



Legitimacy, Justice, and the Future of Africa

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Human Rights, the Rule of Law, and Development in Africa
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In 1961, just as the countries of Africa were acquiring their independence, a junior *Washington Evening Star* reporter named Smith Hempstone, having just returned from a three-year-long odyssey across the continent, pessimistically opined:

All that can be said at this juncture is that Western democracy is not going to work in Africa. Nor is government going to revert to a tribal framework. A new synthesis is in the making and something new in political organization is about to emerge, an “Afrocratic” system which utilizes the form but not the substance of democracy and draws much of its inspiration from indigenous institutions. This implies limited freedom of speech, irregular and semi-free elections, a one-party system and rule of popular dictator. Western democracy evolved from a given set of circumstances to fit the needs and aspirations of a small portion of the world’s population at a given point in time. This is not the time in Africa and parallel circumstances, needs and aspirations do not exist among the peoples and nations (Hempstone 1961: 640-641).

In effect, the writer argued, one should not expect much from the new African nations in the matters of democracy and human rights. Four decades later, the same Hempstone, returning this time from a sojourn as United States ambassador to Kenya, professed his faith that:

[I]t is profoundly racist to suggest that democracy is impossible in Africa. It will be difficult and messy. The process will likely be a protracted one. But we owe it to ourselves as much as to the Africans to support the pro-democracy forces in their struggle. The support of human rights and the expansion of democracy will always be a component of U.S. diplomacy, but we need to decide how large a component it will be and then pursue it with logic and consistency (Hempstone 1997: 327).

What is even more amazing about this *volte-face* is that the writer had not been converted to liberal idealism: prior to serving as the envoy to Nairobi of the administration of George H.W. Bush—the consummate foreign policy realist—Hempstone had retired as the hard-hitting editor-in-chief of the conservative *Washington Times*. So, if journalist-turned-diplomat had not changed, what had?

There is a general consensus among political scientists and other observers that a wave of democratization swept across the globe with the end of the Cold War and the collapse of the Soviet bloc (Conteh-Morgan 1997). Many countries embarked on—or at least announced—a course of political transformation. While there have been reversals, failures, and even violence, many formerly

dictatorial regimes have successfully made the tumultuous transition to freer polities. Neither has Africa been aloof from this worldwide process. Before 1990, all but a literal handful of the continent's states were ruled by one-party—if not one-man—regimes. Up to then, with the exception of the state presidents of the apartheid regime in South Africa, no African leader had ever left office through electoral defeat and only three had retired voluntarily: Léopold Sédar Senghor of Senegal (1980), Ahmadou Ahidjo of Cameroon (1982), and Julius Nyerere of Tanzania (1985) (although Ahidjo, apparently undergoing a change of heart, subsequently tried to shoot his way back into office). By the end of the decade, however, virtually all sub-Saharan African states—even those that have collapsed or are on the very verge of collapse—opened themselves to what Jean-Germain Gros has termed the “first phase of democratization:” the opening of the political system to competition (Gros 1998: 2). Even some of the continent's longest ruling incumbents—including Gabon's Omar Bongo and Togo's Gnassingbé Eyadema, both of whom have been in power for more than three decades¹—have felt themselves compelled by the *zeitgeist* to at least go through the motions of subjecting themselves to electoral scrutiny.

While the actual mechanisms and modalities of democratization varied according to the internal dynamics of each case, the phenomenon gives rise to several questions: What led to this evolution in the first place? What kind of political structures have been—and are being—erected in place of the former regimes? What is the future likely to hold for these enterprises? Of course, a historic transition as vast and complex as the wave of democratization in Africa in the 1990s defies generalization. Nonetheless, there are underlying commonalities that can be discerned that transcend contingent elements and may prove determinative of whether the newly democratized polities successfully make it through the more difficult “second phase of democratization,” which involves creating the conditions conducive to the establishment of the rule of law—or, in the more inclusive French phrase, the *état de droits* (literally the “state of rights”), which guarantees citizens a broad range of rights, social and economic as well as civil and political (Gros 1998: 3). It is in the search for the lessons to be learned from the general trends that Paul Tiyambe Zeleza, professor of African studies and history at Pennsylvania State University, and Philip J. McConaughay, dean of Penn State's Dickinson School of Law, assembled the contributions of eighteen other scholars, including some of Africa's leading jurists and human rights advocates, to examine the experience of the last decade in Human Rights, the Rule of Law, and Development in Africa.

The first part of the collection, entitled “Universalism and Relativism in Human Rights Discourse,” centers on Western and African discourses about human rights and whether the relevant paradigm of human rights ought to be universal or culturally relative. While the longest of the volume's three subdivisions, this one is ultimately also the least satisfying, with little new ground

¹ Gnassingbé Eyadema, the African leader with the longest tenure, having seized power in 1967, four years after he helped lead the continent's first post-colonial coup, died unexpectedly after a heart attack on February 5, 2005. Two days later, his son was installed as head of state by the military after Togo's constitution was hastily amended to preclude the planned succession of the National Assembly speaker to the interim presidency and to allow the 38-year old *fils* to remain in office until 2008, when the late *père's* most recent term would have expired. While pressure from neighboring states forced Fauré Gnassingbé to relinquish the presidency on February 25, it did not succeed in restoring the displaced speaker Ouattara Fambaré Natchaba to his place as interim head of state. However, with the government-owned *Télévision Togolaise* country's only television station, the government-owned *Togo-Press* the only daily newspaper, and most of the radio stations in the hands of the ruling *Rassemblement du Peuple Togolais*, Fauré Gnassingbé is expected to be “duly elected” in the “constitutional” poll scheduled for April 25. *La plus ça change...*

covered by the seven contributors, who rehash a theoretical debate that predates the 1948 adoption of the Universal Declaration of Human Rights. On this issue, there is a diversity of viewpoints within the scholarly community, in general, and from the contributors to the present volume in particular, who span the spectrum from the spirited defense of the universal validity of rights (Ada O. Okoye) to passionate advocacy of their cultural relativism (Zezeza, Bonny Ibhawoh), with most located near the relativist end (N. Barney Pityana, Alamin M. Mazrui, E. Ike Udogu, and Kidane Mengisteab). The former position argues that the admission of cultural relativism is a slippery slope that undermines progress for human rights, while the latter fears the classical liberal formulation of human rights is itself a Western imposition on non-Western societies, especially, in this context, African ones. One contributor approvingly quotes the late Tanzanian president, Julius Nyerere, who once asked:

What freedom has our subsistence farmer? He scratches a bare existence from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are less real to him than his freedom to be exploited. Only as his poverty is reduced, will his existing political freedom become properly meaningful (36).

The either/or argument is that economic and social rights, which are allegedly more “African,” must take precedence over the civil and political rights that are said to dominate Western discourse. This line of zero-sum reasoning, however, tends to ignore the fact that civil and political rights are needed, not only to anchor economic and social development, but to protect society itself from the worst effects of even natural catastrophes (Sen 1999). It is no small irony that at the end of a life dedicated to denouncing Western “impositions” in favor of African relativism, Nyerere himself died in a private London hospital in 1999—the socialist medical system he bequeathed the people of Tanzania being found inadequate to treat his chronic leukemia.

The *via media* between the horns of the radical-universalist/radical-relativist dilemma might be found through recourse to Jack Donnelly’s distinction between “strong cultural relativism” and “weak cultural relativism.” The former holds that culture is the primary determinant of rights, values, and other social norms, although the universality of human nature can serve as a check on the excesses of relativism. The latter, while recognizing the importance of culture in the articulation, interpretation, and appropriation of norms, upholds their universality, particularly with respect to basic human rights. Donnelly wisely advises human rights advocates to hew to a “weak cultural relativism” which allows for “limited cultural variations in the form and interpretation of particular human rights,” while insisting on their “fundamental moral universality” (Donnelly 1989: 124).

Donnelly’s theoretical approach would be compatible with a compromise strategy for dealing with a case mentioned—but not resolved—by one contributor to the volume, N. Barney Pityana, former chair of the South African Human Rights Commission, in which a woman belonging to the Bafokeng ethnic group discovered that when her parents died, a tribal court, following customary law, awarded their estate to her nephew, to her total exclusion. Donnelly cites the work of Rhoda Howard who observed that while an outright ban on customary practices that are perceived to be particularly egregious in their discrimination might appeal to advocates of strict universalism, it would not only be objectionable to cultural relativists but might prove politically unfeasible in a given country. However, national legislation might be adopted that guaranteed the right of individuals or families to “opt out” of traditional practices in favor of a more universal standard—in

effect, allowing an individual to choose his or her own culture or at least determine the extent to which they might elect to participate in customary juridical institutions (Donnelly 1989: 124).

The second part of the volume, “The Economic and Political Dimensions of Human Rights,” examines how African states (as well as the United States) have both protected and subverted human rights on the continent. The first two essays discuss human rights and development in general (Pansy Tlakula, Yemi Osinbajo), while a third contribution by Christof Heyns and Frans Viljoen give an overview of regional and sub-regional² mechanisms for human rights protection. Luitfried Mbunda then offers a positive assessment of the task, thus far unfinished, of progressively securing basic human rights in Tanzania through legal reform and judicial mandate. A fourth essay by Ahmed Thabet documents the apparent stagnation of human rights in Egypt during the 1990s—a situation that he notes has worsened since the September 11, 2001, attacks even as “the illusory and noncommittal policies of the Egyptian state have empowered Islamic fundamentalism, which has undermined human rights” even further (172). Cassandra Veney rounds the section off with a survey of the role of governmental and nongovernmental actors in formulating U.S. foreign policy toward Africa, observing that because the post-Cold War policy toward the continent “is predicated on trade rather than aid, the business community will have to take a lead in promoting human rights in Africa” (175).

The final section of essays, “NGOs and Struggles for Human Rights,” looks at the role of nongovernmental organizations (NGOs) in the quest for human rights across the continent. Fittingly, the most extensive contribution in this section comes from the distinguished scholar of African politics and human rights Claude E. Welch, Jr., who two decades ago convened an important conference on “Human Rights and Development in Africa” that resulted in the publication of an eponymous volume (Welch 1984). That volume had only one chapter discussing nongovernmental organizations, while references to NGOs abound throughout Human Rights, the Rule of Law, and Development in Africa, with five essays devoted to studying them in detail. The explanation for the change is readily apparent from both the two general surveys (Welch, Makau Mutua) and the three case studies (Vincent Saldhana, Jotham C. Momba, Monica Kathina Juma): whereas, with perhaps the exception of South Africa, manifestations of civil society were relatively rare in sub-Saharan Africa until after the fall of the Iron Curtain, today NGOs play an important role in political affairs, especially as they touch upon human rights concerns. In fact Welch argues that “in the ‘body’ of human rights, NGOs can be envisaged as the nervous system, with states providing the skeleton and muscle” (200). Certainly, often working with limited resources and apathetic publics against hostile regimes, Africa’s human rights NGOs have carried a yeoman’s load during the 1990s, documenting abuses, promoting awareness, and otherwise helping to lay the foundations for the rule of law that is the condition *sine qua non* for the consolidation of the first phase of democratization and the transition to that second phase where one can speak meaningfully of development—including economic, social, and cultural rights—in an *état de droits*.

Who Represents Whom?

² Regionally: the Organization of African Unity/African Union, the African Commission on Human and Peoples’ Rights, and the proposed African Court on Human and Peoples’ Rights. Sub-regionally: the Economic Community of West African States, the Common Market of Eastern and Southern Africa, and the Southern African Development Community.

Given the importance of non-governmental actors both in bringing African concerns to the world's attention and mobilizing public opinion within African societies themselves, however, it is disappointing that—aside from Juma's criticism of failures in the protection for internally displaced persons in East Africa and some passing observations by Mutua—the not insignificant issues of the legitimacy of the representative function of NGOs receive relatively short shift in the current volume. These issues arise at two distinct levels. On the global stage, the international advocacy as well as more localized service provisions by transnational organizations headquartered in Western countries, oftentimes, staffed by their citizens, and financed ostensibly for the benefit of Africans, raises the obvious question of whose interests are being promoted, especially when there are open tensions between the NGO representatives and the official representatives of sovereign African states. Many African government officials undoubtedly empathize with the complaint voiced by Peter Jiwa Kuyembah, then finance minister in the democratically-elected Sierra Leonean government, about protesters at the Third Ministerial Conference of the World Trade Organization in Seattle in 1999:

I was in Seattle, and I will tell you: no one is fighting for me. Those highly sophisticated, self-made attitudinal people who have their ideas of what the good world is and the bad world is. Quite honestly, if you go deep down there, they may fight for you; if you don't care, when you get out, you may be boxed by them....So, actually, it is their will they are carrying (Lavelle 2004: 114).

On the national level, there is likewise a question about the representative credentials and general accountability of many African NGOs that goes beyond their understandable dependence on outside resources, although Mutua is correct in his conclusion that “an externally funded and directed movement cannot address the needs of Africans much less be integrated into the fabric of society” (196). Reliance on foreign donors lessens the need for the leaders of these groups to respond to concerns and priorities of the “masses” they ostensibly represent. Many, it seems, are more adept at addressing the needs of foreign stakeholders than they are at cultivating national constituencies.³ Furthermore, the leadership of many of these NGOs is drawn from narrow urban elites who are relatively detached from the social realities of the rural poor who still make up the majority in most African countries. Not surprisingly, the human rights agenda of these groups tends to concentrate on issues that reflect the aspirations of their primary constituencies, rather than those which might require of them a broader base. In fact, success is often deadly for local civil society organizations that have gradually become professionalized as a result of the resources becoming available through increased international attention. While this dependence on full-time, salaried professional staff can lead to a noticeable improvement of the reliability of many third sector organizations, which previously depended on part-time volunteers, it can just as easily isolate the same groups from the very constituencies from which they derived both their legitimacy and dynamism. Following the forceful international military intervention in the country's civil conflict in 2000, for example, many Sierra Leonean organizations were transformed virtually overnight into

³ Of course, things cut both ways. As development economist Mary B. Anderson acknowledged, in her book Do No Harm: How Aid Can Support Peace—Or War (Boulder, CO: Lynne Rienner Publishers, 1999), 146: “The ways outsiders enter and assume important roles in these circumstances correspondingly pose the most complex moral, as well as practical, challenges aid workers face.”

top-down, Freetown-centered⁴ institutions dominated by the competing agendas of their leaders rather than representative of concerns on the street. Over time, the inevitable donor fatigue of the international community leads to a drying up of resources. Unless this is reversed, the failure to build up strong institutional ties to local communities could seriously undermine the very viability of the same civil society organizations.⁵

Currently, the most extreme case of questionable NGO activity that undermines the third sector's credibility—indeed its very survival—may well be Liberia. In 2003, during multi-party talks following the resignation of President Charles Taylor (who had been indicted for war crimes by the United Nations-backed Special Court for Sierra Leone) representatives of Liberian NGOs adopted a new approach.⁶ Whereas previously, despite the sometimes ambiguous lines of demarcation between NGOs and civilian political parties, NGO representatives had nonetheless sought to cast themselves as advocates somehow above the fray of partisan politics. However, this time they sought not only inclusion in the Accra peace talks, but also a formal role in the transitional government being negotiated. The argument was that with most of Liberia's professional political class tainted or worse, NGO leaders needed to step in to participate directly in governance. The result was a four-way power-sharing arrangement that parceled out positions in the cabinet and the rest of the National Transitional Government of Liberia (NTGL) between the remnants of Taylor's National Patriotic Party (NPP) government, the Liberians United for Reconciliation and Democracy (LURD) and Movement for Democracy in Liberia (MODEL) rebels, and representatives of civil society organizations.

In the cabinet that was picked to work alongside NTGL chairman Gyude Bryant, the NPP retained five ministries, while five each were allocated to the members of LURD and MODEL. The remaining six ministries—national security, education, gender and development, information, rural development, and youth and sports—were entrusted by the Comprehensive Peace Agreement to representatives of NGOs. Likewise, the seventy-six seats in the unicameral National Transitional Legislative Assembly (NTLA)—that was created by the agreement—were divided up by participants to the negotiations. Supporters of the outgoing NPP government, LURD, and MODEL were each given twelve seats. Each of the eighteen registered civilian political parties, except for the NPP, was allocated one seat each. Seven seats were reserved for representatives to be designated by NGO

⁴ Independence for Sierra Leone meant the grafting together of two distinct colonial political entities: the Crown Colony of Freetown, established in 1808, and the hinterland Protectorate, which was proclaimed only in 1896. British administrators, missionaries, and teachers, created a largely Christian elite out of the former slaves settled in Freetown between 1787 and 1850. The “Krio” descendants of these freed slaves, who today constitute only 2 to 3 percent of the Sierra Leonean population and largely concentrated in the capital, have long formed a well-educated, Western-oriented class who served British interests during the colonial period by staffing the colonial apparatus and who continue to fill positions in the more recently arrived international organizations. In contrast, the British presence in the Protectorate was minimal. To a certain extent, this cleavage continues to bedevil the country's politics. See Akintola Wyse, *The Krio of Sierra Leone: An Interpretive History* (London: C. Hurst & Co., 1989).

⁵ For details, see the article “Lazarus Rising: Civil Society and Sierra Leone's Return from the Grave” *International Journal of Not-for-Profit Law* 7, no. 1 (November 2004), available at http://www.icnl.org/JOURNAL/vol7iss1/ar_pham.htm.

⁶ For details, see the article “A Nation Long Forlorn: Liberia's Journey from Civil War toward Civil Society” *International Journal of Not-for-Profit Law* 6, no. 4 (September 2004), available at http://www.icnl.org/journal/vol6iss4/ar_pham.htm.

groups. Only fifteen of the parliamentary seats—less than one-quarter of the total—were left to be filled by popular election, with one representative chosen from each of Liberia’s counties.

The agreement also parceled out Liberia’s publicly-owned corporations and autonomous government agencies and commissions, with the lion’s share going to civil society organizations.⁷ Likewise, local NGOs were entrusted with the management of no less than sixteen agencies.⁸

Needless to say, the formalization of the role of civil society organizations *qua* organizations in the transitional government did not come without controversy. While there is a certain logical segue to having representatives of civic groups assume responsibilities for some. The agencies—such as the Truth and Reconciliation Commission and the National Human Rights Commission—(entities that are less involved in the day-to-day business of direct public administration) as well as aid agencies such as the National Food Assistance Agency—the rationale for having NGOs run banks, lotteries, and rubber plantations—to say nothing of government ministries—is less apparent. Worse, the text of the Accra agreement did not designate which specific groups or individuals among civil society should assume which charges. As a result, the conference was the scene of rather unseemly squabbles as civil society leaders who presented themselves as “non-political,” “non-governmental,” and “representative,” vied with each other for very political government positions. With their leaders having entered the fray, the ability of civil society organizations to credibly remain “above politics” as impartial monitors of the implementation of the peace accords is questionable at best.

While the intention of many of the NGOs participating in the negotiation process may well have been to act as advocates for and custodians of popular interests amid the convened warlords and politicians, the ensuing jostling for positions in the NTGL and competition for control of state agencies and enterprises fundamentally altered their role in Liberian society. One cannot be both a political “insider” angling for a share of the spoils *and* a non-partisan watchdog over the actions of the government. Even if these leaders—presumably men and women of great integrity—remain personally unimpeachable during their government service in the transitional administration, it is still likely that the inevitable disappointments that will derive from failures of the agencies they manage to deliver basic services will redound negatively on Liberia’s civil society organizations and negatively impact their ability to exert positive pressure in the lead-up to the elections scheduled for October 2005—and jeopardize their ability to be effectively nurture a culture of human rights and the rule of law in the future.

In short, while a great deal of energy has been channeled into NGO activity during the 1990s and Africa has witnessed an unprecedented proliferation of advocacy groups promoting a variety of human rights causes, ranging from basic civil liberties to women’s concerns to environmental justice, it is still premature to draw any long term conclusions from this phenomenon and the tentative

⁷ Whose representatives were installed at the head of the Agriculture Industrial Training Board, the Liberia Domestic Airport Authority, the Liberia Mining Corporation, Liberia National Lotteries, the Liberia Rubber Development Unit, the Liberia National Oil Company, the Monrovia Transit Authority, the National Housing and Savings Bank, the National Housing Authority, and the National Insurance Corporation.

⁸ The Bureau of Immigration and Naturalization, the Bureau of General Auditing, the Bureau of State Enterprises, the Center for National Documents and Records, the Civil Service Agency, the John F. Kennedy Memorial Medical Center, the Independent National Human Rights Commission, the Liberia National Police Force, the Truth and Reconciliation Commission, the National Bureau of Investigation, the National Fire Services, the National Food Assistance Agency, the Contracts and Monopoly Commission, the National Elections Commission, and the Governance Reform Commission.

opening to political competition that occurred at the same time. Given the elite nature of many of these organizations, as well as their dependence on foreign resources and general lack of grassroots presence, both their legitimacy and their actual long-term impact remain to be tested. While empowering NGOs and other civil society groups is a first step in the process of political transformation, it is unlikely to be sufficient as a viable democratization strategy.

The Malaise of the African State

Disappointingly for a collection entitled Human Rights, the Rule of Law, and Development in Africa, none of the contributions in the present volume address what is arguably *the* most formidable obstacle to all three goals over the long term: the questionable *legitimacy* of the African state itself.⁹ In this context, legitimacy is understood not as a normative judgment about juridical right or moral virtue but in the social and political sense of whether or not the structures of a given polity have evolved endogenously within a society and its institutions can claim some historical continuity (Englebert 2000).

Amid the discussions this past year regarding whether the violence in the Darfur region of western Sudan constituted a genocide, and what, if any, actions the international community ought to take to stop it, it has been all but forgotten that at the very moment that one of the largest humanitarian disasters in the world was occurring, the Arab-dominated Islamist government in Khartoum signed a pact with African Christian and animist rebels in the south to end a conflict that, with few respites, has consumed the country since its independence in 1956.¹⁰ The Naivasha (Kenya) Accord, signed after two years of negotiations, mediated by the United States, Norway, Italy, and African member states of the regional Inter-Governmental Authority on Development (IGAD), provides for sharing political power and oil revenue and, most significantly, a future referendum allowing southerners to determine whether to remain a part of Sudan or to secede. Although African peace agreements have a notoriously short shelf life, and it still remains to be seen whether the two sides in the Sudanese conflict will honor their commitments, the Naivasha Accord stands out among similar deals for just admitting the possibility that international borders might be altered and a new map of the continent ought to be drawn up, permitting the creation of a new state. One of the little (but not inconsequential) ironies of international politics is that while the continent is often portrayed as chaotic—a “frontier of anarchy” and the birthplace of “the coming chaos,” to recall Robert Kaplan’s memorable titles—Africa is actually remarkable for having retained, essentially unchanged, the boundaries of the 1880s—a feat that international society has repeated nowhere else. In fact, Africa’s newest internationally recognized sovereign state, Eritrea, which achieved its independence from Ethiopia following the victory of insurgents against the then-Ethiopian regime

⁹ To be fair, one of the contributors, Makau Mutua, Professor of Law and Director of the Human Rights Center at the State University of New York at Buffalo School of Law, in a relatively obscure law review article published a decade ago, did break the *de facto* taboo and raised the possibility of adjusting the political boundaries of sub-Saharan African states. See Makau wa Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry,” *Michigan Journal of International Law* 16 (1995): 1113-1176.

¹⁰ The text of the May 26, 2004, Protocol Between the Government of Sudan (GOS) and the Sudan People’s Liberation Movement/Army (SPLM/A) on the Resolution of the Abyei Conflict, is available at http://www.usip.org/library/pa/sudan/abyei_05262004.pdf.

and a plebiscite in 1993, is the restoration of a colonial era political unit that had been merged with Ethiopia in 1952, rather than an entirely new entity (Keller 1995).

The challenge for African states since independence has been how to refashion what Bertrand Badie has called “*l'état importé*” into an arrangement that is not only stable, but will also be accepted by its citizens as legitimate, as well as sufficiently able to perform the basic functions of statehood: control over national territory; oversight of the natural resources; effective and rational collection of revenue; maintenance of adequate national infrastructure; and capacity to govern and maintain law and order, including respect for basic human rights (Badie 2000). As the distinguished British Africanist Patrick Chabal—who is also the premier biographer of the Luso-African revolutionary Amílcar Cabral—has observed:

Once the nationalists had gained independence and captured the state, they faced the difficult prospect of building on foundations which were rarely as solid as they would have wished them to be. Few African countries were “natural” nation-states, that is geographically, ecologically, ethnically, culturally, economically, socially or politically homogenous, cohesive or even coherent. Most are amalgams or patchworks, with predictable consequences for the nation-builders. Some were hardly plausible candidates for nationhood. In almost all cases, therefore, the task of constructing an African nation-state was difficult, on balance more difficult (though in different ways) than it had been in Europe, Asia or Latin America (Chabal 1992: 120-121).

A cursory glance at any major newspaper, however, reveals that in Africa today these “imported states” are in serious trouble. Sierra Leone has barely emerged from a more than a decade of civil war that resulted in the near-total collapse of its government as well as frightening scenes of violence. Until a year and a half ago, Liberia was run as a personal fiefdom by a warlord-turned-president; now the country is a *de facto* United Nations protectorate supervised by a retired U.S. Air Force major general pending elections later this year. The ironically-named Democratic Republic of Congo (DRC)—which has never, in its history as an independent country, had so much as one free and democratic election (one is due this year if the peace accord ending the most recent civil conflict holds)—has been embroiled in a conflict that has been called “Africa’s first world war” and taken an immense toll of 3.3 million lives, giving the DRC the highest crude mortality rate in the world today. Somalia—or at least its southern half—still lacks an effective central government more than a decade after the ill-starred international intervention of “Operation Restore Hope.”¹¹

¹¹ While most of Somalia remains an international basket case, one part of the country is functional. In 1991 a congress drawn from the inhabitants of the former British protectorate of Somaliland declared withdrawal from the 1960 union with Somalia to form the Republic of Somaliland along the northern coast. Since that time, Somaliland has maintained a *de facto* separate status, governed by a republican constitution, with an elected president (the current incumbent, Dahir Rayale Kahin, succeeded his elected predecessor, Mohamed Ibrahim Egal, on the latter’s death in May 2002) and a bicameral legislature including a Chamber of Elders and a House of Representatives. According to Amnesty International, the judiciary is functioning independent, and various political parties exist and compete in multiparty elections. There are 163 public schools, enrolling some 33,000 students. The country even maintains an official website (www.somalilandgov.com). However, lack of diplomatic recognition has meant that Somaliland is effectively cut off from most international aid and development programs. In contrast, the Transitional National Government, cobbled together in 2003 after talks hosted by the African Union in Kenya and consisting of self-appointed warlords with ties to other African rulers, enjoys the perks of international recognition, including funding (most of which presumably never gets anywhere near Somalia) and the use of the collapsed state’s diplomatic missions, including a swank piece of real estate on

At the center of this crisis is the contrived and artificial nature of the African state, coupled with the surreal expectation that post-independence leaders should somehow forge viable nation-states out of heterogeneous groups of peoples and cultures. A thumbnail definition of a nation has been given as a “named human population sharing a historic territory, common myths and historical memories, a mass, public culture, a common economy and common legal rights and duties for all members” (Smith 1991: 43). If that is the case, then there is no such chimera as the “Sierra Leonean nation”—or any other sub-Saharan nation for that matter. While Africa has a rich social, cultural, and political history, modern African states are not rooted in this past. The present-day borders and national compositions of African states are colonial legacies, emerging directly from the often arbitrary ways that the great powers delineated their respective spheres of influence during the late-nineteenth and early-twentieth centuries. With his usual detachment from any sentimentality, Henry Kissinger has elaborated on the consequences of this colonial past:

In Africa, borders not only follow the demarcations between the spheres of influence of the European powers, as in Asia; they also reflect the administrative subdivisions within each colonial area. In East and West Africa, Britain and France governed colonies with long coastlines. Hence it proved efficient to divide these colonies into a multiplicity of administrative units, each with its own outlet to the sea, which later became independent states. On the other hand, in Central Africa, tiny Belgium governed a region nearly as large as the British and French possessions without, however, any significant coastline. Possessing only a very short outlet to the sea at the mouth of the Congo River, this vast territory was ruled by Belgium as a single unit, which later emerged as a single state with an explosive ethnic mixture.

Most importantly, the administrative borders in each colony were drawn without regard to ethnic or tribal identities; indeed, the colonial powers often found it useful to divide up ethnic or tribal groups in order to complicate the emergence of a unified opposition to imperial rule (Kissinger 2001: 201-203).

While the struggle for independence from colonial rule united disparate groups in a common cause, whether peaceful (as was the case especially in West Africa, where non-settler colonies predominated) or violent, (as was the case in the settler colonies of Southeastern Africa, Algeria, and part of Morocco), this were rarely sufficient to form a national identity. The challenge was even greater in some cases like that of Sierra Leone where the country was created by amalgamating two separate colonial-era political units, the Crown Colony of Freetown and the Protectorate of Sierra Leone, each of which came to independence with a distinct colonial experience grafted upon more ancient differences. The survival of these artifices has not been contingent so much on internal legitimacy—by and large, non-existent—but due to international recognition derived from the right of self-determination granted to the colonial state and reinforced by the logic of the Cold War. Absent the Cold War or neo-colonial guarantees to client states,¹² ethnic plurality and, in some cases, state duality, have finally caught up with Africa. The consequences of the failure of post-colonial states (and their highly arbitrary borders) to forge national identities and loyalties have been devastating. Without any organic ties to a nation-state, rulers, constrained by neither local customary

East 61st Street on Manhattan’s Upper East Side that purports to be the “Permanent Mission of the Somali Republic to the United Nations.”

¹² Witness the ongoing French military mission in Côte d’Ivoire (which, prior to the French colonization, had only one centralized political authority, while the rest of the eventual country was politically decentralized) where an estimated 12,000 people have been killed and anywhere between 700,000 and 1 million displaced since September 2002.

law nor the colonial civil law that supplanted it, pillage at will with their cronies—and, by extension, members of their descent group—and resort to massive human rights abuses to repress those excluded. The genocide in Rwanda ten years ago is just one example—albeit perhaps the most poignant one—of the destructive potential in ethnic cleavages.

In fact, while one ought not to undervalue the progress made toward establishing the rule of law, securing human rights, and opening the political arena to competition since the end of the Cold War, it should not be forgotten that the same period saw the outbreak of nearly two dozen wars that have killed at least eight million Africans and displaced an estimated 20 million.¹³ Despite the heroic talk about an “African renaissance,” the reality has been a vicious circle of weak states and the collapsing rule of law frightening off both local and international investment, leading to chronic underdevelopment which, when coupled with disease and environmental stress, contributes to anarchy and lawlessness and, eventually, open conflict. The whole cycle constitutes what one study succinctly characterized as “development in reverse” (Collier 2003: 13).

Despite damning evidence of wholesale failures of the juridical states they inherited from their former colonial masters, African elites have persisted in their canonization of the *status quo*. The precursor of the present African Union, the Organization of African Unity, formally declared at its very first summit that the received borders are a “tangible reality” and require that its member governments pledge themselves “to respect the frontiers existing on their achievement of national independence.”¹⁴ This preservation of arbitrary territorial divisions more often than not has benefited illegitimate and, often enough, incompetent rulers, while depriving the masses of the civil and political liberties that ought to have been the fruits of independence—to say nothing of the minimal condition *sine qua non* for the development of a tolerable standard of living.

Crisis of Legitimacy, Crisis of Development

By and large, the contemporary African state is not endogenous. It supplanted preexisting political institutions, underlying norms of social and economic behavior, and customary sources of law and authority.¹⁵ Rather, it is an instrument of colonialism that, when abandoned by its creators,

¹³ While estimates of war casualties are notoriously imprecise, the figure of “at least eight million” can be reliably taken as a conservative estimate when one considers that the six largest conflicts alone yield more than seven million casualties: the Democratic Republic of Congo, 3.3 million; Sudan, two million; Angola, one million; Rwanda, 800,000; Somalia, 300,000; and Liberia, 250,000. See Human Rights Watch, *World Report 2003: Africa Overview* (New York: Human Rights Watch, 2003), 3-13.

¹⁴ The resolution, published as the final communiqué of the first ordinary session of the O.A.U. Assembly of Heads of State and Government in Cairo, Egypt, July 17-21, 1964, went so far as to brand any dissension on the subject to “extra-African maneuvers aiming at dividing African States.” The late Senator Daniel Patrick Moynihan, in his 1991 Cyril Foster Lecture at the University of Oxford, labeled the decision “an act of prescient statecraft,” albeit one “not likely to endure,” and predicted the appearance of as many as one hundred-fifty new states, mostly in Africa, over the course of the following fifty years. See Daniel Patrick Moynihan, *Pandaemonium: Ethnicity in International Politics* (Oxford: Oxford University Press, 1993), 73, 168.

¹⁵ Victoria Bomba Coifman of the University of Minnesota, for example, has done pioneering work on the flexible nature of pre-colonial patterns of political organization in West Africa, including the coastal region stretching south from the Senegal River to Liberia (and also visible in the Sahara and Morocco). Broadly, political organization existed on a continuum with decentralized (stateless) societies at one end and centralized political authorities (states) at the other:

was picked up with gusto by the new political elites. It consequently lacked legitimacy among large segments of the population who, despite the alienating experience of colonialism, maintained some attachment to earlier institutions. In short, independence was not a return to a history brutally interrupted by the colonial experience (Davidson 1992). In fact, many of the post-independence leaders tried to repress, rather than build on the pre-colonial past. In his keynote address to a 2001 conference on “Democracy, Sustainable Development, and Poverty” at the United Nations Conference Center in Addis Ababa, the distinguished African scholar Ali Mazrui asked:

Who killed African democracy? The cultural half-caste who came in from Western schools and did not adequately respect African ancestors. Institutions were inaugurated without reference to cultural compatibilities, and new processes were introduced without respect for continuities. Ancestral standards of property, propriety and legitimacy were ignored. When writing up a new constitution for Africa these elites would ask themselves, “How does the House of Representatives in the United States structure its agenda? How do the Swiss cantons handle their referendum? I wonder how the Canadian federation would handle such an issue?” On the other hand, these African elites almost never asked, “How did the Banyoro, the Wolof, the Igbo or the Kikuyu govern themselves before colonisation?” In the words of the Western philosopher Edmund Burke, “People will not look forward to posterity who never look backward to their ancestors” (Mazrui 2002: 20).

What does this historical discourse have to do with the continent’s anemic development?

Africa’s post-independence leaders faced the challenge of establishing political control in polities founded on neither historical legitimacy nor institutional continuity. Very shortly, many relied on the control of markets that came with their *de jure* sovereignty and on their ability to manipulate access to resources created by those markets, so as to enhance their own power. This gave birth to the pattern of behavior described by political economists as “neopatrimonialism,” whereby national resources were redistributed as marks of personal favor to followers who respond with loyalty to the leader rather than to the institution that the leader represents. For want of moral and historical foundations—or even knowledge of these—the new rulers relied on a sort of instrumental legitimacy, knitting together a network of private interests behind the façade of formal statehood. A not atypical (albeit extreme) example is the current state of things in Gabon, an equatorial nation with a little more than one million inhabitants and abundant natural resources (including petroleum). Gabon has been ruled for four decades by El Hadj Omar Bongo, *né* Albert Bongo, who succeeded the deceased independence leader Léon M’Ba in 1967, and relies heavily on his family. His son, Ali-Ben Bongo, holds the strategic portfolio of minister of defense, while his daughter, Pascaline, is

In a society with decentralized political authority, government remained in the hands of the citizens, decisions were reached through consensus, and a leader was chosen to deal with specific issues. Afterwards, he or she returned to the position of ordinary citizen. There was no permanent political authority in this very democratic political organization based on lineages. After the coming of food production technology, some societies began to centralize in varying degrees. A permanent leader would make some decisions for the community. In West Africa, a common model came to be that of a permanent ruler elected from certain eligible lineages by members of a council, based on other (non-ruling) lineages. Often the council could vote the deposition of the ruler too. It was possible to move along the political continuum, from decentralized to centralized political authority, and back (Coifman 1998: 114).

These points are further developed in Coifman, “The People of the African-European Frontier, from the Sahel to Sierra Leone, the Rio Nuñez and Rio Pongo of Lower Guinea,” in Gérard Gaillard (ed.), *Migrations Anciennes et Peuplement Actuel des Côtes Guinéennes* (Paris: Éditions L’Harmattan, 2000), 487-515.

director of the office of the president and has been married, successively, to Foreign Minister Jean Ping, president of the current 59th session of the UN General Assembly, and Minister of Economy, Finance, and Budget, Paul Toungui. Ali-Ben and Pascaline's younger siblings are equally well-placed in either government and state-owned enterprises: Jeff is the regulatory head of the State Treasury, Christian is director-general of the Banque Gabonaise de Développement (BGD) and president of the Transgabonais railroad (of which his mother, Cécilia Ndjavé Ndjoy, is chief operating officer), Alex is chief financial officer of Gabon Télécom, and Nadine is director-general of Libreville's luxury Hôtel Atlantique, whose website (www.hotelatlantique.com) informs potential guests that every room has a satellite connection to TVSAT without mentioning that that particular service is headed by none other than sister Anicet.

Given the government of "Bongoland" (as the country was dubbed by one of the regime's leading critics, Father Paul Mba Abessole), it is not surprising that, notwithstanding the country's strong per capita GDP, about half of which comes from currently skyrocketing oil revenues, most of the citizenry remains mired in misery. Approximately five percent of the population—mostly natives of the Bongo clan's ancestral Haut-Ogoué region—receives over 90 percent of national income, which is viewed as means to finance political allegiance, just as employment in state and para-state enterprises is used as means of patronage. In such a system, development policies necessarily observe political and social (of a limited sort), rather than economic, criteria. Consequently, the rule of law is dead (if it was ever present), along with public trust in institutions. As a result, as a survival mechanism, households and businesses retreat into the "informal" sector and the entire economy stagnates, even as the perverse logic of the neopatrimonial system renders it ever increasingly resistant to reform.

While the post-colonial crisis of state legitimacy is not unique to Africa—a similar process occurred in states in South Asia and the Middle East including, as the United States has learned, in Iraq—what is unique is the high concentration of sovereign states whose birth was disconnected from the organic development of the peoples they incorporated within their boundaries. With a very few exceptions, African independence did not mark the return to pre-colonial institutional forms of sovereignty—if anything, the current went in the opposite direction as nationalist leaders forged ahead with nation-building. Thus, the newly-independent states suffered from what Kalevi Holsti termed a deficit of "vertical legitimacy," meaning they lacked a "connection between society and political institutions" (Holsti 1996: 97). Furthermore, the artificial nature of the inherited colonial boundaries that (consciously or not) cut across preexisting ethnic, social, economic, and political communities, also leads to a further gap, which Holsti termed one of "horizontal legitimacy:" a lack of consensus on criteria for membership in the polity due to the absence of a link between the population and the territory of the state (Holsti 1996: 97). In sociological terms, in the illegitimate state, there is agreement neither on the contents of the social contract nor on the identity of those entitled to negotiate the contract itself.

The legitimacy, or lack thereof, of the states has a direct impact on the range of governance strategies and economic options that political leaders have to choose from. The leadership of a state that has evolved endogenously and, consequently, represents either the interests of a predominant group (e.g., aspirations for national unity among the speakers of *castellano* in Spain) or the compromise between competing groups (e.g., the municipal division of power and its prerogatives between various ethnic voter constituencies in many American urban centers), is generally freed of

concerns about consolidation and is likely to adopt policies with longer time horizons. In contrast, rulers in states lacking this quality find it more rational to focus on a shorter horizon, using state resources to establish their hegemony through nepotism, patronage, and other preferential policies. While the returns from the latter strategy are greater for the ruler in the short term, over time it leads to a vicious cycle of diminishing state capacity that culminates in the weak state sliding into the failed state.

In Sierra Leone, for example, upon assuming office in 1968, Siaka Probyn Stevens inherited a sound, if poor, economy based on diamonds and iron mining as well as agriculture (primarily coffee and cocoa production) that was expanding at the respectable, if not stellar, annual rate of 4 percent against an annual population growth rate of 1.9 percent (Chege 2002: 151). In little over two decades, his neopatrimonial governance strategy reversed everything. In no sector was this more evident than in Sierra Leone's fabled diamond industry. Before Stevens took over, the diamond trade constituted one-third of national output and contributed over 70 percent of Sierra Leone's foreign exchange reserves. By the mid-1980s, less than \$100,000 worth of the precious minerals passed through legal, taxable channels. Most of the rest was appropriated by Stevens and a coterie of his closest associates, who also embezzled profits and other assets from various state enterprises, including the oil and rice monopolies. Having looted an estimated \$500 million and leaving a balance of barely \$196,000 in foreign reserves in the Bank of Sierra Leone on the day he left office, Stevens retired in 1985, designating the army chief, Major General Joseph Saidu Momoh, as his successor (Reno 1999: 116). Unfortunately for Sierra Leone, Momoh's regime was not only more venal than its predecessor, but an even more incompetent captain of the ship of state. Sierra Leone's straitened circumstances accelerated a downward spiral of political, economic, and social malaise. As one former United States ambassador to Sierra Leone, John Hirsch, observed:

Unpaid civil servants desperate to keep their families fed ransacked their offices, stealing furniture, typewriters, and light fixtures.... One observer has noted that the government bit bottom when it stopped paying schoolteachers and the education system collapsed. Without their salaries, teachers sought fees from the parents to prepare their children for their exams. With only professional families able to pay these fees, many children ended up on the streets without either education or economic opportunity (Hirsch 2001: 30).

Bereft of the resources to provide its potential clients with jobs and educational opportunities, the central government lost its base of support and began to unravel altogether at the very moment when contracting services and collapsing infrastructure left the state itself most vulnerable to attack, plunging the country into the horrors of a decade-long civil war in 1991.

While the 1990s have seen a considerable transformation of the African political arena toward greater openness, as Seymour Martin Lipset has observed, "the stability of any given democracy depends not only on its economic development but also upon the effectiveness and the legitimacy of its political system" (Lipset 1981: 64). However, as the capacity of any state for economic development and institutional effectiveness is a direct corollary of its stability, ultimately everything hinges upon the question of state legitimacy. On the one hand, lacking legitimacy and a strong sense of national community, neopatrimonial strategies become the basis for the political elites' grasp on power. On the other hand, such patronage and corruption undermine the development of functional institutions and further weaken state legitimacy. In the end, the absence of state legitimacy is both cause and effect of Africa's perennial underdevelopment—political, economic, and otherwise. One political scientist has likened the resulting system as an "insurance policy:" the international

community underwrites the main beneficiaries—the rulers,—not the peoples—of sub-Saharan Africa. Regimes are recognized regardless of their domestic legitimacy, provided they do not disturb their neighbors (Jackson 1990). Ironically, this arrangement is, in effect, a return to the same principle of dynastic legitimacy that secured the “thrones” of Africa’s colonial exploiters, albeit with one crucial “improvement:” by and large, to vindicate their claims, European monarchs had to both govern their realms and secure their marches against their rapacious neighbors without recourse to international legal guarantees of the sacrosanct nature of their inherited frontiers.

Conclusion: The Road to the Future

When confronted with the wide range of problems facing contemporary Africa—civil conflict, political corruption, economic stagnation, international debt, the AIDS pandemic, inadequate food and housing, and so on—there is a strong temptation to despair about the continent’s future. However, the publication of *Human Rights, the Rule of Law, and Development in Africa* is a salutary reminder that as dark as the horizon may seem, Africa has already seen even darker days. As the various authors attest, the prospects for basic civil and political rights and the rule of law are better today than they were just a decade ago. Freed from the bipolar logic of the Cold War, Western nations (including the former Soviet Union) no longer perpetuate African dictators as local proxies in the struggle against the opposing block. Increasingly, donor states and institutions who formerly resisted political conditionality nowadays tie their development aid to democratic reforms and good governance. The aging Robert Mugabe’s Zimbabwe being a case apart, the impact of the collapse of communism in Eastern Europe has discredited the idea of the one-party state and dampened the ardor for radical politics across the continent.

It ought to be recalled that even before the dark days of the Cold War, there were the even darker days of colonial violence. If today Africa presents a bleak picture, notwithstanding the progress made toward democratization in the 1990s, much of the crisis harkens back to the rude interruption of its historical and political evolution that the colonial enterprise represented when it intruded into the organic efforts of the continent’s peoples to achieve their own political accommodation. Ironically, the illegitimacy of colonization is perpetuated in the configuration of the post-independence states and their almost sacrosanct adherence to the doctrine of *uti possidetis juris* that precludes any discussion of basic legitimacy of the state and its inherited frontiers.¹⁶ While external political and economic factors as well as internal social and cultural tensions have contributed to the crisis that many African countries find themselves in, these issues cannot be

¹⁶ The doctrine of *uti possidetis* was introduced into modern legal thought in the aftermath of the dissolution of the Spanish colonial empire in Latin America. In the interest of reducing conflicts over borders, the emergent states accepted as their respective national borders the administrative boundaries established by the colonial rulers. As the doctrine was generally applied by the Latin American states *inter se*, it distinguished between *uti possidetis juris* and *uti possidetis de facto*. The former referred to the legal right to a territory based on the claims asserted in Spanish colonial documents, while the latter referred to a legal right based on the actual exercise of colonial governance over a given territory. The differences between these two interpretations of the doctrine have been at the root of many of the boundary disputes between Central and South American states, including *inter alia* the contentions between Guatemala and Belize. The OAU’s adoption (and adaptation) of the more generalized form of the doctrine was essentially a political affirmation that such border disputes that might arise between the newly-independent states were to be resolved by reference to the pre-existing borders. For a brief survey of the history of this doctrine, see Enver Hasani, “*Uti possidetis juris*: From Rome to Kosovo,” *Fletcher Forum of World Affairs* 27, no. 2 (Summer/Fall 2003): 85-98.

divorced from the congenital crisis of state legitimacy, which created a perverse set of incentives for the continent's rulers.

Historically, building the state preceded its democratization. In many parts of the world, including most of Europe, the modern state was created in the forge of conquest and force, and only afterward did economic interdependence, cultural, educational and administrative homogenization, and, ever so gradually, democratic political arrangements finish the task of state building. In contrast, the African experience has been one where the colonial state imposed artificial boundaries without encouraging—when not actively discouraging—economic, social, and political integration. After the colonial era, the newly independent states were left with the task of trying, as Zambia's founding father Kenneth Kaunda put it, "to create nations from sprawling artifacts the colonialists carved out" (Neuberger 1995: 235). In many places, the post-colonial state has not only failed to weld a nation together, it has proven incapable even of deploying sufficient force to control the inherited colonial boundaries. Democratization and the growth of the culture of human rights, welcome as they are, have rendered this task of state building even more daunting: the option of forging a nation-state by force is no longer available; the integration of disparate groups into a single polity, if it is to occur at all, must nowadays be accomplished on a voluntary basis through negotiation and compromise. Where an accord cannot be reached, as the Naivasha accord for Sudan demonstrates, the possibility of self-determination must be accepted.

Africa's drive toward political transformation and economic development is, in effect, headed for a dead end unless past failures and present weaknesses are acknowledged. Individual histories, economies, ethnic dynamics, and geopolitical concerns will vary from case to case. Nonetheless it is clear that the road to a future where the state is not only respectful of its citizens' basic freedoms and rights and capable of providing them not only security against internal and external threats, but also minimal economic and social entitlements—and, consequently, is accepted by them as legitimate—lies through the past. Justice in the future cannot be achieved unless the injustice of the past—including the founding injustice of the imposition of the colonial state—is addressed. Although that path is not without its own hazards, they are no more treacherous than the current unstable and largely illegitimate political arrangements. At the very least, the openness to new approaches is most respectful of that most fundamental of human aspirations: the hope for justice; justice for the wrongs suffered by one's ancestors as well as justice for the visions yet to be dreamed by one's children.

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