of the government to do something for the person, to enable her or him in some way. They display a highly social orientation in the sense that they evolve to temper the equally highly

73. Karel Vasak, *A 30-year Struggle*, 11 UNESCO COURIER 29 (1977).

74. See JOHAN GALTUNG, *HUMAN RIGHTS IN ANOTHER KEY* 151–56 (1994).

75. *Contra* Theo C. van Boven, *Distinguishing Criteria of Human Rights*, in *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 43 (Karel Vasak ed., 1982) (suggesting that they are compatible, even concordant).

76. The terms “negative” and “positive,” as used here are not value statements. Negative rights imply that states have to refrain from certain actions, and positive rights imply that they have to take certain actions.

77. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., arts. 1–21, at 71, UN Doc. A/RES/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

individualistic orientation of first-generation rights. They are, however, generally interpreted as programmatic clauses, obligating governments and legislatures to pursue social policies, but do not create individual claims. They require the affirmative action of governments for their implementation.⁷⁸

The ongoing attempts “to convert needs into rights . . . is the hallmark of contemporary human rights.”⁷⁹ It is in this respect that the African Charter on Human and Peoples’ Rights⁸⁰ makes a significant contribution to the international human rights corpus. The Charter was one of the very few multilateral human rights treaties to recognize the indivisibility and interdependence of negative and positive rights. For example, its preamble provides:

[I]t 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.⁸¹

78. See Claude Welch Jr., *Human Rights as a Problem in Contemporary Africa*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 11, 24 (Claude Welch & Ronald I. Meltzer eds., 1984). The UDHR implies that every government and society should act for individual members to enable them to enjoy certain social and economic rights and benefits pertaining to social security, employment, housing, education, health care, and the general standard of living. See UDHR, *supra* note 77, arts. 22–28; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, (entered into force Jan. 3, 1976) [hereinafter ICESCR].

79. Upendra Baxi, *Too Many, or Too Few, Human Rights?*, 1 HUM. RTS. L. REV. 1, 3 (2001) (noting that this enlargement of the scope makes any serious judgment on the efficiency and quality of human rights difficult).

80. AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 [hereinafter AFRICAN CHARTER]. For literature, see, for example, U. ORJI 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); Makau Wa Mutua, *The African Human Rights System in a Comparative Perspective*, 3 LEGAL F. 31 (1997); Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984); U. Orji Umozurike, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L L. 902 (1983).

81. AFRICAN CHARTER, *supra* note 80, pmb., para. 7. African leaders reemphasized the indivisibility, universality, and interdependence of all human rights in the *Algiers Declaration*, *supra* note 18.

However, unlike the first two generations, which focus largely on individuals, the third-generation rights include the rights of peoples⁸² and groups.⁸³ It has received increasing rhetorical affirmation at the international level, though "only the peoples' rights to self-determination and to disposal of natural wealth, included in the International Covenants have received authoritative acceptance in international law."⁸⁴ Other group rights include development, peace, environment, ownership of the common heritage of mankind, and communication.⁸⁵

As with the second-generation rights, the African Charter parts ways with other regional human rights conventions by providing for peoples' rights, to reflect the African focus on collectivities.⁸⁶ Indeed, at the OAU Summit Conference of 1979 in Monrovia, when the Charter was still being elaborated, some States, notably Guinea Republic and Madagascar, had insisted that the proposed Charter include peoples' rights.

The peoples' rights guaranteed in the Charter include the right of equality of peoples and nondomination of one people by another,⁸⁷ as well as the important right of self-determination.⁸⁸ Another is the right to disposal of natural wealth and resources in the interest of the people,⁸⁹ "with a view to strengthening African unity and solidarity,"⁹⁰ but "without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law."⁹¹

2. A Critique of the Generations Metaphor

The generations metaphor reflects the essential dynamism of the human rights tradition, taking cognizance of the fact that specific historical circumstances form the basis of all demands that are made in the

82. Cf. Theo van Boven, *Human Rights and Rights of Peoples*, 6 EUR. J. INT'L L. 461, 470-72 (1995).

83. See, e.g., U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 11, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention] (defining "genocide" to mean "acts committed with intent to destroy, in whole or in part, a national, ethnic[,], racial or religious group . . .") (emphasis added).

84. See Louis Henkin, *Human Rights*, in 1 ENCYCLOPEDIA OF PUBLIC INT'L LAW 886, 890 (Rudolf Bernhardt ed., 1992).

85. See Jack Donnelly, *Third Generation Rights*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 119, 121 (Catherine Brölmann et al. eds., 1993).

86. See generally Theo van Boven, *The Relations between Peoples' Rights and Human Rights in the African Charter*, 7 HUM. RTS. L.J. 183 (1986).

87. See AFRICAN CHARTER, *supra* note 80, art. 19.

88. *Id.* art. 20.

89. *Id.* art. 21(1).

90. *Id.* art. 21(4).

91. *Id.* art. 21(3).

name of human rights. This metaphor, however, has come under intense attacks by some human rights scholars. Some describe the periodization of human rights as misleading, to the extent that it implies a hierarchy within human rights standards. It is, according to this view, also incompatible with the indivisibility of human rights, which is a necessary concomitant of inclusive universality.⁹² The generations metaphor also “refers to the idea of succession and to a possible historical description of the field of human rights in neat and chronological terms.”⁹³ The truth, says Cees Flinterman, is that “the various so-called generations of human rights, especially the first generation of civil and political rights and the second of social (economic and cultural rights) have themselves grown and expanded in a more or less parallel way.”⁹⁴

Others believe that the concept of generations, particularly third-generation rights, tends to expand the scope of human rights and that such expansion may sacrifice quality at the altar of quantity. The current pace of inclusion of all types of endeavors as “human rights,” according to this view, may serve to dilute the concept and render the enforcement of rights difficult. This fear appears to be justified by the fact that foreign investors, global corporations, and international financial capital—in short, global capitalism—are asking for collective recognition and protection of their “rights.” Upendra Baxi, for example, notes the tourism efforts of the hospitality and transportation industries to persuade the U.N. to recognize tourism as “a universal human right.”⁹⁵

According to Milan Kundera, in a cynical portrait of the attempt to convert every human desire, need, or want into human rights:

The world has become man’s right and everything in it has become a right: the desire for love the right to love, the desire for rest the right to rest, the desire for friendship the right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness, the desire to publish a book the right to publish a book, the desire to shout in the street in the middle of the night the right to shout in the street.⁹⁶

92. See Cees Flinterman, *Three Generations of Human Rights*, in *HUMAN RIGHTS IN A PLURALIST WORLD* 75 (Jan Berting et al. eds., 1990).

93. *Id.* at 76.

94. *Id.*

95. See Baxi, *supra* note 79, at 1 n.1. Baxi questions whether each and every human social problem can be best defined and solved “through the talismanic property of human rights enunciations.” *Id.* at 1.

96. MILAN KUNDERA, *IMMORTALITY* 136 (Peter Kussi trans., 1991).

There is, thus, a call for some quality control of human rights, an identification of core human rights, whose respect by all States should be mandatory, giving rise both to international concern and direct action.⁹⁷ The production of a new human rights genre “should be marked by efficiency, constructed not just in terms of the *quantity* but the *quality* of contemporary human rights norms and standards.”⁹⁸ Baxi sets out tests of *quality* for the enunciation or “production” of new human rights based on the following:

- (1) efficiency of the deliberative process leading to production of draft documents, efficiency here measured by considerations of equitable representation and participation as well as levels of expertise or insight . . .
- (2) clarity and communicability (or translatability) of textual outcomes . . . levels of consensus reached (on individual formulations and the text as a whole) . . .
- (3) consensus levels measured, partly, by the extent of reservations, derogations, declarations and statements of understanding when right enunciation takes the form of an international treaty and by patterns of voting power when it assumes forms of declarations or resolutions) . . .
- (4) specificity or diffuseness of definitions of violative behaviours and levels of accountability monitoring or implementation . . .
- (5) mechanisms or processes for promotion and protection, including strategies for human rights education [and]
- (6) procedures for collective review and reformulation.⁹⁹

B. *Making Room for Yet Another Generation: The Right to Democratic Governance*

If the inclusion of all categories of human problems as human rights could possibly harm the human rights movement—necessitating a call for quality control—the question is why should another generation of rights be added to the existing generations? Why crowd further, the already congested traffic? This Section attempts to answer this question.

97. See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 614–15 (1984).

98. Baxi, *supra* note 79, at 2.

99. *Id.* at 3 n.5.

It restates the arguments for a fourth generation of human rights, in particular the right to democratic governance. It traces the contours of this right, particularly in the context of African milieu and finally attempts a critique of the enterprise.

a. Defining the Terms

Since certain titles or terms will be frequently used in the remainder of this paper, both in narrative and allusion, it will be well to define or, at least, describe them. What do we mean by the words “democracy” and “governance,” or by the phrase “right to democratic governance?”

i. Democracy

Democracy is a fuzzy and fussy concept. Some assert that it “consist[s] of no more than the essential element of periodic, genuine, contested elections,”¹⁰⁰ and that it “concentrates on, and sometimes does not go beyond, the fundamental premise of ‘rule by the people’ (or related expressions of this premise, such as popular sovereignty, or government [expressing] the will of the people) through one or another form of representative government that elections are meant to achieve.”¹⁰¹

This Article, however, asserts that democracy must be defined functionally, rather than as involving just formal political processes like periodic elections. Democracy is an ideology demanding that those entrusted with authority must use it for the common or public good.¹⁰² A significant element of democracy is reciprocity, “between governors and the governed, between those who exercise political leadership in society

100. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 888 (2d ed. 2000).

101. *Id.*

102. Legal theorists, of diverse views and backgrounds, have espoused the cause of the common good in examining the essence of law. They include Jeremy Bentham’s principle of utility: JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 12 (J.H. Burns & H.L.A. Hart eds., Althone Press 1970) (1789); Lon Fuller’s purposive approach to law: LON FULLER, *THE MORALITY OF LAW* (1964); and John Finnis’ theory of human basic good: JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). Others include Joseph Raz’s idea of the function of law: Joseph Raz, *Reasons for Action, Decisions and Norms*, in *PRACTICAL REASONING* (Joseph Raz ed., 1978); Deryck Beyleveld and Roger Brownsword’s notion of the essence of law: DERYCK BEYLEVELD & ROGER BROWNSWORD, *LAW AS A MORAL JUDGMENT* (1986); H.L.A. Hart’s criteria for the existence of a viable social organization: H.L.A. HART, *THE CONCEPT OF LAW* (1961); and Taslim Elias’s law in a developing society: T.O. ELIAS, *LAW IN A DEVELOPING SOCIETY* (1972). See generally O.A. Obilade, *The Idea of the Common Good in Legal Theory*, in *ISSUES IN NIGERIAN LAW* 1 (J.A. Omotola ed., 1990).

and those who are led, between those who exercise authority and those who are the subjects of this authority.”¹⁰³

Democracy is connected “to thoughts about . . . aspirations, solidarity, virtue, faith, [and] the development of political identities” in a civilized society.¹⁰⁴ More specifically, it is the right of peoples to make choices about the quality of their lives: the participation of all segments of society—not just the majority—in decisions that affect their lives. Democracy also requires that people have equal access to information so that they can make these decisions intelligently. It also means equality before law enforcement agencies, including equal protection from arbitrary interference, whether it is from government officials or private actors. It involves the fair distribution of resources, including equal access to education.¹⁰⁵

A component of democracy is the right of citizens freely to express their opinions on all matters of governance. This includes the right to protest, dissent, or even disobey the laws. It even includes the right to abolish the government when it becomes destructive of citizens’ rights and, ultimately, “to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”¹⁰⁶

ii. Governance; Good Governance

Governance, in contradistinction with democracy, is the process whereby public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights. Put differently, it is the structure of rules and processes that affect the exercise of power, particularly with regard to openness, participation, accountability, effectiveness, and coherence. Goran Hydén defines it as

that aspect of politics that aims to formulate and manage the rules of the political arena in which state and civil society actors operate and interact to make authoritative decisions. In more operational terms, governance refers to those measures that involve setting the rules for the exercise of power and settling conflicts over such rules. Such rules translate into constitutions, laws, customs, administrative regulations, and international agreements,

103. KPUNDEH, *supra* note 31, at 23.

104. See Ulrich R. Haltern, Book Review, 7 *EUR. J. INT’L L.* 135, 136 (1996) (reviewing JAMES G. MARCH & JOHAN P. OLSEN, *DEMOCRATIC GOVERNANCE* (1995)).

105. See Howard Zinn, *How Democratic Is America?*, in *POINTS OF VIEW: READINGS IN AMERICAN GOVERNMENT AND POLITICS* 2, 2–3 (Robert E. DiClerico & Allan S. Hammock eds., 1983).

106. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)

all of which in one way or the other provide the framework for the formulation and implementation of policy decisions.¹⁰⁷

Good governance, in particular, is “the responsible use of political authority to manage a nation’s affairs.”¹⁰⁸ It is the key to economic development and, therefore, must be participatory, transparent, and accountable.¹⁰⁹ It must also be effective and equitable, in order to promote the rule of law.¹¹⁰ The yardsticks for its measurement are effective leadership, technical policy competence, and administrative efficiency. Good governance, really, is a basket of many practices: “a professional civil service, elimination of corruption in government, a predictable transparent and accountable administration, democratic decision-making, the supremacy of the rule of law, effective protection of human rights, an independent judiciary, a fair economic system, appropriate devolution and decentralization of government, [and] appropriate levels of military spending.”¹¹¹ The true test of “good” governance is the extent “to which it delivers on the promise of human rights—civil, cultural, economic, political, and social.”¹¹²

iii. Right to Democratic Governance

The right to democratic governance has been defined as:

the subjective capacity of individuals and peoples to demand of their rulers a political regime based on the rule of law and separation of powers, in which citizens can periodically elect their leaders and representatives in free and fair elections, on the basis of the interaction between a number of political parties,

107. Goran Hyden, *Governance and the Reconstitution of Political Order*, in STATE, CONFLICT AND DEMOCRACY IN AFRICA 185 (Richard Joseph ed., 1999); cf. WORLD BANK, GOVERNANCE AND DEVELOPMENT 1 (1992) (defining governance as “the manner in which power is exercised in the management of a country’s economic and social resources for development”).

108. CLARENCE J. DIAS & DAVID GILLIES, HUMAN RIGHTS, DEMOCRACY, AND DEVELOPMENT 10 (1993).

109. See Ngairé Woods, *Good Governance in International Organizations*, 5 GLOBAL GOVERNANCE 39, 43 (1999) (arguing that the three core elements of good governance are participation, accountability, and fairness); cf. ANNAN, *supra* note 5, at 13 (noting that “[b]etter governance means greater participation, coupled with accountability”).

110. See U.N. Development Programme, *Reconceptualising Governance*, U.N. DISCUSSION PAPER, at 14, (2003), at <http://magnet.undp.org/Docs/!UN98-21.PDF/Recon.htm> (last visited Sept. 8, 2003).

111. See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 16–17 (2000).

112. U.N. OHCHR, HUMAN RIGHTS IN DEVELOPMENT: GOOD GOVERNANCE (2000), at <http://193.194.138.190/development/governance-01.html> (last visited Sept. 10, 2003).

full respect for the exercise of the freedoms of expression, the press and association and the effective enjoyment of human rights.¹¹³

Democratic governance is about how individuals and societies can achieve institutions that make politics both civil and capable. Democratic decision-making gains its legitimacy from being rooted in the people. Accountability is defined as “holding public officials responsible for their actions.”¹¹⁴ As one observer noted, “*Accountable* governance is about reconstituting a political order in which the state’s accountability towards society is increased. It . . . brings state and society closer to each other,” allowing for “a degree of bargaining between the government and the public,” as well as increasing the public’s discretion concerning the use of public resources.¹¹⁵ In short, accountability involves the constitution of the individual as a citizen with rights and duties rather than merely as a subject. This is a necessary condition for popular sovereignty and, ultimately, democracy.

1. The Case for a Right to Democratic Governance

Many contemporary international jurists and scholars have advocated for recognition of the right to democratic governance. The foremost advocate is Thomas Franck,¹¹⁶ and his proposition will be the point of departure for the discourse that follows. Franck asserts that “democratic entitlement” is a recognized and recognizable right. He anchors his theory on two notions: the idea that governments derive their just powers from the consent of the governed¹¹⁷—a Lockean

113. *Promotion and Consolidation of Democracy*, U.N. ESCOR, 53d Sess., at 17, ¶ 81, U.N. Doc. E/CN.4/Sub.2/2001/32, at 17 (2001) [hereinafter *Promotion and Consolidation of Democracy*].

114. NATIONAL RESEARCH COUNCIL, *ASSESSING PROGRESS TOWARDS DEMOCRACY AND GOOD GOVERNANCE: SUMMARY OF A WORKSHOP 4* (Daniel Druckman ed., 1992) [hereinafter *NRC SUMMARY*].

115. Anne Mette Kjaer, *Governance and State Capacity in Africa*, Research Proposal, University of Aarhus, Denmark (2002), at http://www.ps.au.dk/mkj/OngoingProjects_Materiale/project_proposal.htm (last visited Sept. 8, 2003) (discussing the concept of state capacity in Africa and offering hypotheses as to what factors influence the building of such capacity).

116. *See, e.g.*, THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) (positing an emerging right to democratic governance and a participatory electoral process); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992); James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT’L L. 113 (1993); *see generally* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000) (assessing international law’s newfound interest in fostering transitions to democracy).

117. Franck, *The Emerging Right to Democratic Governance*, *supra* note 116, at 46.

philosophy¹¹⁸—and the idea that the international legitimacy of a State requires acknowledgement by mankind.¹¹⁹ These two notions form a “radical vision” that is “rapidly becoming, in our time, a normative rule of the international system.”¹²⁰ Analyzing the international community’s response to the coup in the former Soviet Union and in Haiti, Franck argues that, “a new legal entitlement is being created, based in part on custom and in part on the collective interpretation of treaties.”¹²¹

According to Franck, a community expectation has emerged, to the intent that “those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”¹²² The “democratic entitlement,” he continues, is gradually being transformed “from moral prescription to international legal obligation”¹²³ largely because such entitlement results from “the craving of governments for validation.”¹²⁴ As Franck argues,

[In order to] achieve such a system of autochthonous validation (and thus to facilitate governing), those who hold or seek political power have made a far-sighted bargain comparable to John Locke’s social compact; they have surrendered control over the nation’s validation process to various others: national electoral

118. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 374–75 (Peter Laslett ed., Mentor Books 1965) (1690). The essential teaching of Locke was that all legitimate governments derive their authority solely from the consent of the governed; cf. THE DECLARATION OF INDEPENDENCE pmb1. (U.S. 1776) (proclaiming that, “[w]e hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. . .”).

119. See Franck, *The Emerging Right to Democratic Governance*, *supra* note 116, at 46.

120. *Id.*

121. *Id.* at 47.

122. *Id.* at 46; cf. Afr. Comm’n on Human and Peoples’ Rights, *Resolution on the Military* (1994) [hereinafter *Resolution on the Military*], compiled in RECOMMENDATIONS AND RESOLUTIONS 22, (Dec. 2002), at http://www.achpr.org/Recommendations__Resolutions_-_ACHPR_88-02.pdf (last visited Sept. 4, 2003) [hereinafter RECOMMENDATIONS AND RESOLUTIONS] (maintaining that, “the trend world-wide and in Africa in particular is to condemn military take-overs and the intervention by the military in politics . . .” The resolution calls on “incumbent military governments to handover [sic] political power to democratically elected governments without prolonging their incumbencies and unnecessarily delaying the return to democratic civilian rule.”).

123. Franck, *The Emerging Right to Democratic Governance*, *supra* note 116, at 47.

124. *Id.* at 50 (arguing also that in the absence of validation, governance becomes more difficult).

commissions, judges, an inquisitive press and, above all, the citizenry acting at the ballot box.¹²⁵

Franck argues that the evolution of democratic entitlement has occurred in three normative phases. The first phase was the right to self-determination, followed by free expression and, finally, "the entitlement to a participatory electoral process."¹²⁶ The right to self-determination, for example, has replaced the previously accepted norm of colonialism at the end of the Second World War.¹²⁷ As a universal concept, it encompasses obligations owed by all governments to their citizens, as well as to the international community.¹²⁸ The history of self-determination is, indeed, "a remarkable saga that tells of a rule that gradually augments its compliance pull, overcomes resistance and ultimately brings about an incontestable, historic transformation."¹²⁹ It is far from certain, however, that self-determination will lead to a "universal right to democracy," since the former "must permit a people to decide its own political system and form of government."¹³⁰

Franck's argument is also embedded in the idea of national democracy. In other words, the territorial state continues to define the limits of the democratic community. All that is necessary to satisfy the human right to democratic government is the creation and maintenance of national democratic institutions, including periodic elections and a representative assembly.

There are also institutional voices that recognize the right to democratic governance. For example, in 1999, the U.N. Human Rights Commission adopted a resolution on the *Promotion of the Right to Democracy*,¹³¹ which, significantly, was the first text approved in the U.N. recognizing the existence of this right. The resolution refers to developments in international law related to the recognition of democracy as a value for international protection, and to its interdependence with human rights. It recalls the large body of international law and instruments, including the resolutions of the Commission on Human Rights and those of the General Assembly, and confirms "the right to full participation

125. *Id.*

126. *Id.* at 90.

127. *Id.* at 54.

128. *See id.*

129. *Id.* at 55.

130. Tony Evans, *If Democracy, Then Human Rights?*, 22 *THIRD WORLD Q.* 623, 632 (2001).

131. *Promotion of the Right to Democracy*, Commission on Human Rights Res. 1999/57, UN ESCOR, Commission on Human Rights, 57th mtg., U.N. Doc. E/CN.4/RES/1999/57 (1999) [hereinafter *Promotion of the Right to Democracy*].

and the other fundamental democratic rights and freedoms inherent in any democratic society.”¹³² Furthermore, the U.N. recognizes that “the right to development and the principle of the right of self-determination of peoples are concepts that are mutually interdependent with democracy and human rights.”¹³³

This recognition of the interdependence between democracy and development is particularly significant for Africa, which is struggling with questions of sustainable development. The continent has remained “the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned.”¹³⁴ Regrettably, African leaders have, until recently, failed to see that bad governance is the main reason for the underdevelopment of the continent.

The UN Human Rights Commission has demarcated the various layers of the right to democratic governance.¹³⁵ These include:

- (a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) the right . . . to seek, receive and impart information and ideas through any media; (c) the rule of law, including legal protection of citizens’ rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections.¹³⁶

Other rights it has distinguished are:

- (e) the right of political participation, including equal opportunity for all citizens to become candidates; (f) transparent and accountable government institutions; (g) the right of citizens to choose their governmental system through constitutional and other democratic means; and (h) the right to equal access to public service in one’s own country.¹³⁷

132. *Id.*

133. *Promotion and Consolidation of Democracy, supra* note 113, ¶ 4.

134. Yaounde Declaration (Africa: Preparing for the 21st Century), ¶¶ 2, 6, OAU Doc. AHG/Decl.3(XXXII) (1996) (pointing out that Africa has “the lowest life expectancy, the highest infant mortality and illiteracy rates, the lowest GNP, in short, the lowest human development indicator . . .”).

135. *See Promotion and Consolidation of Democracy, supra* note 113, ¶ 5.

136. *Id.*

137. *Id.*

2. How Democratic Governance Entered Into the Human Rights Agenda

A number of developments led to the emergence of a right to democratic governance in international law. Franck, for example, cites U.N. instruments and programs in the field of human rights and electoral assistance.¹³⁸ Each of these instruments recognizes related specific entitlements as accruing to individual citizens, thus constituting internationally mandated restraints on governments. Others, however, trace the development to the insistence by Western aid donors on open and accountable government as a condition precedent to development assistance¹³⁹ to the poorer countries of the South.¹⁴⁰

Donor governments and agencies are continuously making decisions on which country to assist, how much aid to give, and for what purposes—largely because aid needs are much larger than available aid.¹⁴¹ Up to the 1980s, conditions were only economic ones. Human rights were peripheral, for example, to the European Community (now European Union), essentially because the Council was founded as an

138. Franck, *The Emerging Right to Democratic Governance*, *supra* note 116, at 55 (arguing that this transition “was facilitated by the UN reporting requirements, the organization’s close scrutiny of the work of colonial administrations and the active involvement in monitoring elections and plebiscites in territories advancing toward independence”); *see also id.* at 71, 74–76, 82–83 (regarding UN-inspired human rights instruments that have relevance to democratic governance in Africa).

139. Development assistance covers a wide range of resource transfers, including “technical assistance, food and commodity transfers, budget support, rural and urban projects, infrastructural and institutional assistance, sectoral specific assistance targeted, for example, to agriculture, education, health and industry, and bilateral and multilateral channels for intervention.” R.C. RIDELL, *FOREIGN AID RECONSIDERED* 204 (1987).

140. Reif, *supra* note 111, at 1 (noting that “[t]he concept of good governance developed in the practice of relevant international organizations and some donor governments as a guide for rebuilding or reforming governance structures”); *see also* Akin Oyeboode, *UN and the Protection of Human Rights in Africa*, in *AFRICA AND THE UN SYSTEM: THE FIRST FIFTY YEARS* 86, 89 (George A. Obiozor & Adekunle Ajala eds., 1998); Babacar Ndiaye, *International Cooperation to Promote Democracy and Human Rights: Principles and Programmes*, 49 *REV. INT’L COMM’N JURISTS* 23 (1992).

141. While three-quarters of official aid is bilateral, the remaining third is multilateral, with the World Bank and the IMF dominating these latter transactions. Resources also flow through regional multilateral banks, including the Inter-American, African, and Asian Development Banks, and through the institutions of the European Community and the Organization of Petroleum Exporting Countries (OPEC). The U.N. is also heavily involved, through the Food and Agricultural Organization (FAO), the World Health Organization (WHO), and the U.N. Development Program (UNDP). These transactions, however, are confined to the provisions of technical assistance and advisors, and to research and training. *See* TERESA HAYTER, *EXPLOITED EARTH* 28 (1989).

economic association. Besides, European nations were reluctant to condemn States that had only recently been decolonized.¹⁴²

Of course, human rights are not synonymous with democracy; but they are generally regarded as conditions for enhancing democracy and have, in recent memory, become the basic condition in deciding on performance-related aid. Actually, the problems and consequences of marginalizing human rights and democracy from development led to a reformulation of donor aid policy in the late 1980s.¹⁴³ After the Cold War, the EU countries began to attach political conditions—including respect for human rights—to their development cooperation agreements. Western financial institutions imposed structural adjustments and economic stabilization as conditions for their assistance to African governments. They also insisted that aid must not support systems that deprive citizens of equal opportunities to enjoy economic and other resources, including education and political participation without discrimination.¹⁴⁴ Explicit linkage between reported human rights violations and development aid has increased in the last couple of years.¹⁴⁵

As a corollary, it has been noted that good governance:

was born at the end of an era in which concern with the misappropriating, inefficient and patrimonial State prevailed. [It] was introduced as part of an agenda of creating *enabling States*, i.e., States that would establish a room for maneuver of enterprises and citizens that would engender growth as well as efficient resource utilization. The good governance agenda was thus the child of a modified liberal agenda, which made concessions to the fact that efficient resource utilization also depended on modes of governance and public involvement.¹⁴⁶

142. See, e.g., Amy Young-Anawaty, *Human Rights and the ACP-EEC Lome II Convention: Business as Usual at the EEC*, 13 N.Y.U. J. INT'L L. & POL. 63, 79 (1980) (citing the statement of Mr. Prescott of the United Kingdom at the meeting of the ACP-EEC Council of Ministers in 1977); Demetrios James Marantis, *Human Rights, Democracy, and Development: The European Community Model*, 7 HARV. HUM. RTS. J. 1, 5 (1994).

143. See ALEXANDER R. LOVE, DEVELOPMENT ASSISTANCE COMMITTEE OF THE OECD, DEVELOPMENT CO-OPERATION: EFFORTS AND POLICIES OF THE MEMBERS OF THE DEVELOPMENT ASSISTANCE COMMITTEE 1991 REPORT 66 (1991).

144. See Lars Adam Rehof, *Development Assistance from the Point of View of Human Rights*, in HUMAN RIGHTS IN DOMESTIC LAW AND DEVELOPMENT ASSISTANCE POLICIES OF THE NORDIC COUNTRIES, 17–20 (Lars Adam Rehof & Claus Gulmann eds., 1989).

145. See KATARINA TOMASEVSKI, COMMONWEALTH SECRETARIAT, HUMAN RIGHTS VIOLATIONS AND DEVELOPMENT AID: FROM POLITICS TOWARDS POLICY 3 (1990).

146. Hans-Otto Sano, *Good Governance, Accountability and Human Rights*, in HUMAN RIGHTS AND GOOD GOVERNANCE: BUILDING BRIDGES 123, 123 (Hans-Otto Sano & Gudmundur Alfredsson eds., 2002).

African countries themselves appeared to have acknowledged the connection between democratic governance and development aid when, in 1996, they admonished the West in the following words: "We hope our efforts in embarking on macro-economic and political reforms geared towards achieving greater equilibriums and creating an enabling economic environment for both local and foreign direct investments would be supported by a substantial reduction in the debt and a major inflow of debt-free financial assistance."¹⁴⁷

This Article will now turn to some illustrative studies on the development of democratic governance at the international level. It starts with the Charter of Paris for a New Europe, signed by the Heads of State or Government of the Conference (now Organization) on Security and Cooperation in Europe on November 21, 1990. The Charter provides a striking example of this new approach. In the all-European context of the Conference, "but phrased in a language which radiated beyond European boundaries,"¹⁴⁸ the Charter states that:

[T]he free will of the individual, exercised in democracy and protected by the rule of law, forms the necessary basis for successful economic and social development. We will promote economic activity which respects and upholds human dignity.

Freedom and political pluralism are necessary elements in our common objective of developing market economies towards sustainable economic growth, prosperity, social justice, expanding employment and efficient use of economic resources. The success of the transition to market economy by countries making efforts to this effect is important and in the interest of us all.¹⁴⁹

The Lome Convention has become one of the many forms of North-South multilateral arrangements between Western donor countries and Africa. Under the agreement, which has been revised on many occasions,¹⁵⁰ sub-Saharan Africa is entitled generally to non-reciprocal duty-free access to the EU market; technical and industrial cooperation;

147. Yaounde Declaration, *supra* note 134, ¶ 11.

148. Van Boven, *supra* note 54.

149. Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 195.

150. There have been four conventions thus far; ACP-EEC Convention, Feb. 28, 1975, 14 I.L.M. 595 (1975) [hereinafter Lome Convention I]; Second ACP-EEC Convention, Oct. 31, 1979, 1277 U.N.T.S. 3 (1982) [hereinafter Lome Convention II]; Third ACP-EEC Convention, Dec. 8, 1984, 24 I.L.M. 571 (1985) [hereinafter Lome Convention III]; Fourth ACP-EEC Convention, Dec. 15, 1989, 29 I.L.M. 783 (1990), *as amended* by Mauritius Agreement, Nov. 4, 1995, [hereinafter Lome Convention IV], available at http://www.idea.int/lome/bgr_docs/lomeiv.html (last visited Sept. 10, 2003). See generally MARJORIE LISTER, THE EUROPEAN COMMUNITY AND THE DEVELOPING WORLD 58-109 (1988).

economic assistance under the European Development Fund scheme; and insurance schemes to compensate Lome States for fluctuations in earnings from primary commodity exports to the EU. Lome Conventions III and IV brought human rights into the forefront of European development policies. Lome Convention III, for example, explicitly incorporated the promotion of human rights as an objective of development cooperation.¹⁵¹

The turning point, however, came in Lome Convention IV. It reiterates “the right of each State to determine its own political, social, cultural and economic policy options.”¹⁵² It, nevertheless, provides that:

Cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Cooperation operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognised as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights.¹⁵³

The Contracting Parties further reiterate—

[T]heir deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.¹⁵⁴

This express linkage of the promotion of human rights to development “creat[es] a legal basis for advancing the observance of human

151. See Lome Convention III, *supra* note 150, art. 4 (referring to promotion of economic, social, and cultural rights); art. 119 (educational development); art. 122 (grassroots outreach); art. 123 (the advancement of women); art. 124 (healthcare); and arts. 125–27 (cultural enrichment).

152. Lome Convention IV, *supra* note 150, art. 2.

153. *Id.* art. 5(1); see also *Resolution to the Council and Representative Meeting in the Council on Human Rights, Democracy and Development*, ¶ 10 Bull. EC 11/1991 (1991), available at http://www.idea.int/lome/background_documents/resolution.html (last visited Sept. 10, 2003) (“The Community and its Member States will explicitly introduce the consideration of . . . relations with developing countries; human rights clauses will be inserted in future cooperation agreements. Regular discussions on human rights and democracy will be held, within the framework of development cooperation, with the aim of seeking improvements.”).

154. Lome Convention IV, *supra* note 150, art. 5(2).

rights through specific development programs.”¹⁵⁵ Indeed, the international concern for democratic governance in Africa could be further illustrated with the Council of Europe’s 1992 statements on the human rights situations of Zaire, Togo, Burundi, Kenya, Algeria, and Equatorial Guinea. The statements were issued with a view “to promote and raise awareness concerning human rights and democracy,” and to “consolidate the processes of peace and democratisation.”¹⁵⁶

The World Bank has also promoted good governance practice, including reform of the public sector.¹⁵⁷ The Bank defines governance in a three dimensional framework. The first relates to “the form of political regime.” The second relates to “the process by which authority is exercised in the management of [the] country’s economic and social resources for development.” The third dimension relates to “the capacity of governments to design, formulate, and implement policies and discharge [government] functions.”¹⁵⁸ The Bank regards the first dimension as outside its mandate, preferring to concentrate on the second and third dimensions.¹⁵⁹ Governance, from these dimensions, is a means toward promoting economic development rather than an end in itself.¹⁶⁰ This restrictive, though significant, interpretation is understandably borne out of the Bank’s mandate,¹⁶¹ as its Articles of Agreement do not permit it to drown in the political waters of member countries.¹⁶²

155. Marantis, *supra* note 142, at 9.

156. Report from the Commission to the Council and the European Parliament on the Implementation in 1993 of the Resolution of the Council and of the Member States Meeting in the Council on Human Rights, Democracy and Development, Adopted on 28 November 1991, COM(94)42 final at 10, 16.

157. See, e.g., WORLD BANK, THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT (1997); WORLD BANK, GOVERNANCE: THE WORLD BANK’S EXPERIENCE (1994); LAWYERS COMM. FOR HUMAN RIGHTS, THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS (2d ed. 1995); WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992).

158. See WORLD BANK, GOVERNANCE: THE WORLD BANK’S EXPERIENCE, *supra* note 157, at xiv.

159. *Id.*

160. See Nicholas H. Moller, *The World Bank: Human Rights, Democracy and Governance*, 15 NETH. Q. HUM. RTS. 21, 22 (1997) (examining the prospects that governance holds for ensuring that the World Bank and its borrower countries respect human rights and democratic values).

161. The World Bank was set up as a non-political facilitator of investment to help war-torn and developing countries in their reconstruction and development. See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT, art. 1 (1960) [hereinafter IBRD, ARTICLES OF AGREEMENT].

162. Article IV, section 10 provides:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their

The International Monetary Fund (IMF), the other leg of the Bretton Woods stool, also promotes those components of good governance that relate to economic performance.¹⁶³ The same goes for the Organization for Economic Cooperation and Development (OECD),¹⁶⁴ which develop good governance standards for its development assistance activities.

To sum up, development assistance and other forms of resource transfers to Africa are now tied to political reforms. This results from the fact that the international community now regards democracy and good governance as essential parts of human flourishing. Although actual donor practices differ,¹⁶⁵ what is not in doubt is that:

[T]here is increasingly strong agreement among donors that political reforms in Africa must result in reduced corruption and more financial accountability, better observance of human rights, independent media and an independent judiciary, participatory politics, and a liberalized market economy in order to move closer to the ultimate goal of meaningful economic growth and development.¹⁶⁶

3. A Critique of the Discourse on Democratic Governance

The good governance discourse will certainly boost the transmission of ideas in Africa. Not many, however, are convinced. Some believe that the whole concept of democratic governance is a gimmick, and that international law has no business promoting what will merely legitimize a neoimperialist agenda to remake the world in the image of the West.¹⁶⁷ In the context of Africa, it is said that the democratization process might

decisions, and these considerations shall be weighted impartially in order to achieve the purposes stated in Article I.

Id. art. IV, § 10.

163. See INT'L MONETARY FUND, *GOOD GOVERNANCE: THE IMF'S ROLE 2* (1997) (discussing the IMF Guidance Note on the Role of the IMF in Governance Issues reference to transparency in financial transactions in the public sector, reform of public administration, and ridding government of corruption and fraud.)

164. See, e.g., ORG. ECON. COOPERATION & DEV. (OECD), *PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE* (1995).

165. See KPUNDEH, *supra* note 31, at 32 (noting that France links aid to greater liberty and democracy, Great Britain and the United States recommend good governance, and Japan focuses on the reduction of military expenditures).

166. *Id.*

167. See, e.g., Martti Koskenniemi, "Intolerant Democracies": A Reaction, 37 HARV. INT'L L.J. 231 (1996); cf. Susan Marks, *Democratic Celebration, Democratic Melancholy*, 9 FINNISH Y.B. INT'L L. 73, 77 (1998) (arguing that the right to democratic governance is an attempt to remake the world in the interests of global capital and that, as currently theorized, it is based on a highly attenuated conception of democratic governance, pitching it "significantly lower than any of the specific conceptions of democracy that animate Western politics").

actually be a public relations trick by African autocrats who are bent on making their regimes more presentable to Western donors in the aftermath of the Cold War.

Critics also believe that the global governance debate could legitimize exclusionary democracies, because of “the idea that democratisation necessarily goes hand-in-hand with the retreat of the state from its public welfare role and increased economic liberalisation.”¹⁶⁸ It largely prohibits the emergence of democratic systems that cater to the needs of Africa’s poor majority. Like in Zambia, Ghana, Kenya, and Côte d’Ivoire, the World Bank and the IMF, for example, adhere to the distinctly undemocratic notion that democracies can only count as examples of good governance “if the electorate chooses governments that adhere to a free market ideology.”¹⁶⁹

The conditions that permeate African nation-states, though conducive to the triggering of the transitions from authoritarianism, have been inimical for further democratization and consolidation. The nature of the forces that the transition unleashes has put a tremendous burden on the democratic project, giving rise to the dominant form of democratic polity in Africa, the pseudo-democracy¹⁷⁰ or virtual democracy.¹⁷¹ In this new form of democracy, “authoritarianism or, at least, illiberalism and neo-patrimonialism subsist alongside electoral competition.”¹⁷² In Kenya, aid donors initially played a central part in advancing the cause of multiparty activities. Subsequently and on several occasions, they actively impeded further democratization, in order to avoid “any path that could lead to a breakdown of the political and economic order, even if this meant legitimising and prolonging the regime’s authoritarian rule.”¹⁷³ Cameroon offers another illustration of incomplete transition to democracy, given

168. Paul Williams, *Indifference and Intervention: International Society and Human Rights in Africa*, 5 J. INT’L HUM. RTS. L. 140, 150 (2001).

169. RITA ABRAHAMSEN, DISCIPLINING DEMOCRACY: DEVELOPMENT DISCOURSE AND GOOD GOVERNANCE IN AFRICA 52 (2000); see also Alex de Waal, *The Shadow Economy*, AFR. REP., Mar.–Apr. 1993, at 24, 27.

170. LARRY DIAMOND, PROSPECTS FOR DEMOCRATIC DEVELOPMENT IN AFRICA 3–4 (1997).

171. See STATE, CONFLICT, AND DEMOCRACY IN AFRICA (Richard Joseph ed., 1999).

172. See Stephen N. Ndegwa, *A Decade of Democracy in Africa*, 36 J. ASIAN & AFR. STUD. 1, 2 (2001).

173. Stephen Brown, *Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya’s Daniel Arap Moi in Power*, 22 THIRD WORLD Q. 725 (2001) (arguing that “prior accounts of Moi and Kanu’s re-election in Kenya’s 1992 and 1997 polls overemphasise divisions within the opposition and underestimate the role of international actors”).

the widespread corruption of President Paul Biya's regime and his unscrupulous determination to cling to power.¹⁷⁴

Although the good governance discourse has, at least in theory, "encouraged the emergence of multi-party states in Africa [that indulge] in periodic elections," these states are in practice "forced to pander to the needs of international donors and investors at the expense of the poorer elements of their domestic constituencies."¹⁷⁵ The results are the birth of "democracies that are exclusionary both in the sense that they cannot incorporate the poor majority in any meaningful way, and to the extent that this is a form of democracy where the power and influence of external constituencies is extraordinarily high."¹⁷⁶ Western financial institutions, particularly the Bretton Woods cabals, are largely to blame for this messy situation in Africa. Joseph Stiglitz, ironically former Chief Economist of the World Bank, offers a chilling criticism of the Bank's sister—the IMF—in these significant words:

The IMF likes to go about its business without outsiders asking too many questions. In theory, the fund supports democratic institutions in the nations it assists. In practice, it undermines the democratic process by imposing policies. Officially, of course, the IMF doesn't "impose" anything. It "negotiates" the conditions for receiving aid. But all the power in the negotiations is on one side—the IMF's—and the fund rarely allows sufficient time for broad consensus-building or even widespread consultations with either parliaments or civil society. Sometimes the IMF dispenses with the pretense of openness altogether and negotiates secret covenants.¹⁷⁷

There is a widening gap between current political arrangements and the promise of democracy to give control over public decision-making on a footing of equality among citizens. This has led to what Susan Marks calls "democratic melancholy."¹⁷⁸ According to Marks, "[l]arge arenas of public power are unaccountable. Many citizens consider political institutions so irrelevant and remote they do not bother to vote.

174. See generally JOSEPH TAKOUGANG & MILTON KRIEGER, *AFRICAN STATE AND SOCIETY IN THE 1990S: CAMEROON'S POLITICAL CROSSROADS* (1998).

175. Williams, *supra* note 168, at 150.

176. ABRAHAMSEN, *supra* note 169, at 145.

177. Joseph Stiglitz, *What I Learned at the World Economic Crisis*, NEW REPUBLIC, Apr. 17, 2000, cited in Michael W. Doyle, *A More Perfect Union? The Liberal Peace and the Challenge of Globalization*, 26 REV. INT'L STUD. 81 (2000).

178. Marks, *supra* note 167, at 73 (explaining why consciousness of the limitations of liberal democracy is currently so acute, including "the enduring disappointments of Western democracy").

Universal suffrage has not brought equal opportunities to exercise and influence political power. Economic and social resources continue to be asymmetrically distributed; and so on.”¹⁷⁹ Similarly, the harsh reality of scarcity conspires with liberal economic dictates to seriously undermine the promises of democracy: “[L]iberal democracy on the edge of empire is very thin indeed.”¹⁸⁰

The good governance rhetoric has also succeeded in legitimizing the particular view that Africa, in particular, and the Third World, in general, requires Western intervention to develop.¹⁸¹ Globalization may indeed reinforce, rather than weaken, cultural differentiation between Western and non-Western societies. This could trigger, in the process, culturally conservative and even reactionary backlashes capable of complicating the evolution of a global culture of human rights.¹⁸² It may also undermine the articulation of shared social and political identity essential for sustainable economic growth. The civil society, thus, will not be able to articulate its position clearly where ethnic and group solidarities inhibit the emergence of autonomous individuals acting as moral agents.¹⁸³

These criticisms notwithstanding, it may be said that the right to democratic governance is a core right and that the international community should, through the instrumentality of international law, advance and promote it, especially in developing African countries. One central problem of governance is the relationship between the State and its citizens. Consequently, the search for limitation on arbitrary government—embodied in the concept of constitutionalism—must be a universal, as opposed to merely a Western, ideal. Constitutionalism is not opposable

179. *Id.*

180. David Moore, *Neoliberal Globalisation and the Triple Crisis of 'Modernisation' in Africa: Zimbabwe, the Democratic Republic of the Congo and South Africa*, 22 *THIRD WORLD Q.* 909, 911 (2001).

181. Williams, *supra* note 168, at 150.

182. See Rhoda E. Howard, *Human Rights and the Culture Wars: Globalization and the Universality of Human Rights*, 53 *INT'L J.* 94, 94–95 (1998); see also *Human Rights Questions: Letter Dated 16 June 1993 from the Charge d'Affaires A.I. of the Permanent Mission of Indonesia, to the United Nation Addressed to the Secretary-General*, U.N. GAOR, 48th Sess., Agenda Item 115, at 9, U.N. Doc. A/48/214 (1993) (urging that human rights not “serve as a pretext to wage a political campaign against” other countries by “linking questions of human rights to economic and developmental cooperation”); Vichai Phuphatana, *Asia Rejects Pressure on Human Rights: Regional Declaration Efforts to Link Development Assistance to Rights Obligations*, *NIKKEI WEEKLY*, Apr. 12, 1993, at 20 (reporting that the Bangkok Declaration, adopted by an Asian Regional Human Rights Preparatory Meeting for World Human Rights Conference on April 5, 1993, emphasizes “non-interference in the internal affairs of states and the non-use of human rights as an instrument of political pressure”).

183. See ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* 146 (1992); see also Marantis, *supra* note 142, at 2.

to a government; it only insists on a limitation on its powers, since the opposite of constitutionalism is despotism.¹⁸⁴

This is not to say that democracy is a perfect system; it is not. In fact, as this Article indicates, many democracies have failed in Africa as, indeed, elsewhere. Even those surviving are sometimes too marked by violence and intrigues as to warrant a sanguine view of the chances for democracy. Nevertheless, these are not sufficient reasons to despair; at any rate, it is wrong to judge a philosophy by its abuse. Pessimism concerning the success of democracy enhances the likelihood that nondemocratic forms of government will prevail.

Democracy “is not even a system of government that fully embodies all democratic ideals, but one that approximates them to a reasonable degree.”¹⁸⁵ Ideologically, democracy is the only form of government that currently enjoys legitimacy.¹⁸⁶ Other than a small number of theocracies, alternatives to democracy are rejected at both ideological and political levels.¹⁸⁷ Democracy makes it possible, but by no means certain, that human rights will be protected and secured. It validates emancipatory change, and, alongside rationality, equality, and freedom, represents part of “the deeply ambiguous legacy of modernity.”¹⁸⁸

Research on wars among nations has also shown that democracies almost never fight one another, and that “since 1816, no democracy has fought another democracy.”¹⁸⁹ It has also been shown that “the more people in individual communities within a society participate in community decisions, the less fighting there is among communities in that society.”¹⁹⁰ The AU should consider this, particularly given the avalanche of inter- and intrastate conflicts that plague the continent. Furthermore, it is not true, as some insist, that development could be fostered under any type of economic or political system—including an authoritarian regime. Experience shows, to the contrary, that a democratic political system is more conducive to economic development, as well as a necessary

184. See, e.g., B.O. NWABUEZE, *CONSTITUTIONALISM IN THE EMERGENT STATES* (1973).

185. AREND LJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 4 (1977).

186. See Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 *AM. J. INT'L L.* 86, 86–87 (2001) (exploring “what empirical social science has to say about the design of democracy in the aftermath of conflicts”). Barnes also argues that “the twentieth-century struggles between alternative political and economic ideologies have largely subsided . . .” *Id.* at 87.

187. See *id.* at 87.

188. Marks, *supra* note 167, at 78.

189. Jane Mansbridge, *Politics*, in *THE TRANSITION TO DEMOCRACY: PROCEEDINGS OF A WORKSHOP*, 5 (Comm'n on Behavioral & Soc. Sci. & Educ. ed., 1991).

190. *Id.*

condition to sustainable economic development.¹⁹¹ It is generally associated with economic well-being and is, thus, better placed to meet “the most pressing social needs of citizens, particularly at moments of crisis or displacement that most affect poor people.”¹⁹²

The next Part examines how far African countries have gone in erecting the normative infrastructures of democratic governance through ratification of U.N.-inspired human rights instruments and the elaboration of regional treaties, documents, and action plans.

IV. ERECTING DEMOCRATIC NORMS IN AFRICA

Collectively, African countries have come to accept democratic governance as a basic right that they must advance. In the Addis Ababa Declaration,¹⁹³ the OAU defined the right to democracy as the right of peoples “to determine, in all sovereignty, their system of democracy on the basis of their sociocultural values, taking into account the realities of each of [the countries] and the necessity to ensure development and satisfy the basic needs of [the] peoples.”¹⁹⁴ This Part elaborates on this right, from the various instruments that African leaders have collectively adopted or ratified in recent memory. Some of the instruments to be considered are, of course, “soft” laws, defined as precepts emanating from international bodies that conform in some sense to expectations of required behavior, but that are not binding on States.¹⁹⁵ However, when frequently reiterated in subsequent textual practice, these declarations and resolutions become “hard” law, acquiring some sort of customary status.¹⁹⁶ At the moment, they are norm candidates.¹⁹⁷

191. See NRC SUMMARY, *supra* note 114, at 1.

192. UNDP Report 2002, *supra* note 63, at v.

193. See OAU, *Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World*, adopted in Addis Ababa, Ethiopia on July 11, 1990 [hereinafter Addis Ababa Decl.].

194. *Id.*

195. See Steven R. Ratner, *International Law: The Trials of Global Norms*, 110 FOREIGN POL'Y 65, 67 (1998). However, as Malcolm Shaw observed, “a document . . . does not need to constitute a binding treaty before it can exercise an influence in international politics” SHAW, *supra* note 4, at 93. See generally Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

196. See Ratner, *supra* note 195, at 68 (arguing that soft law principles represent a starting point for new hard law, which attaches a penalty to noncompliance).

197. A norm is a standard or principle of conduct that is deemed to be binding on the members of a group and serves as an instrument to guide and regulate acceptable behavior among those members. However, certain moral and legal principles or claims exist in international law—as well as domestic law—as candidates for the office or status of standards rather than as standards themselves. These legal-moral principles or claims are really

This Part starts with relevant U.N.-inspired human rights instruments that a large number of African countries have ratified. It is the logical place to begin any discussion of various normative standards on democratic governance in Africa, since the U.N. is the cradle of contemporary international protection of human rights. The paper, thereafter, looks at “home-grown” African human rights and related instruments.

*A. Adoption and Ratification of Relevant U.N.
Human Rights Instruments by African States*

Several African countries are parties to several U.N.-inspired human rights and related instruments incorporating, directly or indirectly, the right to democratic governance.

1. The U.N. Charter

All independent African countries—fifty-four at the moment—are, parties to the Charter of the United Nations. Although the Charter is an organization of States, it is written in the name of “the peoples,” an acknowledgement that ultimate sovereignty lies with the people, not the States. The Charter reaffirms the dignity and worth of the human person, dignity being the common denominator of our very humanity. It reaffirms respect for human rights, and the equal rights of men and women. It is a commitment to social progress, measured by better living standards for the world’s peoples, free from want and fear alike. These, undoubtedly, are ingredients of good governance.

The U.N. Charter also proclaims “the principle of equal rights and self-determination of peoples,”¹⁹⁸ which is stated as the basis for friendly relations among nations.¹⁹⁹ Similarly, under the now irrelevant provisions regarding non-self-governing territories, administering States pledged to “develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.”²⁰⁰ Self-determination “has evolved into a more general notion of internationally validated political consultation, one that is beginning to be applied even to independent (postcolonial) States

nominees offered by nation-states to potential voters, that is, the States. These moral and legal principles we call norm candidates. Although many such candidates are sometimes offered, not many are chosen as norms; and even when some are chosen, that choice often takes many years. See W.F. Langley, *Children as Subjects of International Law: The Conquest of the Ideology of Care-Taking*, REV. INT’L AFF. 40, 43 (1999).

198. U.N. CHARTER art. 1(2).

199. See *id.*

200. *Id.* art. 73.

... ”²⁰¹ It enjoys primacy in international law, acquiring the status of *jus cogens*—that is, a peremptory norm of international law from which no derogation is permitted.²⁰²

The U.N., over the years, has undertaken and supported several measures to promote and protect the right of self-determination, especially by encouraging and accelerating the attainment of independence by colonial African countries.

2. The UDHR and ICCPR

Although the majority of African States were not yet independent during the time of adoption of the Universal Declaration of Human Rights (UDHR) in 1948,²⁰³ at least one African country—Egypt—was involved in its deliberative processes, as a member of the Commission on Human Rights.²⁰⁴ In any event, almost all African countries have now incorporated its principles into their respective national constitutions, as have all civilized countries.

The UDHR was adopted “as a common standard of achievement for all peoples and all nations.”²⁰⁵ It provides for the right to democratic governance in these words: “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”²⁰⁶ More importantly, the UDHR proclaims the maxim *vox populi suprema lex*, by providing that “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic

201. Franck, *The Emerging Right to Democratic Governance*, *supra* note 116, at 55.

202. See Vienna Convention on the Law of Treaties, May 22, 1969, art. 53, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Id. Note that while some jurists ground *jus cogens* in either convention or custom, other publicists would only accept custom and general principles of law as possible sources. For an excellent review of these arguments, see Robert Kolb, *The Formal Source of Jus Cogens in Public International Law*, 53 *AUS. J. PUB. INT'L L.* 69 (1998).

203. See UDHR, *supra* note 77.

204. See B.G. Ramcharan, *A Debate About Power Rather Than Rights*, 4 *INT'L POL. & SOC.* 423–24 (1998) (asserting also that the Commission drew upon the constitutions and legislations of fifty-five countries “as the basis of its work in drafting the declaration”).

205. UDHR, *supra* note 77, pmbl., ¶ 8.

206. *Id.* art. 21(1).

and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”²⁰⁷

Though the UDHR is not a legally enforceable instrument, it has become “the principal conduit for bringing the idea of human rights into the life of many nations”²⁰⁸ Some have also argued that many of its provisions “constitute general principles of law or represent elementary considerations of humanity.”²⁰⁹

The adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966 crystallized the floating human rights ideals enunciated in the UDHR. It gave legal force to the UDHR, making the rights enshrined in the Declaration concrete, fixed, more precise, and sacrosanct. Significantly, several African countries are parties to this Covenant. As of June 13, 2002, forty-five African States had ratified the Covenant, while three countries—Guinea-Bissau, Liberia, and Sao Tome and Principe—had signed but not yet ratified it.²¹⁰

The ICCPR is the most significant universal human rights instrument incorporating the principles of democratic governance, one of which is the right to self-determination of peoples. It provides that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²¹¹

207. *Id.* art. 21(3).

208. Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 6 (Rudolf Bernhardt & John Anthony Jolowicz eds., 1987). For a general commentary on the provisions of the UDHR, see THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Asbjørn Eide et al. eds., 1992).

209. BROWNLEE, *supra* note 9, at 575; see also John Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 29 (B.G. Ramcharan ed., 1979) (asserting 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”); Mary Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998) (noting that the UDHR “is already showing signs of having achieved the status of a holy writ within the human rights movement” and that “[c]lubs have formed around selected provisions [of the UDHR]”).

210. See *Status of Ratifications of the Principal International Human Rights Treaties* (Dec. 9, 2002), at <http://www.unhcr.ch/pdf/report.pdf> (last visited Sept. 4, 2003) [hereinafter *Status of Ratifications*] (providing status of ratification by treaty).

211. ICCPR, *supra* note 77, art. 1(1), 999 U.N.T.S. 173, 6 I.L.M. 369; cf. ICESCR, *supra* note 78, art. 1(1), 993 U.N.T.S. 5, 6 I.L.M. 360. The current debate about self-determination regards how international law should protect the rights of minorities within a political system. The problem of national, racial, ethnic, religious, and linguistic minorities constitutes currently one of the most burning issues on the international human rights agenda. Modern human rights has matured; while it once considered only the idea of simple majority rule and political rights for all, it now takes into consideration the interests of minorities who

The ICCPR also guarantees the right to freedom of expression,²¹² assembly,²¹³ and association.²¹⁴ More importantly, every citizen is guaranteed the right and the opportunity, without any discrimination or unreasonable restriction:

(a) To take part in the conduct of public affairs, directly or indirectly through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.²¹⁵

The key words in the above provisions, as in the UDHR, include “representatives” and “freely chosen.” Similarly, the “will” of the people must be expressed in elections, which must be “periodic” and must be “genuine.” The Covenant also demands for “secret ballot,” though the UDHR uses “equivalent free voting procedure.” Finally, such election must be by “universal and equal suffrage.” These rights may, of course, be derogated, but only in exceptional circumstances, such as “[i]n time of public emergency that threatens the life of the nation.”²¹⁶ Such public emergency must, however, be officially proclaimed.²¹⁷ Besides, the

experience difficulty in making bodies of power consider their special position and interests. See Maxim Smyslov, Book Review, 4 EUR. J. INT'L L. 137 (1993) (reviewing PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991)). A minority in this context could be defined as a group numerically inferior to the rest of the population, in a non-dominant position, consisting of nationals of the State, possessing distinct ethnic, religious or linguistic characteristics and showing a sense of solidarity aimed at preserving those characteristics. See Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶ 568, UN Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78XIV.1 (1979). See generally PEOPLES' RIGHTS (Philip Alston ed., 2001); THE RIGHTS OF PEOPLES (James Crawford ed., 1988); ZELIM SKURBATY, AS IF PEOPLES MATTERED: A CRITICAL APPRAISAL OF 'PEOPLES' AND 'MINORITIES' FROM THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE AND BEYOND (2000); Caroline Foster, *Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples*, 12 EUR. J. INT'L L. 141 (2001).

212. ICCPR, *supra* note 77, art. 19, 999 U.N.T.S. 178, 6 I.L.M. 374.

213. *Id.* art. 21, 999 U.N.T.S. 178, 6 I.L.M. 374.

214. *Id.* art. 22, 999 U.N.T.S. 178, 6 I.L.M. 374–75.

215. *Id.* art. 25, 999 U.N.T.S. 179, 6 I.L.M. 375. For a general commentary on the provisions of the ICCPR, including those on democratic governance considered above, see MANFRED NOWAK, *UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENT* (1993).

216. ICCPR, *supra* note 77, art. 4(1), 999 U.N.T.S. 174, 993 I.L.M. 369–70.

217. *See id.*

derogation measures must not entail breaches of the State Parties' other obligations under international law.²¹⁸

The ICCPR imposes immediate and readily identifiable obligations on State Parties. For example, each party "undertakes"—an obligation of conduct²¹⁹— "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."²²⁰ State Parties also undertake to ensure that an effective remedy is available for violations of the rights enshrined in the Covenant; to provide for determination of claims by "competent judicial, administrative or legislative authorities;" and "to enforce such remedies when granted."²²¹ The ICCPR particularly mandates State Parties to "promote the realization of the right to self-determination," and to respect it in conformity with the U.N. Charter.²²²

3. Other Multilateral Human Rights Instruments

African countries have ratified other multilateral human rights instruments which, *inter alia*, guarantee the right to democratic governance. These include the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention)²²³ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²²⁴ Forty-seven African States have ratified the Race Convention, while three—Comoros, Guinea-Bissau, and Sao Tome and Principe—have signed but not yet ratified.²²⁵ Under the Race Convention, States agree to guarantee equality before the law with respect to a wide range of civil, political, economic, social, and cultural rights, and to prohibit and penalize the dissemination of propaganda based on the idea of racial superiority or that incite racial hatred. They also commit themselves "to pursue by all appropriate means and without delay a policy

218. *See id.*

219. *See* Egon Schwelb, *The Nature of Obligations of the States Parties to the International Covenant on Civil and Political Rights*, in *AMICORUM DISCIPULORUMQUE LIBER: PROBLÉMS DE PROTECION INTERNATIONALE DE DROITS DE L'HOMME* 302 (René Cassin ed., 1969); *see also* Anja Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 ¶ 2 (sic)*, 5 *MAX PLANCK Y.B. UNITED NATIONS L.* 399, 402 (2001).

220. *See* ICCPR, *supra* note 77, art. 2(2), 999 U.N.T.S. 173–74, 6 I.L.M. 369.

221. *See id.* art. 2(3), 999 U.N.T.S. 174, 6 I.L.M. 369.

222. *See id.* art. 1(3), 999 U.N.T.S. 173, 6 I.L.M. 369.

223. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 85 [hereinafter Race Convention].

224. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14 [hereinafter CEDAW].

225. *See also* *Status of Ratifications*, *supra* note 210.

of eliminating racial discrimination in all its forms and promoting understanding among all races.”²²⁶

Similarly, forty-eight African States have ratified the CEDAW,²²⁷ often described as an international bill of rights for women. The Convention condemns discrimination against women in all its forms. It provides the basis for realizing equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life—including the right to vote and to stand for election—as well as education, health, and employment.²²⁸

Many African countries also participated in and, in fact, were influential to, the adoption of the U.N. Declaration on the Right to Development.²²⁹ Aspects of the Declaration are relevant to the discourse on the right to democratic governance. The Declaration, *inter alia*, requires States “to formulate appropriate national development policies that 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 the benefits resulting there from.”²³⁰ States also “undertake, at the national level, all necessary measures for the realization of the right to development” and agree 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.”²³¹

226. See Race Convention, *supra* note 223, art. 2(1).

227. See *Status of Ratifications*, *supra* note 210.

228. See generally HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994) (showing the multiplicity of problems and perspectives on issues affecting women and linking them with efforts to have human rights instruments applied correctly in order to repair the gender-based injustice experienced by women).

229. See United Nations Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986) [hereinafter Declaration on Development]; Nsongurua Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium*, 22 HUM. RTS. Q. 753 (2000) [hereinafter *The Third World*].

230. Declaration on Development, *supra* note 229, art. 2(3).

231. *Id.* art. 8(1).

B. African Regional Instruments and Action
Plans on Democratic Governance

1. The African Charter and Commission
on Human and Peoples' Rights

The African Charter²³² was the first major collective effort towards taking human rights seriously in Africa.²³³ It was the first significant attempt by African States to defeat the “efforts by votaries of sovereignty and the *domain reserve* to shield abuse of human rights by State officials through the argument that how a State treats its nationals was its exclusive business.”²³⁴ The Charter guarantees civil and political rights,²³⁵ economic, social, and cultural rights²³⁶ as well as group or peoples' rights.²³⁷ It guarantees to every citizen “the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”²³⁸ The African Commission on Human and Peoples' Rights (“African Commission”)—the only existing regional mechanism for the implementation of the African Charter²³⁹—has interpreted the Charter's provisions broadly. Thus, according to the Commission, the right to free participation entails, *inter alia*, the right to vote for the representative of one's choice and a duty to respect the results of that choice, since a breach of that duty will render the right of free expression of the will of the voters meaningless.²⁴⁰

The African Charter contains the important right to self-determination. According to the Charter, “[a]ll peoples shall have the right to existence. They shall have the *unquestionable and inalienable* right to self-determination. They shall freely determine their political status and shall pursue their economic and social development *according*

232. See AFRICAN CHARTER, *supra* note 80.

233. See *Can a Leopard Change Its Spots?*, *supra* note 30, at 1207, 1206–67 (also describing the Charter as “presumably Africa's trumpet of liberty blowing over the land of the living”).

234. Oyeboode, *supra* note 140, at 86.

235. See AFRICAN CHARTER, *supra* note 80, arts. 2–13.

236. See *id.* arts. 14–18.

237. See *id.* arts. 19–23.

238. *Id.* art. 13.

239. The mandate of the Commission includes the promotion and protection of human rights and interpretation of the Charter at the request of States Parties or African Intergovernmental Institutions. See *id.* arts. 30 & 45.

240. *Communication 102/93, Constitutional Rights Project and Civil Liberties Organisation v. Nigeria (Afr. Comm'n)*, in TWELFTH ANNUAL ACTIVITY REPORT, *supra* note 35, ¶¶ 50, 53 [hereinafter *Communication 102/93*] (holding that the annulment of results of a free and fair election in Nigeria, adjudged to be free and fair by international observers, was a violation of article 13(1) of the African Charter).

to the policy they have freely chosen.”²⁴¹ The right of a people to determine their “political status” is a counterpart of article 13 and involves the right of citizens to be able to choose freely those persons or party that will govern them.²⁴² Government by force is incompatible with the rights of peoples to freely determine their political future. Consequently, any forcible conquest of government by any group contravenes articles 13(1) and 20(1) of the Charter.²⁴³ Indeed, the Charter declares a further right to liberation from the bonds of domination,²⁴⁴ which, it is submitted, is not limited to colonial situations but should be extended to include internal domination by whatever shape and form, including military regimes. For such “liberation struggles,” the Charter enjoins assistance from other State Parties.²⁴⁵

The Charter guarantees the independence of the courts. This is crucial, since courts are vanguards of the democratic process and the bastion of the protection of the rights of individuals against the abuses of State power.²⁴⁶ The Charter provides that “States Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”²⁴⁷ The African Commission has held that article 26 of the African Charter speaks of the institutions that are essential to give meaning and content to the rights, and clearly envisions the protection of the courts.²⁴⁸ Under the *General Guidelines Regarding the Form and Contents of Reports from States on Civil and Political Rights*, issued by the Commission,²⁴⁹ each state party to the African Charter must report, *inter alia*, on “[w]hat judicial, administrative or other authorities have jurisdiction affecting human and

241. AFRICAN CHARTER, *supra* note 80, art. 20(1) (emphasis added).

242. See Communication 102/93, *supra* note 240, ¶ 52.

243. See *Resolution on the Military*, *supra* note 122, pmbi., ¶ 4.

244. See AFRICAN CHARTER, *supra* note 80, art. 20(2).

245. *Id.* art. 20(3).

246. See, e.g., Communication 129/94, *Civil Liberties Organization v. Nigeria*, in NINTH ANNUAL ACTIVITY REPORT 1995–96, Annex VIII, ¶ 14 [hereinafter Communication 129/94].

247. AFRICAN CHARTER, *supra* note 80, art. 26.

248. See Communication 129/94, *supra* note 246, at ¶ 14.

249. See AFR. COMM’N, SECOND ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, ANNEX X: COMMISSION GUIDELINES FOR NATIONAL PERIODIC REPORTS, pt. I (adopted on June 14, 1989), *reprinted in* 11 HUM. RTS. L.J. 390, 405–07. The guidelines were issued pursuant to the African Charter, *supra* note 80, art. 62 (providing that “[e]ach State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report 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”).

peoples' rights,"²⁵⁰ and "[w]hat remedies are available to an individual whose rights are violated."²⁵¹ Significantly, the African Charter, unlike most other human rights treaties, does not permit any derogation of the rights in any circumstance.

Generally, civil and political rights are predicated on the rule of law, and the rule of law presupposes a form of organization that limits and controls authority to safeguard freedom.²⁵² These rights find their utmost expressions under constitutional democracies, as opposed to military regimes or one-party dictatorships that clothe government with omnipotence. As the African Commission observed, "the best government is one elected by, and accountable to, the people."²⁵³ Aristotle wrote several centuries ago that:

He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; [but] he who commands that a man should rule adds the character of the beast. Appetite has that character; and . . . perverts the holders of office, even when they are the best of men.²⁵⁴

The African Charter adds a catalogue of political duties, which are at the core of political participation, and which the Charter describes as "the obligation of solidarity."²⁵⁵ It provides that "[e]very individual shall have duties towards . . . society, the State and other legally recognized communities and the international community."²⁵⁶ He shall also have the duty, *inter alia*,

[T]o serve his national community by placing his physical and intellectual abilities at its service; [n]ot to compromise the security of the State whose national or resident he is; [t]o preserve and strengthen social and national solidarity, particularly when the latter is threatened; [and] [p]reserve and strengthen the na-

250. *Id.* ¶ 4(iii).

251. *Id.* ¶ 4(iv).

252. See *Promotion and Consolidation of Democracy*, *supra* note 113, ¶ 14 (citing Manuel Aragón Reyes, *Estado y Democracia (State and Democracy)*, in MANUEL ARAGÓN REYES, ET AL., *EL DERECHO PUBLICO DE FINALES DE SIGNO: UNA PERSPECTIVA IBEROAMERICANA* 43 (1997)).

253. See *Resolution on the Military*, *supra* note 122, pmb1., para. 2.

254. ARISTOTLE, *THE POLITICS OF ARISTOTLE*, bk. III, ch. XVI, 1287a (E. Barker trans., Oxford Univ. Press 1968); cf. C.S. Lewis, *Membership*, in *THE WEIGHT OF GLORY* 126 (Touchstone 1996) (1949) (asserting that the true ground of democracy is the belief that "men [are] so wicked that not one of them can be trusted with any irresponsible power over his fellows.").

255. AFRICAN CHARTER, *supra* note 80, art. 10(2).

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

tional independence and the territorial integrity of his country and contribute to its defence in accordance with the law²⁵⁷

He must also preserve and strengthen positive African values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, contribute to the promotion of the moral well-being of society; and contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.²⁵⁸

The African Commission also has developed a number of soft laws, in the form of resolutions, to complement the normative provisions of the Charter. Few of these touch on the right to democratic governance but the foremost of them is the Commission's Resolution on Electoral Process and Participatory Governance, adopted during the Commission's Nineteenth Ordinary Session at Ouagadougou, Burkina Faso in 1996.²⁵⁹ The resolution affirmed and asserted that "elections are the only means by which the people can elect democratically the government of their choice in conformity to the African Charter"²⁶⁰ It called on states party to the Charter to take necessary measures to preserve and protect the credibility of the electoral process,²⁶¹ including the presence of national and international observers during the elections. Access to the electoral process and personal safety should be guaranteed, to enable such observers to fulfill their mission and prepare their report on elections in a proper manner.²⁶² The resolution ordered African countries and institutions to participate in observation of elections in State Parties.²⁶³ It emphasized that States Parties should provide those tasked with organizing elections with "adequate material resources and any items necessary for the preparation and holding of elections."²⁶⁴

2. The Addis Ababa Declaration

The OAU adopted the Addis Ababa Declaration in 1990.²⁶⁵ The Declaration acknowledged that the promotion of popular participation of

257. See *id.* art. 29.

258. *Id.*

259. See *Resolution on Electoral Process and Participatory Governance* [hereinafter *Resolution on Electoral Process*], in RECOMMENDATIONS AND RESOLUTIONS, *supra* note 122, at 34.

260. *Id.* ¶ 1.

261. *Id.* ¶ 3.

262. See *id.*

263. *Id.* ¶ 5.

264. *Id.* ¶ 4.

265. See Addis Ababa Declaration, *supra* note 193.

African people in the process of government and development would facilitate the process of socioeconomic transformation and integration of the continent.²⁶⁶ Consequently, a

political environment which guarantees human rights and the observance of the rule of law, would assure high standards of probity and accountability particularly on the part of those who hold public office. In addition, popular-based political processes would ensure the involvement of all including in particular women and youth in the development efforts. We accordingly recommit ourselves to the further democratisation of our societies and to the consolidation of democratic institutions in our countries.²⁶⁷

3. The Algiers Declaration

In 1999, the OAU carried its democracy crusade to Algiers, with the adoption of the Algiers Declaration.²⁶⁸ The Declaration reflected on the demise of colonialism in Africa and stressed that the struggle for independence “contributed significantly in inculcating in the peoples and nations of the continent the universal principles of the right of peoples to be the architect of their own destiny.”²⁶⁹ It noted the positive changes that human rights have undergone since African States attained political independence, such as the liberation movements and the codification and implementation of a number of human rights instruments.²⁷⁰ The Declaration, however, admitted “much remains to be done to bring these developments to the level of our own expectations and the legitimate aspirations of our peoples.”²⁷¹ Nevertheless, African leaders pledged their determination to transcend these problems.²⁷²

The Declaration reiterated the OAU’s commitment to protect and promote human rights and fundamental freedoms.²⁷³ It emphasized the indivisibility, universality, and interdependence of all human rights, whether they are political and civil, economic, social, and cultural, individual, or collective. More importantly, African leaders expressed their conviction that

266. *Id.*

267. *Id.*

268. *Algiers Declaration, supra* note 18.

269. *Id.* para. 2.

270. *Id.*

271. *Id.* para. 16.

272. *Id.*

273. *See id.* para. 17.

the increase in, and expansion of the spaces of freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modern African States underpinned by the rule of law, respect for the fundamental rights and freedoms of the citizens and the democratic management of public affairs.²⁷⁴

4. The Lome Declaration

The Lome Declaration was adopted at the Thirty-sixth Ordinary Session of the OAU Assembly in Lome, Togo, in July, 2000.²⁷⁵ The Declaration lamented the many woes that have befallen Africa over the years. These inflictions include conflicts and acts of violence,²⁷⁶ the problem of refugees and internal displacements,²⁷⁷ and the deterioration of the prices of raw materials and the obstacles to international trade.²⁷⁸ Others are the indebtedness of African countries,²⁷⁹ and cross-border crime including trafficking of small arms and light weapons, drug trafficking, corruption, and terrorism.²⁸⁰ The Declaration recognized that poverty, hunger, disease, injustice, illiteracy, and war constitute major impediments to the development and advancement of African citizens;²⁸¹ and that “development, democracy, respect for fundamental freedoms and human rights, good governance, tolerance, [and a] culture of peace are essential prerequisites for the establishment and maintenance of peace, security and stability.”²⁸²

The Declaration was not all a tale of woes, for the OAU Assembly also plotted ways out of these “pothole and gully” indexes. Of particular relevance was their commitment “to continue to promote respect and protection of human rights and fundamental freedoms, democracy, rule

274. *Id.* para. 18.

275. *Lome Declaration*, OAU Doc. AHG/Decl.2 (XXXVI) (July 12, 2000), at <http://www.uneca.org/itca/ariportal/lome.htm> (last visited Sept. 10, 2003) [hereinafter *Lome Declaration*].

276. *Id.* pmbl.

277. *Id.*

278. *Id.*

279. *Id.* (pointing out also that such indebtedness has “negative effect[s] on African economies” and decrying “the persistent decline of ODA [official development assistance] and investments”).

280. *Id.* (stressing that such acts threaten the security and stability of Africa, and hamper its economic and social development).

281. *Id.* African leaders were also concerned about the worsening plight of millions of African children due to war, their conscription for armed conflicts, and general exploitation.

282. *Id.*

of law and good governance in our countries.”²⁸³ This is probably a statement that is born out of experience, as Africa has experienced crisis of security for more than four decades mainly due to political instability. They have, thus, acknowledged that there can be no peace without democracy. The OAU also pledged to reduce poverty in Africa, as part of the implementation of the Plan of Action pursuant to the Libreville Summit Declaration, and the Social Summit of Copenhagen.²⁸⁴

5. The Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government

Coup d’etat, as noted earlier, have been a major problem in Africa,²⁸⁵ causing political, economic and social problems for the continent and its peoples.²⁸⁶ The Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government was adopted in 2000 as an expression of concern by the OAU over the problem of *coup d’etat* in Africa.²⁸⁷ The Declaration proclaims a continent-wide commitment to democracy and attempts to give substance to that commitment by setting out “common values and principles for democratic governance [in African countries].”²⁸⁸ It firmly rejects unconstitutional change in government as “an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions.”²⁸⁹

The Declaration articulated certain common values and principles for democratic governance in Africa. These are:

- (i) adoption of a democratic Constitution: its preparation, content and method of revision should be in conformity with generally acceptable principles of democracy; (ii) respect for the Constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament; (iii) separation of powers and independence of the judiciary; (iv) promotion of political pluralism or any other form of participatory democracy

283. *Id.* ¶ 13.

284. *Id.* ¶ 17.

285. *See Resolution on the Military, supra* note 122, pmb., para. 1 (“Recalling the intervention in African States by the military during the past three decades, and the fact that only very few states have escaped this phenomenon . . .”).

286. *See id.* pmb., para. 5 (noting that military interventions “stultify political development and antagonize relations between national groups”).

287. *See Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc. AHG/Decl. 5 (XXXVI) (2000), at <http://esa.un.org/ffd/policydb/PolicyTexts/aec-1.htm> (last visited Sept. 4, 2003) [hereinafter *Declaration on Unconstitutional Changes*].

288. *Id.*

289. *Id.*

and the role of the African civil society, including enhancing and ensuring gender balance in the political process; (v) the principle of democratic change and recognition of a role for the opposition; (vi) organization of free and regular elections, in conformity with existing texts; (vii) [the] guarantee of freedom of expression and freedom of the press, including guaranteeing access to the media for all political stake-holders; (viii) constitutional recognition of fundamental rights and freedoms in conformity with the [UDHR and the African Charter]; [and] (ix) [the] guarantee and promotion of human rights.²⁹⁰

African leaders defined the situations that constitute an unconstitutional change of government as the following:

(i) military *coup d'état* against a democratically elected Government; (ii) intervention by mercenaries to replace a democratically elected Government; (iii) replacement of democratically elected Governments by armed dissident groups and rebel movements; [and] (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections.²⁹¹

The occurrence of any of these situations should trigger a number of actions.²⁹² First, the Secretary-General of the OAU “should immediately and publicly condemn such a change and urge the speedy return to constitutional order.”²⁹³ Second, he “should also convey a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized by the OAU.”²⁹⁴ The OAU appears to be firmly committed not to seat a delegation sent by the usurping regime.²⁹⁵ Furthermore, the Chairman of the OAU, the Secretary-General of the OAU, or any Member State can request a meeting of the OAU Central Organ to condemn the unconstitutional change.²⁹⁶ If the Central Organ condemns the change, a six-month period is given to the usurpers to restore constitutional government.²⁹⁷ During this period, “the government concerned should be

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *See id.*

suspended from participating in the Policy Organs of the OAU.”²⁹⁸ Where, however, there is no restoration of constitutional order after six months, “a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted.”²⁹⁹ The Declaration established a Sanctions Subcommittee of the General Organ to monitor compliance with decisions of the Central Organ.³⁰⁰ It should be noted that virtually all of these steps appear to be mandatory—the Declaration provides that actions “should” be taken, as opposed to “may.”³⁰¹

The import of this Declaration will better be appreciated by looking at the practice of states in recent times. Prior to the above Declaration, some sub-regional groupings in Africa had begun to react adversely and, sometimes, violently, to attempted or actual unconstitutional changes of government in neighboring countries. The activities of the Economic Community of West African States Monitoring Group (ECOMOG) deserve special emphasis.³⁰² The ECOMOG has been described as “a unique example of intervention on a multilateral basis in Liberia and Sierra Leone.”³⁰³ On May 25, 1997, for example, some rebel groups in Sierra Leone, led by a group of military officers, staged a coup and forcibly took power from the legitimate government of Tejan Kabbah.³⁰⁴ On February 12, 1998, the ECOMOG succeeded, after six days of fierce

298. *Id.*

299. *Id.*

300. *See id.*

301. *See id.*

302. *See generally* REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS (M. Weller ed., 1994) (describing how the Economic Community of West African States (ECOWAS), originally designed as a subregional organization for the pursuit of economic and social goals, became involved in an internal conflict within Liberia, eventually helping to resolve the conflict through the establishment of the ECOWAS Mediating Standing Committee in 1990). The text further notes that not all ECOWAS members participated in the force, though decisions, which included calling for a cease-fire between the warring parties and establishing a cease-fire observing force called the ECOWAS Military Observer Group (subsequently approved by the ECOWAS Heads of State and Government), were taken on behalf of the Authority of the Heads of State and Government. *Id.*; *see also* Edward Kwakwa, *Internal Conflicts in Africa: Is there a Right of Humanitarian Action?*, 2 AFR. Y.B. INT'L L. 9 (1994) (examining the law and policy issues involved in situations where there is internal conflict within a domestic jurisdiction and the international community intervenes).

303. Adebayo Adedeji, *Comprehending African Conflicts*, in COMPREHENDING AND MASTERING AFRICAN CONFLICTS 3 (Adebayo Adedeji ed., 1999).

304. *See* AMNESTY INT'L REPORT 1998, at 298 (1998) (reporting on how the Armed Forces Revolutionary Council (AFRC), which took power in May 1997, was subsequently joined by the Revolutionary United Front (RUF) and on how these rebels “assumed extensive powers of detention, without safeguards against arbitrary arrest or indefinite detention without charge or trial.”).

battle, in crushing the rebellion and restoring Kabbah to power. The U.N. Security Council later endorsed ECOMOG's activities in Sierra Leone.³⁰⁵

Space does not permit other illustrative cases; suffice it to mention the mass and violent reaction to the attempted overthrow of a democratic government in Côte d'Ivoire a few years ago. Another recent attempt to truncate democratic rule in this unfortunate African country was met with international condemnation.³⁰⁶ It may be predicted that Africa is likely to witness more mass protests and multilateral interventions in the future in order to secure democratic entitlements. This points to a crystallization of the right to democratic governance in Africa. Africa is slowly but surely entering a brave new world "in which the citizens of each State will look to international law and organization to guarantee their democratic entitlement."³⁰⁷

6. The African Union Act

African leaders adopted the AU Act on July 11, 2000³⁰⁸ to replace the OAU Charter.³⁰⁹ The Act establishes the AU as a political, economic, and social organization, and provides the basis of its operation. The AU is established "to take up the multifaceted challenges that confront [the African] continent and peoples in the light of the social, economic, and political changes taking place in the world."³¹⁰ It is established, in particular, "to accelerate the process of implementing the Treaty establishing the African Economic Community (AEC) in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization."³¹¹ Its architects claim they are guided by a "common vision of a united and strong Africa and by the need to build a partnership between governments and all segments

305. See S.C. Res. 1132, U.N. SCOR, 3822d mtg., U.N. Doc. S/RES/1132 (1997).

306. See, e.g., *Communiqué* ¶ G(4), in EIGHTY-SIXTH ORDINARY SESSION OF THE CENTRAL ORGAN OF THE MECHANISM FOR CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION AT AMBASSADORIAL LEVEL, A.U. Doc. Central Organ/MEC/AMB/Comm. (LXXXVI) (2002), at http://www.africa-union.org/News_Events/Communiqués/86th%20Communiqué%20_Eng_%2029-10-02.pdf (last visited Sept. 4, 2003) ("welcoming the Decision of the Summit of Heads of State and Government of the ECOWAS Contact Group held in Abidjan on 23 October 2002, for the rapid deployment of a Monitoring Group to supervise the cessation of hostilities and maintain a climate conducive to dialogue between the Government and the assailants."). The communiqué also "appealed to the International Community to provide ECOWAS with all the necessary assistance to facilitate the successful conclusion of its peace efforts, particularly by providing the requisite logistics and financial assistance for the deployment of the Monitoring Group." *Id.* ¶ G(7).

307. Franck, *The Emerging Right to Democratic Governance*, *supra* note 116, at 50.

308. See AU Act, *supra* note 10.

309. *Id.* art. 33(1), 2000 AFR. Y.B. INT'L L. 479, 490.

310. *Id.* prml., para. 5, at 481-82.

311. *Id.* prml., para. 6, at 482.

of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among [African] peoples.³¹²

Significantly, the AU promises to ensure good governance and the rule of law, to “promote and protect human and peoples’ rights, [and to] consolidate democratic institutions and culture.”³¹³ It also promises to “take all necessary measures” to strengthen common African institutions, and to provide them with the necessary powers and resources that would enable them [to] discharge their respective mandates effectively.³¹⁴ These are wonderful promises, but past experiences make them sound hollow. It is true that African governments have established many democratic institutions, such as the judiciary and the media; but it is equally true, and far more self-evident, that African rulers have so emasculated these institutions as to render them useless. They seem more comfortable with weak rather than strong democratic institutions! Thus, it will require more than rhetoric to resuscitate and strengthen these institutions for optimal performance.

The AU Act contains many aims, some of which relate to democratic governance, such as the promotion of peace, security, and stability on the continent,³¹⁵ and the promotion of democratic principles and institutions, popular participation, and good governance.³¹⁶ The Union will also promote and protect human and peoples’ rights, as articulated in the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.³¹⁷ It will promote cooperation in all fields of human endeavor, in order to raise the living standards of African peoples,³¹⁸ an implicit acknowledgement that living standards are low in the continent.

Among the principles that will underpin the AU’s activities are the participation of all the African peoples in the activities of the Union;³¹⁹ promotion of gender equality;³²⁰ and respect for democratic principles, human rights, the rule of law, and good governance.³²¹ Other important principles are the promotion of social justice to ensure balanced economic development;³²² respect for the sanctity of human life, and the condemnation of political assassination—which has become a defining

312. *Id.* pmb., para. 7.

313. *Id.* pmb., para. 9.

314. *Id.* pmb., para. 10.

315. *See id.* art. 3(f), at 484.

316. *Id.* art. 3(g).

317. *Id.* art. 3(h).

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

319. *Id.* art. 4(c).

320. *Id.* art. 4(l), at 485.

321. *Id.* art. 4(m).

322. *Id.* art. 4(n).

feature of politics in many African countries such as Nigeria—, acts of terrorism, and subversive activities.³²³ States party to the Act must condemn and reject unconstitutional changes of governments.³²⁴ In particular, “[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”³²⁵ The rejection of unconstitutional forms of government is on its way to becoming customary international law in Africa.

Significantly, the AU Act establishes a Pan-African Parliament (PAP) “to ensure the full participation of African peoples in the development and economic integration of the continent.”³²⁶ The Protocol on the Parliament has already been adopted,³²⁷ in accordance with the Act.³²⁸ The Protocol, which will enter into force after the deposit of the instruments of ratification by a simple majority of the Member States,³²⁹ establishes the PAP to “represent all the peoples of Africa.”³³⁰ The ultimate aim of the PAP is to develop “an institution with full legislative powers, whose members are elected by universal adult suffrage.”³³¹

The PAP will facilitate the effective implementation of the policies and objectives of the AEC and the AU as well as cooperation and development in Africa.³³² It will promote the principles of human rights and democracy in Africa and encourage good governance, transparency, and accountability in Member States.³³³ The PAP will also familiarize the peoples of Africa with those objectives and policies that seek to integrate Africa within the framework of the establishment of the AU; promote peace, security, and stability; contribute to a prosperous future for the peoples of Africa by promoting collective self-reliance and economic recovery; strengthen continental solidarity and build a sense of common

323. *Id.* art. 4(o).

324. *Id.* art. 4(p).

325. *Id.* art. 30, at 493.

326. *Id.* art. 17(1), at 490.

327. See Protocol to the AEC Treaty to establish the Pan-African Parliament, Assembly Decision EAHG/Dec.2 (V) (2001) [hereinafter PAP Protocol]. Twenty-one Member States have so far signed the Protocol while three countries have ratified it. See *Transition from the OAU to the African Union*, at http://www.au2002.gov.za/docs/background/oau_to_au.htm (last visited July 15, 2003).

328. See AU Act, *supra* note 10, art. 17(2), 2000 AFR. Y.B. INT’L L. 479, 490.

329. See PAP Protocol, *supra* note 327, art. 22.

330. *Id.* art. 2(2).

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

332. *Id.* art. 3. For an analysis of the PAP and other institutions of the AU, see Nsongurua Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT’L L.J. 69, 101 (2002) [hereinafter *Institutional Structure*].

333. *Institutional Structure*, *supra* note 332.

destiny among the peoples of Africa; and facilitate cooperation among Regional Economic Communities (RECs) and Parliamentary fora.³³⁴

7. The New Partnership for Africa's Development

On October 23, 2001, African leaders, meeting in Abuja, Nigeria, launched "a development strategy" known as the New Partnership for Africa's Development (NEPAD).³³⁵ Described as "a holistic, comprehensive integrated strategic framework for the socio-economic development of Africa,"³³⁶ NEPAD seeks to give impetus to African development by bridging gaps between the continent and the developed world. It provides the vision for Africa, a statement of the problems facing the continent, and a Program of Action to tackle the problems in order to attain the beatific vision.³³⁷

Through the partnership, African leaders have agreed to strengthen mechanisms for conflict prevention, management, and resolution; promote and protect democracy and human rights by developing standards for accountability; run a transparent and participatory government; restore and maintain macroeconomic stability; implement transparent legal and regulatory frameworks for financial markets; revitalize and extend education, technical training, and health care services; promote women's role in social and economic development; and promote the development of infrastructure, agriculture, agro-processing, and manufacturing to meet the needs of export and domestic markets that will generate local employment. NEPAD notes that Africa "undertakes to respect the global standards for democracy, the core concepts of which include political pluralism" and fair elections that allow people freely to choose their leaders.³³⁸ Consequently, African states promise to:

[C]onsolidate democracy and sound economic management on the continent. Through the Programme, African leaders are making a commitment to the African people and the world to work together in rebuilding the continent. It is a pledge to promote peace and stability, democracy, sound economic management and people-centred development, and to hold each

334. *Id.*

335. See OAU, *The New Partnership for Africa's Development* (Oct. 2001), at <http://www.iss.co.za/AF/RegOrg/nepad/nepaddoc.pdf> (last visited Sept. 4, 2003) [hereinafter *NEPAD*].

336. Dep't Foreign Aff., *NEPAD Background I: Introducing the New Partnership for Africa's Development* (Feb. 2002), at <http://www.dfa.gov.za/docs/nepad1.htm> (last modified Feb. 28, 2002).

337. *Id.*

338. *NEPAD*, *supra* note 335, ¶ 79.

other accountable in terms of the agreements outlined in the Programme.³³⁹

In sum, NEPAD emphasizes certain success factors as imperatives to the achievement of its set goals. These include peace, security, democracy, and good political governance,³⁴⁰ improved economic and corporate governance,³⁴¹ and regional cooperation and integration.³⁴² The democracy component embodies free and fair elections as well as democratic institutions, respect for human rights, including the rights of women and children, as well as transparency in public management. The political governance initiative consists of commitments by participating countries to create or consolidate basic governance and practices and to take the lead in supporting initiatives that foster good governance. It also institutionalizes commitments through the leadership of the NEPAD to ensure that the core values of the initiative are followed after regime changes in participating countries.

NEPAD also develops a mechanism of peer review. Known as the African Peer Review Mechanism (APRM), the document will be used by Member States of the AU “for the purpose of self-monitoring,” and is aimed “to foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration in the continent.”³⁴³ It is also intended to enhance the capability of States, to increase the effectiveness of aid, to stem policy reversals, and, thus, to accelerate development. Undoubtedly, the collective action, mutual learning, and support implicit in the APRM can have great benefits, as it will demonstrate to African citizens and the international community that African states have the political will and commitment to abide by codes and standards that they set for themselves.

The APRM appears to be a transitional arrangement by African leaders, in view of the fact that the AU Act has provided for similar mechanisms for enforcement through the PAP and the African Court of Justice. However, as these institutions and processes are yet to be in place, the Heads of State and Government Implementation Committee

339. *Id.* ¶ 202; *see also id.* ¶¶ 7, 43, 49, 80, 183.

340. *See id.* ¶ 71.

341. *See id.* ¶¶ 86–89.

342. *See id.* ¶ 91.

343. Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD), ¶ 6; OAU Assembly of Heads of State and Government, 38th Ord. Sess. ASS/AU/Decl.1(1) (July 8, 2002), at [http://www.avmedia.at/cgi-script/csNews/news_upload/NEPAD_2dCORE_2dDOCUMENTS_2edb.Assembly.AU.DeclonImplNEPAD090902.1\(1\).doc](http://www.avmedia.at/cgi-script/csNews/news_upload/NEPAD_2dCORE_2dDOCUMENTS_2edb.Assembly.AU.DeclonImplNEPAD090902.1(1).doc) (last visited Sept. 4, 2002).

decided to implement the APRM through the NEPAD. To be credible and effective, however, the APRM must be firmly anchored in rigorous monitoring and evaluation of performance.³⁴⁴

8. The Declaration on the Principles Governing Democratic Elections in Africa

On July 8, 2002, the OAU, at its Thirty-eighth Ordinary Session, adopted the Declaration on the Principles Governing Democratic Elections in Africa.³⁴⁵ The Declaration was the sequel to an earlier report of the OAU Secretary-General on how to strengthen the role of the OAU in election observation and monitoring “in order to advance the democratization process.”³⁴⁶ It acknowledged earlier instruments that had elaborated on democracy, democratic institutions, accountability, and participatory governance in Africa. It acknowledged the African Charter for Popular Participation in Development, adopted in Addis Ababa, Ethiopia, in July 1990,³⁴⁷ which emphasized “the need to involve the people of Africa in the spheres of economic and political governance.”³⁴⁸ It also acknowledged the Cairo Agenda for Action adopted in Cairo, Egypt, in 1995, which stressed the necessity of ensuring good governance “through popular participation based on the respect for human rights and dignity, free and fair elections, as well as on the respect of the principles of freedom of the press, speech, association and conscience.”³⁴⁹

The Declaration asserted that “[d]emocratic elections are the basis of the authority of any representative government,”³⁵⁰ and that “[r]egular elections constitute a key element of the democratization process.”³⁵¹ The Declaration further states that such periodic elections—which often are

344. See Nsongurua 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 (2002) (examining the reasons for failures of past efforts at economic and political integration in Africa and suggesting ways toward making the current efforts succeed).

345. See OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, OAU Assembly of Heads of State and Government, 38th Ord. Sess., A.U. Doc. AHG/Decl. 1(XXXVIII) (July 8, 2002), at <http://au2003.gov.MZ/key-documentation/oaudec.pdf> (last visited Sept. 4, 2003) [hereinafter Declaration on Principles of Democratic Election].

346. *Id.* pmbl.

347. The author has been unable to access this important Charter, as well as the Cairo Agenda for Action; thus, the Article relies on aspects cited in the Declaration on Principles of Democratic Election, *supra* note 345, pmbl., para. 9.

348. Declaration on Principles of Democratic Election, *supra* note 345, pmbl.

349. *Id.* pmbl.

350. *Id.* ¶ II(1).

351. *Id.* ¶ II(2).

few and far between in Africa—are necessary in order to maintain and promote peace, security, stability, and development, as they play “an important role in conflict prevention, management, and resolution.”³⁵² The Declaration, thus, lays down principles for the conduct of democratic elections. Elections, according to the Declaration, should be conducted “freely and fairly and under democratic constitutions and in compliance with supportive legal instruments.”³⁵³ Specifically, “elections should be conducted under a system of separation of powers that ensures the independence of the judiciary, be held at regular intervals, as provided for in national [c]onstitutions, and be conducted by an impartial, all-inclusive, competent, and accountable electoral institutions.”³⁵⁴

Member States commit themselves to take necessary measures to ensure the implementation of these democratic principles, in accordance with the constitutional processes in their respective countries.³⁵⁵ They also commit themselves to protecting the human and civil liberties of all citizens, including the freedom of movement, assembly, association, expression, and campaigning, and allowing candidates and parties access to the media during the electoral process.³⁵⁶ The emphasis on access to media by all stakeholders is particularly significant, as only few African governments have liberalized ownership of the media. Incumbent governments in Africa use government media houses, funded by taxpayers, to launch campaigns of calumny against the opposition.

Parties to the Declaration further commit themselves to promote, in close cooperation with civil society groups, education on democratic principles and values;³⁵⁷ to take all necessary measures to prevent illegal practices during the electoral processes;³⁵⁸ and, significantly, to encourage the participation of African women in all aspects of the electoral process.³⁵⁹

The Declaration reaffirmed certain rights necessary for democratic elections, including the right of every citizen to participate in the electoral processes of his country, without discrimination;³⁶⁰ the right to freedom of association and assembly, including the establishment of political organizations;³⁶¹ and the right of appeal to the competent judicial

352. *Id.* ¶ II(3).

353. *See id.* ¶ II(4).

354. *Id.*

355. *Id.* ¶ III(a).

356. *Id.* ¶ III(d).

357. *Id.* ¶ III(e).

358. *Id.* ¶ III(f).

359. *Id.* ¶ III(j).

360. *Id.* ¶ IV(3).

361. *Id.* ¶¶ IV(4)–(5).

authorities “against all proven electoral malpractices,” and to be given fair hearing thereto.³⁶² Conversely, the Declaration enjoins all stakeholders in electoral processes from acts that may lead to violence³⁶³ and orders them to “publicly renounce the practice of granting favours to the voting public for the purpose of influencing the outcome of elections,”³⁶⁴ a veiled reference to political corruption that is the bane of Africa.

The Declaration requests the OAU (now AU) “to be fully engaged in the strengthening of the democratization process, particularly by observing and monitoring elections” in Africa.³⁶⁵ Election monitoring has become the norm the world over. The basic premise appears to be that the criteria for what constitutes free and fair elections are internationally agreed upon and that these criteria, being part of international human rights standards, must be constant across national borders. International observers are put in place to apply these criteria. Election monitoring prevents a national government with a vested interest in the outcome of an election from being the final arbiter of whether the election took place in accordance with international standards.³⁶⁶

The international community, including major intergovernmental organizations like the U.N., the Commonwealth, and the EU, has been involved in election observation and monitoring, again underscoring the emergence of an international law on democratic governance. Election monitoring has become particularly useful in Africa, because of the political atmosphere in the continent in which the state has had its legitimacy and trustworthiness repeatedly questioned. In such situations, election observation is needed to boost public confidence in the democratic process and to secure the fairness of the elections.³⁶⁷ Such observers or monitors usually present reports and make recommendations after the elections, which aim at identifying lapses and improving the situation in the future, though incumbent authorities could use even such seemingly benign reports out of context to serve their own ends.

However, like in trial observation, election monitors or observers are usually expected to maintain neutrality and gather as much information as possible on the conduct of the elections. This is not different in the

362. *Id.* ¶ IV(6).

363. *Id.* ¶ IV(8).

364. *Id.* ¶ IV(9). Other obligations include the need for the media to maintain impartiality in covering elections; for political parties to respect the impartiality of the public media; and for the individual and political parties to recognize and respect electoral bodies burdened with the facilitation of electoral duties. *See id.* ¶¶ IV(11)–(13).

365. *Id.* ¶ V.

366. *See* Communication 102/93, *supra* note 240, ¶ 48.

367. *See generally* ELECTION OBSERVATION AND DEMOCRATIZATION IN AFRICA (Jon Abbink & Gerti Hesseling eds., 2000).

case of Africa. The Declaration, thus, provides guidelines for election observers and election monitoring and commands the Secretariat, now Commission of the AU, to issue such guidelines.³⁶⁸ The guidelines, which must encompass the principles of this Declaration, should indicate “the specific mandates and terms of reference to be determined by the particular case in question.”³⁶⁹

The Declaration also orders Member States to facilitate easy access of observers and monitors to locations of electoral activities. The monitors should not be hindered in the performance of their tasks.³⁷⁰ The reason might be the fact that incumbent governments in Africa are notorious for creating all imaginable obstacles—including blackmail—that make effective monitoring difficult, if not impossible. At any rate, the Declaration commands the Secretary-General/Chairman of the Commission to “[u]ndertake a feasibility study on the establishment . . . of a Democratization and Election Monitoring Unit that will also discharge issues of good governance.”³⁷¹

V. TOWARD SUSTAINABLE DEMOCRATIC GOVERNANCE IN AFRICA

The above survey demonstrates that African states have come to terms with the reality of democratic governance. This final Part now considers some of the superstructures that Africa must put in place to disenchant these norms from the realm of political ideal into reality. However, as this paper demonstrates, the norms of democratic governance in Africa are not contained in a single instrument; they are scattered apart like the pearls of a snapped necklace. It is, thus, necessary to first attempt a synthesis, before looking at the challenges to democratic governance in Africa.

A. *Synthesis*

The following syntheses could be distilled from the discussion in the preceding part of this Article, though the list is not exhaustive:

- Democratic governance has emerged as a human right under general and particular international law.

368. Declaration on Principles of Democratic Election, *supra* note 345, ¶ V(2).

369. *Id.*

370. *Id.* ¶ V(4)

371. *Id.* ¶ VI(d).

- This right, at least, is a species of the right of self-determination.
- Dictatorship, in every one of its manifestations, has become taboo in Africa.
- Democratic elections are the basis of the authority of any representative government.
- Democracy offers the most viable route to good governance in Africa.
- Democracy promotes peace and economic development; in fact, the former is a *sine qua non* to the latter.
- Democracy promotes human rights and the rule of law; indeed, “the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law.”³⁷²
- The judiciary, media, and other civil society bodies play indispensable roles in democratic governance.
- Election monitoring is a norm of the democratic process.

B. Challenges to Democratic Governance in Africa

Africa must erect certain superstructures on the infrastructure of democratic governance for the structure to be stable and withstand the storms of political crisis. The AU must exorcise all deadweights on the umbilical cord of the new entity, mindful that it is easy to break eggs without making omelettes. This Section discusses some of the challenges to democratic governance in Africa.

1. Institutions of Democratic Governance

The first major challenge to democratic governance in Africa is to develop and strengthen competent institutions of democracy, such as the media, judiciary, civil service, electoral systems, independent commissions, and educational institutions. These and similar institutions implement policies that are necessary to democracy and development.

372. Communications 48/90, 50/91, 52/91 and 83/98, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan*, in THIRTEENTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN RIGHTS AND PEOPLES' RIGHTS 1999–2000, OAU Doc. AHG/222(XXXVI), Annex IV, ¶ 79, available at http://www.achpr.org/13th_Annual_Activity_Report_AHG.pdf (last visited Sept. 4, 2003).

They also provide alternative voices, guaranteeing alternative mechanisms to various groups to get a response from the government.

Sadly, many of these institutions have been dysfunctional in a majority of African states largely due to neglect. The AU must encourage its Member States to empower these institutions so that they can discharge their mandates effectively—in the spirit of the AU Act.³⁷³ African states must ensure an effective and accountable legislature, and public service and an electoral system that ensures periodic, free, and fair elections.³⁷⁴ These institutions and this power should be structured and distributed to allow for significant input from ordinary citizens, and to create mechanisms through which the powerful—whether political leaders, corporations or other influential actors—can be held accountable for their actions.³⁷⁵

This is where the AU should be commended for committing its Member States to “establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections.”³⁷⁶ However, African leaders must also pay particular attention to the judiciary. The courts are critical monitors of legality of governmental actions, which no lawful government acting in good faith should seek to evade. Their ability to examine government actions and, where necessary, halt those that violate human rights or constitutional provisions, is an essential protection for all citizens.³⁷⁷ When the legislative and executive organs of government become anti-citizen—as they often do in Africa—an independent judiciary will be able to check “executive law-

373. See, e.g., AU Act, *supra* note 10, pmb. ¶ 10 (expressing the determination of African rulers to strengthen common institutions); cf. Durban Declaration in Tribute to the Organization of African Unity and the Launching of the African Union, Assembly of the AU, 1st Ord. Sess., A.U. Doc. ASS/AU/Decl.2(I) (July 10, 2002) [hereinafter Durban Declaration], available at http://www.africa-union.org/official_documents/Decisions_Declarations/Decisions_&_Declarations.htm (last visited Sept. 4, 2003). Paragraph 16 of the Durban Declaration notes that African leaders have committed themselves

[T]o urgently establish all institutional structures to advance the agenda of the African Union and call on all Member States to honour their political and financial commitments and to take all the necessary actions to give unwavering support to all the Union's initiatives aimed at promoting peace, security, stability, sustainable development, democracy and human rights in our continent.

Id. ¶ 16.

374. See *Promotion and Consolidation of Democracy*, *supra* note 113, ¶ 2.

375. See *UNDP Report 2002*, *supra* note 63, at vi.

376. Declaration on Principles of Democratic Election, *supra* note 345, ¶ 3(c).

377. See *Media Rights Agenda et al v. Nigeria*, *supra* note 35, ¶ 79.

lessness³⁷⁸ and provide succor to marginalized and aggrieved citizens. The judiciary is normally the last hope of the common person.

Regrettably, the judiciary, as yet, is not independent in many African states. They are often understaffed and underfunded, and only remembered by accident, thus placing their survival at the mercy of any government in power. Securing an independent judiciary must be a special project of African leaders. The judiciary must be allowed to exercise its constitutional functions, including the power of judicial review of executive and legislative acts, which is necessary for democratic governance. It must remain "the logical means for independent mediation when the boundaries of legislative and executive power come into dispute."³⁷⁹ It is important, in this regard, to recall the Resolution on the Respect and the Strengthening of the Independence of the Judiciary, adopted by the African Commission during its Nineteenth Ordinary Session at Ouagadougou, Burkina Faso in 1996.³⁸⁰ The resolution "not[ed] that justice is an integral part of human rights and a necessary condition for democracy . . . [and of] the need for African countries to have a strong and independent judiciary [that enjoys] the confidence of the people for sustainable democracy and development."³⁸¹ The resolution called on African countries to:

- repeal all . . . legislation which is inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting
- provide, with the assistance of the international community, the judiciary with sufficient resources in order to enable the legal system [sic] fulfill its function;

378. The Supreme Court of Nigeria used this phrase in reference to the executive act of the Lagos State Government of Nigeria, when the latter disobeyed an order of the Court. See *Governor of Lagos State v. Ojukwu* (1986) 1 N.W.L.R. (Pt. 18) 621 (Nig.). The Court also noted, per Obaseki J.S.C.:

Nigeria being one of the countries in the world, even in the third world, which proclaim loudly to follow the rule of law, there is no room for the rule of self-help by force to operate. Once a dispute has arisen between a person and the Government or authority and the dispute has been brought before the court, thereby invoking the judicial powers of the state, it is the duty of the government to allow the law to take its course or allow the legal and judicial process to run its full course. . . . The courts expect the utmost respect of the law from the government itself, which rules by the law.

Id. at 636.

379. See Leander Shaw, *The Role of the Judiciary in a Democracy*, in *DEMOCRACY AND THE LAW* 221, 225 (Bola Ajibola ed., 1991).

380. *Resolution on the Respect and the Strengthening of the Independence of the Judiciary*, in *RECOMMENDATIONS AND RESOLUTIONS*, *supra* note 122, at 33 [hereinafter *Resolution on the Judiciary*].

381. *Id.*

- provide judges with decent living and working conditions to enable them to maintain their independence and realise their full potential;
- incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure; and
- refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.³⁸²

If African states summon the needed political will to put these and other suggestions in place, then democracy will blossom like a rose.

Another institution critical to the survival of democracy in Africa is the media and other means of communication. These play key roles in ensuring freedom of expression, promoting the free flow of information and ideas, and assisting people in making informed decisions.³⁸³ Sadly, the media is still being harassed in Africa, and journalists are often arbitrarily arrested and detained in many African states. "Media houses deemed critical of the establishment"³⁸⁴ are victimized, while there are "inadequate legal frameworks for regulating electronic media[,] especially broadcasting . . . [C]riminal and civil laws [of most African countries still] inhibit the right to freedom of expression."³⁸⁵ The Gambia is one such African country where the media is operating under heavy burdens.³⁸⁶

The AU must urge its Member States to abrogate antimedia laws, and should also use the APRM of NEPAD to monitor compliance. More importantly, African states should liberalize the broadcasting industry and encourage a diverse, independent private broadcasting sector. "A State monopoly over broadcasting is not compatible with the right to

382. *Id.*

383. *See Declaration of Principles on Freedom of Expression in Africa*, Afr. Comm'n, 32nd Ord. Sess., pmb. (Oct. 2002), in RECOMMENDATIONS AND RESOLUTIONS, *supra* note 122, at 86 [hereinafter *Declaration on Principles of Freedom of Expression*].

384. *Resolution on Freedom of Expression*, in RECOMMENDATIONS AND RESOLUTIONS, *supra* note 122, at 70 [hereinafter *Resolution on Freedom of Expression*].

385. *Id.*

386. *See, e.g.*, Press Release, Amnesty Int'l, Gambia: Growing Clampdown on Freedom of Expression (Aug. 7, 2002), at <http://www.amnesty.org/library/engindex> (last visited Sept. 4, 2003) ("expressing concern at increasing attacks on freedom of expression in the Gambia following the recent arrests of three journalists [Pa Ousman Darboe, Alhaji Yoro Jallo, and Guy-Patrick Massaloko] solely on the grounds of their legitimate professional activities").

freedom of expression” and democratization.³⁸⁷ Experience has shown that most government-owned media are usually mouthpieces of the government in power, rather than services to the collective interest of the citizenry. It is, in this regard, necessary that, “[s]tate and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government.”³⁸⁸

The best way to achieve democratization is for the state to strengthen the civil society—”that silver bullet that helps all societies to govern better.”³⁸⁹ Government actions in the past have been geared toward winning the civil society, or weakening it. It is hoped that the AU will collaborate with the civil society to bring about positive political and economic transformation in the continent, in the spirit of the AU Act.³⁹⁰

The civil society—”defined as comprising those associational bodies between the personal and the State”³⁹¹—must, itself, act as a catalyst in bringing about the realization of democratic governance in Africa. This group³⁹² is indispensable for democracy; it is the force for societal resistance to state excesses, and the centerpiece—organizationally, materially, and ideologically—of the civil movements and protests for reform and change.³⁹³ As the Interim Chairman of the AU Commission admits, “[t]he

387. *Declaration of Principles on Freedom of Expression in Africa*, in RECOMMENDATIONS AND RESOLUTIONS, *supra* note 122, at 86, 88. This declaration also calls for the promotion of community broadcasting, “given its potential to broaden access by poor and rural communities to the airwaves.” *Id.*

388. *Id.*

389. Kuldeep Mathur, *Good Governance State and Democracy*, Paper Presented at the Conference on Beyond the Post Washington Consensus: Governance and the Public Domain In Contrasting Economies—The Cases of India and Canada 2 (Feb. 12–14, 2001), at http://www.robarts.yorku.ca/pdf/mathur_delhi.pdf (last visited Sept. 4, 2003) (setting out the challenges that face India in strengthening civil societies and limiting the role of the state, so that the former can have greater spaces to act).

390. See AU Act, *supra* note 10, pmb. (expressing the need for African governments “to build 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 [the] peoples”).

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

392. In the context of education, for example, the civil society will include all NGOs and non-profit associations involved in education. It will embrace groups such as campaign networks, teacher unions and religious organizations, community associations and research networks, parents’ associations and professional bodies, student organizations, social movements, and others.

393. Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, 41 WORLD POL. 407 (1989). See generally CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA: CRITICAL PERSPECTIVES (John L. Comaroff & Jean Comaroff eds., 1999) (revealing that it is important to stress that civil society could be multi-faceted in its many guises, inherently exclusive and egalitarian and susceptible to high-handed and parochial application in unfamiliar territory); 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

rule of law, governmental accountability, peace and security are key to the social, economic and political development of Africa. All of these require, as a necessary condition for their success, a strong and autonomous civil society.³⁹⁴

The civil society should work to galvanize the continent's citizens who have been beaten into submission by years of repression and oppression. It should resist the desperate consolidation of power that has become the hallmark of African politics and should check other forms of power manifestations and leadership vanities in the continent. It should work to ensure that the unlimited power of the majority, which is a concomitant of democracy, does not degenerate into the tyranny of the majority. Thus, while the political class dictates the tune of the political music, the civil society should, at least, amplify the melody—for greater democracy, accountability, and transparency.

2. Poverty and Illiteracy

Africa is plagued by poverty “on a scale never known in earlier times, or even dreamed of.”³⁹⁵ There are serious deprivations in many aspects of life, as hundreds of millions of people live in absolute poverty.³⁹⁶ Bad weather, coupled with bad leaders,³⁹⁷ has left many Africans

society as they relate to political development in Africa); Naomi Chazen, *State and Society in Africa: Images and Challenges*, in *THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA* 325 (Donald Rothchild & Naomi Chazen eds., 1988) (discussing the state's problems, societal happenings, political changes, and the challenges faced by the states and society in Africa); Augustine Ikelegbe, *The Perverse Manifestation of Civil Society: Evidence from Nigeria*, 39 *J. MOD. AFR. STUD.* 1, 2 (2001) (discussing “the wave of popular protests . . . that has resulted in democratization since the early 1990s” and the romanticism associated with these movements).

394. Amara Essy, Statement at the Opening of the Second OAU-Civil Society Conference on Developing Partnership Between the OAU and African Civil Society Organizations (June 11, 2002), at http://www.africa-union.org/Official_documents/Speeches_&_Statements/Speeches_&_Statements.htm (last visited Sept. 4, 2003). Amara Essy also asserts that the “role of civil society organizations as grassroots agents of mobilization for the processes of economic development [has been] widely acknowledged [though] their role in the areas of peace, security and stability [is] . . . still highly contested. *Id.*”

395. See DAVIDSON, *supra* note 28, at 9.

396. Absolute poverty, also known as extreme poverty, is defined as the “lack of income necessary to satisfy basic food needs—usually defined on the basis of minimum calorie requirements.” UN DEVELOPMENT PROGRAMME, *OVERCOMING HUMAN POVERTY* at 20, U.N. Sales No. E. 00.III.B.2 (2000), available at <http://www.undp.org/povertyreport/ENGLISH/ARchapI.pdf> (last visited Sept. 3, 2003). It is to be contrasted with relative or overall poverty, which is the “lack of income necessary to satisfy essential non-food needs, such as clothing, energy and shelter—as well as food needs.” *Id.* Numerically, there were 1.5 billion persons living in absolute poverty at the dawn of the new millennium. See *Report of the UN Secretary General on Implementation of the First United Nations Decade for the Eradication of Poverty (1997–2000)*, U.N. GAOR, 54th Sess., Agenda Item 105, at ¶ 15, U.N. Doc. A/54/316 (1999).

397. See, e.g., U.N. FOOD & AGRICULTURE ORG., *GLOBAL INFORMATION AND EARLY WARNING SYSTEM ON FOOD AND AGRICULTURE: FOOD SUPPLY SITUATION AND CROP PROSPECTS*

hungry. A 2002 report “estimates that the proportion of the population living on less than US \$1 a day in the least developed countries of Africa has increased continuously since 1965–1969, rising from an average of 55.8 percent in those years to 64.9 percent in 1995–1999.”³⁹⁸ NEPAD corroborates this gloomy picture, pointing out that

340 million Africans, or half the population, live on less than one dollar per day. The mortality rate of children under five years of age is 140 per 1000, and life expectancy at birth is only 54 years. Only 58 percent of the population [has] access to safe water[, while] the rate of illiteracy for people over 15 is 41 percent. There are only 18 mainline telephones per 1000 people in Africa, compared with 146 for the world . . . and 567 for high-income countries.³⁹⁹

It is submitted that poverty is a great hindrance to democracy and the enjoyment of human rights. Poverty leaves many people susceptible to manipulations by several forces and interests. Democracy will not thrive in instability or under conditions of excruciating and humiliating poverty. As Christopher Weeramantry rightly observes, “[t]he human rights dialogue breaks down completely if the listener suffers from an empty stomach or the preacher has had any hand in producing it.”⁴⁰⁰ It is true that elections are evidence of popular sovereignty and the basis for international endorsement of the elected government; but free elections are only one side of the coin. A hungry person—who usually is also an angry person—cannot appreciate the aesthetics of a ballot box or, for that matter, the significance of his ballot.⁴⁰¹ Such a person thinks about food, not freedom.

IN SUB-SAHARAN AFRICA, at ii (Dec. 2002), available at <http://www.fao.org/giews> (last visited Sept. 4, 2003) (reporting that twenty-five countries face food emergencies in sub-Saharan Africa, mainly due to drought, civil strife and internally displaced persons). The countries listed are Angola, Burundi, Cape Verde, Central African Republic, Democratic Republic of Congo, Republic of Congo, Eritrea, Ethiopia, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Mozambique, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

398. U.N. CONFERENCE ON TRADE & DEV., ECONOMIC DEVELOPMENT IN AFRICA: FROM ADJUSTMENT TO POVERTY REDUCTION: WHAT IS NEW? at 2, U.N. Doc. UNCTAD/GDS/AFRICA/2, U.N. Sales No. E.02-II-D.18 (2002).

399. See NEPAD, *supra* note 335, ¶ 4.

400. CHRISTOPHER G. WEERAMANTRY, JUSTICE WITHOUT FRONTIERS: FURTHERING HUMAN RIGHTS 122 (1997); see also Claude Ake, *The African Context of Human Rights*, 1st/2nd Quarters AFR. TODAY 5 (1987) (arguing that “the right to peaceful assembly, free speech and thought, fair trial, etc. . . . appeal to people with a full stomach.”).

401. See *The Third World*, *supra* note 229, at 785. This article also argues that “[i]nternational cooperation must bring to bear a concerted effort to tackle the obstacles to democracy.” *Id.*

Therefore, the first challenge to democratic governance in Africa is to address the problem of hunger and illiteracy, bearing in mind, that "literacy, especially functional literacy and adequate education, represents an indispensable element for the development and harnessing of science, technology, and human resources for economic and social progress outside of."⁴⁰² The irony is that most constitutions in Africa require the possession of a primary or secondary certificate as a basic condition for standing for elected positions.⁴⁰³ Yet, most African constitutions make economic, social, and cultural rights, including the right to education, nonjusticiable.⁴⁰⁴ There are a few exceptions, such as South Africa⁴⁰⁵ and Algeria,⁴⁰⁶ but the general rule in many African countries is that citizens have the right to vote, but not to be voted for, by reason of illiteracy and such other inhibiting factors. This, undoubtedly, is a violation of democratic rights.

An economic crusade to eradicate poverty and illiteracy in Africa should be the urgent vision of development of the AU. These needs are as important as the current crusade to eradicate polio, malaria, and HIV/AIDS in Africa. The progress of a nation is not judged by its military strength but by how many people have food on their table, clean water, and access to health care facilities. Since the proper study of shepherds is the sheep, not other shepherds, the good governance goals of NEPAD and other such projects should aim primarily at ensuring a better life for present and future generations of Africans. African leaders must bend their strength to fulfill the citizens' ends.

402. *Draft Resolution on Education for All*, U.N. GAOR, 3d Comm., 52d Sess., Agenda Item 102, at pmbl., ¶ 6, U.N. Doc. A/C.3/52/L.11/Rev.1 (1997). This document recognizes the need for a "more forceful and concerted action at national and international levels to achieve the goal of education for all" because of "emerging and continuing" problems in this area. *Id.* pmbl. ¶ 10. This document also "appeals to all Governments to step up . . . efforts [toward] eradicat[ing] illiteracy and to direct education towards the full development of the human personality and . . . the strengthening of respect for all human rights and fundamental freedoms." *Id.* ¶ 4. See also *A U.N. Literary Decade: Education for All*, G.A. Res. 54/122, U.N. GAOR, 54th Sess., Agenda Item 106, at 2, U.N. Doc. A/Res/54/122 (2000) ("Urging international organizations and NGOs, to promote the right to education for all and to create conditions for all for learning throughout life").

403. See generally NIG. CONST. (1999), available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (last visited Sept. 8, 2003).

404. See, e.g., *id.* art. 6(6)(c).

405. See S. AFR. CONST. art. 29 (1997), at http://www.oefre.unibe.ch/law/icl/sf00000_.html (last modified Dec. 8, 2002) (providing for the right to education, "which the state, through reasonable measures, must make progressively available and accessible").

406. See ALG. CONST. art. 53 (1996), available at http://www.oefre.unibe.ch/law/icl/ag00000_.html (last modified Dec. 8, 2002) (providing for the right to education and requiring the State to ensure that "equal access to education and professional training").

The alleviation of poverty depends on economic growth, which, in turn, depends on sound economic policies and management. African governments should seek to promote macroeconomic stability and higher growth in their economic policies, as well as the improvement of the delivery of social services.⁴⁰⁷ The main themes of economic policy in Africa should include both the “creati[on of] an enabling environment for producers, investors, and employers, and the improv[ement of] governance and public finances.”⁴⁰⁸ Ghana appears to be making progress in this regard, as the President John Kufour’s government is “luring [investors] into new sectors [that are] capable of diversifying the export base [of the country]. This has become possible because of the government’s pro-business legislation [and] privatization,”⁴⁰⁹ which is what good governance is all about.⁴¹⁰

African governments must stop using the problem of economic underdevelopment as an alibi for their low scorecard in meeting the basic needs of their people. This argument is now singularly flaccid and unconvincing. The truth is “that any State—no matter how poor—can cover the basic needs of its people, provided that it is properly managed and governed.”⁴¹¹ As Botswana’s economic success demonstrates, good governance is critical to Africa’s renaissance and development.

407. ECON. COMM’N FOR AFR., *ECONOMIC REPORT ON AFRICA 2002: TRACKING PERFORMANCE AND PROGRESS* 40 (2002) [hereinafter *ECA REPORT 2002*] (indicating that “economic policies in Africa in 2000–01 sought to promote macroeconomic stability and higher growth and to improve the delivery of social services”).

408. *Id.*

409. *Id.* at 43. This report also indicates that:

Sound fiscal management . . . has achieved impressive results [in Ghana, as the] . . . inflation rate dropped from 41% in January 2001 to 25% in August. [Similarly, i]n the first half of 2001 the cedi depreciated by 38%, relative to the U.S. dollar, but in the second half of the year, depreciation was just 2.5% . . . The primary fiscal balance recorded a surplus (1.9 percent of GDP) for the first time since 1997 . . . [By the end of 2001, according to the report,] a 2.6 trillion cedi (\$350 million) gap in foreign exchange requirements was closed . . . and debt service was cut by 2.8 trillion cedi (\$375 million) under the HIPC initiative. [Finally,] GDP growth—which had been expected to slow because of high inflation, severe imbalances in fiscal and external accounts, and the tight monetary policy announced in March 2001—actually improved, rising 3.5% in 2001 compared with 2.0% in 2000.

Id.

410. See Reif, *supra* note 111, at 16–17.

411. Germain Baricako, *The African Charter and the African Commission on Human and Peoples’ Rights: A Mandate to Promote and Protect Economic, Social and Cultural Rights in Africa*, in INT’L COMM’N OF JURISTS, *REPORT OF A REGIONAL SEMINAR ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 45, 60 (1998); *Report of the Secretariat*, U.N. GAOR World Conference on Human Rights, Preparatory Comm., 4th Sess., Provisional Agenda Item 6, U.N. Doc. A/CONF. 157/PC/73 (1993).

Botswana not only has transparency in decision making but also offers an example of “input that continually recharges the batteries of government, and that the doors of government are open.”⁴¹² This partially explains why a country that only escaped from the list of the Least Developed Countries (LDCs)⁴¹³ in 1994 is currently the world’s number one producer of diamonds by value, with production worth US \$1.9 billion at an average price per carat of US \$97.⁴¹⁴

Botswana’s development record stands in sharp contrast to that of most African countries.⁴¹⁵ For example:

With a population of about a million people in the 1960s, [Botswana] sustained an average per capita economic growth rate of ten percent from 1960 to 1980, exceeding that of South Korea or Hong Kong. While per capita income private consumption throughout Sub-Saharan Africa declined at 2.1 percent a year, from 1980 to 1997, it increased in Botswana at 2.3 percent . . . the institutional capacity of African States in general to reverse underdevelopment has ‘vanished’ in the last twenty years, but the capacity of the public sector in Botswana has improved considerably.⁴¹⁶

412. KPUNDEH, *supra* note 31, at 47 (noting also that “elections [in Botswana] have been relatively honest, the government has, in fact, kept its promises by and large, and has remained popular; and the opposition continues to act as a loyal opposition, believing sincerely in the possibility of alternation.”).

413. See Arghyrios A. Fatouros, *Developing States*, in I ENCYCLOPEDIA OF PUBLIC INT’L LAW 1017, 1019 (Rudolf Bernhardt ed., 2000). The importance of this classification was stressed:

[As] far back as 1964, in the Final Act of the UNCTAD I [United Nations Conference on Trade and Development] Since then, the [UN] General Assembly, through . . . [its] resolutions, has [regularly] identified . . . countries [falling within the] . . . category [of LDCs,] . . . on the basis of three tests: very low per capita GNP, very low literacy rate, and low contribution of manufacturing to the gross domestic product (GDP).

Id. In 1981, the U.N. organized a Conference on LDCs in Paris, where it “adopted a Substantial New Program of Action for the 1980s, which lists a series of international measures to assist [the] poorest of the poor countries.” *Id.* Similarly, “[t]he overwhelming majority of developing countries are . . . given preferential treatment by all developed countries, [though] a few [s]tates benefit from special

Id.

414. See James Brew, *Confidence Grows in the Regional Economy*, AFR. TOPICS, Jan.–Mar. 2000, at 21. World production is worth US\$6.6 billion.

415. Clements, *supra* note 22, at 303.

416. *Id.*

Whatever may be the strength of the dependency theory,⁴¹⁷ it may no longer be fashionable for African states to use it as an alibi for its current economic meltdown. To take a non-African case study: Singapore was a former colony of Britain whose citizens were poor and a heterogeneous mix of Chinese, Malay, and Indians, living in an overpopulated land. Largely because of good governance, Singapore today enjoys a vibrant economy, in what might be regarded as “the Singapore miracle.”⁴¹⁸ Singapore’s per capita income is one of the highest in the world. It enjoys equity among its citizens, as “the top twenty percent of households earn 9.6 times as much as the lowest twenty percent.”⁴¹⁹ Its health care services are sound; housing is adequate; literacy is high, as its educational opportunities are excellent; and unemployment is almost nonexistent. It is even estimated that more than 90 percent of Singaporeans own their own homes.⁴²⁰

African countries should stop making excuses; they should get their acts together, and move on. They should stop deceiving the citizens, for the latter are led to believe a lie only when they do not see through the eye. The final cause of democracy must be the welfare of society. The rule that misses its aim cannot permanently justify its existence. Unless democracy produces prosperity in Africa in the short run, it will lose its legitimacy in the long run.

3. Corruption

Corruption is endemic in Africa and is the defining feature of its governance. It has made so many headlines in African cities such that the citizens are growing weary of bad news, and feel powerless in relation to the monster. Government institutions in Africa have become breeding grounds of paralysis and patronage, turning a blind eye to corrupt practices. Corruption, especially political corruption, is antithetical to democracy, as it denies the state of resources needed to strengthen the institutions of democracy—like the judiciary. It denies the state of resources needed to bring about democratic dividends, like good roads, communication, health facilities, and water. It denies the state of

417. The dependency theory contends that a wide range of foreign forces, including the hegemonic powers and international financial institutions, are decisive factors in bringing about policy changes in least developed countries. It states that the core countries tend to exert pressure on the peripheral States to liberalize and internationalize their economies when dependency increases. See J.D. Pedersen, *Explaining Economic Liberalization in India: State and Society Perspectives*, 28 *WORLD DEV.* 265 (2000).

418. See TOMMY KOH, *Explaining the Singapore Miracle*, in *THE QUEST FOR WORLD ORDER: PERSPECTIVES OF A PRAGMATIC IDEALIST* 204 (Amitav Acharya ed., 1998).

419. *Id.* at 207.

420. *Id.* at 206.

resources needed to empower the citizens—especially women—through education and other means necessary to play useful roles in the democratic project. Corruption brings about moral decay in society and weakens that vital moral fiber that society needs for survival.

The democratization of the continent will be a mirage unless the AU wages a concerted crusade against corruption. The AU must move from being a thermometer that records the ideas and principles of popular opinion to a thermostat that transforms the mores of society. It is, of course, gratifying that the body is already addressing the problem of corruption at the continental level. In July 2003, the AU Ministers, at its Conference held in Maputo, adopted the African Union Convention on Preventing and Combating Corruption.⁴²¹ The convention contains provisions that will guarantee access to information and the participation of civil society and the media in the monitoring process. Among others, it “[p]roscribe[s] the use of funds acquired through illegal and corrupt practices to finance political parties,”⁴²² and orders states to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.⁴²³

These are bold and imaginative moves to tackle the problem of corruption in Africa; but more must be done, and more quickly, for the rot is deep and continuous.

4. Social Justice in Plural States

It is not news that Africa is plagued by the twin problems of sharp cleavages of various kinds and by political instability. What is news is the idea that it is possible to achieve democratic governments in plural societies—defined as a society that is divided by “segmental cleavages.”⁴²⁴ That it is difficult has long been established, reaching back to Aristotle’s adage that “A state aims at being, as far as it can be, a society composed of equals and peers.”⁴²⁵ Admittedly, it is much easier to secure

421. Decision on the Draft Convention on the Prevention and Combating of Corruption, AU Assembly, 2d Ord. Sess., A.U. Doc. Assembly/AU. Dec. 27(II) (2003).

422. African Union Convention on Preventing and Combating Corruption, July 11, 2003, at art. 10(a) [hereinafter Corruption Convention], at http://www.africa-union.org/Official_documents/Treaties_Conventions_Protocols/Treaties_Conventions_&Protocols.htm (last visited Sept. 10, 2003).

423. *Id.* art. 16(1)(c).

424. HARRY ECKSTEIN, *DIVISION AND COHESION IN DEMOCRACY: A STUDY OF NORWAY* 34 (1966) (writing that a “segmental cleavage” exists “where political divisions follow very closely, and especially concern, lines of objective social differentiation, especially those particularly salient in a society”); LUPHART, *supra* note 185, at 4 (“A further characteristic [of a plural society] is that political parties, interest groups, media of communication, schools, and voluntary associations tend to be organized along the lines of segmental cleavages.”).

425. ARISTOTLE, *POLITICS* 181 (Ernest Barker trans., 1958).

stable democracies in societies with “social homogeneity and political consensus,”⁴²⁶ but it is not impossible to achieve the same in plural societies. This could be attained, partly, through what Arend Lijphart calls “consociational democracy,” by which he means that, “the centrifugal tendencies inherent in a plural society are counteracted by the cooperative attitudes and behavior of the leaders of the different segments of the population.”⁴²⁷

African states must promote pluralism, protect human rights, and maximize the participation of individuals in decision-making. Democracy can thrive in plural societies where there is social justice, where the government in power seeks to advance the individual and collective well-being of all citizens. Democracy cannot thrive under exclusivism, where double standards or a “divide and rule” strategy are instruments of government policy. In such an environment, the motto will be: “everyone to himself and God for all.” That is bad for the democratic project, in particular, and the society in general.

Whatever structures and processes African states struggle to put in place, democratic governance must recognize the basic principles of inclusion, participation, freedom, justice, and equity for all, since citizens will not compromise any of these principles under any circumstances. Similarly, “free and fair” election is meaningless so long as it does not engage the broader problems of democracy, equality, and justice.⁴²⁸ When a state fails to offer its people sanctuary, hope, confidence, and, above all, a sense of belonging, questions will necessarily be raised about the viability of such a state.

5. Aid Dependency and Foreign Debts

Africa’s attempt at democratization will only lead to good governance and prosperity “when Africans learn to neutralize the harm that the unholy trinity of loans, aid and debt has done to them.”⁴²⁹ The reason is that “the more States depend on unearned income, the less accountable they will be towards their citizens and the less capacity they will possess.”⁴³⁰ This is a very elementary principle, and it is baffling that African

426. LIJPHART, *supra* note 185, at 1 (examining “consociational democracy” and concluding that it is possible “to achieve and maintain stable democratic government in a plural society”).

427. *Id.*

428. See ELECTION OBSERVATION AND DEMOCRATIZATION IN AFRICA, *supra* note 367, at 8.

429. Mammo Muchie, *Wanted, African Monetary Union*, NEW AFR., Apr. 2002, at 32.

430. See Kjaer, *supra* note 115 (defining ‘unearned income’ to mean “the kind of revenue that comes easy, like, for instance, donor grants”).

states appear not to have grasped it. States tend to be accountable towards their main source of income. In the case of African nations, their main sources of income are the international donor communities. "The very presence of external actors demanding evaluations of programs, regular reports and accounts for moneys given, put a strain on the limited capacity that these states possess and directs accountability outwards instead of inwards."⁴³¹ This is neocolonialism through and through. For African states to earn income, they must build organizational apparatuses to extract resources from the population that will enable them, in return, to provide basic services and infrastructures.

Paradoxically, the prospects of democratization in Africa lie not only in the careful strategies of African governments, but also in the good will of the international community. Conditioned aid could also be detrimental to the growth of democracy.⁴³² Besides, there is need for democratization of the institutions of global governance—the WTO, World Bank and IMF—in view of the impact of globalization on the realization of democracy, or the human rights consequences of the form of democracy being promoted.⁴³³ Elections alone are not sufficient.

By far, the greatest threat to the democratic project in Africa is the debt burden. Not surprisingly, it has remained in the forefront of debates on Africa's political and economic renaissance. The debt burden, imposed on African citizens by their inept governments in collaboration with multilateral corporations and international financial institutions, is one of the greatest challenges to democratic governance in Africa. More than half of African countries are classified as Heavily Indebted Poor Countries (HIPC).⁴³⁴ For many African countries, it takes more than half of their Gross National Product (GNP) to service their debt. This heavy debt burden and debt-servicing obligation has debilitated the socioeconomic structure of many African countries.⁴³⁵ It has also

431. *See id.*

432. *See, e.g.,* JOAN M. NELSON & STEPHANIE EGLINTON, ENCOURAGING DEMOCRACY: WHAT ROLE FOR CONDITIONED AID? (1992).

433. *See* Evans, *supra* note 130, at 632.

434. These include: Angola, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, DR Congo, Republic of Congo, Kenya, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sierra Leone, Sao Tome and Principe, Senegal, Somalia, Sudan, Tanzania, Togo, Uganda, and Zambia. *See HIPC Initiative: Status of Country Cases Considered Under the Initiative* (Dec. 2001), at http://www.worldbank.org/hipc/progress-to-date/Status_table_December.pdf (last visited Sept. 8, 2003).

435. *See* Frank X. Njenga, *The African Debt Problem: Legal and Institutional Dimensions*, 2 AFR. Y.B. INT'L L. 95 (1994).

constrained Africa's prospects for economic growth,⁴³⁶ as well as its ability to fulfill socioeconomic and cultural rights to its citizens.

The international financial institutions must be more responsive and more responsible. Why are billions of U.S. dollars poured into Africa yearly while the continent continues to languish in poverty and underdevelopment? The simple answer is that Africa's development trajectory has been deflected by the self-serving colossus known as the "loan and aid industrial complex."⁴³⁷ The IMF and World Bank may have done more to compound Africa's economic and political crisis than have conflicts.

The international community, particularly the international financial institutions, must take the issue of debt relief and cancellation seriously, since underdevelopment is a great hindrance to democracy.⁴³⁸ The immense structural inequalities that define our world must be torn down. In particular, the global economic injustice of unpayable and unjust debts must be addressed, so that everyone, including African citizens, can reach their full potential. Africans have a moral right to freedom from harassment by international creditors; and that right, if submitted, is a major component of the right to democratic governance.

VI. CONCLUSION

This Article attempts to articulate the right to democratic governance in Africa within the context of the global discourse on this emergent generation of rights. It shows, from the prism of the U.N.- and regional-inspired instruments, how the norm on democratic governance has grown gradually but graphically in the continent. It is, of course, certain that both the U.N. and AU have not said the last words on this emergent right, in terms of standard setting. However, the greatest challenge to democratic governance is how to implement the existing norms, particularly as Africa has no existent uniform superstructures for their implementation.

436. See Yaounde Declaration, *supra* note 134, ¶ 10; cf. *U.N. Programme of Action for African Economic Recovery and Development 1986-1990*, G.A. Res. S-13/2, U.N. GAOR, 13th Special Sess., Agenda Item 6, U.N. Doc. A/RES/S-13/2 (1996) [hereinafter *U.N. Programme of Action for Africa*]. See generally HOWARD STEIN, *ECONOMIC DEVELOPMENT AND THE ANATOMY OF CRISIS IN AFRICA: FROM COLONIALISM THROUGH STRUCTURAL ADJUSTMENT* (2001); GILES MOHAN ET AL., *STRUCTURAL ADJUSTMENT: THEORY, PRACTICE AND IMPACTS* (2000) (providing a summary of leftist critiques of structural adjustment).

437. See Muchie, *supra* note 429, at 32.

438. See *The Third World*, *supra* note 229, at 785 (arguing that "[t]he West must recognize that underdeveloped societies are not likely to become democratic").

This Article identifies the challenges to democratization in Africa and suggests remedial actions—such as erecting and strengthening the institutional structures for democratic governance and working to reduce poverty and illiteracy—since these are the possible routes toward instilling meaning in the idyllic words of global and regional instruments. There are no rules of architecture for a castle in the clouds. The AU must move from dreaming to doing, and must strive to make the right to democratic governance real in Africa. African nations in general, must allow democracy and the rule of law to blossom, since the absence of the rule of law implies the presence of rule by law.⁴³⁹ Fundamental challenges at the heart of development require not only leadership and resources, but a legal response as well; and a key barometer of Africa's progress will be the promotion of, and respect for, the rule of law. Similarly, economic, social, cultural, and political transformations are taking place daily in the continent, and a healthy degree of press freedom and political participation could help to absolve the strains of such wrenching changes.⁴⁴⁰ At any rate, freedom and a genuine and meaningful political participation are among the tools for democracy.

Since Africans themselves are agents of sustainable democracy, they must never forget that the military remains the most formidable threat to democracy in Africa. They must watch out for such self-seeking and corrupt adventurers seeking to reap where they do not sow and must rise up and shout with one voice: "Never again!" to despotism, tyranny, and mismanagement of African economies. Despotism is almost always the end of societies that have been highly democratic. Africans must not allow the dying dynasty of dictators to resurrect in the continent. They must particularly resist trends toward omnipotence by incumbent rulers; and they should do so through nonviolent disobedience, including sit-ins, strikes, and demonstrations—the kind that the international community has witnessed, and is witnessing, in the South American countries of Haiti, Argentina and Venezuela. Such actions will send clear messages to

439. The rule of law consists of certain core elements, such as "(1) a set of rules that are known in advance; (2) as set of rules that are in force; (3) the existence of mechanisms to ensure application of the rules; (4) the resolution of conflicts through an independent judiciary or through arbitration; and (5) known procedures of amending the rules when they no longer serve their purpose. See NRC SUMMARY, *supra* note 114, at 4–5. See generally *The Rule of Law*, *supra* note 37.

440. Cf. *Resolution on Freedom of Expression*, *supra* note 384, pmbl. (noting that "freedom of expression is a potent and indispensable instrument for the creation and maintenance of a democratic society and the consolidation of development"); *Declaration on Principles of Freedom of Expression*, *supra* note 383, pmbl. (noting that "respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy").

prospective military adventurers that the era of military rule is over, “in the interest of the African image, progress, and development, and for the creation of an environment in which human rights values may flourish.”⁴⁴¹

Africans must never forget that democracy, for all intents and purposes, is subversive of extant conventional social and political orders and relations. They must work to reconstruct such orders, bearing in mind that there are many imperfect democracies in the continent, and that the process of state building is far from complete. Since democracy itself is a goal as well as a process, there has to be continuous consultation, construction, and reconstruction to meet changing needs and opinions. As a Ghanaian taxi driver is reported to have said: “[g]overnment is like a T-shirt. If you don’t change it from time to time, it begins to stink.”⁴⁴²

The process of democratic reconstruction certainly will not be simple, since the natural person is resistant to change and the oppressor does not usually give freedom and, *a fortiori*, democracy, voluntarily. The oppressed Africans must demand freedom, which is a cherished ideal. This struggle for change requires courage, for where courage is lacking, no other virtue can survive except by accident. Of course, the resolution to engineer change will sometimes relax, and diligence will sometimes be interrupted; but no accidental surprise or deviation, whether short or long, should dispose Africans to despondency. This is a life and death struggle; and, indeed, several Africans—including Nigeria’s M.K.O. Abiola⁴⁴³—have died in defense of democracy. Too much is at stake for silence to be anyone’s option.

441. *Resolution on the Military*, *supra* note 122, ¶ 4.

442. A Ghanaian taxi driver commenting on recent elections in his country, in Barkan, *supra* note 46, at 72.

443. Chief M.K.O. Abiola was the undeclared winner of the June 12, 1993 presidential election in Nigeria, the election having been annulled by General Babangida. Chief Abiola was later incarcerated by General Abacha for insisting on his mandate, and died in detention in 1998.