Chapter 1
Introduction
Expanding Legal Protection of Human Rights in African Contexts

Abdullahi Ahmed An-Naʿim

The value added of international standards of human rights is that they are universally valid and legally binding on states that have ratified the relevant treaties or are bound by applicable customary international law principles, subject to clarification and qualification below. As such, human rights provide an external "common standard of achievement" for all nations and peoples, according to the Preamble of the Universal Declaration of Human Rights of 1948. Accordingly, states have the international legal obligation to provide for the protection of human rights under their own national constitutions, legal systems, and other official measures. In other words, international human rights law provides an independent frame of reference for ensuring the fundamental rights and freedoms of all persons subject to the jurisdiction of a state. It is from this perspective that each chapter in this book presents a detailed country study of the context and resources available for the legal protection of human rights under the constitution and legal system of a specific African state.

My objective in this chapter is to provide a theoretical framework for these country studies by clarifying the parameters of the role of the people themselves in protecting their own human rights because that is the only legitimate, principled, and sustainable way for realizing this essential objective. The premise of my analysis here is that an international human rights approach is both practically essential and conceptually problematic. This approach is practically essential because no state can be trusted to protect the rights of its own citizens, and it is conceptually problematic in that international human rights law maintains that the same state is bound to protect these rights. Making the protection of human rights a matter of state responsibility under international law means that an injury or harm is not a human rights violation unless the state is implicated in its happening

by the acts or omissions of its officials or institutions. To simplify an example to make this point, the victim of bodily injury should always receive effective legal remedy against the perpetrator. But the act cannot be legally characterized as a human rights violation of torture, for instance, unless committed by or under color of the authority of state officials. In this sense, human rights violations can be committed only through the action of or omission by the state. Yet, the international law principle of national sovereignty and territorial integrity, as affirmed by the Charter of the United Nations, does not permit redress for human rights violations except through the agency of the state.

The question is therefore how to mediate this "paradox of self-regulation" by the state in order to induce, or coerce if necessary, the state to protect the rights of those subject to its jurisdiction against abuse and violation by its own officials and institutions? I believe, together with all the contributors to this volume, that this mediation must be undertaken by the people for themselves because that is the only way to reconcile the protection of human rights with the national sovereignty and territorial integrity of their own state. Direct so-called humanitarian intervention by other states or the international community at large in the territory of any state in the name of protecting the human rights of its people is problematic in principle and unsustainable in practice.[1] But to object to such external "enforcement" apparently raises another paradox. On the one hand, governments are unlikely to respect human rights without strong and effective accountability for their failure to do so. On the other hand, an oppressed people are by definition unable to achieve such accountability of their oppressive government. Here is an outline of an approach to mediating this second paradox, to be elaborated through the subsequent analysis.[2]

First, the choice for other states and the international community at large is not between rushing to "doing something" or passively watching flagrant and systematic violations of basic human rights. Rather, it is between the principled and institutionalized application of the same standards everywhere over time, on the one hand, and self-help and vigilante justice in crisis situations, on the other. The morally viable and practically sustainable approach is for other states to act individually and collectively in gradually investing in the capacity of the oppressed people to defend their own rights, while generally upholding the fundamental credibility of the rule of law in international relations. The possibility of direct intervention in the territory of states that engage in gross and systematic violation of human rights should remain as a last resort, provided it is exercised in a principled and consistent manner. But the primary response must be the promotion of local capacity for legal and political accountability of governments to their own people.

Second, this promotion of local capacity must be through the development of national institutions and mechanisms of accountability within the specific context of each country. In other words, such efforts must build on what actually exists on the ground because attempting to impose norms and models developed elsewhere is both objectionable as a colonial exercise in cultural imperialism, and unlikely to be workable in a sustainable manner in practice. Moreover, these efforts should always respect the independent agency and human dignity of its intended beneficiaries by gradually diminishing their dependency on external support.

But in the final analysis, the ultimate success of this approach is contingent on the willingness and ability of the people themselves to oppose oppression and violation of their rights to the maximum possible degree. The critical elements of this most fundamental requirement might be called the sociology and psychology of resistance and the context within which such resistance is supposed to take place. I will discuss these elements under the two sections following this introduction. In the last section of this chapter, I will draw on some of the findings of the country studies prepared under the project from which this book emerged, as explained in the Preface, to highlight differences in the level of achievement and challenges facing various African societies. But first, here are some further reflections on my earlier remarks about the nature and dynamics of the legal protection of human rights in general.

As a working definition, human rights are those claims which every human being is entitled to have and enjoy, as of right, by virtue of his or her humanity, without distinction on such grounds as sex, race, color, religion, language, national origin, or social group. This generally accepted definition does not provide an authoritative list of what these rights are or specify the precise content of any right in particular. It does not explain the criteria and methodology by which specific human rights can be identified and recognized, or settle controversies about economic, social, and cultural rights and whether there are, or ought to be, collective human rights other than the right to self-determination. In addition to addressing questions of more precise definition and content, one also needs to reflect on issues of how and by whom are human rights to be respected and protected, whatever they are and whatever content they may have. Theoretical definitions and enumeration of lists of human rights in the abstract is wishful thinking, unless supported by clarification of the process by which these rights are supposed to be implemented in practice.

To begin with, the assertion that human rights are claims to which all people are entitled, as of right, by virtue of their humanity firmly locates these rights and their implementation in the social and political realm of human affairs. Whatever these rights are, and whatever their precise

content may be, their implementation necessarily requires allocation of resources over extended periods of time, and the establishment of institutional capacity to mediate between rights in case of conflict, and to adjudicate the competing demands in specific cases. The protection of human rights can only be realized through some form of wide-scale political organization that is capable and willing to undertake these functions. Whatever may be its failings and problems, as discussed in the next section, the postcolonial state in Africa is the most viable regime of political organization for these purposes for the foreseeable future. Though constantly contested by a variety of cultural (customary) institutions and networks, and recently increasingly undermined by globalizing forces, the state remains a fundamental framework for political interaction, social relations, economic development, administration of justice, as well as the provision of essential services at the national level. It is also the entity recognized and dealt with by all other states and external actors on such matters as international trade and economic activities, and diplomatic and foreign relations. The postcolonial state is the universally acknowledged medium of policy formulation, daily administration, and the embodiment of national sovereignty.

Thus, the very concept of legal protection of human rights assumes and presupposes the existence of a state that accepts responsibility for upholding the authority of human rights and has the institutional capacity and political will to effect such protection. That is clear enough regarding national constitutional and legal systems, as well as human rights norms and implementation mechanisms based on international treaties between states. Even principles of customary international law, to the limited extent they can establish human rights norms, are premised on state practice out of a sense of legal obligation.[3] It is true that formal legal obligations and implementation mechanisms are supported by such informal methods as pressure by nongovernmental organizations (NGOs) and the media or through diplomatic exchanges. But such efforts seek implementation of human rights obligations through legislation and enforcement by national jurisdictions, and not by direct action independent from the will of the state in question. Therefore, whether one is relying on a country's constitution and legal system, or invoking international legal obligations, the juridical sovereignty of the state means that its appropriate organs and institutions have exclusive jurisdiction over the interpretation and implementation of those rights.

Despite these legal and practical realities, the universality of human rights is intended to ensure the protection of certain minimum entitlements of all human beings, especially when they are not sufficiently protected under national legal and political systems. In practice, the present international standards of human rights are negotiated and adopted by

delegates of state governments and become binding as treaties between states. Under international law, treaties create international obligations, but each state has the ultimate power to interpret and implement those obligations within its own exclusive national jurisdiction, though other actors may try to influence state action in this regard. It is true that intergovernmental organizations like the United Nations and its organs, NGOs, the media and public opinion, among others, seek to influence the human rights performance of various states. These activities are most welcome and indeed essential for the respect and protection of human rights. But the point to emphasize here is that such efforts can only work *through the agency of the state,* rather than through independent action within the territory of the state without its cooperation or at least consent.

Another point to note about the nature of the international source of the obligation to protect human rights is that, from an international law perspective, a state owes its legal obligations to other states parties to the treaty or customary practice. International obligations are normally supposed to be vindicated through interactions among states, whether unilaterally or through intergovernmental organizations like the United Nations and other mechanisms of multilateral relations. If other states parties to a treaty deem a state to be in breach of its obligations, it is up to those states to take necessary action under international law to ensure compliance or otherwise retaliate against the offending state. As a general rule, the whole system does not conceive of any legal role for nonstate actors, though they may well be able to exercise strong political or other influence on state actors.

This system is unlikely to work well for human rights treaties because their beneficiaries are individual persons and groups making claims against the state that is supposed to represent them in the international arena. For the system to work properly, states are supposed to have sufficient self-interest in monitoring and acting against breaches of international obligations by other states parties to a treaty or bound by a rule of customary international law. National self-interest is normally defined to include such matters as trade or economic relations, defense and national security, and natural resources. States may also deem the protection of their nationals against other states as part of their self-interest, though they may not be able to do it effectively in some situations. While many states claim commitment to international human rights standards, they are unlikely to risk their own self-interest in order to challenge another state's failure to honor its international human rights obligations toward its own nationals. This reality may explain why interstate complaint procedures under global and regional human rights treaties are rarely used, even against states that are universally condemned for their flagrant and massive human rights violations.

The same is true of claims to incorporate human rights concerns in the foreign policy of a state by making the protection of these rights a condition for giving aid to developing countries, through diplomatic pressure, or as part of the rhetoric of justifying so-called humanitarian intervention. But one should recall here that the rationale of international protection of human rights is that governments cannot be trusted to respect the rights of their own citizens, let alone those of citizens of other countries. Even if one is to assume a government's genuine commitment to the protection of human rights in other countries, its motives will probably be mixed because of the unavoidable complexity of the foreign policy interests of any state. Moreover, it is unlikely for declared intentions to translate into concrete and consistent action, regardless of changes in government and shifting priority in national politics. In any case, responses by other states are too slow and generalized to assist specific individual or group victims of human rights violations.

By the People for Themselves

It is therefore clear that the beneficiaries of human rights standards themselves must assume primary responsibility for protecting their own rights, whether against their own state, or by inducing it to support them against some external actors or conditions causing the human rights violation. This process can either relate to how to prevent the occurrence of violations in the first place, or effectively redress the wrong done to the victim in order to deter future violations. It should also be emphasized here that all persons and groups are "beneficiaries" of human rights standards, and not only the immediate victims of violations. Indeed, violators too can become victims when they fall out of favor with an oppressive government they used to serve in the past, or upon a revolutionary change of regime.

It may sound odd to speak of the victims protecting their own rights, but that is in fact true in all cases, whether at the national or international level, as it is always a matter of relative power relations between the violator and victim. That is, the question is how to move the violator to comply by finding an appropriate point of relative advantage or leverage point to that end. The availability to the victim of effective means of recourse that the violator will find difficult to resist is part of this process. But since this is unlikely to be readily available or self-evident, the issue is usually how to somehow shift the balance of power in favor of the victim, thereby prompting an actual or potential violator to comply with human rights norms in question.

Regarding the legal protection of human rights in national settings in particular, the first point to make is that being a victim does not necessarily mean that one is standing in an objectively and permanently weaker posi-

tion in relation to the violator. In fact, the violator's power is usually dependent on the victim's perception of, and response to, the situation. If the victim is somehow able to refuse to submit to the apparent power of the violator, and able to resort to whatever means of resistance are available, the terms of the relationship between the victim and violator would already have begun to shift or change. Part of that transformation is an understanding of the nature of balance of power relations between the victim and violator, and calculation of how it might sufficiently shift or change in favor of the victim.

This psychological dimension of the relationship is closely linked to its political dynamics because violators cannot act without consideration of the consequences of their actions, especially the reaction of the actual or potential victims. The state itself is a political creature that does not have an independent existence from the people who control its apparatus and those who accept their commands. Despite all the material resources and coercive powers available to them, the ability of those officials who act in the name of the state is first and foremost political, including the willingness of the general population to accept or at least acquiesce to the state's actions. Since those in control of the state are a tiny fraction of those who accept its power, the ability of the former to enforce their will through direct force is untenable in the face of large scale and persistent resistance. Those who control the state would therefore need to persuade or induce the vast majority to submit to their power and authority, which is usually achieved by claiming to represent the will of the majority or acting in their best interest. In fact, not a single government in the world today openly claims that it is entitled to rule irrespective of its ability and willingness to serve the best interest of the population. The question is therefore how can violating the human rights of the population of a country be in the best interest of that very population?

From a practical perspective, there appear to be several possibilities for justifying the political authority of the state, such as safeguarding national security, the dictates of tradition or of moral or religious standing of the ruling elite. Political authority may even appear to be founded on the reality of effective control over the population through the sheer force of intimidation. Ultimately, however, none of these possibilities can materialize unless the population at large accepts or acquiesces to the authority of those in control of the state. Since human beings are always motivated by their self-interest in basic survival as well as material and moral well-being, such acceptance or submission is usually based on the people's belief that it is in their best interest. Whether it is based on the force of tradition or of moral or religious standing of the ruling elite, people will not submit to an authority that threatens or undermines their fundamental self-interest in human existence. It is better to speak of "human existence" in this context

to indicate that it is more than purely physical survival and includes a sense of social justice and human dignity. Resistance may be delayed because of the psychological or material force of the bases of authority, but it can also mount in response to severity of oppression that weakens the legitimizing effect of an alleged rationale. For example, people may be culturally conditioned to submit to the authority of traditional or religious leaders, but this tendency will diminish in proportion to clarity of perceptions that those leaders are actually violating the interests of their constituencies. Even when people submit out of fear for their personal safety, there will probably come a point when the drive for human existence will overcome the force of intimidation.

For our purposes here, one can therefore conclude that the strength of a people's determination to insist on the protection of their human rights is proportionate to their belief that those rights are essential for their human existence. In other words, weakness in a people's determination to resist human rights violations reflects a lack or weakness of conviction that those rights are essential to their human existence. Conversely, the stronger that conviction, the more likely will people insist that the state respects and protects those rights against whoever violates them. The question that emerges from this analysis is whether a particular set of human rights has achieved, or is likely to achieve, the necessary level of acceptance among its purported beneficiaries as essential for their human existence.

The answer to this question is relative in the sense that the strength of a people's determination to accept the consequences of resistance is proportionate to their perception of the relationship between a given right and human existence. For example, people will more readily resist a threat to their physical survival than a denial of their right to participate in their own government or violation of their freedoms of expression or association that appears to be abstract and far removed from their daily concerns. But this, in turn, is a function of perception and understanding of the relationship between these freedoms and physical survival, which is also a relative matter. For instance, a denial of the right to participate in government is likely to be resisted to the extent that it is believed to be related to physical survival because bad governmental economic planning or poor response to natural disasters can threaten human life or essential health. The matter is also relative in the sense that people may also be moved to resisting non-life-threatening violations of their rights, but they are unlikely to do so at a serious risk to their lives. The question is therefore how do African peoples relate to human rights and perceive the relationship between those rights and their own human existence?

The type of norms that came to be known since the mid-twentieth century as "human rights" certainly had some philosophical, religious, and intellectual antecedents in the history of many societies. Moreover, the values

and institutions that underlie these norms have come to be accepted by most societies today as a result of the internationalization of Western European and North American models of the nation-state, constitutional orders, and international relations through colonialism. In that sense, one can speak of the universality of human rights as a product of widely accepted moral insights and shared political experiences. But the idea of recognition and legal enforcement of these norms as overriding fundamental rights clearly emerged from Western political and intellectual experiences since the eighteenth century. Although not acknowledged for local populations during colonial rule of African and Asian societies, these rights came to be routinely included in constitutional bills of rights upon achieving independence in the mid-twentieth century.

The problem with the constitutional origins and international development of human rights from the point of view of African societies is that they did not participate in the early domestic development of these rights, or in their initial formulation at the international level. When these rights were developed in Western Europe and North America, African societies were not organized as nation-states with national constitutional orders and related institutions. Moreover, the colonial administration from which African societies emerged in their present nation-states was by definition a denial of any possibility of constitutional standing and participation for local African societies. At the time of the drafting and adoption of the Universal Declaration in 1946–48, as the constituent document of the modern human rights movement, there were only four African members of the United Nations (Egypt, Ethiopia, Liberia, and apartheid South Africa). The same European powers which upheld human rights for their citizens under national constitutions, and proclaimed the Universal Declaration for all of humanity, were at the time denying African societies their most basic human rights under colonial rule. Furthermore, as discussed in the next section, the concept of the nation-state, with its constitutional order and bill of rights, that African societies were supposed to implement after independence was a colonial impositions rather than the product of internal political, social, and economic developments. This is one aspect of the perception of lack of legitimacy of human rights in African societies.

Another aspect of this legitimacy issue is the apparent tension between certain African cultural and religious traditions, on the one hand, and some human rights norms, on the other. It is true that similar tensions exist in all societies, including liberal cultural relativism of Western societies against social, economic, and cultural human rights. But the issue seems to enjoy greater resonance in African societies because they did not yet have the level of political stability and economic development that would enable them to mediate such tensions for themselves in their own specific context. Moreover, issues of legitimacy and relevance in origins and current context

are exacerbated in the African context through deliberate manipulation by those who wish to discredit or undermine human rights for their own political or ideological reasons. The ruling elite seek to legitimize their authoritarian regimes and oppressive practices, while religious fundamentalists and other cultural relativists perceive the human rights ethos as antithetical to their worldview and vision of the social good.

Given these realities, proponents of human rights in Africa should take challenges to the legitimacy of human rights in African societies very seriously. For example, they should not assume that the majority in their respective societies already understand and accept these norms, but are only unable to uphold them in practice because of oppressive regimes or authoritarian social structures and institutions. As indicated earlier, Africans may be failing to stand up for their human rights because they do not perceive international standards as essential for their human existence. Accordingly, the challenge facing the proponents of human rights is to demonstrate to their local communities the legitimacy and relevance of international standards in their own immediate context. This is by no means an easy task, but it can be done if taken as a sufficiently high priority by human rights advocates in Africa.[4]

Part of this process is to emphasize the importance of pursuing the legal protection of human rights in particular. First, the very concept of human rights in the modern sense of the term is that these are entitlements *as of right,* and not simply because of charity, social solidarity or other moral consideration, though those purposes may well be served in the process. In the present context of state societies in Africa, as opposed to what they may have been in precolonial times, no entitlement can be claimed as of right without legal mechanisms for its implementation or enforcement. That is, whatever other strategies one may adopt for the promotion and protection of human rights, there has to be ways and means for legal protection if human rights are rights at all.

Second, the availability of effective means of legal protection enables people to resist violations of their rights peacefully and in an orderly fashion, without having to risk their personal safety or suffer other serious consequences every time. As indicated earlier, this possibility is part of the process of shifting the balance of power in favor of victims or potential victims of human rights violations against the violator. The victim's apprehension that the cost of resistance might be too high is part of the violator's psychological advantage. Conversely, reducing and quantifying the consequences of resistance through the legal process will encourage victims to resist and support them in that process.

Another useful function of legal protection of human rights is that it provides society with opportunities for resolving conflicts within specific rights or between competing claims of rights. The deliberate nature and

slow pace of the legal process is particularly appropriate for the sort of sociological and theoretical reflection necessary for resolving difficult issues like striking a balance between freedom of speech and protection of people's privacy and reputation. For example, should the incitement of racial or religious hatred, commonly known as "hate speech," be allowed as legitimate freedom of opinion and expression, or prohibited because of its negative social and political consequences.

An appreciation of these valuable functions of the legal protection of human rights will assist in building up political support for the success of this type of remedy or avenue of redress. Without strong political support, the legal protection of human rights is unlikely to receive sufficient human and material resources for its effective implementation. An understaffed and overcrowded legal process is hardly conducive to social and moral deliberation over the difficult policy issues that are likely to arise in human rights litigation. Even stronger political support is needed for making immediate accountability for any human rights violation so imperative and categorical that it becomes simply "unthinkable" for those who control of the apparatus of the state to act in that way.

Strategies for promoting political support include campaigns for raising public awareness about the importance and benefits of legal protection of human rights and exercising sufficient public pressure to ensure the success of such protection whenever it is sought by victims or potential victims to generate a momentum in its favor. But the main point that should be emphasized here is that the existence of sufficient political support for the legal protection of human rights cannot be taken for granted or assumed to exist without deliberate efforts for promoting and sustaining it over time.

As suggested earlier, the state is the essential context within which human rights are to be protected in practice. I now turn to a brief discussion of this subject in the African context, primarily in relation to the underlying issues of legal protection of human rights, before concluding with an overview of the current situation and future direction of developments in this regard.

The Postcolonial State in Africa

Notwithstanding the wide diversity of earlier forms of social and political organization and significant differences in their colonial experiences, all African societies today live under European model nation-states. Even those parts of Africa, like Egypt and Ethiopia, which were not colonized in the formal sense of the term,[5] have come to adopt the same European model in order to achieve national sovereignty and international recognition. Paradoxically, although in fact a poor copy of an alien model imposed by European colonialism, and while incapable for a variety of reasons of

discharging its responsibilities at home and abroad, the postcolonial state in Africa is supposed to enjoy all the prerogatives and privileges of equal sovereignty. In this way African states are expected to protect their citizens and territories and to that end are deemed to be entitled to exclusive national jurisdiction over them, regardless of their ability and willingness to discharge the obligations of that claim.

Thus, although many African states are internally deficient and externally weak, their sovereignty is guaranteed by the world community of states in ways that stand in sharp contrast to the model of external recognition of their statehood on the basis of their empirical sovereignty on the ground. As explained by Robert Jackson and Carl Rosberg:

> African states are direct successors of the European colonies that were alien entities to most of Africa. Their legitimacy derived not from internal African consent, but from international agreements—primarily among European states—beginning with the Berlin Conference of 1884–85. Their borders were usually defined not by African political facts or geography, but rather by international rules of continental partition and occupation established for that purpose. Their governments were organized according to European colonial theory and practice (tempered by expediency), and were staffed almost entirely by Europeans at decision-making levels. Their economies were managed with imperial and/or local colonial considerations primarily in mind. Their laws and policies reflected the interests and values of European imperial power, and these usually included strategic military uses, economic advantage, Christianization, European settlement, and so forth. Although the populations of the colonies were overwhelmingly African, the vast majority of the inhabitants had little or no constitutional standing in them.[6]

For our purposes here, it should be emphasized that African societies had little control even over the timing and dynamics of the process of decolonization that is supposed to have "restored" their sovereignty. Independence eventually came about as a result of shifts in the dynamics of European domestic politics and international relations after the end of World War II. The timing of independence was largely decided by the colonial power for its own considerations, rather than by internal developments within African societies. In order to immediately end colonial oppression and exploitation of African societies, the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples stipulated that the inadequacy of political, economic, social, or educational preparation should never serve as a pretext for delaying independence. In this way, increasing international moral and political pressures resulted in the separation of the juridical right of self-determination from the empirical capacity for self-government.[7] This blanket and unconditional preservation of juridical statehood and territorial integrity, regardless of ability and willingness to live up to consequent obligations, became the primary concern of the Organization of African Unity (OAU) since it was established in 1963.

This preoccupation with the preservation of juridical statehood does not mean that African countries are free from serious political conflict. The sovereignty and stability of African states are constantly contested in regional conflicts and internal civil wars,[8] as well as by the forces of diminishing sovereignty over vital national economic and social policy under current structural adjustment programs and unfavorable global trade relations. Such serious threats in turn led African states to be more concerned with their juridical sovereignty and political stability at almost any costs than with their ability to perform their essential functions of protecting and serving their citizens.

A particularly significant factor to note here is the nature of colonial administration and the political culture it cultivated in African societies. For decades, colonial powers exercised exclusive control over local populations by ruling through a few educated local elite and traditional rulers and the extensive use of divide and rule tactics. All that independence signified in most African states was the transfer of control over authoritarian power structures and processes of government from colonial masters to local elite. Notions of popular participation in governance and accountability of officials at the national and local level were never known to African societies during colonial rule or after independence. The political parties that were established during the struggle for independence often remained auxiliary institutions of personal power and rarely transformed into authentic organizations of public opinion or expressions of popular sovereignty.

Moreover, with external defense secured by agreement among colonial powers since the conference of Berlin, and largely preserved by the OAU since 1963, state security came to mean directing military forces inward at African populations as protection against rebellion or riot. National security has been transformed into the security of the regime in power, with no possibility whatsoever of transparency or political and legal accountability in the operation of security forces. Unable to govern effectively and humanely, postcolonial governments tended to compensate by using oppressive and authoritarian methods, usually employing the same colonial legal and institutional mechanisms maintained by several cycles of "native" governments since independence.

Since the state usually lacked effective presence in most of its territorial jurisdiction, ruling elite tended to focus on controlling the government apparatus and patronage system and to strive to retain the support of key ethnic leaders, instead of seeking genuine legitimacy and accountability to the population at large. Ironically, those shortsighted political strategies in fact facilitated the loss of power by most of the first generation of civilian African leaders to military usurpers who would succeed in controlling the government and the whole country by simply physically holding a few officials and key government installations in the capital. Within hours of a

successful coup, military usurpers would be deemed to be in "effective control of the government" and thereby granted automatic recognition by "the international community" in almost every single case. In this way, both the domestic and international sources of recognition of independent statehood in postcolonial Africa tend to be exclusively concerned with sovereignty of the government, not of the people.

Whatever may have been the reasons or alleged justifications, the vast majority of first constitutions were actually either suspended or radically altered by military usurpers or single party states within a few years of independence. In other words, there appears to have been a fundamental weakness of the principle of constitutionalism itself in the vast majority of African countries. Subject to minor and partial exceptions, the idea that government must be in accordance with the rule of law in ways that uphold the fundamental individual and collective rights of all citizens has not been observed by postcolonial states. Constitutional instruments have also failed effectively to hold governments accountable to the principle of constitutionalism. Whatever the specific reasons may have been from country to country—and they are no doubt complex and often controversial—these are the sad realities in almost all African countries. Irrespective of the explanation one may wish to accept, local populations seem to be unwilling or unable to resist the erosion or manipulation of their national constitutions and governments by a variety of civilian and military leaders since independence.

In my view, the weakness of the principle of constitutionalism and actual failure of African constitutions are symptoms of the wider problem of the lack of dynamic relationship between civil society as it exists on the ground, on the one hand, and state institutions and processes, on the other. Part of the underlying causes of this problem, it seems to me, is the fact that the concept and nature of the present nation-state was an external imposition, rather than an indigenous growth that has evolved out of the lived experiences and cultural values of African societies. Far from having a sense of ownership and expectation of protection and service, as well as a general belief in their ability to influence its functioning, African societies apparently regard the postcolonial state with profound mistrust. They tend to tolerate its existence as an unavoidable evil but prefer to have little interaction with its institutions and processes.

These problems can be redressed through a variety of strategies to enhance the legitimacy and popular accessibility and utility of a constitution as a living institution. Analysis of drafting and adoption processes and of the content, interpretation, and application of the document are also necessary for assessing the ability of a people to hold officials and institutions of the state responsive to, and accountable for, the basic needs of the popu-

lation. For the purposes of legal protection of human rights in particular, it is important to examine the cluster of norms, institutions, and processes pertaining to the rule of law, political participation, protection of fundamental rights, and so forth. However, as illustrated by the recent developments in Ethiopia briefly examined below, even with the most "promising" drafting and adoption process and despite the desperate need of the population for constitutionalism to take root and operate effectively, it is difficult to predict what will happen in practice. But since it is unthinkable, in my view, to abandon the possibility altogether, there is no alternative but to continue the struggle for moving the process forward whenever there is a setback for, or apparent failure of, constitutionalism in any country. From this perspective, it is critical to take a long-term view of the complexity and contingency of the process of ensuring the sustainability and practical utility of this principle in each country.

After decades of civil war and severe political and economic instability, Ethiopia finally appeared to have begun the process of securing the principle of constitutionalism, as explained in Chapter 2. However, developments in that country since the author finalized her draft for publication seem to seriously undermine that promising prospect. It is not possible to review these developments in detail or discuss various possible explanations and underlying causes in the political culture and recent history of the country. But the immediate trigger of the present crisis (as of August 2001) appears to have been the 1998–2000 war between Ethiopia and Eritrea, and the postwar relationship between the two countries in general. Major human rights problems during the war include the Ethiopian government's forceful expulsion of 70,000 Ethiopians of Eritrean parentage to Eritrea, after holding them in harsh detention conditions, without any possibility of challenging their expulsion. The government of Ethiopia also continued to hold under harsh conditions, and without charge or trial, thousands of people it suspected of sympathizing with insurgents within the country itself.

Moreover, disagreements over the causes and conduct of the war and postwar relations appeared to have been the cause of a serious division within the Tigray People's Liberation Front (TPLF), the main party in the ruling coalition, the Ethiopian People's Revolutionary Democratic Front (EPRDF). In the ensuing power struggle within the TPLF and EPRDF, the faction led by Prime Minister Meles Zenawi apparently won and succeeded in expelling the dissident group within the central committee of his own party.[9] To achieve its objectives, however, the winning faction has resorted to detaining the leading dissidents on allegations of corruption and manipulating the judicial process to keep them in detention. Such developments are to be expected in the politics of any country. Indeed, the fundamental

purpose of the legal protection of human rights is precisely to prevent such abuse of the constitutional and legal system of the country for the political ends of the government of the day.

To summarize, this book presents studies on the legal protection of human rights under the constitutions of present African states that are the product of arbitrary colonial histories and decolonization processes. By their very nature, these states have tended to continue the same authoritarian policies and to enhance their ability to oppress and control, rather than to protect and serve, their citizens. The constitutional systems by which these states rule were hurriedly assembled at independence, only to collapse or be emptied of all meaningful content within a few years. The legal systems these states continue to implement are usually poor copies of the colonial legal systems, lacking legitimacy and relevance to the lives of the population at large. Many African states also suffer from cycles of civil wars and severe civil strife that undermine any prospects of the stability and continuity needed for building traditions and institutions of government under the rule of law. Their economies are weak and totally vulnerable to global processes beyond their control.

But the here goal is not simply to lament the deplorable status of the legal protection of human rights under African constitutions. Rather, the purpose is to provide a realistic basis for developing strategies to transform the situation in favor of greater and more effective protection. This objective is founded on the firm conviction that state practice must and can be changed in this way, provided appropriate strategies are implemented with the positive belief in the ability of African peoples to protect their own human rights.

Legal Protection of Human Rights

My purpose in this last section is not to summarize the various country studies but rather to highlight and draw upon some representative samplings of those findings for a general view of where different African countries are at present, and indicate what needs to be done to improve the quality and sustainability of the legal protection of human rights.

According to the guidelines that were agreed upon among all the authors, they were requested to organize and analyze their studies under six subheadings. They were all asked to begin with an overview of the historical background and demographic profile of the country and to highlight general political social, cultural, and economic conditions relevant to their subject. Against that general background, each author should proceed to examine the constitutional and legal framework for the protection of human rights, the status and performance of the judiciary and legal profession, the impact of political, social, and economic context, and the status

and role of nongovernmental organizations, and offer some conclusions and recommendations.

Constitutional and Legal Framework

In this section, authors were asked to explain the origins, main developments, and current status of the constitutional and legal systems of their respective countries, followed by an overview of constitutional provisions relating to the protection of human rights. They were also requested to note ratifications of, and reservations on, the African Charter on Human and Peoples' Rights and the main United Nations human rights treaties. Special attention should be given to possibilities of using international human rights norms in domestic litigation and legal enforcement, regardless of how much this is happening in practice. In other words, this section is supposed to cover all aspects and possibilities of the formal legal view of the protection of rights, that is, what the law says should happen. The relationship between theory and practice should emerge from other parts of each country study.

Authors were also urged to discuss the status and role, if any, of customary (including religious) law and practice and its relation to the formal legal system of the state. Questions to be covered in this part of the chapter should include, for example, whether customary law and practice are subject to an overriding concern with the protection of constitutional and/or human rights. Is it possible, for instance, to challenge customary law as unconstitutional, or is there broader judicial review or other mechanisms to ensure respect for procedural or substantive constitutional and human rights standards in the application of customary law?

African countries may be characterized or classified in different ways, but for our purposes here, it might be useful to consider them in terms of whether the government is, on the whole, an aid or an obstacle to the legal protection of human rights. Whether a country's legal system is based on common or civil law is not the most important criterion in determining its attitude toward the legal protection of human rights. Similarly, whether a country has a federal system like Nigeria, or unitary system, as is the case in Mozambique and Uganda, is immaterial in principle, though the constitutional framework and institutional arrangements for legal protection under each type of system will probably be significantly different.

The influence of Western liberal theory can be seen in the fact that some African constitutions tend to recognize civil and political rights and generally disregard economic, social, and cultural or collective rights. None of the countries surveyed provide full-fledged constitutional protection for economic, social, and cultural rights. A few constitutions, like those of Ghana and Uganda, include economic and social rights as "Directive

Principles of State Policy." South Africa, which has apparently made the most advanced constitutional provision for economic, social, and cultural rights, still make them subject to progressive realization. It also remains to be seen how far South Africa can maintain its constitutional lead over the rest of the continent. But in all countries, additional protection of these rights can be drawn from international treaties providing for the rights when the treaties are ratified and their promises are fully incorporated into national domestic law.

In contrast, provisions for civil and political rights, like freedom of expression and association, can generally be found in every African constitution. Even repressive governments pay lip service to these notions, although they have developed some impressive ways of circumventing them, such as claw-back and ouster clauses and the use of military tribunals, as discussed below. Moreover, as already illustrated by the case of Ethiopia above, the existence of constitutional provision for specific civil and political rights is a necessary but insufficient condition for the legal protection of those rights. Regardless of the details of constitutional and statutory schemes, the question should always be whether the government is open and legally accountable to its citizens. Since many constitutions have been totally or partially suspended, drastically amended, or totally abrogated, the question may therefore be whether some form of constitutional framework for legal accountability remains despite the absence of, or the imposition of severe restriction on, a written constitution as a formal document.

Despite the existence of human rights protections in most African constitutions, however, repressive governments have found numerous ways to limit or eliminate these protections at the theoretical level, let alone as a matter of practice. The most important constitutional limitations and restrictions include the following. *States of emergency* appear to be the norm, rather than the exception, in several African countries, and the criteria and procedure for regulating them tend to grant considerable discretion to the executive branch of government. Once a state of emergency is declared, the executive can suspend the people's exercise of their civil and political rights in the interest of state security. For example, in a state of emergency it is common for the rules regarding preventive detention to be relaxed to "legalize" detention without charge or trial for exercising one's freedom of expression or association. Specific provisions of the constitution may be subject to *derogation* (partial repeal or suspension), based on the operation of other constitutional provisions, during an emergency or for other reasons. *Ouster clauses* are used to preclude or "oust" the jurisdiction of the courts over provisions of the constitution or other laws, thereby prohibiting them from hearing cases brought under the provisions in question. *Claw-back clauses* are also used to permit constitutional provisions and guarantees to be restricted by ordinary legislation.

Few of the studies actually discuss the rules of *standing to sue,* but the relevant provisions in most of the constitutions surveyed tend to limit standing to those who have suffered the actual violation of their rights. However, some countries, like South Africa and Uganda, have specifically broadened the rules of standing to permit public interest litigation. It is interesting to note that the bill of rights in the new South African constitution may apply to relations among private persons, as well as against the state and its organs and officials, as usual in Western constitutional schemes. The extent of the protection will vary, depending on the nature of the right in question, and it remains to be seen what the courts and other institutions will make of this provision.

Most of the countries studied have ratified the major *international human rights treaties,* without major reservations. Differences in legal systems are reflected in whether or not incorporating these international obligations into domestic jurisdiction requires specific legislation or procedure, while political factors determine whether or not those steps are taken for human rights treaties in particular. But the critical question here is whether national courts do apply such treaty obligations, or whether there are opportunities for realizing some degree of accountability for their governments before regional or international bodies, like the Commission of the African Charter on Human and Peoples' Rights and the UN Human Rights Commission. These types of issues were to be discussed in each chapter under the practical application aspects of the role of the judiciary, the legal profession, and NGOs.

The *legal systems* described in the country studies appear to be broadly based on Western models of either the English common law or continental civil law variety. As noted above, the choice of one system or another is a product of colonial experience and is not itself indicative of whether and to what extent human rights are legally protected in the country. But generally speaking, an imported legal system is likely to alienate the local people, as the law appears to them as both intimidating and inaccessible. Such perceptions are only exacerbated when courtroom proceedings are conducted in European languages that the parties do not understand. The result is particularly anomalous when all the major actors in the courtroom, judge, jury, attorneys, parties, speak the same local language just outside the courtroom, yet the proceedings inside are conducted in a foreign language.

Moreover, in former British colonies in particular, the "reception" of the legal system of the colonial power meant that English statutes existing as of a certain date were deemed to be the law of the colony. Statutes passed by the British Parliament after the date of reception were applied in the colony. That practice not only gave foreign law unusually high status in many African countries, but also meant that those imported statutes often remained in force in "independent" African countries in their original form,

even when the original provisions in English law have long since been repealed or amended.

Given these anomalies, it is curious that almost all country studies took the colonial origin and nature of their legal systems for granted, without much comment. For most of the authors, the chief difficulty is not the statutes themselves or the foreign origin of much of the legal system, but rather problems of implementation and the constraints of resource limitations. Given their own training and the experiences of their own countries, it is not surprising that the authors of these studies find it difficult to imagine how a more authentically African legal system might be different from what prevails now throughout the continent.

One possible difference is the role of *customary law*, which is directly or indirectly recognized in almost all the legal systems discussed in these studies but plays different roles in each. In South Africa, for example, while customary law governs the domestic affairs (family law) of three-quarters of the population, its application must be consistent with the nondiscrimination provisions of the constitution. It will be interesting to see how the Constitutional Court of South Africa will attempt to mediate this tension between the individual right to equality and collective rights to cultural self-determination through the application of customary law. In Uganda, customary law is not codified and is deemed to be subordinate to statutory law. The party relying on a customary law rule must show the rule to be recognized by the native community whose conduct it is supposed to regulate. According to section 8(1) of the Ugandan Judicature Act of 1967, to be applied, customary law must satisfy two other tests: it must not be "repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law."

The Judiciary and the Legal Profession

Having covered the normative side of what the law says should happen, the contributors were to consider the institutional framework of the legal protection of human rights in their respective countries. To this end, authors were asked to first explain and discuss the general structure and organization of the judiciary, training of judges (or lack thereof), their institutional culture and professional tradition, and so forth. Second, they were to consider the theory and reality of independence of the judiciary in their countries, past and present, as well as its prospects in the near future. A similar discussion was requested for the structure and organization of the legal profession and its role (or lack thereof) in the legal protection of human rights. Issues to be addressed in this part include the composition, training, traditions, and organizations (bar associations, and so on) of the legal profession, and its role, if any, in the legal protection of rights, whether

through the judicial process or by other means. For example, does the legal profession provide any legal aid or other services for human rights organizations? Is the legal profession engaged in training or education for the legal protection of human rights?

As can be expected, there are significant differences in the structure and organization of the judiciary in common law and civil law jurisdictions, as a result of colonial background as noted earlier. In common law countries, although the terminology may vary, the structures are fairly similar. Usually, there is a hierarchy of courts of generalized and specialized jurisdiction. Courts of general jurisdiction hear both civil and criminal cases and are usually divided geographically, with district courts feeding into regional courts. These lower courts of general jurisdiction are often referred to as magistrates' courts. There is usually a high court with unlimited original jurisdiction over both civil and criminal matters. It may also function as a constitutional court. Often there is no right of appeal for decisions rendered by the high court in its capacity as a constitutional court. The highest court in the system is the court of appeal, which will only rule on questions of law. Limitations may be placed on lower courts in terms of geographic area covered, subject matter jurisdiction, and size of claim.

Civil law or continental type of judicial structures can be found in countries colonized by France, like Guinea, and Portugal, like Mozambique. Some of its features are also found in North African countries. In this type of model, judges are trained lawyers whose judicial careers are essentially part of the civil service. Mozambique presents an interesting case of transition from a revolutionary socialist judicial system to a more common civil law system since the early 1990s. The "popular justice" system under the first organization of the judiciary after independence (Law 12 of 1978) encompassed all courts from the supreme court to local tribunals. Judges for local tribunals were all elected, while all other courts functioned with a combination of professional and elected judges. That popular justice system was an integral part of a wide process of social transformation after independence. Under the new system, popular local tribunals have become community courts, which operate outside the judiciary as organized under the 1990 constitution.

There are also differences in the recruitment and training of judges. In Senegal, magistrates are recruited in one of two ways. One way is from the ranks of lawyers, professors or other officials with varying levels of experience depending on the category (for example, ten years for lawyers and three years for university professors). Another way is for interested individuals who have a law degree but lack the requisite experience to pass an entrance examination that will admit them to a two-year training program at the National Center for Judicial Studies. In Uganda, judges receive no special training before or after their appointment. The lower ranks of the

judiciary, the magistrates, need only a postgraduate diploma in legal practice from the Law Development Center. Judges are appointed from the ranks of the magistracy, the bar, or lawyers in the public service. It goes almost without saying that since there is no judicial training for judges, there is no specialized training in human rights either. In Morocco, judges are selected on a competitive basis and undergo a two-year training program consisting of five months at the National Institute of Judicial Studies, fifteen months of practical experience in the courts, and four months of practical experience in penitentiary institutions, companies, and prefectures. After the training program, candidates must pass another examination before appointment as judges.

Judicial independence can be undermined in two ways. First is the actual dependence of judges on the executive branch of government for job tenure and security. The second risk comes in the form of restrictions on judicial power to decide cases, as illustrated by the case of Nigeria under military rule. Separation of powers and independence of the judiciary in the liberal constitutional sense were unknown under the popular justice system that prevailed in Mozambique from 1978 until the adoption of the 1990 constitution.

As for dependence on the executive, judges are almost invariably appointed by various components of the executive branch. In a number of countries a nominally independent judicial service commission will nominate judges, but these commissions are often dependent on the executive branch of government. Lower-level judges may be appointed by designated agencies within the executive branch. In general, at the highest level (the high court and above) judges are nominated by the chief executive.

Security of tenure in office exists on paper, but it is likely to be rather easily circumvented in practice, as the judiciary is normally subordinate to the executive power. Thus, while the removal of judges is supposed to occur only for good cause, considerable discretion is vested in the executive branch of government in defining and applying that in individual cases. In Morocco, for instance, the executive can suspend a magistrate accused of serious error or transfer a magistrate to "any vacant post in the kingdom at any time." In theory, the judge can be transferred without his or her consent for a maximum of three months, but in practice it is difficult for magistrates to withhold consent or refuse a renewal of the period of "temporary" transfer. Originally relatively autonomous, the Sudanese judiciary has been subject to continual erosion of its independence since 1969. Judges serve at the pleasure of the president of the republic, who has complete power to appoint, discipline, and remove them. Judges may be removed from office unilaterally at any time in the name of protecting "the public interest."

In addition to dependence on the executive branch for their jobs, judges may also be incompetent or corrupt. The need for judges to curry

favor with the executive power, whatever the original motivation, will, sooner or later, fatally compromise the quality of judicial decision making. Nigeria provides a clear illustration of these difficulties. Material and equipment, such as typewriters (much less computers) and stationery, are lacking. Most litigants must supply the stationery required for their case, including writing materials and file folders. As a result of the severe financial constraints and the low level of professionalism generally, court personnel, including magistrates, extort money from litigants. Nigeria may represent an extreme example of a much wider problem, however, as the judicial systems of all African countries studied under this project suffer from a lack of resources across the board. Court dockets are crowded, courtroom facilities are inadequate, delays are frequent, and there is a general lack of access to case reporters and other sources of legal precedent that are necessary for adequate judicial performance in common law jurisdictions. Dissemination of decisions that could be useful in human rights cases is often random or inadequate.

Legal education is generally available at law schools inside the country, which offer a standard curriculum. But access to the legal profession may be restricted by requiring lawyers to serve a training period as "articled clerks" before they can practice on their own, and the number of placements for articled clerks is limited. The system of articles of clerkship required for advocates is a problem in South Africa, where the finite number of places (about one thousand per year) is sufficient to meet only 60 percent of the demand, which means that available places are awarded to the most privileged law graduates.

As can be expected, the independence of local bar associations, and their willingness to take human rights cases and provide assistance to human rights organizations, closely corresponds to the overall climate for human rights in the country. In relatively open countries, like Uganda, bar associations and lawyers generally have more scope to litigate on behalf of human rights. In contrast, the Sudan Bar Association, established in 1935, had a distinguished record of advocacy of civil and political rights until the military coup of 1989 banned the preexisting bar association and instituted its own bar association.

Access to the legal system, particularly for poor, rural, and otherwise disenfranchised people, is also a problem. Lawyers are expensive, and their fees are beyond the reach of most potential litigants. The legal system is usually elitist, its practitioners concentrated in the cities, literally beyond the reach of the largely poor rural population. Public defenders, if found at all, are available only for criminal defendants in serious cases. The Legal Aid Project in Uganda is an example of privately sponsored and funded legal services for the poor. In South Africa, the Ministry of Justice, in response to legislation, has created a government-funded Legal Aid Board,

whose goal is to render or make available legal aid to indigent persons involved in civil cases, work-related cases, divorces, appeals, and other constitutional matters. However, as with so many other aspects of the "new South Africa," the government's goals far exceed its capacity to fund them. South Africa is also exhibiting considerable creativity by experimenting with other, less expensive ways of delivering legal services to those who need them. The Legal Aid Board has established several community centers, housed at universities, to provide legal assistance for both civil and criminal matters.

Mozambique once more presents an interesting case. When only five out of about 350 Portuguese legal practitioners remained in the country upon independence, private law practice was banned, and Law 4 of 1975 allowed law students and paralegals to provide legal services under the supervision of the National Service for Legal Counsel and Assistance. However, as with other aspects of the administration of justice, the system for provision of legal services is in transition, with the establishment of the bar association in 1994, and the legalization of private legal practice. Since the vast majority of the two hundred legal practitioners are concentrated in the capital Maputo, the role of legal counsel in district courts is left to ad hoc "public defenders" who have no legal background at all.

Practice in Political, Social, and Economic Context

In light of the normative and institutional frameworks for the legal protection of human rights under the two preceding subsections, authors were requested to try to place the current practice and future prospects in general political, cultural, and economic context. In other words, authors were asked to assess the *actual practice and operation* of the formal normative and institutional frameworks they described. Questions to be addressed here should also include general reflections beyond a factual review of practice and obvious expectations. For instance, does the country's experience since independence support or repudiate the assumption that formally "democratic" governments are more likely to respect and protect human rights than nondemocratic governments? Which human rights, if any, do democratic governments tended to violate? What human rights, if any, do nondemocratic governments succeeded in protecting or promoting?

Authors considered the current role and operation of customary law, where applicable, especially as a possible source of human rights violations, and its future prospects in view of wider social, economic, and political developments. The main issue here is whether the role of customary law is likely to continue or diminish as a source of human rights violations. What are the dynamics of the relationship between the statutory regulation of the application of customary law and the political process, cultural and so-

ciological factors, or economic constraints facing the state-law system? Another underlying issue suggested for the studies is whether customary law is so deeply entrenched that it would be difficult to displace it immediately or in the near future despite strong human rights objections to its continued application? If so, is it still possible to gradually influence the content and operation of customary and religious law?

Some authors under various sections of their studies gave part of the relevant information. But since most of the studies were more descriptive than analytic, I will offer here a couple of brief reflections on the role of customary law from a human rights perspective, as far as I can gather from the various country studies. One should first note the main features of the political, economic, and social context within which the role and status of customary law should be assessed. These features include general and drastic instability due to civil war or insurrection in the country. Another factor is the weakness and inaccessibility of institutional resources for the legal protection of rights, which forces people to find alternative mechanisms for the adjudication of disputes.

Regarding the application of customary law, the question is not whether it is possible or desirable to replace it by statutory or state law in the abstract. Rather, it is the relationship between the application of customary law and legal protection of human rights that is at issue here. At one level, since customary law will probably be perceived as more culturally authentic and practically accessible and useful by local populations than the much-maligned colonial legal systems, its forcible displacement may itself constitute a human rights violation. Statutory legal systems are incapable of properly serving urban populations, let alone rural populations who have even less access to them and are less able to afford their costs. Neither are they conceived and implemented in ways that are necessarily more protective of human rights than customary law. But the cultural authenticity or practical expediency of customary law should never be upheld at the expense of effective protection of human rights, especially those of women who suffer the most under various customary and religious law systems.

The challenge is therefore how to regulate the content and application of customary and religious law in order to better protect and promote human rights in local communities. Some of these studies clearly show that it is possible for the statutory state system to keep a tight grip on customary law, but that may not necessarily be for the right reasons or in appropriate ways from a human rights point of view.

Status and Role of Nongovernmental Organizations

Having discussed the theory and practice of the formal sector, as it were, authors were then invited to discuss and evaluate the *informal sector*, namely,

the status and role of NGOs, whether openly identifying themselves as "human rights" organizations or not. Issues to be considered here include the mandate, constituency (popular support), operational capacity, funding, and accountability of local or national NGOs, their networks, and future prospects. For example, could they survive and be effective without external funding and technical assistance? What is the relationship between local or national NGOs, on the one hand, and international ones as well as foreign governments, especially of the North, on the other?

Reactions among the authors to NGOs are mixed. They are sometimes criticized for being elitist, out of touch with the population, or ineffective. But even the studies that criticized NGOs acknowledged some positive role for them. For example, the Nigeria study criticizes NGOs for being urban and elitist, but notes that the urban and elite bias of NGOs has begun to change since 1993 and the rise of the community-based environmental rights movement, focused on the oil-producing region and encompassing the rural communities there. According to this study, the public views NGOs in a positive light and relies on them for expression and protection of fundamental rights. NGOs are also criticized for lack of coordination among themselves and consequent duplication of effort, but there are also some attempts to address this problem. In Uganda, for instance, NGOs have begun to work together, coordinate their activities, share information, training, and other resources, and lobby the government and international donors. To facilitate these initiatives, Ugandan NGOs have formed an umbrella organization called the Development Network of Indigenous Voluntary Associations (DENIVA).

The human rights structure often reflects circumstances and political divisions in the country. In Morocco, for example, there are three national human rights NGOs: Ligue Marocaine pour la Défense des Droits de l'Homme (LMDDH); Association Marocaine des Droits de l'Homme (AMDH); and Organisation Marocaine des Droits de l'Homme (OMDH). The LMDDH, which is the oldest of the three, dating back to 1972, is associated with groups calling for more general and strict application of Islamic law. Various left-wing activist groups founded the AMDH in 1979. In response to the ineffectiveness of these organizations and increasing human rights abuses, a broad range of secular groups established the OMDH in 1988 under the aegis of the Bar Association. In 1990 all three organizations began working together and with the Bar Association to develop a national charter for human rights, which was signed in December 1990. They have continued to work together, although all have had difficulty institutionalizing their efforts, faced with the numerous challenges presented by the human rights situation in Morocco. These include government hostility and deficiencies of funds, material and human resources, and weakness of managerial and administrative capacity.

South African NGOs arose out of opposition to apartheid. Prior to 1993 NGOs mostly confined themselves to defending and providing other legal services to individual victims of apartheid. Many are now struggling to adjust to the drastic transformations of the last few years. The positive changes in the system carry with them a host of new and unfamiliar risks. Instead of opposing the government, NGOs now find themselves competing with it for funding, as foreign donors are increasingly channeling to the government funds that they used to provide to NGOs. In response, NGOs have to quickly develop unfamiliar fund-raising skills. Because of the dangerously steep drop in funding, NGOs cannot provide competitive salaries and are losing skilled leadership to the public and private sectors at a time when they are most in need of it. All this turmoil is having an impact on the quality of the services they provide.

There is broad agreement among those authors who addressed the question that NGOs are dependent on foreign sources of funding and technical assistance at the present time and will remain dependent for the foreseeable future. According to the Uganda study, for example, foreign funding can function to censor NGO activities because those NGOs that are dependent on these funds will not want to appear "subversive" in donors' eyes. The Nigeria study attributes poor in-country fund-raising to three factors: fear of government reprisal for becoming identified with human rights activities, the economic recession in Nigeria since the 1980s, and the failure of NGOs to reach out to the local resource base.

Conclusions and Recommendations

Finally, authors were asked to bring their whole discussion and analysis together to give an integrated and coherent evaluation of the reality and prospects of the legal protection of human rights in their respective countries. They were strongly urged to develop specific and concrete policy recommendations and propose practical steps for enhancing and promoting the legal protection of human rights in the country in question.

Notes

1. For a brief comment on this problematic concept and practice see Abdullahi Ahmed An-Naʿim, "NATO on Kosovo Is Bad for Human Rights," *Netherlands Quarterly of Human Rights* 17, no. 3 (1999), pp. 229–31.

2. I have argued elsewhere for elements of this approach from a variety of perspectives. See, for example, Abdullahi A. An-Naʿim, "The Legal Protection of Human Rights in Africa: Doing More with Less," in Austin Sarat and Thomas R. Kearns, eds., *Human Rights: Concepts, Contests, Contingencies* (Ann Arbor: University of Michigan Press, 2001), pp. 89–116; "The Cultural Mediation of Human Rights Implementation: Al-Arqam Case in Malaysia," in Joanne Bauer and Daniel Bell,

eds., *Human Rights in East Asia* (New York: Cambridge University Press, 1999), pp. 147–68; "Expanding the Limits of Imagination: Human Rights from a Participatory Approach to New Multilateralism," in Michael G. Schecter, ed., *Innovation in Multilateralism* (Tokyo: United Nations University Press, 1998), pp. 205–22; and "The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts," *Emory International Law Review* 10, no. 3 (1997), pp. 29–66.

3. Besides the difficulty of proving the existence of principles of customary international law in general, the nature and dynamic of this source of international law is not conducive to precise specification of legal norms or to their effective implementation. See Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), pp. 4–11.

4. For a possible methodology for achieving this, and its application in different settings around the world see, generally, Abdullahi Ahmed An-Naʿim and Francis M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, D.C.: Brookings Institution, 1990); and Abdullahi Ahmed An-Naʿim, ed., *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

5. Egypt was greatly influenced by France following a brief invasion by Napoleon around 1802, and was subsequently occupied by Britain in 1882 as a "protectorate." Ethiopia was briefly occupied by Italy during the 1930s, and had to cope with much European interference in its internal affairs. But both countries retained their own native monarchies until they were overthrown by national revolutions, and were never colonized in the same way suffered by other African societies.

6. Robert H. Jackson and Carl G. Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis," *Journal of Modern African Studies* 24 (1986), pp. 5–6.

7. Ibid., p. 9.

8. Regional conflicts ranged from Tanzania's invasion of Uganda to overthrow Amin in 1978–79, Morocco's forcible occupation of large areas of Western Sahara since 1976, the Ethiopian-Somali wars of the 1970s and 1980s, invasions and destabilization tactics by apartheid South Africa against neighboring countries until the early 1990s, the Eritrea-Ethiopia war of 1998–2001, to the continuing conflict in the Great Lakes region of Central Africa. Many African countries have also suffered devastating civil wars, some continuing for many decades as in Sudan, or in several cycles as in Chad.

9. *Horn of Africa Bulletin* (Nairobi, Kenya: Life and Peace Institute), 13, no. 2 (March–April 2001), p. 13