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Human Rights and Cultural Diversity in Islamic Africa

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A thesis submitted to the College of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Doctor of Civil Laws (DCL)

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Abstract

This thesis establishes a framework for analysing and evaluating human rights within the contexts of global, African-Islamic and Sudanese cultural diversity. The normative impact of culture on international human rights is viewed from the perspective that culture is adaptive and flexible. African-Islamic culture, as exemplified by the Sudan, is no exception.

The first part of this thesis advances a theoretical framework for recognition of cultural diversity and its impact on human rights. Recognition of change as an integral part of culture is vital for a successful mobilisation of internal cultural norms to the support of international human rights. An important conclusion is that ruling elites and those engaged in human rights violations have no valid claim of cultural legitimacy.

The second part of the thesis examines the notion of human rights in traditional Africa and under Shari'a with a specific focus on conceptions of the individual, the nation-state and international law. It is argued that the African-Islamic context is an amalgam of both communitarianism and individualism; further, that the corrupt and oppressive nature of the nation-state in Islamic Africa demands an effective implementation of human rights as set out in the African Charter on Human and Peoples' Rights.

It is suggested in the third part of the thesis that three of the rights included in the African Charter are paramount to effective human rights protection in Islamic Africa: the right to self-determination, the right to freedom of expression and the right to participate in public life. These rights are examined within the Sudanese context in order to provide a more concrete illustration of their potential implementation. The dynamics of Sudanese culture are explored to exemplify a culturally responsive implementation of these rights.

This thesis contributes to the debate on the role of culture in enhancing the binding force of human rights and fundamental freedoms. It aims to inspire pragmatic discussion on the need for effective protection of human rights in order to alleviate the suffering of millions of Africans under existing ruthless and shameless regimes.

Résumé

Cette thèse esquisse un cadre d'analyse et d'évaluation des droits de la personne dans le contexte afro-islamique et la diversité culturelle du Soudan. L'impact normatif de la culture dans les droits de la personne au niveau international devait être appréhendé dans la perspective de la capacité d'adaptation et la felxibilité de la culture. La culture afro-isalmique n'est pas une exception à cette règle générale.

La premièr partie de cette thèse présente une cadre théorique afin d'identifier et admettre la diversité culturelle et les droits de la personne. La reconnaisance du changement culturel comme partie integrante de la culture est primordiale pour la nécessité de la mobilisation des normes culturelles endogènes sensées soutenir les droits de la personne et droit international. Une des conclusions majeures est que la classe dirigeante et ceux impliqués dans la violation des droits de la personne ne peuvent invoquer la culture et la tradition pour légitimer leurs actes.

La seconde partie de cette thèse examine la notion des droits de la personne dans l'Afrique traditionelle et dans la shari'a avec une emphase particulière sur l'individu, l'état-nation, et le droit international. Il est soutenu que le contexte afro-isalmique est un amalgame de communalisme et d'individualisme; et que la nature de l'état-nation en afrique musulmane impose l'application intégrale des droits de la personne enchassés dans la charte africaine des droits de l'homme et des peuples.

Dans la dernière partie, la thèse soutient que trois droits de la Charte africaine sont de première importance dans la protection des droits de la personne en Afrique musulmane. Le droit à l'autodétermination, la liberté d'expression et le droit de participer à la vie publique. Ces droits sont examinés dans le contexte soudanais afin d'illustrer plus concrètment leur application pratique. Les dynamiques culturelles de la "culture soudanaise" sont invoquées pour illustrer une application de ces droits sensible à la culture.

Cette thèse contribue au débat sur la rôle de la culture en sonlignant le caractère obligatoire des droits de la personne et libertés fondamentales. La volunté est de contribuer à une discussion réaliste du besoin de protéger les droits de la personne de façon à soulager les souffrances de millions d'Africains soumis àdes règimes autocratiques et sans vergognes.

Acknowledgements

During the course of working on this thesis, I have been very fortunate to benefit from the advice, help and wisdom of many scholars, colleagues and friends. I am most indebted to my supervisor Dean Stephen Toope, whose unlimited support, patience and knowledge made the completion of this work possible. Dean Toope's concern and enthusiasm, which went beyond the conventional confinement of academia, ranged from untiring and meticulous corrections of the many drafts of this thesis, to moral, financial and social support. As my work progressed, my relationship with Dean Toope grew into friendship, and admiration. In a way it served as an affirmation that despite a countless number of cultural differences, an enlightened cross-cultural dialogue and understanding is indeed possible.

One of the ways in which my pride in being a Sudanese manifests itself is in appreciating the importance and wisdom behind the work of Abdullahi An-Na'im, which served as a continuing influence in my academic and human rights work. I am lucky to have benefited from his knowledge and expertise during my first year of law school in Khartoum, during my LL.M studies at the University of Saskatchewan, and through a number of conversations.

Many thanks to Professor Jeremy Webber, Associate Dean of Graduate Studies, for his support and encouragement, for his class on social diversity and law which added more motivation for undertaking this project, and for the numerous conversations which helped in clarifying some of my thoughts. The friendship, intellectual and moral support of René Provost, Shauna Van Praagh, Pierre Klein, Linzi Monicam, Abdul Khalig Ali, and Jaye Ellis are most appreciated.

I have pondered, argued and learnt a great deal from my friend, colleague and fellow African, Kwadwo Appiagei-Atua. Kwadwo and I share a strong committment and interest in human rights in Africa. Many thanks to him and to other colleagues and friends: Luan Vu Tran, Guy Lachapelle, Trudo Lemmens, Seanna McGuire, and Gwen Schulman.

Thanks are also due to the staff of the Graduate Programme in Law, the Law Library and the Dean's office: Ginette Van Leynseele, Margaret Baratta, Maria D'Amico, Melissa Knock, John Fitzpatrick, Harold Lapin, Mary Laurenço, Carlos Rojas, Linda Coughlin, and Heather Elliot.

The greatest acknowledgement of all goes to the people of the Sudan and the rest of Africa, whose struggles, suffering and plight inspired this work. The value of my work and commitment pales in the face of these struggles.

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INTRODUCTION

The human rights debate in Africa is emblematic of the life of my generation in the Sudan. I grew up during the Nimeiri regime which ruled the country for 16 years.[1] During this period, Nimeiri subjected Sudan to various "isms": communism, socialism, Pan-Arabism, Americanism and his own brand of Islamism. The legal system underwent more or less similar ideological swings, from Sudanese-English common law, to Egyptian civil law and finally the adoption of the so-called Islamic laws. Meanwhile, the human rights debate in Africa experience similar ideological swings between economic rights, priority of the right to development and national security to the current move towards multiparty democracy.

My own impression of the current political state of Africa is that we have reached a significant watershed, namely the decline of the social-political blueprints and schemes which guided previous generations. Most post-colonial African ideologies ended with repression and a sell-off of the continent's resources in exchange for military hardware. One factor remains the same, that is the continuing crisis of the nation-state in Africa

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[1]. Nimairi staged a coup overthrowing an elected government in May 15, 1969, and was himself overthrown by a popular uprising in April 6, 1985. I started my education in 1970, the year during which the education system was overhauled, and finished university the year following the fall of the Nimeiri dictatorship.

and the challenges to the legitimacy of the claims of a "nation". Fanon recognised this crisis over 35 years ago.[2] The political forces in Africa ought "to start from living reality and it is in the name of this reality, in the name of the stark facts which weigh down the present and the future of men and women, that they [must] fix their line of action."[3] Various conferences and seminars were organised in post-independence Africa to discuss an African system to promote and protect human rights. The rights discourse was dominated by stark contrasts and contradictions. While loudly condemning human rights violations in white ruled territories, official Africa was virtually mute about similar and in some cases worse atrocities committed by members of the Organisation of African Unity (OAU). President Museveni of Uganda captured this reality at an OAU summit: "While Ugandans perished ... the rest of the world kept largely silent .... Ugandans felt a deep sense of betrayal that most of Africa kept silent."[4] Human rights in Africa will have to be articulated in such a way that the appeal to cultural norms and moral tenets of Africans are mobilised so as to motivate Africans to take part in the fight for the protection of these rights.

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[2] Frantz Fanon, *The Wretched of the Earth*, C. Farrington's translation, (New York: Grove Press, 1968), "On National Culture", pp. 206-248.

[3] *Ibid.*, 207.

[4] Amnesty International, *A Guide to the African Charter on Human and Peoples' Rights* (London, UK: AI, 1991) 7. It should be noted here that most of Africa kept silent not as a matter of choice, rather the majority of Africa was rendered silent by the same type of regime (more or less) under which Ugandans perished.

Contemporary African history is full of instances in which national claims of legitimacy have been disarmed by ill-fated economic and political ideologies. The current reality in the continent is no exception. Africans are still engulfed in reactionary (anti-Western) politics that are evident in romanticising about a "glorious African past" or a strong movement (within Islamic Africa) towards enforcing a strict religious order within society. The danger here is that in both cases the ultimate goal is to mask the present realities of political oppression and corruption. We (as Africans) need to study the past to ground some of our findings, we need to study the impact of colonialism and the inherent authoritarianism in anti-colonial movements, and finally we need to understand the role of religion and ethnicity in shaping our contemporary national identities. Fanon reminds us that the commitments of a native intellectual, in the face of the colonial legacy, "are not a luxury but a necessity in any coherent program."[5] Attempts to articulate national legitimacy are vital, and any intellectual who "is willing to strip himself naked to study the history of his body [i.e. of his culture], is obliged to dissect the heart of his people".[6]

Any effective conceptualisation of human rights therefore will have to be grounded in the outcome of these findings, i.e. be properly situated within the cultural context of the continent. The language of rights is not in contention here. One of my underlying

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[5] Fanon, *The Wretched of the Earth*, supra note 2, at 211.

[6] *Ibid.*

assumptions in this thesis is that Africans (as well as Muslims) have little or no difficulty in adopting the language of rights discourse. The reason for this is simple: the assumptions upon which rights are based are shared by most cultures, and most of the time the debate is on the scope and significance (priority) of the rights, not necessarily on the terminology.

Following independence, African "leaders" were faced with two possible scenarios. The first scenario was to replace the colonial ruling elite and pursue somewhat similar policies. This implied the continuation of the colonially induced culture (economic, political, legal and administrative) which did not have roots in African culture. The second scenario was to undertake the monumental task of formulating policies and ideas based on original cultural elements that continued to affect daily life in Africa. While the official rhetoric was the second, results clearly indicate an orientation toward the first scenario. Two reasons can be cited here. African economies were (as a result of colonialism) oriented towards the needs of Europe and not Africa. Secondly, most of the post-colonial leaders initially promoted education through their promotion of educated persons who were successful in orienting themselves within the new, but alien culture.

These are all legitimate issues to be considered in outlining human rights in African culture.[7] The elements of this culture include the original (indigenous) culture, Islam and Christianity, colonial educational and legal systems, colonial languages and symbols, etc. One would have to embark on extensive research to describe these elements in detail. It is the culture of the people which will determine what aspects of an influencing (both voluntary and imposed) culture are retained, what aspects modified and what aspects discarded. This process is easier to describe than analyse, for the process of cultural accommodation is tainted with equally powerful factors, namely the economic strength and interests of the influencing culture, as well as the conscious choices of the actors involved in the process of cultural accommodation. A *sina qua non* for the success of cultural accommodation is our knowledge of our own true cultural personality, i.e. our need to know our own complex of ideas and attitudes. This knowledge represents the gate to finding out clearly what we need to borrow and the possibility of integrating it with our own cultures. *Indeed we need to find out also what we shall not be grieved to discard in our own cultures*. After all, we should all be reminded that culture is not biological but a mostly human creation, *ergo*: the different levels of cultural contents depend on our mental attitudes and other prevailing conditions. Our interest in culture should not only be historical but oriented towards the future. By so orienting ourselves, we not only come closer to deciphering who we

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[7] There is no monumental singular African culture. Reference to African culture, here, denotes the combination of the shared elements, outlined in the following lines, the scope and magnitude of which differ from one country to another.

are, but also make the best of our human resources. The cultural alienation felt with most legal education systems in different parts of the world intensifies our need for culturally situating legal norms and rules. Culturally sensitive normative investigation requires the devotion of tremendous effort and energy to mould cultures into a more articulate and comprehensive way of meeting contemporary challenges. Alice Walker once said, in her book *The Temple of My Familiar*: "Always keep in mind the present you are constructing. It should be the future that you want."

This thesis is undertaken with the intention of contributing to the debate on the binding force of the existing international human rights instruments. My approach is based on an assumption of the right of legal cultures and traditions, other than those which have contributed directly to the creation of these standards, to be considered and accommodated. For human rights to be effectively implemented they need to have the support of local cultures. This support is not likely to be gained if the norms and processes do not reflect, at the drafting as well as the implementation levels, input and contributions from diverse cultures.

The jurisprudential outlook of my thesis is not necessarily derived from the "known" approaches, but rather from an Afro-Islamic perspective. In other words, this thesis aims at conceptualising human rights within an Islamic African context. Most readers would notice that the current human rights literature focuses on human rights in Africa

separately from Islam. My understanding of African culture is that it is diverse, has undergone extensive evolution, and sometimes radical change, and includes various cultural artefacts from Islam and Christianity as the case may be. To speak of "African culture" is no longer enough. There are many shared cultural elements, but there are also various differences of significance. Recognition of this fact is vital, for to speak of one African culture that applies across the continent is to echo the colonial image of a Negro. Fanon is again insightful:

> Colonialism ... has never ceased to maintain that the Negro is a savage, and for the colonist, the Negro was neither Angolan nor Nigerian, for he simply spoke of "the Negro." For colonialism, this vast continent was the haunt of savages, a country riddled with superstitions and fanaticism, destined for contempt, ... in short, the Negro's country. Colonialism's condemnation is continental in its scope.[8]

The Islamic elements of African culture are seen in this study as part of the significant differences amongst Africans. They cannot be abstracted from the African context and dealt with as independent.

In order to achieve the goals set out above, the research deals with three main fields of investigation. The first field is the elaboration of a theoretical framework for human rights and cultural diversity. The second seeks to outline conceptions of human rights in the traditional African context, and under Shari'a. The third provides an example dealing with human rights in the Sudan.

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[8] *Ibid.*

The underlying assumption in the first part on Human Rights and Cultural Diversity is that *culture* does indeed play a vital role in the implementation of human rights. The thesis advances, as a central focus, a two-layer process for obtaining global recognition of cultural diversity in human rights: external and internal. The external level deals with the right of diverse cultures to contribute to the interpretative process of human rights regardless of whether this contribution is in contradiction with the Western perspective. The internal level, on the other hand, seeks to identify areas of agreement and differences between cultural norms and international human rights. There are two stipulations, it is argued in this part, if an optimum mobilisation of internal cultural norms is to be attained.

The first stipulation is the proper acknowledgement of the process of cultural change. While colonialism affected a number of changes in relation to the state apparatus, and the legal system, these changes are now an integral part of African culture. A study of the nature of the nation-state in Africa, for example, reveals the need to devise some measurements against abuses and excesses by the ruling elite. The second stipulation for an effective mobilisation of internal cultural norms deals with the question of who can claim cultural validity of human rights standards. While it is essential to recognise that no group or institution has a monopoly over cultural interpretation, I will argue

that ruling elites and those engaged in human rights violations have no moral claim to cultural legitimacy.

The second part of the thesis moves to the "regional level" of culture by seeking to outline the conceptions of human rights within traditional Africa and under Shari'a. While most studies would distinguish between "the African" and "Islamic", this part rests on the assumption that the impact of Islam (or Christianity for that matter) on human rights in Africa must be grounded in the African specificity. Three concepts are examined in dealing with human rights in Africa: the position of the individual, international law and the nation-state. The thesis challenges the notion that human rights in Africa are communitarian and not individualistic because the individual, *qua* individual, is not recognised in Africa. The proposition advanced, instead, is that the African social order is an amalgam of both communitarianism and individualism. This proposition is supported by both "original" African conceptions, and through cultural changes which enhanced the recognition of the individual within African culture. The same approach is applied to international law and its binding character in Africa. It is argued here that certain aspects of modern international law, e.g. the law of treaties, share some similarity with traditional African practices. Therefore, international instruments duly ratified by African states constitute contractual obligations which ought to be carried out by these states. The capacity of African states to discharge their human rights contractual obligations is weakened by the nature of these states.

Because of the ruling elite's continual disregard for ethnic diversity within the confinement of the state and the lack of connection between the state and society, the state in Africa is weak and ineffective. It is argued in this section that political corruption by the ruling elite and resort to militarism are characteristics of the African state which warrant consideration in the formulation of human rights concerns in Africa. The Islamic conception of human rights is examined in light of this African specificity.

The use of Islam in politics, it is argued in this thesis, should not be viewed differently from ideological appeals to traditionalism, socialism, etc. While Islam in Africa was traditionally more tolerant and adaptable to local cultures, political Islam is rigid, intolerant and politically repressive. The implication of Islam in politics introduced more elements to the human rights debate in Africa. These elements are grouped and analysed under three main headings: Islamic political organisation, international law and human rights. The debate on the nature of the Islamic state focuses on outlining the shortcomings of the traditional model of the state, which is a universal state as opposed to the modern nation-state, including the concept of almost absolute sovereignty, lack of objective constraints over the ruler's powers, and the imposition of a religious-based legal system.

The impact of the traditional model of state extends to a type of international rules fleshed out in traditional Islamic thinking which viewed the world as Islamic and non-Islamic. Islam, despite some of the contradictions between modern international law and traditional *figh*, was well-disposed towards the use of treaties as a model for creating international rules provided that these treaties do not contradict Shari'a. One of the conclusions in this section is that areas of agreement between Islamic and international standards of human rights are binding and constitute the core of what should be human rights in Islamic Africa. The next part examines human rights and fundamental freedoms under Shari'a to outline these areas of agreement, as well as proposing some solutions to areas of difference.

The examination of both the Islamic and African contexts reveals the need for precautions against abuses by the ruling elites who appeal to Islam and "traditional" African values in order to justify these abuses. The underlying assumption in this part is that Islam will have to be grounded in the socio-political realities of Africa in order to attain effective precautions against abuses by the ruling elites. The African Charter on Human and Peoples Rights is examined and application of its provisions is advanced as part of the necessary precautions needed for the effective protection of Africans.

The third part of the study focuses on three rights under the African Charter which are argued to be essential for effective human rights protection in Islamic Africa: the right to self-determination, the right to freedom of expression, and the right to participate in public life. The scope and impact of these rights are examined in the context of the Sudan which is seen here as a microcosm of Islamic Africa. The importance of the right to self-determination stems from the nature of the African nation-state and the existence of overlapping allegiances, e.g. religious and ethnic. It is argued in this part that the right to self-determination is an important tool for dispute resolution by providing people with the option of determining their political fate. The definition of "people" as holders of the right to self-determination represents the most complicated aspect of this right. Traditional elements of the definition of people included a common historical tradition, racial or ethnic identity, cultural and linguistic unity, religion, and territorial connection. In examining these elements within the Sudanese context, one realises their inadequacy. This study proposes a new element, "negative identification" as an element in defining people for the purposes of self-determination.

The Northern and Southern part of the Sudan are distinguishable by the negation of the other as a unit. The process of "negative identification" is examined in four Sudanese cultural areas: lack of political trust between Northern and Southern Sudan, political exploitation of Islam, separate existence, and the cultural and what I term psychological divide.

The application of the right to self-determination presupposes the application of the right to freedom of expression and the right to participate in public life. Guaranteeing freedom of expression is vital to the encouragement of public debate and exchange of views regarding the recognition of diversity and other matters affecting people's lives. The guarantee of the right to participate in public life assures political participation and representation and serves as a precaution against abuses by the ruling elite. Both rights must be guaranteed to the entire population of the country, Muslims and non-Muslims alike.

It is hoped that this study will contribute positively to the human rights debate in Africa, and therefore help to alleviate the suffering of the African people under ruthless regimes. This goal will be satisfied if the ideas articulated in this thesis manage to stimulate a realistic discussion on the prospects of an efficient and culturally responsive human rights system in Africa. "O my Lord! bestow wisdom on me, and join me with the righteous; grant me honourable mention on the tongue of truth among the latest (generations)."[9]

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[9] The Holy Qura'n, 26:83 &84.

PART ONE

Chapter One

CULTURAL DIVERSITY AND THE INTERNATIONAL LAW OF HUMAN RIGHTS

> *In our wish to make ourselves heard, we tend very often to forget that the world is a crowded place, and that if everyone were to insist on the radical priority of one's own voice, all we have would be the awful din of unending strife, and a bloody political mess, the true horror of which is beginning to be perceptible here and there in the re-emergence of racist politics in Europe, the cacophony of debates over political correctness and identity politics in the United States, and – to speak about my own part of the world – the intolerance of religious prejudice and illusionary promises of Bismarckian despotism, a la Saddam Hussein and his numerous Arab epigones and counterparts.*
>
> Edward Said [1]

The former secretary-general of the United Nations, Perez de Cuellar, argued that "the enhancement of human rights ... contributes to the enrichment of popular sovereignty".[2] He was arguing for the position that internal state sovereignty, internationally defined, is limited by international standards such as the goals and

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[1] Edward Said, *Culture and Imperialism* (New York: Alfred A. Knopf, 1993) xxi.

[2] "Perez de Cuellar discusses Sovereignty and International Responsibility" (1991) 47 Review of the International Commission or Jurists 25.

objectives of the United Nations Charter and international human rights instruments. Since its establishment, the United Nations has expressly stated the duty of all member-states to co-operate in promoting respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[3]

This requirement of respect for human rights has proved to be a valuable tool against the oppression and abuse of power perpetuated by several United Nations members. Nevertheless, the implementation of the universal standards of human rights has not yet reached a stage which can be described as successful. In fact, the last few years have witnessed growth in both the number and variety of international human rights instruments, as well as growth in violations of the standards set out in these instruments. A wide and complex group of causes, which include economic conditions, structural and social factors, and political expediency, have led to the present lack of compliance.

Most states, by adhering to the United Nations Charter and other instruments, have virtuously undertaken to accept international obligations under these instruments, thereby submitting themselves to the scrutiny of the international community. Despite

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[3] Article 1(3) of the United Nations Charter. Articles 55 and 56 of the UN Charter are regarded by the International Court of Justice as firm obligations on UN member-states to respect and observe human rights and fundamental freedom. ICJ's Advisory Opinion on "The Legal Consequences of the Continued Presence of South Africa in Namibia", (1971) ICJ Reports 16.

the fact that human rights violations are increasing, this international scrutiny has been seldom and selectively employed.

My underlying assumption in this thesis is that compliance with international human rights standards, and international obligations generally, will require mobilisation of both international and national resources. In other words, we need to consider the impact of the present state of international economic-political and environmental interdependency, as well as the ability of human rights standards to mobilise internal (national) resources for their support. Sovereignty is the key word in international law and is still -- for better or worse -- the source of the law's effectiveness. This sovereignty, under international law, is possessed by states, and states are composed of peoples, territories, and authority.[4] People need to be motivated to press their states to comply with their obligations under inclusively supported human rights instruments.[5]

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[4] See I. Brownlie, *The Principles of Public International Law* (Oxford: Clarendon Press, 1990), Chapter IV "Incidence and Continuity of Statehood", 71-86. He relied on Article I of the Montevideo Convention of 1933, which states: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states." For the text of the Convention, see "Convention on the Rights and Duties of States - Signed at Montevideo, December 26, 1933", 6 International Legislation (1932-1934) 620. Some writers, such as Buzan, would argue that a state's population and territory can exist without it, and therefore, the state is not more than a metaphysical entity (an idea) the protection of which becomes a major object of national security. This reduces the state to a rather weak idea that becomes a mere institution within which the elite demands the machinery of government, which, in my opinion, is not far from reality. B. Buzan, *Peoples, State and Fear: The International Security Problem in International Relations* (Chapel Hill: University of North Carolina Press, 1983) 38-9. However, it is also important to take notice of the fact, as emphasised by one author, that accepting the idea of state solves the problem of how to validate knowledge without reference to general philosophical inquiry into 'rights' or 'truth'. C. Navari, "Knowledge, the state and the state of nature", in M. Donelan, ed., *The Reason of State: A Study in International Political Theory* (London; Boston: Allen and Unwin, 1978) 102 at 107. In other words, we still tend to equate state with "authority" without imposing the mediating concept of "legitimate" authority.

This motivation will have to be fostered in the light of the post-cold war global era, and should aim at addressing some of the difficulties pertaining to international law,[6] especially the claim of universalism. The validity of this claim of universalism rests on successfully addressing the gap between the present body of international law, which is greatly influenced by Western legal culture,[7] and the diverse cultures of the world.[8] The task of international lawyers, especially those concerned with the African and Islamic regions, is to successfully address some of the difficulties and limits pertaining to universalism.[9] The stability and complexion of the so-called world order depends to a great extent on the normative evolution of international law. So "any serious

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5 De Cuellar has stated: "The sovereignty that resides in the people and meant to be exercised for the benefit of the people can neither be used against the people, nor for the destruction of the patrimony of humanity". Perez de Cuellar, supra note 2 at 26.

6 For a discussion of contemporary difficulties with international law, see R. Higgins, *Problems and Process: International Law and How we Use It* (Oxford: Clarendon Press, 1994); M. Bedjaoui, *Nouvel ordre mondial et contrôl de la légalité des actes du Conseil Sécurité* (Brussels: Bruylant, 1994); and M. Koskennimi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiestiiton Kustannu, 1989).

7 Bedjaoui described traditional international law as "derived from the laws of the capitalist economy and the liberal political system." Mohammed Bedjaoui "Poverty of the International Order" in R. Falk *et al, eds., International Law: A Contemporary Perspective* (Boulder: Westview Press, 1985) at 153.

8 "International law represents the application of ideas flowing from the legal, political and historical experience of the West - an experience that non-Western societies have not shared and cannot be accepted *in toto*. If a universal international law is to be truly realised in the future, this cultural chasm must be bridged by mutually compatible legal mores." C. C. Joyner and J. C. Dettling, "Bridging the Cultural Chasm: Cultural Relativism and Future of International Law" (1990) 20 California Western I. L. J. 275 at 276. McDougal and Reisman have plausibly pointed out that: "The exchange of ideas across cultural "boundaries", at one time restricted to human carriers, is even more rapid and, in the longer run, may prove even more influential." M. S. McDougal and W. M. Reisman, *International Law Essays* (Mineola, N.Y.: The Foundation Press Inc., 1981) at 44 and accompanying notes.

9 See, generally, A. Carty, *The Decay of International Law? : a repraisal of the limits of international imagination in international affairs* (Manchester, U.K.: Manchester University Press, 1986).

appraisal of the future international legal order[10] must take into account the plurality of cultures in the world."[11]

The involvement of many diverse cultures in international affairs makes inter-cultural dialogue a matter of universal concern. This is to be expected since cultures shape the struggles, as well as perceptions, of human beings. Culture, as will be indicated later, is a complex concept because of its involvement in most aspects of life, e.g. a world view is based upon the culture(s) of the holder of this view. If international law is to acquire a more self-confident and effective role in international affairs, two urgent reforms must be affected. Firstly, it will have to be invoked less selectively, and secondly, serious attempts must be made to account for culture's influence in some of the major legal spheres such as human rights, self-determination and dispute resolution.[12] This will require going beyond the traditional plea for expanding the

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10 International legal order is defined as "[a]n aggregate conception embodying those structures and processes by which authority is created, applied and transformed in international society." R. Falk, "The Interplay of Westfalia and Charter Conceptions of International Legal Order", in Falk et al, eds., *International Law: A Contemporary Perspective*, supra note 7, at 117.

11 Joyner and Dettling, supra note 8, at 276.

12 Falk identified five abstract preferences necessary to attain change or transition in the present international legal order: (1) minimisation of violence; (2) promotion of human rights (individual and group rights) which include national autonomy and racial equality; (3) wealth transfer from wealthy to poor countries; (4) equitable participation, in the formulation of this order, of diverse cultures, religions, and ideologies; and (5) growth of supranational or international institutions. R. Falk, "Westfalia and Charter Conceptions", supra note 7, at 117-9. If I were to rearrange these preferences, I would place 4 at the beginning and make a number of reservations concerning five.

scope of international law beyond its focus -- the state and its territorial sovereignty -- to include supranational and international institutions.[13]

It is on experience that judgements are based, and "each experience is interpreted in terms of one's own enculturation so that even our perception of the physical world is to an extent viewed through this enculturative screen."[14] The capacity of human beings for action is, therefore, greatly shaped and affected by their acculturation. I therefore submit that international law generally, and human rights particularly, can be more effective if we manage to mobilise inhabitants of states to its support. The first step towards this goal is to investigate different cultural groundings for international law

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[13] Wolfgang Friedman is one of those who well articulated this plea. He noted the changes that took place in international law and international relations, from focus on coexistence, to co-operation on universal concerns, and finally to co-operation on regional concerns. These changes prompted the need to redefine the scope, impact and purposes of international law, e.g. to include public international institutions, and to a lesser extent private international institutions. Wolfgang Friedman, "The Changing Structure of International Law", in Falk et al eds., supra note 9, at 142-152. His ideas can find support in the following sources: P. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) pp. 15-6; M. McDougal, "International Law, Power and Policy: A Contemporary Conception" (1953) 82 Hague Recueil 137; and W. Jenks, *The Law of Mankind* (New York: Praeger, 1958), where it was pointed out that: "[t]he emphasis of the law [international law] is increasingly shifting from the formal structure of the relationship between states and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member states." *Ibid.*, at 17.

[14] I.C.Brown, *Understanding Other Cultures* (Englewood, N.J.: Prentice-Hall Inc., 1963) at 159. Kluckhohn pointed out that: "There is a philosophy behind the way of life of each individual and of every relatively homogeneous group at any given point in their histories. ... The underlying principles arise out of, or are limited by, the given of biological human nature and the universalities of social interaction. The specific formulation is ordinarily a cultural product." C. Kluckhohn, "Values and Value Orientation in the Theory of Action" in T. Parsons et al, eds., *Towards a General Theory of Action* (New York: Harper and Row, 1951) 109. See, also, A. B. Boseman, *The Future of Law in a Multicultural World* (Princeton, N.J.: Princeton University Press, 1971), especially the part on "Cultures and Modes of Thought", 14-33.

and human rights norms. I am aware of the fact that the acceptance of this step presupposes acceptance of rights discourse, but I have already asserted that the language of rights is not the key problem; rather, the commitment to rights within diverse cultures is the greatest challenge faced by proponents of human rights.

Cultural evaluations vary from country to country, and from one culture to another within the same country. So one has first to answer one rather big question: what is meant by culture? As I researched possible definitions, or pointers towards a possible definition, I promptly realised what a thorny task this was going to be. Culture is described by one writer to be among the two or three most complicated words in the English language.[15]

The word is derived, according to the Oxford English Dictionary, from the Latin word *cultura* which denotes "cultivation", "tending" and also "worship" for Christian authors.[16] Culture is said to have taken its present form in the 15th Century, when it acquired the primary meaning of tending of natural growth, basically of crops and animals, before it was later extended to a process of human development.[17] The

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15 R.Williams, *Keywords: A Vocabulary of Culture and Society* (London: Fontana Press, 1988) at 87.

16 The Oxford English Dictionary, 2nd edition, J.A.Simpson and E.S.C.Weiner, eds., (Oxford: Clarendon Press, 1989), Vol. IV, pp. 121-2. See, also, "cultural", *ibid.*, at 121.

17 Williams, *Keywords*, supra 15, the part on "Culture" at 87-93.

equivalent word used in Arabic is *thaqafa* from the verb *yothaqif* which primarily meant "to straighten", especially spears, and later came also to be used to denote the person who becomes intelligent and skilful in dealing with science and knowledge.[18] The Qura'n has used the same term with the meaning of "presence" or "encounter".[19] The complexity of the term *culture*, which took its present Arabic form in the 19th century, manifests itself in the endeavour to establish a link between the general process of human development and a particular way of life which includes social rules, works of arts and other manifestations and products of the intellect.

The purpose behind the quest to define culture is to set the stage for the cross-cultural perspective I intend to develop in the following section of the study. One of the elements in this perspective will be that cultures are capable of either producing norms or enhancing them through cultural interpretation or accommodation. The definition of culture is, therefore, important for identifying the cultural elements essential to the process of establishing a forum for a cross-cultural dialogue. The context of this

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18 See, *Al-Ma'ajam al-Arabi al-Assasi* (The Essential Arabic Dictionary), which is issued by the Arab League Education, Culture and Science Organisation (ALECSO), (Larousse: 1989), vol 1, at 24; *Al-Munjid fi al-Luga wa al-A'lam* (The Rescuer in Language and Known Personalities) (Beirut: Dar al-Mushriq SALR Pub., n.d.); and also Ibn Mazour, *Lisan al-Arab al-Muheet* (The Comprehensive Arabic Dictionary), (Beirut: Dar Lisan al-Arab, 1988) at 364, where the author, who wrote this dictionary more than 700 years ago, used only the traditional meanings without alluding directly or indirectly to the present meaning which is provided for in the first source, as will be mentioned later.

19 "And slay them whenever ye catch them..." 2:191 "Shame is pitched over them wherever they are found." 33:61 "They shall have a curse on them: whenever they are found." 3:112. 'Abdullah Yusuf 'Ali, *The Holy Qur'an: Text Translation and Commentary* (Brentwood, Maryland: Amana Corporation, 1989).

dialogue will be the international arena which has experienced a swift and huge expansion and intensification of inter-cultural contacts on different levels of human activities.[20]

Based on the definition offered by Klemm in 1843, Preiswerk defined culture as:

> [a] totality of values, institutions and norms of behaviour transmitted within a society, as well as the material goods produced by man [and woman]. It must be noticed that this wide concept of culture covers *weltanschauung*, ideologies and cognitive behavior.[21]

This definition has also been used by An-Na'im in his cross-cultural perspective on human rights.[22] Said adopts, more or less, a similar approach towards the definition of culture by dividing its meaning into two parts. First, culture denotes practices such

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[20] Preiswerk has plausibly pointed out that: ".... cultural diversity is one of the most obvious phenomena in human development." R. Preiswerk, "The Place of Inter-Cultural Relations in the Study of International Relations" (1976) 32 Yearbook of World Affairs 251-267.

[21] Preiswerk, *ibid.*, at 251. A definition that shares many similarities with Preiswerk's is to be found in the British Journal of Sociology: "By culture is meant the whole complex of learned behaviour, the traditions and techniques and the material possessions, the language with other symbolism, of some body of people." (1964) XIV The British Journal of Sociology at 21. Abraham, a noted African scholar, defined culture to include almost everything: "the term includes whole knowledge, the arts, science, technology, religions, morality, ritual, politics, literature, even etiquette and fashions." W. E. Abraham, *The Mind of Africa* (London: Weidenfeld and Nicolson, 1962) 12.

[22] cf: A. A. An-Na'im "Problems of Universal Cultural Legitimacy for Human Rights", in An-Na'im and F. Deng eds., *Human Rights in Africa: A Cross-Cultural Perspective* (Syracuse University Press, 1989); and also, An-Na'im *Toward Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, N.Y.: Syracuse University Press, 1990)

as "arts of description, communication, and representation",[23] and secondly culture as "a concept that includes a refining and elevating element, each society's reservoir of the best that has been known and thought."[24] However, it is useful to read this definition together with Geertz's idea of meanings and symbols in his definition of culture:

> an historically transmitted pattern of meanings in symbols, a system of inherited conceptions expressed in symbolic form by means of which [women and] men communicate, perpetuate and develop their knowledge and attitudes towards life. [25]

A question might arise at this stage why I am seeking a definition primarily in Western scholarly works, if I intend to work within a cross-cultural perspective? I have surveyed a number of works in Arabic, or in English by Islamic and African writers, which led me to conclude that they have been greatly influenced by Western scholarship in defining, or rather identifying issues of relevance to, culture.

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23 E. Said, *Culture and Imperialism*, supra note 1, at xii.

24 *Ibid.*, at xiii.

25 C. Geertz, *Interpretation of Culture: Selected Essays* (New York: Basic Books, 1973) at 89. Earlier anthropological works have also shown tendency of including this idea of meaning and symbols into the definition of culture. On the top of this is the fact language, which the ultimate form of symbols and meanings, have never been absent from the definition of culture or the cultural process. For example, it was stated earlier in 1942, that: "The activities of a society - that is of its members - constitute a culture . ... Language, then, is not only an element of culture itself, it is the basis for all cultural activities." Bloch B., et al, *Outline of the Linguistic Analysis* (Baltimore: Waverly Press, 1942) 5.

A similarity of approach is evident, explicitly or implicitly, in modern Arabic literature. The present meaning of *thuqafa* is a major departure from the meanings indicated earlier. The Arab League Education, Culture, and Science Organisation (ALECSO), defined culture in its dictionary, as, *inter alia*, the aggregate of achievements by a nation or a country, in the different fields of arts, literature, thought, industry and science; and alternatively as customs, societal situations and structures, popular values and other aspects of direct relevance to people's daily life.[26]

The modern (Western) usage of the term "culture" (*thuqafa*) has also been implicitly accepted into Arabic and Islamic literature.[27] There seems to be a pattern of accepting the word as defined in Western scholarship.[28] This can be said even when writers try

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26 ALECSO's Dictionary, supra note 18, at 214. This seems to be the same definition given by Shiekh Ridha, who focused more on education, and also added that the present usage of the word in Egypt came from the French word *culture*, Shiekh Ahmed Ridha, *Ma'jam matn al-Luga'a* (Dictionary of Arabic Grammer) (Beirut: Dar Muktabat al-Hayat, 1958) 440-1. The Oxford English-Arabic Dictionary translated culture into Arabic, *inter alia*, as *thuqafa* in a sense of societal development especially of intellect: see *The Oxford English-Arabic Dictionary of Current Usage*, N.S.Donlach ed., (Oxford: Clarendon Press, 1983) 295. In most of the Arabic-English dictionaries, thuqafa has been interpreted as culture and education: see for example, *Gamoos al-Yass al-Assri* (Elias' Modern Dictionary), (Beirut: Elias' Modern Publishing House & Co., 1977) at 99.

27 Abd al-Da'im acknowledged, not accepted, this Western definition, and in its light proceeded to explore the characteristics of Arabic culture in the light of Arabic history, sociology and heritage: see A.Abd al-Da'im, *Fi sabil al-Thaqafa al-Arabia Dhatiyah: al-Thaqafa al-Arabia wa-al-Turath* (Towards an Arabic Culture: Arabic Culture and Heritage), (Beirut: Dar al-Adab, 1983). Others have used the elements of this definition to flesh out characteristics of Islamic or Arabic culture, e.g. A.M.Sa'idi, *Thaqafat Islamiyah* (Islamic Cultures) (Cairo: Dar al-Wa'ai al-Quomi, 1958) 3, where he described the Prophet's mission as to spread "al-thuqafa al-Islamiyah" (Islamic culture), and then he introduced the subjects discussed in the book, and as facets of Islamic culture, which included: the Prophet's biography, essentials of the Islamic belief, Islamic jurisprudence, history, philosophy and various readings.

to give the impression of departing from the Westernised definition.[29] Similar attitudes are to be found in the writings of non-Arabic speaking Muslim writers.[30] The only difference which is frequently found between Islamic and Western concepts of culture is not definitional *per se*, but instrumental:

> Culture means enculturation and, as the word is generally used now-a-days when used alone, especially the enculturation of the human mind. Islamic culture differs from other cultures in that it can never be the aim and the object of the cultivated individual, since its aim, clearly stated and set before everyone, is not the encultivation of the individual or group of individuals, but of the entire human race.[31]

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28 This is clearly the case in Labib's endeavour to establish the social importance of culture in developing the process of national building. See, T.Labib, *Susyulujiyah al-Thaqafa* (The Sociology of Culture) (Cairo: ALECSO's Institute of Arabic Studies and Research, 1978).

29 For example, see al-Sharqawi, *Nuho al-Thuaqafa al-Isalmiyah* (Towards the Islamic Culture) (Cairo, Egypt: Dar al-Ma'arif, 1979).

30 For example, Sheikh Ali, who, in attempting to explore the cultural aspects of Islam, seems to have accepted implicitly the Western conception of culture by dealing with the elements of the Islamic culture with reference to earlier Western definitions. He identified these elements as: historical and religious aspects, ethical and philosophical premises, social order, art, architecture and political spirit. See, generally, B. Sheikh Ali, *Islam: A Cultural Orientation* (New Delhi: Macmillan India Limited, 1981); and, also, A. M. A. Shushterg, *Outlines Of Islamic Culture: Historical and Cultural Aspects* (Lahore, Pakistan: M. Sharaf, 1975).

31 Muammad M. Pickthall, *The Cultural Side of Islam (Islamic Culture)* (Lahore, Pakistan: Ashraf Press, 1979) 22. This seems to be the case with Sharquawi, who rejected the Western usage and indicated that there is no agreement between this meaning and the meaning intended in the Qura'an. However, in the same line, he indicated that *thuqafa* can be, for the sake of argument, considered as the individual's experience which s/he acquires through education, knowledge and experience, and, therefore, it requires human intelligence. I find this to be very similar to the present anthropological definition, i.e. a departure from the Qura'nic usage he indicated earlier. Hassan Sharquawi, *Nuho al-Thuqafa al-Islamiyah* (Towards the Islamic Culture), in Arabic, (Cairo: Dar al-Ma'arif, 1979) 18. See, also, M. M. Salehi, *Insurgency Through Culture and Religion: The Islamic Revolution of Iran* (New York: Praeger Publishers, 1988).

A very useful technique in the process of seeking cultural legitimacy is to look at culture as a variable conception which contains different levels. People frequently refer to African culture, Islamic culture, or European culture, to give a few examples. Preiswerk, based on an earlier attempt made by Herskovits,[32] identifies four levels of culture that can be conceptually differentiated:

> Conceptually, we differentiate between at least four forms of culture: (1) *micro-culture* can be used to describe the particularity of smaller units such as tribes, minorities, village communities, social classes and sub-cultures; (2) one speaks of *national culture*, a very frequently used term (e.g. "French culture"), mostly in the narrow sense of artistic and intellectual creation. But, in so far as the nationals of a country, despite differentiated micro-cultures, have certain common values, institutions and forms of behaviour, one can here speak of culture in the broad sense; (3) the cultural particularity of a nation is limited to specific cultural characteristics; in other respect it is part of a wider cultural area in so far as it shares other characteristics with neighbouring nations within a *regional culture*; (4) beyond this level one can speak, in the broadest sense, of *macro-cultures* to describe characteristics which are common to a number of cultures despite local, national and regional differences.[33]

It is obvious from all these attempts to define culture that it remains an influential factor in shaping human interest, both individually and collectively.[34] It is the source

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32 See, M. Herskovits, *The Human Factor in Changing Africa* (New York: Knopf, 1962) at 52.

33 Preiswerk, supra note 20, at 252.

34 As An-Na'im noted: "[culture] stipulates the norms and values which contribute to a people's perception of their self-interest and the goals and methods of individual and collective struggles for power within society and with other societies." A. An-Na'im, "Towards a Cross-Cultural Approach to

of our world view[35] and private interest, and it also shapes the means and venues we seek to pursue these interests. The impact of culture is obvious in each individual personality and identity, which are deeply influenced by culture.

Culture has developed into one of those abstract terms that has no concrete, definable existence, and although it could never be objectively defined, it has become the object of numerous definitions in different languages. However, the impact of culture on human behaviour cannot be ignored, as it affects the perception of human behaviour and the norms that guide and limit it. Since international law generally, and human rights in particular, deals with human behaviour, culture must play a vital role both in enacting as well as implementing normative standards to that. If a truly international system is to be established and to function efficiently, it is only logical that this system should strive to gain what I will call "global cultural support". This global cultural support can only be obtained through a cross-cultural investigation of cultural norms with a view to establishing a universal minimum for the implementation of human rights standards.

Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment", in A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1990) at 6.

35 Geertz defines world view as the "picture of the way things in sheer actuality are, their concept of nature, of self, of society. It contains their [a given people] most comprehensive ideas of order." C. Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 127.

Let us try to anatomize this process of obtaining "global cultural support". It contains several ingredients. (1) It comes with the presumption that there are in every culture some principles which aim at guaranteeing certain rights and freedoms. (2) This presumption makes it possible to arrive at a universal minimum of human rights which can be deemed to be binding across cultural boundaries. (3) The means for arriving at this minimum is the process of cross-cultural investigation into different normative processes in support of human rights protection. This is a multi-faceted process with external as well as internal determinants.

The external aspect will focus on highlighting the need for a flexible international framework that is less selective -accommodating for the international reality of diversity - and more egalitarian in its recognition of cultures. The internal aspect focuses on identifying areas of agreement, acknowledging areas of cultural influence and change, and undertaking more enlightened discourse to resolve tensions between the international setting of human rights and diverse cultural norms.

I. CULTURAL NORMS OF HUMAN RIGHTS

The presumption that there is, in every culture, a normative support for a conception of rights of some sort is, I believe, essential. This presumption is based on the fact that "human beings and societies share certain fundamental interests, concerns, qualities, traits and values which can be identified and articulated as the framework for a

common 'culture' of universal human rights."[36] My understanding of human rights is that they have their roots in human nature and human dignity. It is only factors such as economic, social and cultural orientation which affect our perception of the details of this nature.

The cultural normative support for "human rights" is indigenous -- to a greater or lesser extent -- in most if not all cultures but is also induced through external influence such as cultural interaction, both voluntary and forced. If standards are to be effectively enforced they ought to be clearly in conformity with cultural norms and imperatives, i.e. they ought to be grounded in "cultural legitimacy",[37] which is possible to achieve through a process of cultural investigation. There do seem to exist cultural norms supporting conceptions of rights and freedoms, for example, within Islamic and African cultures, as will be discussed in the following chapters. These norms might not have been articulated in the language used today, but they nevertheless remain important for the realisation of rights and freedoms. A UNESCO Declaration formulated by its Committee on the Philosophic Principles of the Rights of Man, and based on a general international survey, concluded that "... members of the United Nations share common convictions on which human rights depend, but it [the

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36 An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights", supra note 34, at 4.

37 "Cultural legitimacy" is used and defined by An-Na'im as: ".. the quality or state of being in conformity with recognised principles or accepted rules and standards of a given culture". A. A. An-Na'im "Problems of Universal Cultural Legitimacy for Human Rights", supra note 22, at 336.

Committee] is further convinced that those *common convictions are stated in terms of different philosophic principles and on the background of divergent political and economic systems.*" It was further pointed out in the same document that "[t]he history of the philosophic discussion of human rights, of the dignity and brotherhood [sic] of [hu]man, and of his [her] common citizenship in the great society is long: it extends beyond the narrow limits of the western tradition [38]

Another point I would like to emphasise here is that the origin of human rights cannot be attributed to one culture to the exclusion of another. In other words, I do not share the belief that human rights are a Western conception having their origins in "natural law" as identified and articulated in the Magna Carta or through the French and the American Revolutions. This might be the history of human rights which is prevalent within the Western World and which has some relevance, albeit limited, to other cultures. This limited relevance is due, in my opinion, to two basic facts: firstly, other cultures have been greatly influenced, by Western culture; and secondly, Western culture was itself built on the rich cultural traditions of the Arabs and Persians, among others.[39] However, there is an indefinite number of cultures in addition to this Western culture, and they are bound to have contributed their share.[40]

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[38] UNESCO, "The Grounds of an International Declaration of Human Rights", in *Human Rights: Comments and Interpretations* (London: Allan Wingate Ltd., 1949) 258-272.

[39] Ranelagh states: "We were taught that our [Western] civilisation stemmed from classical and Christian roots, Graeco-Roman and Judeo-Christian, and that the classical elements had been largely, lost until their rediscovery, known as the Renaissance. But now that the world is smaller,

Emphasising the presumption that in almost every culture there exists a conception of "rights" is useful in combating what one might describe as "essentialism"[41] among writers and activists of human rights. Essentialism is used here with the meaning that most of these writers and activists assume essentiality and, consequently, universality of their (civil and political) conceptions of rights, and very often and explicitly deny the fact that other cultures have unique or simply different conceptions of rights and

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communication easier, organised religion more relaxed and scholarly exchange more widespread, our common ground with Arabian tradition is being recognised. Medieval culture was in fact Greek, Latin and Arab." E. L. Ranelagh, *The Past we Share: The Near Eastern Ancestry of Western Folk Literature* (London: Quartet Books, 1979). See, also, P. K. Hitti, *The Arabs: A Short History* (Chicago: Henry Regenry, 1964) "Contributions to the West", 174-192.

[40] The present cultural gap in the international environment could be attributed mainly to the policies of communism and imperialism. This was due to the fact that they were culturally insensitive, as they both reduced people and cultures into objects of indoctrination and influence. This is why both ideologies were based upon conceptions of affecting a transition from the state of "primitive", "peasant", "tribal" into liberal or classless societies. It should also be pointed out that, since over 80% of the world's population lives in non-Western cultures, cultural diversity is the reality of our globe. It will definitely make the study of international law and international relations superfluous, as Prieswerk pointed out: "should we truly believe that all these human beings will be oriented towards the same behavioural model.." Prieswerk, supra note 20, at 267. Herskovits has also stated: "A degree of ethnocentricity is unavoidable because it is the basis of our acceptance of the validity of the norms and institutions of our culture which is a matter of material and psychological survival." M. J. Herskovits, *Cultural Dynamics* (New York: Alfred Knopf, 1964) 54. This degree of ethnocentricity, however, should not be used to justify the imposition of particular cultural norms and moral imperatives on other cultures. Such imposition can be described as a form of rigid ethnocentricity, which, as An-Na'im pointed, "breeds intolerance and hostility to societies and persons who do not conform to our models and expectations." An-Na'im, supra note 34, at 8.

[41] "Essentialism" here is used in the same sense as that advanced by Angela P. Harris in her critique of feminist legal theory, mainly the work of Catharine MacKinnon and Robin West. Angela Harris argued that the work of these two feminist writers, though brilliant and powerful, relied on what she called "gender essentialism" which she defined as "the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" 42 (1990) Stanford L. Rev. 581 at 585.

freedoms.[42] Said points out that the "difficulty with theories of essentialism and exclusiveness, or with barriers and sides, is that they give rise to polarisation that absolve and forgive ignorance and demagogy more than they enable knowledge."[43]

An "essentialist" approach can be found in the work of Rhoda Howard, a Canadian professor of sociology and the editor of the Canadian Journal of African Studies. She indicates that "most human societies did not and do not have conceptions of human rights".[44] It seems, for Professor Howard, that conceptions of human rights are a creation of Western liberal culture,[45] and other conceptions, particularly in Africa, do not seem to qualify for such a description, being mere conceptions of human dignity[46] and not of human rights.[47] Howard arrived at this conclusion by way of rejecting the

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42 A statement such as this does in fact undermine the reality that in inter-cultural relations, morality and knowledge cannot be the exclusive product of some cultures and not others. Geertz has correctly noted that morality and knowledge cannot be placed beyond culture. Cliford Geertz, "Distinguished Lecture: Anti Anti-Relativism" (1984) 86 American Anthropologist 263 at 276.

43 E. Said, *Culture and Imperialism*, supra note 1, at 31.

44 R. Howard, "Dignity, Community and Human Rights", in A. A. An-Na'im ed., *Cross-Cultural Perspectives on Human Rights*, supra note 34, at 81.

45 She has arrived at this conclusion by advancing a Weberian argument that: "... one can abstract particular features of other societies; they have a reality apart from their embeddedness in a particular culture." R. Howard "Is There is an African Concept of Human Rights" in R. J. Vincent, ed., *Foreign Policy and Human Rights* (London: Cambridge University Press, 1987) 11 at 12.

46 This is the argument which permeates her work with Donnely. See, for example, R. Howard and J. Donnely, "Human Dignity, Human Rights and Political Regimes" (1986) 80 Am. J. Pol. Science Rev. 801-17.

47 Howard, "Is there is an African Concept of Human Rights", supra note 45, at 14.

communitarian ideal as articulated in various quotes from Presidents Nyerere and Kaunda.[48] This rejection does not, in my opinion, stand on firm ground, for many reasons.

First, statements by Heads of States, anywhere and particularly in Africa, do not typically reflect the traditional or popular modes of thinking. An independent investigation into cultural norms is more useful, because cultural norms are a product of intricate evolution with lasting impact, while personalities come and go. Kaunda is a perfect example: he was once considered a father of African nationalism, and has lately became so unpopular that he suffered a humiliating defeat in the Zambian elections. There were, however, some African leaders who were more attuned with their culture in their statements. Ahmed Sekou Toure, for example, clearly indicated: ".. the political leader who is freely chosen by a people, maintains a natural link between his action and the culture proper to his people, since, in any event, he could not act effectively upon the people if he ceased to obey the rules and values which determine their behaviour and influence their thought."[49]

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[48] *Ibid.*, at 13. See, also, J. K. Nyerere, *Ujamaa: Essays on Socialism* (London: Oxford University Press, 1968) 11; and K. Kaunda, *A Humanist in Africa* (London: Longmans, 1966) 24-5.

[49] Sekou Toure, "The Political Leader Considered as a Representative of a Culture" (1959):24 & 25 Presence Africaine 122 at 123.

Secondly, it is the economic, social and political organisation (i.e. the structure as Howard referred to it) that shapes society's beliefs and perceptions of rights and freedoms. Finally, rejecting the communitarian ideal, rather than working within it, ignores the African reality, as Howard herself admits: "... communitarian rather than individualistic modes of thinking are still much stronger in Africa than in the fully capitalistic, ideologically liberal West."[50] It is also interesting to note here that, in its origin, liberalism did not promote exclusively the interests of the individual qua individual (as is the case under some strands of modern liberalism). Under the Graeco-Roman meaning, it represented a system of political and moral philosophy with the aim of advancing the liberty of the individual within a given social or community role. The core of the theory was not the individual, but the *polis*, city, tribe, class or state, which are all forms of collectivity within which the individual's existence is recognised. Hobbes wrote: "The libertie, whereof there is so frequent and honourable mention, in the histories, and philosophy of the Ancient Greeks, and Romans, and in the writings and discourse of those that from them have received all their learning in the politiques, is not the libertie of particular men; but the libertie of the commonwealth..."[51]

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50 R. Howard, , "Is there is an African Concept of Human Rights", supra note 45, at 16.

51 T. Hobbes, *Leviathan*, W. G. Pogson-Smith ed., (1906), Part 2, Chapter 21, para. 110.

Presenting the issue of international human rights as simply a Western conception that is not available to other cultures, lacks accuracy and does not help in advancing the debate for a more effective implementation system. It is simply unrealistic to expect one cultural conception to be utterly unique and yet applicable to all cultures.[52] It is true that current human rights as set out in international standards are largely influenced by Western liberalism. However, articulating rights and freedoms into legal language (treaties) is not sufficient to make the idea of human rights appealing to all cultures and hence deemed worthy of protection.[53] It is, rather, the fact that these conceptions exist within various cultures that makes their formulation appealing and ultimately effective.

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[52] Howard adopts a Dworkinian approach by defining human rights as "[c]laims by the individual against society and the state that, furthermore, "trumps" other considerations such as legal (but not human) right of a corporation to property." R. Howard, "Dignity, Community and Human Rights", supra note 44, at 82. She further stresses that human rights are "private and unmediated by social relations", while collective rights are simply claims reasserting "the value of the traditional community over the individual" and, therefore, allowing for inegalitarian ranking of individuals in the interest of the community or "tradition". Ibid., 83 Professor Howard's position seems to extend from that of Rawls, who advanced a theory of justice based on his vision of equal treatment being the *raison d'etre* of (his fictitious) democratic regime: J. Rawls, *Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), Part II, at 195. In his theory, Rawls seems to have extracted the individual as a rational, reasonable, self-sufficient entity very much detached from culture, gender, religion, and economic and social orientation. See Minow's criticism of Rawls in Martha Minow, *Making the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) 154.

[53] There are numerous examples of people who fight for rights and freedom without any awareness of the UN or the activities of Western liberals. Al-Sokitti al-Haj, a Moroccan textiles worker who was wrongfully dismissed from his job on the suspicion that he belonged to a "socialist trade union", was able to persuade the court to order his employer to restore his job on the basis that he has the right to join a trade union. (1989) 23 Huqquq al-Insan fi al-Watan al-Arabi (Human Rights in the Arab World), issued by the Arab Organization for Human Rights, 127. See, also the account of the events which led to student protests in various Egyptian universities. (1987) 21 Huqquq al-Insan fi al-Watan al-Arabi 124-5. More examples can be found in two Amnesty International publications, *Uganda: The Failure to Safeguard Human Rights* (London: AI, 1992); and, *The Tears of Orphans: No Future without Human Rights: Sudan* (London: AI, 1995).

The claim that other cultures do not have a conception of human rights is disturbing for two simple reasons. Firstly, such a statement disguises a sense of indictment against cultures that do not possess such a "valuable concept". Secondly, introducing the concept of human rights which only exists within the Western liberal culture, even if it is necessary, will almost inevitably be perceived as another form of imperialism or imposition from outside. This point has been succinctly stated by Panikkar:

> It would appear, once again, as a continuation of the colonial syndrome, namely the belief that the constructs of one particular culture (God, Church, Empire, Western civilisation, Science, Modern technology, etc.) have, if not the monopoly, at least the privilege of possessing a universal value which entitles them to be spread over all the earth.[54]

Once perceived as a form of external imposition, the discourse of human rights is therefore likely to fail in its objectives. Since no culture, ideology or tradition can speak for the whole of humankind, it is only appropriate to maintain the presumption that there are in every culture norms that support an idea of human values which could be articulated in the Western language of rights and freedoms. I have provided, in the second and third parts of this thesis, some examples from both the African and Islamic cultures. The Qura'n, for example, calls for the protection of dwellings and prohibits

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[54] Raimondo Panikkar, "Is the Notion of Human Rights a Western Concept ?" (1982) 120 Diogenes 76-7.

prying into the privacy of the family. This can be articulated as part of a "right" to privacy.

A question might arise: if I am arguing that human rights are not uniquely Western, then how did it come to be that only the Western conception of human rights is visible and universally noticeable? First, other cultures have some conceptions of rights and freedoms (not necessarily articulated in the same language as the international standard setting) but they let these conceptions slumber. For example, it is argued in the third part of this thesis that the Qura'n guarantees Muslims their opinion in matters relating to the public conduct of their affairs, yet when we look at the practices of the Islamic rulers who followed the Prophet and his caliphs, we will soon realise that the opposite approach came to hold sway.

Secondly, the Western articulation of human rights prevailed as a result of what can be described as a one-way flow of cultural influences and conceptions. While in the past Western legal language spread through colonialism and the adoption of Western legal systems, it is currently popularised through academic efforts, media activities and economic policies and strategies. Thirdly, not enough resources and research have been devoted to identifying existing cultural conceptions and ideas. In seeking to identify these ideas, while one cannot ignore the impact of the Western language of

rights and freedoms and its accepted usage within different cultural contexts,[55] but one must keep in mind that seeking to draw analogies or to use different cultural tools assumes the superiority of the culture of the person who is doing so. Therefore, asking the question whether other cultures have a conception of human rights is, as Panikkar pointed, a "wrong-headed methodology".[56]

II. A UNIVERSAL MINIMUM OF HUMAN RIGHTS

The goal underlying this thesis is to identify innovative ways of enhancing compliance with human rights standards by seeking out possible cultural support in non-Western cultural contexts. The success of this endeavour will rest on the validity of the presumption identified in the preceding part. If this presumption that most cultures have indigenous conceptions of human rights and fundamental freedoms is true, as I believe it is, then enhancing the protection of human rights and fundamental freedoms is possible and indeed attainable. The next stage will be to identify these conceptions with a view to further identifying areas of agreement across diverse cultures.[57] This

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55 See the discussion on the definitions of "culture", "rights" and "freedoms", at the beginning of this part.

56 Panikkar, "Is the Notion of Human Rights a Western Concept ?", supra note, 54, at 77.

57 This step is vital, as human rights activists and scholars, for the most part tend to focus on the differences, and on what they perceived to be negative aspects of other cultures, e.g. corporal punishments, polygamy and oppression of women in the Islamic culture, practice of sutti and the caste system in the Indian culture, to name a few examples. It is quite possible that, if we undertake the effort of examining other cultures, we will realise that there are indeed common grounds for a universal minimum of human rights, i.e. a "common culture" of human rights protection.

area of agreement is what I will refer to as a universal minimum of human rights, which must receive international protection, and be regarded as constituting a *prima facie* obligation owed by various members of the international community.

This proposed universal minimum will be assured most effectively through a careful and enlightened investigation into different cultures by people with a strong background in, and understanding of, their particular cultural context. A question will, no doubt, arise. Does my proposal mean that people from outside a particular culture cannot understand it or are not allowed to say any thing about it? My response to this question will be neither negative nor positive. I can only echo what has been said before: that the validity of a cross-cultural moral judgement increases with the degree of universality of the values on which it is based; and the efficiency of the action increases with the degree of the actor's sensitivity to the internal logic and frames of reference in other cultures.[58] For example, I advance, in Chapter Five of this thesis, the argument that the institution of racism within Sudanese society must be taken into consideration in defining people for the purposes of the right to self-determination. This view is likely to carry more weight, which is evident in the controversy it generates, than if it were expressed by a Western human rights activist. For when the same view is expressed by a Western, it will be viewed as a Westerner (foreign)

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58 An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights" supra note 34, at 12.

perspective on a Western (colonialism) created problem, or simply as part of a Western campaign against Islam, Arabs, Africans, etc.

Cultural evaluations are relative to the cultural background from which they originate.[59] In other words, understanding of another culture does not and cannot happen independently from the investigator's own culture. The new cultural pointers are not add-ons simply because they seem to be interpreted through or integrated with this person's cultural orientation.[60] After stating the importance of observation in gathering data on the sociology of African traditional communities, Sheikh Anta Diop correctly points out that "[t]he problem arises of the difficulty of direct and close

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59 M. Herskovits, *Cultural Relativism: Perspectives on Cultural Pluralism* (New York: Random House, 1972) 14-5. This explanation is similar to Preiswerk's idea of "cognitive ethnocentrism" which denotes placing one's culture in the highest position when viewing or examining other cultures. Prieswerk, supra note 20, at 263. Understanding or misunderstanding other cultures is dependent, for Maletzke, "upon the extent of common traits and differences in forms of reference, value systems, world views of the cultures involved, upon their cognitive and affective distance ...." G. Maletzke, "Interkulturelle und internationale Kommunikation" in *Interkulturelle Kommunikation zwischen industrielandern und entwicklungslandern* (1970) at 13, quoted by Preiswerk, *ibid.*, at 264.

60 "Understanding or rather abridging the barriers to communication takes time and [is] far from being a sudden process." Gail L. Nemetz Robinson, *Cross-cultural Understanding* (New York: Prentice Hall, 1985). Her book aims at availing teachers and students of education with "the necessary knowledge" intended to help them in their involvement in teaching foreign languages, second languages, bilingual education and all fields of education which require understanding people from other culture. I find her description of the process of cross-cultural understanding to have some relevance to the cross-cultural perspective this study is trying to establish. "The process of cross-cultural understanding assumes understanding in general, from a psychological perspective. With these processes we integrate the influences of culture. .... understanding does not mean decoding someone else's verbal system or being aware of why someone is acting or feeling the way they do. Understanding refers to empathising or feeling comfortable with another person. In other words, what experiences may theoretically help members of one culture positively to relate to, to respond to and interact with members of a different culture." *Ibid.*, at 5.

observation of facts in African communities where the research worker, often an outsider, is confronted by numerous obstacles - those of language, esoteric or secret nature of certain rites, and the differences in culture. The African research worker might appear in a better position to integrate himself into the community and into its most secret rites...."[61] Most of the cultural observations today are done either by Westerners or from a Western liberal perspective.[62] Dworkin's Hercules, no matter how intelligent or well informed he is, will definitely be incapable of drawing conclusions in an African or Islamic hard case.[63] There are two specific difficulties with Western liberal scholarship on human rights in Islamic Africa. First, liberal activities are tainted by the prejudices of liberalism's past proponents, e.g. its indifference to colonialism, slavery[64] and its commitment to race superiority.[65]

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61 Sheikh Anta Diop, "African Sociology and Methods of Research" 48 (1963) Presence Africaine 20-27, at 22. He further points out that, this is not necessarily the case. Even in his or her own community, where the African researcher "belongs to a social group (or class) or to a cast which may be in oppositions to others, he [she] is often involved, even in spite of himself [herself], from the very fact of his [her] origin, in most of the group conflicts, divisions and hostilities. He [she] is not sure to be admitted into all sections of society and to be accepted everywhere. Sometimes it has seemed to us that where the African worker has failed a foreigner might have succeeded." *Ibid.*, at 22.

62 I am trying to raise doubts concerning the alleged "scientific objectivity or method" of the social sciences in general, and sociology in particular. Positivists will have us believe that the objectivity of any process is determined by the scientific method, which I find unconvincing. Several important and influential studies have successfully dismantled this positivist position. cf: T. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962); and Alfred Schutz, *Collected Papers* (Hague: Marinus Nijhoff, 1967). Walsh defined this scientific method as: "activity conducted within the parameters of the prevailing paradigm shared by its practitioners; using systematic observation for purposes of confirmation by fitting data into the conceptual framework through which it is examined in a self-validating manner." David Walsh, quoted by Oladimeji I. Alo, "Contemporary Convergence in Sociological Theories: The Relevance of the African Thought-System in Theory Formation" (1983) 126:2 Presence Africaine 34 at 37.

63 Ronald Dworkin, a leading contemporary Anglo-American liberal legal philosopher. See, generally, R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985).

Secondly, reliance on Western scholarship and activities has led to a state of dependency and a lack of a more candid and vigorous human rights discourse within both the Islamic and African contexts. One form of dependency takes the shape of a continuing focus on the critique of Western liberal scholarship and its shortcomings,

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64 Reading Adam Smith, one does not get the impression that he was perturbed with the institution of "modern" slavery. His attitude towards the whole issue was that of an economist who did not see slaves other than as an item of commerce. Accordingly his preference was against slavery because it hampered productivity as "the slave or villain who cultivated the land cultivated it entirely for his master; whatever it produced over and above his maintenance belonged to the landlord; he had no inducement to be at any great expense or trouble in manuring or tilling the land; if he made it produce what was sufficient for his own maintenance this was all that he was anxious about." Adam Smith, *Lectures on Jurisprudence* , R. L. Meek et al eds., Lecture of Wednesday February 16th 1763, paras 122 and 113 at 185-6. See also 114 and 115. After indicating the difficulty involved in abolishing slavery in one of the Republics (of the now U.S), Smith further indicated: ".. the great stock of a West India planter consists in the slaves he has in his plantation. To abolish slavery therefore would be to deprive the far greater part of the subjects, and the nobles in particular, of the chief and most valuable part of their substance. *Ibid.*, para 116 at 187 In another lecture, he indicated: "Thus we have shewn that slavery is more severe in proportion to the culture of society. Freedom and opulence contribute to the misery of the slaves. The perfection of freedom is their greatest bondage. And as they are the most numerous part of mankind, no human person will wish for liberty in a country where this institution is established." *Ibid.*, Lecture on Domestic Law, paras 137 and 138 at 453.

65 cf: C. J. W. Parker, "The Failure of Liberal Racism: The Racial Ideas of E. A. Freeman" (1981) 24 The Historical Journal 825; R. H. Popkin, "Hume's Racism" (1978) 9 Philosophical Forum 211. Let me recite a few exerpts from Hume and Kant, who are regarded, until this day, as major contributors to Western liberalism. Hume once stated "I am apt to suspect the Negroes, and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilised nation of any complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them .." The rest of the quote is hard for a person of African or non-white descent to recite. David Hume, *Philosophical Works*, Green and Grose eds., (Aalen: Scientia Verlag, 1964), Volume three: Essays Moral, Political and Literary, fn at 252. For a contemporary work of similar conclusions, see, R. J. Herrnstein and C. Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: The Free Press, 1994). For Kant, on the other hand, "the Negroes of Africa have by nature no feeling that rises above the trifling." Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime* (Berkley: University of California Press, 1981) at 110. During his discussion of the condition of women, Kant told the following example: "Father Labat reports that a Negro carpenter, whom he reproached for haughty treatment toward his wives, answered 'you whites are indeed fools, for first you make great concessions to your wives and afterward you complain when they drive you mad.'" He then went further to make his *ad hominem* comment that: "And it might be that there were something in this which perhaps deserved to be considered; *but in short this follow was black from head to foot, a clear proof that what he said was stupid.*" [emphasis added], *ibid.*, at 113.

instead of focusing on defining indigenous cultural elements of relevance to human rights.

The investigation into other cultures will have to be conducted with certain precautions in mind. The aim is not to seek analogy, or transliteration, but rather to identify cultural norms in support of the ultimate goal behind the protection of rights and freedoms, namely the protection of the human person (the meaning of which is to be culturally established) and the establishment of a just human order. These two concepts involve chiefly human behavior which in turn is influenced by the culture under which this behavior is being realized. Therefore the quest would be to find the *homomorphic* equivalent.[66] Since values only exist in their given cultural context, it is only logical to assume that there are no trans-cultural values.[67] Brown, has correctly pointed out that:

> peoples define things differently but that no item of culture can be fairly considered outside its cultural context. Cultures are wholes, and the values of any culture constitute in which each art takes its meaning in relation to other parts. Any item of behaviour therefore rests on certain basic premises, and its meaning is

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66 This term was first used by Panikar, supra note 54. According to the Oxford Dictionary, it denotes "of the same or similar form." The usage intended here is similar to that of biology: "Applied to organs or organisms showing an external resemblance, but not really related in structure or origin". The state of homomorphy is the condition of resemblance of form without structural affinity. The Oxford Dictionary, Volume I, at 979.

67 R. Panikar, "Aporias in in the Comparative Philosophy of Religion" (1980) XIII: 3-4 Man in World 357.

> relative to these premises and other associated behaviours. On this basis it is possible to conclude that while there are certain universals, or kinds of values, found in all cultures, there are no absolutes which can apply equally to all societies, all values therefore relative to time, place and circumstance.[68]

The non-existence of trans-cultural values does not mean that there are no cross-cultural values. In other words, although the actual working of values is culture-specific, the idea they purport to advocate might still be shared.[69] As will be noted in the third part of this study, the right to life is guaranteed under both Islamic and Western cultures. The scope and working if this right differ depending on the very meaning of life under both cultures, e.g. the right to life under Islam includes the sanctity of the "dead" body. Indeed the existence of cross-cultural values is the starting point on which my assumptions are based. In other words, values may be transcendent (in their resemblance and regardless of their roots and structure), but they cannot be measured only with the language and world view of one culture judging another.

The presence of cross-cultural values makes cross-cultural critique possible. However, this cross-cultural critique, as pointed out by Panikkar, should not:

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[68] Brown, *Understanding Other Cultures*, supra note 14, at 159.

[69] This is true, also, in the case of values shaped by the process of cultural change which will be discussed below. Abraham notes that: "What makes traditional cultures significant is the fact that they are also contemporary. But present with them in Africa today are some digested Western elements, and some undigested ones; and also certain Middle Eastern elements associated with the Islamic religion, which have found fertile soil in Africa." Abraham, *The Mind of Africa*, supra note 21, at 39.

> ... consist in evaluating one cultural construct with the categories of another, but in trying to understand and criticise one particular human problem with the tools of understanding of the different cultures concerned, at the same time taking thematically into consideration that the very awareness and, much more, the formulation of the problem is already culturally bound.[70]

This approach is to be read in the light of two factors which will be addressed later in this study: first, cultures have undergone a great deal of change as a result of cultural interaction, both voluntary and imposed; and secondly, we must clearly admit these changes and identify them in our quest for cross-cultural consensus on human rights norms.

III. THE PROCESS OF CROSS-CULTURAL INVESTIGATION

Many academic writers have acknowledged the existence and multiplicity of different moral systems, yet the majority of commentators is quick to either set these systems aside, or to rate them as inferior, primitive, underdeveloped or inadequate for the contemporary world.[71] The important question here is not whether Africans, or other non-Western peoples, possess or do not possess a conception of human rights. It is rather whether Africans, Muslims, or any other people should desire and seek protection of their human dignity and respect in a just human society. This is a

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70 Panikkar, "Is the Notion of Human Rights a Western Concept ?", supra note 54, at 34.

71 Adda Boseman, *The Future of Law in a Multicultural World* , supra note 14, at 229. This was certainly implied in the work of Rhoda Howard as indicated earlier in her idea that there is no African concept of human rights, but only a concept of human dignity.

question which can only be answered by referring back to indigenous cultural norms,[72] and investigating which of these norms support ideas of rights and freedoms, and which are likely to pose some difficulties as a result of cultural evolution and modification.

It is fair to say that we all grow up inculcated in the belief that our own ways are the best, but it is also true that never in life do we cease to feel that there are many problems and enigmas in this world for which we lack solutions. "Understanding the ways of other people is important .. because such understanding increases our own self-knowledge and objectivity."[73] Survival in our world in the coming years may depend on our success in joining efforts to salvage the environment and to resist war and global economic injustice. A prerequisite to success is knowledge of and respect for the fact that people have ways which are different from one's own. Acknowledging the variety of possible ways of dealing with issues and problems is bound to produce new perspectives and new clues to human behaviour.[74] It has already been indicated in the preceding section that there are values that are cross-cultural. The working of these values, however, must be contextual. More than two-

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72 Of course African cultural norms are not identifiable as a homogenous set of norms. However, "African" here refers to the regional level of culture without losing sight of cultural diversity within the continent.

73 Brown, *Understanding other Cultures*, supra note 14, at 3.

74 "He knows not England who only England knows."

thirds of the global population lives in the so-called South.[75] The South owns more than two-thirds of the world resources, yet it consumes less than one quarter of these resources.[76] It is not accidental that the same equation manifests itself in the international process of human rights which does not much reflect Southern perspectives[77] despite the fact that most human rights activities are directed to societies in the South.

If one is to look at the history of the Universal Declaration on Human Rights,[78] one will quickly discover the Euro-centric aspirations of its drafters. Several facts can attest to this. First, the composition of the drafting Committee,[79] which could hardly

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75 I am reluctant to use this term or any term to that effect. However, if need be, I rather prefer it to the pejorative phrase "third world". Some might think pejorative is too strong, but given the views the so-called "first world" often expresses about the "third world", one would be quick to conclude it is rather mild.

76 The Report on Global Governance, for example, states: "Industrial countries account for a disproportionate use of non-renewable resources and energy. ... With less than a fourth of the world's people, industrial countries (including Eastern Europe and former Soviet Union) accounted for 72 per cent of the world's use of fossil fuels in 1986-90." The Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (New York: Oxford University Press, 1995) 29.

77 Or interests for that matter. Just as internally and in most cultures the dominant group or class would normally maintain and elevate cultural norms in support of their interests, I submit that this applies to the international community as well.

78 For the history of the Universal Declaration on Human Rights, see, J. P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984).

79 The full Commission of 18 members which started working on 27 January 1947, included Mrs Franklin D. Roosevelt (U.S.A) as the Chairperson, Dr. P.C.Chang (China) and Rene Cassin (France) as vice-president, Dr. Charles Malik (Lebanon) as the Raporteur, and other members from Australia, Belgium, Byelorussia, Chile, Egypt, India, Iran, Panama, the Philippines, the USSR, the UK, Uruguay and Yugoslavia. United Nations, *These Rights and Freedoms* (United Nations Department of Public

be described as representative of the major cultural groupings of the time. Secondly, it is also evident that the chief motivation behind drafting the Declaration was the catastrophic events which took place in Europe during the Second World War. Long before that time, Africans, among others, suffered horrendous economic and human losses as a result of slavery colonialism,[80] which continued even after the Declaration was proclaimed, but these horrors did not shape the consciousness of the drafters of the Universal Declaration or of its subsequent interpreters.

UNESCO was quick to draw attention to the need for respect for cultural diversity, *inter alia*, in its contribution to the preparation of the Universal Declaration.[81] One of the contributors, after indicating that the world was getting closer and divergent cultures were interacting, stated that:

Information, 1950) 7. Although one might get the impression that there were a number of different "cultures" represented in the composition of the Committee, it must be noted that the majority of these representatives were trained in and shaped by Western legal culture.

80 The examples are numerous, e.g. Algeria which is known, in the Arab and African worlds, as the land of a million martyrs, the estimated number of people killed by France during the Algerians' quest for independence. The Declaration was also drafted at the time that Britain was recanting its promise of granting "its" African "colonies" their independence in return for their joining the allied forces in their fight against the Nazis.

81 UNESCO carried out, in 1947, an enquiry into the theoretical problems raised by such a Universal Declaration. A questionnaire was circulated to writers and "experts" from member-states at that time. They were asked to give their views concerning individual vs. group rights, the relation between rights and duties, in what circumstances derogation from rights would be allowed, the effect of industrial and scientific advancements on human relations and the reflection of that on human rights, and perhaps the central question: "How far are the differences between the divergent formulations of ideal human rights and freedoms in different societies accurate indications of the material differences in economic and social conditions in the regions concerned ?" The proceedings of this questionnaire were published in book with the original questionnaire appended to it. See UNESCO, *Human Rights: Comments and Interpretations* (London: Allan Wingate, 1949).

> A charter of human rights today [1947] must .. be based on the recognition of the equal claims of all individuals within one common world. It is necessary to emphasise this because of one fundamental flaw in the Western conception of human rights. Whatever be the theory, in practice they often applied only to Europeans and sometimes to only some among the Europeans. ... It is against the background of a compelling movement towards uniformity that we should have to examine the different existing conceptions of human rights.[82]

Article 18 of the Universal Declaration, which deals with freedom of religion and the right to change one's religion, brought the issue of cultural diversity to a head. The delegate of Saudi Arabia protested the draft article for its explicit statement of the right to change one's religion, and he requested that this article be removed.[83] He, with the support of most Islamic countries which were independent at that time, claimed that the right of a Muslim to change one's religion is not recognised by Islamic law.[84] I will elaborate upon this issue in the section on the International Law of Human Rights and Shari'a.

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82 Humayun Kabir, "Human Rights: the Islamic Tradition and the Problems of the World Today", in UNESCO, *Human Rights, ibid.*, at 191-2.

83 United Nations General Assembly, Official Records of the 3rd Session, 1948–49, Third Committee, Part Two at 49.

84 Official Records, ibid. at 120. He also gave similar comments in relation to some other rights, such as women's rights as embodied in the Draft. One author argued that the Saudi Delegate's comments "seem to be consistent with the idea that Islamic culture is opposed to much of what is signified by the notion of human rights, in relation to Western Culture." I read the last part as meaning the notion of human rights *as articulated by* Western culture. J. Kelsay, "Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights" in *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (Columbia: University of South Carolina Press, 1988) at 36.

The Delegate's statement, despite its flaws, is a good indication of the persistence of cultural differences from the earliest days of standard setting.[85] Cultural diversity is a fact of our age. If human rights instruments are to be more effective, this cultural diversity ought to be fully recognised at the interpretational as well as the implementational level. This recognition can be obtained through broadening the scope of cultural support for these instruments by investigating other cultural norms, and by linking the international standards to various cultural foundations. This is not a matter of a simple search for existing norms, but rather of finding norms, within the context of a situation not yet in itself normative, while at the same time indicating certain lines along which interpretative techniques are to be devised. This goal can only be achieved through what might be described as a cross-cultural perspective on human rights.

IV. CROSS-CULTURAL PERSPECTIVES ON HUMAN RIGHTS

I have indicated earlier that culture, in its deepest sense, shapes peoples' perception of the world and greatly influences their behaviour. What the proposal for a cross-cultural perspective does not seek to do is to propose a new set of rights or instruments. We need to look at a specific culture (i.e. examine the symbols and meanings transmitted

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[85] It was pointed out in a United Nations Report that one of the difficulties arose during the drafting process of the Universal Declaration was that it "seemed impossible, at times, to incorporate a whole series of *divergent concepts into coherent articles*." United Nations, *These Rights and Freedoms*, *supra* note 79, at 8.

in this culture) and see whether a human value or need is conceived of as fundamental and accorded or guaranteed to everyone within this culture. If so, then this human value can be said to have cultural legitimacy.[86] Cultural legitimacy is to be sought at two levels, external and internal.

A. The external level

The external level demands that various cultures should be permitted to contribute to the interpretative process of the international human rights, through the formulation of diverse views on rights and freedoms, regardless of whether they oppose or correspond to the Western perspective. Also at this external level, balance must be maintained in relation to economic, social and cultural rights and civil and political rights.[87] In other words, it is necessary to break away from the Western legalist (adjudicational) view which accords supremacy to civil and political rights over economic, social and cultural rights.[88] The rationale behind maintaining this balance is not merely

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[86] It is to be noted that this cultural legitimacy can be sought in all cultural layers identified by Preiswerk as shown at the beginning of this part.

[87] The African Charter of Human and Peoples' Rights stands as one of the first international human rights standards which recognised this balance. The Convention on the Rights of the Child is another example. The integration of both sets of rights under the Convention on the Rights of the Child is described by Toope as both a "major innovation" and a "signal achievement." Furthermore, the integration of the two sets of rights "will open up more forceful arguments than ever before that both categories of rights would be binding, although certain escape clauses continue to undercut the force of the enumerated economic, social and cultural rights." Stephen J. Toope, "The Convention on the Rights of the Child: Implications for Canada", in M. Freeman, ed., *Children's Rights: A Comparative Perspective* (Aldershot, UK: Dartmouth Publishing, 1996) 35.

[88] It is to be noted that a number of the Western countries, such as Canada and some of the Scandinavian countries, employ social programmes which can be described as one way of implementing

ideological, but rather involves an attempt to enhance the value of cross-cultural moral judgements.[89] Let me provide an example based on comparisons between two international documents, the United Nations Development Programme (UNDP) Human Development Report,[90] and the Amnesty International Report.[91] The United States of America is considered by many to be the land of democracy and freedom. In terms of its obligations regarding civil and political rights, and relatively speaking, it can be described as exemplary, and far better than Trinidad and Tobago.[92] At the same time, U.S whites enjoy the top ranking in the world in relation to human development, while human development among black Americans is much lower than the rate of human development in Trinidad and Tobago.[93] Both economic injustice (denial of economic and social rights) and corporal punishment (denial of civil and political rights) contribute to human misery. Failure to recognise either of the two sets

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economic, social and cultural rights. See Toope's discussion on the implementation of children's economic, social and cultural rights in Canada. Toope, *Ibid.*, 36-43.

89 Or rather achieve, what Mazrui would call "normative convergence". He argued: "Persuasion itself is the art of exploiting mutually familiar predispositions. And this in turn is what normative convergence is all about". Mazrui, *A World Federation of Cultures: An African Perspective* (New York: The Free Press, 1976) 1.

90 UNDP, *Human Development Report* (New York: Oxford University Press, 1993).

91 Amnesty International Report 1993 (London: Amnesty International Publications, 1993). The Report covers the period between January to December of 1992.

92 See Amnesty International 1993 Report, *ibid.*, "USA", at 301-4, "Trinidad and Tobago", at 285-6. Both countries are criticised for their use of the death penalty. Trinidad is further criticised for its use of Corporal punishment (including flogging) both as a criminal penalty as well as a disciplinary measure against prisoners. Corporal punishment is regarded, by Amnesty International and most of the international human rights organisations, as cruel, inhuman or degrading treatment.

93 UNDP, *Human Development Report*, supra note 90, at 18.

of rights weakens our cross-cultural evaluation and contributes greatly to a loss of credibility.[94]

What then is meant by a cross-cultural perspective ? It is the technique through which the proposed investigation of cultural norms supporting, or relevant to, the idea of human rights can be realised. In other words, the process for identification of the *homomorphic*. It is the global version of Nkrumah's "Philosophical Consciencism", which he described as:

> The theoretical basis for an ideology whose aim shall be to contain the African experience of Islamic and Euro-Christian presence as well as the experience of traditional African society, and, by gestion, employ them for the harmonious growth and development of that society.[95]

Universalism can only be obtained through seeking cultural consensus. There are two prerequisites to this consensus: adoption of intellectual tolerance (inclusion) and the avoidance of pejorative cultural evaluations rooted in ignorance. It is naive and ignorant to view Islamic culture as being four wives, veiled women, terrorism and corporal punishment.[96] This plea for cultural consensus should not be confused with

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94 Ali Mazrui has correctly stated that: ".. the world needs to be reformed in the direction of greater social justice, more widely distributed economic welfare, and reduced violence, actual or imminent." He then concluded that any meaningful world reform will have to take the shape of actual realisation of new values through defining new moral preferences. Mazrui, *A World Federation of Cultures*, supra note 89, at 1.

95 Kwame Nkrumah, *Consciencism* (London: Heinemann, 1964) at 70.

the notion of cultural relativism. For the term implies the existence of a "cultural standard" through which other cultures are assessed, i.e. it implies cultural superiority. Yet cultural relativism is a valuable step in that it acknowledges cultural diversity,[97] while it allows for moral judgements.[98] As an African, one has to be worried about a number of anthropologists roaming around in their cosmopolitan frame of mind making observations and judgements, and eventually presenting these in the form of a book, scientific research, field trip results, and so on. This worry is prompted by two concerns: first, the feeling of being reduced to an object of study; and secondly, the illusion that moral principles are self-evident.[99] The external level of the cross-cultural

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96 The same could be said in viewing Indian culture as the practice of sutti, or Africans as primitive people living under crippling traditions that condone sexism and encourage brutal political and ethnic conflicts.

97 Relativism is defined, by Geertz, as the position that all assessments are relative to some standard or other, and standards drive from culture. C. Geertz, "Distinguished Lecture: Anti Anti-Relativism", supra note 42, at 266. He quoted Montainge: "... each man calls barbarism whatever is not his own practice ... for we know no other criterion of reason than the example and idea of the opinions and customs of the country we live in." Todrov, "Montaigne: Essays in Reading" (1983) 64 Yale French Studies 113-44, quoted by Geertz, *ibid.*, at 264. Herskovits described it as a process which lays "stress on the dignity inherent in every body of custom, and on the need for tolerance of conventions though they may differ from one's own." Melville J. Herskovits, *Man and his Works: The Science of Cultural Anthropology* (New York: Knopf, 1948) at 76.

98 David Bindley, "The Concept of Value in Modern Anthropology" in A. L. Kroeber, *Anthropology Today: An Encyclopaedic Inventory* (Chicago: University of Chicago Press, 1953) at 698.

99 Geertz has emphasised that the fact that these anthropologists claim that they have no views as to what is and what is not true, or good, or beautiful, seems (to him) largely a fantasy. Geertz, "Anti Anti-Relativism", supra note 42, at 265. Cook, in advancing the idea of cultural relativism, described its thrust as aiming "at getting people to admit that although it may seem to them that their moral principles are self-evidently true, and hence seem to be grounds for passing judgements on other peoples, in fact the self-evidence of these principles is a kind of an illusion." John Cook, "Cultural Relativism an Ethnocentric Notion", in Rodger Beehler and Alan R. Drengson, eds., *The Philosophy of Society* (London: Methuen, 1978) 294.

perspective contains two basic tenets: a) it implies recognition of the validity of cultural claims, and draws attention to the importance of cultural consensus in creating international norms; b) it requires that the international community, which strives to achieve such a cultural consensus, should have a binding authority on states and a responsibility towards the inhabitants of these states.

B. The internal level

The external level of cross-cultural perspectives on human rights is dependent on the internal level which is based on the belief that internal cultural norms must be invoked in support of a universal minimum of human rights. In other words, it is the duty of enlightened forces to identify areas of support as well as areas of differences and difficulties in implementing universal standards. Of course the ultimate aim of this support is a contribution to the global cultural consensus on universal human rights minimum standards. Three determinants, it is submitted, are necessary to the effectiveness of this internal level: (1) Acknowledging cultural changes which have taken place, both in colonial and post-colonial eras; (2) asking who can claim cultural validity of human rights standards; and (3) recognising that no group or institution has a monopoly over cultural interpretation.

1. Cultural Changes

It is quite evident from the various definitions and interpretations of "culture", that it is indeed dynamic and not static.[100] The first step towards seeking cultural support for human rights lies in acknowledging these changes, and further identifying their impact in the culture. This study takes that further by proposing that these changes are part of culture, and consequently will be invoked in the process in the same way as other original cultural norms.[101] This position is to be read in the light of Abraham's statement:

> [I]t is obvious that it is the cultures of the people which will determine which aspects of the Western civilisation, or the Middle Eastern, are retained, what aspects modified, what aspects discarded. *These choices do not happen gratuitously and without reason, but rest squarely on those adjustments have their nerve-centres in the heritage of the people.*[102]

The integration of these changes within the culture does not imply their transplantation, rather their meaning and working depend on the internal cultural

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100 Ibn Khaldun (1337-1406 A.D.) noted this aspect of culture in his recognition of culture as a way of life which is subject to change. He wrote: "[a] hidden pitfall in historiography is disregard for the fact that conditions within the nations and races change with the change of periods and passing of days. This is a sore affliction and is deeply hidden, becoming noticeable only after a long time, so that rarely do more than a few individuals become aware of it." Abd al-Rahman Ibn Khaldun, *al-Muqaddimah: An Introduction to History*, F. Rosenthal, ed., (New York: Pantheon Books, 1958), Vol. 1, 56-7.

101 This point is based on the idea, expressed by Mazrui that, ".. cultures have a habit of absorbing some of the new after a while and seeking some kind of *modus vivendi* with their cultural rivals." Mazrui, *A World Federation of Cultures*, supra note 90, at 5. However, it would be naive to assume that these changes result more from progress than from mere cultural influences. After all, as pointed out earlier in the attempt to define culture, culture is not a static concept, which means it can be influenced without at the same time losing its relative distinctiveness.

102 Emphasis added. Abraham, *The Mind of Africa*, supra note 21, 38.

dynamics.[103] I have identified, in the second chapter of this study, certain "cultural practices" that ought to be disposed off as a result of their repugnancy following the cultural changes that have taken place in the African context. Conteh correctly points out that:

> Any claim that African culture can make regarding its vigor and resilience rests squarely on the fact that it can sort out those systems or practices that serve as best within the context of reality of our present world. *The development of any culture should be viewed as an ongoing process and no possibility should be fore-closed in this regard.*[104]

Cultural changes are evident in various aspects of African-Islamic life. I will only focus on three general areas of cultural change of relevance to the international law of human rights: political organisation, language and legal systems.

Despite the difficulty in ascertaining its origin, the nation-state is an unquestionable reality of our contemporary life. Nowhere is this more evident than within the Islamic

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103 Abraham states: "There are proved differences in the psychological and cultural attitudes, beliefs, values, emotional discipline, on which urbanity reacts in Africa and in Europe." W. Abraham, *The Mind of Africa*, *ibid.*, at 191.

104 Emphasis added. J. Sorie Conteh, "Circumcision and Seceret Societies", in Ali A. Mazrui and T. K. Levine, eds., *The Africans: A Reader* (New York: Praeger Publishers, 1986) 223 at 226. The same logic applies to the Islamic culture. Mursi, for example, distinguished between *"al-thugafa al-mutassila"* (ongoing culture) which he identifies *"al-turath al-haii"* (the living tradition), and *"al-thigafa al-mondathira"* (disappeared culture) which he identified as *"al-turath al-mathafi"* (museum tradition). See, the contribution of Fouad Mursi, in Ahmed Khalifa, *et al, eds., al-Huwiyah wa-al-turath* (Identity and Tradition), proceeding of the seminar, of the leading Egyptian writers and thinkers, on Identity and Tradition (Beirut: dar al-Kilma lil-Nashr, 1984) 30-1. See, also, M. Imara, *Maza Yaani al-Istiglal al-Hadari li-Umatina al-Arabia al-Islamiya* (What is Meant by Cultural Independence for Our Arabic-Islamic Nation) (Cairo: Dar Thabit lil-Nashr, 1983).

and African contexts. The original Islamic polity was a universal state based on the conception of *umma* (the community of all Muslims).[105] In today's world Muslims live in many nation-states. The relations between these states are governed and conducted in accordance with mostly Western rules constructed around the idea of a nation-state, for example sovereignty and rules of immigration. Accepting this reality of the nation-state instead of the universal state will prompt recognition of a wide array of resulting consequences, such as the introduction of measures to limit the authority of individual governments and to co-ordinate action.

Denying the reality of the nation-state in the continent is unrealistic and insulting for most Africans. More than 50 territorial states, with different religious, linguistic and ethnic backgrounds can no longer be seen as other than independent units. The reality of the nation-state in Africa provides an excellent example of the changes affected in the African culture by colonialism. Colonialism destroyed pre-existing coherent and functioning African societies, and at the same time did not last long enough to promote viable alternatives. This was complicated by the fact that colonialists did not take the nature of existing societies into consideration in devising administrative systems for the continent. Nwauwa is of the opinion that the African polity failed the test of European convenience in four major aspects:

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105 This issue will be dealt with more elaborately in the third Chapter of this study on the Islamic conception of international law of human rights.

> Firstly, it [African polity] possessed hereditary leadership according to certain rules which allowed for popular choice among a number of candidates while the European principles of succession were fixed, and ignored choice. Secondly, the decisions of African monarchs were usually subject to restraints either by custom or Islamic practice, ... Thirdly, African state boundaries were surrounded by no man's land to prevent powerful kingdoms facing each other across lines drawn on the ground. Finally, where African states were felt to be too small for European administrative efficacy, they were grouped together and denied existence or, at best, down graded to clans ...[106]

Accepting the reality of the nation-state is not without complications. One major difficulty pertains to the question of colonial boundaries which were accepted by post independence leaders.[107] African political reality can best be summed up as ancient politics within modern boundaries. A question might arise here: should Africa's boundaries be realigned? A positive answer would have to furnish a clear proof that realignment would be feasible. With Somalia and the former Yugoslavia in mind, one could not possibly suggest a wide scale border realignment along ethnic lines. Endless bloodshed and acceleration of political disintegration which will lead to new conflicts are just some of the possible consequences. This study advances the argument that the present African political and cultural reality calls for a careful re-examination of the

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106 A. O. Nwauwa, "State Formation in Africa: A Reconsideration of the Traditional Theories" (1988) Africa Quarterly 23-4.

107 The Assembly of Heads of States and Governments of the OAU issued a resolution in 1964 in which it declared that "the boundaries of African States, on the day of their independence, constitute a tangible reality." Article III(3) of the OAU Charter enlists as one of its cardinal principles "respect for the sovereignty and territorial integrity of each state."

right to self-determination as the heart of what will be regarded as human rights in Islamic Africa.[108]

There is a strong tendency among so-called Afro-centric scholars, as will be discussed in the next chapter, to romanticise about the African society of the past[109] to an extent which minimises the magnitude of changes which took place as a result of various factors, including colonialism. *Firstly,* the advent of Islam and Christianity in the continent disrupted traditional African systems of belief beyond conceivable repair, i.e. the general coherence of moral values and beliefs has been altered for ever. The conception of human rights is, like anywhere else, shaped by the moral value system as informed by Islam and Christianity. Religion, however, is not the only determinant of this human rights conception. In Islamic Africa, for example, one would have to pay great attention to the role of Shari'a and to the complex relationship between religion and public aspects of life.

Most writers would separate the "African" and the "Islamic" contexts. This study does not share such an oppositional discourse. Instead, I believe that in order to arrive at a

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108 See Chapter Five of this study.

109 Martin Kilson has better stated this point as follows: ".. a more valid criticism of the long history of the black American interface with African realities is not that it involved a major tendency by black Americans to defame this heritage but rather that it involved a dysfunctional tendency to emotionally and ideologically exaggerate the African heritage, mystifying the African heritage into a fetish of re-Africanisation." Martin Kilson, "African Americans and Africa: A Critical Nexus" (1992) Dissent 361 at 362.

useful formulation of human rights in Africa, Islam (and Christianity) will have to be understood and interpreted in the light of African specificity. Islam came to Africa largely because of peaceful activities by *Sufi* movements. Islam in Africa, as will be exemplified by the case of the Sudan, reflected a true essence of *Sufism* evident in the fact that it was more emotional, more personal and deep in divine love as opposed to the fear of God, which was prevalent in the Arab world. The religion, to this day, is blended with pre-existing practices and customs. To conceptualise human rights in Islamic Africa, one would have to start by situating Islamic principles within African realities. This suggestion relates to my argument in the following parts that the right to self-determination transcends religion.

Secondly, the unfortunate experience of European colonialism has induced further negative changes in relation to legal systems, state apparatus and language. The implications of colonialism on the African normative process cannot be extracted from the fabric of African society. Chinua Achebe puts it brilliantly: "To call my colonial experience an inheritance may surprise some people. But everything is grist to the mill of the artist. True, one grain may differ from another in its powers of nourishment; still, we must, in the manner of those incomparable artists of *mbari*, accord appropriate recognition to every grain that comes our way."[110] Thirdly, Africa has been also been plagued by dictators and despots in its post-independence life.

Afro-centric endeavours do not have to be accorded any greater deference than any other traits of Western scholarship.[111] The nation-state, therefore, occupies a central fact around which cultural norms of human rights are to be identified. Mazrui points out that "[t]he new states of Africa, in spite of the artificiality of the boundaries which the colonial powers arbitrarily imposed, provide more effective units of political and economic organisation in a world of nation-states than the original pre-colonial ethnic entities could, on the whole, have hoped to do."[112] I am emphasising acceptance of the reality of the nation-state because I see this as a prerequisite to the most urgent need of defining democratic participation in contemporary African conditions.[113] At the heart of this enterprise will be the question of rights and freedoms.

Linguistic changes are evident in the fact that most of the African countries, following independence, have adopted an official language, invariably a language of non-African

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110 Chinua Acbebe, "African Literature as Celebration: Reflections of a Novelist" (1992) Dissent 344, at 345. *Mbari* refers, in the tradition of the Igbo of Nigeria, to the prohibition against laying a proprietary hand on any part of the property belonging to the communal enterprise. Acting against this prohibition one risks the pain of being finished off rather quickly by the Gods. Chinua Achebe, *ibid.*, at 344.

111 They are, after all, conceived by American (usually African American) scholars using their own cultural tools and experience. A certain image of Africa might be needed in contemporary America to help consolidate a sense of identity within black communities. This image, however, should not be treated as descriptively accurate of contemporary Africa.

112 Mazrui, *A World Federation of Cultures*, supra note 89, at 11.

113 See, generally, Mahmood Mamdani, "Africa: Democratic Theory and Democratic Struggles: Clash between ideas and realities?" (1992) Dissent 312.

(European or Arabic) origin. These languages very often constitute the only medium of communication amongst Africans. Chinua Achebe has put the case forward for accepting English, not because of its origin, but simply as a practical necessity:

> We choose English not because the British desired it but because having tacitly accepted the new nationalities into which colonialism had grouped us, we needed its language to transact our business, including the business of overthrowing colonialism itself in the fullness of time. Now that does not mean our indigenous languages should now be neglected. It does mean that these languages must co-exist and interact with the newcomer at the present time and into the foreseeable future.[114]

The most important linguistic change stems from the implicit acceptance of the discourse of rights. Africans, and Muslims generally for that matter, do not seem to dwell too much on the use of rights discourse. I have indicated earlier, at the beginning of this part, that the contemporary use of "rights" and "freedoms" in Arabic (and the Islamic tradition) is greatly influenced by Western legal language.[115] Africa has gone a step further by adopting an extensive legal language rooted in Western discourse.

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[114] Chinua Achebe "African Literature", supra note 110, at 348.

[115] The impact of Western language is part of the general impact of colonial education in Africa. For example, education, as will be noted in the Second Chapter of this study, has fostered a sense of individualism in Africa. The impact of the colonial education is far more reaching in Christian Africa in its disruption of traditional value system. Sindima states: "The agents of liberalism in Africa were colonial administrators and their accomplices - missionaries educators and evangelists. In their self-appointed roles as agents of change, missionaries joined with merchants and colonial administartors to launch an onslaught on Africa society. The idea that missionaries were the bearers of civilisation made mission schools and Christianity the most destructive forces to African traditional values." Harvey J. Sindima, *Africa's Agenda: The Legacy of Liberalism and Colonialism in the Crisis of African Values* (Westport, Conn.: Greenwood Press, 1995) 45. See, also, J. Harris, *Africans and Their History* (New York: New American Library, 1972) 180. Abraham notes another aspect in which education affected

The changes in legal systems manifest themselves in the structure and substance of these systems, in the substantive laws and in subscribing to rules of international law. The legal systems of former British colonies, for example, are modelled after the British Common Law in most aspects including legal education, jurisprudence, case and written laws.[116] A number of changes, at least in the legal mentality, were brought about as a result of African states subscribing to international law, domestically in the court system and externally in a number of treaties and transactions.[117] Despite the fact that the latter changes are not so significant as the earlier ones, they should not be ignored.[118]

The Sudanese legal system is an exemplification of these cultural changes. Elsewhere, I argued that positivism, as a legal philosophy,[119] was transplanted into Sudan with the

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African culture: "The spread of education is another factor leading to urbanisation in Africa, and there is the differential standard of living between rural and urban areas, and the preference for the latter which education breeds in one." W. Abraham, *The Mind of Africa*, supra note 21, at 165.

116 cf: A. Gledhill, *The Penal Code of Northern Nigeria and the Sudan* (London: Sweet and Maxwell, 1963); Zaki Mustafa, *Common Law in the Sudan: An account of the 'justice, equity and good conscience' provision* (Oxford: Clarendon Press, 1971); and W. C. Ekow Daniels, *The Common Law in West Africa* (London: Butterworths, 1964).

117 cf: T. O. Elias, *Africa and the Development of International Law* (Boston: Martinus Nijhoff Publishers, 1988); and, F. C. Okoye, *International Law and the New African States* (London: Sweet and Maxwell, 1972).

118 These changes will be fully discussed in the next two chapters on the African and Islamic cultures.

119 Positivism can be described, based on professor Hart's assertion, to have the following meanings: (1) Laws are commands. This is essential to Austin and Bentham. (2) There is no necessary connection between law as it is and as it ought to be, i.e. generally referred to as difference between law and

introduction of English law , and the acquisition by Sudanese of English legal education and judicial and legal practice.[120] The Sudanese legal culture, hence, is dominated by both Islamic and English legal principles.[121] The influence of English positivism is evident in four aspects: historical, practice of English Africa, institutional arrangements, and contemporary legal practices.

The historical influence of positivism is evident in the fact that the Sudanese legal system was oriented towards English law, as the English were the dominant partner in the Anglo-Egyptian Condominum regime.[122] Legal education[123] and laws introduced

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morality. (3) Analysis of legal concepts is worth pursuing and is distinguished from historical inquiries into relation between law and other phenomena. (4) Legal system is "a closed logical system" in which correct decisions can be deduced by logical means apart from morality. (5) Moral arguments unlike statements of fact, cannot be established or defended. H. L. A Hart, "Positivism and Separation of Law and Morals" (1957-58) 71 Harvard L. J. at 601, note 25. See, also, R. W. M. Dias, *Jurisprudence* (London: Butterworths, 1985), "Chapter 16: Positivism: British Theories", 331-58; H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); and J. Austin, *The Province of Jurisprudence Determined* (London: Wiedenfeld and Nicolson, 1955).

120 See, Elobaid A. Elobaid, *International Obligations Under the Sudanese Legal System: The Case of Human Rights Obligations*, Unpublished LL.M Thesis, (Saskatoon: University of Saskatchewan, 1990) "Chapter One: The Impact of English Positivism on International Law in Sudan", 8-76.

121 The colonial authorities maintained a strict legal dualism, English law was applied to civil matters while Shari'a was applied to personal matters (family law) of Muslims. Although some attempts were made, in 1971, to implement Egyptian civil law, this legal dualism was maintained in post-independence Sudan until the implementation of September laws in 1983.

122 All the High Court judges, legal secretaries and Chief-Justices during the Anglo-Egyptian rule were English lawyers.

123 In 1936, the Khartoum Law School, now the Faculty of Law of the University of Khartoum, was established by English lawyers with the prime objective of training Sudanese lawyers in English law. The courses and the language of instruction were all in English. The author, who graduated from the University of Khartoum in 1986, was trained both in civil law which was taught in English and based on English law texts, and Shari'a which was taught in the Arabic language.

by the colonial regime were modelled after English law.[124] Section 4 of the 1900 Civil Justice Ordinance was the major instrument through which English law was introduced in the Sudan. It states: "In cases not provided for by section 3 or any other law for the time being in force the courts shall act according to *justice, equity and good conscience*." The phrase "*justice, equity and good conscience*" was taken to literally mean English law.[125] The courts started first by applying English common law, i.e. English precedents,[126] and started referring to English statutes by the late 1920s.[127]

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124 For example, the Civil Justice Ordinance of 1900 which embodied 137 sections, only two sections (3 and 4) dealt with the substantive law to be applied by the courts. The rest of the sections dealt with establishing courts and the procedures to be followed by these courts.

125 Mustafa points out: "As a general rule it is safe to say that, during this period, the courts referred exclusively to English common law rules, and applied them with the slightest hesitation. A number of local judicial precedents could have very easily been written by English judges who must have felt quite home with English precedents, English treaties, and English techniques and English terminology. English common law were never described as foreign rules, and precedents were usually cited without being described as English precedents. The same practices was followed as regards citation of the names of English Courts." Z. Mustafa, *The Common Law in the Sudan*, supra note 115, at 95.

126 For example, in *Yousuf Fawaz v. Mohamed Labib Elshahid*, A.C. - App. - 38 - 1928, the Court of Appeal examined 12 English precedents relating to the rule laid down in the English case *Reynolds v. Fletcher*, (1868) L.R. 1Ex. 265, and then the relevant rules of English law to the case before it. The rules of English law were applied in the majority of cases in the period between 1899 and 1956. See, Mustafa, *The Common law in the Sudan*, *ibid.*; and C. F. Thomson, "The Sources of Law and the New Nations of Africa: A Case Study from the Republic of the Sudan" (1966) 4 Wisconsin L. R., 1146 at 1151.

127 Although the courts, at the beginning, used to distinguish between common law and statutory law, the late practice tended to ignore such a distinction. In *Ahmed Hassan Abdel Moneim v. Heirs of Ibrahim Khalil*, A.C. - App. - 42 - 1926, the court applied English statutory case, the Workman Compensation Ordinance 1908, without any hesitation. The court was deciding on the rights of an employee, who was in killed in the course of his employment, *vis-à-vis* his employer. The decision of the court, delivered by the Chief Justice, also indicated that the courts should have applied English statutes which modified common law provided such statutes (in the court's opinion) suited local conditions and conformed with equity, justice and good conscience.

The *legal culture in former African English colonies* is similar to that of the Sudan. The fact that the legal systems of English Africa were modelled after English legal system, and these countries' foreign relations were conducted as part of the British Empire, meant that attitudes towards international law and obligations within these countries are strongly influenced by English positivistic legal traditions.[128] A number of British statutes and judicial decisions which applied or interpreted rules of international law continued, until explicitly repealed or overridden, to form part of the law of the British colonies which inherited a common British approach to international law.[129] The courts in post-independence English Africa maintained, with some deviations, the traditional English approach to international law.[130]

The third way through which English positivism was maintained was through *colonial institutional arrangements*, i.e. English bureaucracy and style of administration. The Sudanisation committee, established under the 1953 Self-government Agreement to

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[128] See, J. E. S. Fawcett, *The British Commonwealth in International law* (London: Stevens and Sons, 1969) 19.

[129] Elsewhere, I argued that these attitudes included: (1) international law could be considered binding only if incorporated by an act of Parliament; (2) treaties were to be interpreted in accordance with domestic law; and (3) customary international law could be considered by domestic courts only if recognised by Parliament. See, Elobaid, *International Obligations*, supra note 120, at 19-34.

[130] See, for example, the Ghanaian cases *Lardman v. Att. Gen. and Others* (1958) no.s 1 and 2 West Africa L. R. at 55 and 114, and *The State v. Schuman* (1970) 39 Int'l L. Rep. (I.L.R.) 433; Ugandan case *Uganda v. Commissioner of Prisons, ex. p. Matovu* (1970) 37 I. L. R. 1; and Lesotho case *Molefi v. Principal Legal Advisor, Prime Minister and Commissioner of Police* (1970) 39 I. L. R. 415.

supervise the Sudanisation of administration, was able to complete its work several months before its projected time for completion.[131] The work of the Committee was completed quickly, in the opinion of Abd Al-Rahim, mainly because of the overriding political considerations for eliminating the Egyptian and British presence in the Sudan.[132] There is, in my opinion, another consideration that the committee's job was not so difficult and was not expected to take long as the administration system was well established and based on English bureaucracy.[133] What was done was that the British civil servants were replaced by Northern Sudanese ones who were also trained in the English style of administration.[134]

The fourth aspect is the *contemporary impact* of legal positivism on the Sudanese culture. This impact is evident in legal education, legal codification (supremacy of the law and absence of effective law reform), and judicial practices. Although legal education is Arabised and claimed to have been oriented towards teaching Islamic law

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131 M. Abd Al-Rahim, *Imperialism and Nationalism in the Sudan* (Oxford: Clarendon Press, 1969) 213.

132 *Ibid.*, 220.

133 Reminiscing about the efficiency of the Sudanese civil service and its glory is one of the favourite subjects of my parents' generation. British style of administration, e.g. punctuality and promotion hierarchy, is often referred to as the standard for this efficiency.

134 One writer puts it: "Sudanese inherited at independence a personnel system based on the British system in which individuals are ranked through out the service, and status including pay and conditions, inheres in the individual's rank, regardless of the nature of his [her] assignment." A. A. Al-Terairi, "The Civil Service: Principles and Practices", in Abd Al-Rahim *et al, eds.*, *Sudan Since Independence* (London: Gower Publishing Company, 1986) 76.

instead of English law, the influence of English law remains paramount as will be evident from the following discussion.

Judicial practice in the Sudan reflected a narrow positivistic perspective towards the laws the courts were applying. This perspective is evident in treating "the law as it is" and in adopting a restrictive approach in interpreting laws. The Supreme Court in *Shama Abdulla v. Sudan Government*,[135] for example, adopted a rather strict approach in assuming constitutionality of the law passed by the legislature, i.e. the court applied a strict approach of adopting the law as it is.[136] The attitudes of the Sudanese Courts have their origin in the 1920s, and have continued to exert their influence. In some cases these attitudes produced absurd results.[137]

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135 Supreme Court/ Const. C./ 1/ 1980, reproduced in H. R. Sakdla, *Ashhar al-Qadaya al-Dustoria fi al-Sudan*, (The Famous Constitutional Law Cases in the Sudan), (Beirut: dar al-Geel, 1984), 138.

136 The Court declined to look into the constitutionality of the law in question based on various principles which included the following two. First, the Supreme Court should not deal with the constitutionality issue if there is any other way to decide the original case without dealing with the issue of constitutionality. *Ibid.*, 152. Second, the Court affirmed the presumption that all laws issued by the Legislature are constitutional. Furthermore, the Court emphasised that the Supreme Court should not act out of the framework of this presumption, unless for highly restricted reasons which render the conformity between the constitution and the law involved highly impossible. *Ibid.*

137 For example, in *Hussan Hussein v. Sudan Railways*, the question of liability for physical injury which occurred to an employee in the course of his work, was raised. The judge applied the common law rule of *volenti non fit injuria*, which had been modified at the time by the English Workman's Compensation Act of 1880. The ruling judge stated: "as it is, I must take the law as I find it." Cited in Mustafa, *The Common Law in the Sudan*, supra note 116, 136. See, also, *Sudan Government v. Ahmed Omer*, A.C./Const., A.C./ App. 12/ 1940.

Positivistic legal attitudes are particularly detrimental in the case of the Sudan because of the lack of effective law reform policies. Following independence, law reform meant amending English law based statutes, instead of evolving a set of laws which are more in line with the developments in the Sudanese culture. Most of the changes (perceived as major at times) have taken place in the political orientation of the legal system and have not necessarily produced any changes in the attitudes of lawyers and judges towards the law, which remain positivistic. These changes, however, fall under one of two categories: short lived and penological. In both cases the changes have been rather sloppy and far from an effective legal reform.

The first set of changes took place in the period between 1971-2, during the earlier days of Numairi's regime. These changes were influenced by pan-Arabists within the regime, mainly former Chief Justice Babiker Awadalla, then Prime Minister, who was trained in English common law and who wanted Egyptian law to be adopted in the Sudan as a step to bring the two countries closer towards unity. He brought together a number of experts from Egypt, a few Iraqis, a few Tunisians, but no Sudanese member, to form a committee. Its mandate was revision of the Sudanese laws and the enactment of new ones. In record time, the committee produced three major codes: a Penal Code, a Code of Criminal Procedure and a Civil Code modelled after the Egyptian (French) Civil Code. The legal system, as a result, was thrown into confusion and chaos. This did not last for long, as these codes were soon to be repealed in 1973

as the military junta adopted a different political orientation.[138] This new political orientation was prompted by the shift of power in favour of a very obscure group which is difficult to define, but is, more or less, a middle class technocratic group of elites who were "liberal pragmatists" with no mass support. In 1974, the legal system was reoriented back towards English law.[139]

The second set of changes was brought about, in September 1983, at the end of the Numairi regime following the adoption of the so-called Islamic laws, otherwise known as the "September Laws". A committee of three lawyers was set up from within the Presidential Palace, and in less than two months they started producing draft bills which were enacted into laws. Eight bills, including the Penal Code, the Code of Criminal Procedure, the Judiciary Act and the Judgement (Basic Rules Act), were enacted. Ever since their enactment, these laws have been the centre of debate, not only within the legal profession but in broader communities concerned with the socio-political well being of the country.

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138 Two significant political developments took place. First was the split which took place between the Sudan Communist Party (SCP) and the "May Officers" who were successful in aborting a coup backed by the SCP in 1971. The second political development was the loss of the pan-Arabist groups of their role in the government.

139 A great number of legal Codes and Acts was passed, paralleling a number of English law and statutes, e.g. a Penal Code, a Code of Criminal Procedure, a Code of Civil Procedure, an Agency Act, a Contracts Act, and a Sales Act.

The adoption of "Islamic laws" in the Sudan is often taken as a departure from English law and a reorientation of the Sudanese legal system towards its "cultural roots".[140] I believe that this is a statement meant for political consumption and is not necessarily reflective of the actual legal reality which is in my understanding still based on the colonial legal system and is predominantly positivistic in its outlook. Two reasons can be cited in support of this proposition.

First, most of the legislation hailed as Islamic is in fact a less substantial modification of the 1974 Codes, which were based on "Sudanese common law". The 1983 Penal Code, the most "Islamic" of these laws, was a stark exemplification.[141] Out of the 450 sections contained in the Code, only 10 were substantially changed to include the *huddud* penalties. The elements of crime analysis and techniques of implementation remained those of the Sudanese common law.

Secondly, the administration of justice and the organisation of the legal profession are still reflective of the colonial legal system. This is despite the fact that legal dualism, the existence of both Shari'a courts and civil courts, was abolished in 1983.[142] The

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[140] Elkhalifa, for example, hailed the adoption of September laws as a "step to erradicate corruption and bring the criminal law of the Sudan closer to Islamic law." A. I. Elkhalifa, *Development and Future of English Law and Islamic Law in the Sudan*, an unpublished DCL Thesis, (Montreal: Institute of Comparative Law/ McGill University, 1988) 214.

[141] This has been replaced by the 1991 Penal Code, which represents a reproduction of the 1983 one with some modification, e.g. the inclusion of the crime of apostasy.

aspects of the colonial legal system are evident in the following aspects: (1) the judicial system in the Sudan is adversarial and governed by the same rules of procedure enacted by the British and modified by subsequent Sudanese governments. (2) The legal language and terminology used resemble the "secular" language used and developed by the Sudanese common law more so than that of the classic *fiqh*.[143] (3) The techniques of interpretation and implementation of the law remain largely influenced (and shaped) by English positivistic attitudes towards the law.[144]

I believe the debate over the application of Shari'a in the Sudan is made political to conceal the uneasy truth regarding the legal and political changes affected by colonialism. I will try to substantiate this point by examining the work of a typical "Islamist" lawyer, Abdel Rahman Elkhalifa, who is currently the Prosecutor-General, the second most important job in the Ministry of Justice and the Attorney-General.[145] Elkhalifa's thesis is that while the development of Islamic law "was part of the

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142 The division was created by the colonial authorities and maintained by the post-independence Sudanese governments. The 1956 Transitional Constitution, in articles 94-6, allowed for the jurisdiction of both branches of the judiciary and created rules governing conflict of jurisdiction between the two. The same was maintained in the Judiciary Act 1958, the Transitional Constitution 1965, and the draft Constitution of 1968. The Judiciary Act 1972 provided for the amalgamation of the two divisions under a single judicial body. This amalgamation, however, was of the administrative working of the two divisions and not of their jurisdiction.

143 See the meanings of *haqq* (right) and *hurriyah* (freedom) under Shari'a which will be outlined in the third chapter of this study.

144 See, for example, Elobaid , *International Obligations*, supra note 120, "The Impact of English Positivism on International Law in the Sudan", 8-76.

145 A. I. Elkhalifa, *Development and Future of English Law and Islamic Law in the Sudan*, supra note 140.

historical, political and social development of the Sudan", "the genesis of English law in the Sudan was forceful."[146] The cultural influence of English law is summarised in the following statement:

> The impact of imposing English law was only skin deep and has not penetrated the hearts of the Sudanese people. Only a small minority would frankly opt for secular laws in the Sudan. These are the lawyers who are obsessed with a narrow loyalty to English Law with which they are conversant. They feel a vested interest in their skill which they have laboriously acquired. They cling consciously to the usage to which they are accustomed. They are insensitive to the values of their people. This group of lawyers were the agents through which English Law was transplanted into the body of the Sudanese legal system.[147]

Although no one would dispute the two ideas that Shari'a is an integral part of the normative system in the Sudan, and that English law came to the country at the barrel of the gun, I find the whole study to be far from an honest recollection of the Sudanese legal culture for the following reasons. First, there are elements in Sudanese society for whom Shari'a is not part of their "historical, political and social development." For the Southern part of the country, the Sudanese common law represents the basis of the legal system. This claim has been strengthened by the current political developments in the Sudan.

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146 *Ibid.*, 284.

147 *Ibid.*, 264.

Second, the author himself seems to acknowledge that the impact of the colonial legal system is more than "skin deep". Two examples illustrate this point. The first one is evident in the techniques he used in his thesis, e.g. reference to case law and legal analysis, are those of English common law and not of the classic Islamic *fiqh*.[148] The second example relates to the fact, noted earlier in this part, that the only "Islamic" parts of the 1983 Penal Code are those dealing with the *huddud* punishments. Elkhalifa writes:

> By and large, the Penal Code Act, 1983 embodied all the 'huddud' in Islamic Criminal Law. The remaining parts of the Code *are copied verbatim* from the Penal Code, 1925 and its replica, the Penal Code Act, 1974. *However, this can be acceptable since the 'tazir' punishment in Shariah is flexible enough to accommodate offences established by these two repealed codes.*[149]

Third, the acceptance of most parts of the English-law-based codification renders Elkhalifa's criticism of three Sudanese lawyers unfounded. The lawyers were selected: Abu Rannat, the first Sudanese Chief Justice, Mansour Khaild a former Minister of Foreign Affairs, and Galal Ali Lutfi, a former Attorney-General who was appointed Chief Justice by the current "Islamic" regime. The three were described, by Elkhalifa,

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148 See, for example, his analysis of sections 8 and 31 of the Evidence Act 1983, where he notes the codification of the rules laid in two previous precedents. *Ibid.*, 237-8

149 Emphasis added. *Ibid.*, 242.

as "an extreme case of Western oriented fanatics."[150] While Lutfi, who is responsible for the NIF regime's purging of the judiciary, could adequately be described as a fanatic for any regime in power in the same way as Elkhalifa himself, I find the categorisation of Abu Rannat to be a great injustice. Not only did Abu Rannat have a great deal to do with laying the foundations for a Sudanese legal system, but he had the vision to recognise the need to ground the legal system in the Sudanese culture. Consider the same quote, used by Elkhalifa:

> For the future, I believe that a Sudan Common Law will have to develop as an integral part of the society now emerging in the Sudan, and it will not be based on religious adherence, but upon the social customs and ethics of the Sudan as a whole.[151]

The elements of cultural change outlined in this part will have to recognised as an integral part of the cultural normative process in Islamic Africa.

2. Who has the Right to Claim Cultural Validity or Invalidity of Human Rights Norms?

I have, earlier, raised the point that the undertaking of cultural support will have to be sought by people from within the cultural context. The claim of cultural validity, it should be stressed, is open to abuse since many unacceptable practices as well as

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150 *Ibid.*, 265.

151 M. A. Abu Rannat, "The Relationship between Islamic and Customary Law in the Sudan" (1960) J. African L. 16. See, Elkhalifa, *ibid.*, at 264.

unacceptable people might assert this claim.[152] However, he who comes to equity must come with clean hands. Dictators and governments who abuse internal cultural norms cannot claim cultural legitimacy as they lack moral credibility. Two examples from recent events can exemplify this point: the Gulf crisis, and the recent claims by "Islamic" governments, such as the Sudanese, of cultural differences in human rights protection.

Saddam claimed jihad against American troops during the Gulf Crisis after his invasion of Kuwait. If one examines Shari'a, one will quickly realise that his claim is discredited by his invasion of Kuwait and refusal to submit to the call for peace by other Islamic nations. The rule governing dispute resolution among Muslims is laid down in the Qura'n:

> If two parties among the believers fall into a quarrel, make ye peace between them: *but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the commands of Allah; but if it complies, then make peace with justice, and be fair:* for Allah loveth those who are fair (and just). (*) The believers are but a single brotherhood: So make peace and reconciliation between your two (contending) brothers, and fear Allah, that ye may receive Mercy. 49:9 & 10 [emphasis added]

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152 Acceptance is determined by the level of popular resistance and opposition to practices and political personalities.

When a conflict breaks out between Muslims, they must seek a peaceful solution through conciliation. If such a solution fails, then it is the duty of Muslims to initiate the use of force against the *beggat* (the group which committed the injustice and refused the peaceful solution). Hamidulla, a prominent scholar, enumerated instances which might be regarded as rebellion among Muslims which would necessitate the use of force.[153] The Gulf incident might not fit precisely within any of the given categories. It, can however, be looked upon in the light of the precedent, cited by Hamidulla, of the war between Ali and Mu'awiyah.[154] The definition of rebellion includes "occupation of some territory and controlling it in defiance of the home government."[155] In other words, the definition applies to an instance where one Islamic state assaults the sovereignty of another, violating the rules of Shari'a. One cannot violate a cardinal Islamic rule and claim jihad at the same time:[156] *he who comes to equity must come with clean hands.*

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153 M.Hamidulla, *Muslim Conduct of State* (Lahore, Pakistan: Kashmiri Bazar, 1945), Chapter VII on Civil Wars and Rebellions, pp. 166-76.

154 Ali Ibn Abi Talib was cousin and son-in-law of the Prophet as well as the fourth Caliph. Mu'awiyah Ibn Abi Sifian, leader of the Ummayad tribe abd ruler of Sham (Syria), contested Ali's Caliphate (his entitlement to rule the Muslims) on the basis that the Ummayads were the heirs of Othman, the third Caliph who was assassinated, since Othman was an Ummayad. A war errupted as a result. The parties eventually agreed to refer the matter to *tahkim* (arbitration), upon the request of the Ummayads. This incident affirmed in principle the process of dispute resolution called for under the Qura'n. However, Ali eventually refused to abide by the decision of the arbitrators since it was obtained by trickery.

155 Hamidulla, supra note 153, at 167.

156 In a meeting with the Western press, the Grand Imam and Sheikh of al-Azhar, indicated that only Ulamma (Muslim jurists) can decide on the legality of holly war, and declared that Saddam by no means had the right to call for jihad during the Gulf war. (1991) 63:vii Magalat al-Azhar (al-Azhar Magazine), 847 (in Arabic). The Declaration of Mecca, issued by the Conference of Ulamma, which

Another example is to be found in the response of the Sudanese Government to the Report of the U.N Human Rights Commission's Special Rapporteur for Human Rights in the Sudan.[157] The report detailed "massive and continuing human rights violations," such as summary executions, detentions, torture and forced labour.[158] The Report also referred to the corporal penalties included in the Sudanese Criminal Code as cruel, inhuman and degrading punishments regardless of their religious origin. The Sudanese government picked on this statement and went so far as to accuse the Special Rapporteur of blasphemy,[159] regarding him as "worse than Rushdie."[160]

The government went further to state that the Rapporteur would not be allowed into the country since his Report was regarded, by the Government, to be an insult to Islam and Muslims.[161] The government's record of violations, as will be discussed in the

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was held in Mecca, on 9-11 January 1991 stated, *inter alia*, that Saddam had abused Islam by exploiting it and by attempting to justify his aggression with reference to Islamic law. (1991) 63:viii Magalat al-Azhar 854 (in Arabic).

157 U.N Economic and Social Council, Human Rights Commission, *Situation of Human Rights in the Sudan: Report of the Special Rapporteur, Mr. Gáspár Biró*, UN Doc. E/CN.4/1994/48.

158 The Government was further condemned by the UN General Assembly in a resolution adopted (91 in favour, 13 against and 47 abstensions) on December 13, 1994. The Assembly expressed deep concern about the continuing human rights violations in the Sudan.

159 The Guardian, London, March 8, 1994.

160 "Sudan cites higher authority", The Economist, March 5, 1994. The government has denied, however, that a *fatwa*, similar to the one issued by Khomeni against Rushdie, was decreed. *Al-Hayat*, International Arab Daily, (no date).(A clipping is available with the author).

161 *Al-Hayat, ibid.*

next parts, contradicts Shari'a even in its strictest interpretation. I believe that the Rapporteur's statement is not necessarily the most prudent. It is, however, a paragraph in tens of pages clearly documenting atrocities and violations committed by the present Sudanese regime. The regime's attempt to act on behalf of Muslims and Islam is not to be given weight for the regime violates the very rules of the culture upon which it intends to base its claim of cultural insensitivity by the Special Rapporteur.

The following parts of this study will provide more concrete examples for the foregoing arguments. Both the "Islamic" and the "African" cultural contexts will be examined with a view to highlighting areas of agreement with the international human rights standards; areas of cultural influence and change; and the identification of relevant ideas for the protection of "human rights" in Islamic Africa. The study then advances arguments for a more culturally grounded process for the conceptualisation of human rights in Islamic Africa, which will be exemplified by examining the right to self-determination, freedom of expression and the right to participate in political life in the Sudanese culture.

PART TWO

Chapter Two

HUMAN RIGHTS IN AFRICA

> *[I]t is a commonplace to say that culture is not a mere assemblage of works and norms which can function automatically in every climate and at all periods. These works and these norms must have a subject which fires them with its [culture's] passions, its aspirations and its genius. The most universal philosophical doctrine or literary work is only valid by virtue of the men [and women] who live by it. It is only the people who give it authority and dynamic force.*
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> .....
>
> *[E]very effort towards the personification and enrichment of national culture, and every effort to implant Negro men [and women] of culture in their civilisation, constitute in fact, progress towards universalisation and are a contribution towards the civilisation of [hu]mankind.*
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> *Second Congress of Negro Writers and Artists, 1959.*[*]

An old African proverb says: "However poor the crocodile becomes, it hunts in the river, not in the forest."[1] When it comes to human rights, Africa (more particularly pre-colonial Africa) is depicted either as an egalitarian and just society which has been destroyed by Islam and later colonialism (the "Afrocentric view"), or as a society devoid of any conception of rights and freedoms (the "Eurocentric view"). I do not intend to dwell much upon either of these views since I believe they are both hunting in the forest.

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[*] (1995) 24&25 Présence Africaine (Special Issue) 321.

[1] Kofi A. Opoku, *Speak the Wind: Proverbs from Africa* (New York: Lothrop, Lee and Shepard Co., 1972) 51.

The "Afrocentric" view tries to project a Romantic vision of Africa and to accord it a central position in any intellectual enterprise.[2] I believe that this view is valuable in providing departure points to the human rights debate in Africa, so long as it does not try to explain today's Africa exclusively from this point of view. Asante, a self-declared American Afrocentrist, tells us that "African birth does not make one Afrocentric; Afrocentricity is a matter of intellectual discipline and must be learned and practised."[3] His vision of Africa, which he tries to project, is devoid of Islam (equated with the Arabs) and Christianity (equated with Whites). He stated this position by way of criticising Mazrui's vision of Africa as altered by the advent of Islam and Christianity.[4] Asante states:

> Mazrui is incorrect ... in granting to Christianity and Islam the same place as the traditional and centring [sic] African culture found throughout the continent, perhaps less so in places because of the density and intensity of the oppression and suppression of the indigenous people. ... [H]e does not transcend his particular vision of Africa because of an entrapment: combining both European and Arab[ian] hegemonic positions over the intellectual and cultural resources of Africa.[5]

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[2] Cf: Chiekh Anta Diop, *The African Origin of Civilization: Myth or Reality* (Westport, CT: Lawrence Hill, 1974) and, *Civilization or Barbarism: An Authentic Anthropology* (New York: Lawrence Hill Books, 1991); V. Y. Mudimbe, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (Bloomington: Indiana University Press, 1988); and George M. James, *Stolen Legacy: Greek Philosophy is Stolen Egyptian Philosophy* (Trenton, N.J.: Africa World Press, Inc., 1992).

[3] M. K. Asante, *Kemet: Afrocentricity and Knowledge* (Trenton, N.J.: Africa World Press, Inc., 1990) at p. 115.

[4] Mazrui's vision is commonly known as "Triple Heritage" thesis. See, generally, A. A. Mazrui, *The African Condition* (London: Heinemann, 1980).

[5] Asante, *Kemet*, supra note 3 at 115.

If we are to accept this statement, then we are truly hunting in the forest instead of the river. First, we must not underestimate the impact of colonialism on Africa and the far reaching changes it induced on the traditional African context. Secondly, despite the fact that not all Africans are either Christian or Muslim, Islam and Christianity are felt everywhere in the continent. This does not mean that they take primacy over traditions or other aspects of African life. They, instead, have become part of African culture. While the impact of Islam is discussed in the following chapter, the impact of colonially induced changes (especially legal and political) on human rights in Africa are the subject of discussion in this chapter. Contemporary African philosophy[6] has long recognised these changes and identified them as challenges which ought to be met.[7] Two of these challenges are of significant relevance to the present discussion.[8]

First is the desire to understand Africans better in order to make easier accommodation with changes induced by Islam, Christianity and colonialism. This can neither be furthered through a romantic vision of Africa, nor through the work of non-African scholars (and like-minded

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6 I am using philosophy here in reference to views and works of African scholars, including philosophers, who use African cultural forms and symbolism as expressive of philosophy. One particular "African" form expressive of philosophy I use often in this part is that of proverbs. Proverbs are still widely used in our African daily life. Although they are often regarded as an integral part of African Philosophy, the debate is far from being settled. See H. Odera Oruka, "The Fundamental Principles in the Question of African Philosophy" (1975) 4:1 Second Order 45.

7 cf: Kwame Gyekye, *An Essay on African Philosophical Thought: The Akan Philosophical Scheme* (Cambridge: Cambridge University Press, 1987); T. Serequeberhan, ed., *African Philosophy: The Essential Readings* (New York: Paragon House, 1991).

8 These are selected from the challenges identified by Bodurin. Peter Bodurin, "The Question of African Philosophy" in Serequeberhan, ed., *African Philosophy*, *ibid.*, pp. 29-46.

African scholars) who tend to emphasise the irrational and illogical nature of African thought.[9] Second is the challenge prompted by the rise of African nationalism. The struggle for political independence signified the importance of mental liberation in a sense of total detachment from Western (colonial) ways of doing things. The challenge, therefore, is how to balance the need for mental liberation with the needs created as a result of our (African) acquisition of Western ways of doing and being, such as language, legal system, political organisation, to name but a few.

In Africa, much like anywhere else in the world, "traditional" life is no longer adequate as a model to be followed.[10] This is true of certain practices and social arrangements. Social arrangements were based on the unquestionable principle of obedience to elders. This principle, which is still evident in social relations, could be equated with authoritarianism if used in contemporary African politics.[11] A Malawian official was quoted to say that elders, according to African traditions, ought to be respected as long as they live.[12] He made this

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9 Of course what is rational and what is logical are relative in the sense that a rational or logical belief could be determined through the identification of premises and assumptions upon which the system of thought is based.

10 Inadequacy does not mean abandoning this traditional life, it simply calls for more scrutiny in adoption of some aspects of this tradition life. On the other hand, I believe that in Africa there is a wealth of traditional general ideas which are still felt in Africa's contemporary political and social life.

11 Wiredu, aware of the difficulty that comes with applying modern logic to traditional values, states: "Was there anything in our traditional culture of this [authoritarian] nature? I believe that the answer is yes. Our society was deeply authoritarian." J. E. Wiredu, "How not to Compare African Thought with Western Thought", in R. A. Wright, *African Philosophy: An Introduction* (Washington, D.C.: University Press of America, 1979) 134.

12 BBC World Service, World Today Programme, 31 March 1994, 1:15 A.M.

statement in defense of the Malawian dictator Hasting Banda and his decision to censor election campaigns. Banda remains one of the most brutal dictators the continent has known.

Instead of promoting a romantic vision of Africa, I submit, it is rather more useful to develop a pragmatic nexus on two levels: external and internal. *Externally*, the only role for Afrocentricity is in supporting continental African elites in resolving the Continent's problems and dilemmas. The challenge I am trying to face here is how to overcome the political difficulties (anti-freedom aspects) of traditionalism while at the same time respecting its cultural forms. This cannot be helped by advancing an emotive vision of Africa, as Asante is trying to do, which is naive in itself and also has a demoralising impact. While the demoralising impact of romanticising African culture is usually felt by those who live in Africa, is often overseen by others, "Afrocentrists" included. Two examples can be used here to illustrate this point.

The first is to be found in the movement known as Rastafarianism which started in the late 1930s following the crowning of Haile Selassie as Emperor of Ethiopia. The movement, which gained momentum and popularity in the 1950s as part of the return to Africa sentiment, is still popular among English speaking Caribbeans and black communities in Britain and the U.S.[13] Although there may be positive impacts of this movement, the elevation of the personality of Haile Selassie (Ras Tafari) to a holy status brought a demoralising impact to

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[13] For a very useful account on the movement, see H. Campbell, *Rasta and Resistance: From Marcus Garvey to Walter Rodney* (Trenton, N.J.: Africa World Press, Inc., 1990).

millions of Eritreans and other non-Amharic Ethiopians who were living under the brutal regime of Haile Selassie.

The second example involves a different form of romanticism, the "fact of black rule". This became predominant among African American intellectuals following their contacts with African writers in the late 1950s. African states, in the 1970s and 1980s, "benefited from Black-American intellectuals' dilemma of lauding *the fact of black rule* while slighting *the quality of black rule*."[14] One should not forget the positive significance of this intellectual and political engagement in contributing to the anti-apartheid campaigns, while at the same time noting some of the negative elements. The worst example that can be cited is Amin's regime in Uganda, 1972-9, which committed over two hundred thousand political murders.[15] African American intellectuals remained mute in the face of these atrocities.[16] Some black senators opposed the discussion of Amin's regime because of the "concern that a congressional investigation of Uganda might divert public attention from [the] human rights condition in South Africa."[17]

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14 M. Kilson, "African Americans and Africa: A Critical Nexsus" (1992) Dissent 368.

15 Amin was reported to have massacred tens of thousands from the Acholi and Langi ethnic groups. Amnesty International, *Uganda: The failure to safeguard human rights* (London: AI, 1992) 7. Ayittey estimated that more than 800,000 people perished at the hands of Idi Amin, Milton Obote, and Tito Okello, all former Ugandan dictators. G. Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992) 120.

16 A similar attitude was prevalent among OAU members who even went so far as to elect Amin as President of the OAU.

17 The view was expressed by Charles Diggs, a black Congressman in 1977. Cited in Kilson, supra note 14, at 368.

Internally, Africans should recognise the inherent difficulties with the traditionalist argument and seek support for human rights in our cultural contexts which have been greatly altered. We have advanced, in the first chapter of this study, the argument that culture is not static, therefore, any reference to culture entails culture as it has been changed or influenced. An old Ashanti proverb states this position far better: "Rain beats a leopards skin, but it does not wash out the spots". African culture (the leopard's skin) has undergone several changes (rain), which has not erased the fundamentals of the indigenous culture. Nevertheless, the rain does have an impact on the leopard's skin in the same way it does with other kinds of leather. In relation to human rights and fundamental freedoms, some of the following issues could be viewed as integral parts of the rain-beaten leopard's skin.

The drafters of the African Charter on Human and Peoples' Rights seemed to overlook the changes affected in African culture as a result of the colonial nation-state and its legal system. This is evident in the Charter's implementation arm. Enhancing the moral binding force of the African Charter or any human rights treaty, it is argued throughout this thesis is dependent on an ability to appeal to cultural norms more so than on its mechanisms for implementation. This is of vital importance since the African Commission is powerless, both in an institutional and a political sense, in actively seeking compliance with the Charter and its human rights protections. Both the weakness of the Commission and the lack of a judicial arm are

attributed to the African culture of conciliation. The following brief expose of implementation under the African Charter points to a lack of proper understanding of African culture.

The African Commission was created as an organ of the OAU and not as an independent human rights treaty body. Article 30 of the African Charter reads:

> The African Commission on Human and Peoples' Rights ... shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.

The Commission is under the control of and supervision of the OAU and its Assembly of Heads of State and Government. For example, members of the Commission are elected by the Assembly of Heads of State and Government, [18] the appointment of the Commission's Secretary is the responsibility of the Secretary-General of the OAU, [19] the OAU assumes all financial costs, and:

> 1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of Assembly and Government shall otherwise decide.
>
> 2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

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[18] According to articles 32-36, members of the Commission shall be nominated by state-members and elected by the Assembly of Heads of State and Government.

[19] Article 41 of the African Charter. Furthermore, rules 6 and 7 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (hereinafter referred to as the Rules of Procedure), adopted by the African Commission in 1988, stipulate that the provisional agenda for the Commission's Ordinary and Extraordinary sessions are to be prepared and distributed by the secretary-general of the OAU.

> 3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.[20]

On first reading of this provision, one is reminded of the Sudanese proverb: "entrusting the cat with the key to the pigeon cage."[21] For not only the final recommendations of the Commission go to the Assembly of Heads of State and Government, but its composition, financing, and administrative functioning are dependent on the Assembly. This dependency results in far-reaching harmful effects on the efficient functioning of the Commission. I find the following remarks made by Hatchford, at the first UK conference of the Banjul-based African Society of International and Comparative Law, concerning national implementation of human rights equally applicable to the African Commission:

> It must be said that some national institutions in Africa were undoubtedly established for purely cosmetic purposes and were never intended by government to play any meaningful role in the protection and promotion of human rights. ... *One of the main constraints on the operation of many existing institutions concerns their lack of independence. This can occur through, for example, a system which ensures the appointment of a pro-executive individuals, and government control of finances and staffing.*[22]

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20 Article 59 of the African Charter. Rule 78 of the Rules of Procedure of the African Commission also stipulates that the Commission's report "should be confidential" and cannot be made public unless the Assembly of Heads of State and Government "so decides".

21 In order to understand the significance of this proverb, one must be reminded of the fact that cats are kept in Sudanese households not as pets but as a cure and prevention of mice problems. Cats are also known to feast on pigeons.

22 Emphasis added. "Human Rights in Africa", *West Africa Magazine*, 5-11 July, 1993, 1147.

The human rights commitment of many of the commissioners is for once doubtful. Although commissioners are expected to serve in their personal capacity, [23] the majority of the commissioners are former senior government officials, lawyers, and diplomats trained in international relations with no record of human rights activism. The impartiality of the commissioners is also questioned since most of the them are not only appointed by governments, but are still performing functions for their governments.[24] All these factors warrant the conclusion that the African Commission is "little more than a sub-committee of the Assembly of Heads of State and Government."[25] It is no secret that the majority of African Heads of State and Government represent repressive regimes, hence the very utility of the African Commission is much in question, which explains why the creation of a judicial body, to supervise the implementation of the Charter, will be argued for in this thesis.

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23 According to article 31(1) of the African Charter: "The Commission shall consist of eleven members chosen from amongst the African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular attention should be given to persons having legal experience." Furthermore, rule 12(2) of the Rules of Procedure stipulates that the commissioners "shall sit on the Commission on their personal capacity." Rule 16 of the Rules of Procedure, calls for an oath to be taken by the commissioners: "I swear to carry out my duties well and faithfully in all impartiality."

24 The first Chairman of the African Commission did not seem to have any difficulty with this awkward situation: "Members sit in their personal capacity but continue to exercise their functions in their States of origin. They are, however, independent as regards the exercise of their functions as members of the Commission ..." Isaac Nguema, in the introduction to the UN Centre for Human Rights, *The African Charter on Human and Peoples' Rights* (Geneva: UN Centre for Human Rights, 1990) 3. Shivji has noted that the original Dakar draft of the African Charter attempted to address this crippling problem by providing for an explicit provision excluding diplomats and other members of governments from serving as commissioners. This provision was, however, dropped after two days of debate. I. Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) 104.

25 Shivji, *ibid.*, at 105.

The lack of a judicial arm for the Charter is often said to be grounded in tradition. "The drafters of the African Charter emphasise customary and traditional methods of reconciliation and preference to the adversarial procedures common to Western legal systems."[26] In other words, the Commission will undertake an investigation of a human rights violations in a given country, submit its report and a settlement will be reached. Although culture (tradition and custom) is invoked in support of weak enforcement mechanism of the African Charter, present-day African culture does not lend support to this proposition. This is evident in scholarly discussions, cultural changes induced by the colonial legal system, and by the decay of the political state in Africa.

Earlier African human rights initiatives were characterised by a call for an African human rights judicial machinery. The Law of Lagos, for example, called on African states to:

> study the possibility of adopting an African Convention of Human Rights in such a manner ... [that these rights] will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto [would] be made available for all persons under the jurisdiction of the signatory States.[27]

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26 U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (Lagos: Nigerian Institute of Advanced Legal Studies, 1992) 19. Professor Umozurike is currently a member and a former Chairman of the African Commission on Human and Peoples' Rights. Mbaye, a former Senegalese Chief-Justice and former President of the International Court of Justice, although noted that African States opposed the creation of a human rights court because they are not ready to accept scrutiny for their acts, he also stated that there is a philosophical reason as well: "La justice africaine traditionnelle est essentiellement conciliatoire. La décision à intervenir est généralement un consensus. Cette philosophie du droit appaît dans tous les traités initiés par l'O.U.A. et bien sûr se reflète dans la Charte africaine des Droits de l'Homme et des Peuples." Keba Mbaye, *Droits des l'Homme en Afrique* (Paris: Editione A. Pedone, 1992) 165. I find this statement difficult to accept for reasons which will be clarified in the following discussion.

27 The Law of Lagos was adopted by in 1961 by 194 lawyers and judges from 23 African nations. "The Law of Lagos" (1961) Rev. of the I. C. J. 9.

Contemporary commentators on effective implementation of the African Charter also advocate the adoption of an African human rights court. A workshop for human rights non-governmental organisations which was held in Banjul, three days before the 13th Session of the African Commission, was dominated by a call for the creation of an African human rights court.[28] One of the reasons for this demand seems to be that the need for a court is evident in "the character and conduct of the work of the Commission itself."[29]

The call for an African human rights judicial machinery also originates from the changes induced on local cultures by colonial legal systems. Although the adversarial court system was not grounded in any African tradition, present African judicial systems, which are largely based on former colonial systems, cannot be set aside on the basis that they are not part of "African culture". Students of African legal systems know that recourse to the court system is among the least contested of the legal institutions. It is rather the type of law applied which remains in contest. The colonial legal system (especially in anglophone Africa as exemplified by the case of the Sudan in the first chapter) was characterised by the duality of both the system of law and courts.[30]

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28 K. Gyan-Apenteng, "Defining the terrain in Banjul", *West Africa Magazine*, 19-25 April, 634 at 635. The participants in the Workshop were of the opinion that the African Court should be modelled after the European Court of Human Rights.

29 *Ibid.*, at 635.

30 See, for example, A. N. Allott, "What is to be done with African Customary Law: The experience of problems and reforms in English Africa from 1950" (1984) 28:1 & 2 J. African L. 56

If courts are used in resolving criminal, family, traditional land ownership, and a variety of civil and commercial disputes, then there are no grounds for not using the same system in mediating claims of violations of the provisions of the African Charter. The use of tradition to justify a weak enforcement mechanism for the African Charter is, therefore, not only unfounded but reflective of the ruling elites' intention to water down the impact of the Charter on their own regimes.[31] The decaying political situation in Africa makes the adoption of a judicial mechanism paramount. The fundamental reason for adopting a weak enforcement mechanism in the African Charter is the desire to preserve the interests of the ruling elites, and is not, despite the rhetoric, an attachment to African tradition.

Cultural changes have also rendered certain traditional practices unacceptable, even repulsive in some instances. There seems to be an agreement among Africans, at least intellectuals, as to the need for abolishing these practices. The recognition of this need stems from the realisation that "African culture" is "full of broken ends, and the cultural strings are still to be mended".[32] Abraham reminds us that in mending these cultural strings, we need to sort out

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31 The adoption of the African Charter represents an attempt by ruling elites to adopt the rhetoric of human rights in response to mounting international pressure (e.g. the Carter administration in the US) and also as an attempt by the African political elites to salvage their image as a result of the atrocities committed by regimes such as Amin's, Bokasa's, Moboto's, etc ... This position is best stated by Mutua: "The genesis of the [African] Charter is historically located in an African leadership whose main concern was not the protection of human rights but the continuation, at any cost, of its own rulership." Makay Wa Mutua, "The African Human Rights System in a Comparative Perspective" (1993) 3 Review of the African Commission on Human and Peoples' Rights 5, at 8.

32 W. E. Abraham, *The Mind of Africa* (London: Weidenfeld and Nicolson: 1962) 38.

what we need to keep and "indeed to find out also what we shall not be too grieved to discard in our own culture."[33] Let me cite some examples, before engaging in analysis of questions to which there are no clear answers.

Recent reports from South Africa provide a disturbing example of male genital mutilation. This forms part of traditional Xhosa initiation ceremonies. Since 1990, more than 20 initiates have died and 200 were attended in hospitals.[34] During 1993 alone, 10 initiates died and more than a 100 were admitted to hospital. "Some young men had been so badly mauled that their penises had been removed altogether, by the drink-sodden witch-doctors."[35]

Another shocking example comes from Ghana. It involves a practice of slavery whereby young girls are taken to shrines to serve a criminal sentence, for a crime committed by their families, in slavery to the fetish priest of that shrine.[36] The cases cited by the Ghana Committee on Human and Peoples' Rights, include stories of young girls (9 and 10 years old) who were sent to work for fetish priests, and who were forced to have sex with the priests in

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33 *Ibid.*, at 39. Abraham also noted that "these choices do not happen gratuitously and without reason, but rest squarely on those silent adjustments which have their nerve-centres in the heritage of the people." *Ibid.*, at 38.

34 "Another Way to Die in South Africa" *New African Magazine*, June 1994, 23.

35 *Ibid.*

36 Details were provided in the newsletter of the Ghana Committee On Human and Peoples' Rights. "Slavery in Ghana" (1993) 1:4 Ghana Human Rights Quarterly pp. 1 & 3. This practice reminds us of the custom levirate which was practiced in some parts of Africa. Under this custom, a widow is inherited by the brother of the deceased, or the closest male relative in the absence of a brother. cf. J. S. Mbiti, *African Religions and Philosophy* (London: Heinemann, 1969) pp. 144-5; and Ali Mazrui, *A World Federation of Cultures: An African Perspectives* (New York: The Free Press, 1976), Chapter Six where he compares the practices of Suttee and Levirate, pp. 117-135.

their early teenage years. It is estimated that more than 1000 girls are still suffering from this tradition in the Lower Volta Region of Ghana. A Ghanian human rights activist reports:

> When we started setting up this project for the fetish girls, we had not realised what we were going into. This slavery practice is deep rooted and the fetish priests and the soothsayers possess enormous powers in society, even a lot of well educated people would still seek advice from the fetish priest, thus it is very difficult to mobilise the people to rise against this inhuman practice.[37]

The practice contravenes the Ghanaian Constitution which prohibits, in article 26(2), "all customary practices which dehumanise or are injurious to the physical and mental well being of a person"; as well as article 5 of the African Charter which prohibits "all forms of exploitation and degradation", most particularly "slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment".

Let me go back to what I described earlier as questions to which African human rights activists are not likely to find answers. The underlying conclusion behind these troubling questions lies in a recognition that human rights in Africa is not simply an issue of categories, but rather of praxis, full of paradoxes and contradictions. Unanswerable questions include: (1) If we assume the existence of an African conception of human rights and freedoms, is it exclusively communitarian? (2) Is the present body of international law relevant to Africa?

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37 Rev. Walter Primpong, Executive Director of International Needs Ghana, quoted by the Ghana Committee on Human and Peoples' Rights, *ibid.*, at 3.

(3) How can one resolve the lack of clarity among us (Africans) as to the nature of the post-colonial state, and as to the protection of Africans against the abuses of this state?

I. THE INDIVIDUAL IN AFRICAN CULTURE

Most writers tend to believe that the central difference in human rights conceptions between Africa and the West is that the former are communitarian while the latter are mainly individualistic. This is more than just a mere philosophical distinction since writers tend to base their scholarship almost exclusively on these assumptions: for most Western commentators human rights are individualistic and mostly civil and political in nature, while in the African context human rights are collective with little or no individualistic base to them. My concern in this part is to attempt to demystify the allegation that the individual does not have a recognition *qua* individual under the "African conception of human rights" which is primarily communitarian.

My proposition is that the African social order is an amalgam of both communitarianism and individualism. This proposition is supported by both "original" African philosophical conceptions as well as by recent changes which occurred as a result of the advent of both Islam and Christianty. Gyekye correctly tells us:

> The African social order is, strictly speaking, neither purely communalistic nor purely individualistic. But the concept of communalism in African social

> thought is often misunderstood, as is the place of the individual in the communal social order.[38]

Of course we need first to note that individualism is not necessarily submerged by communalism, nor is communalism antithetical to individualism. Gyekye offers a useful definition of communalism as

> [t]he doctrine that the group (that is, the society) constitutes the focus of the activities of the individual members of the society. The doctrine places emphasis on the activity and success of the wider society rather than, though not necessarily at the expense of, or to the determent of, the individual.[39]

For the Akans, individuals were born into human society (contrary to much 18th century European philosophy which seems to assume the existence of an original presocial character of the individual human being). Based on this fact, the individual capacities are not sufficient to meet basic human requirements. In other words, communalism is not a negation of individualism but rather a recognition of these limited human capacities. Consider the following Akan and Sudanese proverbs: "The left arm washes the right arm and the right arm washes the left arm," and "A single hand cannot clap".

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38 Kwame Gyekye, *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (Cambridge: Cambridge University Press, 1987) at p. 154.

39 *Ibid.*, at 155.

One cannot deny that what is being said here is that the success and meaning of the individual life depends, to a great extent, on identifying oneself with the group or community. "This identification is the basis of the reciprocal relationship between the individual and the group", and is also the basis of measuring personal responsibility. [40] This identification with community is not to be mistaken for a negation of individuality, for individuality is recognised within the community on the basis of two facts. First, since individual capacities are not equal, their contributions to the community are expected to be unequal. In other words, individuals are recognised on the basis of their merits to some extent.[41] Secondly, the individual *qua* individual has a will, identity, aspirations and desires which can be described as peculiar.[42]

The idea that the individual in traditional African societies is crushed and submerged by a more powerful entity, the community, is groundless. Instead, "individuals are valued in themselves and as potential contributors to communal survival."[43] The individual is rather

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40 *Ibid.*, at 156.

41 Abraham, after noting that the Akan society is based on duties and not rights, cautioned that "the responsibility of a member of the clan for the welfare of other members is nevertheless not calculated to encourage the lazy and indolent. It has no suggestion of anyone rushing out of step to save the needy but foolish." W. E. Abraham, *The Mind of Africa*, supra note 32, at 64.

42 This is not to deny the individual's obligations which are based on community spirit. It is, however, a recognition of the fact that despite their existence, their (obligations) visibility is being altered. This alteration creates a situation under which "these obligations become more narrowly centred now, [and as a result] the individual obtains a sense of liberation, initiative and creativeness." Abraham, *The Mind of Africa*, *ibid.*, at 66

43 S. Gbadesin, *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realites* (NewYork: American University, 1991) 64.

engaged in what could be termed a voluntary submission for the interest of the community. Gbadegesin has brilliantly articulated this position, in his discussion of individuality and community in traditional Yoruba societies: "a high premium is placed on the practical demonstration of oneness and solidarity among members of the community."[44] Busia provides an illustration from the Akan:

> The individual is brought up to think of himself in relation to this group [his immediate community] and to behave always in such a way as to bring honour and disgrace to its members. The ideal set before him is that of mutual helpfulness and co-operation within the group of kinsfolk. ... Co-operation and mutual helpfulness are virtues enjoined as essential; without them, the kingroup cannot long endure. Its survival depends on its solidarity.[45]

In this sense the idea of individual rights does not necessarily defeat the paramount protection of the communal interest. Menkiti has plausibly concluded that:

> It is generally conceded that persons are the sort of entities that are owed the duties of justice, it must also be allowed that each time we find an ascription of any of the various rights implied by these duties of justice, the conclusion naturally follows that the possessor of the rights in question cannot be other than a person. *This is so because the basis of such rights ascription has now been dependent on a possession of a capacity for moral sense, a capacity, which though it need not be realised, is nonetheless made most evident by a concrete*

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44 *Ibid.*, at 65.

45 K. A. Busia, *The Challenge of Africa* (New York: Praeger, 1962) at 33-4. Gyekye has recalled an Akan proverb in support of a similar position: "the prosperity of man depends on his fellow-man." Kwame Gyekye, *An Essay on African Philosophical Thought*, supra note 34, at 155.

> *exercise of duties of justice towards others in the ongoing relationships of everyday life.*[46]

The view of individuality-in-community finds support in Islam. The literal meaning of the word "Islam" is ultimate submission to Allah and nothing else, not a community nor any other individual. Fatima Mernissi offers an insightful interpretation of this total submission as a necessary step towards "the building of an egalitarian community. The annihilation of individuality before Allah, the Master of the Worlds, would allow construction of the other pillar of the Muslim order-equality."[47] The Qura'n has been unequivocal in stipulating that responsibility before Allah for one's actions is individual and not collective.[48]

It is important to note that the recognition of the community is not the same as the recognition of the state. It is argued, in the discussion on the definition of people for the purposes of the right to self-determination in chapter five, that people cannot be defined in contrast to the state. The same perspective is applied here. The individual, due to the nature of the African

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46 Emphasis added. Ifeanyi A. Menkiti, "Person and Community in African Traditional Thought", in R. Wright, ed., *African Philosophy: An Introduction* (Washington, D.C.: University Press of America, 1979) 157 at 163.

47 Fatima Mernissi, *Islam and Democracy: Fear of the Modern World* (Reading, Mass.: Addison-Wesley Publishing Co., 1993) 110.

48 For example: "Whoever works righteousness benefits his own soul; whoever works evil, it is against his own soul: Nor is thy Lord ever unjust (in the least) to his servants." 41:46 "Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another." 6:164 "Nor can a bearer of burdens bear another's burden. If one heavily laden should call another to (bear) his load, not the least portion of it can be carried (by the other), even though he be nearly related." 35:18 "That man can have nothing but what he strives for; that (the fruit of) his striving will soon come in sight: then will he be rewarded with a reward complete; that to thy Lord is the final Goal." 53:39-42.

nation-state that will be articulated below, needs protection from the tyranny of the ruling elite. The relationship between the individual and the state is not necessarily based on the recognition of mutual rights and duties as in the case of the relationship between the individual and the community. This distinction has been recognised in the African Charter's provision for both individual and collective rights as will be outlined in Chapter Four.

II. AFRICA AND INTERNATIONAL LAW

The international legal personality of Africa was changed as a result of the unfortunate Congress of Vienna of 1815, when the Continent was declared *terrae nullius*, and therefore, open for conquest, discovery and exploitation. This change of legal personality was seen as the original state of affairs in Africa. In other words, early writing of international law made the assertion that "backward" territories in Asia and Africa were not states in the proper meaning of international law and, therefore, were mostly devoid of any form sovereignty.[49] Even a cursory look at African history before the coming of the Europeans would, as Okoye points out, indicate that these views would find little support.[50] Asia and Africa, and despite

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49 Westlake, for example, was blunt in his prejudice. He expressed the view that "a [newly discovered] region was scarcely distinguished from *res nullius*." John Westlake, *The Collected Papers*, L. Oppenhiem, ed., (Cambridge: Cambridge University Press, 1914) 139.

50 F. C. Okoye, *International Law and the New African States* (London: Sweet and Maxwell, 1972) 1. An interesting fact to be noted here is that, these same claims denying the existence of sovereign beings in Africa, were rejected, as "fanciful", by the Privy Council in *Re Southern Rhodesia*. [1919] A. C. 211 In delivering the opinion of the Judicial Committee, Lord Summer stated: "The present case .. raises no question of white settlement among aborigines destitute of any recognisable form of sovereignty. Equally little is there question of the rights attaching to civilised nations, who claim little by original discovery or in virtue of their occupation of coastal regions, backed by an explored interior. On the other hand, it would be idle to ignore the fact that,

the fact that their rulers entered into agreements with the Europeans, were seen as unfit for membership in the family of nations, on the basis of being "uncivilised and barbarous" peoples.[51]

I am not an expert in history nor do I intend to dwell much on the history of African Empires which were in existence prior to the European "discovery" of the continent.[52] It is very important, it is submitted, to note that international law, and more specifically the treaty aspects of it, are not necessarily a unique creation of the Euro-Christian civilisation, both colonial and post-colonial. The importance of this observation lies in its potential ability to help in culturally situating the ideas advanced in this thesis. First by emphasising that there are indeed reasons to assume that international law even in its present form does reflect some of the traditional African conceptions and normative ideas aimed at regulating relations

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between the subjects of Her Majesty Queen Victoria and those of this native monarch, *whose sovereignty* she was pleased to recognise, there was in all juridical conceptions a great gulf fixed, which it would, perhaps, be only fanciful to try to span." (emphasis added) *Ibid.*, pp. 215-6.

51 Oppenheim stated: "it is irrelevant whether or not some agreement is made with the natives by hich they submit themselves to the sway of the occupying [European] State. Any such agreement is usually neither understood nor appreciated by them ..." L. Oppenheim, *International Law: A Treatise* (London: Longman, 1905) 277. He also stated" "Outside Europe there are numerous States under the protectorate of European States, but all of them are non-Christian States of such a civilisation as would not admit them as full members of the family of nations ..." Oppenhiem, *ibid.*, 139. See, generally, C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967). Similar views were expressed by some African writers of international law. Professor Yakemtchouk, of Zaire, in the very first lines of his book on Africa in International Law, notes: "Dans la grande famille des civilisations juridiques l'Afrique est la jeunesse du monde. Ses rapports avec l'exterieur sont regis par un Droit international en voie de formation." Romain Yakemtchouk, *L'Afrique en Droit International* (Paris: Librairie Generale de Droit et de Jurisprudence, 1971) 11.

52 See, for example, Basil Davidson, *Africa in Modern History: Themes and Outlines* (London: Orion Books, 1992), the kingdoms of Ghana and Kanem-Bornu; 87-96, Mali and Songhay, 97-107; and the history of Islamic rule over North Africa, 125-139.

among different political entities. Parkinson states; "[T]races of both [sic] primitive society and [sic] primitive "international law" are still to be found in many parts of the world today .."[53]

Secondly, proving the cultural relevance of international law paves the way for another argument this thesis tries to advance, that conceptions similar to "human rights" did have support in traditional African culture and were worthy of protection. It is for that reason that I will argue later that the international instruments of human rights duly ratified by African states constitute contractual obligations which ought to be discharged by these nations.

The present body of international law reflects, in several aspects, the international law which "was born together with the first States, long before Christian and European civilisation, that ... was conceived by the usages of the first empires brought forth in Asia and in Africa .."[54] This is not to be taken as implying the primacy of one civilisation over another. If international law was primarily concerned with relations among political entities, then it is very difficult to conclude that (conceptually) it was a product of one civilisation to the exclusion of all others.

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53 F. Parkinson, "Pre-Colonial International Law" in A. K. Menash-Brown, ed., *African International Legal History* (New York: UNITAR, 1975) 11.

54 M. Mushkat, "The African Approach to Some Basic Problems of Modern International Law" (1967) 7 Indian Journal of International Law 335, at 342.

One of the early African examples can be found in the Moor Kingdoms and especially the one centred around the ancient city of Carthage, currently known as Tunisia, where there was a treaty that excluded several parts of North Africa from Greek jurisdiction.[55] This jurisdictional exclusion, according to Elias, contributed to the lack of information in the writings of classical authors about the nature and extent of the Carthaginians' African trade and dealings with other kingdoms around them.[56]

Early European nations' contacts with Africa were in part defined by their encounter with "indigenous polities with which they dealt as states according to the European ideal of the law of nations in which they had been brought up."[57] This is true in the case of Don Diego d'Azambuja who negotiated, on behalf of the King of Portugal, with Nana Caramansa the King of Elmina (at the Western end of the coast of modern Ghana) the permission to build the castle of St. George in 1482.[58] The King of Elmina did not hide his fear of European expansion into his Kingdom, but elected to secure the terms of his agreement with the Portuguese. He was quoted to have said:

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55 See, E. W. Bovill, *The Golden Trade of the Moors* (London: Oxford University Press, 1968) 20-1.

56 T. O. Elias, *Africa and the Development of International law* (Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 1988) 3.

57 A. K. Mensah-Brown, , "Notes on International Law and Pre-Colonial Legal Histroy of Modern Ghana", in Mensah-Brown, ed., *African International Legal History*: supra note 53, at 109.

58 B. Davidson, *Africa in Modern History*: supra note 52, at 203

> I am not insensible to the high honour which your great master, the Chief of Portugal, has this day conferred upon me. His friendship I have always endeavoured to merit by the strictness of my dealings with the Portuguese, and by my constant exertions to procure and immediate landing for their vessels. But never until this day did I observe such a difference in the appearance of his subjects: they have hitherto been meanly attired, and were easily contended with the commodities they received; and, so far from wishing to continue in this country, were never happy until they complete their lading and return. Now I remark a strange difference. A great number ... are anxious to be allowed to build houses, and to continue among us. .. The passions that are common to us all will ... inevitable to bring on disputes; and it is far preferable that both nations should continue on the same footing they have hitherto done, allowing your ships to come and go as usual; the desire of seeing each other occasionally will preserve peace among us. The sea and land being always neighbours, are continually at variance, and contending who shall give way; the sea with great violence attempting to subdue the land, and the land with great obstinacy oppose the sea.[59]

Other contacts between Europeans and West Africa were undertaken during the rein of the Benin Kingdom.[60] Contacts between Northern Africa and the Europeans go all the way back to the Egyptian's Pharoahs.[61] There are several historical accounts on the contacts between East Africa and the Arabs,[62] the Chinese[63] and the Europeans.[64]

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[59] Reproduced in J. M. Sarbah, *Fanti National Constitution* (London: Cass, 1906) 60-1. The Portuguese were also involved in another international dealing in the Island of Sao Tome. A trade agreement was said to have been signed between the King of Portugal and a representative of Benin, wherein the representative of Benin agreed to bring a specified number of cowries from India and to be used as currency in the trade with the mainland. R. Smith, *The Kingdom of the Yoruba* (London: Methuen and Company, 1969) p. 7. This was brought up in the discussion regarding the use of currency in West Africa and whether it was influenced by West African contacts with East Africa and consequently with India and the rest of Asia. Elias notes that "a co-operative study of these shell currencies might reveal much about trade routs and cultural contacts in Africa." Elias, *Africa and Development of International Law*, supra note 50, at 6.

[60] See, generally, A. F. C. Ryder, *Benin and the Europeans: (1485 - 1897)* (London: Longmans Green and Co., Ltd, 1969).

[61] See, for example, Greek historians' contacts with the Egyptians which led to their chronicles of the Egyptian dynasties. B. Davidson, *Africa in Modern History*, supra note 30, at 27

Am I of the opinion that there existed "international law" in Africa? The terminology[65] itself might not be appropriate for the description of the rules which regulated relations among kingdoms, monarchs and chieftains.[66] In other words, although "international law" can be traced back mainly to the Westphalian notions of state and of interstate relations, one can still assert that some of the traits of present international law could be rooted in intertribal or inter-group rules that governed their relations.[67] However, two essential facts remain important: most of these rules resembled what is known today as the Law of Treaties, and the second fact is that a number of pre-colonial African political entities in their internal organisation, exhibited several features that would be regarded as part of the concept of a "nation-state,"[68] for the purposes of international law.

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62 Out of this relationship Kiswahili language and culture emerged in East Africa.

63 See Africa's trade relations with China. B. Davidson, *Africa in Modern History,* supra note 52, at 72-3.

64 Elias, *Africa and the Development of International Law*, supra note 50, at .5

65 Alexandrowicz, after pointing to the danger in using present legal terminologies to the events of the past, correctly points out: "While there is no doubt room for caution and while awareness of the difference in the meaning of legal terms now and prior to the nineteenth century is highly advisable if not essential, there is no reason why it should not be possible to solve most of the problems of interpretation by reliance on legal definitions employed by the classic writers." Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, supra note 29, at 3.

66 My position in this regard is similar to that of *international law-in-action*, advanced by Mensah-Brown, which was "dictated by the collective reason of human groupings wherever found, and prior to but still coexisting with its articulation, sophistication, and development by the European creators and practitioners of *international law-in-the-books*." (empasis in the original) A. K. Mensah-Brown, "Notes on International Law and Pre-Colonial Legal Histroy of Modern Ghana", supra note 53, at 123.

67 Or as Parkinson notes: "[c]oncepts of present day international law can be followed down the evolutionary ladder to their primeval stage." F. Parkinson, "Pre-colonial International Law", in A. K. Mensah-Brown, ed., *African International Legal History*, supra note 53, at 11.

III. THE NATURE OF THE POST-COLONIAL STATE AND THE DEBATE ON HUMAN RIGHTS IN AFRICA

"A cow gave birth to fire: she wanted to lick it, but it burned; she wanted to leave, but she could not because it was her own child", runs an old Ethiopian proverb. The fire here resembles, greatly, the nature of the post-colonial state in Africa. Most of the contemporary political crises in Africa could be related directly to the state in Africa,[69] yet it does not seem possible nor logical to call for abandoning this form of polity and finding a new one. Bodunrin is correct in stating that:

> It would be great indeed if we could evolve a political system, a new socio-political order which is different from those found elsewhere and based on an autochthonous African Philosophy. That indeed is a worthwhile aspiration which one must not give up without trial. But I am disturbed at certain presuppositions of attempts so far made. To begin with, I think that the past the political philosophers seek to recapture cannot be recaptured.[70]

The absence of debate on the nature of the post-colonial state has led to a lack of clarity among Africans, a fact which has been compounded by excessive militarism. It is not my

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68 Okoye, *International Law and the New African States*, supra note 50, at 4-5. One of main points in Rotenberg's work is that several African communities were said to have evolved political systems very hard to distinguish from today's modern states. See, generally R. I. Rotenberg, "Political History of Tropical Africa" in Phyllis M. Kaberry and Mary Douglas *Man in Africa* (New York: Tavistock Publications, 1969).

69 Gonidec has captures this in the very title of his article as well as the substance of his arguments. See, P. F. Gonidec, "La Crise Africaines: une crise de l'etat" (1995) 7 African Rev. of Int'l and Comp. L 6.

70 Bodunrin, "The Question of African Philosophy", supra note 8, at 69.

intention here to indulge an analysis of the viability of the nation-state in Africa, but rather to point out that the nature of the present nation-state in Africa warrants certain precautions, or measures to be taken against excessive abuse by the ruling elites.

When we deal with the state in Africa, I propose that we address four distinct eras: pre-colonial, colonial, post-colonial and present-day African nation-state. Pre-colonial Africa witnessed the rise and fall of a countless number of Empires, Kingdoms and Sultanates.[71] We mentioned earlier that these organised polities engaged in dealings, within themselves or with European states, similar to those governed by modern international law, especially the law of treaties. One thing to be noted is that these dynasties were not nation-states, in the present meaning of nation-state, since they were not confined to fixed boundaries or frontiers.[72] Frontiers depended mainly on two factors: military strength, and cultural interaction. It is the second factor which rendered pre-colonial African frontiers far from being fixed. Because of continuing cultural contacts in the continent, Africa has always maintained a broad uniform culture with varying degrees of internal uniformity. Cultural interaction did influence the

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71 cf: R. Smith, *Kingdoms of the Yoruba* (London: Methuen, 1976); M. Abitbol, *Tombouctou et Les Arma* (Paris: Maisoneuve et Larose, 1979); D. T. Niane, *Sundiata: An Epic of Old Mali* (London: Longman, 1965); W. Rodney, *A History of Upper Guinea Coast* (Oxford: Clarendon Press, 1970); and D. A. Low, *Buganda in Modern History* (London: Weidenfeld & Nicolson, 1971).

72 See, generally, Igor Kopytoff, ed., *The African Frontiers: The Reproduction of Traditional African Societies* (Bloomington: Indiana University Press, 1989).

conception of frontiers, properly described as "tidal",[73] which also explains the population distribution within the sub-regions of Africa.[74]

The present African "nation-state" , with fixed frontiers, was first initiated by the colonialists as a colonial creature which was invented without regard to geographic or ethnic boundaries.[75] Lord Salisbury is quoted to have said that:

> We have been engaged in drawing lines upon maps where no white man's foot ever trod: we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.[76]

The African "nation-state" is a colonial creature because there were no nations within the frontiers, but rather diverse groups kept together through coercion and manipulation. In other words, the result of the colonial authorities' efforts in manipulating and pitting ethnic groups against each other was that "[t]he nation-state was conspicuously absent under colonialism".[77]

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73 Kopytoff, *ibid.*, at 10.

74 Kopytoff states: "This African tidal frontier, however, left the continent very sparsely populated - as much of it continued to be in historic times and even now. After the first thin spread of immigrants, large expanses remained available to settlement. Established societies were surrounded by large tracts of land that were open politically or physically, or both. Together these tracts made up a continent-wide interstitial network of thousands of potential local frontiers." Kopytoff, *ibid.*

75 Mazrui and Tidy pointed out" :it may well turn out that Europe's most enduring legacy to Africa is the 'nation-state'" A. Mazrui and M. Tidy, *Nationalism and New States in Africa, from about 1935 to the present* (london: Heineman, 1984) 373.

76 Quoted in J. C. Anne, *The International Boundaries of Nigeria, 1885-1960: The Framework of an Emerging African Nation* (London: Western Printing Services Ltd., 1970) 3.

Ethnic diversity in Africa was underestimated by independence leaders who took the nation-state as given[78] and all that was needed was to devise the democratic institutions necessary for a democratic government.[79] This resulted in the awkward situation of voter choices being based on ethnic lines rather than across ethnic lines as these leaders would have wished. Africa then tried all sorts of ideologies and political orientations. The result is mass dilution and lack of confidence in the existing political structures in Africa, which paved the way for the military to assume the role of the dominant player in African politics. The result is simply that the present "African state is weak, ineffective and often lacks legitimacy",[80] since: (a) the lack of connection between state and society continued or even worsened in post-colonial Africa; (b) the internal relations between the constituent elements of the state apparatus remain ambiguous; and (c) political and legal dualism has intensified.[81] In terms of human rights protection the weakness of the nation-state has been properly placed at the centre of concern. Chapter Five of this study will pursue this reasoning by placing the right to self-

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77 G. Munda Carew, "Development Theory and The Promise of Democracy: The Future of Post-colonial African States" (19930 4 Africa Today 31, at 33.

78 See, A. Mazrui and M. Tidy, *Nationalism and New States in Africa,* supra note 75, especially "Nations and leadership in independent Africa", 185-193.

79 Carew, supra note 77, at 32.

80 Carew, *ibid.*, at 31. This seems to be a widely accepted view. cf: Eboe Hutchful, "Reconstructing Political Space: Militarism and Constitution in Africa", in I. Shiviji, ed., *State and Constitutionalism: An African Debate on Democracy* (Harare, Zimbabwe: SAPES Books, 1991) 183; and P. Chabal, *Power in Africa: An Essay in Political Interpretation* (New York: St. Martin's Press, 1992).

81 Hutchful describes this dualism as: "Confusion as to system of law and political action on the one hand, and the uncertain articulation between traditional African authority systems and the formal political system". Hutchful, *ibid.*, at 188.

determination at the core of the "African human rights perspective". But first, it is useful to identify and examine two further elements responsible for the weakness of both post-colonial and present African nation-state: militarism and corruption.

Militarism: Militarism, in the sense of reliance on military strength and virtues, has been used as a means for attaining certain political and economic interests. Militarism has served as an instrument of dominance and oppression by dominant groups, for example in the case of Rwanda and Burundi. Militarism, the highest form of violence,[82] is a negative factor which needs to be dealt with carefully and systematically if a successful human rights conceptualisation is to be attained.[83]

Although army officers share with the rest of the African elite the belief that they are endowed with the "right to rule",[84] the military is by far the most organised, disciplined institution in Africa.[85] This might explain why the army is usually quick to act in response to public

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82 Tandom states: "It is violence; not any type of violence, but the highest form of violence, the use of military force, to achieve political-economic ends". Yash Tandon *Militarism and Peace Education in Africa: A Guide and Manual for Peace Education and Action in Africa* (Nairobi, Kenya: African Association for Literacy and Adult Education, 1989) 1.

83 Mazrui and Tidy offered a candid observation in their statement that "few observers", at the time of independence, "were astute enough to forecast the power of the military in African affairs." Mazrui and Tidy, *Nationalism and new States in Africa*, supra note 75, at 226.

84 Nwabueze pointed out that: "It is a characteristic of the elite in emergent states that they consider themselves as a privileged group, with a right to rule. There is some kind of distinctly elitist outlook towards the right to rule. Army officers qualify by their training and standing in society as an elite, and so share in this outlook." B. O. Nwabueze, *Constitutionalism in the Emergent States* (Rutherford: Fairleigh Dickinson University Press, 1973) 220.

discontent with the performance of the ruling politicians. However, the pretension to act in response to public discontent, as will be noted in the following part on corruption, soon turns into narrow political and personal ambition.[86]

There are different forms of militarism[87] that affect human rights in Africa. First, state terrorism directed against any kind of political dissent or opposition to the ruling elite. This has led to what one might call a continuing African Holocaust, e.g. Amin was estimated to have massacred over 200, 000 citizens, Bokassa 300,000, Micombero 200,000 and the list goes on.[88] Secondly, militarism based on ethnic conflicts. Colonial economic policies selected parts of the colonies and left other areas as labour reserves (closed areas policies). Post-colonial governments, as a result, inherited unevenly developed areas and communities in their countries. African governments have very often either ignored this inequity or used it for their own survival in power. These economic injustices added more fuel to historical

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85 Another reason, added by Mazrui and Tidy, was the army's possession and "monopoly or near monopoly of Western military technology." Mazrui and Tidy, *Nationalism and New States in Africa*, supra note 75, at 228. I would argue the same is true today except for the fact that the sources of military technologies have multiplied to include, for example, the former USSR, Israel, South Africa, and China.

86 Nun emphasised the need to distinguish between "structural" and "circumstantial" motives behind military take-overs. Jose Nun, "The Middle Class Military Coup", in R. Rhodes, ed., *Imperialism and Underdevelopment: a reader* (New York, 1970) 323. I do not necessarily see this distinction as valid since the outcome of these military take-overs is usually the same, political repression, corruption and waste of resources. See, also, Maxwell Owusu, "Custom and Coups: a Juridical Interpretation of Civil Order and Disorder in Ghana" (1986) 24:1 J. of Modern African Studies 69. Owusu was keen on stating the caveat that his study does not "deny the fact that the personal ambitions , amongst mixed motives, of army officers and rank-and-file may be the basic driving force behind military intervention." *Ibid.*, at 74.

87 See, Tandon, *Militarism and Peace Education*, supra note 82, at pp. 40-7.

88 Although Tandon estimated that Amin massacred over half a million citizens, I rely on earlier and more conservative estimates of at least 200, 000. The other two figures are quoted from Tandon, *ibid.*, at 42.

animosities based on ethnic, social, national, racial and religious divisions, and is finally responsible for most of most of the civil wars raging in the continent, e.g. in Sudan, Somalia, Ethiopia, Kenya, Uganda, Rwanda and Burundi. The civil war in the Sudan has claimed, in the period between 1983 to 1993, more than one million lives.[89]

Thirdly, militarism stemming from pastoralist conflicts as a result of competition over grazing areas. Resource depletion occurred as a result of various factors, colonial economic polices, over-grazing, national government destocking policies and desertification. Atrocities normally occur as a result of government intervention to tilt the balance in favour of one group.[90] Fourthly, militarism stemming from religious conflicts. Post-colonial African history witnessed a growing tension between Islam and Christianity which led to continuous civil war in the Sudan, and a simmering conflict in Nigeria. Fifthly, militarism based on former superpower conflicts. Africa has been used as a pawn in the rivalry between the US and the former USSR. While the USSR sponsored the Mengisto regime in Ethiopia and its bloody attempts to suppress the Eritreans,[91] the US sponsored RENAMO in Mozambique, to counter

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89 Amnesty International estimated that, during the same period, 1.3 million have died as a result of the civil war in the Southern Sudan. Amnesty International, *Tears of Orphans: No Future Without Human Rights* (London: AI, 1995) 55. The conflict in the Sudan is dealt with in more detail as part of the discussion, in Chapter Five, of the right to self-determination.

90 The Sudanese government's policies to arm some of the "Arab" militia, mostly from al-Rizaigat, resulted in the massacres of al-Diein: the death of more than a thousand Dinkas in the South Western Sudanese town of al-Diein. See, Ushari Mahmud and Suleyman Balso, *Al-Diein Massacre: Slavery in the Sudan* (Khartoum, n.p., 1987). Although this incident was caused by a number of factors, the historical tension between the Dinka and Rizaigat arose out of competition over grazing areas.

91 The Eritrean struggle for self-determination is discussed, in Chapter Five, in the part on the right to self-determination.

the pro-USSR FRELIMO liberation movement, which continued its campaigns of terror in the period following independence.

Although it is a matter of common knowledge that militarism represents a major threat to any viable human rights protection in Africa, the African Charter seems to have failed to take this fact into consideration. Two provisions in the African Charter have some relevance to the issue of militarism. Article 14 on the right to participate freely in public life, which is discussed in chapter five of this study. This right however is guaranteed to every citizen and must be exercised "directly or through chosen representatives", hence military take-overs, it could be argued, are excluded as a way of exercising this right.

Article 23 of the African Charter guarantees "all peoples" the right "to national and international peace and security". It is the guarantee of the "national" peace and security that I believe might offer some relevance to our discussion on militarism. The preservation of national peace and security, and stable government is supposedly the paramount function of the military. The elitist ambition to rule, however, always outweighs this function.[92] An example can be found in the Sudan, where the army, since the independence of the country in 1956, successfully staged three coups overthrowing an elected government each time. The

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92 Nwabueze correctly observed that the ambition to rule is instead articulated as the army's "obligation as an elite to society" that they interfere in politics. Nwabueze, *Constitutionalism in the Emergent States*, supra note 79, at 79.

result is that the army has ruled for over 29 of 40 years as an independent country despite constitutional standards specifying the role of the military.[93]

It is therefore imperative that the role of military in preserving national peace must be seen within a more inclusive definition of security:

> Note that the most reliable defence and security that any nation can have is the mobilisation of the citizenry through their involvement and participation. For this involvement and participation to be realised, moral and patriotic motivations must be anchored by full employment, equal opportunities and a popular practice of civilised and democratic society.[94]

It is submitted that "national security" under the African Charter must therefore be interpreted in such a way as to clearly distinguish between preserving security under clear constitutional guidelines which must not allow for members of the armed forces to serve as a government, unless elected..

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93 For example, the 1985 Transitional Constitution has specified, in article 15, that the role of the military was to protect the land and the achievements of the 1985 popular uprising which lead to the adoption of the Constitution and to the election of Saddig al-Mahdi's government. The Constitution also specified, in a number of articles, the ruling of the country, especially the executive and legislative organs of the state, would have to be carried out by those elected for this purpose. Despite these standards, the current ruling military junta staged a coup in June 1989, and has been ruling the country ever since.

94 This was one of the recommendations of the Defence and Security Committee of the All-Nigeria Conference on Foreign Policy, which was convened in April 6-13, 1986. Quoted in Femi Odekunle, "Security and Development in Africa: Socio-economic Prerequisites at the Grassroots Level", in O. Obasanjo and F. Mosha, eds., *Africa Rise to Challenge: Towards a Conference on Security, Stability, Development and Cooperation in Africa* (New York: African Leaders Forum, 1992) 39.

Corruption: Corruption of the ruling elite is no secret. One of the ironies of African nationalism, according to Ogueri, is that "once dedicated front-line nationalists and leaders are invested with power and seated on comfortable saddles, many tend to change colours [and quickly turn into corrupt and repressive leaders]."[95] Appiagyei-Atua has noted that it did not take long for corruption to creep into Nkrumah's Convention Peoples' Party, which was evident in "lavish spending of the politicians and party functionaries."[96] It is to be noted that corruption has permeated the various levels of government and governing in most of Africa. The police in most African states, for example, are notorious for systematic corruption.[97]

The impact of this corruption on human rights in Africa is what needs further elaboration.[98] Corruption contributes to human rights violations in many ways. The continuing shrinkage of

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95 Eze Ogueri II, *African Nationalism and Military Ascendancy* (Owerri, Nigeria: Conch Magazine Publishers, 1976) 9. See, also, M. McMillan, "A Theory of Corruption", in W. J. Hanna, ed., *Independent Black Africa* (Chicago: Rand McNally and Co., 1963) 508-11.

96 Kwadwo Appiagyei-Atua, *Re-Discovering the Rights-Development Linkage through the Theory of Community Understanding: The Experiences of Ghana and Canada*, unpublished LL.M thesis, (Halifax, N.S.: Dalhousie University, 1994) 155. See, also, G. P. N. Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992).

97 A Nigerian study found that more than two-thirds of those who had encounters with the Nigerian police were of the opinion that they were subjected to inhuman and cruel treatment. Corruption is cited as one of the factors contributing to this ill-treatment. The authors of the Study observed that: "The image of the Nigeria Police is very poor. ... It is now taken for granted that provided he can pay his way through, a citizen can manipulate the police as he wishes." M. Ajomo and Isabella Okabue, eds., *Human Rights and the administration of Justice in Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 1991) 126, cited in C. Welch, *Protecting Human Rights in Africa: Role and Strategies of Non-Governmental Organisations* (Philadelphia: University of Pennsylvania Press, 1995) 229. Nigeria toped the list of the ten most corrupt countries in the world, according to Transparency International, a Berlin-based anti-corruption organisation. Kenya ranked at number three and Cameroon at number six. See, *Time Magazine*, June 10, 1996.

98 Corruption here denotes misuse of public authority for personal benefits. Two prime aspects encourage this corruption: it takes place in secrecy and is not easy to legally persecute. The difficulty of legal persecution is

resources increases the burden on the society, leading to abuse of economic, social and cultural rights. Moreover, although the details and exact nature of corrupt behaviour remain usually secret, rumours circulate which contribute to the insecurity of the ruling regime and hence increase the regime's ruthless activities to crack down on such rumours. This results in severe repression of the freedom of expression, and even the freedom of association and conscience.

Economic and political corruption[99] is usually committed under the pretext of consolidating national unity (independence), and in the name of both tradition (in the sense of gift offering and acceptance) and, lately, religion (in the name of Islam, in the case of the Sudan).[100] Thus, corruption has far reaching negative impacts on development which leads to "further abuse of civil and political rights in that corruption breeds instability, and instability in turn breeds abuse of civil and political rights."[101] Abuse of civil and political rights also breeds further

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caused by a combination of lack of evidence, use of political threat and oppression and lack of an obvious individual victim directly affected by this corruption (i.e. lack of *locus standi*).

99 Ogueri outlined some of the examples which illustrate this economic and political corruption: "In Africa, it is most visibly evident in commercial deals, military pacts, government contracts, with the notorious ten percent 'kick-back'; in the development of luxury hotels, banking concerns, educational programmes and even in balance of payments. National leaders are proffered with incredibly expensive gifts, dazzling cars, private planes, yachts, free scholarships to their children and dependents and, in extreme but inconceivable cases, secret life pensions." Ogueri, *African Nationalism and Military Ascendancy*, supra note 95, at 9.

100 Mazrui offers a valuable observation in what he termed "ostentatious acquisitiveness": "The African [politician], in his ostentation, spends his money on luxurious consumer goods, often imported. He harms his country's foreign reserves and deprives the nation of potentially productive capital investment. From the point of view of economic development, ostentatiousness tends to be dysfunctional." A. Mazrui, Monarchical Tendency in African Political Culture", in Doro and Schultz, eds., *Governing in Black Africa: Perspectives on New States*, at 18.

101 Appiagyei-Atua, *Rediscovering the Rights-Development Linkage through the Theory of Community Understanding*, supra note 96, at 157.

corruption since the imposing of gag order prevents the press and more vocal individuals and groups from exposing the corrupt practices of governments, thus completing the cycle of corruption, instability and rights abuse.

Corruption has often been used as a pretext for military take-overs. "Soldiers sometimes feel that they alone can rescue the nation from inefficiency, corruption, decadence or dependence."[102] The current military junta in the Sudan, for example, overthrew the elected civilian government of Saddig al-Mahdi, under the pretext of salvaging the country from the corruption and chaos.[103] Although it is partially true that corruption of the ruling elite during democratic periods lends support to military take-overs, military regimes are usually quick to outdo these elites in their corruption.[104] While Rawlings, for example, took over power in Ghana under the pretext of a "revolution" that would "transform the social and economic order" of Ghana,[105] his regime engaged in a wide range of corrupt practices. These practices

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102 E. Luard, *Conflict and Peace in Modern International System* (Boston: Little, Brown and Co., 1968) 146. Although this source is a bit old, this particular conclusion is still applicable in today's Africa. See, for example, the case of the case in the following note.

103 The first Constitutional Decree issued by the junta, "in the name of Allah, in the name of the people and by the order of the National Council for Salvation", for example, stipulates: "(1) The National Salvation Revolution is the legitimate expression of political and constitutional legitimacy which represents the general will of the Sudanese people; (2) suspension of the 1985 Transitional Constitution; and (3) the dissolution of the Constituent Assembly, Head of State Council and the Council of Ministers." *Constitutional Decrees One, Two and Three, The Official Gazette of the Republic of the Sudan*, June-July 1989, 1. Translation is mine.

104 Lewis offered a candid observation about the general pattern of corruptive behaviour by the ruling elite, which I believe applies to both civilian and military elites. "Men who claim to be democrats in fact behave like emperors. Personifying the state, they dress themselves in uniforms, build themselves palaces, bring all other traffic to a standstill when they drive, hold fancy parades and generally demand to be treated like Egyptian pharaohs." A. Lewis, "Beyond African Dictatorship, The Crises of the One Party State", in Doro and Stultz, eds., *Governing in Black Africa*, supra note 100, at 90.

include:[106] the ruling party's 1992 election campaigns were financed by printing of 100 billion cedis (approximately 100 million US dollars) by the Bank of Ghana;[107] a Jacuzzi whirlpool for the Rawlings' wife at a rumoured cost of 43 million cedis;[108] and various incidents in which the government failed to account for advances and deficits in its 1989 balance sheet.[109] A retired Ghanaian civil servant perhaps eloquently captures the tragedy:

> When Jerry Rawlings came to power in 1981, he criticised our hospitals as graveyards of the working people. Now four years and several hundred million dollars worth of loans later, the hospitals are still graveyards and the labourer's daily wage will not even buy a loaf of bread.[110]

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105 Rawlings made the following remarks in first speech following his coup of 31 December 1981: "Fellow citizens of Ghana, as you would have noticed we are not playing the National Anthem. In other words this is not a coup. I ask for nothing less than a revolution. something that would transform the social and economic order of this country. The military is not in to take over. we simply want to be part of the decision-making process in this country. Fellow citizens, it is now left to you to decide how is this country going to go from today ... We are asking for nothing more than to organise this country in such a way that nothing will be done from the Council, whether by God or Devil, without the consent and the authority of the people." First broadcast speech to the nation by Flt. Lt. Jerry Rawlings, Chairman of the PNDC, 31 December 1981. Quoted in Emmanuel Hansen, "The State and Popular Struggles in Ghana, 1982-86", in P. Anyang' Nyong'o, ed., *Popular Struggles for Democracy in Africa* (London: Zed Books and the United Nations University, 1987) 170 at 173-4. It is to be noted here that the 1981 coup was Rawlings third coup.

106 I am grateful for my friend and colleague Kwadwo Appiagyei-Atua for lending me sources on these practices.

107 *The Independent*, A Ghanaian Weekly Newspaper, September 8-14, 1993, 1.

108 *The Ghanaian Chronicle*, A Ghanaian Weekly Newspaper, Week-ending September 5, 1993, 1. This provides an excellent example to Mazrui "ostentatious acquisitiveness" described earlier at note 100.

109 cf: *West Africa Magazine*, February 1-7, 1993, 140; and *The Independent*, Janury 27-February 3, 1993, 1.

110 Quoted in *The Financial Times*, May 20, 1986.

It is my contention that corruption has so affected African culture to warrant treating protection from governmental abuses as an integral part of any African culture. Corruption has perverted, to use the words of Obasanjo, certain aspects of African culture:

> Others are wont to argue that African culture of appreciation and hospitality encourages corrupt practices. Again I shudder at how an integral aspect of our culture could be taken as the basis for rationalising an otherwise despicable behaviour. In the African concept of appreciation and hospitality, the gift is usually a token. It is not mandated, the value is usually in the spirit rather than in the material world. It is usually done in the open and never in the secret. Where it is excessive, it becomes an embarrassment and it is returned. If anything, *corruption has perverted and destroyed this aspect of our culture.*[111]

The combination of political corruption and repression by post-independence elites has indeed "perverted" most cultural values of traditional leadership and hence effected a cultural change.[112] In other words, while there is nothing in African tradition to support the corrupt practices of post-independence ruling elites, the practices of these elites, instead, necessitate protection against abuse of power and authority. It is argued, in Chapters Four and Five of this study, that the protection of both the right to freedom of expression and the right to participate in public life enhances the transparency of the African political system and allows for public scrutiny over the practices of the ruling elite.

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111 Emphasis added. Keynote Address by General Olusegun Obasanjo at the Seminar on Corruption, Human Rights and Democracy, held in Republic of Benin, 19-21 September 1994, A. Aderinwale, ed., *Corruption, Democracy and Human Rights in West Africa: Summary Report* (Abeokuta, Nigeria: African Leaders Forum, n.d.) 27.

112 I have noted, in the Second Chapter of this study, the example of Hastings Banda who attempted to rely on the traditional institution of leadership to justify his autocratic rule.

The next chapter will examine similar factors to the ones discussed in this section, within the Islamic context. It is important to keep the elements of the human rights discussion in Africa in mind. For the impact of these elements is further complicated, in Islamic Africa, by the introduction of religion into politics.

Chapter Three

ISLAM AND HUMAN RIGHTS IN AFRICA

> *The object of social equality, as in the case of economic equality, is the individual. ... [T]he individual is the object of all social endeavour, through the means of Islam and the Qur'an. Society is also another method, being the best method yet devised by humanity. The individual who is the object off all means is the individual human being as such. Not even the lowest human being should be made a means to another end. This is why there should be no discrimination on the grounds of birth, race, colour, faith, or sex. God says in this connection: "O mankind, we have created you from a male and a female; and we have made you nations and tribes that that you may know one another. Verily the most honourable among you, in the sight of God, is the one who is most righteous among you. Surely God is All-Knowing, All-Aware."(49:13) ... Absence of social discrimination against the weak and removal of distinctions between individuals and classes are the true signs of civilisation.*
>
> Ustaz Mahmood Mohamed Taha (1909-1985)*

Not only is Islam one of the two dominant religions in Africa, its political influence is increasingly felt throughout the continent and far beyond the confinement of the nation-state. Islam in Africa is not the same as in the Middle East, nor is it simply a set of African beliefs (religious and otherwise) that bear similarities with Islam elsewhere. "African Islam" shares the fundamentals of Islam with other Muslims, but also has its distinct African characteristics and dynamics.[1] These fundamentals include:[2] (1) Contrary to common perception, the use of

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* M. M. Taha, *The Second Message of Islam* (Syracuse, N.Y.: Syracuse University Press, 1987) 162.

violence, both against Muslims or for the sake of spreading the faith, is prohibited;[3] (2) the relation between Allah and the individual Muslim is direct;[4] (3) there is an unquestionable equality among believers regardless of colour, race, social status or wealth, and the key test is faithfulness to Allah;[5] (4) the affairs of the Muslim society are to managed by mutual consultation;[6] and (5) Islam represents the final universal message revealed by God through Mohammed. We will elaborate on some of these principles in the following sections of the thesis.

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1 "African Islam" is a simplistic term to describe the rather complex and diverse nature which Islam has acquired in Africa. The population distribution might have contributed to this complexity and diversity. The range of Muslim populations varies from as high as 100 percent (as in Mauritania, Somalia and Djibouti); 90 percent (or more) in the case of Senegal, Algeria, Tunisia and Morocco; and absolute majority as in Sudan, Chad, Niger, Egypt and several other countries, to distinct minorities in, for example, Kenya and Uganda. "The varieties of Islam, from orthodox to cosmopolitan to mystical and particularist, not only from the indigenous customs of the people, but emerge also from their history, geography, culture, politics and education." M. S. Daodi and M. S. Dajani, "Religion and the State: Islam in the Contemporary World" (1982) XIX: 1&2 Studies in Islam 1. This being said, we should not ignore the fact that, what has preserved Islam as a powerful religious and political ideal is the fact that it has basic doctrines that are found across cultures.

2 This enumeration is influenced by what Daodi and Dajani identified as the basic doctrines of Islam. *Ibid.*, 2-4.

3 The Holy Qura'n states: "Let there be no compulsion in religion: Truth stands out clear from error: whoever rejects evil and believes in Allah hath grasped the most trustworthy Handhold, that never breaks. And Allah heareth and knoweth all things." 2:256 "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors." 2:190.

4 See note 89 below.

5 "O mankind! We created you from a single (pair) of a male and female, and made you into nations and tribes, that Ye may know each other (not Ye may despise each other). Verily the most honoured of you in the sight of Allah is the most righteous of you. And Allah has full knowledge and is well-acquainted (with all things)." 49:13

6 "Those who harken to their Lord, and establish prayer; who conduct their affairs by mutual consultation; who spent out of what we bestow on them for sustenance." 42:38

One factor which contributed to the distinct character of African Islam is the fact that Islam came to the continent (less so in the Northern part) through the peaceful efforts of *al-Turuqq al-Sufia* (singular *tariqqa*, Sufi orders). As a result, Islam in Africa is Sunni Islam which has been greatly influenced by institutionalised Sufi mysticism. Sufi thought attaches significant importance to the order and its leaders who are selected on the bases of their personal charisma and piety rather than solely on theological scholarship as is the case in other strains of Islam. The practice of the religion is based on divine love rather than fear of God as is the case in the Arab region. Islam has thus acquired a local character which manifests itself in various ways: (a) Sufi orders are often closely connected with a specific ethnicity; (b) they enjoy independent existence as an entity with their own hierarchy and internal order; and (c) they often mix orthodox religious activities with pre-Islamic African practices of the ethnicity in question.

This African approach, I submit, has continued to be dominant despite the recent orientation towards a universalist approach advocated by proponents of political Islam, commonly known in the West as Islamic fundamentalists. One of the challenges facing this universalist approach is posed by the organisational aspect of these *Turuqq*, i.e. their independence and internal orientation. The aim of political Islam, therefore, is not only to influence or control the secular non-Islamic government, but also to displace the relatively tolerant *Turuqq*. This two-track approach is evident in the case of Sudan where the ruling National Islamic Front

focused its oppressive campaigns upon the country's two biggest *Turuqq*, al-Ansar and Khatmiya, as well as upon other political opponents.

The rise of political Islam[7] supported by external (in most cases) financial and military resources introduces new dimensions to African politics. One dimension is the conflict between secular and Islamic politics; in countries where political Islam has gained control (e.g. Sudan) the alienation of both non-Muslims and Muslims who oppose the reigning version of political Islam is the result. Another disturbing political factor is foreign interference, particularly by Iran which is trying to increase its influence within the continent by capitalising on strong anti-Western sentiments which dominate African politics. African Islam is losing its two distinct characteristics: tolerance and flexibility. What is the impact of all this on human rights in Africa? Since Islam forms an integral part in the lives of many Africans, Islam's conceptions of "rights" and "freedoms", and the complications therein, are also part of the human rights debate in the continent.

In the preceding chapter, I identified the key elements of the human rights debate within Africa. It has been noted that the coming of Islam into the continent has affected far reaching changes into the traditional cultural context. One of the underlying assumptions in this study

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[7] Political Islam is used here instead of fundamentalism since I believe that the term fundamentalism is vague and misleading.

is that the impact of Islam must be grounded in the broader socio-political African context and not treated independently as the case in most current human rights scholarship. In this chapter I will examine the Islamic conception of human rights, shifting the debate to a third level -- between the regional and local -- which I will call the "sub-regional" or the "Afro-Islamic" level.

The use of Islam in politics is not new to Muslim Africa, especially in the last few years when it became almost impossible to succeed in politics without, at least , paying lip service to Islam.[8] One underlying assumption in this part of the study is that since the debate is not, and should not be, presented as two exclusive options: either cultural identity (Islamic or African) or human rights, then it is only logical to emphasise that any serious attempt to introduce a participatory form of government and a minimum of human rights must be grounded in a broader and at least tolerantly inclusive, if not enthusiastically inclusive, Islamic perspective. This perspective must not be equated with the establishment of an Islamic polity within the African context. While the establishment of an "Islamic state" is not realistic,[9] we cannot exclude the increasing influences of Islamic political and legal principles. This influence can be partially attributed to the recent evolution of politically-motivated "Islamic Movements". The political agenda of these movements calls for an Islamic state, application of Shari'a and

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8 Mention the sectarian base of political parties and also the use of ethnic based turuqq by the ruling regime, being elected or a dictatorship.

9 I have argued, in the following section on the "Political Organisation of Islam", that Islamic model of a universalist state, as opposed to the present nation-state, is simply an ideal and impossible to attain.

revival of all other aspects of the traditional Islamic thinking, including those relating to international law and relations. In this part, I will attempt a broad examination of relevant Islamic conceptions in order to pave the way for the next part on the nexus between the Islamic and the African which will be exemplified by the case of the Sudan. Three key Islamic conceptions of political and social organisation will the focus of this chapter: the state; international law and relations; and human rights.

I. POLITICAL ORGANIZATION OF ISLAM

The idea of an Islamic state, as provided for in the majority of juristic and scholarly work, is based on the Medina[10] model of state which was established by the Prophet Mohammed and carried on by his four *Caliphs* (successors).[11] Under this model, the ruler combined all executive, legislative and judicial functions. It is to be noted that neither the Qura'n nor Sunna has provided for a system of government or political organisation that Muslims should adopt. Based on a strong belief in the relation between religion and politics, and the attendant broad application of Shari'a, this model provides for two basic features of specific relevance to the logic of the contemporary international law of human rights. Therefore, before one enters into

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10 A town in Western Arabia in which this first state was established following the Prophet's *hijra* (migration) from Mecca, another town in Western Arabia.

11 I have dealt with the historical background of this model in an earlier work. See, E.A. Elobaid, *International Obligations Under the Sudanese Legal System: The Case of Human Rights Obligations* , unpublished thesis, (Saskatoon: University of Saskatchewan, 1990) pp. 81-5. See, also, M. S. el-Awa *On the Political System of the Islamic State* (Indianapolis: American Trust Publications, 1980); T. Ibn Taymiyya *al-Siyasa al-Shar'iyya* (The principles of Islamic government) (Cairo: dar al-Kitab al-Arabi, 1955); and P. K. Hitti *History of the Arabs* (New York: St. Martin's Press, 1970).

a brief exposé of the features of the Islamic polity, an examination of one central normative concept is vital to this part: the relation between religion and politics.

There is in Islam no separation between religion and politics. The Prophet and Khulafa regarded religion as necessary for the organisation and integration of the society. Some writers, plausibly, consider this to be the divine purpose behind sending prophets.[12] As a result, the state originated as an instrument for the realisation of divine will, and from its inception Islam was associated with the political community and has identified with its fortunes. At the time of the first state, it was adherence to the faith which made individuals eligible for membership in the political community with corollary rights and privileges, such as exemption from poll-tax, participation in holy war and a share in the spoils of this war. The religious association established by the Prophet was not intended as a church within a secular state, but rather as a religious community organised on a political basis.[13] Islam is *deen wa dawla* (a religion and a state), goes a traditional Islamic saying,[14] which is based on the idea that the purpose behind any person's life and activities is to glorify God and acts towards God's acceptance.

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12 cf: A. H. al-Mawardi, *Adab al-Din wad Dunya* (Moral Edicts of Life and Religion) (Cairo: Mustafa al-Halabi Press, 1955) 29.

13 Gibb, "Constitutional Organisation" in Khudduri and Liebsy, eds., *Law in the Middle East* (Washington, D.C.: The Middle East Institute, 1955).

14 It is a saying based on scholarly interpretations of the Qura'n and Sunna and must not to be confused as an authoritative part of the Sunna.

Following the death of the Prophet and his Khulafa, this relation between religion and the politics was later developed to best suit the ruling elite by elevating political rule to a level of holiness. This elevation has opened the door widely for some of the worst abuses of political power. Equating political rule with holiness has all the potentialities for a tyrannical and authoritarian regime. It took Muslims thirteen centuries, as al-Najar pointed out, to realise this fundamental truth, partly under the influence of other thoughts and civilisations, and partly as a result of the collapse of the Ottoman Empire under the most humiliating conditions.[15]

The Umayyads (660 - 750) ruled in a broadly secular rather than religious fashion, unlike the Abbasids (750 - 1258) dynasty which claimed to return to the Prophetic traditions of government.[16] During the Abbasids period, in which the rulers were proclaimed as God's Khulafa or Sultans on earth, several ugly episodes of political abuse of power took place in the name of Islam. Religion has ever since been used by a variety of different oppressive regimes, past and present (such as Sudan and Pakistan) as an effective tool of oppression and as a basis for political and financial power.

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15 F. M. al-Najar, *The Islamic State* (Darien: Monographic Press, 1967) 3.

16 The historical account on both of these periods which followed the four Khualafa were characterised, with few exceptions, by oppressive regimes which would not allow any opposition (scholarly work included) to grow against their interests. For a general account on these dynasties, see P. K. Hitti, *History of the Arabs* (New York: St. Martin's Press, 1970) 189-493. An example of scholar's persecution, see the case of Ibn al-Muquaffa, who wrote a book in the name of *Kitab al-Sahaba* (The Book of the Prophet's Companions) which dealt with the organisation of the state, army and collection of taxes. He was massacred, in 1328, by one of the Abbassides rulers for expressing views not liked by that ruler. See, S.D. Goiteim, *Studies in Islamic History and Institutions* (Leiden: E.J. Brill, 1968) pp. 149-67.

A serious and systematic attack on the Islamic theory of state, especially on the relation between religion and politics, came from a notable Azharite[17] Islamic scholar, Shiekh Ali Abdul Raziq.[18] In disputing the theory that Islam is a religion and a state, he argued that Mohammed was a messenger (*rasul*) with a purely prophetic mission and He (the Prophet) never exercised any secular power (*mulk*) or even established a state in the modern understanding of the term. The Shiekh also argued that although the prophetic tradition needed some kind of leadership (*za'ama*) and authority, it is not comparable to the kind of authority or leadership belonging to secular rulers. Shiekh Abdul Raziq, then, drew a distinction between the leadership of the prophetic leadership (*za'amat ul-risala*) and the leadership of secular dominion (*za'amat ul-mulk*).[19] The Shiekh's fate was like that of most Muslim scholars who dared to express their opinions which were not in conformity with the opinion of the majority of other scholars. After publishing his book, he suffered severe prosecution by Islamic authorities: his book was banned, available copies were burnt, his university degree (and consequently his Azharite status) was revoked, and he was threatened with execution as a heretic.[20]

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17 Graduate of al-Azhar Islamic University in Cairo, one of the oldest Institutions in the Sunni Muslim World.

18 This was a result of his book *al-Islam wa 'Usul al-Hukm* (Islam and the Basis of Government) (Cairo: Misr Press, 1925)

19 *Ibid.*, 64-5.

20 The same was the fate of Ustaz M.M. Taha in the Sudan. See, the discussion, in chapter five, on the political assassination of Ustaz Taha.

The problematique of religion and politics is best exemplified by a look at the idea of nationalism and citizenship under the traditional Islamic concept of state. It is a fact that most of the present Muslim states contain a Muslim majority and a non-Muslim minority of a greater or lesser size. It is, therefore, significant to note that in polities where states and political power are based on religious belief, integral citizenship, given ethnic and religious diversity, is problematic at best. I will exemplify this problem by looking into the present experience in the Sudan, where Iranians and Palestinians enjoy more citizenship rights and privileges than Sudanese from the Southern region, who are not Muslim.

It is axiomatic that in order for an individual to acquire membership in a political community that is based on religious beliefs, this individual has to share the same religious belief. Any rights discourse proposed within a religious framework will have to cater for the exclusion it is bound to effect regarding those who do not share the same belief.[21] In Islam, the problem manifests itself in two ways. First, non-Muslims, who live within the Islamic state, will not enjoy secular-based rights other than those limited rights guaranteed under Shari'a. Second, any Muslim, in theory, can acquire citizenship of the Islamic state by simply being a Muslim, whereas non-Muslims who were born within the boundaries of such state are entitled to only some of the rights Muslim citizens are entitled to. A'la Maududi, in affirming this position states:

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21 The problem is compounded in the case of organised religions. The exclusion is not only faced by the non-subscribers to the religion in question, but by those within the same religion who do not share the same interpretation or vision.

> Nor, in Islam, are the rights of citizenship confined to people born in a particular state. A Muslim *ipso facto* becomes the citizen of an Islamic state as soon as he [she] sets foot on its territory with the intention of living there and thus enjoys equal rights along with those who acquire its citizenship by birth. And every Muslim is to be regarded as eligible for positions of the highest responsibility in an Islamic state without distinction of race, colour or class. Islam has also laid down certain rights for non-Muslims who may be living within the boundaries of an Islamic state and these rights necessarily form part of the Islamic constitution.[22]

To him, the rights of non-Muslims are to be understood in the light of the fact that an Islamic state is essentially an ideological state radically different from a national state.[23] A'la Maududi then concludes that people under an Islamic state are *classified* in accordance with their submission to this ideology; therefore, to him, the state is bound to distinguish between Muslim and non-Muslim citizens and in the rights accorded to each.[24] The relationship between religion and politics, in short, affects the conceptual, as well as the institutional configuration of the "state" in Islam. Looking at some central features of the Islamic state should shed more light on this point.

A. *Universal State*

The Medina model provides for a universal state, as opposed to the present nation-state. This universal state is based on the Islamic community as one religious community (*umma*) to be

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22 A. A'la Maududi, *Human Rights in Islam* (London: The Islamic Foundation, 1986) 12.

23 Maududi, *Islamic Law and Constitution*, supra note at 274.

24 *Ibid.*, at 275. See, also, Chapter 8, pp. 273-301.

managed by divine guidance through the revealed law. The universality of the state is said to be based on the assumption that "[hu]mankind constituted one community, bound by one law and governed ultimately by one ruler", Allah.[25] The "Islamic state", for most of the period following the Prophet, was seen primarily as the institution through which Islam's demands on the *umma* are realised and under which individual Muslims are discharging their obligations as believers. Classic Muslim writers were of the opinion that the function of the Islamic state was defence and maintenance of the religion, protection of the territory of Islam and the duty of jihad against those who refuse to submit to Islam.[26]

The period following the Prophet and his successors, the *umma*, was ruled by the Abbasids and Umayyads, as noted earlier. The state during these periods was a product of bloody violence, which means, as Arkoun puts it, "the inversion of the hierarchy ethical-spiritual authority/power using violence to impose a political social order fixed and run by the victorious group."[27] The cohesion of the *umma* was maintained through force and around the agenda of the ruling elite and not necessarily around well-being of the entire community of Muslims. The disintegration of Muslim unity was ignited by the political dispute early in the history of Islam. The great division between Sunni and Shii Muslims was caused by the dispute over succession to the Caliphate.

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25 F. M. Najjar, *The Islamic State* (Darien: Monographic Press, 1967) at 9.

26 Such was the opinion of al-Mawardi and Ibn Khaldun. See, Encyclopaedia of Islam, pp. 884-5.

27 Mohammed Arkoun, "The Concept of Authority in Islamic Thought: La hukma illa lillah" in The *Classical and Medieval Islamic World: Essays in Honour of Bernard Lewis* (Princeton: Princeton Univ. Press 1989) 38.

A universalist view of the state is simply an ideal that is impossible to attain. Present day Muslims do not exist in a way that could be remotely described as *umma*. Instead Muslims live in different and diverse sects, schools and divisions. In fact, and as will be further discussed later in this part, the divisions among Muslims are far stronger and more deeply rooted than divisions between Muslims and non-Muslims. Moreover, the mere idea of a universal state is outmoded due to the present existence of the modern nation-state, which is a territorial entity in which the state is co-extensive with a political community over which it has (legitimate) sovereignty. This political community consists of the inhabitants of such a territory who are bound together by cultural, political and historical bonds. "Islamic nation-states" are no exception to this rule, and it is not realistic to expect them to waive their sovereignty for the sake of a universal Islamic state. Although practice tends to support the contention that Muslims live under territorial nation-states, contemporary Muslim politics and political thought are dominated by a belief in the universal state. Javed Iqbal, member of the Supreme Court of Pakistan and an author, writes:

> [The Islamic state] is not a national state, for a Muslim community is based on faith and consists of people who may belong to different tribes, races or nationalities; speak different languages; or be of a different colour.[28]

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28 Javid Iqbal, "The Concept of State in Islam", in Mumtaz Ahmad, ed., *State, Politics and Islam* (Washington, DC: American Trust Publications, 1986) 37 at 39.

Justice Iqbal further expressed his belief that the Islamic state is a "multinational" state and not a "territorial state in the strict sense of the term because it aspires to become a universal state."[29] A similar view is held by Turabi who argues that the international dimension of his "Islamic" movement is "conditioned by the universality of the *umma* and the artificial irrelevancy of Sudan's borders."[30] When these views are considered within the African context, one quickly realises their inapplicability. Anyone who is not a Muslim is not a member of the *umma*, and therefore does not have an equal status within this model of state. The disregard of the ethnic composition of most African states has led to serious crisis within the continent. The assumption of the homogeneity of Muslims adds to this disregard and hence ignores the reality of diversity amongst African Muslims, let alone non-Muslims. The crisis in Somalia, which is the only country in Africa where the entire population is Muslim, is just one example. Membership (citizenship) in any African state will have to be granted on the basis of membership of the political community within any given territory as indicated earlier in this part. This comment leads to a focus upon sovereignty which is another complicated concept in Islamic thought.

B. *Sovereignty*

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29 *Ibid.*, at 39.

30 Hasan Turabi, *Islam, Democracy, the State and the West* (1992) 1:3 Middle East Policy 53.

Sovereignty under the Medina model does not belong to any class of people, not even the entire population; it belongs only to Allah.[31] Accordingly, it has been laid down in historical Islamic political thinking that *de jure* sovereignty also belongs to Allah whose *de facto* sovereignty is inherent and manifest in the working of the entire universe and who enjoys exclusively the sovereign prerogative over all creation.[32] It is, therefore, assumed that sovereignty is exercised by Islamic rulers on behalf of Allah. The *fugaha* (singular *fagih*, Muslim jurists), using this principle, provided that obedience to the Shari'a-abiding ruler is equated with obedience to God.[33]

After concluding that sovereignty in both the political and religious sense belongs to the Creator God, A'la Maududi, a distinguished Sunni scholar, states that sovereignty is exercised by the agency of the state provided it is understood that this agency is not a sovereign by itself but is the "vicegerent of the de jure and de facto sovereign, viz., God almighty."[34] He specified the conditions under which this agency can be exercised:

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31 See, generally, S. A. A'la Maududi, *The Islamic Law and Constitution*, (Lahore: Islamic Publications Ltd, 1980). The concept of sovereignty has also been dealt with by Khadduri to the same effect. See M. Khadduri, "Islam in the Modern Law of Nations" (1985) 50 A.J.I.L. at 358.

32 It is, therefore, assumed that sovereignty is exercised by Islamic rulers on behalf of Allah. Muslim jurists, using this principle, concluded that obedience to the ruler is equated with obedience to God. See, for example, A'la Maududi, *ibid.* at 216.

33 *Ibid.*

34 *Ibid.*, at 218.

> Whatever human agency is constituted to enforce the political system of Islam in a state, will not possess real sovereignty in the legal and political sense of the term, because not only that does it not possess de jure sovereignty, but also that its powers are limited and circumscribed by a supreme law which it can neither alter nor interfere with.[35]

Supreme or absolute Sovereignty of Allah is a matter of religion for Muslims, and as a normative concept is pertinent to the universal state. Sovereignty in contemporary international law denotes territorial sovereignty of the nation-state. There is a difference between the usage of the term in each case. The use of the equivalent in Arabic, *siyadah*, might shed some light. When used without qualification, this concept denotes the supreme source of authority which is the religious meaning. When qualified, *siyadat al-dowla* (state sovereignty), it signifies the legal meaning, i.e. exercise of power over persons and things within the territorial confinement of a nation-state to the exclusion of other states and regardless of religion. This is the concept of sovereignty as dealt with under international law.[36] Sovereignty deals primarily with the exercise of jurisdiction over land, territorial sea, air space, rivers and certain areas of the seabed. The exercise and extent of sovereignty are conducted on a purely secular basis and have been observed by almost all states, regardless of their ideological or religious basis.

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35 *Ibid.*

36 See I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990), part III on Territorial Sovereignty, pp. 107-126.

A'la Maududi, like most Muslim scholars, has failed to understand, or at least to accommodate, the idea of sovereignty in the sense of territorial sovereignty. This misunderstanding is evident since the following questions are left unanswered. First, the sovereignty of Allah is indisputable, at least for Muslims, but the question remains: is the agency in exercising this sovereignty a divisible one, and which Muslim nation-state (given that a universal state does not seem to be attainable) will exercise such sovereignty?

Secondly, will his notion of sovereignty be acceptable to states that do not share a belief in Islam? My guess would be that there are either no answers to these questions, or if there are, they would be in the negative, as this idea of sovereignty is based on a religious belief and by definition only Muslims might agree on it although they are in constant disagreement as to who might exercise this sovereignty on earth.

C. Rulers' Powers and Constraints

Under the Medina model, as mentioned earlier, the ruler exercised all three government functions: legislative, executive and judicial.[37] Since the Prophet and his four Khulafa exercised these three functions, Muslim Scholars concluded that the leader of an Islamic state heads all three government functions, and under him the state organs may function separately and independently from one another. Sayd Qutb, one of the founders of the Muslim Brothers

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[37] cf: A'la Maududi concluded his notion of the ruler's fusion of powers by saying: "From these conventions [referring to the Islamic sources he reviewed] we learn that the Head of an Islamic state is, as such, the supreme head of all these three different organs." A'la Maududi, *Islamic Law and Constitution*, supra note 31, at 225.

movement who was executed in 1966, mentions in support of the concentration of powers in the hands of the Islamic ruler:

> While Islam sets a strict limit to the power of a ruler so far as he is personally concerned, it gives him the broadest possible power in looking after matters of welfare which pertain to the community, such matters are these in which there is no guiding precedent in existence and which evolve with the process of time and with changing conditions. The general rule is that: a ruler may make as many new decrees as he finds new problems.[38]

The strict limits on the ruler, mentioned by Qutb, are based on the ruler's conscience and piety, and they are not in any way publicly or logically ascertainable. The public, therefore, has virtually no role to play in determining the political preferences for managing its affairs.

The Medina model of the state is valid within its historical context. The Prophet needed to combine all governmental functions in order for him to establish the religion, i.e. it was a logical necessity during the Medina state which was possibly never contemplated to be final. The necessary contingency of the Medina model is evident from the fact that neither in the Qura'n nor Sunna was it provided how the Islamic state should be constituted. Life has changed a great deal since the times of the Prophet and his four Khulafa. Two factors need to be carefully taken into consideration.

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38 Sayd Qutb, *Social Justice in Islam*, Hardis' translation, (Washington, D.C.: American Council of Learned Societies, 1953) at 97.

First, in the case of Muslim Africa (and I would contend for the rest of the Islamic world), the need for clear and effective limitations on the ruler's and government's powers is beyond dispute. Second, rulers are no more than human agents of groups with different interests, ideas and attitudes towards Islam itself, as well as other aspects of life. I think it is an indisputable fact to the majority of (Sunni) Muslims that no single person will have all the personal qualities of the Prophet or his four Khulafa.

D. Legal System

The Islamic state's legal system is Shari'a as derived from the Qura'n and Sunna. In the absence of the idea of the universal state, Shari'a remains the most important element of the Islamic polity. The adoption of an Islamic state at present is synonymous with the adoption of Shari'a as the legal system of a given nation-state. Most legal systems have at one time or another in their history been connected with religion, but in the case of Shari'a this connection is unique: Shari'a is identified with God's command and the establishment of God's authority on earth. The Qura'n is a source and not a code or book of law, nor was the Prophet (whose Sunna[39] is another source) a lawgiver in the usual sense.

Shari'a, as a legal system, was established and developed during the Abbasids period (750-1258) during which the main Sunni schools came into being.[40] Shari'a was developed in the

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39 Sunna refers to the example or way of the Prophet; what he said, did or concurred to. The actions of the Prophet, in these cases, were divinely inspired. In other words, his actions are to be obeyed since this obedience had been commanded by Allah.

light of certain historical circumstances and within the framework of the social, economic and political conditions prevailing at that time. This point is of special importance as we are dealing here with Islamic concepts of direct relevance to "rights" and "freedoms". Shari'a, as a divine law, is the major criterion for determining the content and scope of these rights and freedoms, and whether they should be given effect within the Islamic state.

Shari'a, as developed by earlier jurists, was "a sophisticated and flexible legal system" which helped to preserve the Muslim civilisation for many years.[41] Its beginnings in a religious ideal did not necessarily ensure a close connection with practice. It was only during the time of the Abbasids regime, which initially made it a programme to establish the rule of God on earth, that Shari'a seemed to have come close to full practice as it had active help from the government. This process was not complete because of two factors; firstly, it did not take long for the gap to widen between the edicts and administration of Shari'a; and secondly, the rigid interpretative approach prevalent at that time has prevented Shari'a from keeping pace with practice.

Apart from the difference between Shiite and Sunni *figh* (jurisprudence), there were differences and conflicting opinions within the Sunni jurisprudence that resulted in four major *mazhabs* (schools) of *figh*: *al-Mazhab al-Maliki* which was developed by Imam Malik Ibn

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40 See, generally, J. Schacht, "The Schools of Law and Later Developments of Jurisprudence", in Khadduri and Liebensy, eds., *Law in the Middle East* (Washington, D.C.: The Middle East Institute, 1955) 57-84.

41 A. A. An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenges and Responses" (1987) 20:2 Cornell International Law Journal 321 at 323.

Anas (710-95) in Medina; *al-Mazhab al-Hanafi* which was developed by Imam Abu Hanifa (700-67) in Kufa, Iraq; *al-Mazhab al-Shafi'i* which was developed by Imam Shafi'i (767-820) in Medina who then followed it by a different school of jurisprudence when he moved to Egypt; and *al-Mazhab al-Hanbali* established by Imam Ahmed Ibn Hanbal (780-855) in Baghdad.[42]

To the first *fugaha*, the search for solutions to legal problems and for the development of a set of rules in areas not covered by Qura'n or Sunna, was merely an exercise of personal opinion based on personal judgement. In other words, these solutions to what the law ought to be were based on a particular understanding of the Qura'n and Sunna, which was influenced by the perspectives of the Muslim community at that time as well as by the customary law then prevailing in the Arabian peninsula. Who was a "qualified" scholar or jurist was not a question at the formation period of Shari'a until the fourth century of Islam (about A.D 900), when most of the Muslim scholars felt that all essential issues had been settled. They were also afraid of the great upheaval if *ijtihad* (independent reasoning) is open for everyone to pursue. This move by scholars is generally known as the *gaflu bab al-ijtihad* (closing the door of ijtihad).

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[42] For a general account on these schools and the nature of their jurisprudential differences, see J. Schacht, *The Origins of Mahammadan Jurisprudence* (Oxford: Oxford University Press, 1959).

Since "closing the door of ijtihad", it has been expected that every Muslim would belong to one of the recognised four major schools. The denial of *ijtihad*, therefore, brought with it the unquestioning acceptance of the doctrine of established schools and authorities.[43] No one can exercise independent reasoning in order to derive a conclusion from the Qura'n and Sunna, but must derive positions from the authoritative books of the several schools. The denial of personal reasoning, in my opinion, has resulted in two phenomena of a great negative effect on juridical creativity, since it has led to the creation of an "elite" of jurists who served as mere tools for legitimating the contemporary authority.[44]

Second, most of the subsequent Muslim scholars are imitators, followers, and copyists within the confinement of the school they subscribe to. As a result, to my own knowledge, since the "closing doors of ijtihad" more than 1000 years ago, none of the Muslim scholars has actually produced any independent interpretation of Shari'a. Those who dared were often persecuted and condemned.[45]

The political influence of Shari'a is mostly internal, that is, it influences the political and economic interests in most of the Islamic countries. In countries like Iran and Saudi Arabia,

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43 Schacht, "Schools of Law", supra note 40, at 73.

44 This seems to be an opinion shared even by advocates of political Islam. Turabi, for example, states: "The *ulama* [Muslim jurists] have been domesticated, sometimes to the extent of providing the right *fatwa* [juristic opinion], other times they have stayed out of politics and just concentrated on private life." Turabi, *Islam, Democracy, the State and the West*, supra note 30, at 20.

45 Examples Raziq, Hallaq, and Taha. See notes 17-20 and text.

Shari'a constitutes the basis for the legitimacy of the ruling elite. In other countries, such as Sudan, Egypt and Pakistan, Shari'a is seen by various groups as a lucrative political and economic tool, whether in the growing business of "Islamic" financial institutions, or its use as a political card to mobilise political support. Although the effect of Shari'a might not extend to a strong influence on international behaviour, it does indeed affect the ability of the state to discharge its international obligations, especially those of human rights. Before investigating the concept of human rights in Islam, it might be useful to outline the Islamic jurisprudence on international Law.

II. ISLAMIC RULES OF INTERNATIONAL LAW

The rules governing international relations under traditional Islamic political thinking are based, as suggested above, upon the conception of a universal state. The aim of Islam is to conquer the whole of humankind and the state is supposed to achieve this goal. The world under such historical thinking is divided into *dar al-Islam* (the territory of Islam) and *dar al-harb* (the territory of war). The first represents the territory which is subjected to Islamic sovereignty; and the second consists of all states outside Islamic territory.

The relation between *dar al-Islam* and *dar al-harb* is based on the principle of *jihad*[46] which provides for the Muslims' duty to spread their faith through aggressive war, if the situation so

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46 Some writers have argued that *jihad* is not the only principle upon which the idea of Islamic international relations is based, even though it is the most important one, as Islamic regimes, following the Prophet, spent most of their time fighting other regimes. Khadduri, for example, outlined other peaceful methods for conducting Islamic international relations, namely: treaty making, diplomacy and arbitration. See M.Khadduri,

requires, until the whole world embraces Islam or submits to Muslim sovereignty. This principle can only be suspended for tactical reasons and to prepare for more fighting.

Under this theory, Muslims might not recognise the territorial sovereignty of non-Muslim states with whom they deem themselves to be in a constant state of war. The idea of relationship with these states is one based on the superiority of Islam. As a result, one might add, an Islamic state, within the traditional conception, will not recognise any authority other than its own, and will only enforce Islamic law and will seek to supersede any other authority.[47] This might amount to what is known under international law as non-recognition.[48] In other words, according to this Islamic thinking, the non-Muslim world is incapacitated, as long as it lacks the essential elements of a true faith, to possess any significant status under Islamic conceptions of international relations.

Muslim rulers may temporarily suspend active *jihad* for reasons indicated earlier, but such suspension should never be for long.[49] Entering into an agreement of peace appears to be

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"International Law", in Khadduri and Liebensy, eds, *Law in the Middle East* (Washington, D.C : The Middle East Institute, 1955) pp. 349-72 The author, nevertheless, still considers *jihad* to be the *grund norm* of Islamic international law and relations.

47 *Ibid.* at 351.

48 Although non-recognition does not necessarily mean no relation between the two entities, it carries with it certain disabilities so far as the non-recognised state is concerned: (a) it cannot bring suits in the courts of the state that has not recognised it; (b) its representatives cannot claim immunity from legal process; and (c) property due to a state whose government has not been recognised may not be recovered, and might as well be claimed by a deposed government of this state. See the section on recognition in I. Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1990) pp. 87-106.

temporary under this theory, but temporary peaceful relations have endured for a long time and proved themselves more permanent than contemplated in the theory. However archaic it might seem, the majority of Muslim thinkers still believe in the temporary nature of peaceful relations with non-Muslim states and the suspension of *jihad*. According to al-Maududi, for example, while an Islamic state potentially remains committed to *jihad*, the duty of *jihad* as an essential component of the state ideology can be suspended.[50] Peace, however, is not a goal in itself, and Maududi, despite such prevarication, does not see peace being established in a lasting and just sense until Islam has acquired the whole world.

Another example of the failure of Muslim scholars to understand and accommodate existing international realities is found in the concept of international peace as stated by Sayed Qutb in his book: *Islam and Universal Peace*.[51] International peace for Qutb is considered as a corollary of the four elements of the Islamic concept of peace, which are: peace of conscience, peace at home, peace in society and peace through law. For him, the issue of international peace is to be treated in the light of the Islamic concept of the universe and the nature of Islam.[52] Muslims are commanded, *inter alia*, to establish the sovereignty of God on earth as

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49 A. An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenge and Response", (1987) 20:2 Cornell I.L.J. at 324.

50 The Shafi'i school limited this period of peace to a maximum of ten years, based on the precedent of the Hudaybiya Peace Treaty, concluded between the Prophet and the pagans of Mecca. cf: *Tabari, Kitab al-Jihad (The Book of Jihad)* J. Schacht, ed., (Lieden: 1933) at 15.

51 S. Qutb, *Islam and Universal Peace*, (Washington, D.C : American Trust Publications, 1977).

52 *Ibid.* at 71.

well as to establish justice in the world.[53] These commands, at the same time, are the prerequisites for international peace:

> Jihad, then, is a means to achieve universal change by establishing peace of conscience, domestic peace, national peace and international peace.[54]

It is beyond the scope of this study to examine at length the Islamic conceptions of international law. However, since international human rights are mostly treaty-based, one must elaborate on the aspects of treaty law under Islam. Treaties are regarded as one of the primary sources of international law, as they are based on consent to create valid obligations.[55] The principles of international law of treaties are embodied in the Vienna Convention on the Law of Treaties of 1969, which entered into force in 1980. The Convention as drafted by the International Law Commission, was a product of conflicting interests and viewpoints, and, as is the case in most international law rules, it has the usual vices of compromise. It is essentially based on customary rules concerning the law of treaties.[56]

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53 *Ibid.*, at 72.

54 *Ibid.*, at 72.

55 Article 38 of the Statute of the International Court of Justice.

56 For the text of the Vienna Convention, see I. Brownlie, *Basic Documents on International Law* (Oxford: Clarendon Press, 1983) 349-86. For a detailed account on the law of treaties, see T. Elias, *The Modern Law of Treaties* (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1974) and I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984).

As far as traditional Islamic thinking is concerned, the available jurisprudence is not as detailed or developed as is the Vienna Convention. Two facts should be noted in this regard. First, when Islamic thinking on international agreements was developed at the time of closing the doors of *ijtihad*, and it was the strict division between dar al-harb and dar al-Islam that served to define the chosen approach. It should also be noted that Islamic nation-states did indeed contribute to the evolution of secular customary international law.[57]

Under Shari'a, the head of an Islamic state is the person entrusted with treaty-making power as well as being the authority charged with the duties of prosecuting *jihad* within the scope of his unlimited authority.[58] The question of peaceful relations, as noted earlier, was only temporary during the first Islamic state and resort to it could be only on the basis of *duroora* (necessity). In other words, peaceful coexistence with the non-Muslim world is temporary until the Islamic state is capable of reclaiming the entire world. Rules governing treaties were developed, by Khulafa and earlier jurists, as part of this temporary peace. In laying down these rules, a Sunna often cited was the Hudaybiya (a town in Arabia) Treaty made between

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57 This has been recognised even by some of the contemporary leaders of political Islam. Turabi has recently stated: "There has been a lot of interaction across the Mediterranean, and I, as a student of the history of international law, know that modern international law owes a lot to this practice in the Mediterranean. It was not Grotius and the Atlantic dimension of Europe that developed international law. The theory? yes; but the practice of international law was essentially economic to begin with; treaties, capitulations, minorities going there and trading, minorities enjoying certain freedoms, and minorities coming back, and, in exchange, how they should be treated in case of conflict or dispute and so on and so forth." World and Islam Studies Enterprise (WISE) *Islam, Democracy, the State and the West: A Round Table with Dr. Hasan Turabi* (Tampa, Florida: WISE, 1993) 30.

58 Khadduri, , in Khadduri and Leibensy, eds., *Law in the Middle East*, supra note 46, at 364-5.

the Prophet and the pagan Arabs of Mecca. The two parties under this treaty came to peace after bitter fighting. This agreement, which was made by the Prophet out of necessity and on a temporary basis, specified for ten, but lasting for two and half years, was taken as a standard precedent by jurists especially in relation to negotiation procedures and duration.[59]

The general rule under Shari'a is that treaties are binding and their terms must be observed, provided that the contents of this agreement or treaty do not contradict Shari'a. In other words, the general rule under Shari'a is generally in conformity with principle of *pacta sunt servanda*, which denotes that treaties are binding on the parties and must be performed by them in good faith.[60] However, this bindingness is conditional upon conformity with Shari'a. The principle of *pacta sunt servanda* has been further stressed in the UN Charter of which the preamble stated, *inter alia*, that it is a duty of member states to establish conditions under which "justice and respect for obligations arising from treaties and other sources of international law can be maintained." Furthermore, article 2(2) of the UN Charter reads:

> All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

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59 The text and history of the Hudaybiya Treaty is provided in M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: The John Hopkins Press, 1955) 205-213.

60 This was the meaning accorded to this principle under customary law as codified in article 26 of the Vienna Convention, and as interpreted by both the PCIJ and the ICJ. cf: *Minority Schools in Albania* (1935) 64 P.C.I.J, Series A/B at 19-20; *The Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* (1934) 44 P.C.I.J. Series A/B, 28; and *Rights of U.S. Nationals in Morroco* (1952) I.C.J. Reports 212. See, also, Elias, *The Modern Law of Treaties*, supra note 56, at 40-1.

Islam, on the other hand, accords a higher position and great value on faithfulness and the firm intention of abiding by one's obligations. For example:

> O ye who believe! fulfil (all) obligations. 5:1

> Verily those who plight their fealty to thee do no less than plight their fealty to Allah: the Hand of Allah is over their hands: then anyone who violates his oath, does so to the harm of his own soul, and anyone who fulfils what he has covenanted with Allah - Allah will soon grant him a great reward. 48:10

Under this verse the status of an agreement is reaffirmed and put in a sacred place by placing Allah as a third party to all obligations incurred by those who believe in Allah. Habachy states that fulfilment of contracts is exalted in the Qura'n to rank with the highest achievements and the noblest virtues.[61]

> [T]o fulfil the contracts you have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing. 2:177

> [F]ulfil (every) engagement, for (every) engagement will be enquired (on the Day of Reckoning). 17:34

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61 S. Habachy, "Property Rights, and Contracts in Muslim Law" (1962) 62 Columbia L. Rev. 450.

It follows from the Islamic tradition that the treaty is binding until the end of its term, without distinction as to believers and non-believers:

> (But the treaties are) not dissolved with those Pagans with whom you have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you. So fulfil your engagements with them to the end of their term: for Allah loveth the righteous. 9:4

> [A]s long as they stand true to you, stand true to them, for Allah loveth the righteous. 9:7

It is now clear, I submit, that Islam is well disposed towards the use of treaties as the mode for the creation of a system of international law, as long as the principles contained in the treaties are consonant with Shari'a.[62] This caveat is of special importance to the issue of human rights. Since human rights are mostly treaty-based, then it is safe to assume that as long as obligations under these treaties are in conformity with Shari'a, Muslim state(s) are bound by them both by way of a contractual obligation and as a matter of religion. The following is an attempt to flesh out ideas of "rights" and "freedoms" under Islam with the intention of identifying areas of agreement and areas of conflict with the contemporary international human rights framework. It goes without saying that from a perspective of international law and Shari'a, in areas where there is agreement between Islamic conceptions of rights and freedoms and the present international standards, Muslim rulers and governments are bound

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62 cf: Al-Maududi is of the opinion that it is beyond the purview of an Islamic state to legislate in contravention of Shari'a and all such pieces of legislation, even though approved by the legislature would *ipso facto* be considered *ultra vires* Shari'a. Al-Maududi, *Islamic Law and Constitution*, supra note 31, at 221.

by the terms of these agreements. It is necessary, therefore, to review with care Islamic concepts of rights.

III. HUMAN RIGHTS UNDER SHARIA: A LIMITED CONCEPT

The conceptions of "right" and "freedom" under Islamic jurisprudence do not seem to have any origin in *Shari'a*; their usage by Muslim scholars seems to have been influenced by other "secular" legal traditions.

A comparative study between the Islamic Universal Declaration on Human Rights[63] (hereinafter referred to as the Islamic Declaration), and the Universal Declaration on Human Rights (hereinafter referred to as the Universal Declaration),[64] reveals that there are indeed differences in the scope of the rights and freedoms stated under both Declarations.

Rights, under *Shari'a*, are limited by a strict classification based on gender and faith. This classification affects freedom of thought, conscience and religion; the right to participate in public life and institutions; freedom from slavery; and most of the rights stated under the Islamic Declaration.

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63 For the text of the Islamic Declaration, see (1981) 4 European Human Rights Reports 166-76.

64 For the text of the Universal Declaration, see *Human Rights: A Compilation of International Instruments*, (New York: United Nations, 1988) 1.

The task of exploring other cultures is best undertaken in recognising that cultures are capable of influencing and being influenced. This part of the examination is not undertaken as an attempt to deny the validity of moral judgements using external cultural norms, even though such moral judgements are likely to produce negative rather than positive effects. Matters of morality and knowledge (in a broad and abstract sense) cannot be culture specific, even though the details and conclusions drawn upon them might differ.

Morality and knowledge, as noted in the first chapter, cannot be placed behind culture, and therefore in intercultural relations morality and knowledge cannot be the exclusive product of some cultures and not others.[65] I have indicated in Chapter One of this study that the validity of the cross-cultural moral judgement increases with the degree of universality of the values on which it is based; and the efficiency of the action increases with the degree of the actor's sensitivity to the internal logic and frames of reference of other cultures. This approach is not, however, without complications.

These complications arise as a result of some of the difficulties which present themselves in the cross-cultural dialogue. For example, I will argue, in a latter part of this section, that there are fundamental differences between the concept of rights under the *Islamic Declaration* and

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65 Geertz was responding to anti-relativists and their argument that if something cannot be anchored universally then it cannot be anchored anywhere. He stated: "The objection to anti-relativism is not that it rejects an it's-all-how-you-look-at-it approach to knowledge or a when-in-Rome approach to morality, but that it imagines that they can only be defeated by placing morality beyond culture and knowledge beyond both. This .... is no longer possible. If we wanted home truths, we should have stayed at home." C. Geertz, "Distinguished Lectures: Anti Anti-Relativism", (1984) 86 American Anthropologist 263 at 276.

their counterparts under the *Universal Declaration*. These differences, in some cases, are difficult to accommodate in the cross-cultural dialogue. The Islamic system is particularly problematic as limitations on rights and freedoms are often based on divine sources (*Qura'n* and *Sunna*) which human beings are not allowed to question. This next part will expand on this point by attempting a comparative study of human rights and freedoms under both the Universal Declaration on Human Rights and the *Universal Islamic Declaration for Human Rights*. The reason I have chosen to use the Islamic Declaration is that it resembles most of the attempts, by contemporary Muslim jurists, to formulate an Islamic Constitution and bill of rights.[66]

A. THE CONCEPTION OF RIGHT & FREEDOM UNDER SHARI'A

Even though Muslim jurists have used *huqq*[67] (the closest English term is "right") frequently, they have not made any attempt to define it in juristic terms,[68] and it is probable that they

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66 cf: A. Garisha, *Ilan Dustouri Islami* (An Islamic Constitutional Declaration) (Mansoura, Egypt: Dar al-Wafa li-iltiba'a, 1985), in which three Draft models were considered: (1) the model prepared by the Islamic Research Center of al-Azhar; (2) the model prepared by the International Islamic Council; and (3) the model prepared by the leading Egyptian scholar Mustafa Kamil Wasfi.

67 According to the *Encyclopaedia of Islam*, the original meaning of the root of *hakk* (hqq) has become obscured in Arabic, but can be recovered by its Hebrew meanings of (a) to cut or engrave in wood, stone or metal; (b) to inscribe, write or portray; and the most relevant meaning, in my opinion, (c) due to God or man, right or privilege. J. Schacht *et al*, eds., 3 *Encyclopaedia of Islam*, New Edition, the Section of *Hakk*, at 82-3. For the meanings of the Hebrew corresponding word of *hkk*, see S.A. Cooke, *North-Semitic Inscriptions* (Oxford, 1903) at 171 and 185; and B. Driver-Briggs, *Hebrew and English* (Oxford, 1952). The word *huqq* was commonly used in pre-Islamic Arabian poetry to mean something right, true, just and real. The usage of *huqq* to denote God was derived, it is suggested, from the two meanings of "the one" and "truth". This seems to be the same meaning used in *Mukhtar al-Sahhah*, one of the most respected Arabic language dictionaries, which

relied on the linguistic meaning to that effect.[69] The term was used to denote the right to property and other rights enumerated by earlier jurists.[70]

Some jurists have attempted to define *huqq* in a manner which approximates the meaning of "rights" under Western traditions. Al-Khalaf, a well known Egyptian Hanfi scholar, defined *huqq* as a legally secured and guaranteed interest.[71] Another Sunni scholar defined it as a power conferred by law which denotes jurisdiction or duty.[72] However, one notes that any definition of *huqq* is likely to emphasise the idea of a right together with its corollary duty.[73]

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defines *huqq* as the opposite of *batil*, i.e. the opposite of falsehood, and also to mean "the one". M.A.Razi, *Mukhtar al-Sahhah* (Beirut: Dar al-Fikr lil Tiba'a wa al-Nashr, n.d.) at 146.

68 Nevertheless, the linguistic usage of *huqq* has further extended its meaning, based on the primary meaning of "the one", to denote claim or right as a legal obligation. *Encyclopaedia of Islam*, *ibid.* at 82; and *al-Sahhah*, *ibid.* at 146.

69 I. Ahmed, *al-Madkhal lil Fikh al-Islami* (Introduction to Islamic Jurisprudence), (Beirut: dar al-Hayah, n.d.) at 304. M. R. Osman, *al-huqquq wa al-Wajibat fi al-Islam* (Rights and Duties in Islam), (Beirut: dar Iqra'a, 1983) at 12.

70 A. al-Khafif, *al-huqq wa al-Zima* (The Right and Duty), (Cairo, 1979) at 36. Isawi, *ibid.*, at 304-5.

71 This was also the meaning used in the Dictionary of Legal Terminology, which defined *huqq* as an interest protected by the law, and equated it with the English term of "right" and the French term of "droit". A. Karan, *Mu'jum al-Mustalahat al-Qanuniyah* (The Dictionary of Legal Terminology), (Beirut: Maktabat al-Nahdah al-Arabiyah, 1987) at 188.

72 This was opinion of the Egyptian Sunni scholar Mustafa al-Zarqa, cited in M.R. Uthman, *al-Huqquq wa al-Wajibat fi al-Islam* (Rights and Duties in Islam), (Beirut: dar Iqra'a, 1982) at 13-4.

73 *Huqquq* (plural of *huqq*) is defined as "legal rights or claims, and corresponding obligations, in the religious law of Islam". Encyclopaedia of Islam, *supra*, note xxx at 551. *Huqquq* is also used to mean "law" in some of the Arab countries with civil law background, e.g. Kuliyat al-Huqquq in Egypt is the Faculty or School of Law, which seems to be the Arabic translation of Faculté de Droit. In some other countries with common law background, as the case in the Sudan, Faculty of Law is Kuliyat al-Qanon. Qanon means law, and is probably borrowed from canon as in canon law.

This prediction is based on the linguistic meaning of *huqq*, together with the tendency among Muslim jurists to overemphasise that every right comes with a religious duty.

What most Muslim jurists have managed to reach agreement upon is the general categorisation of rights under *Shari'a*, which fall into three categories. First, there are Allah's rights. Human beings do not have any right to interfere with or relinquish these rights, but rather they are expected, out of religious duty, to submit and follow Allah's directives. In other words, these rights impose duties upon believers. Examples of such rights include: the belief in Allah as the only God and in the Prophet Mohammed as the last prophet; praying five times a day; fasting through the month of *Ramadan* (the ninth month in the lunar calendar), etc. Since this thesis is focusing upon "human rights", this theme will only be expanded upon to the extent to that it might affect human rights.

Second, there are the rights of individual human beings which involve their choice or ability to exercise or relinquish. These rights are sometimes defined as dealing with private interest, such as rights pertaining to land and personal property.

Third, there are rights which involve both the interests of Allah and of human beings. Scholars have disagreed as to which of these rights ought to prevail in the case of conflict. A good example is to be found in what is known under *Shari'a* as *hudd al-Gazf* (the prescribed crime of defamation). The definition of this crime can be summarised as follows: if one

person assaults another person's honour and reputation by accusing this other person of committing adultery, *Shari'a* mandates the person who made the allegation of adultery to provide conclusive evidence to that effect or he will be punished with 80 lashes. This rule is based on the following provision of the *Qura'n*:

> And those who launch a charge against their Chaste women, and produce not four witnesses (To support their allegations) - flog them With eighty stripes; and reject their evidence Ever after: for such men are wicked Transgressors - (*) Unless they repent Thereafter and mend (their conduct), for Allah Is oft-Forgiving, Most Merciful. 24:4 & 5

This crime involves both divine as well as human being's rights. The human being's right involves the individual right to protect his/her honour and reputation; while the divine rights centres on the promotion of truth and punishing the person who failed to furnish conclusive evidence. Another divine right, involved here, is that believers should follow His orders and avoid His prohibitions. Among His prohibitions is attacking another's honour and reputation. A scholar has suggested a test to be applied in such conflict: when a right involves both human as well as divine interests, then if the divine interest is the dominant one, this right is to be treated in the same way as Allah's rights, otherwise it is a human right.[74]

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[74] A. Khalaf, *Ilmu 'Usul al-fiqh* (The Science of Islamic Jurisprudence), 8th ed. (Kuwait, H1388) at 210-11. Also A. Al-Sanhouri, *Musadir al-huqq fi al-Fiqh al-Islami* (The Sources of Right in Islamic Jurisprudence), vol. 1 (Cairo: dar al-Kitab, n.d.) at 14.

Like "right", "freedom" does seem to have a root in Islamic (Arabic) juristic work. Despite the fact that the word hurriyah (freedom) is continually used in Arabic today, it does not seem to have a defined or clear conception.[75] Arabic society did not understand freedom the same way liberal Europe did, therefore, as Arawi points, it is very difficult to think of the contemporary conception as rooted in the Arab mentality, nor it is realised in behaviour or life.[76] In attempting to seek the meaning of freedom, three questions need to be addressed: Is the word *hurriyah* just a terminological translation of a European word from which the meaning is also borrowed? If so, does the concept of freedom have no roots in the traditional Arabic-Islamic culture? Was the exercise of freedom non-existent in traditional Islamic society? To answer these questions, I will survey the possible meanings of *hurriyah*. Four possible distinct meanings might be found for *hurriyah*: moral, legal, social and Sufi meanings.

The moral meaning was used during the *jahiliya* (The period of ignorance, i.e. pre-Islam Arabia) and kept in the artistic usage. For example, *hurr* (free) means someone who is

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75 *Hurr* (free) means, according to *al-Sahhah*, the opposite of slave, and *hurriyah* means descending from a noble ancestors. *Mukhtar Al-Sahhah*, *supra*, note xxx at 130. *Hurriyah* is also regarded as an abstract formation derived from *hurr* corresponding to Hebrew *hor*. It was mainly used as a legal term denoting the opposite of "unfree" or the opposite of "slave". Encyclopaedia of Islam, *supra*, note xxx at 589. Rosenthal, writing about freedom in Islam, pointed out that: "[I]t developed into one of those powerful abstract terms that has no concrete, definable existence unless it be given to them by the human mind. While it could no longer be objectively defined, it became the object of numerous definitions. ... The efforts to define this freedom of ours have been technically unsuccessful, and they will always be so". F. Rosenthal, *The Muslim Concept of Freedom* (Leiden, the Netherlands: E.J. Brill, 1960) at 1.

76 A. A. Arawi, *Mafhum al-Hurriyah* (The Conception of Freedom), (Casablanca: Al-Murkaz al-Thagafi al-Arabi, 1983) at 105.

dignified and of high quality. To say that someone is free from you, is another way of saying this someone is better than you.[77] *The legal Meaning* is the one used in the *Qura'n*. For example,

> Never should a Believer kill a Believer; but (If it so happens) by mistake, (compensation Is due); If one so kills a believer it is Ordained that he should free a believing Slave, and pay compensation to the deceased Family, unless they remit it *freely*. If the Deceased belonged to a people at war with you, And he was a believer, the *freeing* of a Believing slave (is enough). If he belonged to A people with whom you have a treaty of mutual Alliance, compensation should be paid, and a Believing slave should be *freed*. ... 4:92 (emphasis added)

The *Qura'n* has also provided:

> Behold! a woman of Imran said: "O my Lord! I Do dedicate unto Thee what is in my womb for Thy special service: so accept this of me: for Thou hearest and knowest all things. 3:35 (emphasis added)

"For Thy special service" is a translation of the Arabic word *muharrar* (freeing), which means to be freed from all worldly affairs and specially dedicated to Allah's service.[78] *Hurriyah* is also used in juristic writings, e.g. the rule of *Shari'a* that a free man will not be executed for a

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77 See *al-Sahhah*, *supra* note , 12 at 131.

78 A. Y. Ali, *The Holy Qura'n: Text Translation and Commentary*, (Brentwood, Maryland: Amana Corporation, 1989) at 136. This was part of the story of Mariam (Mary) the mother of Jesus. The woman of Imran refers to Mary's mother, who expected a son who was to be a special devotee, a miraculous son of the old age of his parents. Allah, instead, gave the woman of Imran a daughter, Mary. The same meaning is used in Tafsir Ibn Kathir, the primary Arabic source for the interpretation of Qura'n. See Imam Ibn Kathir, *Tafsir al-Qura'n al-Azim* (The Interpretation of the Holly Qura'n), commonly known as *Tafsir Ibn Kathir*, vol. 1 (Beirut: Dar al-Ma'arifa, 1987) at 367.

slave, while a slave can be executed for a free man. In general, the legal usage of freedom is used in the context of slavery, and the discharging of obligations.

The social meaning is employed by some Islamic historians to denote a social status of nobility. For example, *hurr* (free) is the one who is exempted from taxes. *Hurriyah*, for Sufis, denotes the ability to free the self from the slavery of all the material beings, and cutting ties therewith.[79] Islamic Africa, as noted in the previous chapter, is mostly Sufi. Sufism goes further to indicate that one's ability to free himself should include relinquishing property, breaking away from the stronghold of worldly affairs in order to encourage dependency on God. *Hurriyah*, in this sense, for the Sufis, represents the highest and most honourable level a human being can hope to achieve. Because the journey towards the divine is a personal one, the Sufis have developed the most tolerant form of Islam.[80] This might explain African Islam's ability to accommodate various aspects of recipient African societies.

It is clear that from the foregoing discussion of these historic meanings that the contemporary Arabic linguistic meaning of *hurriyah* owes a great to cultural influences. This in addition to

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[79] Sufism is a mystical theological approach to Islam which has been developed as more of a philosophy than a rigid set of doctrines. Sufism signifies one's religious quest in the form of a journey (*tariqah* which is also used to mean sect) towards Allah, i.e. union with the divine is the ultimate destination of this journey. Sufism, like most factions, seeks its origin in the Qura'an: "When my servants ask thee concerning Me, I am indeed close (to them); I listen to the prayer of every suppliant when he calleth on Me: Let them also, with a will, listen to My call, and believe in Me: That they may walk in the right way." 2:186 "It was We who created man, and We know what dark suggestions his soul makes to him: for We are nearer to him than (his) jugular vein." 50:16 See also 34:50 and 56:85.

[80] I will further contend that this version is the closest to the true essence of Islam as expressed in the Qura'n and relayed by the Prophet.

the fact that the original linguistic meaning has its practical limits, and, in order to understand what the meaning of ***hurriyah*** entails, as Arawi pointed out, we need to pay attention to the preconceived conception of the term we seek to define.[81] An attempt can be made to explore the culture in order to find guidance for the definition of ***hurriyah***. This can be done, it is submitted, by expanding on two of the above meanings, the legal and the moral.

In legal matters, Islamic jurists have dealt with freedom, in relation to certain legal issues, with a meaning similar to that of legal capacity.[82] These legal issues include slavery interdiction, and child custody and guardianship. Therefore, the meaning of ***hurriyah*** is not complete unless the person, besides being a human being, is capable of being subjected to divine commands and prohibitions. The society which the jurists were talking about, is one that is divided into slaves and free persons. The scope of freedom is determined by the status of these persons who are divided into capacitated and incapacitated. Capacitated persons are also divided into men and women, and men into rulers and ruled.

The moral meaning of ***hurriyah*** can be further explored in discussions of the mind and the self, and the soul and nature. I am trying here to relate this moral meaning to two relevant questions. First, whether the mind is capable of controlling the self and altering its natural preferences. Second, the nature of the relation between the individual will and the divine will,

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81 Arawi, supra note , at 14.

82 Arawi, *ibid.*, at 17.

and whether the two are likely to conflict. The answer to these questions is likely to draw us close to a possible conception of *hurriyah* aligned with the idea of freedom. The *fugaha* (Islamic jurists) arrived at a middle position regarding these questions.

Every individual Muslim believes that Allah knows about all her/his deeds before and after they take place, yet humans are left with some ability of judging for themselves. Ibn Taymiya, defined *hurriyah* with the concept of one enslaving the self to Allah, i.e. it is by worshipping Allah and obeying His commands that one becomes ultimately free.[83] Such a statement relates to the confinement of *hurriyah* within the tenets of *Shari'a*,[84] and ties it with the same notions discussed earlier in this part regarding the meaning of "right" under *Shari'a*.

No matter what meanings are given to "right" and "freedom", it remains important to point out that the scope of the concepts of "right" and "freedom" are restricted by the boundaries set by *Shari'a*. Muslim jurists might have borrowed the usage and meaning of the two terminologies from the Western legal traditions, yet it is very difficult to assert that these two concepts have the same legal effect as a result of the application of *Shari'a*. I will illustrate this point by

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83 Ibn Taymiyah, *al-Iboodiyah* (Enslavement), in Arabic, (Beirut: 1397H) at 36. Also at 61-96 and 101-114.

84 Cf: Mauddudi, who argues that freedom with meaning indicated by Ibn Taymiya, represents the base upon which the individual personality and the social system are to be built. A. Mauddudi, *Nazariyat al-Islam wa Huddiyihi fi al-Siyasa* (The Islamic Theory and Guidance of Politics, Law and Constitution), in Arabic, (Beirut: 1969) at 97-8.

examining some of the rights and freedoms under the *Universal Declaration on Human Rights* with their correspondents under the *Universal Islamic Declaration of Human Rights*.[85]

B. AN OVERVIEW OF HUMAN RIGHTS IN ISLAM

The theoretical foundations of "human rights" in Islam are different from those in the West in different respects. Firstly, the history of human rights in the West dates back to the origination of "modern" human rights instruments, e.g. the *Magna Carta*, the U.S. Bill of Rights, the *French Declaration of Rights of Man and Citizens*, the Charters of both the League of Nations and the United Nations, and the *Universal Declaration of Human Rights*. These instruments were mainly arrived at through the continuous struggles of human beings against each other, e.g. Kings withholding privileges, revolutions taking place and jurisdictional conflicts emerging. In Islam, human rights are not to be viewed, exclusively, within such settings.[86] The struggle for rights itself is not seen as a struggle against the ruler, even though it is the case now in the majority of nominally Muslim countries. The struggle, instead, is seen as the individual being's quest to discharge her/his duties towards Allah, instead of asserting rights against another.[87]

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85 See, also, Chapetr III of the Constitution of the Isalmic Republic of Iran, which deals with the "Rights of the People". *Constitution of the Islamic Republic of Iran*, Hamid Algar's translation, (Berkeley: Mizan Press, 1979) 35-42.

86 This is not intended to doubt the validity of universal standards such as the Universal Declaration. Preliminary inquiry of human rights under *Shari'a* can only be undertaken by using *Shari'a*'s internal logic and terms of reference.

Secondly, and closely connected with the first issue, the concept of rights in Islam is clearly linked with duties. In other words, because Islam deals with the issue of rights and duties within the scope of the individual's relation with the divine, the Islamic concept of human rights differs radically from Western counterparts. Under Western traditions, human rights are designed, in most cases, to protect individuals against the state and, to a lesser extent, against one another. The author is by no means overlooking that some of the rights under Western traditions did in fact have religious origins. Nevertheless, one does not feel the need to focus on this issue as most, if not all, of these rights are implemented today regardless of any religious considerations. Another way to reflect upon the difference between the two rights traditions lies in the type of social contract underlying each. While the social contract in the West is a secular one between individuals, the ruler and the ruled; the contract under Islam reflects a covenant between the individuals and Allah, whether these individuals are rulers or ruled. Individualism is, therefore, partially recognised in Islam.[88] It is within this context that the issue of human rights and freedoms ought to be viewed and examined.

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87 C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin's Press, 1988) at 116-7.

88 This recognition is based on the fact that the fundamentals of the basic doctrines of Islam is that there is no medium between Allah and the individual Muslim, i.e the relation between God and the individual and Allah is direct. The Qura'n further indicates that each and every human being is individually responsible towards Allah: "Namely, that no bearer of burdens can bear the burden of another; that man can have nothing but what he strives for; that (the fruit of) his striving will soon come in sight; then he be rewarded with a reward complete; that to thy Lord is the final Goal." 53: 38-42 "That Allah may requite each soul according to its deserts; and verily Allah is Swift in calling to account." 14:51 "Its deserts" is explained by Ali as: "according to what it earned by its [reference here to the human soul] own acts, good or evil, in its life of probation." Ali, *The Holy Qura'n*, supra note , at 617.

1. EQUALITY AND NON-DISCRIMINATION

As pointed out earlier, Allah is the source of rights, and his will is expressed in the *Qura'n*. Therefore, human beings might acquire certain rights and freedoms not necessarily because they are human, but simply as *subjects* granted these rights and freedoms by Allah. In the light of these beliefs, one can examine critically from an Islamic perspective the concept of equality and non-discrimination, which is a sine qua non for human rights and fundamental freedoms.

The Islamic Declaration has provided for the obligation to establish an "Islamic order"[89], wherein, *inter alia*, all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of colour, race, sex, origin or language.[90] It has also been provided that all persons are regarded as equal before the law and entitled to equal opportunities and protection of the law.[91] There is no article devoted to equality between women and men, even though there are some relevant provisions dealing partially with related issues:

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89 The meaning of the phrase "Islamic order" as used in the Declaration is not clear. The equivalent used in Arabic suggests an Islamic state which will be elaborated later.

90 The Islamic Declaration, Preamble g(i).

91 Article III(a) of the Islamic Declaration.

-- The right not to be denied the opportunity to work by reason of religious belief, sex, etc.. [92]

-- The right to found a family and "related matters", which includes, *inter alia*, the obligation of every husband to maintain his wife and children;[93] special respect and care given to motherhood;[94] the family responsibilities of both spouses which are shared in accordance with their sex.[95]

-- Rights of married women, e.g. the right to live in the same house in which her husband lives, right of inheritance, and others.[96]

The Universal Declaration, on the other hand, provides that all human beings are equal in dignity and rights.[97] This principle of equality and non-discrimination has further been affirmed in the entitlement of everyone to the rights and freedoms set forth in the Universal

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92 Article III(c) of the Islamic Declaration.

93 Article XIX(C) of the Islamic Declaration.

94 Article XIX(g).

95 Article XIX(h) of the Islamic Declaration states: "Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowments, talents and inclinations, bearing in mind their progeny and their relatives".

96 See article XX of the Islamic Declaration.

97 Article 1 of the Universal Declaration.

Declaration without *discrimination of any kind* such as race, sex, religion and others.[98] Another principle is that of equality before the law and the entitlement of all, without discrimination, to the equal protection of the law.[99]

An examination might reveal a few differences between the two Declarations concerning the principle of equality and non-discrimination, for example:

i. The Islamic Declaration is not clear on the condition of the equality of women and men in enjoying the rights stated therein.

ii. The Universal Declaration has recognised the protection of minorities with limitations based on securing and respecting the rights of others;[100] meanwhile under the Islamic Declaration, the protection of minorities seems to be reduced to the question of choice of law in respect of civil and personal matters.[101]

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98 Article 2 of the Universal Declaration.

99 Article 7 of the Universal Declaration. See also article 17 of the same Declaration.

100 Article 29(1) and (2) of the Universal Declaration.

101 Article X(b) of the Islamic Declaration. The Declaration does not mention criminal law, due to the fact that non-Muslims are not exempted, under *Shari'a*, from the application of *huddud* crimes, which provide for the punishments of flogging, amputations and public executions. These punishments are regarded by several human rights organisations, such as Amnesty International, as cruel, inhuman and degrading. While the Universal Declaration stated expressly its condemnation of torture and other cruel, inhuman or degrading punishments, the Islamic Declaration only referred to the right to protection against torture under article VII and remained silent about the
rest.

The major difference, in my opinion, is to be found in the scope of the principle of equality and non-discrimination as provided for in both Declarations. The scope of this principle may be limited by law, under the Universal Declaration, "solely for the reason of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".[102] This, of course, is to be read in light of the fact that all rights and freedoms are to be enjoyed and exercised by everyone regardless of, *inter alia*, religion or sex.

Under the Islamic Declaration, the scope of the principle of equality and non-discrimination is limited by *Shari'a*. When we look at the relevant articles viewed above, we might recall the equality is meant before "the law",[103] and the rights accorded to women are exercised in accordance with the terms of "law".[104] The term "law" as the Islamic Declaration puts it "denotes the *Shari'a*".[105]

How does *Shari'a* view the principle of equality and non-discrimination? To answer this question, I might use two examples from Islamic jurisprudence, the status of women and

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102 Article of 29(2) of the Universal Declaration.

103 Article III(a) of the Islamic Declaration.

104 Article XX of the Islamic Declaration.

105 Islamic Declaration, explanatory notes 1(b): "the term 'Law' denotes the *Shari'ah*, i.e. the totality of ordinances derived from the *Qur'an* and the *Sunnah* and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence".

minorities. Rights, accorded under *Shari'a* are based on a strict classification based on religion and gender.[106]

i. Gender Classification

Muslim males have full capacity to enjoy the rights allowed under *Shari'a*. Nevertheless, men have a limited participatory role in the Islamic government as they have almost no safeguards against the ruler who is not popularly elected and enjoys unlimited executive, legislative and judicial powers.[107] Male leaders can advise the ruler, but the ruler is not obliged to follow that advice.[108] The ruler can also impose criminal sanctions at his discretion.[109] This fact, as An-Na'im pointed out, "dampens freedom of speech and creates a sense of intellectual and political impotence".[110]

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106 A. A. An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Spiritual Imperatives: A Preliminary Inquiry" (1990) 3 Harvard Human Rights J. 22.

107 See the following part on the right to participate in the conduct of public affairs and freedom from the tyranny of the state.

108 He can take the opinion of Muslim scholars (not the public opinion) in enacting decrees to face new problems, but such opinion is of a merely consultative nature and is not binding on him. Instead he is only limited by his "conscience" and "piety". A. A. An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenges and Response" (1987) 20(2) Cornell Int'l Law Journal 317 at 321.

109 This is done by virtue of the principle of *ijtihad* (creative interpretation) and issuing of new laws and regulations through his interpretation of the *Qura'n* and the *Sunna*.

110 An-Na'im, supra note 52 at 330.

Muslim women, on the other hand, enjoy limited rights under the principle of *quwama* (guardianship) of men provided in the *Qura'n*:

> Men are the protectors (*quawamoon*) and Maintainers of women, Because Allah has given The one more (strength) than the other, and Because they support them from their means. Therefore the righteous women are devoutly Obedient, and guard in (the husband's) Absence what Allah would have them guard...[111]

The verb *quawam* (*quawamoon* for plural) is used in this verse with a meaning: "one who stands firm in another's business, protecting her and looking after her business.[112] Several rules affecting the status of women, under *Shari'a*, are based on this principle of *quawama*. For example, women are not qualified for holding a public office that would entail exercising guardianship over men, based on the terms of the verse cited above.[113] The notion of *hijab*

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111 The rest of the verse reads:" As to those women on whose part ye fear disloyalty and ill conduct admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for Allah is Most High Great (above you all)". The verse implies a "good wife" is obedient to her husband in his presence and absence. In case of family disputes, according to Ibn Kathir, four steps are to be followed: (1) verbal advice, (2) if does not work then sexual relationship suspended, if this does not work (3) physical correction may apply, and as a final step (4) he may seek arbitration by relatives, in accordance with 4:35.

112 Such was the meaning used by Ali. See A.Y. Ali, *The Qura'n* at 195 note 545. The meaning is also used in other verses, cf: 4:135.

113 According to verse 4:34, only men are entitled to exercise such guardianship over women and not vice versa. See, A. al-Qortubi, al-Jami li Ahkam al-Qura'n, vol.5 169, (n.d.), (Arabic). A'la Mauddudi has listed the ruler's qualifications which include that the ruler should be: (a) a Muslim; (b) a *male*; (c) sane and adult; and (d) should be a citizen of the Islamic state. In supporting his assertion that the ruler should be a Muslim *male*, A'la Mauddudi cited verse 4:34 of the Qura'n which says: "Men are in charge of women." And from the *Sunna*, he cited the Prophet's *hadith* (saying): "Verily, that nation would not prosper which hands over the reigns of its government to a woman." A'la Mauddudi, *The Islamic Law of Constitution* (Lahore: Islamic Publications Ltd., 1980) at 81.

(veil), is a good example of a principle having a broad application ranging from requiring women to cover their face and body in public,[114] to requiring women to stay home and leave it only for an urgent necessity.[115] Other areas where the gender classification is manifest, include family laws which are husband biased,[116] and criminal justice.[117] It is important here to note that when *Shari'a* was developed, between the 7th and 9th centuries, it was a pioneer in guaranteeing women certain equality rights which were not achieved by other legal systems at that time. Women, under *Shari'a*, enjoy certain limited rights in family law and in inheritance.[118] They have also, and "equally" with men, a legal personality regarding ownership and disposition of property.[119] One of the arguments this study advocates is that

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114 As has been provided for in the Qura'n in the following verses. 24:31 which demands women to "lower their gaze and guard their modesty" and that they "should not display their beauty and ornaments". 33:33 which directs women to: "... stay quietly in your houses, and make not a dazzling display, like that of the former period of ignorance ..." See also verses 33:35 and 33:59. Although I will further elaborate on this aspect in examining the Sudanese case, it is worthwhile to note what Turabi has said recently: "[N]o organisation like the Saudi *amr bil-ma'rouf wal-nahi an al-munkar*, [morality police] would have a legal authority to stop women or to harass them. And no punishment can be attached unless someone goes completely naked; that would be obscenity." H. Turabi, *Islam, Democracy, the State and the West*, supra note.., 36.

115 An-Na'im, supra note 52, at 38.

116 For example, the husband has an unconditional right to divorce, while the wife enjoys no such right. If she attempts to leave her husband he is entitled to petition the court for obedience. See also notes 55, 57 and 58.

117 For example: (1) The testimonial competence of women is worth half that of men, and (2) the concept of *diya* (blood money) values a female victim at only half that of a male victim.

118 Females, for example, inherit under *Shari'a* half the amount of males of the same status.

119 W. Smith, "Islam", in A. Sharama, ed., *Women in World Religions* (Albany: State University of New York Press, 1987) at 235. Also, note that whatever rights given to women, they are likely to be hampered by the general limitations under *Shari'a* on the status of women, as one author pointed out: "While legally recognised as 'economic persons' to whom property is transmitted, Muslim women are constrained from acting out economic roles because of other legal, as well as ideological, components of Muslim female status". See Pastner, "The Status of Women and Property on Baluchistan Oasis in Pakistan" in Beck and Keddie, eds., *Women in the Muslim World*, cited in An-Na'im, *supra*, note 47 at note 118.

there is an urgent need for reinterpretation of the provisions dealing with women. This assertion will be clarified in the part that deals with Sudan, but it suffices for present purposes to note that this urgent need is supported by the following facts: (1) in Muslim countries there are Muslim women who were elected as heads of government and members of parliament; (2) Muslim women participate in various aspects of civil life; and (3) there exist in most Muslim countries popular women's movements calling for improvements in the status of women within these countries.

ii. **Classification Based on Religion**

People under *Shari'a* are classified as Muslims and non-Muslims, who in turn are further classified into tolerated non-Muslims (*ahimis*), otherwise known as the people of the book, and others. This classification affects the legal status of non-Muslims, as well as their rights on the basis of their religious affiliations. As mentioned previously, the *Universal Declaration* sets out the obligation to ensure the rights provided therein without distinction of any kind, such as race, colour and religion.[120]

This distinction between Muslims and non-Muslims is said to be necessary as long as the Islamic state is an ideological one which is, in the words of al-Maududi, by its very nature

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120 Article 2 of the Universal Declaration.

bound to distinguish between Muslims and non-Muslims.[121] Furthermore, as their allegiance to the Islamic state is doubtful, non-Muslims have very limited access to either public offices or military services.[122] According to the *Qura'n* non-Muslims cannot exercise any form of Wilya (guardianship) over Muslims, based on the following verses:

> Let not the Believers take for friends or Helpers unbelievers rather than Believers: if Any do that, in nothing will there be any help From Allah: except by way of precaution, that Ye may guard yourselves from them.[123] But Allah Cautions you (To remember) Himself; for The final goal is to Allah. 3:28

> O ye who believe! Take not the Jews and the Christians for your friends and protectors; They are but friends and protectors to each Other. And he amongst you that turns to them (For friends) is of them. Verily Allah Guideth not a people unjust. 5:51

> O ye who believe ! take not my enemies and Yours as friends (or protectors) - offering Them (your) love, even though they have Rejected the Truth that has come to you, and Have (on the contrary) driven out the Messenger and yourselves (from your homes), (Simply) because ye believe in Allah your Lord! If you have come out to strive in My Way And to seek My Good Pleasure, (Take them not As friends), holding secret converse of love (And friendship) with them: for I Know full Well that all ye conceal and all that ye Reveal. And any of you that does this has Strayed from the right path. 61:1

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121 See S.A. Al-Maududi, *The Islamic Law of Constitution*, supra note , at 274-99 where he provided for further classifications among non-Muslims to believers (Christians and Jews) and non-believers, and concluded that they enjoy limited rights because of their lack of belief in the ideology of the state.

122 See, A.H. Siddiqi, *Non-Muslims Under Muslim Rule and Muslims Under Non-Muslim Rule* (Karachi: Jamiyatul falah Publications, n.d.) pp. 1-9.

123 Part of these precaution is not to enable non-Muslims exercise any sort of authority over Muslims, *Tafsir Ibn kathir*, *supra*, note 24 at 241.

Other examples of limitations imposed on non-Muslim rights can be found in *Shari'a* rules of evidence regarding the proof of *Huddud* offences; for example non-Muslims cannot give testimony in a *haddi* offence, while Muslims can. The Islamic Declaration has pointed out, under "Rights of Minorities", that "religious minorities have the choice to be governed in respect of their civil and personal matters by Islamic law or by their own laws."[124] The Islamic Declaration has excluded criminal matters which are obviously left to be governed by Islamic law, as a choice is not here accorded.

I have devoted some length to such principles of equality and non-discrimination because if one is to discuss rights under *Shari'a* this would be the determinant of their scope. This will have to be situated within the African context. The following discussion of some of the rights provided for under the Islamic Declaration should be considered in relation to the principles of equality and non-discrimination found in the Islamic Declaration.

2. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Freedom of thought, conscience and religion extends, according to the Universal Declaration, to include freedom to change religion and belief.[125] It also includes individual freedom, alone or in a community and in public or private, to manifest religion or belief in teaching,

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124 Article X(b) of the Islamic Declaration.

125 Article 18 of the Universal Declaration.

practice, worship and observance.[126] The Islamic Declaration, on the other hand, has taken freedom of religion to be the right of every person "to freedom of conscience and worship in accordance with his religious beliefs".[127] The Islamic Declaration has also provided, under article XII(a), that:

> Every person has the right to express his thoughts and beliefs so long as he *remains within the limits prescribed by the law [Shari'a]. No one, however, is entitled to disseminate falsehood* or to circulate reports which might outrage *public decency*, or indulge in slander, innuendo or to cast defamatory aspersions on other persons. (Emphasis added)

On first reading, it might seem that the two Declarations provide, more or less, for the same freedom of thought, conscience and religion. Exploring the meaning and scope of this freedom under *Shari'a* will reveal otherwise. The discussion of article 18 of the Universal Declaration's draft is a case in point. The Delegate of Saudi Arabia protested that the draft article on freedom of religion was unacceptable, for its explicit statement of the right to change one's religion, and he requested that this article be removed.[128]

The Delegate of Saudi Arabia, with the support of most Islamic countries which were independent at that time, claimed that the right to change one's religion, for Muslims, is not

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126 *Ibid.*

127 Article XIII of the Islamic Declaration.

128 United Nations General Assembly, Official Records, 3rd Session, 1948-49, 3rd Committee, Pt.2 at 49.

recognised by Islamic Law.[129] He also offered similar comments in relation to some other rights, such as women's rights as embodied in the draft. One author argued that the Saudi Delegate's comments "seem to be consistent with the idea that Islamic culture is opposed to much of what is signified by the notion of human rights, in relation to Western Culture".[130]

These statements by the Saudi Delegate find some grounding in *Shari'a*, and therefore one has to distinguish between freedom of thought, conscience and religion as provided for under both Declarations. The distinction is the result of the application of the *Shari'a* law of apostasy. Repudiation of faith, directly or otherwise, by a Muslim, is a capital offence punishable by death.[131] The assignment of the death penalty to the "crime of apostasy" is based on the *Sunna*,[132] and said to be sanctioned by *ijmaa'* (the consensus) of the Prophet's companions.

The apostasy of a Muslim can be, as An-Na'im pointed out, inferred by the court [or *fugahaa*, Muslim scholars] for statements or publications contradicting the tenets of Islam [*Shari'a*],

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129 Official Records, *ibid.*, at 120.

130 J. Kelsay, "Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights", in *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty*, (Columbia: University of South Carolina Press, 1988), c.2 at 36.

131 M.S. Al-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis: American Trust Publications, 1980) at 43.

132 The Prophet was recorded to have said: "Whoever changes his religion, kill him". *Sahih Al-Bukhari* (al-Bukhari Collection of Sunna).

and heresy may therefore be declared regardless of the accused Muslim's belief that he is a Muslim.[133] The *Shari'a* law of apostasy, read in light of the restriction (earlier emphasised) under article XII(a) of the Islamic Declaration, acutely limits the scope of freedom of religion, and distinguishes it from the concept articulated in the Universal Declaration.

Apostasy might also extend to include persons who hold views that are not agreeable to the official (judicial and political) view of *Shari'a*. A recent example can be found in the Sudan, where *ustaz* (reverend teacher) Mahmoud Mohammed Taha, leader of the Republican Brothers and a religious reformer, was executed, in January 1985, by the authorities. His ideas were deemed to be contrary to the principles of Islam, mainly his opposition to the adoption of *huddud* penalties implemented by the authorities in 1983.[134] Since 1991, the Sudanese Penal Code has provided for the crime of apostasy, and regards as apostate any Muslim who advocates the rejection of Islamic beliefs or announces his own rejection of Islam by word or act.[135]

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133 An-Na'im, supra note 50, at 23.

134 Ustaz Taha, and the Republican Brothers made their opposition to the imposition of *huddud* penalties in 1983 publicly clear. He, among some of his followers such as An-Na'im, were detained without charges for a year and a half. Ustaz Taha was released briefly and quickly re-arrested in January 1985. He was executed publicly on January 18, 1985 for the crime of apostasy, which was not included in the Penal Code at the time. His case is dealt with in more details in the last chapter of this study.

135 Section 129 of the Sudanese Penal Code reads: "Any Muslim who advocates the rejection of Islamic beliefs or announces his own rejection of Islam by word or deed is an apostate. A convicted apostate should be given a certain length of time to renounce his heresy and declare *toaba* (return to Islam); otherwise he is punishable by death." The original text is in Arabic, this version is based on my own translation as there is no official translation available to me.

3. RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS AND FREEDOM FROM TYRANNY OF THE STATE

The Universal Declaration has expressly stated the right of everyone to participate, directly or through elected representatives, in the public management of one's own country.[136] The "will of the people", which forms the basis of the government, is to be expressed in "periodic and genuine" elections.[137] The Islamic Declaration, on the other hand, has stated the right of every individual, subject to *Shari'a*, to assume public office.[138] While the Universal Declaration has provided for this right of participation in public affairs without distinction as to, *inter alia*, sex and religion, the Islamic Declaration, by subjecting this right to *Shari'a*, has confined it only to Muslim males, since women and non-Muslims are not allowed to exercise any form of *wilaya* or *quawama* over Muslim men.

The Islamic Declaration, under the title Right to Protection Against Abuse of Power, has set out the right to "protection against harassment by official agencies".[139] It is submitted that this is a novelty, as it is well known in Islamic history and scholarly work that the Islamic state has no constraints. In order to be able to understand the scope of this right, it is important to

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136 Article 21(1) and (2) of the Universal Declaration.

137 Article 21(3) of the Universal Declaration.

138 Article XI of the Islamic Declaration.

139 Article VI of the Islamic Declaration.

refer back to the discussion, at the beginning of this chapter, on the nature of the Islamic state under *Shari'a*. The Islamic Declaration stated:

> Process of free consultation (*shura*) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.[140]

This might have been intended as an alternative to the "will of the people", provided for under the Universal Declaration. The scope is different.[141] Turabi, however, argues that: "Ideally, the Muslims always look to minimum government, very much like the liberal tradition, very much like the Marxist dream of a vanishing state";[142] he further emphasised that "people have no access to public office except through consultation."[143]

4. SLAVERY

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[140] Article XI(b) of the Islamic declaration.

[141] See the earlier part on the nature of the Islamic polity.

[142] Turabi, supra note , at 23.

[143] *Ibid.*, at 25. Despite the fact, he went on to cite a contradictory example of the "appointed" Parliament in the Sudan, this at least implies a recognition of the fact that access to public office is to take place through popular ways of selection.

Slavery, the slave trade and servitude are prohibited, under the Universal Declaration, in all their forms.[144] The prohibition of slavery, under the Islamic Declaration, is not so clear as the issue has only been dealt with in the preamble:

> Therefore, as Muslims, who believe
> ...
> (g) in our obligation to establish an Islamic order;
> ...
> (iii) wherein slavery and forced labour are *abhorred*;

The Arabic word for abhorred is *mukrooh* which means disliked or not encouraged, i.e. it states a moral prohibition and not a legal one. This may be due to the fact that *Shari'a*, even though it restricted the practice of slavery and strongly discourages it, still regards the institution of slavery as lawful.[145] *Shari'a* was definitely ahead of its time when it restricted the sources of acquisition of slaves, improving their life quality and strongly encouraged their emancipation,[146] but it has not evolved to prohibit slavery.

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144 Article 4 of the Universal Declaration.

145 A.A. An-Na'im, *Toward an Islamic Reform: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990) at 172. See the section on *abd* (slave) in the Islamic Encyclopaedia, *supra*, note 10.

146 See verses 2:177 and 6:90 which encouraged emancipation of slaves as an "item" of expenditure and private charity; emancipation as way for forgivance of sins under 4:92 and 58:3; emancipation is generally recommended under 90:11-13; and the encouragement of a Muslim to grant freedom in exchange of a prescribed sum of money stated under 24:33. See M.Khadduri, *War and Peace in the Law of Islam*, (Baltimore: Johns Hopkins Press, 1961) at 130.

Slavery was widely practised and recognised as an institution at the time *Shari'a* was formulated. Furthermore, I am not arguing that it is likely that slavery would now be sanctioned by any of the Islamic countries nor by most Muslims. It is important to point out that the *Qura'n* does not contain any verse which decrees slavery. The rules dealing with slavery were developed by *fugaha* for the regulation of the institution at the time. Issues such as treatment of slaves, their partial legal capacity and other rules are still, however, being taught and used as examples in juristic and religious teachings.

For example, in order for a person to be able lead the prayers or become a ruler, he has to satisfy a number of conditions which include, *inter alia*, being a free person. The proof for most *Huddud* offences requires the testimony of *shuhud 'udul*, who are defined as *free* male Muslims known for their honesty. Or, to take another case, a marriage contract is necessary before any lawful sexual relationship can be undertaken. The only exception to this rule is when the person owns a female slave.[147]

The only possibility through which a person might now be brought into slavery is through a military defeat in a war sanctioned by *Shari'a*.[148] If these conditions should arise, then

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147 See Khadduri, *ibid.*, at 80.

148 See M. F. Osman, *Huquq al-Insan bayn al-Shari'a al-Islamia wa al-fikr al-Qanoni al-Qarbi* (Human Rights in Shari'a and the Western Legal Tradition), (Cairo: Dar al-Shirouk, 1982) at 72-3, where he argued that slavery is chosen in this case as an alternative to the killing of war captives. He went on to say that, while it is not encouraged, enslavement of a war captive can only be carried out of necessity, as a preventative measure against his (the captive's) potential danger, but his final fate must be total freedom. See, also, Khadurri, *ibid.*, at 80 and accompanying notes.

specific rules under *Shari'a* would apply. Tabandeh, after noting the impossibility of anything under *Shari'a* that would support the enslavement of any person today, pointed out:

> Nevertheless, should the legal condition for the enslavement of anyone be proven (because he has been prisoner fighting against Islam with a view to its extirpation and persisted in invincible ignorance in his sacrilegious and infidel convictions, or because there did exist legal proof that all his ancestors without exception had been slaves descended from a person taken prisoner conducting a warfare of such invincible ignorance) Islam would be bound to recognise such slavery as legal, even though recommending the freeing of the person and if possible his conversion, in this modern age.[149]

The original intention behind restrictions, under *Shari'a*, of the practice of slavery might well have been total emancipation of slaves and elimination of the institution of slavery, yet this intention has never been realised by Muslim scholars. This is part of their failure or reluctance to bring *Shari'a* into conformity with developments which took place following the formulation of its rules some centuries ago.

Slavery is definitely one of the most hideous of human acts, and because it is morally indefensible it ought to present every Muslim with a moral dilemma which should be addressed by *Shari'a*. The fact that slavery is not expressly prohibited under *Shari'a* and

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149 S. Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London: F.T. Goulding & Co., 1970) at 27.

under the Islamic Declaration, has serious implications within the context of Islamic Africa given the history of slavery on the continent.

These implications, as An-Na'im has pointed out, will not only manifest themselves in "perpetuating negative social attitudes toward former slaves and segments of the population that used to be a source of slaves but also in legitimising forms of secret practices akin to slavery".[150] An example can be found in a recent tragic and disgraceful incident which took place, known as the ad-Daien massacres, ad-Daien being a town in Western Sudan. Hundreds of Dinkas originating from the Dinka tribe of Southern Sudan were massacred, while many others were abducted into domestic slavery by Rizeigats, another tribe in Western Sudan, as a result of a conflict over grazing lands between Dinka and Rizeigat.[151]

The Government failed to deny the allegations of slavery; did not condemn the incident or take any steps to free the enslaved Dinkas. The same attitude manifested itself within public opinion in Northern Sudan. Although it is very difficult to cite *Shari'a* or Islam as a cause of this misery, it is likely that the ambivalent position of *Shari'a*, together with images of slavery in Islamic literature and social stereotypes, have influenced such attitudes.

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150 An-Na'im, *Toward an Islamic Reformation*, supra note 94, at 175.

151 See Ushari A. Mahmud, *et al.*, *Al-Daien Massacre: Slavery in the Sudan* (Khartoum: 1987). Since the publication of this report, Ushari has been the target of the Government and the ruling religious fundamentalist group of Muslim Brothers. For example, he was detained by the present junta days after the coup in 1989, without charges for more than 18 months.

The abolition of slavery, in my opinion, is a matter of vital importance to African Muslims for two particular reasons: (1) the history of slavery on the whole continent; and (2) the fact that slavery was practised on African Muslims, among other Africans, by both Muslims (Arab or European) and non-Muslims alike. My strong belief is that there is a close relationship between the history of slavery and the current treatment of African Muslims in, for example, Arab countries. Let me give more concrete examples: a Northern Sudanese like myself who is often identified as an Arab is referred to in a number of Arab countries as *al-abd al-Sudani* (literally translated a Sudanese slave). A number of examples can be found in the treatment, in the Gulf countries, of nationals from certain Afro-Arab countries, e.g. Sudan, Somalia and Djibouti, as opposed to nationals of other members of the Arab League. The treatment is also evident in the response by most Arab countries to crises within Afro-Arab countries, e.g. the Somali crises, as opposed to crisis in other Arab countries, e.g. the crisis in Yemen.

5. OTHER RIGHTS AND FREEDOMS:

The right to life has been guaranteed by both the Universal and Islamic Declarations.[152] The conception of life in Islam, like many other religions, extends to life after death. This might explain the extension of the right to life,[153] under the Islamic Declaration, to include the

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152 Article I(a) of the Islamic Declaration, and article 3 of the Universal Declaration.

153 Provided for under verses 6:151 and 5:35 of the Qur'an.

protection of the inviolable "sanctity of a [dead] person's body", and the right "of believers to see that a deceased person's body is handled with due solemnity".[154]

The right to privacy includes protection of reputation under the Universal Declaration[155]; while privacy in the Islamic Declaration is dealt with separately from protection of honour and reputation.[156] This separation is based on the parallel treatment of these rights in the *Qura'n*.[157] Islamic jurisprudence is extensive in dealing with various aspects of privacy, which include: protection of honour and sanctity of dwellings noted earlier, prohibition against spying on Muslims,[158] and eavesdropping[159] among other things.

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154 Article I(b) of the Islamic Declaration.

155 Article 12 of the Universal Declaration.

156 Right to privacy under article XXII of the Islamic Declaration, and the right to protection of honour and reputation under article VIII.

157 The protection of honour and reputation is dealt with under two verses: "O ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards become full of repentance for What ye have done." 49:6 "O ye who believe! Avoid suspicion in some cases is a sin: and spy not on each other, nor speak ill of each other behind their backs. Would any of you would like to eat the flesh of his dead brother? Nay, ye would abhor it ... But fear Allah: for Allah is Oft-Returning, most Merciful." 49:12 The protection of privacy of family and home is dealt with under verses 2:189 and 24:28 which states:"If you find no one in the house, enter not until permission is given to you: if you are asked to go back, go back: that makes for greater purity for yourselves: and Allah Knows well all that you do". Ibn Kathir in interpreting this verse cited the Sunna:"No person is to be held guilty for any offense for poking the eye of the one who peaks without permission". *Tafsir Ibn Kathir*, vol. 3, at 227.

158 M. al-Dagmi, *al-Tajassos wa Ahkamihi fil Shari'a al-Islamiya* (The Rules Governing Spying Under Shari'a) (Aman: Gamiyat al-Matabi'i al-Ta'aouniya, 1984) 153.

159 al-Imam al-Gazzali, *Ihya'a Ulum al-Din* (Reviving the Religious Knowledge), Vol 3, 324.

The Islamic Declaration has provided for *the right to protection against torture*,[160] but did not go as far as the Universal Declaration to include within this right protection against cruel, inhuman and degrading punishment.[161] This approach has probably been adopted for compelling reasons. *Huddud* punishments (flogging, amputations and crucifixion) are regarded by most international observers, for example Amnesty International, as cruel, inhuman and degrading. This might well be the intuitive reaction of a large number of educated and moderate Muslims. Yet for most Muslims, these punishments are derived from divine sources and as such are not open for human beings to question.

The right to property,[162] *freedom of movement*,[163] and *the right to asylum*,[164] are all guaranteed under both Declarations. The two Declarations have included a wide variety of economic and social rights. The scope of all rights, under the Islamic Declaration, is to be determined in accordance with the general limitations imposed by *Shari'a*, and highlighted

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160 Article VII of the Islamic Declaration.

161 Article 5 of the Universal Declaration.

162 Article XVI of the Islamic Declaration, and article 17 of the Universal Declaration.

163 Article 17 of the Universal Declaration, and article XXIII of the Islamic Declaration. The only difference between the two is that under the Islamic Declaration, this freedom is based on the conception of the Islamic nation (*umma*) being one nation within which all *Muslims* regardless of their nationality will be free to enter and leave. It is not clear whether this freedom is guaranteed to non-Muslims as well.

164 Article 14 of the Universal Declaration, and article IX of the Islamic Declaration. The Universal Declaration states at article 15 that everyone has the right to a nationality of which she should not be arbitrarily deprived or denied. The Islamic Declaration is silent in this regard, due to the fact indicated earlier, that citizenship and nationality are determined in accordance with subscription to Islam, not to statehood or nationalism.

earlier in the preceding parts, which are based on faith, gender and political opinion (as a recent phenomenon).

The comparison between the two Declarations clearly indicates differences in the conceptions of rights and freedoms, both as to meaning and scope. Although the Islamic Declaration seems to have adopted the language and format of the Universal Declaration, it has failed to resolve the conflict between some basic *Shari'a* conceptions and human rights. There is no doubt that the usage of the terms right (*huqq*) and freedom (*hurriyah*) was mainly influenced by Western human rights literature. I would go further to suggest that this Declaration, as well as most Islamic juristic work on human rights, is itself a reaction to the contemporary international movement towards the protection of human rights and fundamental freedoms.

IV PROPOSED REFORM

The Islamic Declaration has attempted, in its preamble, to assert that human rights were decreed by divine law which does not allow for their curtailment or abrogation.[165] Even though the *Qura'n* was possibly intended to guarantee rights for all human beings, I find this

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165 This practice is common to Islamic human rights literature, as will be indicated later, which "commonly suggests that Islam has had its own human rights tradition ever since it came into being in the seventh century". A.E. Mayer, "Current Muslim Thinking on Human Rights", in Deng and An-Na'im, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, D.C. : The Brookings Institution, 1990) 133 at 138.

assertion in the Islamic Declaration very difficult to accept as historically accurate for two reasons.

The first is that the terminologies of right and freedom were not used, as already indicated in the second part of this study, for the same purpose until the present human rights movement started. Secondly, only after the promulgation of Western influenced standards such as the Universal Declaration on Human Rights, did Muslim scholars show interest in human rights and attempt to relate that to early Islamic history. I have indicated in the present part that cultures are capable of both influencing and being influenced, i.e. it is the effect of the present human rights movement which led to Muslim scholars and jurists being interested in the protection of human rights.

Most of the Muslim scholarly works on human rights surveyed for the purpose of this study contain a blend of three general ingredients: (1) strong emphasis on Islam being first to provide for human rights and fundamental freedoms; (2) keen condemnation of those Muslims (and non-Muslims to a lesser extent) who argue for human rights on the basis of contemporary universal standards; and (3) use of the terminologies of "right" and "freedom" with the same secular meaning given to them under these universal standards.[166] The authors of the Islamic Declaration seem to have followed the same path.

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166 To cite a few examples, see M. Omara, "*Al-Islam wa Huqquq al-Insan: Darorat la Huqquq* (Islam and Human Rights: Necessities not Rights), (Kuwait: National Council for Arts and Culture, 1985) at 5-11, where he dedicated most of his introduction to a condemnation of Muslims who resorted to Western sources and ideas in search for human rights and democracy, and who described Islam as totalitarian; M. R. Osman, *Al-Huqquq*

Despite the Islamo-centric tone in the Islamic Declaration, it does not seem to have been based upon Islamic history, but rather upon Western format and language.[167] By doing this, the authors of the Declaration are actually constructing a model tacitly based, as identified by Tibi, "on the modern European tradition of human rights, which they are injecting into Islam while claiming that Islam was the first to pronounce these rights to humanity."[168]

The idea of human rights, as embodied in the International Bill of Rights, is too powerful to be ignored, irrespective of one's religion and culture. Instead of dedicating most of the efforts towards either denying its validity, or claiming it to be Islamic first (which implies recognition of the idea), it might have been more productive to exert effort in attempting to resolve the conflicts between *Shari'a* and human rights.

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wa al-Wajibat wa al-Alagat al-Dawliyah fi al-Islam (Rights, Duties and International Relations under Islam), *supra*, note 69 at 33-45. M. Fathi Osman, *Huqquq al-Insan bayn al-Shari'a al-Islamiyah wa al-Fikr al-Qanoni al-Qarbi* (Human Rights Between Shari'a and Western Legal Thought), *supra*, note 148 at 11-27. See generally, A'la Maududi, *Human Rights in Islam* (London: The Islamic Foundation, 1986).

167 Ann Mayer has correctly pointed out: "Reluctant to say that following Islam means denying human rights, Muslims who reject the international norms now argue that Islamic sources have supposedly authorised. Islamic schemes of human rights are a recent innovation that appeared only after the articulation of human rights principles in international documents like the Universal Declaration on Human Rights of 1948. Especially in the last two decades, the impetus to conjoin Islamic law and human rights principles has spawned many new theories and publications". Mayer, *ibid.*, at 137-8.

168 B. Tibi, "The European Tradition of Human Rights and the Culture of Islam", in Deng and An-Na'im, eds., *Human Rights in Africa*, supra note 165, at 118.

In other words, Muslims need to explore possible ways of cultural support[169] for human rights and fundamental freedoms to the extent provided under the Universal Declaration.[170] This, as a direct benefit from the cross-cultural perspective elaborated in the first part, will enhance enforcement of universal human rights. The Universal Declaration, it is suggested, has gained a universal character and permanency and as such cannot be challenged as simply irrelevant. Therefore, its authority goes beyond format and terminology to the protection and guarantee of the rights and freedoms it contains.

This universal character which the Universal Declaration has gained moves it from the monopoly of any specific culture or legal tradition. The right of Muslims, equal to that of other cultures, to assert cultural identity entitles them to their share of contribution to the "effectiveness" of these rights and freedoms. This right is not to be seen as in a state of collision with universal standards. It is my belief that allowing for cultural contributions will consolidate the universal character of the Universal Declaration of Human Rights.

It may prove to be easier to state these preceding arguments than to deal with the practical reality. First, the existence of the right to assert cultural identity in human rights also requires

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169 The pursuit of cultural support is not to confused with uniform application of human rights. See, for example, the discussion, in Chapter Five, on the application of the right to participate in public life, where I argue against extending the application of the right to those who participated, at a constitutional level, in former regimes.

170 Because the language of rights, as argued at the beginning of this part, has been adopted by the Afro-Islamic culture, the formulation of rights under the Universal Declaration as such makes a good starting point for the debate on the protection of human rights. The scope of these rights, however, is to be culturally construed. In other words, the adoption of the Universal Declaration does not render it a "trump" over cultural constraints.

respect from other cultural participants in the formulation as well as the implementation of universal human rights. This cannot be assumed, as it depends on a complex of political and economic factors which, by their nature, are not predictable.

Secondly, and because of the nature of *Shari'a*, Muslims are not likely to tolerate (let alone accept) proposing a completely secular code of human rights.[171] Any solution, therefore, is to avoid proposing a completely secular base of rights, and as well total rejection of these rights and freedoms as advocated by Khomeini.[172]

Muslims everywhere are witnessing a rapid growth in the political usage of religion, particularly the interplay between *Shari'a* and human rights. Muslim scholars, within and outside the Muslim world, are continually echoing the same political arguments as Islamic fundamentalist who have gained power in some of the Islamic countries such as Sudan and Pakistan. These fundamentalists have a political, as well as an economic interest in relating human rights to Islam and presenting their vision as the only authentic source of interpretation

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171 Take the example of a person who is sentenced to amputation of the right hand because he committed theft (one of the *huddud* offenses). This person does not need to steal in order to survive and is tried and duly sentenced by a competent court. This punishment is based on divine sources (e.g. 5:38) and as such can not be condemned as cruel, inhuman and degrading.

172 Khomeini is quoted on several occasions to have advocated total rejection of the "satanic" conceptions of human rights: "What they call human rights is nothing but a collection of corrupt rules worked out by Zionists to destroy all true religions"; "... collection of mumbo-jumbo by disciples of satan"; and commenting on a report by Amnesty International: "Be aware that all satanic powers and all their allied agencies such as Amnesty International and other organisations have all been united to stifle this Islamic Republic here and not to allow it blossom". *The Cry of Justice: A Collection of the Statements of Imam Khomeini on Human Rights* (Tehran: 1988) at 23-4.

of these rights and freedoms. Several reasons can be cited as evidence of this political and economic interest.

First, by appealing to Islamic sentiments and emotions, fundamentalists are able to seek legitimacy for their political (repressive) strategies as well as for the growing "Islamic" financing institutions. Resistance to these strategies through human rights protection are decried as Western, Christian and anti-Islamic, regardless of the fact that some of these rights are guaranteed under Shari'a. *Second*, it is submitted that the attempts by political Islam to relate human rights to Islam can only be seen as a bid to capitalise on the appeal and prestige which the ideal of human rights actually enjoys within the Islamic world.

Third, the relationship between Islam and rights can also be used to undermine universal standards and, therefore, to facilitate a government's oppressive policies. *Fourth*, relating human rights to Islam can also be used as fuel for emotionally charged messages aimed at eliminating the voices of moderate and enlightened Muslims and any political opposition. For these reasons, I think the Islamic Declaration is not to be taken other than as a "public relations" document and is not to be regarded as a basis for a serious reformation of "Islamic" human rights.

Muslims must resolve some of the serious conflicts between traditional conceptions of *Shari'a* in order to maintain a reasonable minimum of human rights. This would both contribute to

the cultural legitimacy of human rights and fundamental freedoms and would ease the pressure on the inhabitants of the Islamic world who continue to suffer under repressive governments, some of which claim to be Islamic.

There are some indicators which may signal a possible move towards broader recognition of human rights within Islam. As indicated earlier, the Qura'n has provided for the protection of privacy, personal security, property, and limited rights of public participation and expression. Muslim scholars have actually recognised the importance of human rights, even though they either claim these rights to be Islamic in origin or they engage in the formulation of declarations of rights similar (if not modelled upon) universal standards. The Muslim public will soon realise, as is already the case in Sudan, the moral bankruptcy of those who vehemently oppose the present universal settings of human rights. Most obvious is the artificial incorporation of secular (Western) articulations and meanings of "right" and "freedom" within Islamic jurisprudence. These signs are far from enough to constitute the basis for protection of human rights and freedoms within *Shari'a* and the Islamic world. There are some major issues which need urgent reform if Islam is to participate in the process of cultural support for universal human rights. Three main issues need be addressed: (1) Muslims must accommodate the reality of the nation-state (within which membership is to be based on citizenship rather than subscription to Islam) instead of a universal state; (2) they need to guarantee the principle of equality regardless of faith and gender; and (3) they need to

respond constructively to the complications arising out of the implementation of *huddud* punishments. These three trajectories of reform will each be discussed briefly.

A. The Nation-State and Citizenship Rights

Contrary to what most Muslims believe of Islam, that it is an evolving phenomenon realised in their daily life and conduct, Islam has been presented in juristic works as a static constellation of fixed meanings. No better example can be found than in the inability of Islamic jurisprudence to accept and accommodate the reality of the nation-state instead of a universal state. The fact of the matter is that there are currently a number of Islamic states[173] founded and organised on a secular basis and relying heavily on secular sources to organise relations among themselves.

Most governments in Islamic countries resort to *Shari'a* only internally, and typically when they find it beneficial in their attempts to consolidate their use and abuse of power. Recent resorts to impose *Shari'a* in some of these countries, such as Sudan and Pakistan, arose not out of religious piety or duty but rather as a convenient means of suppressing political opposition to these governments. Since *Shari'a* was designed to best suit a universalist model of the state, which was relevant in its historical context, it ought now to be reformed to confront new realities.

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[173] Islamic states denote these nation-states with Muslim majorities and not necessarily with only Muslim inhabitants.

There are no objective constitutional safeguards for limitations on the actions of rulers under the traditional Islamic state, but rather these are limited only by the ruler's conscience and piety. Such limitations of conscience and piety are not in any way publicly or logically ascertainable. The absence of objective limitations on the ruler's powers undermines the well being of the ruled, while publicly articulated human rights can form an integral part of that well being. One vital step towards achieving these objective limitations, is by clearly identifying the limited rights provided for in Shari'a. It is important to keep in mind that neither the *Qura'n* nor *Sunna* provided for a particular type of political organisation. Therefore, proposing total acceptance of and working with the notion of the modern nation-state, is appropriate and feasible. In working with this notion of state, we should bear in mind the African elements identified in the preceding chapter. Citizenship rights within the nation-state can no longer be based on religion or gender. This leads to the second key issue for reform, the acceptance of equality rights.

B. Equality

It has been stated earlier that *Shari'a* should not apply to non-Muslims, because it is based on religion which makes it authoritative only for those who subscribe to this religion. In other words, *Shari'a* has no moral force over non-Muslim citizens, and need not be recognised by

them as part of the regulatory process within non-Muslim social networks. It possesses no normative character for non-believers.

As for Muslims, present scholarly interpretations of *Shari'a* discriminate against women[174], and, like all religious and other normative frameworks, are susceptible of political manipulation. The only way to accommodate these concerns is through sustaining a minimum standard of rights and freedoms to be guaranteed to citizens within a nation-state. Universal standards of human rights can play an essential role in forming, as well as sustaining, this minimum.[175] This suggestion is likely to collide with standards derived from *Shari'a*, relevant principles of which are based on divine sources. The same problem arises in the following section.

C. Huddud Punishments

Huddud, under *Shari'a*, refers to a limited group of offences strictly defined and punished by the express provisions of the *Qura'n* and *Sunna*. These sources provide for an array of corporal punishments which include flogging, amputation, public executions, crucifixion and stoning to death. As indicated earlier, they contradict the right to protection against and

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174 I have to draw attention to the fact that this opinion, as well as many of the other opinions expressed in this study, are not very popular with Muslims. In fact, most of these ideas can, and are likely to be, construed as heretic.

175 I argue, in Chapter Four, for the application of the African Charter on Human and Peoples' Rights as a necessary tool for the protection of human rights within Islamic Africa. The discussion of some rights under the African Charter, in Chapter Five, aims at illustrating some of the possible ways of attaining a universal minimum of human rights standards.

freedom from cruel, inhuman and degrading punishments, yet it is difficult (if not impossible) for Muslims to advocate their abolition because they are not allowed to question the sources upon which these punishments are based.

How to resolve the difficulty facing implementation of human rights arising out of the sanctity of the sources of *Shari'a*? Any proposed reform ought to stumble, as indicated earlier, on the inflexibility of the divine sources upon which rules of *Shari'a* are based. The work of the late Muslim reformer Ustaz Taha is a vital contribution in addressing this difficulty.[176] The use of Ustaz Taha's work to reform the *Shari'a* position on human rights was first set out by one of his most articulate followers, An-Na'im.[177]

Ustaz Taha viewed *Shari'a* as an historically conditioned interpretation of the *Qura'n* and the *Sunna*, which was undertaken by earlier jurists who were influenced by the prevailing social, economic and political realities. One step towards reform is to challenge jurisprudential techniques used by these jurists and embodied in *Shari'a*.[178] This approach will help in breaking the monopoly of the traditionalist scholars on the interpretation of the *Qura'n* and

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176 See generally, M.M. Taha, *The Second Message of Islam*, An-Na'im translation, (Syracuse: Syracuse University Press, 1987).

177 See generally his works cited in notes 91 and 94.

178 An-Na'im, *supra*, note 50 at 48. See also A. Hasan, "On Human Rights and the Qura'nic Perspectives" (1982) 19 J. of Ecumenical Studies 51.

Sunna, and at the same time give room for accommodating present realities of the nation-state and cultural diversity within Islamic Africa.

Another and far more complicated step of reform is needed to address the difficulty arising out of the restrictive *Shari'a* approach to human rights which are based on express provisions in the *Qura'n* and *Sunna*. The mere fact of questioning these scriptural limitations is sufficient to stir up anger and trouble among Muslims. To avoid more complications, reform of this aspect of *Shari'a* must derive legitimacy from and be based on the *Qura'n* and *Sunna*.

The *Qura'n* provides for general as well as specific verses which deal with different aspects of public life. According to Ustaz Taha this variety in texts is systematic, not arbitrary, and linked with both timing and circumstances of the revelation. Several techniques were developed for resolving contradiction between verses of the *Qura'n*. Among these techniques is what is known as *naskh* (abrogation of verse(s) in favour of another). This technique is widely accepted, and upon it several rules of *Shari'a* affecting public life are based.[179] It was also used to abrogate some parts of the revelation of Mecca in favour of the revelation of Medina. It can, as well, be used to resolve contemporary complications, limitations on human rights included, raised by the application of *Shari'a*.

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179 An-Na'im, *Toward Islamic Reform*, *supra*, note 92 at 21.

These proposed reforms are not likely to be well received by certain powerful players in the Islamic World. Therefore, a political struggle, within the Islamic communities and countries, is definitely to be initiated as part of a "global" struggle for human rights and fundamental freedoms.

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Improving the enforcement of universal standards of human rights will require addressing the political, social and economic factors which lead to their violations. Special attention, however, should be given to enhancing these standards through local cultural support. Cultures have an equal share of contribution and responsibility to improve the human rights situation. The aim of the cross-cultural perspective is to provide a forum through which cultures can initiate a dialogue in order to advance their support for the protection of human rights.

This study has explored *Shari'a* with a view to assessing possible Islamic contributions to the protection of human rights. The conceptions of "right" and "freedom" do not seem to have an indigenous origin in *Shari'a*, as the meanings given to them departed from the linguistic (Arabic) meaning and are based on secular legal traditions. Yet, "right" and "freedom" have been used by Muslim scholars in their endeavours to formulate human rights under *Shari'a*.

An example of these endeavours is the Islamic Declaration. This Declaration is modelled after the Universal Declaration on Human Rights, with the exception that the scope of rights under the former is limited by *Shari'a*. This limitation of *Shari'a*, in fact, makes the rights under the Islamic Declaration radically different and far less conceptually powerful than their counterparts in the Universal Declaration. These differences resulted primarily from *Shari'a* conceptions limiting equality and non-discrimination rights and the freedom of thought, conscience and religion. The *Shari'a* treatment of the institution of slavery and issues of public participation, as well as the limited scope of most of the rights and freedoms under the Declaration are further sources of divergence between the universal and the posited "Islamic" standards.

Any reform proposal must accommodate the reality of the nation-state instead of a universal Islamic state; citizenship rights; equality; and the imposition of *huddud* punishments. In order for this reform to be effective, it has to advocate two distinct approaches. First, challenging techniques of interpretation used by *Shari'a*, suggesting instead a more enlightened interpretation of the *Qura'n* and *Sunna*. Through this interpretative reform, Muslims can then draw out their own at least partially indigenous standards of human rights if necessary. Secondly, reforms must recognise the cultural differences among Muslims themselves. This second point is of particular importance since I have emphasised at the beginning of this

chapter the particularity of Islam within the African context. The following chapter explores the nexus between relevant "Islamic" and "African" conceptions of rights and freedoms.

Chapter Four

Human Rights and the African Charter In Islamic Africa

> The time has come for our own theologians to take up the cudgels of the fight by restoring a meaning and direction in the black man's understanding of God. *No nation can win a battle without faith, and if our faith in our God is spoilt by our having to see Him through the eyes of the same people we are fighting against there obviously begins to be something wrong in that relationship.* ... I would like to remind the black ministry, and in indeed all black people that God is not in the habit of coming down from heaven to solve people's problems on earth.
>
> Steven Biko*

As is evident from the preceding chapters, there are points of agreement and areas of contention when it comes to human rights in Islamic Africa. This part aims at clearly articulating what will constitute human rights in Islamic Africa. My approach is based on my belief that we need first to articulate areas of agreement and regard these as the core of human rights in this context and as well the basis for any universal standards.

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* Emphasis added. Steve Biko *I Write What I Like: A Selection of his Writings*, Aelred Stubbs, ed., (London: Heinemann (African Writers Series), 1979) 60.

The second step will be highlighting areas of difference and difficulty with a view to identifying possible solutions. I will deal with both steps as part of the discussion on the *African Charter on Human and Peoples' Rights* (hereinafter referred to as the African Charter).

Scholarship on human rights in Africa tended to focus on reporting, treaty obligations and "traditional" concepts of human rights. International human rights reporting on Africa emphasised violations of civil and political rights. Such a concentration not only ignores the context of the international political economy, but also provides a static and one-sided view of the reported country. The nature of cultural and historical details surrounding these violations needs to be explained and included in such a human rights evaluation process. In order to understand human rights in Africa, one would have to distinguish between Western liberals and African scholars.

I noted earlier, in the first chapter, that Western liberalism, in its origin and given its earlier association with colonialism, was loaded with racist and colonialist connotations and references. Hence, western liberals working on human rights in Africa are likely to be viewed with that history in mind. It is a common view among African colleagues that Western liberals are reminiscent of the old colonial Christian missionaries, i.e. human rights missionaries. I am emphatically not of the opinion that Western liberals should refrain from writing or reporting on human rights violations in

Africa. Instead, I am of the opinion that their writing and views should only carry a weight proportionate to the degree of their sensitivity to the cultural complexities involved.[1] No one should underestimate the fact that undertaking cross-cultural moral evaluations is far from being an easy endeavour.

Africans, on the other hand, face a number of problems in dealing with human rights in Africa. Firstly, they often suffer the same problems as Western liberalism since they are often more immersed in Western liberalism than in the legal implications of their local cultures. Muslim Africans are an exception in this regard, at least to some degree, because of the fact that Islamic family laws are part of their cultural life and because of the fact that the religion itself does not accept a clear distinction between the legal and other aspects of life. Secondly, in dealing with human rights, African scholars have appealed to one of three ideological orientations: Western (liberal), socialist (revolutionary), and traditional (communitarian). Each tradition contains its own constraining influences

Appeals to Western liberalism have tended to focus on legal codification as the solution to human rights violations in Africa. Post-colonial Africa has witnessed

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[1] In our attempt to seek cultural sensitivity, I find what Halstead stated, in describing the elements of cultural relativism, particularly enlightening: "It is impossible to gain more than a superficial understanding of a set of cultural beliefs without being in some way connected to them, and therefore, a selection of their most important elements can only be made, and presented, by someone on the inside." J. Halstead, "To What Extent is the Call for Separate Muslim Schools in the UK is Justifiable? Part One", J. of Muslim Education Q. 5 at 9

enormous developments in this regard. Most of English Africa, for example, provided for a bill of rights in post-independence constitutions. The courts interpreted these bills in accordance with colonial (Western) legal standards.[2] The jurisdiction of the Courts was, however, severely limited following the revocation of most of these bills of rights.[3]

Those who shared a strong socialist belief, or even a belief in a socialist democracy in traditional Africa, have failed to undertake a thorough analysis of traditional African political and economic arrangements. This is evident in ignoring prevailing social and political conditions prevalent in post-colonial Africa. In other words, this group underestimated the impact of colonialism on African societies.

The third group of African scholars believe that human rights in Africa are community based and hence provide no place for recognising the individual as an independent entity worthy of protection. This belief has often lent support to Western anthropologists' claims that African societies do not possess the very conception of

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[2] See, for example, B. O. Nwabueze, *Constitutionalism in Emergent States* (London: Hurst and Co., 1973); and T. O. Elias, *The Judicial Process in Commonwealth Africa* (Legon, Ghana: University of Ghana Legon, 1977).

[3] A. Aguda and O. Aguda, "Judicial Protection of some Fundamental Rights in Nigeria and in the Sudan before and during Military Rule" (1972) 16 Journal of African Law 130.

rights and freedoms.[4] One of the conclusions of the second chapter was that the African cultural context is neither exclusively communalistic nor individualist. It is an amalgam of both. The need is therefore obvious to focus the debate on the actual cultural realities of the continent.

Africa has changed as a result of the advent of Islam, Christianity (colonialism) and the nation-state. It is more useful and realistic to look into the African cultural context as it has been altered by these factors; these alterations form an integral part of African culture today. This African cultural context in itself varies internally depending on the religion, language, and legal and political system adopted within given states. There are, however, five general legal (constitutional) human rights factors which can confidently be described as shared by most participants in the African cultural matrix:[5]

(1) Most independence constitutions affirm a number of civil and political rights.[6]

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[4] These include the examples of Howard, discussed in the first chapter by way of illustrating Western essentialism in human rights, and Donnelly. See J. Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985).

[5] Based on the remarks articulated by the Nigerian civil rights activist Aguda. T. Akinola Aguda, *Human Rights and the Right to Development in Africa* (Lagos: The Nigerian Institute of International Affairs, 1989) 30. See, also, Asian-African Legal Consultation Committee, *Constitutions of African States*, Volumes 1 &2, (Dobbs Ferry, New York: Oceana Publications, 1972); and Egyptian Society of International Law (ESIL), *Constitutions of the New African States: A Critical Overview* (Cairo: ESIL, 1962).

[6] E.g. Chapter V of the Kenyan Constitution of 1969; Articles 8-18 of the Moroccan Constitution 1962; Chapter III of the Nigerian Constitution 1963; Part II of the Senegalese Constitution 1963; and Chapter Two of the 1956 Sudanese Transitional Constitution.

(2) Soon after independence elected bodies were replaced by successive military dictatorships.[7]

(3) Most of these dictators embarked on massive human rights violations, some in a flagrant manner, others with some discretion.

(4) Constitutional human rights provisions were either abrogated or simply ignored.

(5) Most of the rights provided for were themselves "elitist in their content and application."[8]

Political factors which contributed to the oppression of the majority of the African population ranged from colonialism, post-colonial dictatorships, traditionalism, political manipulation of religion. The reader might begin to get the impression that I am beginning to lay more emphasis on the "African" cultural context than the "Islamic", while most leading Afro-Islamic writers will tend to do otherwise.

There is a tendency, among human rights writers and scholars, to separate the "Islamic"[9] from the "African".[10] The intricate relationship between Islam and Arabic

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[7] E.g. the Sudanese elected Government was overthrown, two years following independence, by Gen. Abboud's coup.

[8] Aguda, *Human Rights and the Right to Development in Africa*, supra note 5, at 30.

culture, the history of Islam and the colonial experience have created this state of apparent separation between the Islamic and the African. In order to understand the nature of Afro-Islamic culture and its conception of human rights, one needs to understand the nature of Islam in Africa. Some of the important elements of this culture include:

(1) There is an increasing focus on Islam and its impact on law and politics for a host of different reasons: (a) the increase in both the size and distribution of the Muslim population in Africa and the rest of the world; (b) increase in the political use and manipulation of Islam; (c) increasing gap between the predominant (Western) culture of commercialism and consumerism and Islamic values; and (d) the increase in violence and negative stereotypes against Muslims.[11] This heightened focus of attention has lead either to ignoring the existence of the peculiarities of African Islam,[12] or to assuming that Islam in Africa is no different from Islam in Iran or in the Middle East.

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9 E.g. the work of An-Na'im, who focuses mainly on the impact of Shari'a on modern international law of human rights. See, A. A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse University Press, 1990).

10 E.g. C. E. Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organisations* (Philadelphia: University of Pennsylvania Press, 1995); and R. Howard, *Human Rights in Commonwealth Africa* (Totowa, NJ: Rowman and Littlefield, 1986).

11 Reckless blaming of the Oklahoma bombing on Muslims, the initial ambivalence towards the plight of Bosnian Muslims, Israeli attacks on Southern Lebanon, and the recent surge in anti-Muslim nationalist politics in Tanzania are just a few examples.

12 Highlighted at the beginning of the third chapter of this study.

(2) There seems to be a generalised sub-division of Africans into Arabs/North Africans and Black/Sub-Saharan Africans. Yet, the distinction between Arab Africans and black Africans is often illusive.[13] While the Arabic identity is often a linguistic and self-perceived one,[14] the "black" African identity is often grounded in colonial division of the continent and associated with Christianity. While the number of African Muslims is substantial, the fact remains that the majority of them are not of Arabic origin regardless of their linguistic background. This leads to the next point on the negative impact of Arabicisation on African Islam.

(3) African Muslims are still struggling to properly understand and situate Islam in contemporary Africa.[15] Most importantly the need to better understand the relation between the African and the Arabic, and between both and Islam. *First*, being a

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[13] Gonidec is of the opinion that the alleged distinction between North Africa and sub-Saharan Africa has been used *abusivement*. P. F. Gonidec, "La Crise Africaine: une Crise de l'Etat" (1995) 7 African Rev. of Int'l & Comp. L. at 6. Shiekh Anta Diop's work, which aims at showing the cultural unity of the continent, is also useful in this regard. See, for example, *Unite Culturelle de l'Afrique Noire* (Paris: Presence Africaine, 1962); and *Pre-colonial Unity of Black Africa: A comparative study of the political and social systems of Europe and black Africa from antiquity to the formation of modern states* (Westport, Conn.: L. Hill, 1987).

[14] Examples include Northern Sudanese, Somalis, Tuareqs of West Africa, Berber of North Africa and Nigerian Fulanis and Hausas who all identify themselves as Arabs and at times claim to be descendants of the Prophet or one of his companions.

[15] This must be viewed as part of Africa's continuing search for identity which lead eventually to pan-Africanism. See, Colin Legum, *Pan-Africanism: A Short Political Guide* (New York: Praeger, 1965); and R. Makonnen, *Pan-Africanism from Within* (New York: Oxford University Press, 1973).

Muslim implies acceptance of the fundamentals of the religion which are shared with other Muslims world-wide. Hence "to be a Muslim does not mean to be an Arab, nor does it involve a replacement of African values by Arab ones."[16] This is an integral part of the cultural make-up of a large number of Africans. The same is true for Christians and followers of traditional beliefs. An effective realisation of human rights could be achieved by relinquishing competing negative mutual treatment and perceptions by both Muslim and Christian Africans. In other words, Christianity in Africa is no longer a religion which should be principally associated with colonialism, nor is Islam to be principally associated with the Arabs and slave-trade.

The *second* relationship which African Muslims need to assess is the uneasy link between Islam, the Arabs and the Slave-trade. The history of the Arabs in Africa is linked to slavery in the past and claims of racial purity and superiority in the present. Although Islam was spread by Arabs and non-Arabs[17] alike, association of Islam with the Arabs has had a negative impact on African Muslims. The history of slavery (which was practised on African Muslims at times) is one of these negative effects. The second impact is to be found in the prejudiced attitudes of Arabs towards

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16 Hatimi M. Amiji, "Religion in Afro-Arab Relations: Islam and Cultural Change in Modern Africa" in UNECSO, *Historical and Socio-Cultural Relations Between Black Africa and the Arab World from 1935 to the Present* (Paris: UNESCO, 1984) at 101. As will become clearer in the next point, I do not share Amiji's assessment that "Islam in Africa does not exist as a distinct African version separate from Islam in the Arab World." *ibid.*

17 Amiji states: "The Malinka passed it [Islam] to the Songhay along the bend of the Niger, who in turn transmitted Islam to the Hausa of modern Northern Nigeria. Thus Islam was played from West to East in the great empires of medieval West Africa." *ibid.*, 105.

Africans.[18] Whatever the relation between Arab and African Muslims, Islamic Africa has two distinct features:

(a) A tolerant and locally responsive brand of Islam, instead of a rigid set of doctrines and dogma similar to the version developed in Arabia during the Abbasid and Ummayad dynasties. Islam spread largely through cultural and trade interactions and not through the use of violence. "Solidly implanted in Africa, Islam became a local religion."[19] It incorporated existing customs, norms and mysticism.[20]

(b) The normative impact of Islam on the African legal systems is affected by Africa's colonial experience. Colonialism has affected a tremendous change in African culture, as noted in the second chapter, through the introduction of both the nation-state and

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18 There are a number of examples attesting to these attitudes. The official Arab position on the conflicts in the Western Sahara, Somalia and the Southern Sudan and other African conflicts is a manifestation of these attitudes. This becomes more evident when one compares this position with the Arab position on the Palestinian question or their response to the Gulf Crisis. Another example is to be found in the treatment of Somali refugees by Saudi Arabia and Yemen. Non-official attitudes can be found in the treatment of Sudanese in the gulf and other Arab states, e.g. a Sudanese is called abd al-Sudani (Sudanese slaves) in Gulf states and asmar (brown) in Egypt.

19 "Summary record of the proceedings of the Symposium on the Historical and Socio-cultural Relations between black Africa and the Arab World from 1935 to the Present", Paris 25-27 July 1979, UNESCO, *Historical and Socio-Cultural Relations Between Black Africa and the Arab World*, supra note 16, at 203.

20 I have noted the nature of Islam in Africa in the introduction to the third chapter of this study. See, however, Kaba, *The Wahhabiyya - Islamic Reform and Politics in French West Africa* ; and Chiekh H. Kane, *Ambiguous Adventures* (New York: Macmillan, 1974), where he described Islam as "the religion of the West African heart", at p. x.

colonial legal regimes. When the British colonised Africa, they devised a three tier legal system in most of their colonies: extra-territorial law (British common law); customary law and laws governing personal matters and inheritance. This has resulted, as will be exemplified by the case of the Sudan, in significant cultural alterations. While common customary laws were merging together, the laws governing personal matters and inheritance remained largely religious and indigenous.

The place human rights occupied in African culture underwent various ideological and political swings similar to those ascribed to by African scholars. First was the concern of independence movements primarily with political rights both during liberation struggles and for some time. The denial of the colonial authorities of civil and political rights was based first upon their economic exploitation of the continent and secondly upon the assumption that Africans did not reach a level of "sophistication" necessary for the enjoyment these rights.

An important alteration in attitudes took place following the dramatic change in the nature of the post-independence African ruling regimes which became alarmingly repressive.[21] Most of the human rights violations during this period took place in the name of either economic development, national security or both. In reality, however,

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21 This change was prompted either by a coup d'etat or by a change in mentality of the post-independence ruling elite itself.

these violations took place , and are still taking place, due to what I earlier described as the "rule by all means principle" subscribed to by most of the African ruling elite. The fallacy of the economic development and national security argument should have been obvious from the colonial experience which ironically resorted to similar arguments.[22] Another unfortunate consequence of totalitarianism in Africa is that adherence to the "rule by all means principle" favoured certain ethnic and religious groups to the exclusion of others. In so doing, repressive regimes were nonetheless receiving all the help they needed from former colonisers and the leading superpowers.[23]

The third swing in attitudes and practices in relation to human rights took place at different levels: traditional and religious. We alluded to the traditional aspects in the second chapter of this study. The religious swing is more evident in Afro-Islamic countries than in the rest of the continent. Political power is claimed on a religious basis, often resulting in political repression and the abrogation of human rights. Religion, in today's Africa, represents a strong normative motivator for both adoption and respect of social regulation be it law or social etiquette. The construction of human rights must be articulated with this fact in mind.

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22 As one African writer brilliantly puts it: "The rule of law itself will not guarantee economic development anywhere, but one can almost guarantee that without the rule of law there can be no sustained economic development." Ibrahim J. Wani, "The Rule of Law and Economic Development in Africa" (1993) 1:1 East African Journal of Peace and Human Rights 52 at 77. See, also, M. Arnold, "Africa in the 1990s" (1991) The Fletcher Forum of World Affairs 9 at 17.

23 Aguda, *Human Rights and the Right to Development in Africa*, supra note 5, at 30. See, also, W. J. Breytenbach, "Inter-Ethnic Conflict in Africa" (1975) 1 Human Rights Case Studies 312.

These shifts and swings in political context and attitudes towards human rights form an important part of what would be conceptualised and then construed as African human rights. It is with this background in mind, that I propose to discuss the African Charter on Human and Peoples' Rights.

I. The African Charter within the Afro-Islamic Context

The following is a brief analysis of the African Charter on Human and Peoples' Rights within Islamic Africa. The African Charter has been accepted and ratified by the majority of African states. I have indicated in the preceding two parts that both Islamic and traditional Africa have known international obligations and accepted their binding effect. One might therefore conclude that in Islamic Africa the African Charter is binding as a matter of accepted obligations. More specifically, the provisions of the Charter that do not contradict Shari'a are binding as a matter of religious belief.

A question might arise in this regard: is the African Charter a true reflection of the African (including Islamic aspects) culture, or is it rather an imitation of the Western-Universal standards? To answer this question, one must recall the earlier parts of this thesis on the Islamic and African legal cultures and their attitude towards human rights. The Charter is a true reflection of African legal culture; it provides for a set of

rights and freedoms similar to those stated in various international and regional instruments, as well as containing distinctively African features. The distinctive features of the African Charter include the right to self-determination, peoples' rights and the explicit recognition of social duties. One other distinct feature of the Charter is its state-oriented enforcement machinery which is more promotional than protective. I am of the opinion that one of the Charter's major shortcomings is its enforcement mechanism. While the main focus of this study will, therefore, be on national implementation of the Charter, a brief examination of the implementational aspects of the Charter itself is necessary to demonstrate why national implementation is vital to a meaningful implementation of the African Charter's provisions.

II. Implementation of the African Charter

The nature of the implementation machinery under the African Charter is discussed in the second Chapter of this study. One of the conclusions reached is that the African Commission is weak and cannot be expected to play a significant role in the protection of human and peoples' rights under the African Charter. This is why it is important to focus on the national level in our attempt to seek protection of these rights.

The moral strength of the African Charter's principles may justify the Commission.

The adoption of the African Charter, and the principles contained therein, is an important step since these principles constitute moral and legal obligations on African

states.[24] These principles will still remain in debate, shaping behaviour at least implicitly, following the demise of the current African regimes. The Commission's work will likely improve tremendously following improvements in the nature of African systems of government. As many African regimes are currently challenged, one hopes that this will soon lead to some changes in the Commission. Current developments might even lead to the introduction of a judicial arm into the African human and peoples' rights system.

III. A Brief Outline of the African Charter

The main assumptions underlying the promulgation of an African Charter are indicated expressly in the preamble.

First Assumption: "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'".[25] African states, therefore are to work towards the achievement of a better life for their inhabitants and to promote international co-operation on the basis of the principles stated in the UN

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[24] It is not to be forgotten here that formal recognition of the of the rights and freedoms guaranteed under the African Charter, or any other human rights document for that matter, are an ideal far from the actual observance of these rights and freedoms. Keba Mbaye states: "[b]etween the avowal of the rule of law and its effective realisation, between the provision of human rights and their actual enjoyment, there is an awkward and often an abysmal gap." Keba Mbaye, "Opening Remarks at the International Commission of Jurists on Development, Human Rights and the Rule of Law", The Hague, 27 April - May 1, 1981, (Pergoman Press, 1981) p. 11.

[25] Paragraph 3 of the preamble. This was borrowed, word by word, from the Charter of the OAU. See the second paragraph of the Preamble to the Charter of the OAU, I. Brownlie, ed., *Basic Documents on African Affairs* (Oxford: Clarendon Press, 1971) 2.

Charter and the Universal Declaration of Human Rights.[26] It is evident from the second part of this study that this principle of equality is in contradiction with Shari'a's limited equality and non-discrimination principle. The limitation is based on the strict classification of individuals, under Shari'a, on the basis of gender and religion.

How to alleviate the apparent contradiction between the African Charter and the treatment of women and non-Muslims under Shari'a, depends on how successful are we in properly situating this principle of Shari'a within the African context. In situating the principle of equality under Shari'a, one must consider the following elements of African culture:

(a) The particular make-up of the population of the nation-state in Africa necessitates a broad criteria for incorporation of all inhabitants regardless of their religious or ethnic affiliation. This requires a simple task of recognising the impact of the colonialist policies of random demarcation of what would become African nation-states. Ethnic allegiance is by far one of the most relevant factors affecting the efficiency of any normative idea. Religious allegiance, on the other hand, as influential as it is, is also affected by this ethnic composition of African nation-states. Preferential recognition of one ethnicity or religion over the other has lead to the current state of crisis within the

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26 Para 4. When drafted, the Charter was supposed to have been based on the principle that "it should reflect the African conception of human rights, [and] should take as a pattern the African Philosophy of law and meet the needs of Africa." Amnesty International (AI), *A Guide to the African Charter on Human and Peoples' Rights* (London: AI, 1991) 11.

continent. The principle of equality under the African Charter is to be interpreted as forming the basis of citizenship in Africa. An-Na'im goes so far as proposing reform of the idea of citizenship under Shari'a.[27] I, on the other hand, do not see this as a needed exercise within the African context, where Muslims and non-Muslims share interchanging allegiances, cultural commonalties and historical entitlements.

There is no doubt that equality (*mosawa'a*), as a principle, is recognised as a basic value grounded in both the Qura'n and the Sunna.[28] The Qura'n states:

> O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well-acquainted (with all things). [29]

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[27] See, A. A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, supra note 9, "Citizenship", 84-6.

[28] M. S. El-Awa, *On the Political System of the Islamic State* (Indianapolis, Indiana: American Trust Publications, 1980) 110; A. Awda, *al-Tahri'i al-Ginai'i al-Islami* (Islamic Criminal Law), the theory of equality under Shari'a, volume I, 316-341; and A. Mutwali, *Mabadi Nizam al-hukm fi Islam: ma'a al-mugarana bil-mabadi al-dutoria al-haditha* (The Principles of the Islamic Political System: A Comparative Study with Modern Constitutional Principles) (Alexandria, Egypt: Minsha'at al-Ma'arif, 1978), the principle of equality, 385-406.

[29] The Holy Qura'n, 49:13.

The bases of equality are, therefore, two fold: all human beings have the same origin;[30] and *tagwa* (piety and God fearing) is the only merit for distinction between human beings. Piety cannot, however, be ascertained by human beings, so it is not to be used as a ground for classifying individuals. El-Awa writes:

> [I]t *[Taqwa]* has no effect on the application of the principle of equality on peoples' lives. This is because the place of superiority through *Taqwa* is in the Hereafter and not in this life, and in front of Allah and not the people. It is inconceivable, therefore, that such superiority will have any effect on the application of rules of law to people.[31]

Although the "message" of equality is intended for all human beings,[32] the scope and implications of equality are to be "understood and judged within the framework of the

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30 The Prophet is reported to have said, in his farewell sermon: "O people, indeed your Lord, may He be praised and exalted, is One, and indeed your father (Adam) is one. Indeed, no superiority of an Arab over a non-Arab, and indeed, no superiority for a red man over a black except through *taqwa* (fear of Allah). Have indeed conveyed to you the message? ... Let those who are present convey it to the ones who are absent." Cited in El-Awa, supra note 28, at 111.

31 El-Awa, *ibid.*, at 112. The Prophet said in his farewell sermon: "O people, indeed your Lord, may He be praised and exalted, is One, and indeed your father (Adam) is one. Indeed, there is no superiority of an Arab over a non-Arab, and indeed, no superiority for a red man over a black except through *taqwa* (piety). Have I conveyed to the message?" The people present responded "yes". Then the Prophet repeated: "Let those who are present convey this message to those who are absent." The Prophet was also reported to have said, in response to his companions' intervention on behalf of a noble woman who was accused of theft, that: "By Allah if Fatimah the daughter of Muhammad had committed theft I would have cut off her hand." Al-Awa, *ibid.*, 112.

32 Commenting on the verse 49:13 of the Holy Qur'an, Ali states: "This is addressed to all mankind and not only to Muslim brotherhood, though it is understood that in a perfect world the two would be synonymous." A. Y. Ali, *The Holy Qur'an: Text, Transalation and Commentary* (Brentwood, Maryland: Amana Corporation, 1989), para. 4933, at p. 1342.

Islamic system, not within that of other legal systems; and in the context of Islamic society, not in that of other societies."[33] Naturally the "framework of the Islamic system" is valid for Muslims[34] because of their belief in the fundamentals of Islam, a belief which is not shared by non-Muslims. There is a need then for a more neutral idea of equality to mediate different normative and belief systems. The principle of equality under the African Charter must be recognised as the basis of equality within Islamic Africa. More of this in the discussion on the right to self-determination.

(b) The long history of political corruption and oppression on the continent presupposes a protection of individuals on the basis of general criteria applicable to all members of the political community regardless of their religious and ethnic affiliation. Although ethnocentrism has dominated African politics since the 1950s, religion has been equally manipulated. Nwauwa correctly points out that "to claim authority from God is an ultimate legitimacy and very helpful in retaining power, especially when military force is relatively weak vis-à-vis the populace."[35] Religion may be used for power preservation and wealth accumulation through corruptive political practices.[36]

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[33] El-Awa , supra note 28, at 113.

[34] It is not to be forgotten here that the details of the "Islamic system" might vary to a great extent depending on the cultural dynamics in question.

[35] Nwauwa, "The State Formation in Africa: A Reconstruction of the Traditional Thesis" at 28.

[36] The examples of Gen. Zia in Pakistan and Nimeiri of the Sudan who both resorted to Islam in order to save their dying regimes, will lend support to this conclusion. It is also my firm belief that the use of

(c) Given the close cultural and geographical proximity of African nations, the use of Shari'a's limited conception of equality will have some negative repercussions on African Muslims who live under predominantly non-Muslim nation-states.

Second assumption: the Charter seeks a balance between individual and collective rights and articulates the linkage between them by introducing the concept of duties on "the part of everyone".[37] By adhering to the African Charter, African States recognised "on the one hand, that fundamental human rights stem from the attributes of human beings" and that "the reality and respect of peoples' rights should necessarily guarantee human rights."[38]

Third assumption: the Charter posits, and as a matter of conception and universality, that civil and political rights cannot be dissociated from economic, social and cultural rights.[39] I have noted earlier, in the second chapter, that among the factors that have

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Islam by the present Sudanese junta is not out of piety and fear of God, but for a narrow power and economic interest.

37 Para 7 of the preamble to the African Charter.

38 Para 6 of the preamble. Keba M'baye states: "In traditional Africa, the individual completely taken over by the archetype of the totem, the common ancestor of the protective genius, merges into the group ... In traditional Africa, rights are inseparable from duties. They take the form of a rite which must be obeyed because it commands like a "categorical imperative"." Keba M'baye, "Human Rights in Africa" , in Karel Vasak, ed., *The International Dimensions of Human Rights*, Vol. 2, (Paris: UNESCO, 1982) 583 at 588-9.

39 Para 8 of the preamble to the African Charter.

contributed to the continuing oppression of African masses are militarism and political corruption. Consideration of these factors is vital to any future protection of human and peoples' rights in Africa. In order not to sink into the same old political rhetoric concerning the ability of African states to afford the implementation of economic, social and cultural rights, this linkage between the two sets of rights must be more seriously implemented. For example, a criteria must be developed whereby a balance between military spending and spending on education, and a balance between optimum use of public resources and political accountability could be achieved and measured.

Fourth assumption: the Charter reflects "the African conception of human rights" and the "needs of Africa"[40], and was inspired by "the virtues of ... [the] historical tradition and values of African civilisation."[41] Unless these statements are grounded in an understanding of current African realities, they remain mere utopian rhetoric. Although the Afro-Islamic context remains communitarian in most aspects, the individual *qua* individual has gained recognition. This recognition requires the present Charter's protection of individual rights[42] which will be enumerated in the following parts. The

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40 This was part of the guidelines submitted to the Committee of experts which drafted the Charter, OAU Doc. GAB/LEG/67/3, rev. 1 at 1.

41 Para 5 of the preamble to the African Charter.

42 Earlier post-independence African juridical efforts seem to lend support to this third conclusion. The Law of Lagos, which was adopted in 1961 by 194 lawyers and judges from 23 African nations, states in its third paragraph: "That fundamental human rights, especially the right to personal liberty, should be

current African realities include the crisis of the nation-state, the continuing, even increasing dominance of ethnic politics and corrupt political elites.

Rights under the Charter can be classified under three main headings: individual rights, economic, social and cultural rights, and peoples' rights.

A. Individual rights under the African Charter

The Charter reflects the changes taking place in African society and culture through its recognition of the individual as a holder of rights independent from the collectivity. First, the individual is entitled to enjoy all the rights enumerated under the Charter without distinction of any kind.[43] Secondly, every individual is equal before the law;[44] and thirdly, every individual is entitled to the equal protection of the law.[45] The Charter has enlisted a number of individual rights similar to civil and political rights under various international and regional instruments. Two differences remain, however, between international human rights standards and the African Charter.

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written and entrenched in the Constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial in a Court of Law.." "The Law of Lagos" (1961) Rev. of the International Commission of Jurists at 9.

[43] Article 2 of the African Charter.

[44] Article 3(1) of the African Charter.

[45] Article 3(2) of the African Charter.

The first difference is to be found in the absence of the right to privacy from the list of individual rights guaranteed under the Charter. It is argued, both in the first and third chapters of this thesis, that the right to privacy is guaranteed in the Afro-Islamic context as a matter of religion and hence the absence of this right under the Charter is not reflective of this particular cultural context. Nor is the Charter, in any event, intended as an exhaustive listing of human rights. The second difference is to be found in the Charter's linkage of economic, social and cultural rights together with civil and political rights. Four rights could be used as examples:

The Right to property, guaranteed under article 14 of the Charter, which is an individual right, can be restricted in one of three instances: in the interest of public need, for the good of the community and in accordance with the law. The Charter does not specify how the interest of the public will be ascertained nor how the good of the community will be determined. It is a matter of common sense, however, that the public and community will have to be consulted one way or another. Further, any authority which purports to act on behalf of the public and the community should have a mandate, directly or indirectly through proper representation, to do so.

The Charter guarantees to everyone *the right to work* under healthy conditions and with equal pay for equal work.[46] While healthy conditions are to be read in conjunction with the Charter's guarantee of the right to health and medical care, equal pay for equal work is a reference to the prohibition against discrimination in the place of work. In other words, although the right to work is considered within the boundaries of economic, social and cultural rights, its exercise involves aspects of civil and political rights, e.g. equality before the law, equality between men and women.

Every individual, under the Charter, is guaranteed *the right to education*.[47] The Charter adds more elements to the right to education. It stipulated that each individual is also entitled " to freely take part in the cultural life of his community."[48] Since no African country is composed of a singular and homogeneous cultural community, it is to be understood from this provision that communities within any given state are guaranteed their cultural survival as an aspect of their right to self-determination. This provision, in my opinion, has been compromised by the following aspect of the right to education under the Charter.

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46 Article 15 of the African Charter.

47 Article 17 of the African Charter.

48 Article 17(2) of the African Charter.

The Charter also states that "[t]he promotion and protection of morals and traditional values recognised by the community shall be the duty of the state."[49] This provision initially seems disastrous, making the state a custodian of morals and values. While it assumes the state to be a value neutral entity, the African reality is that the state in most cases is synonymous with either a specific ethnic entity, a rigid religious orientation or both. Furthermore, in the presence of various internal contexts, the state should not be the only actor to mediate the determination of what would constitute morals and traditional values which ought to be respected and promoted. A more innovative approach would be to recognise the jurisdiction of religious authorities over moral and traditional values, while relegating the state's role to mediating competing claims and prevention of inter-religious or inter-cultural domination.

There might be room, however, for one to argue that there are two restrictions upon the state in promoting and respecting morals and traditional values. First, the state is restricted by the community's recognition of what constitutes "morals and traditional values,"and by the general prohibition, under article 19 of the Charter, that "[n]othing shall justify the domination of one people by another." Secondly, in the face of a multiplicity of cultural communities, the state is (ideally) to seek mediation of values through (a) the principles of the Charter; [50] (b) collective efforts of the various

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[49] Article 17(3) of the African Charter.

communities; and through a closer look at the question of cultural change, and the introduction of new values, as argued in the previous chapters.

Finally, *the family* is considered, under article 18 of the Charter, as "the natural unit and basis of society," and hence it is entitled to protection and assistance by the state. Elimination of discrimination and protection of the rights of the child were included under the provisions of this article. What is peculiar here is that the Charter mandated the protection of the rights of women and children "as stipulated in international declarations and conventions."[51] The aged and the disabled are also included within the provision for the family as entitled to special measures and protection "in keeping with their physical and moral needs."

B. Peoples' Rights under the African Charter

Those who consider the African Charter to be unique will contend that the concept of peoples' rights is one of the primary reasons for its uniqueness. The Charter recognised that peoples are equal and "shall enjoy the same respect and shall have the same rights.[52] Peoples' rights include:

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50 The African Commission is expected to interpret the states duty to protect and promote values in harmony with other rights recognised under the Charter. This expectation is implicit in the provisions of the Charter, e.g. 1,2,60 and 61. The state by ratifying the Charter is, hence, under the same duty.

51 Article 18(3) of the African Charter

1. The right to existence under article 20(1);

2. the right to self-determination under articles 20 and 21;

3. the right to economic, social and cultural development under article 22;

4. the right to international peace and security under article 23; and

5. the right to a satisfactory environment under article 24.

The definition of people has been noted in the following discussion on the right to self-determination. One thing has to be made clear: what constitutes a "people" differs depending on the right in question, and on against whom the right is claimed. It is also important to stress that peoples' rights remain largely rhetorical rather than imposing concrete legal obligations. The enjoyment of these rights presupposes an effective guarantee of both civil and political rights as well as economic, social and cultural rights. The precise scope of peoples' rights is not the focus of this study.

C. Individual Duties under the African Charter

Another distinct feature of the African Charter is its provision for duties as corollaries to rights. The inclusion of duties is based on the belief that human rights is a "two-way" system, i.e. "the connection between rights and duties is as a result of the fact that

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52 Article 19 of the African Charter.

people do not exist in isolation but are social beings."[53] Mbaye is of the opinion that criticisms of the linkage between rights and duties ignores a fundamental aspect of African human rights:

> Certains ont critiqué cette conception [of linking rights and duties]. En fait, c'est peut-être parce qu'ils ne conçoivent pas qu'en Afrique l'idée de droit ne va jamais sans l'idée de devoir. Il s'agit en réalité des deux faces d'une même chose.[54]

This is further consolidated by the African Charter's emphasis, in the Preamble, that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."[55] The Charter stipulates for general and specific duties.

General duties: These are similar to the duties provided for in most human rights instruments. According to the African Charter:

> Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promotion, safeguarding and reinforcing mutual respect and tolerance.[56]

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53 C. Maina Peter, *Human Rights in Africa: A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of Rights* (Westport, Conn.: Greenwood Press, 1990) 42.

54 Keba Mbaye, *Les Droits de l'Homme en Afrique* (Paris: Editions Pedone, 1992) 163-4.

55 Paragraph 5 of the Preamble to the African Charter.

This duty of the individual is to be read in light of the Charter's general proviso that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[57] It is interesting to note that while the same duty is provided for in the Universal Declaration on Human Rights, [58] the African Charter does not follow suit in stipulating that this duty ought to be discharged in a "democratic society". I will return to this point in the discussion below on whether the concept of duty trumps individual rights. The duties are owed, according to article 27(1) of the African Charter, to "the family and society, the State and other legally recognised communities and the international community."

Specific duties: The African Charter enumerates a number of duties owed by individuals to the entities specified above. It is necessary to quote the Charter in *extenso:*

> The individual shall also have the duty:

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56 Article 28 of the African Charter. This seems to echo article 29 of the Universal Declaration on Human Rights which reads: "In the exercise of his [her] rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

57 Article 27(2) of the African Charter.

58 Article 29 of the Universal Declaration, see note 56.

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;

2. To serve his national community by pacing his physical and abilities at its service;

3. Not to compromise the security of the state whose national or resident he is;

4. To preserve and strengthen social and national solidarity, particularly when the later is threatened;

5. To preserve and strengthen national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

7. To 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, to contribute to the promotion of the moral well-being of society;

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

There is a need to sort out and clarify these duties since, it is submitted, there are some good ideas (what I will call reasonable duties) as well as some dispensable propaganda-like ones ought not be taken seriously (I will call them nonsensical).

Reasonable duties: These refer to the duty of the individual to contribute to the development of the family, to pay taxes, not to compromise public security, to preserve positive African values, to work to the best of her abilities and to the serve the national community. The discharge of some of these duties is already insured through domestic laws, for example the duty to pay taxes. Although the responsibility of the individual towards the family is also affirmed under domestic laws on personal matters and inheritance, the state is also mandated under the Charter to care for the well-being of the family.[59]

Nonsensical duties: These are mainly rhetorical duties which are alarming in the sense that they resonate "pan-Africanism", "Socialism", and other ideological pretexts used by the ruling elite often to justify abuse of rights. They include the duty to strengthen "social and national solidarity", the duty to "strengthen the national independence and the territorial integrity", and to contribute to African unity. I argue in the next Chapter that the implementation of the right to self-determination is paramount to an effective realisation of a system of human rights in Africa. The importance of the right to self-determination stems from the nature of the African state, obsession with territorial integrity and ethnic inequality. The importance of this right will be greatly compromised if states are allowed to use escape clauses, under the Charter, such as

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[59] Article 18 of the African Charter reads: "(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health. (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community."

threats to "national solidarity", "national defence" and "territorial integrity". It is, therefore, difficult to accept the simplistic description of one of the original drafters concerning the duties of the individual:

> L'individu doit égalment préserver et renforcer l'indépendence nationale, de même que l'intégrité territoriale de la partie, et d'une façon générale, contribuer à la défense du pays. Cette obligation s'exerce dans le cadre des lois qui réglement la défense nationale et la participation aux travaux d'intérêt général. [60]

There are a number of difficulties with such a statement. The defence of the any country is the duty of the state itself (the military) and not of the individual. The insistence on the preservation of territorial integrity sounds more like traditional OAU rhetoric than a genuine imposition of a duty. Most of the current crises in Africa, as pointed out in the second Chapter and as will be further elaborated in the following one, have a connection to the OAU's principle of *uti posseditis*. Since these duties are based on "l'idée de droit en Afrique",[61] the very fact that the territorial integrity of the African nation-state is a colonial creation calls into question the assertion that the duty of the individual to preserve and strengthen territorial integrity originates from an

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60 Mbaye, *Les Droits de l''Homme en Afrique*, supra note 54, at 216.

61 *Ibid.*, at 163. Mbaye dealt with the subject of duties in outlining the characteristics of the African Charter and the African conception of human rights, which include: the values of African civilisation, rights and duties, the absence of an African human rights court and the new (third generation) rights. *Ibid.*, 161-165.

"African conception of human rights".[62] Instead, I believe that the provision for nonsensical duties is most likely an attempt to appease and protect the African ruling elites.

The inclusion of duties in the African Charter prompts an important question: is the enjoyment of individual rights contingent on or limited by the fulfilment of these duties? There are some writers who believe that the imposition of duties on the individual presupposes "surrendering certain rights and assuming duties towards the society,"[63] and the state, while discharging its obligations under the Charter, will ensure the implementation of these duties.[64] It is more useful that these duties be considered in light of two necessary precautions: duties should be merely general in nature, and not owed to the state *per se*, but to the community.

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62 For this reason, I find implausible Mabye's assertion that the imposition of duties such as the respect of territorial integrity is a positive step in conformity with the general spirit of the African Charter. Mbaye is of the opinion that the inclusion of duties "ce n'est pas un mal. Tout au contraire. D'ailleurs en énonçant dès son préambule l'attachement des pays africains aux valeurs de civilisation africaine, la Charte ne puvait s'abstenir de coller à la conception africaine du droit et des droits de l'homme." Mbaye also remarked that the duty of African states to protect and promote "vertus de civilisation africaine". Mabye, *Droits de l'Homme en Afrique*, supra note 54, at 213. See my assertion in this chapter, in the discussing the main assumptions of the African Charter, that the commitment to the African virtues and values must be grounded in the current African realities instead of presenting such a duty as mere utopian rhetoric.

63 Chris Maina Peter, *Human Rights in Africa*, supra note 53, at 42.

64 Mbaye, *Droit de l'Homme en Afrique*, supra note 54, at 213-215.

The imposition of duties under the African Charter must be interpreted as a mere guidelines rather than as specific limitations upon individual rights. Ouguergouz aptly described these duties as *disposition-cadre*, and as such:

> Cette disposition n'a pas une grande portée juridique en raison précisément de sa généralité. Ne prescrivant à l'individu aucun devoir particlulier envers les entités qu'elle énumère, elle ne saurait servivre à justifier *a posteriori* l'imposition d'un de ces devoirs.[65]

Although the International Bill of Rights has also provided for duties,[66] the scope of these duties is limited by the "just requirement" of a "democratic society".[67] The African Charter, on the other hand has omitted reference to state's legitimacy, i.e. "democratic society", in its provision duties. The African Charter contains other articles which can be interpreted as factors in outlining the scope of duties in the same way stipulated for in the International Bill of Rights.[68] For example, article 2 of the

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65 Fatsah Ouguergouz, *La Charte africaine des droits de l'homme et des peuples: Une approche juridique des droits de l'homme entre tradition et modernité* (Paris: Presses Universitires de France, 1993) 373. Ouguergouz further notes that the imposition of duties under the African Charter "n'est pas plus attentatoire aux liberté de l'individu que ne le sont lea disposition précitées de la Charte Internationale des Droits de l'Homme." *Ibid.*

66 See, article 29 of the Universal Declaration on Human Rights, and paragraph five of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

67 Article 29(10) of the Universal Declaration on Human Rights.

68 Mbaye correctly notes that the linkage between rights and individual duties, under the African Charter, requires a guarantee by the state for individual rights. "Cette déclaration [on the linkage between rights and duties in the preamble of the African Charter] concerne les individus, mais aussi les

African Charter affirms the entitlement of every individual "to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind".[69]

An important caveat in interpreting duties under the African Charter is that the state is not synonymous with family, society and community. Otherwise the Charter would not have distinguished between these entities in its provision for duties. Furthermore, since the state in Africa, as noted in Chapter Two of this thesis, is culturally diverse and comprises different communities, the state is itself under a duty to prevent domination of one community by another.[70]

The interpretation of individual duties under the African Charter, and most of the provisions of the Charter, must be undertaken in light of the relation between the individual and the community. Ambrose has eloquently argued:

> Dignity for the Africans translates into ensuring a humane existence for each other. The elderly are cared for in the family, and more privileged family members share their good fortune with the family. This is the social safety net that has ensured the survival of African families and communities. Values such as respect for elders are stressed among all

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pouvoirs publics sur qui repose en grande partie l'obligation de respecter et de faire respecter les droits de l'homme." Mbaye, *Droits de l'Homme en Afrique*, supra note 54, at 164.

69 See, also, article 12-19 and 26 of the African Charter, as well as the discussion, in the next chapter, on the right to participate in public life.

70 Article 19 of the African Charter.

> groups. ... However, individuals can be overburdened by the rules of the group. It is necessary to ensure individual protection. ... To preserve one's dignity, one simply toes the line. [71]

This thesis seeks to attain the balance between the protection of the individual and her duties to the community through a culturally responsive conceptualisation of human rights in Islamic Africa. The next Chapter focuses on three of the rights guaranteed under the African Charter: the right to self-determination, the right to freedom of expression, and the right to participate in public life. These rights are viewed as important as a first step towards a culturally responsive guarantee of human rights. The focus on these rights also aims at contributing to a detailed exposé of the African Charter provisions with a view to contributing to the discussion of international human rights and cultural diversity.

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71 Brendalyn P. Ambrose, *Democratisation and the Protection of Human Rights in Africa: Problems and Prospects* (Westport, CT: Praeger Publishers, 1995) 31.

PART THREE

Chapter Five

Cultural Change and the African Charter in Islamic Africa

> *To associate with them [rulers] would necessarily involve the learned man in seeking their approval and winning their hearts, although they are unjust and unrighteous. It is, then, the duty of every religious man to censor and twit them by exposing their tyranny and decrying their practices. For he who frequent their (palaces) will either seek their favour and consequently forget the blessings God has bestowed upon him, or hold his peace and allow their misdeeds to go uncensored, thereby courting their favour. He may also undertake to justify (their sins) and improve their standing in order to gain their pleasure, which is the limit in perjury and falsehood. Or he may hope to share their luxury which is downright lawlessness. ... In short, their company is a source of evil and it is, therefore, necessary for the learned men of the hereafter to be careful and beware. Al-Imam Al-Gazzali (1058-1111 A.D.)*[*]

There is no doubt that Africans have continued to live under appalling levels of political oppression during colonialism, post-independence and through to the present day. The ideological justifications for this suffering, employed by the ruling regimes (colonial and national alike), mask two detrimental consequences: economic

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[*] Al-Imam Al-Gazzali, *The Book of Knowledge* (*Kitab al-Ilm* - the opening part of his treatise Ihya Ulum al-Din - The Revival of the Religious Sciences), Nabih Amin Faris, tran., (New Delhi: International Islamic Publishers, 1988) 177.

corruption and political repression. The rise in the use of political Islam in Africa must not be mistaken for an "authentic" expression of the religion itself. Rather, it must be viewed in the light of the political history of the continent and not, therefore, to be treated differently from the gamut of ideologies experimented with by the post-independence African ruling elites, such as one-partyism, African socialism or crude dictatorships à la Amin, Bokasa and Nimeiri. The socio-political realities in Africa, identified in the preceding sections as parts of the Afro-Islamic cultural context, are shaped by nation-states with haphazard borders and ethnic composition, corrupt and oppressive ruling elites and militarism.

The challenge facing African Muslims in pursuit of human rights protection is how to attain an equilibrium between the contemporary socio-political realities in Africa and the ideals of Islam. Ibn Khaldun (1337-1406),[1] perhaps the most famous and prolific Muslim philosopher and historian,[2] is insightful in how to attain this equilibrium.[3] He

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[1] Abdul Rahman Ibn Khaldun, a North African, was writing at the time of the decline of the Arab Islamic medieval civilisation. See, P. K. Hitti, *Makers of Arab History* (New York: St. Martin's Press, 1968) 238-256; M. A. Enan, *Ibn Khaldun: His Life and Work* (Lahore: Sh. Muhammad Ashraf, 1969); and Muhammad Aziz Lahbabi, *Ibn Khaldun: Presentation, Choix de texts, bibliographie* (Paris: Seghers, 1968).

[2] "By the consensus of all critical opinion Ibn Khaldun, who died in 1406, was the greatest historical Islam produced and one of the greatest of all time." P. K. Hitti, *The Arabs: A Short History* (Chicago: Gateway Edition, 1964) 181.

[3] Ibn Khaldun's main oeuvre is *al-Muqaddimah* (literally translated as the introduction to history) which is based on his experience in North Africa and Spain. It is generally agreed that Franz Rosenthal's three volume translation is by far the most comprehensive and closest to the original Arabic text. I will mostly refer to this translation unless there is a need to refer to the original text. Abu Zaid Abdalrahman ibn Muhammad ibn Khaldun, *The Muqaddimah: An Introduction to History* , Franz Rosenthal's translation, (New York: Pantheon Books, 1958). Edwin Rosenthal notes striking parallel between Ibn Khaldun and leading European thinkers from 18th century and onwards, e.g. Comte, Hegel

recognised it is next to impossible for human beings to transcend their *asabiyah* (socially constructed self-interest of a kinship group)[4] for the interest of a larger (more universal) community. *Asabiyah*, in turn, informs both the creation of state and the pursuit of the religious ideal. *asabiyah* is used by Ibn Khaldun not to mean a crude tribalism, but rather "as a very complex socio-political reality with important psychological implications."[5] In other words, it was a reflection of the tribal structure of North Africa and the political instability of the region during the time of Ibn Khaldun. One of his entries states: "A dynasty rarely establishes itself in lands with many different tribes and groups." Ibn Khaldun justifies this statement as follows:

> The reason for this is the differences in opinions and desires. Behind each opinion and each desire, there is a group feeling defending it. At any time, therefore, there is much opposition to a dynasty and rebellion against it, even if the dynasty possesses group feeling, because each group feeling under the control of the ruling dynasty thinks that it has in itself (enough) strength and power. One may compare what happened in this connection in Ifrîqiyah [Africa] and the Maghrib from the beginning of Islam to the present time. The inhabitants of those lands are Berber tribes and groups. The first victory of Ibn Abî Sarh [the third caliph's

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and Marx. He notes that "if a comparison must be made, we can still think of no closer parallel in matters political than Machiavelli." E. I. J. Rosenthal, "Ibn Khaldun: A North African Muslim Thinker of the Fourteenth Century", (1940) 24 Bull. of the John Rylands Library 308.

[4] *Asabiyah* is by far the important concept in Ibn Khaldun's work. It has been defined as "solidarity in battle", "blood ties", "agnatic solidarity", "esprit de corps", "partisanship", "tribal conscienceness", "tribal spirit and loyalty", "sense of solidarity", and "social solidarity". F. Baali, *Society, State and Urbanism: Ibn Khaldun's Sociological Thought* (Albany, N.Y.: State University of New York Press, 1988) 43-44; and, Y. Lacoste, *Ibn Khaldun: The Birth of the History and the Past of the Third World* (London: Verso Editions, 1984)101. I have adopted "socially constructed self-interest of a kinship group" based on both my Arabic understanding of the term and for the purposes of our discussion in this section.

[5] Lacoste, *Ibn Khaldun*, *ibid.*, 103.

> ruler over Egypt who attempted to conquer North Africa in the seventh century] over them and the European Christians (in the Maghrib) was of no avail. They continued to rebel and apostatised time after time. ... After the Muslim religion [Islam] had been established among them, they went on revolting and seceding, and they adopted dissident (Khârijite) religious opinions many times.[6]

The relation between the polity and *asabiyah*, as articulated by Ibn Khaldun, is of particular importance to human rights in Africa. *asabiyah* is considered as the main motivation behind acquisition of power and the development of a dynasty.[7] This in turn leads to an overlapping of allegiances and constant altering in the cultural make-up of the ruled. Ibn Khaldun believed that the state (dynasty) has a life span similar to that of the individual human being,[8] and hence is his conclusion that "as a rule no dynasty lasts beyond the life (span) of three generations."[9] Each generation is expected to last for 40 years based on the analogy that the individual human being would require such an amount of time to complete his growth and reach maturity.[10] The first generation in the life span of the dynasty is *tribal* when "nomadic people" lead healthy,

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[6] Ibn Khaldun, *al-Muqaddimah*, supra note 3, Vol. 1, 332-3.

[7] Ibn Khaldun states: "When a person sharing the group feeling has reached the rank of chieftain and commands obedience, and when he finds the way open toward superiority and (the use of) force, he follows that way, because it is something desirable. He cannot achieve his (goal) except with the help of the group feeling, which causes (the others) to obey him. Thus, royal superiority is a goal to which group feeling leads, as one can see. Even if an individual tribe has different "houses" and many diverse group feelings, still, there must exist a group feeling that is stronger than all the other group feelings combined, that is superior to them all and makes then subservient, and in which all the diverse group feelings coalesce, as it were, to become one greater group feeling. Otherwise, splits would occur and lead to dissension and strive." Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 284-5.

[8] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, "Dynasties have a natural life span like individuals", 343-346.

[9] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 343.

[10] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 344.

open-air lives and hence the strength of the group spirit is preserved.[11] The second generation is that of the *transition from tribal to sedentary life* during which group spirit starts to wane, real authority centres in a leader, and the populace become more indolent.[12] The third generation in the life span of a dynasty is the replacement of group spirit by *dependency on dynasty*. This occurs as a result of people losing the taste for "the sweetness of fame and (for) group feeling, because they are dominated by force.[13]

It is this third generation that I find to be relevant to the contemporary Afro-Islamic context. Post-independence nationalist African leaders hoped to create such dependency on the nation-state in order to replace competing ethnic and religious loyalties. Their adoption of "rule by any means" principles has instead fostered a revival in overlapping ethnic, religious and extra-territorial allegiances. The following passage from *al-Muqaddimah* summarises the arguments about culture and cultural change outlined in the preceding parts of this thesis:

> When politically ambitious men overcome the ruling dynasty and seize power, they inevitably have recourse to the customs of their predecessors and adopt most of them. At the same time, they do not neglect the customs of their own race. This leads to some discrepancies between the customs of the (new) ruling dynasty and the customs of the

[11] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 344.

[12] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 344, and "The transition of dynasties from desert life to sedentary culture", *ibid.*, 347-351.

[13] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 345.

> old race. The new power, in turn, is succeeded by another dynasty, and customs are further mixed with those of the new dynasty. More discrepancies come in, and the discrepancy between the new dynasty and the first one is much greater (than that between the second and the first one). Gradual increase in the degree of discrepancy continues. The eventual result is an altogether distinct (set of customs and institutions).[14]

More than 500 years later, this description still applies to Islamic Africa. The study of cultural change and human rights in Africa is a study of the dynamics of the nation-state and ideologies essential to the understanding of what would be a "culturally effective" human rights system in this context. The dialectical interaction and contradictions between "culture" and power relations in any given cultural context are the driving force of the political system. Hence my earlier conclusion, in the first chapter, that Islam would have to be grounded in the socio-political realities of Africa in order to articulate this culturally effective human rights system. Three rights under the African Charter, therefore, are considered as a *sine qua non* for an effective human rights system within Islamic Africa:

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[14] Ibn Khaldun, *al-Muqaddimah*, *ibid.*, 58. See, also, Ibn Khaldun's proposition, and his explanation thereto, that "Vanquished always want to imitate the victor in his distinctive mark(s), his dress, his occupation, and all his other conditions and customs." *Ibid.*, 299-301.

(1) The right to self-determination, under article 20 of the African Charter, based on the recognition of the impact of overlapping allegiances, e.g. ethnic, religious, and linguistic, in shaping the political system within Islamic Africa.

(2) The right to participate in public life, under article 13 of the African Charter, in order to achieve a broader level of political participation.

(3) The right to freedom of expression, under article 9 of the African Charter, based on recognition of the fact that sorting out political issues presupposes a level of freedom of expression conducive to the creation of an environment in which each individual would be able to contribute to political debate without coercion from the ruling elite.

I. The Right to Self-determination:

If all groups were treated equally, and not oppressed, the reasons and rationale for the following discussion would likely vanish. Present day Africa unfortunately reveals the need for the discussion: "[T]he existing states have not treated nations and nationalities under them democratically".[15] This reality leads to raging civil wars, ethnic violence, and massive flows of refugees. This Part rests on the assumption that the right to self-

[15] Issa Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) at 74.

determination, if reconstructed with the present African reality in mind, remains a valuable tool in both the conceptualisation and the protection of human rights in Africa. In other words, I would like here to swim against the current and to argue that the events in South Africa, the independence of Namibia, and, optimistically, the resolution of the Western Sahara question this year, do not exhaust the relevance of the right to self-determination in Africa.[16]

The right to self-determination has a special relevance to Africa, since it occupies a central position in Africa's modern political history.[17] The right to self-determination evolved out of the principle of "equal rights and self-determination" provided for in first article of the United Nations Charter, and in the context of the development of friendly relations among states.[18] This evolution resulted in: the 1960 Declaration of Granting of Independence to Colonial Countries and Peoples,[19] the General

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[16] I have in mind Suzuki's statement, writing in 1976, that in the African context, there remained only three instances where the right of self-determination can be invoked: dismantling the white minority rule, the independence of Namibia and the Western Sahara. Eisuke Suzuki, "Self Determination and World Public Order: Community Response to Territorial Separation" (1976) 16 VA. J. INT'L. L at 779.

[17] Shivji states: "The experience of national and anti-imperialist struggles ... shows that the 'right of peoples and nations to self-determination' remains central in Africa to-day." Issa Shivji, "State and Constitutionalism: A New Democratic Perspective", in Shivji, ed., *State and Constitutionalism: An African Debate on Democracy* (Harare, Zimbabwe: SAPES Books, 1991) 27 at p. 36.

[18] See the General Assembly Declaration on Friendly Relations and Co-operation Among States, G.A. Resolution 2625 (XXV) of 1970, UN Doc. A/8028(1970).

[19] United Nations General Assembly Resolution 1514 (XV) of 14 December 1960. For the text of this Declaration, see *Human Rights: A Compilation of International Instruments* (hereinafter referred to as *International Instruments* (Geneva: United Nations Centre for Human Rights, 1988) pp. 47-9.

Assembly's Resolution on Permanent Sovereignty over Natural Resources,[20] and in the inclusion of the right to self-determination within the International Covenants.[21] The UN General Assembly described this right as a "prerequisite for the full enjoyment of all fundamental human rights", and regarded the right as "one of the pillars of the international human rights order".[22]

The right to self-determination entitles all `peoples' freely to determine their political status and to freely pursue their economic, social and cultural development.[23] Human beings have always sought association with other human beings on the basis of common bonds. One characteristic of these human associations or societies is the drive to control their collective fate or destiny. This drive becomes stronger in the face of dangers that these associations may face. The right of self-determination clearly entails the right of these human associations to "free themselves from the bonds of

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[20] United Nations General Assembly's Resolution 1803 (XVII) of 14 December 1962, *International Instruments*, *ibid.*, pp. 49-51.

[21] Article (1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[22] Mr. Matenson, Under-Secretary-General for Human Rights, commenting on the right to self-determination at the Third Committee. UN Doc. A/C.3/45/SR.3 (1990) para 27 at p. 8. UNGA Resolution 44/80 (1989), has, also, reaffirmed that the "universal realisation of the right of peoples, including those under colonial, foreign or alien domination, to self-determination was a fundamental condition for the effective guarantee and observance of human rights and the preservation and promotion of such rights". See, also, the Reports of the Secretary-General on the *Importance of the Universal Realisation of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, UN Docs A/45/488 (1990); and A/45/500 (1990).

[23] See article 1(1) of both of the International Covenants, and article 20(1) of the African Charter on Human and Peoples' Rights.

domination".[24] It is no surprise, then, that this right was brought to the forefront by the struggle of Africans to free themselves from European colonialism.

The right to self-determination was not much considered during the League of Nations era, nor was it mentioned in the Universal Declaration of Human Rights. Its inclusion in the UN Charter was said to be due to the insistence of the former Soviet Union.[25] However, a right to self-determination is now recognised under international law.[26] Although the right is affirmed, its scope and content remains contentious and far from being solidly established. When does it apply? Who has the right to claim it? What are its limits? These questions are being addressed daily through the practice of recognition and in state dealings with minorities and with aboriginal peoples.

The determination of political status guaranteed under this right entails both international political status and domestic political status. The two facets are commonly referred to as external and internal self-determination. The external right

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[24] Article 20(2) of the African Charter states: "Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by any means recognised by the international community".

[25] A. Cassese, "Political Self-determination - Old Concepts and New Development", in Cassese, ed., *U. N. Law - Fundamental Rights: Two Topics in International Law* (Alphen aan der Rijn, 1979) at 138.

[26] I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990) p. 597 Brownlie notes that the International Court of Justice confirmed, in the *Western Sahara Case*, "the validity of the principle of self-determination" under international law. *Western Sahara Case* [1975] ICJ Rep. at pp. 31-3.

involves the ability of a 'people' to choose their status within the international community.[27] In Africa, this status has traditionally taken the shape of either an independent or sovereign state, as in the case of Guinea and Ghana, or an association between independent states as in the case of Tanganyika and Zanzibar.[28]

The African struggle for independence[29] has no doubt shaped the contemporary formulation and implementation of the right to self-determination.[30] Fourteen years

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[27] Dinh Thi Minh Huyen, the delegate of Viet Nam to the Third Committee of the UN, and commenting on the item on the Right to Self-Determination, offered a broader sense of this external aspect. In her delegation's view, the right is broader than achieving national independence and "should include respect for the sovereign equality of States, independence and territorial integrity and the right of peoples to determine their own future and choose their own system of government." Official Records of the Third Committee of the General Assembly, UN Doc. A/C.3/46/SR.11 (1991).

[28] The union of Tanzania is undergoing major crisis and is greatly threatened following the adoption of a resolution by Tanganyikan parliamentarians for the creation of a separate state for Tanganyika. See *New African*, November 1993, p.31. Nyerere , although not in favour of preserving the union as it is, was greatly disturbed by such a move and warned that: "If you break the union between mainland and Zanzibar, it will have far-fetched repercussions. It will reach a time when you will want Tanganyika divided on tribal lines." *New African*, February 1994, at 17. Although traditionally it was Zanzibar that wanted to leave the union, Tanganyikan separatism is said to be motivated by several factors: (1) the rising tide of "Islamic fundamentalism" and the religious tension that has ensued between Muslims and Christians; (2) Zanzibar's secret attempt to join the Organisation of Islamic Conference which was eventually withdrawn; and (3) the recent news of selling land to an "Arab" businessman in Dar-es-Salam. *Ibid.*, at 18.

[29] The struggle for independence intensified with the growth of "anti-colonial conscience" following [the] return of the Africans who fought against Nazi Germany and "in the name of human dignity and equality .. to enthrone the principle of self-determination." O. C. Eze, "The United Nations and Decolonization in Southern Africa" Vol 3:1 Nigerian J. of Int'l Affs 44. Another factor favouring self-determination was the weakening of former colonial powers following the World Wars. This development was well captured by Eze: "France and Holland came out of the World Wars broken and humiliated. The United Kingdom, having scored some major successes during the World Wars, had her economy shattered and required considerable American aid to rebuild her ailing economy. The myth of imperial power was thus tarnished and the power base of the colonial powers weakened." O. C. Eze, *Human Rights in Africa: Some Selected Problem* (Lagos, Nigeria: The Nigerian Institute of International Affairs, 1984) at 75.

after the promulgation of the UDHR, the UN Secretary General was requested by the General Assembly to organise seminars on a regional level with the purpose of studying new ways and means for promoting human rights, with special attention to the problems and needs of the various regions of the world.[31] One of these seminars was held in Dar-es-Salam, Tanzania.[32] The external right to self-determination was emphasised in the Seminar,[33] both in its traditional sense, freedom from colonial domination,[34] and in its then-emerging post-colonial significance, sovereignty over natural wealth and resources.[35]

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[30] This observation is not to be treated as a definitive statement concerning the history or the origin of this right, which is said to go back to the Greek and Roman civilisations. The terminology was created by early German philosophers, its application was said to be facilitated by the European advent of the nation state. See, for example, Umozurike O Umozurike, *Self-Determination in International Law* (Hamden, Conn.: The Shoe String Press, 1972) "Chapter One: Self-Determination Before 1919" pp. 3-26; and W. Ofustey-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen Publishing Co., 1977) pp. 21-38. I am simply arguing that the present formulation of the right was influenced and greatly shaped by the African struggle for independence regardless of the history of the terminology or of the nation state.

[31] UNGA Res. 2906 (XXVII) of October 1972.

[32] United Nations Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa, Dar-es-Salam, United Republic of Tanzania, 23 Oct. 5 Nov 1973, UN Doc. ST/TAO/HR/48

[33] *Ibid.*, paras 43-47, at pp. 9-10.

[34] The following was noted in the Report of the Seminar: "It was the consensus of opinion that unless the right of self-determination was attained by African peoples still under colonial domination, there would be continuing violations of human rights." *Ibid*, para 47, at p. 10.

[35] The participants of the Seminar suggested that the United Nations "should urge the industrialised nations to take a more positive view as regards the question of sovereignty over natural resources." *Ibid.*, para 115, at 23. Article 1(2) of the Declaration on the Right to Development reads: "The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, *the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*" [emphasis added] Declaration on the Right to Development, adopted by the General Assembly Resolution 41/128 of December 1986.

The internal right to self-determination involves the right of the `people' freely to choose the form of association under which they wish to carry on their collective life. It is this part of self-determination which is contentious and yet to be clearly developed. This study advances the notion that internal self-determination is vital to the present African situation: a useful tool for dispute resolution (civil wars and ethnic clashes); and a pillar of the "African conception of human rights". In other words, I will be arguing for the continuing validity and utility of this right in post-colonial Africa. Most importantly, because of the use of political Islam, the internal right to self-determination has attained a special urgency in Islamic Africa.

A. The definition of people

The limits to self-determination are determined at first instance by who is entitled to exercise the right. Although "peoples" are the designated holders of the right to self-determination, none of the instruments, which state the right to self-determination, provide a definition of what is meant by `people'. UN sources, such as resolutions and declarations, tend to provide a vague and narrow definition of "people" by confining it to the inhabitants of non-self governing territories.[36] Despite this lack of a clear

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[36] The issue arose before the International Law Commission (ICL) in 1949. The Commission opted to leave the meaning of peoples to be determined in accordance with the international practice. (1949) Y. B. of the I. L. C. at 289.

definition of the right holders, the right to self-determination remains, in my opinion, the clearest of the "Peoples' Rights" as set out in the African Charter.

In undertaking the task of defining "peoples", one must be careful to avoid either a minimalist or maximalist approach. There seems to exist a consensus as to the common features shared by a group of human beings who might well be regarded as `peoples' for the purposes of the right to self-determination. UNESCO's Meeting of Experts on Further Study of the Rights of Peoples, held in Paris in 1990, defined peoples for the purposes of peoples' rights under international law, including the right to self-determination as:

> 1. A group of individual human beings who enjoy some or all of the following common features:
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> (a) a common historical tradition
> (b) racial or ethnic identity
> (c) cultural homogeneity
> (d) linguistic unity
> (e) religious or ideological affinity
> (f) territorial connection
> (g) common economic life...[37]

This definition also pointed to other considerations such as: (a) the group must be of a certain number and not a mere association of individuals within the state; and (b) this

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[37] UNESCO, "New reflections on the concept of peoples`rights: Final Report and Reflections of an International Meeting of Experts" (1990) 11:3&4 Human Rights L. J. at 446.

group must have the will and means to identify itself as a people.[38] The definition of people in Shari'a seems to focus on: size (people are a congregation of tribes and hence they form a group larger than a single tribe); sharing a common language; and, sharing a common ancestry.[39]

Who is entitled to the right to self-determination depends on the extent to which the group asserting this right shares ethnic, linguistic, religious or cultural bonds, i.e. depends on the existence of what Brownlie calls a "distinct character".[40] The UNESCO definition seems to capture most of the important elements one would like to see. However, there is a need to further qualify this definition by considering the

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[38] *Ibid.* This latter part was also emphasised in the definition offered by Dinstein who, and after noting the importance of the existence of a common history, states: "It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such." Y. Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) I. Comp. L. Q. at 104.

[39] Academy of Arabic Language, *Al-Mo'ujam al-Wasit* (The Concise Dictionary), A. H. al-Zayat, *et al, eds.*, (Cairo: Matba'at Misr, 1960), Vol.1, 486. See, also, M. Ibn Abi Bakr al-Razi, ed., *Mukhtar al-Sahah* (Cairo: al-Matba'a al-Amiriya, 1926) 338-9; and *al-Munjid fi al-Luga'a wa al-A'alam* (Dictionary of Arabic Language and Names) (Beirut: Dar El-Machreq, 1988) Vol. 1, 390-1; and Ibn Manzour, *Lisan al-Arab al-Muheet* (A Comprehensive Arabic Dictionary) (Beirut: Dar Lisan al-Arab, 1988), "Sha'ab - Shi'oub" (People - Peoples) Vol. 3, 319-22. Arab League Education, Social and Cultural Organisation (ALESCO) defines people as a "large group which shares the same language and social origin, e.g. Arab people." ALESCO, *Al-Ma'ajam al-Arabi al-Assasi* (The Essential Arabic Dictionary) (Beirut: Larousse, 1989) 688.

[40] He identified a core of "reasonable certainty" regarding the definition of people. This core, to him, consists of the right of a community which possesses a distinct character to have this character reflected in their political life. "The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate." I. Brownlie, "The Rights of Peoples in Modern International Law" (1985) 9 Bulletin of Australian Society of Legal Philosophy, at 108.

following concerns, which I believe to be of specific (but not necessarily exclusive) interest to Africa:

*1. **Minorities and peoples:*** The debate on minority rights, which has often been confused with the peoples' right to self-determination, might not have the same significance in Africa as it does elsewhere, such as Canada, Britain or countries struggling with questions of visible minority groups and indigenous people. While minority protection entails guaranteeing a core of rights and freedoms within the existing normative order, self-determination, which includes this principle, might well lead to establishing a new or separate normative order. The difference is due to the fact that, although the nation-state is a reality in Africa, it has not acquired the same status as it has in these countries. Africans, of the same ethnic and cultural affiliation, are often scattered between two or more countries: e.g. *Ashante* in Ghana and Cote d'Ivoire; *Afar* between Eritrea, Ethiopia and Somalia; *Bija* and *Bani Aamir* between Sudan and Ethiopia; and *Masaleet* between Sudan and Chad, to give a few examples. In other words, the common historical tradition, racial and ethnic characteristic, linguistic unity and religious affinity transcend the territorial connection and require a different calculation of the size and geographical confinement of "people".

We need not, therefore, place much emphasis upon the requirement of territory for a group to qualify as a peoples, since the requirement did not originate with a view to peoples as minorities or indigenous populations.[41] Several points can be raised here against such a purported distinction which I do not see as valid within the African context. First, it is based on a mistaken belief that the exercise of self determination entails cession or separation. As will be noted later, the exercise of the right does not necessarily lead to an "either or" result. Secondly, paying so much attention to the territorial integrity of the state and its stability[42] only promotes the present political strife in Africa.[43]

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[41] Aurelia Cristescu, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined peoples, and for the purpose of his extensive study on the right to self-determination as: "(a) The term "people" denotes a social entity possessing a clear identity and its own characteristics; (b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population; (c) *A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in article 27 of the International Covenant on Civil and Political Rights.*" [emphasis added] A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (New York: United Nations, 1981) at 41. An-Na'im has expressed the opinion that such distinction lacks validity, and concluded that: "an ethnic, religious and linguistic are a 'people'" entitled to the right to self-determination. A. A. An-Na'im, "The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination", in I. Shivji, ed., *The State and Constitutionalism: An African Debate on Democracy*, supra note 17, at 108. An-Na'im seems to echo Kiwanuka, who described Cristescu's exclusion to be based on certain assumption which are no longer tenable. Richard Kiwanuka, "The Meaning of "Peoples" in the African Charter on Human and Peoples Rights" (1988) 28:1 Am. J. I. L., 80 at 88.

[42] A recurring provision which has been echoed in several subsequent resolutions was first stated for in the Declaration on Granting Independence to Colonial countries and People, states as follows: "Nothing in the foregoing paragraphs [stating for the right to self-determination] shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples.." UN Resolution 2625 (XXV) See, also, UN Doc. A/47/277.

[43] It is not to be understood here that I am arguing in favour of fragmenting Africa into smaller units, and consequently making it less stable. The UN Secretary-General expressed the following concerns:

Stability during the colonial period was maintained through the imposition of colonial policies (based on divide and rule), such as imposition of a certain language and/or religion, that kept the population of former colonies together, and without identifying or promoting any shared national characteristics. Eze, correctly, points out that "[t]he manner in which Africa was carved up, without due regard being paid to these entities, contributed in no little measure to their disintegration"[44] It is common knowledge that territorial boundaries were drawn arbitrarily and with no consideration to ethnic or cultural boundaries. Consequently, stability can be maintained only when the same condition stipulated by Nyerere for unity, is maintained. Nyerere, commenting on the Biafran problem, states: "Unity can only be based on the general consent of the people involved. The people must feel that this State, or this Union, is theirs and they must be willing to have their quarrels in that context."[45] Nevertheless, *uti possidetis juris* is one of the cardinal principles upon which the OAU was established.[46]

"[i]f every ethnic, religious or linguistic group claimed statehood, there would be no limits to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve." UN Doc. A/47/277 (1992) para 17. The contemporary revival of ethnic politics in Africa is, and has always been, a constant source of destabilisation, responsible for the loss of millions of human lives in post-colonial Africa. If one has a choice, and if there is no bloodshed in the Continent, one would definitely have favoured a lesser number of countries in Africa. Ndegwa calls the large number of states unfortunate for two reasons: (i) most of these countries are not, because of their size, economically viable; and (ii) the large number makes reaching agreements on economic and political co-operation very difficult if not impossible. Philip Ndegwa, "Africa and the World: Africa on its Own", in O. Obasanjo and F. Mosha, eds., *Africa: Rise to Challenge* (New York: Africa Leadership Forum, 1993) at p. 14.

[44] Eze, *Human Rights in Africa*, supra note 29, at 90.

[45] Nyerere , the Observer April 26 1968 "Why we recognised Biafra? This brilliant statement was contrary to what a former UN Secretary-General stated, in commenting about the Biafran crisis: "[the] United Nations has never accepted .. and I do not believe *it will ever accept* the principle of secession of

The notion of minority implies a dominance of the majority of the population "whose members possess ethnic, religious or linguistic characteristics which affect those of the rest of the population."[47] The existence of a cohesive majority, which is hardly the case in the Sudan, is also assumed in the definition of minority. Instead, I argue, in the following section, that even though the Southern Sudan is considered as a "people" for the purposes of the right to self-determination, this definition of people can only be justified by the "negative identification" of the Southern Sudan by the rest of the country. The thrust of the discussion, in the fourth point of this section, on "negative identification" is that Southerners, despite their extreme diversity, are unified by both Northerners' perception of them and by their struggle against repression by the Sudanese state. Another difficulty with the logic of minority-majority, within the

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a part of its Member State." (1970) U. N. Chronicle at p. 36. Nyerere's union of Tanzania is said to be facing a fast growing Tanganyikan nationalism which calls for the separation of Tanganyika from Zanzibar. He was quoted as saying: "If you break the union between the mainland and Zanzibar, it will have far-fetched repercussions. It will reach a time when you will want Tanganyika divided on tribal lines." *New African*, No. 316, February 1994, at pp. 17-8.

[46] Article III (3) of the OAU Charter states for the solemn affirmation and adherence of member States to the principles which include, *inter alia*, "(3) respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence." This article was further consolidated by a resolution issued by the Assembly of Heads of State and Government in the year following the OAU establishment. The resolution considered that "the borders of African States, on the day of their independence, constitute a tangible reality", and therefore, the Assembly solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence." I. Brownlie, *Basic Documents on African Affairs* (Oxford: Clarendon Press, 1971) 360, para 2, at 362.

[47] F. Capatorti, "Minorities", in *Encyclopaedia of Public International Law* (Amsterdam: Elsevier Suive Publishers B.V., 1985), Vol. 8, 385. See, also, M. B. Shaw, "The Definition of Minorities in International Law" (1990) 20 I. Y. B. Human Rights 13.

context of the Sudan, is that it re-enforces the dichotomy of "them" and "us" advanced by the Muslim brotherhood in the context of the treatment of non-Muslims in the Islamic state.

The discussion on the status of non-Muslim minorities masks two sinister assumptions: the Muslim majority is well treated under this model of state, and non-Muslims, regardless of being indigenous, are in need of some paternalistic protection. One argument stressed in this study is that the nature of the African state presupposes a recognition of overlapping allegiances and the need for protection from the tyranny of the ruling elite. The discussion of the status of non-Muslim minorities, as well, contradicts the essence of the notion of tolerance in African Islam. An exposé of the works of some of the leading writers of political Islam might illustrate this point. These works range from moderate to extreme.

Examples of moderate views are to be found in the works of Muhammad al-Gazzali and Yusuf al-Garadawi.[48] Al-Gazzali stressed the mandate, under the Qura'n,[49] to

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[48] Shiekh M. al-Gazzali, *Al-Ta'asob wa al-Tassamoh bein al-Isalm wa al-Massihiya* (Extremism and Tolerance in the Relation Between Islam and Christianity) (Cairo: Dar al-Kutob al-Haditha, 1965); and, Y. al-Garadawi, *Gair al-Muslimeen fi al-Mujtama'a al-Islami* (Non-Muslims in Islamic Society) (Cairo: Muktabat Wahba, 1977).

[49] See, the Qura'n, 4:135.

attain justice, and concluded that the following verses are to be interpreted as referring to non-Muslims who are at war with Muslims:[50]

> Let not the believers take for friends or helpers unbelievers rather than believers: if any do that, in nothing there will be help from Allah: except by way of precaution, that ye may guard yourselves from them. ... 3:28

> O ye who believe! take not the Jews and the Christians for your friends and protectors; they are but friends to each other. And he amongst you that turns to them (for friendship) is of them. Verily Allah guideth not a people unjust. 5:51

> How (can there be such a league), seeing that if they get an advantage over you, they respect not in you the ties either of kinship or of covenant? With (fair words from) their mouths they entice you, but their hearts are reverse from you; and most of them are rebellious and wicked. 9:8

He then drew what I will call the most moderate view, in concluding that non-Muslims ought to be treated (politically and in terms of citizenship) in the same way as Muslims.[51] Al-Garadawi, echoed most of al-Gazzali's conclusions, and further added two dimensions. Non-Muslims should have equal access to public office, except those of a religious nature such as Imamate, presidency, army command and judging

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[50] Al-Gazzali, supra note 48, at 33.

[51] *Ibid.*, at 55.

between Muslims.[52] Non-Muslims are also to pay poll-tax and respect Muslims laws of transaction.[53]

Extreme views are to be found in the works of Sayed Qutb[54] whose views are echoed in the writings of Hawa.[55] Qutb believed that the relationship between non-Muslims and Muslims is based on the agreement by non-Muslims to pay *jizyah* (poll-tax) in exchange for keeping their religion and living in peace within the Islamic state.[56] Unlike al-Gazzali, Qutb understood the preceding verses to mean that Muslims are required to be tolerant of non-Muslims, however this tolerance is not to be understood as a licence, for Muslims, to seek loyalty, solidarity or alliance with non-Muslims.[57]

These views, whether moderate or extreme, cannot be considered seriously in the Afro-Islamic context for many reasons. Their articulation of the Islamic state is that of

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[52] Al-Garadawi, supra note 48, at 23.

[53] *Ibid.*, 32-56.

[54] S. Qutb, *Fi Zilal al-Qura'n* (In the Shadows of the Qura'n: Commentary and Interpretation) (Beirut: Dar al-Shirroq, n.d.). See, also, my critique, in the third chapter of this study, of his minimalist views on the limitations over the powers of the Islamic ruler.

[55] S. Hawa, *Al-Madkhal ila Da'awat al-Ikhwan al-Muslimeen* (An Introduction to the Ideology (Mission) of the Muslim Brotherhood) (Cairo: n.p., 1979).

[56] Qutb, supra note 54, Vol. 3, at 1620. He based his views on the Qura'n which states: "Fight those who believe not in Allah nor the Last Day, nor hold that forbidden by Allah and His Messanger, nor acknowledge the religion of Truth, from among the People of the Book until they pay the *jizyah* with willing submission, and feel themselves subdued." 9:29

[57] *Ibid.*, Vol. 2, at 907.

a universal state, which I described as unrealistic in the second chapter, for it ignores the nature of the African nation-state and the reality of diversity. These writers seem to confuse the Islamic ideal of tolerance with the reality of overlapping religious, ethnic and racial identities. The most troubling aspect of these works is their disregard of the fact that acceptance of their ideas is preceded by acceptance of the moral values upon which their conclusions are reached. Advancing an "Islamic state" agenda, therefore, contributes to the alienation of non-Muslims, and hence adds to "negative identification", which will be further elaborated in this section.

*2. **Territorial connection:*** The requirements of territorial connection and common economic life emphasised in the UNESCO definition point to peoples in association with their state. This is further consolidated by the UN, OAU and state practice. "Peoples could be used in contradistinction to their state".[58] This distinction appears to be based on the spirit of the Algiers Declaration.[59] Therefore, the distinction is vital and indispensable. Richard Falk has better stated this in his advocacy of a "populist and socialist" perspective in breaking away from the present state of international law

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[58] R. N. Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights", supra note 41, at 83.

[59] The Declaration, and in its preamble, identified some of the way by which imperialism extends "its stranglehold over many peoples" in our present world, which includes, inter alia: "[m]anipulation of corrupt local politicians, with the assistance of military regimes based on police oppression, torture and physical extermination of opponents, through a set of practices that has become known as neo-colonialism .."

which accords legitimacy to states by assuming that governments represent the interests of their peoples. He stipulated, as a first step, the entitlement of people "to insist upon their own legitimacy as a source of rights, even as against the state."[60]

*3. **Peoples under the African Charter:*** The African Charter states, in article 20, that:

> 1. All 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 to the policy they have freely chosen.
>
> 2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community. [emphasis added]

The wording of this article, in my opinion, clearly allows for the right to self-determination both internally and externally. In other words, "peoples" under the African Charter is not confined to colonised people, otherwise it would not have: firstly, provided for *colonised peoples* as one of the categories despite the first statement which guarantees the right to *all peoples*; secondly, because self-

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[60] R. Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier Publishers, 1981) "The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights" at 190.

determination arises whenever existence is threatened or endangered. The term "peoples" is, therefore, to be given the widest possible interpretation within the African context.

4. Negative identification as a definition of peoples: "Me and my brother against my cousin"

War, and not peaceful coexistence, has dominated the relationship between North and South Sudan since independence.[61] The geographical division between North and South is the clearest element in the definition of Southerners,[62] regardless of the fact that this division was created by colonial authorities for administrative convenience.[63] I believe that there is another element which can be clarified to consolidate this geographical division, mutual "negative identification", or group perceptions (and misperceptions) of each other. The recognition of this element increases the benefits to

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[61] Civil war in the Southern Sudan can be divided into two periods. The first started with the 1955 mutiny and lasted, sporadically though, until 1972. The second period started in 1983 as a result of Nimeiri's unilateral revocation of the 1972 Addis Ababa Accord and continued to this day. Peaceful coexistence between the two parts of the country has lasted for 11 years or less. See, A. Alier, "The Southern Sudan Question", in Dunstan M. Wai, ed., *The Southern Sudan: The Problem of National Integration* (London: Frank Cass, 1973) 11; and A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* (Reading: Ithaca Press, 1991).

[62] The Southern Sudan refers to the area South of the tenth parallel and extends to the Southern Sudanese borders with Central African Republic, Zaire, Uganda, Kenya and Ethiopia. Dunstan Wai, "The Southern Sudan: The Country and the People", in Dunsatn Wai, ed., *The Problem of National Integration*, *ibid.*, 7.

[63] M. O. Beshir, *The Southern Sudan: Background to the Conflict* (New York: Frederick Praeger, 1968) 2. Professor Beshir, who passed away in 1992, was the founder of the Sudanese Human Rights Organisation (SHRO). He was also regarded as a monumental intellectual and scholar who dedicated his life to seeking a lasting solution to the conflict between Northern and Southern Sudan. I was lucky that I had the opportunity to learn from Professor Beshir, both as the student of his work and as an executive secretary for SHRO under his leadership.

be generated from the exercise of self-determination. For if the exercise does not lead to the creation of two separate countries, it would serve as an official recognition of diversity in the form of recognition of the differences between North and South Sudan. There are four constituent elements which inform this process of negative identification: (i) lack of political trust between Northern and Southern Sudanese in dealing with the conflict in Southern Sudan; (ii) political exploitation of religion and the creation of Northern specific problems; (iii) the separate existence of the two parts of the country; and (iv) the cultural, social and psychological divide.

(i) Lack of political trust: The first meaningful contact between the Northern and Southern elites[64] was during the Juba Conference of 1947 during which the two elements agreed to the idea of a single Legislative Assembly.[65] The idea of a unified country was not necessarily part of the Southern vision then, for the Northern elite, being more organised and immersed in politics than the Southern counterpart,[66] was

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[64] I am only focusing on the elements of history which have a direct bearing on the arguments in this part. For a more comprehensive historical view of the North-South relations in the Sudan, see, M. O. Beshir, *Background to the Conflict, ibid.* , 9-60; Alier, "The Southern Sudan Question, supra note 61, at 9-18; and, Ministry of foreign Affairs, *Peace and Unity in the Sudan: An African Achievement* (Khartoum: Khartoum University Press, 1973) 21-38.

[65] M. A. Mahjoub, *Democracy on Trial: Reflections on Arab and African Politics* (London: Andre Deustch, 1974) 208. For the proceedings of the Juba Conference, see, Beshir, *Background to the Conflict, ibid.*, "Appendix 9: Proceedings of the Juba Conference on the Political Development of the Southern Sudan, June 1947", 136-153. Deng questioned the true representation of the South in this Conference. F. Deng, *War of Visions: Conflict of Identities in the Sudan* (Washington, D.C.: The Brookings Institution, 1995) 129.

[66] Beshir pointed out: "Southern leadership, compared to that of the North, was less sophisticated and much less prepared for the new task of self-government. The whole Southern Sudan was ill-prepared for the new political developments." Beshir, *Background to the Conflict*, supra note 63, at 70.

able to see its vision implemented.[67] The composition of the first Legislative Assembly, which included 13 Southerners out of its 93 members, provided the first serious flaw in the relationship between Northern and Southern Sudan, the under representation of the South disregarding the spirit of the Juba Conference.[68]

A series of events followed which hastened Southerners' mistrust of the Northern elite. No Southerner was present during the negotiations between Northern politicians and the Egyptian Government which resulted in the Anglo-Egyptian Agreement of 1953.[69] The Sudanisation Committee, which finished its work in October 1954, further added negative impact by allocating less than one percent of senior civil service positions to Southerners. The first armed clash, known as the Mutiny of 1955, occurred only a few months before independence. The mutiny by the Equatoria Corps left 261 Northerners and some 75 Southerners dead.[70] The mutiny, which was a direct result of the mistrust noted earlier, proved to have far reaching impact on the relations between the two parts of the country. Alier noted:

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[67] Alier, *Too Many Agreements Dishonoured*, supra note 61, at 20-1.

[68] *Ibid.*, 21. See, points 2-4, of the Conference's agendas, Beshir, *Background to the Conflict*, supra note 63, 138.

[69] The Agreement was enacted into law, Self-government Act 1953, which formed the basis of Sudan's independence and the first Transitional Constitution. Beshir stated: "The absence of Southerners from these discussions was seen as a proof of a desire to belittle the South and ignore its demands." Beshir, *ibid.*, 71.

[70] Beshir, *ibid.*, 73.

> The Northerners witnessed the tragic deaths of some of their fellow countrymen and close relatives. Most of these persons were unarmed and unaware that their death were imminent; some of them had the best of intentions for the South and its people; some of them were women and children who, in the best traditions of both primitive and modern warfare, should not have been touched.[71]

Instead of learning from this incident and the events which preceded it, the first national government (1956-8) engaged in petty political manoeuvring and bickering which lead to the coming of the first military regime of General Abboud (1958-1964). Abboud's regime added more difficulties by pursuing a policy of Arabicisation and Islamisation as a way of controlling the South. The result was an intensification of the civil war which was one of the factors which contributed to downfall of Abboud's regime in 1964.[72]

The only breakthrough in the conflict was brought about following the adoption of the Addis Ababa Accord in 1972 between Nimeiri and the Southern rebel movement.[73] The Accord's main features include:

(1) Granting the South self-government;[74]

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[71] Alier, "The Southern Sudan Question", supra note 61, 19.

[72] For the political developments during the second democratic period (1964-69), see, M. O. Beshir, *The Southern Sudan: Form Conflict to Peace* (London: C. Hurst & Co., 1975) 24-44.

[73] Ministry of Foreign Affairs, *Peace and Unity in the Sudan*, supra note 64. For the text of the Accord, which was enacted into law, see, *ibid.*, "Appendix 6: The Southern Sudan Provinces Regional Self-government Act 1972", 133-9.

(2) The three Southern provinces, Upper Nile, Equatoria, and Bahr El-Ghazal, would be regarded as one region;[75]

(3) A regional legislative assembly with legislative powers over traditional law and customs was created;[76] and

(4) Guaranteeing the freedom of religion and conscience.[77]

The Accord contained other elements aimed at respect for cultural diversity in the Sudan which will highlighted later. What could have been a right start towards rebuilding political trust, was soon abrogated by Nimeiri in his bid to stay in power. Nimeiri re-divided the South into three provinces and adopted the September Laws (as incorporating Shari'a laws) in 1983, in clear violation of the terms of the Addis Ababa Accord.[78] The result is the current bout of civil war which has so far claimed more

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[74] Aricles 3 and 4 of the Addis Ababa Accord.

[75] Article 3 stated: "The Southern provinces of the Sudan shall constitute a self-government region within the Democratic Republic of the Sudan and shall be known as The Southern Region."

[76] Articles 7, 10 (C), 13, 14, and 15 of the Accord.

[77] Article 32(2) of the Accord. Freedom of religion and conscience was later enshrined in articles 32 and 47 of the 1973 Constitution.

[78] See the factors which lead to the creation of Sudan People's Liberation Movement/ and Army (SPLM and SPLA), Alier, *Too many Agreements Dishonoured*, supra note 61, 261-9. Deng notes: "Tensions in South-North relations had begun to grow as Nimeiri shifted to accommodate Northern conservatives and to ally himself with Muslim Brotherhood [NIF] in promoting an Islamic agenda. The central government had accelerated the move towards confrontation." Deng, *War of Visions*, supra note 65, 171.

than one million lives.[79] The political mistrust between North and South has reached a point at which it is impossible to build bridges.

(ii) Use of religion in politics: The adoption of Islamic laws in 1983 not only increased the level of mistrust between the North and South, but added more complications which render living together impossible in the Sudan.[80] The use of religion in Sudanese politics dates back to the discussions of the first Constitutional Committee, in 1958, which was to draft a permanent constitution. Its work was cut short as a result of General Abboud's coup in the same year. The most serious attempt, however, was the "Draft Islamic Constitution", drafted by the National Constitutional Committee in 1968.[81] The Draft Constitution called for Islam as the official state religion,[82] Shari'a as the main source of legislation,[83] and a wide array of measures directed against

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[79] Both Africa Watch and Amnesty International estimate the number of human lives claimed by the civil war at 1.3 million. Africa Watch, *Civilian Devastation: Abuses by all Parties to the Civil War in Southern Sudan* (Washington, DC: Human Rights Watch, 1994) 1; and Amnesty International, *'The Tears of Orphans': No Future Without Human Rights. Sudan* (London: AI, 1995) 55. Both Organisations relied on the figures provided in M. Burr, *A Working Document: Quantifying Genocide in Southern Sudan 1983-1993* (Washington, DC: The U.S. Committee for Refugees, 1993) 2.

[80] I have argued, in chapter three, that the adoption of Shari'a as the basis of the legal and political system has led to the creation of first and second class citizens. See, also, A. A. An-Na'im, "Constitutional Discourse and the Civil War in the Sudan", in M. W. Daly, *et al., eds., Civil War in the Sudan* (London: British Academic Press, 1993) 112-4.

[81] See, National Constitution Committee, *Draft Permanent Constitution 1968*, copy available with the author; Alier, *Too Many Agreements Dishonoured*, supra note 61, 39-40; A. Sidahmed, "Religion and Human Rights in Sudanese Constitutions", in Sudan Human Rights Organisation (SHRO), *Religion and Human Rights: The Case of the Sudan* (London: SHRO, 1992)76.

[82] Articles 1 and 3 of the 1968 Draft Constitution.

[83] Article 13 of the 1968 Draft Constitution.

communism, and communist activities and press.[84] The most dangerous provision was the one calling upon the state to "strive to spread religious enlightenment among citizens and eradicate atheism, all kinds of corruption and moral turpitude."[85] The Constituent Assembly was dissolved as a result of Nimeiri's coup in 1969. Nimeiri, as noted earlier, was able to formalise the political use of religion by adopting Shari'a in 1983. The current regime went a step further by declaring it a holy war to fight Southern Sudanese rebels.

(iii) Separate existence: Contacts between Northern and Southern Sudan were sporadic and insignificant prior to the beginning of the 1940s when the British "closed areas" policies were challenged. These policies were manifest in the Closed Areas Order 1922 and the Passport and Permits Ordinance 1922, which restricted movements between the two parts of the country.[86] Although there were increased contacts between Northerners and Southerners in the period following independence, the two entities have maintained a separate existence even in their contacts. In other words, the two parts of the country have not, because of the two preceding factors, had

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[84] See, for example, articles 33 and 34 of the 1968 Draft Constitution. The "dissolution of the Communist Party" incident, discussed in the following part on freedom of expression, was used as an excuse for adopting an Islamic Constitution.

[85] Article 14 of the 1968 Draft Constitution.

[86] Ministry of Foreign Affairs, *Peace and Unity in the Sudan*, supra note 64, at 27; and Beshir, *Background to the Conflict*, supra note 63, at 41, 61 and 89. See, also, B. M. Said, *The Sudan: Crossroads of Africa* (London: The Bodley Head, 1965) "Southern Sudan: Old Policy 1900-1946", 29-37.

any meaningful social interaction. This, in my opinion, led to what can be termed an accumulation of negative social and psychological misperceptions which define both the North and the South.

(iv) Social and psychological divide: Negative identification: The Mutiny of 1955, as argued earlier, was a lucid pointer to the consequences of ignoring the diversity of the Sudan. On the official level, successive governments fostered the divide between North and South by ignoring its existence. Beshir candidly observed that:

> The policies adopted regarded the diversities as if they did not exist. In addition to this, the general attitude was that the promotion of the culture of the majority would ultimately lead to integration and the establishment of national integration [unity]. Assimilation, rather than the recognition of diversity and equality of cultures was seen as the way to national unity. The result of these policies was the war which continued for 17 years - from 1955 to 1972 - and the emergence of groups and organisations with nationalist and separatist tendencies.[87]

One of the by-products of these policies of assimilation by the Northern ruling elite is that the attitude of the entire Northern Sudanese population is perceived in the shadow of these policies regardless of the fact that the vast majority of the Northern Sudanese

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[87] M. O. Beshir, *Diversity, Regionalism and National Unity* (Uppsala: The Scandinavian Institute of African Studies, 1979) 26. Albino, a prominent Southern Sudanese nationalist, also noted: "Nationalisms can co-exist. But to try to suppress one in favour of another, is ... to venture upon an impossible task." O. Albino, *The Sudan: A Southern Viewpoint* (London: Oxford University Press, 1970) 7.

are equally alienated by the ruling elite. Also, we should not ignore the history of slavery and the slave-trade and its impact on the formation of similar perceptions.

There is a tendency to point to two factors in outlining the difference between North and South Sudan: ethnic (Arabs vs. African), and religious (Muslims vs. Christian and other non-Muslims). None of these distinctions is entirely sufficient to satisfy the requirements of the definition of people for the purposes of article 20 of the African Charter. The Arabness of the Sudanese is cultural and linguistic rather than ethnic, for only Arab males came to the Sudan.[88] Racially speaking, therefore, Northern Sudanese are predominantly African. The Sudanese cultural context, given the history of the country and arguments concerning cultural change raised in this study, is predominantly African.[89] The distinctions on the basis of religion and ethnicity are further confused by the fact that a substantial number of Sudanese "Africans" (i.e.

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[88] Only 39% of the Sudanese population was deemed to be "racially" Arab (in term of membership or claimed membership of an Arab tribe) at the time of independence. Ali A. Mazrui, "The Black Arabs in Comparative Perspective: The Political Sociology of Race Mixure", in Dunstan Wai, *ed.*, *Problems of National Integration*, supra note 62, 47 at 54. Abd al-Rahim was of the opinion that more than 50% of the Sudanese population are deemed Arabs by virtue of the fact that they speak Arabic as a first language, because linguistic identification, in his view, is indicative of cultural assimilation. M. Abd Al-Rahim, *Imperialism and Nationalism in the Sudan: A Study in Constitutional and Political Development, 1899-1956* (Oxford: Clarendon Press, 1969) 12. See, also, H. A. MacMichael, *A History of the Arabs in the Sudan* (London: Frank Cass, 1967); P. M. Holt, *A Modern History of the Sudan* (London: Weidenfeld & Nicolson, 1967) "The coming of the Arabs", 16-8; and M. El-Mahdi, *A Short History of the Sudan* (London: Oxford University Press, 1965) "The Entry of the Arabs", 27-34.

[89] African here encompasses the impacts of religion (Islam and Christianity), language (e.g. Arabic, English and French), the host of other factors introduced by the continent's experience with colonialism.

those who did not mix with Arabs, e.g. Southern Muslims, the Nuba and Fur in Western Sudan) are Muslims.

The two parts of the country are distinguishable, besides geographical location, primarily by negative identification, i.e. the South is definable by its opposition to the North and by Northern prejudice against it as a unit (people), while the North is defined by what the South is not. The distinction is, hence, grounded on social and psychological misperceptions which must be considered as cultural determinants in the definition of people. Most Sudanese (Northern and Southern alike) have shied away from exploring these misperceptions. This might be attributed to a variety of reasons: it requires a tremendous amount of courage and honesty to be candid about the existence of these misperceptions and their impact, not political unpopularity or unacceptability, or a simple lack of sensitivity to these misperceptions. My experience as a Northern Sudanese in North America has a great deal to do with the realisation of the existence of these misperceptions and of their impact. First there was the realisation that I am "black" regardless of where I come from. If I had been told how I would be perceived in North America while I was living in the Sudan, I would have been quick to respond to this perception on the basis that I am not "black". Instead, and being from the dominant segment of the society, people in my position used to identify others (both as black or other identification) and not used to been identified. Hence my realisation of the fact that a human being's entire existence can be defined by physical attributes

regardless of whether these attributes are viewed significant by this individual human being.[90] When decisions and political choices are based on these misperceptions, ignoring them is catastrophic. The following are some examples of these misperceptions by Northern Sudanese of Southern Sudanese and vice versa.[91] Southerners are perceived by Northerners as:

- Westernised, English speaking separatists, (if intellectuals); of lower social status, domestic labourers, and makers of alcoholic beverages (if of the masses).

- Easy prey for political and token exploitation. There are countless stories about the corruption of Southern politicians. These stories, however, are rarely contrasted with those of corruption within the Northern elites.

- Anti-Islamic and anti-Arabic.

- Expected to respect and refrain from insulting Arabic-Islamic cultural realities of the North without reciprocal expectations.

- Objects of a variety of derogatory remarks and attitudes, e.g. *abd* (slave, also used to mean "black" as an insult), *kafir* (non-believer), *khaddam* (domestic servant), and *wad al-yomiya* (while *wad* means boy, the entire phrase refers to a daily manual worker regardless of age).

Northerners are generally perceived by Southerners as:

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[90] There is no reason to prevent one from assuming that large numbers of Northern Sudanese who migrated to a number of Arab, European and North American countries would have, or in the process of coming, come to the same realisation. Two qualifications must, however, be taken into consideration: the migration of Northern Sudanese is a recent phenomenon; and that such a realisation is a painful and disturbing ordeal which must not be taken as a mere intellectual exercise.

[91] I have deliberately prevented myself from seeking sources or references to support my listing of the following misperceptions because they are taken directly from experience.

- Uniformly responsible for the Sudanese crises despite the fact that the majority of Northern Sudanese suffered and continue to suffer from abuses by the ruling elites.

- Anti-African, proponents of slavery and inherently racist.

- Blameable for all the problems of the South including those between Southerners themselves.

- Conservative and uncivilised (in the Western sense).

- Dependent on the South for the resolution of their problems.

It is true that there exist misperceptions and stereotypes in each and every culture.[92] The scope and implications of these misperceptions vary from one culture to another and must be examined independently. The genesis of the Sudanese conflict can be summed up in the Sudanese proverb: "Me and my brother against my cousin, and me and my cousin against the stranger." Northerners are unified in their treatment of the South regardless of the level of diversity within the North and regardless of the atrocities committed by the Northern elite in the North. The introduction of Islamic laws and the increase in the use of political Islam has created Northern-specific issues,[93] for example the interplay of human rights and Shari'a, the nature of the Islamic state. The unity of the South in opposition to the North is more paradoxical.

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[92] Albino points out: "A racial problem cannot exist unless there is a conscienceness of individuals to differences between their racial groups, and this conscienceness is almost invariably provoked by the ruling race [sic] which has monopoly of power." Albino, *A Southern Viewpoint*, supra note 87, at 4.

[93] I.e. issues the discussion of which presupposes acceptance of the moral system that informs them. I have argued earlier that Shari'a, being a religious code, applies only to Muslims by virtue of their subscription to the religious principles upon which the entire faith is built.

Although differences among Southerners have led to atrocities, of similar or worse magnitude to those inflicted by the North on the South,[94] one can still maintain that the South ought to be considered as a people for the purposes of self-determination. The negative identification by the North is maintained regardless of the Southern diversity and serves as a unifying force confronting the repression of the Sudanese state.[95] Reference to this diversity is mentioned either to discredit Southern politicians or to demonstrate the Southerners' incapability to rule themselves. It is not morally defensible for Northerners to use the diversity of the South as a ground for denying the South the right to self-determination.[96]

B. Self-determination: a tool for dispute resolution

The universal system of international law and relations has provided a role for regional arrangements to be invoked first in resolving international disputes likely to endanger international peace and security.[97] The effectiveness of my proposal for self-

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[94] cf: Operation Lifeline Sudan (OLS), "Situation Assessment 1992-1993", Nairobi, 1993; Africa Watch, *Civilian Devastation*, supra note 79, at 25, and the horrific stories of "faction fighting in 1993 in Upper Nile", *ibid.*, 146-173; and AI, *The Tears of Orphans*, supra note 79, "Human rights abuses after the split", 95-99.

[95] One is reminded here of an old African proverb: "If the mouse were the size of a cow; it would be the cat's slave nevertheless." Kofi A. Opoku, *Speak the Wind: Proverbs from Africa* (New York: Lothrop, Lee and Shepard, 1975) 51.

[96] See my discussion on who has the right to claim cultural validity in the first chapter of this study.

determination in the Southern Sudan presumes the active engagement of the Organisation of African Unity (OAU). Admittedly this makes the prospect for success less likely, since the OAU has turned into a mere gathering of despots, corrupts and "so-called leaders".[98] Of course, this development has been compounded by the fact that the well-being of Africans is not a priority within the post-cold war international community. Instead of establishing the cultural foundations for the emerging states, African leaders were used as pawns in the bipolar politics of the cold war era. The difficulty with the OAU is both political and legal.[99] Part of the legal problems relate to the principle of *uti possidetis juris* discussed earlier in this part. The OAU has, since its inception, been an organisation for ruling elites with no consideration of African public opinion which has expressed itself in indifference towards their very boundaries which have served to justify the political power of elites. Basil Davidson emphasised:

> Yet public opinion, if in a different and perfectly illegal dimension, was already recording its vote against the frontiers of the colonial partition by the regular and large-scale smuggling of goods across all of West Africa's national boundaries; and no government, as yet, had found any way of stopping this. However improperly, huge numbers of West African producers and traders were reverting to the old regional unities

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[97] Paragraphs 52 (1) and (2) of the UN Charter encourages members to "achieve pacific settlement of local disputes through such regional arrangements .... before referring them to the Security Council", "either on the initiative of the states concerned or by reference from the Security Council."

[98] Haile Selassi was credited as one of the founders of the OAU and was behind the decision to choose Addis Ababa as the seat of the organisation, yet under his reign Eritreans, as well as the majority of Ethiopians, experienced atrocities of various sorts.

[99] It is important to note here that because of the nature of the right to self-determination, this distinction between the legal and the political might not be easy, or, even possible. However, issues of a purely political nature are beyond the scope of this study.

> of pre-colonial times. Partial and illegal though it was, this rejection of the legacy of colonial partition had become another factor in reinforcing the belief that basic institutional changes of structure must be inseparable from the achievement of long-term stability and over-all development[100]

Other problems relate to some of the provisions of the OAU Charter which need to be reconsidered or redefined.

I have two aspects in mind. First, one of the main purposes of the Organisation, under the Charter, is "eradicate all forms of colonialism from Africa."[101] To achieve such an end, African States "solemnly affirm their adherence" to the principle of, *inter alia*, "absolute dedication to the total emancipation of the African territories which are still dependent."[102] A redefinition is required to expand the definition of colonialism from traditional European domination to include some of the practices of the present African nation-states. Two cases might well exemplify this point:[103] Eritrea and Western Sahara.

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[100] Basil Davidson, *Africa in History: Themes and Outlines* (London: Orion Books, 1992) 361-2.

[101] Article II (1) (a) of the OAU Charter.

[102] Article III (6) of the OAU Charter

[103] A third case is to be found in the Sudan, where continuous civil war in the Southern part has dominated its post-colonial history. This case is dealt with, *in extenso*, in the Second Part of the Study.

The ongoing civil war in the Western Sahara has "suspended the decolonisation process of this former Spanish colony".[104] The details of this case are well documented in the Decision of the International Court of Justice in *The Western Sahara Case*, where it concluded that Western Sahara existed as an independent entity apart from both Morocco and Mauritania.[105] The OAU's dealing with this case can only be seen as grossly inadequate. First, the claim by both Morocco and Mauritania,[106] to the Sahrawi[107] territory, which was ruled by Spain between 1884 - 1975, contradicted the cardinal principle of *uti possidetis juris*[108] enshrined in the OAU Charter and affirmed at the Cairo Summit of 1964.[109] From a legal point of view, based on the Charter of the OAU, the Madrid Accord of 1975,[110] which accommodated the claims of both Mauritania and Morocco, ought to have been declared void, *ab initio*, since it divided

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[104] Proceedings of the Panel on "Self-Determination: the Cases of Fiji, New Caledonia, Namibia, and the Western Sahara" remarks made by Teresa K. Smith, (1988) 82 Proceedings of the Am. Soc. I.L. 429 at p. 439.

[105] (1975) ICJ Reports 12 at p. 68 The case is also a source of a wide range of information concerning the history of the problem as well as the international legal issues involved, which are beyond the focus of this study.

[106] Mauritania renounced its claims to the Western Sahara, recognised the Polisario and withdrew from the conflict in 1979.

[107] Adjective from Sahara and also the person who comes from the Sahara

[108] This of course despite the history of this territory, which includes 50 years of resistance to the Spanish. Source(s) to the history.

[109] OAU Resolution AHG/Res.16 (1), supra note 46, at 360.

[110] For the text of the Madrid Accord, see J. Damis, *Conflict in Northwest Africa: The Western Sahara Dispute* (Stanford, California: Stanford University, 1983), "Appendix A: Tripartite Agreement Among Spain, Morocco and Mauritania, Signed at Madrid on November 14, 1975", pp. 149-150.

the territory between the two.[111] So should be the fate of the Moroccan annexation of the territory by force, following the withdrawal of Mauritania in 1979. The OAU was presented with a *fait accompli* when the Sahrawi Arab Democratic Republic (SADR)[112] first sought membership in the Organisation at the 1980's Summit held in Sierra Leone.[113] Due to Moroccan pressure, the issue was postponed in spite of its legal clarity.[114] SADR became a member of the OAU in 1982, a fact which threatened the 1983 Summit, as Morocco and 16 other members threatened to withdraw membership from the Organisation.[115] The treatment of the Western Sahara by the

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[111] Smith correctly points out that the war between Morocco and the Polisario started simply because of "Spain's irresponsible administration of Western Sahara". Teresa Smith, supra note .., at p. 440. Spain's actions were in contradiction to a UN assessment of the situation in the Western Sahara. The UN Mission of Inquiry reported, based on its encounters, that "[i]t became evident to the Mission that there was an overwhelming consensus among Saharans within the territory in favour of independence and opposing integration with any neighbouring country." UN Doc. A/10023/Rev. 1 (1975) at p. 59.

[112] SADR was proclaimed, in February of 1976, by the Provisional Sahrawi National Council to fill the vacuum created by the departure of the Spaniards.

[113] By that time two significant developments took place: first the right to self-determination for the Sahrawi people was affirmed by the UN, the Non-Alignment Movement and the OAU itself through its ad hoc Committee (of Wise Men) on Western Sahara; and secondly, SADR had already been recognised by 35 states. See, J. Naldi "The Organisation of African Unity and the Saharan Arab Democratic Republic" (1982) 26:2 J. Afr. L. 152 at p. 152. Ironically, one of the earliest OAU resolutions on the issue took place in the capital of Morocco, Rabat, in 1972, when the Council of Ministers requested African states "to intensify their efforts to enable the population of Sahara .. to freely exercise their right to self-determination." Cited in the International Commission of Jurists' "Western Sahara" (1984) 32 the Review of the ICJ 25 at p. 27.

[114] President Siaka Stevens of Sierra Leone, commenting on this regard, made the following remark: "Not everything that is legal is expedient, so we shelved it." The Guardian July 21 1980.

[115] SADR agreed to postpone taking its seat hoping to save the OAU the embarrassment, and to finally enable the Summit to take place in June of 1983. See, International Commission of Jurists, "Western Sahara", supra note 113, at 31.

OAU has been greatly influenced (and shaped) by the intransigent diplomacy of one state, Morocco.[116]

The same could be said concerning the case of Eritrea, which the OAU avoided due to the influence of Emperor Haile Selassie of Ethiopia, one of the founders of the Organisation, which has its headquarters in the Ethiopian capital Addis Ababa.[117] Eritreans were nonetheless able to break away from the Ethiopian diplomatic blockade and to bring to world attention their fight for self-determination. There was still hope that the international community would honour its rhetorical commitment "to the principle of self-determination and the rule of law, and help in a settlement of a conflict whose resolution is long overdue. It would be fitting if the OAU could take the initiative towards that worthy objective."[118] Eritrea was fully liberated in May 1991, with no help from either the OAU or the UN.[119] As noted by the Eritrean

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[116] Namibia argued strongly in favour of conducting a referendum in Western Sahara, by way of "enabling the people of the Western Sahara to exercise their inalienable right of self-determination and independence." Official Record of the Third Committee of the UNGA UN Doc. A/C.3/46/SR.9 (1991) para 107 at p.19 The Algerian delegate echoed these sentiments in A/C.3/46/SR.5 (1991) para 10 at p.4. See, also, UNSC resolution 690 (1991).

[117] The fact that Emperor Haile Selassie was one of the founders of the OAU and host of the first meetings added great obstacles towards serious consideration of the Eritrean cause within the OAU. Selassie, who was regarded as one of the "elder" statesmen in Africa "succeeded in excluding any mention of the Eritrean question in the agenda, presenting his African brethren a *fait accompli* of an annexed Eritrea.." Bereket H. Selassie, *Eritrea and the United Nations* (Trenton, N.J.: The Red Sea Press, 1989) at p. 146.

[118] B. Selassie, *ibid.*, at 154.

[119] In fact the UN Commissioner on Eritrea was of the opinion that Eritrea was not in a position to challenge the federation plan. UN Doc. A/2188 (1955). It is to be noted that independence was not one of the options the UN contemplated for Eritrea. See, UN GA Resolution 390(V) of 2 December 1950.

President Afewerki at the 29th Summit when Eritrea was admitted to the OAU: "The sad fact remains that the OAU has failed to deliver on its pronounced objectives and commitments", and he added that the OAU "championed the lofty ideas of unity, co-operation, economic development, human rights and other worthy objectives [while] it has failed to seriously work for their concrete realisation."[120]

The political situation in Africa, as exemplified by these two situations, as well as countless others,[121] demonstrates that the denial of the right to self determination routinely leads to violence and civil strife.[122] This is even more true in post-cold war Africa.[123] Dispute resolution dominated the 29th OAU Summit.[124] The Cairo

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[120] West Africa, No. 3955, 12-18 July 93 at p.1197. The admission of Eritrea to the OAU coincided with the 30th Anniversary of the Organisation. See, also, Kwesi Krafona, ed., *Organisation of African Unity 25 Years on: Essays in honour of Kwame Nkrumah* (London: Afroworld Publishing Co., 1988).

[121] E.g. the continuing civil war in the Sudan, and the present tension, arising out of a boarder dispute, between Nigeria and Cameroon. The tension was heightened by Nigeria's deployment of troops and Cameroon's attempt to bring the dispute before the United Nations. The disputed area, which was part of Western Cameroon which was part of Nigeria during the colonial era, is said to be rich in oil and other mineral resources. This of course brings the question of sovereignty over natural resources into issue. See, *West Africa*, March 7-13 1994, at pp. 397 and 402. It is said that "Of the 35 internal wars raging in the world, where battle related deaths exceed 1,000 a year, 16 are in Africa." West Africa, 24-30 Jan 1994 p. 114.

[122] Bowett has well stated the case: "[s]trife between nations is not itself a consequence of the principle of self-determination, but the reflection of the desire to resist it; in other words, if the states involved are prepared to accept a result based on self-determination, then there is no reason to presuppose violence will ensue .." D. W. Bowett, "Self-Determination and Political Rights in the Developing Countries" (1966) Proc. Am. Soc. I. L. 129 at p. 130.

[123] The effect of the Cold War in Africa was summed up by the UNCHR: "the proxy wars of the previous decades have proved to have lives of their own after their patrons withdrew, leaving devastating armouries behind in the hands of rival factions." Cited in Desmond Davies "Conflicts in Africa: A New Initiative" West Africa, No. 3982, 24-30 Jan 1994 p. 114.

Declaration mandated the OAU to establish a new mechanism for Conflict Prevention, Management and Resolution, in order to present "the opportunity to bring to the process of dealing with conflicts on our continent a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur."

After noting the OAU's inability to sustain intervention due to financial weakness which had previously lead to disastrous results in the case of Burundi, E. Dumbutshena, the former Chief-Justice of Zimbabwe, did not seem optimistic about the outcome of this mechanism since he believes that "a close examination of the OAU mechanism characterise its weaknesses."[125] A major conference on "The Challenge for Peacemaking in Africa; Conflict Resolution and Conflict Prevention" was held in Addis Ababa at the end of 1994.[126] Among the recommendations of this Conference: calling upon the OAU to encourage sub-regional arrangements such those of the Economic Community of West Africa (ECOWAS) and the Southern African Development Co-ordination Conference (SADCC); an early warning system to alert

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[124] For the proceedings of the 29th Summit, see "OAU 1: The Cairo Declaration" as well as "OAU 2 & 3", *West Africa*, No. 3955, 12-18 July 1993, pp. 1197-1200.

[125] He expressed this view in the Seminar on Conflict Resolution in Africa which was organised by International Alert, a London based human rights organisation, in 14 January 1994. Cited in Davies, supra note 123, at 114.

[126] The Conference, organised by International Alert (IA) and sponsored by the European Commission, was attended by 250 participants mostly from Africa. The aim of the Conference was to provide a forum for discussion and analysis of mechanisms for conflict resolution which exist within the continent. See IA, *The Challenge for Peacemaking in Africa: Conflict Prevention and Conflict Transformation* (London, UK: IA, 1994). See, also, *IA Update*, Issue No. 4, November 1994.

the Continent and the international community to potential trouble spots; and an OAU-sponsored network of elder statesmen and diplomats with relevant, practical experience in the field of dispute management.[127]

I will also add another reason for the OAU's failure of leadership: its lack of moral credibility to play an effective role.[128] It was earlier submitted that the African Commission[129] is more qualified to play such an important role, as part of its mandate is to promote human and peoples' rights.[130] I am of the opinion that the Commission should adopt a stand regarding constitution making in Africa which must take into account the needs and reality of the African (cultural) context.[131] I am suggesting that the Commission's handling of the issue of constitution making implies that questions of internal self-determination should not be treated as internal matters within the state's

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[127] *IA Update*, *ibid.*, 8.

[128] Details were still to be sketched out for the new mechanism, but it was agreed that the ECOMOG would be the model for peace monitoring and conflict management in the continent. *Ibid.*

[129] The Commission's qualification stems from the fact that the question of politics with its central issue of democracy has once again dominated the debate in Africa. The adoption of the African Charter has placed the Commission in a central position in this debate. cf: *Anyang Nyong'o, ed., Popular Struggles for Democracy in Africa* (London: Zed Books, 1987) Unlike the OAU members, the Commission is less likely to be influenced by narrow political interests.

[130] The role of the Commission and its mandate was briefly discussed in the second chapter of this study. As my research progressed, I realised the difficulties with both the composition of the Commission and its dependency on the OAU Assembly of Heads of State and Government. Hence was the change in my earlier opinion favouring a role to be played by the African Commission.

[131] R. Siedman was correct in pointing out that every constitution constitutes a solution for the particular difficulties its authors perceive. R. Siedman "Perspectives on Constitution-making: Independence Constitution for Namibia and South Africa" (1987) Lesotho L. J. 25 at p.50.

boundaries and exclusive jurisdiction. This entails expanding the scope of the right to the self-determination in the matter suggested by Shiviji. He argued that the contents of the right are to include the following:

> (a) equality of all peoples and nations;
>
> (b) right of colonised people to independence and formation of their own sovereign states;
>
> (c) right of oppressed nations to self-determination up to and including the right to secession;
>
> (d) right of all peoples, nations, nationalities, national groups and minorities to freely pursue and develop their culture, traditions, religion and language;
>
> (e) freedom of all peoples from alien subjugation, domination and exploitation; [and]
>
> (f) right of all peoples to determine democratically their own socio-economic and political system of governance and government.[132]

While external self-determination, as outlined in Shivji's (a), (b) and (e), is important,[133] it is internal self-determination that is essential to the resolution of the

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[132] I. Shivji, *The Concept of Human Rights in Africa*, supra note 15, at 80. Those were described as the Principal elements of self-determination, which are complemented by secondary ones that include: the right to seek assistance in the struggle for self-determination; and, the principle of state sovereignty and non-interference.

[133] He proposes that external self-determination ought to be translated into constitutional norms with primary focus on independent national economy, people's sovereignty and political accountability. See I. Shivji, "State and Constitutionalism", supra note 17, at pp. 40-1.

conflict in the Sudan. The right to self-determination is applicable by virtue of both Sudan's ratification of the African Charter and by acceptance of all political parties of the significance of self-determination. The Umma Party and the SPLM/A, for example, have concluded an agreement in which they:

> Recognise the right to self-determination as a basic human and peoples' right;
>
> Affirm the right to self-determination for the people of the Southern Sudan to be exercised in a free and internationally supervised referendum to be conducted in Southern Sudan;[134]

The ruling NIF regime has, reluctantly and without absolute clarity, arguably recognised the right of Southern Sudan to self-determination in its recent agreement with one of the breakaway factions of SPLM/A, which states:

> After full establishment of peace, stability and reasonable level of social development in the South, and at the end of the interim period, a referendum shall be conducted by the people of the Southern Sudan to determine their political aspiration.[135]

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[134] Articles 2&3 of *The political Agreement Between the Umma Party and the Sudan Peoples' Liberation Movement and Sudan Peoples' Liberation Army (SPLM/SPLA) on Transitional Government and Self-Determination*, concluded in Ethiopia, on December 12, 1994, copy available with the author, pp. 1-2. The same principles were reaffirmed in article 3 of the *Declaration of Political Agreement*, signed, on 27 December 1994, by SPLM/A and most of the major Northern Sudanese opposition parties, including the UMMA and the DUP, copy available with the author.

[135] Article 3 of the *Political Charter* concluded, in April 1996, between the NIF government and the South Sudan Independence Movement/Army (SSIM/A). Reprinted by the Sudanese Embassy in the U.K.

There are two possibilities following the exercise of the right to self-determination, the majority of Southern Sudanese deciding to separate from the Sudan and form their own country or decide to remain within one Sudan. The best case scenario, in my opinion, is a decision to separate and form an independent country for the Southern Sudan.[136] This is based on the belief, expressed earlier in the part on negative identification, that the rift between Northern and Southern Sudan has reached an unbridgeable level. Horowitz points out that:

> If the short run is so problematical, if the constraints on policy innovation are many, if even grand settlements need patchwork adjustment, perhaps it is a mistake to seek accommodation among the antagonists. If it is impossible for groups to live together in a heterogeneous state, perhaps it is better for them to live apart in more than one heterogeneous state, even if this necessitates population transfers. Separating the antagonists - partition - is an option increasingly recommended for consideration where groups are territorially concentrated.[137]

There are a number of advantages to gain from adopting such a position. Termination of the North-South civil war and putting an end to the loss of human lives is paramount. A valid point could be raised here that termination of the civil war between North and South might lead to the start of another kind of civil war, inter-ethnic war in

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[136] This is not a popular opinion within the Northern Sudan, where the belief in a united Sudan is still prevalent. In fact less than ten years ago, this opinion would have been considered treasonable.

[137] D. L. Horowitz, *Ethnic Groups in Conflict* (Berkeley, Cal.: University of California Press, 1985) 588-9.

the South. This remains to be addressed by Southerners and not by Northerners as discussed earlier. The end of the civil war will have a positive impact on the human rights situation in the North. Besides the obvious economic benefits from a better use of resources, the civil war would no longer be used as an excuse for imposing the state of emergency and embarking on massive human rights violations in the North. Northerners will also finally be able to seek some solutions to the Northern-specific problems created as a result of the implication of religion into politics.[138]

The worst case scenario is Southerners choosing to remain within a united Sudan. This basically implies revisiting the history of the conflict and dealing with the additional difficulties accumulated since the beginning of the last bout of civil war in 1983. My pessimism stems from the fact that since the political forces failed to find a lasting peace in the previous history, it is more difficult to attain this peace at this more complex stage of the conflict. There is, however, a useful precaution which must be taken into consideration if Southerners decide to remain in a united Sudan, that is an effective recognition of cultural diversity. The recognition of diversity is a natural extension of the right to self-determination under the African Charter.[139] It is also

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[138] There is a valid argument that separation of the South will make it easier for NIF fanatics to seize control over the North. However, this is not likely to be the case. The South is actually used as an excuse for the NIF government to embark on more repressive measures. Besides, the unpopularity of the NIF regime is increasing everyday and regardless of the war in the South. This is evident in the number of strikes and demonstrations which have taking place through out the rule of the present regime. See, "War and Politics: NIF attempts to escape from the problems at home", *Sudan Democratic Gazette*, a monthly London-based news magazine, Number 76, September 1996, 2-3.

[139] See, article 20(1) of the African Charter.

important to note the general precautions outlined by the African Charter concerning respect for cultural diversity:

> (1) The general precaution, under article 19, that "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify a domination of a people by another.[140]
>
> (2) States are under a duty to promote and respect "moral and traditional values".[141] This duty extends to mediating these values through the provisions of the African Charter and not through an imposition of one set of values.[142]

Like the right to self-determination, the recognition of cultural diversity is shared by the majority of political forces in the Sudan.[143] This recognition, however, remains a formality until a more detailed agenda is developed.[144] The Addis Ababa Accord can

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[140] Article 22(1) of the African reinforces this precaution: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of common heritage of mankind."

[141] See article 17(1) and (2) of the African Charter.

[142] Articles 1, 2, 60 and 61 of the African Charter. See, also, my discussion, in the fourth chapter of this study, of the right to education under the African Charter.

[143] "Sudan is multi-racial, multi-ethnic and multi-cultural society. Full recognition [of these diversities] and accommodation must be affirmed." Article 1(b) of the *Declaration of Political Agreement*, supra note 131, 2. See, also, paragraph 5 of the Preamble to the *Political Agreement Between the Umma Party and the SPLM/A*, supra note 131, 1. The NIF regime has, also, recognised these diversities: "Cultural diversity in the Sudan is recognised; Sudanese people are encouraged to freely express its values." Article 3 of the *Political Charter*, supra note 132, 1. It is to be noted, however, that this recognition by the NIF regime is contradicted by policies and attitudes of this regime which continue to exclude non-Muslims and the majority of Muslims. See, for example, the violations committed by the NIF regime against both Muslims and Christians, Human Rights Watch/Africa, *Behind the Red Line: Political Repression in the Sudan* (New York: Human Rights Watch, 1996) 193-219; and Amnesty International, *Tears of Orphans*, supra note 80, "Exploiting Ethnicity", 71-84.

[144] Effective recognition of cultural diversity is seen here as an integral part of the internal right to self-determination, the right of peoples to pursue their cultural development.

serve as a useful starting point for the development of this agenda.[145] The Accord recognised the importance of equality in political representation and diversity in its linguistic, legal, and religious facets.

Linguistic diversity: Arabic was recognised, in the Addis Ababa Accord, as the official language of the Sudan and English for the South, "without prejudice to the use of any other language or languages which may serve a practical necessity or the efficient and expeditious discharge of executive and administrative functions of the region."[146] The Regional Government, under the Accord, was responsible for policies for the promotion of "local languages and cultures."[147]

Religious diversity: The Accord provided for the general limitation that equality among Sudanese was to be guaranteed "regardless of race, tribal origin, religion, place of birth or sex."[148] The recognition of religious diversity was elaborated in the 1973 Permanent Constitution, article 16 of which stated[149] :

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[145] The recognition of cultural diversity in the Addis Ababa Accord was further affirmed in article 25 of the 1973 Permanent Constitution which stated fro the government's obligation to promote cultural diversity.

[146] Article 5 of the Accord. Article 10 of the 1973 Permanent Constitution, however, referred only to Arabic as the official language of the Republic of the Sudan.

[147] Article 10(f) of the Addis Ababa Accord. See, also, articles 8 and 38 of the 1973 Permanent Constitution.

[148] Article 32(2) of the Addis Ababa Accord.

[149] Freedom of religion was also guaranteed under article 47 of the 1973 Permanent Constitution.

> (a) In the Democratic Republic of the Sudan Islam is the religion and the society shall be guided by Islam being the religion of the majority of its people and the State shall endeavour to express its values.
>
> (b) Christianity is the religion in the Democratic Republic of the Sudan, being professed by a large number of its citizens who are guided by Christianity and the State shall endeavour to express its values.
>
> (c) Heavenly religions and the noble aspects of spiritual beliefs shall not be insulted or held in contempt.
>
> (d) The State shall treat followers of religions and noble spiritual beliefs without discrimination as to the rights and freedoms guaranteed to them as citizens by this Constitution. The State shall not impose any restrictions on citizens or communities on the grounds if religious faith.
>
> (e) The abuse of religious and spiritual beliefs for political exploitation is forbidden. Any act which is intended or is likely to promote feelings of hatred, enmity or discord among religious communities shall be contrary to this Constitution and punishable by law.

It is, however, Nimeiri's disregard for this same Constitution by his imposition of the September Laws, which ignited the civil war in the South.

Legal Diversity: The Regional Legislative Assembly was entrusted, under the Addis Ababa Accord, with the power to legislate on "traditional law and custom".[150] "Islamic law and custom" were regarded, under the 1973 Constitution, as "the main sources of legislation."[151] The Sudanese legal system, prior to 1983, was divided into civil and

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[150] Article 10(c) of the Accord. See, also, articles 7, 13, and 14 of the Addis Ababa Accord.

Shari'a divisions. While the Shari'a division was confined to personal matters for Muslims, other legal matters (civil, criminal and personal matters for non-Muslims) were governed by Sudanese common law.[152]

Equality in political participation: The Addis Accord devised self-government for the South as both a recognition of past political exclusion of Southerners by the Northern ruling elite, and as an alternative to secession.[153] A legislative assembly, whose members were to be directly elected, and a High Executive Council were set up, under the Accord, for the administration of the South. The number of Southerners in the central government increased visibly in the period following the enactment of the Accord.[154]

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[151] Article 9 of the 1973 Permanent Constitution, which further stated: "Personal matters of non-Muslims shall be governed by their personal laws."

[152] cf: A. Tier, "The Conflict of Laws and Legal Pluralism in the Sudan", (1990) 39 Int'l & Comp. L. Q 611.

[153] See, article 3 of the Accord. It was widely believed that there was an agreement because there was a will to compromise. See, for example, N. Kasfir, "Sudan's Addis Ababa Treaty: Intraorganisational Factors in the Politics of Compromise", in *Post-Independence Sudan: Proceedings of a Seminar held in the Centre of African Studies, University of Edinburgh. 21-22 November 1980* (Edinburgh: Centre for African Studies, 1981) 143.

[154] There are, however, what might be described as *silent rules of political prejudice* whereby Southerners are usually confined to peripheral ministries, such as labour, animal resources and transportation.

The forgoing aspects of the Addis Ababa Accord are useful as a starting point for a serious discussion on an effective guarantee of internal self-determination. Beshir reminds us all that:

> [T]he goals of liberation and development cannot be won except by recognition of diversity. New concepts of national unity, to replace the old and out date concepts, based on religious, linguistic and ethnic ideas, need to be formulated and promoted.[155]

In order to promote and attain these concepts, freedom of expression becomes vital in creating an environment that is conducive to open, honest and candid discussions.

II. Freedom of Expression:

Every individual is guaranteed, under article 9(2) of the African Charter, "the right to express and disseminate his opinions within the law".[156] Although freedom of expression has been recognised in all the Sudanese Constitutions following independence,[157] the adoption of the 1983 September laws and the coming of the

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[155] Beshir, *Diversity, Regionalism and National Unity*, supra note 87. at 31.

[156] Article 19(2) of the International Covenant on Civil and Political Rights, ratified by the Sudan in 1986, states: "Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[157] cf: Article 8(a) of the 1956 Transitional Constitution; article 5(2) of the 1964 Transitional Constitution; articles 48 and 49 of the 1973 Permanent Constitution the scope of which was limited following the constitutional amendments of 1975; and article 19 of the 1985 Transitional Constitution.

current regime signalled the withering away of any hope for an effective implementation of this freedom. Religion has been misused both legally and politically to limit the scope of freedom of expression in the Sudan. I will first examine the scope of freedom of expression under Shari'a before attempting to support this argument.

Freedom of expression, as a general rule, is guaranteed under Shari'a. There is a tendency among scholars to distinguish, in outlining the scope of this freedom, between two domains, religious and non-religious.[158] Expressing an opinion in non-religious matters, including matters relating to the conduct of public and political affairs, is guaranteed under Shari'a.[159] A number of examples from the time of the Prophet and his four Khulafa attest to this freedom.[160] Expressing an opinion in religious matters is also allowed under Shari'a provided it is done within the confinement of Shari'a principles and does not contradict an explicit provision from the Qura'n or Sunna. The present Sudanese regime's persistent attack on freedom of expression[161] is, hence, against both Shari'a and the African Charter.

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[158] See, for example, A. Khallaf, *al-Siyasah al-Shariiya* (Islamic Political System) (Cairo: Dar al-Ansar, 1977) 37-8; and A. Mutwalli, *Mabadi Nizam al-Hukm fil Islam* (Principles of Islamic Government) (Alexandria, Egypt: Munsha'at al-Ma'arif, n.d.) 280-7.

[159] Khallaf, *ibid.*, at 37; and Mutwalli, *ibid.*, at 281-3.

[160] See, for example, M. S. El-Awa, *On the Political System of the Islamic State* (Indianapolis: American Trust Publications, 1980) 88; C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: MacMillan Press, 1988) 124.

[161] See, for example, Amnesty International (AI), *Sudan: Permanent Human Rights Crisis: The Military Government's First Year in Power*, AI Index: AFR 54/10/1990; AI, *Sudan: Appeals on Behalf of Imprisoned Academics*, AI Index: AFR 54/11/1990; AI, *Sudan: Human rights violations*

The general scope of freedom of expression, under Shari'a, is restricted by both the "closing of the doors of ijtihad" and by the *huddud* punishments of ridda (apostasy) and baghi (revolt against the Imam). During the eighth and ninth centuries, there was a general feeling, among the *ulama*, that Shari'a was well developed as a legal system and there was no need for further development of rules. The goal was to prevent *fitnah* (upheaval) as a result of misguided opinions, so the doors of ijtihad were closed (and in most cases regarded to be closed till this day).[162] Only the *ulama* are allowed to undertake a limited ijtihad in order to elaborate on the scope of the existing rules of Shari'a. This begs the question, to which I shall return in the following discussion, who are the *ulama*?

The application of the *huddud* crime of ridda has far-reaching implications for the freedom of expression. Ridda is defined as repudiation of Islam both by act or an opinion.[163] If a person is convicted, he is to be given three days to repent before the

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during the military government's second year in power, AI Index: AFR 54/11/1991; Africa Watch, "Sudan: Violations of Academic Freedom" (1992) IV:12 News From Africa Watch, November 7, 1992; AI, *Sudan: A continuing human rights crisis*, AI Index: AFR 54/03/1992; "Freedom of Speech throttled to death as Abdel Seed is Arrested", *Sudan Human Rights Voice*, February 1993, 3; "Sudan Halts Freedom of the Press", *Sudan Human Rights Voice*, September 1993, 2; and *Situation of human rights in the Sudan*, Report of the Special Rapporteur, Mr. Gáspár Bíró, submitted in accordance with the Commission on Human Rights resolution 1993/60, UN Doc. E/CN.4/1994/48, para. 81-85, pp. 24-26.

[162] See, N. Coulson, *History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) 80-1. Hallaq was of the opinion that the doors of ijtihad were never actually quite closed. See, W. Hallaq, "Was the Gate of Ijtihad Closed" (1984) 16 Int'l J. of Middle Eastern Studies 3.

death penalty is carried out. Section 126 of the Penal Code, enacted by the present junta, states:

> 1. Shall be deemed to commit the offence of apostasy every Muslim who propagates for the renunciation of the creed of Islam or publicly declares his renouncement thereof by an express or conclusive act;
>
> 2. Whoever commits apostasy, shall be given a chance to repent during a period to be determined by the court; whereas he who insists upon apostasy, and not being a recent convert to Islam, shall be punished to death;
>
> 3. The penalty provided for apostasy shall be remitted whenever the apostate recants apostasy before execution.[164]

Awda outlined two elements for the crime of apostasy: repudiation of Islam and the criminal intention to do so. [165] Repudiation of Islam, according to Awda, results from a number of acts or omissions which include expressing an opinion or holding a belief prohibited by Islam such as advocating drinking and extramarital sex, refusing the application of Shari'a or advocating the application of secular laws instead, and denying that Islam is a comprehensive and timeless political and legal system.[166] For the element of criminal intention to be established, the accused person must be aware

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[163] See, Shaikh Abdur Rahman, *Punishment of Apostasy in Islam* (Lahore: Institute of Islamic Culture, 1972).

[164] Based on the English translation of the 1991 Criminal Act by the Sudanese Ministry of Justice.

[165] A. Awda, Al-Tashri al-Jin'iy al-Islami (Isalmic Criminal Law) (Beirut: Mu'asasat al-Risala, 1992), vol.2, 706.

[166] *Ibid.*, at 707-713.

of the heretic nature of his acts or omissions.[167] In short, any act or opinion that is likely to be interpreted, by the *ulama* and judges under Shari'a, could be deemed to constitute this crime. Hence any effective application of freedom of expression, as required in the African Charter, will depend upon the suspension of this particular crime.[168] There are two reasons to support such a position. First, although condemned by the Qura'n in the strongest terms, the Qura'n does not provide a punishment for apostasy, and Muslim jurists refer to Sunna for punishment. This might be the reason which lead a number of scholars to regard ridda as a doubtful *hadd*.[169]

The reason for advocating abolition of the crime of ridda is to be found in the Sudanese political-legal culture. I have argued, in the second chapter of this study, that political corruption of the ruling elite is an element in this culture. Because this corruption extends to the exploitation of religion through the use of ridda to silence political opposition, any interpretation of article 8 of the African Charter must consider this element.[170] Two examples stand out as stark exemplification of this point: the

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[167] *Ibid.*, "Criminal Intention", 719-720.

[168] This opinion, in itself, is tantamount to apostasy under the foregoing definition. An-Na'im correctly points out: "To remove all constitutional and human rights objections, the legal concept of apostasy and all its civil and criminal consequences must be abolished." A. A. An-Na'im, *Towards Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, N.Y.: Syracuse University Press, 1990) 109.

[169] Al-Imam Muhammad Abdu expressed an opinion to this effect. See, Muhammad Abdu and M. Ridha, *Tafsir al-Manar* (Al-Manar Qura'nic Interpretations) (Cairo: Dar al-Manar, 1947-8) Vol.5, 327. See, also, Rahman, *Punishment of Apostasy in Islam*, supra note 163, 54-5; and An-Na'im, *ibid.*, 105-109.

dissolution of the Sudanese Communist Party (SCP), and the political assassination of Ustaz (teacher - as known to his followers and those who hold him in high regard) Mahmoud Muhammad Taha.

"The dissolution of the Sudanese Communist Party (SCP)":[171] The Constituent Assembly adopted in 1965, by 50 votes to 12, the 1965 Dissolution of the SCP Act,[172] following the accusation that a student member of the SCP had publicly insulted one of the Prophet's wives. The SCP denied that the student was one of its members, and reaffirmed its respect for religious beliefs.[173] In *Joseph Garang and Others vs. Supreme Commission*,[174] (which is one of the rare constitutional decisions against the government) the Supreme Court deemed unconstitutional the constitutional amendments aimed at dissolving the SCP, and further ruled that fundamental rights, secured by article 5(2) of the 1964 Transitional Constitution, were immune from abridgement by legislative amendment by the Constituent Assembly. Immediately after

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[170] Most particularly the interpretation of the limitation, in article 8 of the Charter, that "no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

[171] See, Sudan News Agency (SUNA), *al-Mushkila al-Dustoria fil Sudan 1942-1985* (A Documentary Research on the Constitutional Question in the Sudan 1942-1985), (Khartoum: SUNA, 1985), "The Constitutional Question and the Dissolution of the SCP", 34--40.

[172] The Act, which introduced as an amendment to the 1964 Transition Constitution, states for the termination of the membership, of the Constituent Assembly, of any individual who was a member of the SCP at the enactment of the Act or who was elected to the Assembly as a member of the SCP, SUNA, *ibid*., 35.

[173] See, SCP, "Communiqué to the People of the Sudan: The SCP is innocent of the Fabricated Accusations", issued in Khartoum on November 11, 1965. Copy available with the author.

[174] (1968) S.L.J.R 1.

the decision, Prime Minister Saddig al-Mahdi called for a cabinet meeting, which was then followed by a meeting of the Constituent Assembly in which the government declared that the constituent Assembly had the indisputable right of amending the constitution, or even having a totally new one.[175] The Supreme Court decision was said to be a "declaratory resolution" rather than a binding decision. Turabi, who was the leader of Islamic Charter Front (predecessor of the Islamic National Front which rules Sudan today), which initiated the motion for the amendment, expressed the following opinion in the meeting of the Constituent Assembly:

> The decision is wrong and contradicts the unanimous political will of the nation. ... It is a matter of common knowledge that courts look into laws to check their conformity with the constitution but not to assume they have authority to revise such amendments, because they have no higher measurements in themselves but are mainly a branch of the constituent authority and subject to it.[176]

The Political Assassination of Ustaz Taha: Ustaz Taha was the founder of the Republican Brothers movement which started its activities in the midst of the Sudanese struggle for independence at the end World War II.[177] His work revealed a

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[175] It was also added, "if we are to keep our political and constitutional existence we must declare the entitlement and protection of such rights to the Assembly." SUNA, supra note .. , 38.

[176] SUNA, *ibid*., 38. His opinion was in clear contradiction with article 9 of the 1964 Transitional Constitution which guaranteed the independence of the judiciary and prohibited any control interference by both the legislative and executive authorities.

[177] M. U. Bashiri, *Ruwad al-Fikr al-Sudani* (Pioneer Sudanese Thinkers) (Beirut: Dar al-Gil, 1991), the entry on M. M. Taha, 361-4. See, also, Deng, *War of Visions*, supra note 65, at 125-7.

strong belief in non-violence and in the need for Islamic reformation,[178] which generated a lot of animosity from both fanatic and sectarian leaders. The Republican Brothers issued a communiqué, following Nimeiri's adoption of the September Laws, in which they called, *inter alia*, for the abrogation of these laws for their distortion of Islam, degradation of the Sudanese people and endangering of national unity.[179]

Ustaz Taha was arrested with four of his followers on the 5th of January 1985, twelve days after the communiqué was released.[180] They were charged and convicted, on January 8 1985, of crimes against the State in the court of first instance.[181] The court, even though it did not convict any of the accuseds of ridda, sentenced them to death unless they *repented* of their opinions before the execution of the death penalty. The Special Court of Appeal, in its confirmation of the verdict, added the charge of apostasy, despite the fact that under Sudanese law an appellate court could not add new charges and ridda was not a crime in the Penal Code at the time.[182] The Court

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[178] cf: M. M. Taha, *The Second Message of Islam* (Syracuse, N.Y.: Syracuse University Press, 1987).

[179] "Haza aw al-Tawafan", a communiqué issued by the Republican Brothers, Omdurman, Sudan, December 25, 1984. Copy available with the author.

[180] Ustaz Taha, and about thirty of his followers, including An-Na'im, had just been released prior to this arrest from a year and a half's detention without charge.

[181] Under sections 96 and 105 of the 1983 Penal code, and section 20 of the 1973 Security Act.

[182] *Sudan Government v. Mahmoud Muhammad Taha and Others*, the entire decision was reproduced in the Arab Human Rights Organisation's (1985) 9 Huquq al-Insan al-Arabi (Arabic Human Rights) 77.

framed the new charges in the form of two questions: Was ridda punishable under Sudanese Law? Did the acts of [Ustaz] Taha and his four followers constitute a repudiation of faith to render them apostates?[183]

The Court's decision on the first question was that ridda was punishable under Sudanese law, s. 3 of the Judgements Basis Act and s. 458 of the Penal Code 1983, which gave judges the power to seek rulings from the Shari'a in matters not dealt with expressly in the civil law. The Court decision on the second question was by far the most tragic and ruthless decision to be taken by a Sudanese Court. The Court decided, on 16 January 1985, that Ustaz Taha and his four followers were apostates, and sentenced Ustaz Taha to death by hanging with no chance for repentance, unlike his four followers who were given one month to repent. In order to reach its decision, the Court neither mentioned nor discussed the content of the communiqué on the basis of which Ustaz Taha was arrested and convicted in the first place. Instead, the court quoted, in *extenso*, a political decision issued by the Shari'a Supreme Appellate Court in 1968 which selectively surveyed the work of Ustaz Taha.[184]

In imposing the death sentence on Ustaz Taha, the court, despite the fact that under Shari'a a person convicted of ridda is to be given a chance to repent his acts, relied on

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[183] *Ibid.*, 78.

[184] *Ibid.*, 79-85. The 1968 decision is described as a political one because at the time the court had jurisdiction only on personal matters of Muslims.

the "secular" crimes against the state under the Security Act 1973 and the Penal Code, to conclude that the death penalty must be carried out and regardless of Ustaz Taha's age.[185] Although the normal procedure was that the case was to be submitted to the Supreme Court before the President ratified the death penalty, the case was submitted directly to the President. The day following the Court's decision, 17 January 1985, the President confirmed the death penalty on Ustaz Taha and reduced the repentance period for the other convicted "apostates" to three days instead of one month. On 18 January 1985, Ustaz Taha, because of his non-violent expression of opinions and beliefs, was hanged before a large crowd with the four other accuseds being forced to watch his execution.[186] The political assassination of Ustaz Taha is reminiscent of the political execution of another Sufi reformer, al-Hallaj (858-922 A.D.), in the tenth century.[187]

In conclusion, a culturally responsible application of the right to freedom of expression under the African Charter would require its equal guarantee for both Muslim and non-Muslim within the cultural context of Islamic Africa. Non-Muslims, should be able to

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[185] *Ibid.*, 86. Ustaz Taha was 76 years old at the time he was executed. The execution of the death penalty was to be suspended, under section 247 of the Code of Criminal Procedure 1983, if the person convicted is 70 or more years old.

[186] See, "Sudan: 76-year-old 'Teacher' hanged before large crowd in Khartoum", Amnesty International Bulletin, May 1985.

[187] See, L. Massignon, *The Passion of al-Hallaj: Mystic and Martyr of Islam* (Princeton, N.J.: Princeton University Press, 1982); and H. Mason, *Al-Hallaj* (Richmond, Surey: Curzon Press, 1995).

express their opinions and concerns regarding the type of legal system to be implemented, the relation between religion and polity and on the implications of the application of Shari'a upon them. Muslims, on the other hand, should be able freely to voice their opinion concerning the government and the ruling elite. In order for Muslims to be able to exercise this right, two factors must be taken into consideration. First, Muslims need not worry about "upheaval" as a result of diversity of opinion since each Muslim is individually accountable to Allah for his or her intentions and opinions. In other words, each Muslim is responsible for the consequences of her or his actions and beliefs. The second factor necessary for an effective implementation of freedom of expression is the suspension of the ridda which has become a politically tainted and oppressive tool.

III. The right to participate in public life

I have noted, in the second and third chapter, the difficulties with the nation-state, corruption of the ruling elite and militarism as the root causes of political oppression in Africa. Any cultural solution to political repression will have to take these factors into consideration. The right of every individual to participate fully in public life must be guaranteed as one of the necessary precautions against political oppression. This will enhance the legitimacy of the state, better the connection between state and society,

and help develop more egalitarian internal relations between the constituent elements of the state. Article 13 of the African Charter states:

> 1. Every citizen shall have the right to participate freely in the government of his [or her] country, either directly or through freely chosen representatives in accordance with the provisions of the law.
>
> 2. Every citizen shall have the right of equal access to the public service of his [or her] country.
>
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

The right to participate in public life is discussed, in Islamic jurisprudence, under the principle of *shura* (mutual consultation). *Shura* is stated in two verses of the Qura'n:

> It is part of the mercy of Allah that thou dost deal gently with them. Wert thou severe or harsh-hearted, thou would have broken away from about thee: so pass over (their faults), and ask for (Allah's) forgiveness for them, and consult them in affairs (of moment). Then, when thou hast taken a decision, put thy trust in Allah. For Allah loves those who put their trust (in Him). 3:159
>
> Those who harken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation; who spend out of what we bestow on them for sustenance. 42:38

The Prophet was reported to have sought and accepted the opinion of his companions even when it was contradictory to his own.[188] The scope of *shura* can be dealt with

[188] Abu Huraira, the most famous of the Sunna narrators, commented: "I have never seen any one who seeks consultation of his companions more than the Prophet." M. S. El-Awa, *On the Political System of*

under three headings: matters subject to consultation, who can participate in the process of consultation, and the binding effect of consultation.

Matters subject to consultation: "All public affairs of the Muslim ummah (community) can or should be the subject of consultation."[189] The only condition for consultation on these matters is that they are not covered by an explicit provision in the Qura'n and Sunna and the final outcome of consultation must not contravene any of the injunctions therein.[190]

Who can participate in shura? The predominant opinion, among Muslim jurists, is that only the ulamma are to be consulted.[191] Although the two verses, quoted above, do not call for this restriction, earlier jurists stipulated this restriction by reference to their interpretation of the Sunna.[192] The majority of Muslims and all non-Muslims are excluded from the process of consultation. This renders the process of *shura*, as

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the Islamic State (Indianapolis: American Trust Publications, 1980) 88, for other examples, see pp. 88-9. See, also, C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: MacMillan Press, 1988) 124.

[189] Al-Awa, *On the Political System of the Islamic State*, *ibid*. 90. See, also, Mutwali, *Mabadi Nizam al-Hukm*, supra note , 254.

[190] Mutwali, *ibid*., 253.

[191] Mutwali, *ibid*., 254-260; and Al-Awa, *ibid*., 89. Awda is of the opinion that the ulamma have a duty to express their opinion in public affairs even if they were not consulted by the ruler. A. Awad, *Al-Islam wa Awda'una al-Siyasiya* (Islam and our Political Condition) (Beirut: Dar al-Risala, 1967) 120-160.

[192] Mutwali went further to stipulate that it could not be possible for *shura* to emerge from ordinary persons for their lack of knowledge and expertise. Mutwali, *ibid*., 256.

interpreted by jurists, problematic at best. The process is elitist and narrow minded since it undermines the obvious fact that knowledge is not a monopoly of one group over another.[193] The close association between rulers and jurists in the period following the Prophet and his four Khulafa make it impossible to attain a body of ulamma who are pious, honest and capable of pointing to the wrongs of the rulers.[194] Also, the exclusion of non-Muslims and the majority of Muslims from the process will render the current state of political strife in Africa worse.[195]

Shura's binding effect: Opinion is generally divided, among Muslim jurists, into jurists who argue that the outcome of *shura* is binding on the ruler and others who argue otherwise. This division among jurists is paralleled by another division concerning

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[193] This has even been recognised by the ideological leader of the present regime in the Sudan. Turabi states: "ideally there is no clerical or ulamma class, which prevents an elitist or theocratic government. Whether termed religious, a theocratic, or even a secular theocracy, an Islamic state is not a government of the ulamma. Knowledge, like power, is distributed in a way that inhibits the development of a religious hierarchy." Hassan al-Turabi, "The Islamic State", in J. Esposito, ed., *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) 241 at 244. Of course Turabi's regime ended up doing exactly the opposite by restricting the process of consultation to members of the ruling National Islamic Front while ruthlessly prosecuting other political opinions.

[194] See the opening quote, by al-Imam al-Gazzali, at the beginning of this chapter. See, also, the treatment, by some of "the ulamma" of the Gulf crisis highlighted in the first chapter. I also recall the rush by most of the Shari'a "ulamma" in the Sudan to support Numeiri's adoption of the September laws on the basis that they were Islamic laws. An-Na'im correctly points out: "it should be emphasised that the modern possibility of establishing an independent and constitutionally sanctioned authority which is capable of declaring and implementing the law against the executive ruler should not be confused with the position under historical Shari'a." An-Na'im, *Towards Islamic Reformation*, supra note 168, 80.

[195] I have pointed out, in the second chapter and in the forgoing discussion on the right to self-determination, that political corruption, lack of political accountability, and the continuing denial of both the right to self-determination and the right to participate in public life, have lead to the current of political violence in Africa.

whether the ruler is under a duty to seek consultation. Jurists who argue that outcome of *Shura* is binding, who seem to be in the majority, rely on other verses of the Qura'n which mandate taking decisions by consultation and rely on the fact that consultation is taken on matters not contradictory and not stated for in the Qura'n. Those who argue that the ruler is not bound by the outcome of *Shura*, suggest instead that it is sufficient to consult the ulamma and act according to the ruler's best judgement. Current tendencies lean towards arguing that the outcome of the consultation process is binding on the ruler. Turabi is reported to have said:

> It is true that Hasan al-Banna and the Egyptian Muslim Brotherhood represented a shiekh and followers within which *shura* or consultation was not binding. In our movement in the Sudan, on the other hand, what began as an elitist movement has now been joined to a regional elective process. The leader is elected and he is held accountable. There is no shiekh or dynasty in the movement. In fact, "Islam shuns absolute government, absolute authority, dynastic authority and individual authority.[196]

This preference for the binding effect of *shura* cannot, however, be "represented as the historical interpretation of the verses as understood by the founding jurists."[197] Nor can it be represented as a genuine realisation of the need, within Islamic Africa, for a more participatory form of government. Instead, it is reminiscent of post-independence

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[196] "Islam, Democracy, the State and the West", Summary of a lecture and roundtable discussion with Hasan Turabi, prepared by L. Cantori and A. Lowrie, (1992) 1:3 Middle East Policy 49 at 51.

[197] An-Na'im, *Towards an Islamic Reformation*, supra note 168, at 80.

African leaders' reference to tradition, African socialism, pan-Africanism ideologies. Turabi, for example, while representing the NIF as "a grass-roots and populist phenomenon and highly democratic",[198] offered the explanation, for the despotic activities of the current NIF regime in the Sudan, that "the government is currently intruding as a matter of expressing its leadership."[199] Another difficulty with the whole discussion about the binding effect of *shura* is its ambivalence towards the fact that non-Muslims are not included in the process.

It is obvious from the foregoing discussion that juristic formulation of *shura* is inadequate as the basis for ensuring an effective participation in public life. Instead, I believe that article 13 of the African Charter is more adequate in its provision for the right to participate in public life. This is based on the realisation that *shura* is a limited principle rooted not only in religious ideals not shared by non-Muslims, but in a narrow and restrictive interpretation which excludes the majority of Muslims as well. This suggestion is not a novelty but is shared by a wide spectrum of contemporary thought and orientation including the NIF.[200] Article 13 of the African Charter, must be applied in light of Sudanese constitutional history which leads to two conclusions.

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[198] "Islam, Democracy, the State and the West", supra note 196, 51

[199] *Ibid.*, at 53.

[200] See, Turabi, "Islam, Democracy, the State and the West", supra note 182, at 51. Another supporter of the NIF regime went even further: "One should indeed consider an Islamic state run by an infidel a curious institution. However, the problem goes deeper than this, for it involves the very nature of the modern nation-state and its place in the world. In order to be established at all, a state must gain international recognition, its borders must be guaranteed by international conventions against encroachments, while its survival and that of its government must depend on active economic and

First, the right to participate in public life was guaranteed in all Sudanese constitutions to the same extent as in the African Charter. Article 6(b) of the 1956 Transitional Constitution prohibited discrimination, on the basis of colour, creed or religion, in assuming public office and position.[201] These constitutions, with the exception of the 1973 Constitution, also guaranteed the right to formation of political parties and associations.[202] The second conclusion is that the right to participate in public life, under article 13 of the African Charter, must not be guaranteed to those who previously assumed constitutional positions in previous military and elected governments in the Sudan. I strongly believe that this condition is required by our socio-political culture. It would begin to address the general problem of political corruption in Islamic Africa and more significantly speak to some of the pressing political problems in the Sudan.[203] The difficulties with military regimes is too obvious

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political co-operation of influential members of the world community. ... It is clear, regardless of the particular situation of Muslim communities, that the Muslims represent a marginalised minority within the modern international order. The task of creating an Islamic state, which should include non-Muslims, has to be resolved within this system which, regardless of the proportion of non-Muslims, exacts special treatment for them." A. El-Affendi, *Who Needs an Islamic State*? (London: Grey Seal, 1991) at 67.

[201] The same prohibition is echoed in article 4(2) of the 1964 Transitional Constitution; articles 45 and 46 of the 1973 Constitution; and article 31 of the 1985 Transitional Constitution. Article 8(f) of the 1956 Constitution affirmed the same guarantee as in article 13 of the African Charter.

[202] Article 8(c) of 1956 Transitional Constitution; article 5(1) of the 1964 Transitional Constitution; and article 20 of the 1985 Transitional Constitution. Article 4 of the 1973 Constitution stipulated "the Sudanese Socialist Union" as "the sole political organisation."

[203] One of the areas of study I intend to pursue is intellectual and individual responsibility and human rights in Africa. This is based on the belief that the elite has a great many responsibilities towards the population. These responsibilities, I intend to argue, have not been properly discharged. Instead, the elite

to be discussed here. The performance of the ruling elite during democratic periods (1956-8; 1964-9; and 1985-9) is both weak and largely responsible for creating an environment conducive to military regimes. Two patterns of behaviour seem to be repeated in every period: petty political rivalry and irresponsible dealing with the question of the civil war in the Southern Sudan.

The first democratic period: The post-independence government ignored the 1955 mutiny in the South and reneged from the self-government promises made during the negotiations for independence. Political parties engaged in inter-party politics and rivalries which ended-up in the elected prime minister inviting the commander-in-chief of the army to take over power.[204]

The second democratic period (1964-69): Despite the fact that traditional political parties played a less significant role in overthrowing the military regime of General Abbod (1958-64),[205] they were able to form the second democratic government. Not only the same leading personalities were retained, but the same dynamics of inter-party rivalry and mismanagement of the Southern question were repeated. This lead to the

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has engaged in both justifying and participating in most of the political activities responsible for the current malaise in Africa.

[204] Taisier Ali, "Civil War and Failed Efforts for Peace in the Sudan", in T. Ali and R. Mathews, eds., *Civil Wars in Africa: Roots and Solution* (forthcoming 1996) 6.

[205] M. W. Daly, "Broken Bridge and Empty Basket: The Political and Economic Background of Sudan Civil War", in M. W. Daly and Ahmad A. Sikainga, *Civil War in the Sudan* (London: British Academic Press, 1993) 14.

creation of an environment conducive to the advent of the Nimeiri military regime (1969-85).

The third democratic period (1985-89): The Nimeiri regime was brought down by a popular peaceful uprising as a result of the combination of the general state of public dissatisfaction and the activities of a broad coalition between the Trade Unions Alliance (TUA) and political parties. The TUA was able, in 1986, to secure the Kokadam Declaration which was signed by the main South rebel movement, the Sudan Peoples' Liberation Army, and by most members of the coalition with the exception of the two major political parties, the Umma (lead by prime minister Saddig al-Mahdi) and the Unionist Democratic Party (DUP).[206] The Declaration called for a constitutional conference to settle the civil war and the question of the South. The Mahdi government, which had entered into various coalitions to form governments with DUP and with the NIF, did not recognise the Declaration due to pressure from the NIF and because the Umma party was not involved in the negotiation of the Declaration. The Mahdi government, which was further embarrassed by the endorsement by the DUP of the Declaration in 1988, finally agreed to adopt the Declaration in March 1989. The country was, by that time, volatile and unstable which lead to the coming of the present NIF-military regime.

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[206] Taisier Ali, supra note 204, 22-3.

Limiting the scope of the right to participate in life will make politicians aware of the responsibilities of public office and access to public resources. It is also a recognition of their role in the deterioration of social, economic and political life in most of the African continent. Such an approach would also prevent the demoralising and embarrassing situations created by the re-election of former dictators and despots.

The crisis of the nation-state, ethnic strife, political exploitation of religion, and political oppression are some of the factors negatively affecting African life. An effective human rights protection is an important step in alleviating these negative affects. A culturally responsive interpretation of the rights set out in the African Charter on Human and Peoples' Rights is a useful methodology. Implementation of the internal right to self-determination, freedom of expression and the right to participate in public life are regarded as important steps towards achieving a culturally adequate human rights protection for Africans. In other words, people will have to be able to freely discuss and participate in all matters affecting their lives and in the pursuit all possible political options, if the enormous socio-economic problems facing the African continent are ever to be tackled effectively.

Conclusion

As culture is intricate and complicated to define, its implications and what it embraces in the area of human rights and fundamental freedoms are even more complex. Cultural legitimacy is not a simplistic exercise in discarding colonial ways and adopting "African" or "Islamic" ones. It is rather a question of properly situating the changes in local culture. The underlying relationship between culture and human rights is that culture informs the human action and inaction that leads to respect and/or violation of these rights.

It should be recognised, however, that the language of the rights discourse is inherently Western and as such has not been a subject of contention within the African-Islamic context. However, the articulation of human rights into a particular legal language is not sufficient to make them culturally appealing, it is rather the appeal of this articulation to internal cultures that makes it effective. Attributing concern for human rights to one culture, however, to the exclusion of all others, is a wrong headed methodology. The role of culture in human rights protection is much more decisive than has been admitted in the past. Awareness of cultural difference is helpful in reducing tensions and imbalances which accompany socio-political changes and their consequences.

While externally the recognition of cultural diversity guarantees the right of every culture to contribute to the interpretative process of human rights, internally it presupposes a sense of intellectual responsibility in sorting out cultural norms of support and areas of difficulties. One aspect ensuing from the external element of cultural diversity is that the role of cultural "outsiders" is limited by their lack of understanding of internal cultural interpretative tools. This is not to say that external criticism should be prohibited. Rather, it points to the need to recognise the degree to which external cultural criticism and evaluation is tainted by its own cultural biases.

Internal cultural actors, on the other hand, have a responsibility to identify relevant elements which might support or buttress human rights within their cultural matrix. This identification is by no means an intellectual luxury. Rather, it must serve as a recognition and proper articulation of internal struggles against tyranny and political oppression. One of the responsibilities of internal cultural actors is to recognise cultural change and the harmful effects of outdated cultural conceptions. The question of who can claim cultural legitimacy is also important. It is only logical that those who are engaged in violating internal cultural norms must not be allowed to rely on the same cultural norms to justify their violations.

In examining human rights in the African-Islamic context some basic observations may be offered. First, the African-Islamic cultural outlook is neither communitarian nor individualistic, but an amalgam of both. The individual, *qua* individual enjoys a recognition for the purposes of the protection of certain rights and freedoms. Secondly, one must articulate a sophisticated understanding of the nature of the nation-state in Islamic Africa. The fact that the boundaries of the nation-state and ethnic distribution within it are haphazard has created a climate of boundary conflicts and ethnic tensions. This in turn has been compounded by the ethnic manipulation and militarism of the ruling elites, for example in the Sudan and Somalia.

The political use of Islam as a basis for the state adds another complication by excluding the majority of Muslims, as well as non-Muslims, from the governing process. The use of Islam in politics is no different from other attempts by ruling elites to exploit popular sentiments in order to attain narrow political and individual interests. Resort to Islam in politics is not generally to be mistaken for a genuine religious and pious expression; rather, it should not be viewed differently from former attempts to exploit "tradition", African socialism, Pan-Arabism and Pan-Africanism, in order to remain in power. Nazisi Kunene's poem, *The Day Treachery,* is a timeless warning:

> Do not be like the people of Ngoneni
> Who rushed with warm arms

To embrace a man at the gates
And did likewise in the day of treachery
Embracing the sharp end of the short spears[1]

Using Islam as a political tool is also based on the naive assumption that religion can transcend other social and cultural allegiances. In other words, all Muslims could be united and treated equally under the aegis of Islam as the basis of political legal organisation. This is no doubt the ideal tenet of the religion, but is not necessarily supported by socio-political reality in Islamic Africa. Somalia is a case in point. While it is unique in that its entire population is Muslim, other forms of allegiances (primarily clan-based) are not transcended by religion. Religion, as a vital cultural element, must be one of several cultural elements taken into consideration when articulating human rights protection within Islamic Africa. Political repression and corruption, which characterise African ruling elites, are among these other cultural elements that must be taken into account.

The importance of mobilising national cultural resources in the promotion and protection of human rights is highlighted by the weakness of the implementational arm of the African Charter on Human and Peoples' Rights. When we apply the sense of cultural responsibility outlined above in order to achieve an optimum implementation of the African Charter, there are certain rights the protection of which becomes

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[1] M. Kuneni, "The Day of Treachery", in Chinweizu, ed., *Voices from Twentieth-Century Africa: Griots and Towncries* (London: Faber and Faber, 1988) 209.

paramount. I argue that the right to self-determination, the right to freedom of expression and the right to participate in public life are identified as representing the core of human rights in Islamic Africa.

The right to self-determination guarantees peoples the right to determine their political fate. When this right is interpreted within the African-Islamic context, the right to self-determination must be extended beyond the conventional interpretation of freedom from colonial domination, to include the right of groups within any given state to determine their political fate. More particularly, the definition of a "people", for the purposes of self-determination, must takes into consideration the socio-political factors and circumstances affecting the existence of a given group. The population of the southern Sudan is defined as a people not because it is a homogeneous group, but as a result primarily of its negative identification by the rest of the country. Some of the consequences of this identification are evident in the civil war which has dominated the post-colonial history of the Sudan.

A comprehensive interpretation of the right to self-determination can result in a number of scenarios which range from secession and the formation of an independent state to the recognition of cultural diversity at the national level, and a protection of that diversity through the guarantee of a core of citizenry rights to individuals, regardless of their ethnicity and religion. This interpretation is useful as a mechanism

for resolving disputes, such as civil wars and ethnic tension, arising out of the nature of the nation-state in Africa. Recognition of diversity is essential to an effective human rights protection nationally. The words of E Beshir are inspiring on this point:

> [T]he goals of liberation and development can not be won except by recognition of diversity. New concepts of national unity, to replace old and outdated concepts, based on religious, linguistic and ethnic ideas, need to be formulated and promoted. ... *Cultural diversity, given the right policies can be a factor of equilibrium serving the cause of national integration, economic development and liberation. This is true on the national, regional and continental levels.*[2]

The essence of the present African nation-state is neither universal (Islamic) nor traditional (African), rather it is the exercise of *political* authority over the population within the confinement of territorial boundaries created by the colonial regimes. Regardless of their religious affiliations, the inhabitants of any given African nation-state are a collection of different (and at times competing) ethnic and cultural groups. The manipulation, by both colonialists and African ruling elites, of these groups has led to the current state of ethnic disputes and civil wars in Africa.

The essence of the theoretical framework of this thesis is that Muslims have a right to assert their cultural claims to human rights on the basis that each culture must be

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[2] Emphasis added. Mohamed Omer Beshir. *Diversity, Regionalism and National Unity* (Uppsala: Scandinavian Institute of African Studies, 1979) 3:31.

treated equally in its potential contribution to the international protection of human rights. By the same token, non-Muslims, within an Islamic majoritarian state, must be guaranteed the same right. Such a recognition of diversity must be complemented by the creation of a political environment conducive to a free exchange of opinions and public participation.

The right to freedom of expression ensures the input of each individual in public affairs. For non-Muslims this right guarantees a voice in matters affecting their livelihood, while for Muslims it guarantees this same right regardless of their expertise in matters of religious knowledge and interpretation. When construed in this way, the right to freedom of expression has another important role, in that it helps to curb political corruption and repression by enhancing public scrutiny of the ruling elite's activities. As a general rule, this right cannot be limited for the sake of a communitarian political ideal. The ruling elite's past manipulation of traditional concepts of leadership to justify repressive and corrupt policies has stripped it of moral credibility to impose reasonable limits on this right. In the Sudanese case there are compelling arguments that the crime of apostasy must be abolished in order to attain a meaningful guarantee of the right to freedom of expression. Although Shari'a guarantees the right to express one's opinion in political matters, the crime of apostasy has been used to silence these very opinions.

The implementation of the right to freedom of expression encourages a free debate on the nature of the political organisation and governance of a given country. It is, therefore, a factor in ending the continuing exclusion of the masses from the process of governance in Islamic Africa. A culturally sensitive interpretation of this right, under the African Charter, must take into consideration two factors. First, that religion cannot be used as a condition for the full enjoyment of this right. The debate on use of Islam as a basis for determining the capacity of individuals to elect and be elected is valid – if at all – only for those who share the tenets of the religion. Furthermore, within Islamic jurisprudence, the classic interpretation of the principle of shura is problematic if used as a basis for public participation.

The second, and by far the most controversial factor to be taken into consideration when interpreting the right to public participation, is the argument that the protection of this right must not be extended to those who have previously assumed prominent positions in military and civilian governments. This restriction is based on a recognition of the responsibility of the ruling elite for the deterioration in the quality of life in Africa. This is most evident on the Sudanese socio-political context. I realise that acceptance of this principle would mean exclusion of a large number of people involved historically in the struggle for democracy in Africa, particularly in the case of the Sudan, which might weaken the continuing capacity to struggle. Although this thesis does not pretend to devise specific political solutions or alternatives, the fact that

a discussion might ensue on the viability of this restriction on the right to participate in public life, is in itself a progressive step towards attaining a more culturally responsive human rights protection. An old politician uttered the following advice to a novice:

> The old game to which we are committed
> We must play it
> Watching each step
> As men do that walk
> Sheer mountain paths:
>
> Hitch not your hope to others,
> That when they slip
> They may tremble in their death
> Alone,
> While you climb on.
>
> Watch![3]

I am conscious of the work accomplished by many African scholars, and I am honoured to follow their paths -- analysing African culture and the nation-state. But I am also aware of the need to identify the shortcomings of the past. We must watch.

Perhaps the following exerpts from Farah's novel *Sweet and Sour Milk*, are a more appropriate conclusion for this thesis:

> And the two walked side by side, they walked silently with their shoulders nearly touching. They were almost the same height. But could they ever be of the same opinion? Could they share an idea, like two

[3] Joe de Graft (Ghana), "An Old Politician to a Novice", in Chinweizu, ed., *Voices from Twentieth-Century Africa*, supra note 1, at 209.

> near-strangers might share a plate of anything, with hands coming into contact with one another every now and again, as their jaws munched, each within a morsel of something picked from the same source, the same plate and hence the same idea, could they? Or did it depend on what use each made of the lungfuls of oxygen inhaled, as they walked side by side, hardly talking, hardly noticing what was going on outside their own heads. ... Would they forget their differences? Would they exchange their shoes, would each be ready to place his feet in the other's and walk in them? Would their feet feel comfortable? Would their shoes pinch, would a heel come off, some nails as well?[4]

They might not feel immediately comfortable in either their or other's shoes, but we all know it takes a while to break shoes in.

[4] Nuruddin Farah (Somalia), *Sweet and Sour Milk*, in Chinweizu, ed., *Voices from Twentieth-Century Africa*, *ibid*., 411-.

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APPENDIX

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Done at Banjul, June 26, 1981.
Entered into force, Oct. 21, 1986.
O.A.U. Doc. CAB/LEG/67/3 Rev. 5

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling decision 115 (XVI) of the Assembly of Heads of State and Government at it Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and people's rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and people`s rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER I: HUMAN AND PEOPLES' RIGHTS

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
   (a)the right to appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
   (c) the right to defence, including the right to be defended by counsel of his choice;
   (d) the right to be tried within a reasonable time be an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinion within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in

particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have 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.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State Parties to the present Covenant shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples 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 to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation or promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:
   (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
   (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favorable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of the appropriate

national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

CHAPTER II: DUTIES

Article 27

1. Every individual shall have duties toward his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;

3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II: MEASURES OF SAFEGUARD: CHAPTER I

ESTBLISHMENT AND ORGANIZATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Article 30

An African Commission on Human and Peoples' Rights, hereafter call "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

Article 32

The Commission shall not include more than one national of the same State.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be the national of that State.

Article 35

1. The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the election to nominate candidates;

2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of the three others, and the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

Article 42

1. The Commission shall elect its Chairman and Vice Chairman for a two year period. They shall be eligible for re-election.
2. The Commission shall lay down its own rules of procedure.
3. Seven members shall form of quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The Secretary General may attend the meeting of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the members of the Commission in the Regular Budget of the Organization of African Unity.

CHAPTER II: MANDATE OF THE COMMISSION

Article 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Right and in particular:
   (a)to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local

institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

(b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and the fundamental freedoms upon which African Governments may base their legislations.

(c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER III: PROCEDURE OF THE COMMISSION

Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

COMMUNICATION FROM STATES

Article 47

If a State party to the present Charter has good reason to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the inquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other State involved.

Article 49

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the State concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

OTHER COMMUNICATIONS

Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communications relating to the human and peoples' rights referred to in Article 55 received by the Commission, shall be considered it they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based on news disseminated through the mass media,
5. Are sent after exhausting local remedies, it any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and

7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious of massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV APPLICABLE PRINCIPLES

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Article 62

Each 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.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instrument of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after reception by the Secretary General of the instruments of ratification of adherence by a simple majority of the member states of the Organization of African Unity.

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States Parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

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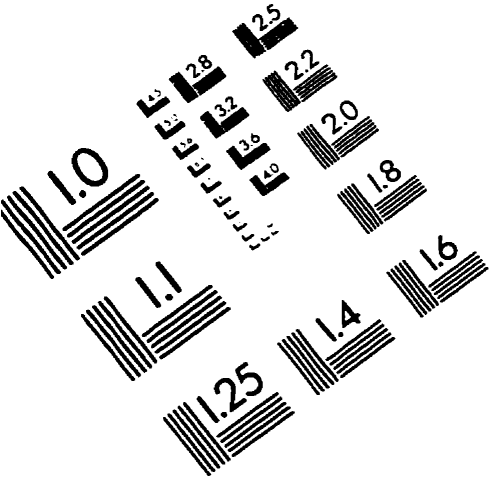

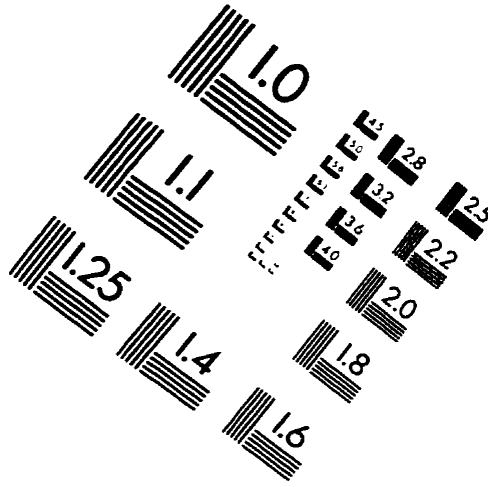

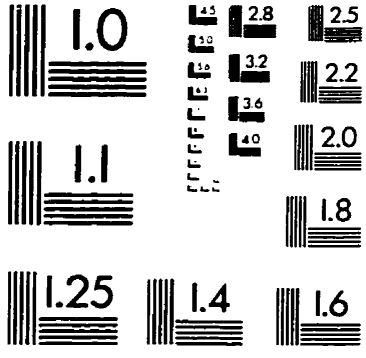

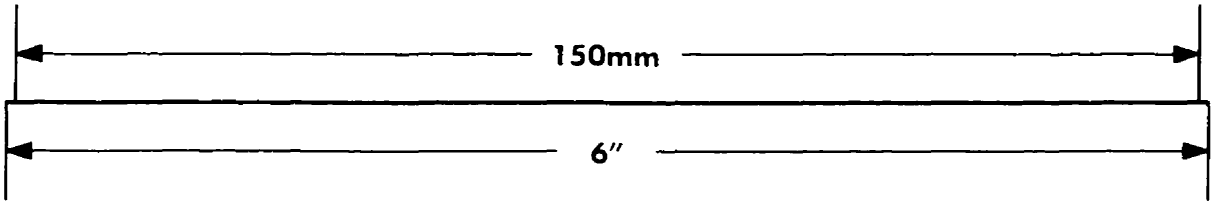

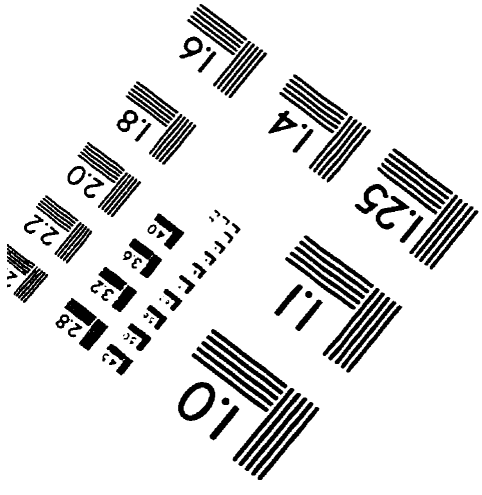

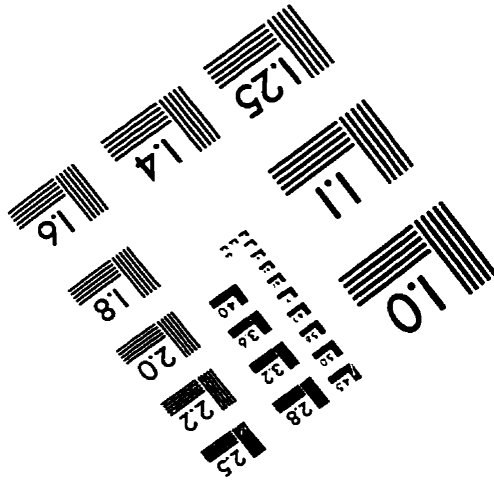

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