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Chapter 1 INTRODUCTION

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As the turn of the century (and millennium) approaches, Africa stands poised between the extremities of **despair and hope**. In the last decade of this century, the butchers who hacked helpless victims to death on the killing fields of Rwanda have etched despair onto the face of the continent. The inability of the government of Rwanda, the international community and common humanity to protect the lives of the innocent has reinforced images of Africa as a savage mystery,

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and an impenetrable heart of darkness.[1] Nigeria so nearly progressed towards participatory democracy before the process was reversed and military-style government was reinstated. In fact, deflated expectations have characterised developments in Nigeria since independence, starting with the bloody Biafran war in the early 1960s.

Hope, on the other hand, has become symbolised by Nelson Mandela's long walk to freedom, and millions of South Africans' long wait to cast their first votes in the democratic elections of 1994. The 1990s were ushered in by other promising images from the continent: the rising sun unfolding on the independence flag of Namibia; a triumphant Chiluba and a defeat-conceding Kaunda after the Zambian elections; masses taking to the streets of Cotonou, forcing a national conference in Benin; the post-independence wars and eventual Peace Accord, followed by elections in Mozambique, two rounds of elections since 1992 in Ghana ; a peace accord between warring factions in Angola; and most recently the relatively peaceful overthrow of Mobutu Sese Seko in Zaïre.

But images of hope fade fast. Experience has shown how tenuous the establishment of democracy is. And human rights only stand a chance if hope is kept alive. Optimism should not be based on a dream that the future will be different: It is important to link the hopes of the future to positive aspects from the African past. In other words, the African greatness of bygone eras should be linked to attempts at renewal and restoration. Carthage, that city-state in Northern Africa that challenged the greatness of the Roman Empire and under Hannibal came within a hair's breadth of sacking Rome is an example of this past. Cato the Censor, who became a Roman commissioner to Carthage, was so impressed by the danger posed to Rome by this city that he ended each of his speeches to the Senate with the phrase: "Carthage must be destroyed".[2] This indeed happened with the Roman victory in 202 BC. This, and other forms of greatness need to be restored as part of the African renaissance, and must be extended to the realisation of human rights to Africans by

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1 In the imagery of Conrad (1994), who portrays the journey of Marlow into the former Zaïre as a penetration "deeper and deeper into the heart of darkness" (at 50), faced with the suspicion of the men encountered "not being human" (at 51).

2 "Carthago delenda est" (see Harvey (1940) at 94).

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African governments.[3] This will not be achieved overnight, but by rebuilding and building stone by stone. This study aims to be a stone in this process of building and rebuilding.

Violations of human rights under colonial rule in Africa did not end with the African independence of the late 1950s and 1960s. One, rather belated, response to these violations was the adoption of an inter-African human rights instrument, the African Charter on Human and Peoples' Rights, in 1981. The Charter created the African Commission on Human and Peoples' Rights. By November 1997, the Commission has already celebrated ten years of existence, underlining that the Charter system has become part of the recent African reality. It is on this reality that a future of improved human rights realisation in Africa should be built. This study takes the optimistic view that progress is possible. It also accepts as premise that the improvement of the human rights records of African states is a prerequisite for converting the ideal of an African renewal into reality.[4] It further underscores the necessity of common African approaches to common African problems. Rather than relying on answers from other regions of the world or attempting to work out problems in isolation from other states, African solutions should be sought.

As an introduction to the study, this chapter sets out the aim and my understanding of the terminology used in the title. It also provides a background to the motivation behind undertaking the research. Moreover, the limitations of the study are spelt out.

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3 See the description of Carthage by Virgil: "and now they were climbing the hill that looms large over the city and looks down on the confronting towers. Aneas marvels at the massive buildings, mere huts once; marvels at the gates, the din and paved high roads. Laws and magistrates they ordain, and a holy senate" (*Aeneid* book I at 420 - 429). Not everyone agrees about the nature of the society in Carthage, as the following description shows: "The Carthaginians were hardly an attractive people. They did not have it in them to be the standard-bearers of a higher civilization. Selfish, parasitic, money-grubbing, corrupt and,when it cost them nothing, oppressive ..." (Caven (1980) at 293, commenting on the same period in Carthaginian history)).

4 African leaders such as South African President Mandela, Vice-President Mbeki, and Ugandan President Museveni have over the last few years articulated the ideal of an African Renaissance from various platforms.

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1.1 Aim of the study

The aim of this study, which is entitled "The realisation of human rights in Africa through inter-governmental institutions", is twofold:

- It investigates the ways in and extent to which human rights have been and are realised in Africa through international law. Although the focus ultimately falls on what happens in individual countries, the role and contribution of instruments, institutions and structures created **between governments** at the **supra-national** level are analysed. Inter-governmental structures providing protection at three levels are discussed. These levels are:

- the global level, under the auspices of the United Nations ("UN");

- the regional level, under the auspices of the Organisation of African Unity ("OAU"); and

- the sub-regional level, mainly under the auspices of various African sub-regional organisations.

  The approach in each instance is largely descriptive of the legal framework, although criticism is also voiced.

- It further investigates ways of **improving** the realisation of human rights through inter-governmental co-operation. Comparisons are drawn with other regional human rights systems. Arising from these comparisons, the possibility of creating a supra-national African human rights court is canvassed in more detail. The events leading to the proposed African Court on Human and Peoples' Rights are discussed, the draft Protocol that is in the process of being considered within the OAU is analysed, and arguments for and against the establishment of such a pan-African Court are evaluated. Alternative ways to realise human rights through supra-national institutions in Africa are also considered. The approach to the Protocol starts off descriptively, but becomes reformative as it extends to evaluation and the consideration of alternatives.

It must be emphasised from the outset that the legal protection of human rights should not be viewed in isolation from non-legal (or extra-legal) factors. Although the focus here is on legal

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instruments and institutions, the contention is not that human rights or their realisation is the exclusive domain of legal institutions or lawyers. This study deals with one form of response to human rights violations in Africa, and one strategy to improve Africa's human rights record. Even if the inter-relationship of non-legal factors with the aspects covered in this study is not spelt out, the observations made and conclusions reached in this study retain their inter-dependence and interaction with the political, social, economic, demographic and geographic contexts.

1.2 Conceptual clarification

The title introduces five concepts that need to be discussed and delineated for the purpose of this study. These terms are "realisation", "human rights", "Africa", "inter-governmental" and "institutions".

1.2.1 "... realisation ..."

Different concepts are used in the literature to convey the process of converting paper or formal human rights guarantees into practical realities, to make human rights more meaningful, and to bring the vague concepts associated with human rights to life. Terms that have been used include the following:[5]

- "observance" of rights;[6]
- "translation into reality";[7]
- rights are "in fact enjoyed";[8]
- "enforcement" of rights;[9]

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5 What follows, are examples of how these terms are used, rather than in any way providing a representative sample.

6 See eg Chenge in Peter and Juma (eds) (1996) at 7: "... the international community has every right to be concerned about the observance of these rights ...".

7 See eg Bernhardt in Bernhardt and Jolowicz (eds) (1985) at 145; Kisanga in Peter and Juma (eds) (1996) at 32.

8 See eg Kisanga in Peter and Juma (eds) (1996) at 32.

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- "application";[10]
- "implementation";[11]
- "operationalisation";[12]
- "realisation";[13]
- "protection";[14]
- "respect";[15]
- "promotion";[16]
- "give effect to";[17]
- "fulfilment";[18] and
- "guarantee".[19]

Of these terms, the three most frequently used probably are "enforcement", "implementation" and "realisation". The question is which one of these terms best expresses all the nuances contained in

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9 See eg Peter in Peter and Juma (eds) (1996) at 52: The title of his contribution is "Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice".

10 See eg Forsythe (1991) at 107: "The application of the American Convention ... covers only about a decade."

11 See eg Opsahl (1989) 10 *HRLJ*, Peter in Peter and Juma (eds) (1996) at 69.

12 See eg Peter in Peter and Juma (eds) (1996) at 69: "the operationalisation of the constitutional guarantees to fundamental rights".

13 See eg Peter in Peter and Juma (eds) (1996) at 70.

14 See eg Forsythe (1991) at 77, referring to "short-term protection". See, however, at 57: "By *protection*, I refer to implementation and enforcement action". See also his distinction between direct and indirect protection, at 59. Shue ((1980) at 52) distinguished three levels of state obligations in relation to socio-economic rights. At the primary level, states must "respect" the resources owned by the individual. On the secondary level, states must "protect" the rights of the individual. At the tertiary level, there is a duty to "promote and fulfil" these rights. Shue referred to the duties to "avoid depriving", to "protect from depriving" and to "aid the deprived". See also De Vos (1997) 13 *SAJHR* 67.

15 See eg s 7 of the final South African Constitution.

16 See eg s 7 of the final South African Constitution.

17 See eg art 62 of the African Charter: Each State Party must report on measures "taken with a view to giving effect to the rights".

18 See eg s 7 of the South African Constitution.

19 See eg Donnelly (1993) at 20.

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the different ways of ensuring compliance with human rights on the supra-national plane. To answer this question, another must first be answered: What are the nuances of "enforcement", "implementation" or "realisation" of human rights provided for in international instruments? Compliance with international human rights norms may be brought about mainly through relatively **confrontational** or relatively **non-confrontational** methods.

Confrontational methods of **monitoring** state performance may take the following basic forms:[20]

- The harshest measures that human rights monitoring bodies undertake are **investigations** of the human rights position within states. Such fact-finding may be undertaken in two **forms**, either by a Special Rapporteur or working group. The **mandate** of the fact-finding body may be to investigate a particular aspect or theme, which affects more than one state, such as extra-judicial killings, or to investigate the situation in a specific country, for example in Rwanda. In other words, fact-finding may be undertaken as **thematic** or as **country studies**.

- The **consideration of complaints by quasi-judicial or judicial bodies**. Complaint procedures are either based on **treaty** provisions in a multilateral treaty or on a **resolution**[21] by an inter-governmental body. Communications in terms of treaties may be submitted by individuals against states **(individual communications)**, or by one state against another **(inter-state communications)**.

Non-confrontational or **co-operative** methods of implementation, which emphasise consensus and consultation, include the following:

- The **examination of country reports** that are submitted by states in terms of treaty obligations by treaty monitoring bodies.

- The use of **good offices** to resolve a human rights problem is akin to fact-finding, but takes a more informal and *ad hoc* form and usually takes place behind closed doors.

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20 See ch 2 below, where the detailed functioning of international instruments is discussed.

21 For example Res 1503, in terms of which communications may be directed to the UN Human Rights Commission: see ch 2.3.1 below.

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- **Technical assistance** may be granted to states and **consultative status to non-governmental organisations ("NGOs")**. Technical assistance is often directed at **education and dissemination** of information on human rights and the creation of a human rights culture. Other means may also be used to ensure **awareness** about rights. Another aspect of inter-state co-operation to ensure rights is the process of initiating, discussing and elaborating new human rights standards in declarations and treaties. **Standard setting** in the form of a treaty is a prerequisite for the confrontational methods of monitoring the human rights performance of states.

If these methods have failed to ensure compliance, and a state persists with serious human rights violations, the **international organisations as such** may take confrontational or **coercive** measures. Such measures may take the following forms:

- **resolutions** may be adopted which criticise the state and expose it to international "mobilised shame",
- **international sanctions** (of a specified or general nature) such as economic, diplomatic, sport and cultural sanctions or boycotts may be instituted against the offending state,
- the recalcitrant state's membership may be temporarily **suspended,** or
- in its most extreme form, that state may suffer **expulsion** from the organisation.

At the **global** level, **state reporting** is the method most frequently used. It was introduced by the International Labour Organisation ("ILO")[22] and today forms the single pillar of implementation under the Covenant on Economic, Social and Cultural Rights ("CESCR"),[23] the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") and the Convention on the Rights of the Child ("CRC"). The other three major international instruments (the Covenant on Civil and Political Rights ("CCPR"), the Convention on the Elimination of All Forms of Racial

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22 See ch 2.5.1 below for a more comprehensive discussion of the ILO.

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Discrimination ("CERD") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT")) also provide for compulsory state reporting, but in addition also give states parties a choice of opting into **individual and inter-state complaint** systems. The CAT goes the furthest by allowing for a "confidential inquiry"[24] into allegations of torture. Such an inquiry may include visits to the state party concerned, but only with the consent of the state.[25]

State reporting, communications, fact-finding and good offices are also used at the **regional level**.

- States parties to the oldest system, created by the **European Convention** on Human Rights and Freedoms (the "European Convention"),[26] automatically accept inter-state complaints. The acceptance of individual complaints was made optional, but is today generally accepted as a political prerequisite for membership of the Council of Europe. State reporting obligations were introduced in Europe in 1965, when the European Social Charter entered into force. Only recently, in 1989, was the first compulsory acceptance of on-site investigations incorporated into the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT").[27] As a political body, the Committee of Ministers of the Council of Europe uses its good offices to ensure compliance.

- The **Inter-American** system provides all individuals in ratifying states with the competence to bring complaints, allows for optional inter-state complaints under the American Convention on Human Rights, and obliges states to submit periodic reports in terms of the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights.[28] The Inter-American Commission on Human Rights has interpreted its mandate to prepare studies and reports widely, to include on-site investigations.[29]

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23 Full references to the CESCR and the other human rights instruments mentioned in this par are given in ch 2.4 below.

24 Art 20(2) of CAT.

25 Art 20(3) of CAT.

26 See ch 5.1 for full reference and background.

27 State parties to the Convention "shall permit visits ... to any place within its jurisdiction where persons are deprived of their liberty by a public authority" (art 2).

28 Of 1988, also known as the "Protocol of San Salvador". On the Inter-American system, see ch 5.2 below.

29 See art 41(c) of the American Convention.

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- The most recent regional human rights instrument, the **African Charter** on Human and Peoples' Rights,[30] is the only one to provide for individual and inter-state "communications", as well as reporting obligations, all as a necessary consequence of ratification. Of late, the African Commission on Human and Peoples' Rights has started interpreting its mandate to include visits to states parties.[31] Using the good offices of commissioners, the Commission also tries to reach friendly settlements.

International institutions responsible to oversee compliance take a variety of forms. The **extent of judicialisation** of these institutions presents an axis along which differences may be measured. "Enforcement" mechanisms may be judicial (in the form of courts), quasi-judicial (such as commissions or committees) or political (in the form of regional organs such as ministerial committees or councils).

At the international level the **International Court of Justice** ("ICJ") has, to a limited extent, involved itself in human rights issues.[32] The **European and Inter-American Courts of Human Rights** are judicial institutions implementing human rights at the regional level. International human rights treaties usually create specific bodies to implement the provisions of the various human rights instruments. These monitoring bodies consist of independent experts and may be characterised as **quasi-judicial** institutions: They issue "comments" and "views", but not binding judgments. The UN Human Rights Commission, on which members represent their respective states, is closer to a **political** mechanism. Each of the three existing regional systems has a commission, which may be categorised as quasi-judicial. The role of the Council of Ministers in the European system provides an example of politicised enforcement.

Against this background, one may return to the question posed initially: Which one of the three terms from the list most frequently used in this context (enforcement, implementation or realisation) best fits all these forms of converting human rights promises into meaningful guarantees?

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30 On the African system, see ch 3 below.

31 See ch 3.3 below.

32 See ch 2.2.4 below.

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1.2.1.1 Enforcement

"Enforcement" is derived from the verb "to enforce", which is defined as "to strengthen physically or morally".[33] Emphasising the "physical" dimension, Forsythe conceived of "enforcement" as "the issuing of a command linked to the threat of application of sanctions".[34] "Enforcement" then becomes the "authoritative application of human rights".[35] At the UN level, he identified the Security Council and the ICJ as agencies involved with enforcement, as they may make law or issue binding judgments.

Derrida emphasised the "moral" dimension when he contrasted the term "applicability" of law (from the French "appliquer la loi") with "enforceability". "Application", in his view, loses "this direct or literal allusion to the force that comes from within to remind us that law is always an authorized force, a force that justifies itself or is justified in applying itself ...".[36] The word "enforceability" reminds us that the concepts of law and justice (and justice through law) by their very nature imply the application of force. He adds: "There are, to be sure, laws that are not enforced, but there is no law without enforceability".[37]

The term may however also be used in a wider sense, "comprising all measures intended and proper to induce respect for human rights".[38] Some problems associated with the use of the term "enforcement" to refer to all these aspects are:

- One problematic aspect of the use of the term "enforcement" is that it encapsulates in itself the concept of "force". It conjures up images of combat, of attack and defence. Numerous writers have taken this imagery to heart on the subject.[39]

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33 *The Shorter Oxford English Dictionary* (1973).

34 Forsythe (1991) at 57.

35 *Ibid.*

36 Derrida in Cornell (1992) at 5.

37 Derrida in Cornell (1992) at 6.

38 As used by Bernhardt in Bernhardt and Jolowicz (1985) at 145.

39 See eg Amoah, who describes the African Charter as a "weapon" ((1992) 4 *RADIC* 226).

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- In international law the term is also closely associated with the competence of the Security Council to undertake "enforcement measures" for the maintenance of international peace in terms of Chapter VII of the UN Charter.

- The nature of "solidarity rights" is not correctly characterised as "enforcement". This set of rights incorporate most of the non-confrontational and co-operative nuances. Roberto Unger, in his re-conceptualisation of rights, distinguishes between market rights, immunity rights, destabilisation rights and solidarity rights. Of the last category, he admits that they may not be enforceable, as they "give legal form to social relations of reliance and trust".[40] But he then explains that in his system of rights not everything need be either enforceable or be relegated to the status of natural rights or meaningless gestures: "The rights that governmental or other institutions may not enforce, remain a public declaration of a public vision, extending, qualifying, and clarifying the ideals embodied in other, enforceable parts of the system of rights."[41]

Consequently, this term is not appropriate for the purposes of this study, as it excludes the more non-confrontational and co-operative nuances mentioned above.

1.2.1.2 Implementation

To "implement" is to "fulfil", or to "complete",[42] making it a much broader term than "enforcement". Opsahl expressed a preference for the use of "implementation" as a broad term, referring to "all measures which aim at putting the substantive norms of human rights into operation".[43] One of the reasons for this preference is that it is more neutral than terms such as "enforcement", "guarantee" and "protection" of human rights".[44] Forsythe used the term in a similar sense when he described the UN's primary goal in the human rights field as "long-term

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40 Unger (1987) at 536.

41 Unger (1987) at 539.

42 *The Shorter Oxford English Dictionary* (1973).

43 (1989) 10 *HRLJ* 13 at 14.

44 *Ibid.*

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implementation". Under "implementation" he includes "passing nonbinding resolutions about specific problems or states".[45] Urging a state to take certain measures is not only promotional, but is protection "in the realm of implementation",[46] as it constitutes an effort to exert political pressure on the target-state. The distinction between "enforcement" and "implementation" becomes one between command and diplomacy.[47] Once this definition is accepted, it is clear that implementation is too restrictive as a term, as it is closely **linked to protection**. "Implementation" leaves little room for the nuance of **standard setting**.[48]

Like "enforcement", "implementation" is not a broad enough term, as it suggests measures stronger than standard setting, education and dissemination. Both terms leave insufficient room for promotional activities as part of efforts to bridge the divide between formal adherence and concrete steps taken.

1.2.1.3 Realisation

The dictionary definition of the word "realisation"[49] addresses the principal concern raised above. It stems from the verb "realise": "to make real", "to convert into reality", or "to have actual experience of".[50] Realising rights may take the form of commands ("enforcement"), or may include measures for direct and indirect protection ("implementation"). Furthermore, the term leaves room

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45 Forsythe (1991) at 57.

46 *Ibid.*

47 See Forsythe (1991) at 77.

48 It is sometimes argued that the elaboration of human rights in different treaties and other instruments has reached saturation. The focus globally should not be on "more rights", but on ensuring that those already codified, are complied with. In response to such sentiments, one may argue that the articulation and elaboration of human rights should not be regarded as something separate from implementation. Rather, they are both part of a seamless web. Identification and invocation of rights is foundational to effective implementation.

49 *The Shorter Oxford English Dictionary* (1973).

50 A question arises: To "realise" or to "realize"? According to most dictionaries both terms may be used. My preference for the first possibility is based on considerations of standardised "UK" rather than "US" English (see the Preamble to the European Social Charter: "further realisation of human rights").

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for promotional activities, such as standard setting and education. It is consequently wide enough and best suited to cover all the nuances set out above.

"Realisation" is also a term widely used. Two of the founding documents of the UN refer to this term: The **UN Charter** provides a role to the General Assembly to assist "in the realization of human rights",[51] and the **Universal Declaration of Human Rights** uses the term in its Preamble and as part of its provisions.[52] In the list of responsibilities given to the UN High Commissioner for Human Rights, he or she is empowered to "play an active role ... in meeting the challenges of the full realization of all human rights..."[53] It is also often invoked in the context of "progressive realisation" of socio-economic rights.[54] One of the most recently drafted UN human rights treaties, the Convention on the Rights of the Child ("CRC"), uses "realisation" as an overarching term, as illustrated in phrases such as "more conducive to the realisation of the rights of the child"[55] and "achieving the realisation of the obligations undertaken in the present Convention".[56]

It must be obvious that there is **no consistency** in the use of terminology in this field. Even if a preference for one term ("realisation") is expressed here, it will (and can) not be used exclusively or prescriptively. As indicated above, each of the terms denotes a difference of nuance. Many participants in the human rights discourse use terms interchangeably.[57] "Realisation" is used

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51 Art 13(1)(b) of the UN Charter.

52 In the Preamble, it refers to the "full realization" of the pledge to achieve the promotion of human rights, and in art 28 to the entitlement everyone has to a social and international order in which the rights in the declaration "can be fully realized".

53 UN GA Res 48/148(4) (1994), par 4 (f).

54 See eg art 2 of CESCR and eg Part I of the European Social Charter, which refers to the aim of effectively realising rights and principles.

55 Art 41 of the CRC.

56 Art 43(1) of the CRC.

57 See eg Peter in Peter and Juma (1996) at 69 - 70: "a law that does not have a mechanism for *implementation* is not worth the paper it is written on ... there were several hindrances to the *realisation* of the rights ... no mechanisms were provided for its *enforcement* ..." (my emphasis). See also Van Boven in Eide and Hagtvet (1992) at 37: "Human rights have to be *implemented* first and foremost at national and local levels. The primary responsibility of states to *realize* human rights is towards the persons who live under the jurisdiction of these states" (my emphasis).

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precisely because it comes closest to conveying what is contained in all the other terms, and serves as an **umbrella term** in this study.

1.2.2 "... of *human rights* ..."

The concept human rights, as understood for the purpose of this study, is primarily concerned with the **relationship between the individual and the state**. States are a given in Africa today, as is their impact on the lives of their citizens. Human rights is defined here as a concept that can be employed in any context where the individual (or groups of individuals) is the potential victim of externalised authority.[58] "Human rights", as used here, is a consequence of and tied to the forming of nation-states on the Western model. In this model, the individual inevitably is the "ultimate repository" of human rights in idealised liberal democracies, where protection takes the form of individual human rights in a "bill of rights" which may be invoked against the executive or will of the majority (the "group").[59]

The debate about the universality of human rights is, in my view, at least as far as traditional Africa is concerned, best understood when couched in terms of enforcement or realisation. The main problem with the debate is the imprecision of terminology. "Human rights" as concept is capable of many different interpretations. Three concepts recur: dignity, nation-state, and democracy. For some human rights is a concept inherent in mankind.[60] For others it carries a very circumscribed meaning - claims enforceable against a government, which is a product of the

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58 In the way defined by Howard (1991) 11 *Jnl of Contemporary African Affairs* 1: "These rights are claims against the state that do not depend on duties to it, although they do depend on duties to other citizens (eg, not to commit crimes). They are also rights that the individual can claim against the society as a whole". She makes it clear that these are aspects not necessarily realised, as all humans "ought to be entitled" to these rights merely by virtue of being human beings.

59 See Legesse in Thompson (ed) (1980) at 124.

60 See eg the communitarian approach, in terms of which membership of the "group" is the source or guarantee of dignity. There is no need to protect individual rights within the group. As Howard shows, this is based on a utopian view ((1991) 11 *Jnl of Contemporary African Affairs* 1 at 2).

formation of a nation-state.[61] The view is adopted here that a distinction should be drawn between **substance and form**. Societies in different phases of development, in different cultures and hemispheres all subscribed to the **substantive notion of human dignity**. The very idea of a community undeniably presupposes tolerance and co-existence. This very fact made it possible for almost all the states of the world today to subscribe to the Universal Declaration of Human Rights and the CRC. A measure of cultural specificity does not in my view detract substantially from this universality. But divergence is the name of the game when one considers the **different forms in which human rights are to be realised**. Using rights as trumps that may be invoked against authority in the form of the state is and has not been accepted universally as the only way of realising rights.

The modern form of human rights protection developed after the Enlightenment and with the establishment of nation-states.[62] In statist societies notions based on human dignity came to be regarded as private, individual, autonomous "claims of the individual against society and the state".[63] Not only a developed state structure, but also a democratic social order is an assumption or prerequisite for the effective implementation of the Western concept of human rights. This stems from the principle that human rights protect individuals. Society is not regarded as a family unit, "but as something unavoidable which can easily abuse the power conferred on it".[64] In ideal liberal democratic state is the crystallisation of society and embodies the will of the people through majority rule. The concept "human rights" only enters the picture with the arrival of repressive state machinery. Westernisation, modernisation, urbanisation, development and exploitation have and are in the process of uprooting Africa's deep ties with tradition. Contemporary African states have greatly contributed to the severance of the individual from the closed, supportive community. The individual has almost no choice but to stand up against perceived and real oppression by the state and its pervasive bureaucracy.[65]

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61 See eg Donnelly (1982) 76 *American Political Science Review* 303.

62 See eg Motala (1989) 12 *Hastings Intl and Comp Law Review* 373 at 374 - 375.

63 Howard in An-Na'im (ed) (1992) at 82.

64 Pannikar (1982) 120 *Diogenes* 75.

65 Donnelly (1982) *American Political Science Review* 303 at 312 observed in this regard: "Society, which once protected [the individual's] dignity and provided him with an important place in the world, now

Footnotes continued on next page.

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Traditional Africa did not view "human rights" as claims enforceable by individuals against the group. This was occasioned mainly by and coincided with a lack of comprehensive state structures and conceptions of the "state" in traditional Africa.[66] Considering the sociology of traditional Africa, most writers identify the individual's absorption into the group as one of the overriding characteristics of those societies. Kéba M'Baye, the "father" of the African Charter, describes how the individual in Africa, "completely taken over by the archetype of the totem, the common ancestor or the protective genius, merges into the group".[67] Being both socialist and humanistic, traditional Africa "could not fail to have particular respect for man and for all that attaches to him, including his rights".[68] This human-centredness is echoed in to name but three contemporaneous

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appears, in the form of the modern state, the modern economy, and the modern city, as an alien power that assaults his dignity and that of his family".

66 The assumption is often made that traditional African societies lack both state structures and democracy. From this assumption it would follow that human rights cannot be meaningfully enforced in these societies. This is however only partly correct and does not present a true reflection of the diverse forms of governance in traditional Africa. For most Africans in traditional societies the notion of the state or central authority did not exist. The unit in which people lived was based on kinship and close ties. Society was run on the basis of consensus. The human worth, dignity and survival of all was the concern of all. When conflict arose, it was a communal concern. A tribunal consisting of elders of the community sought to redress the imbalance caused within their group. In resolving these conflicts, members of the group certainly had "rights", for example the right to compensation, the right to dignity, the right to life. But these are, from a contemporary Western perspective, subjective rights, and not "human rights" protecting the individual from state repression. But a rigid distinction between statist and non-statist societies does not take into account the different levels of statism in traditional Africa. Pre-colonial African political organisations can roughly be divided into centralised and decentralised "nations" (Elias (1956) at 11). It is generally accepted that the centralised form was the exception. The dominant model may have been the tribe and the inability to air claims against the community. The Bamileke people of western Cameroon is one group that had a coherent and efficient system of centralised government. Three levels existed: the family, the district or quarter and the central level of authority. The administration of justice resembled the three-level division. At the first level, the head of the family was responsible to settle conflicts. At the second, the head of the quarter "had to assure the respect of the social order, rights and individual liberties" (Temgoua (1994) at 7). The supreme judicial authority was vested in the Fo, who could overturn decisions of the quarter head that "infringed on the rights of a villager" (Temgoua (1994) at 8).

67 Vasak (ed) (1982) vol 2 at 589.

68 M'Baye in Vasak (ed) (1982) vol 2 at 589.

examples, the Woloff saying "Nit moodi garab u nit",[69] the Dinka term "cieng"[70] and the concept "ubuntu"[71].

But this does not deny the existence of **human dignity** in these societies. Numerous writers have identified a long list of "human rights" in traditional Africa. In his discussion of "rights and freedoms" in traditional Africa M'Baye refers to the right to life, to work and to education. Especially the right to work and to education is tied to membership of the community.[72] Work is both a right and a duty in societies structured along socialist lines. Education is a communal function that is not institutionalised. Freedom of expression, of association, of movement and religious freedom also existed in traditional Africa, M'Baye argues. Wiredu concedes that it may be misleading to assess principles without having regard to practice.[73] Basing himself on "empirical confirmation", he illuminates divergent Akan practice with reference to "a premeditated abrogation" (the ritual killing of a tribe member to accompany the deceased chief) and "a situational diminution of a human right" (the circumscribed freedom of expression of minors).[74] Slavery, a caste system, human sacrifice and the killing of baby twins were identified as examples of "institutionalized derogations from human rights"[75] in African societies. Dignity is not a claim against society, Howard continues, but is "something granted at birth ... as a concomitant of one's particular ascribed status ... and is earned during the life of an adult ... who accepts normative constraints on his or her particular behaviour".[76] As a general observation, one may contrast the position of children and the elderly in modern constitutional states with similar groups in traditional African societies. The phenomena of neglected street children and forgotten elders did not occur in

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69 Translated as "man is man's own cure"; reference was often made to this by Senegalese leader and deputy to the French Parliament Leopold Senghor.

70 Meaning "respect for self and others, loyalty and piety, compassion and generosity, and unity and harmony": Deng in An-Na'im and Deng (eds) (1990) at 266.

71 "Ubuntu" may be equated with "humaneness" and "human dignity", see the "post-amble" to the Constitution of the Republic of South Africa 200 of 1993 and *S v Makwanyane* 1995 6 BCLR 665 eg at paras 237, 241 (*per* Madala J), 311, 313 (*per* Mokgoro J) and 374 (*per* Sachs J).

72 See, in general, his contribution in Vasak and Alston (eds) (1982) at 583 – 601.

73 Wiredu in An-Na'im and Deng (eds) (1990) at 257.

74 Wiredu in An-Na'im and Deng (eds) (1990) at 258 - 259.

75 Eze (1984) at 12 - 13.

76 An-Na'im (ed) (1992) at 83.

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societies where the dignity and harmonious co-existence of all members of the group were paramount.

Human rights, as understood in this study, thus only follows the formation of states. Because state formation in this sense came about through colonialism, human rights also became relevant only after colonialism - not as a product of colonialism as such, but as an **inevitable adjunct** to the introduction of repressive, alienating state machinery created and nurtured in its aftermath.

1.2.3 "... in *Africa* ..."

To use the concept "Africa" in this context is at once too wide and too narrow, too general and too specific.

Using the concept "Africa" is like trying to paint minute details using broad strokes across a canvass. Any invocation of an African identity is over-generalised and stereotypical. "African law", for example, is a phrase used at one's peril, as it presupposes some underlying similarity in the legal systems on a continent of some 600 million people.[77] African states differ in obvious ways as far as human rights are concerned:

- The **status of ratification** of documents, and protocols thereto, differs from country to country. One state (such as Namibia) may have ratified all the major human rights instruments, while another state (such as Djibouti) may have ratified very few of these instruments.[78]
- If more than one state had ratified an instrument, the **status** which that international instrument has **in domestic law** may differ. This status is to a large extent based on theories that are remnants of colonial legal legacies, referred to as dualist and monist theories.[79]
- **Socio-economic conditions** and levels of **development** vary greatly across the continent.

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[77] Since 1965 Africa has had the highest population growth in the world (see Africa Institute of South Africa (1995) at 16).

[78] See Table B in ch 2.

- Political systems and **levels of democratisation** differ. Even in countries where elections have been held since 1991, the levels of liberty and democratic participation differ significantly.

- Cultures differ. In some instances **cultural practices**, which are widely condemned in human rights circles, such as female circumcision, are rife.

- In some countries the internal **legal system is not functioning**, and is sometimes almost non-existent, making **judicial independence** an illusion.

- The impact of **colonial control** is another cause for variance, being still reflected in different legal systems and language policies.

- As for **religion**, Christianity and Islam are two dominant religions that took a foothold in various African regions, while traditional religions also continue to play an important role in African spiritual life.

- **Ethnic diversity** is another factor that creates diversity, not only within but also between states.

- **Membership** of international or **regional organisations** varies.[80]

If the concept "Africa" is used uncritically, its focus is too specific and narrow, in that it suggests that there is a peculiarly African way of realising rights through supra-national institutions that differs fundamentally from the realising of rights in other regions and in the global context. The implied invitation to enter into the debate about the universality or particularity of human rights is not taken up here. However, in analysing the African system of protection, specific African instruments (such as those on refugees and dealing with children) will be juxtaposed with their international equivalents.

An effort will be made here to account for and to overcome this paradox. On the one hand, the study deals with specific countries, with measures taken in particular jurisdictions, and reporting

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79 See ch 3.4 below.

80 See ch 5.4 below, on African membership of eg the Arab League and the Organisation of Islamic States.

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obligations by individual states. These specific experiences will be extrapolated to observations about Africa as a whole. On the other hand, while the discussion remains rooted in African soil, taking account of realities here, notice is also taken of other regional systems and international trends. The ultimate aim is to investigate ways of securing the fullest possible realisation of rights in Africa.

1.2.4 "... inter-governmental ..."

An individual's human rights may be realised by institutions which have been put in place at four levels: **domestically** (at the national level), **sub-regionally** (on the "sub-continental" scale), **regionally** (in the "continental" sphere), and **globally** (at the universal level).

As a pebble is thrown into tranquil waters, it unsettles the undisturbed surface. At the point of impact the reaction is at its most violent and visible. From there, outwardly, circles form concentrically. The violation and redress of individual rights form a similar pattern. The effect of a violation is felt first and foremost where it occurs, in the state itself (at the national level). The next two potential rings of protection are slightly more remote, and lie at the sub-regional and regional levels. At the outer circle, potentially encompassing all regions and localities, one finds the global system of human rights protection. The outer circles may, ultimately, all be traced back and are linked to the initial "point of impact", because it is specific human rights which give rise to their creation, and it is at the elimination of these violations that the human rights machinery in its various forms is aimed.

At the inner circle, the national level, a **single government** is primarily responsible to protect the human rights of persons within the national jurisdiction. All the other circles of protection are formed through co-operation between **more than one government**, and together constitute the **international human rights system**. **This study focuses on inter-governmental activities and is thus restricted to the international level**. Human rights protection through national institutions as such is not discussed, but will be referred to in so far as it impacts on inter-governmental human rights institutions.

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Although the international human rights system is predominantly made up of inter-governmental institutions, non-governmental institutions also play a role of increasing importance. NGOs are important role players in the regional and global human rights systems.[81] Some **international NGOs** ("INGOs"), such as "Article 19", Amnesty International, the Danish Centre for Human Rights, Human Rights Watch/ Africa Watch, Interights,[82] the International Commission of Jurists and International PEN are active on a global scale, and have also been involved in the African context. Other INGOs only operate on a regional or sub-regional level. African INGOs, which have been accredited by the African Commission, include the Southern African Research and Documentation Centre, the African Centre for Democracy and Human Rights and the African Association of International Law. A sub-regional INGO, the Southern African Human Rights NGO Network ("SAHRINGON") has recently been formed in Southern Africa.[83] The contribution of INGOs as such is not discussed here, but reference to some of their activities will inform the issues addressed by this study.[84]

The concept "inter-governmental" refers to the international sphere, and of necessity implies a distinction between the **national and international spheres** in relation to the realisation of human rights.

1.2.4.1 National level

Every person lives in an immediate legal environment, that of his or her own state. In an ideal world, all the rights of that person would be secured by the legal system, which impacts on his or her life. The ideal legal position would be one in which legislation, common law and courts provide for the fullest possible realisation of all rights. If isolated violations occur, courts or other institutions would offer redress. Redress may be secured through legal, quasi-legal or non-legal means.

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81 See eg Otto (1996) 18 *HRQ* 107 and Sanders (1996) 18 *HRQ* 67.

82 The International Centre for the Legal Protection of Human Rights, based in London.

83 See ch 4.3.2 below.

84 For a single example, see the role of the International Commission of Jurists in the drafting of the Protocol establishing the African Court on Human and Peoples' Rights in ch 7.1.

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Even if one does not live in an ideal state, the domestic **legal system** still provides the parameters in which one lives one's life. Human rights standards may be incorporated into domestic law through many possible avenues. Administrative law, labour law, criminal justice, civil procedure, a government's socio-economic programmes or priorities may all embody these principles. They may also be formally included in the Constitution. Such formal adherence to human rights is usually emphasised in human rights discourse. This emphasis easily leads to the danger of negating realities by focusing on formalities. If an individual's rights are not realised through national law, domestic mechanisms should be in place to redress the situation. These mechanisms will usually consist of **courts**, either in the form of the ordinary courts, or a specialised constitutional court.

In addition to the judicial enforcement of rights, **quasi-judicial** possibilities may also exist. This could take the form of a commission, which investigates complaints of human rights violations and endeavours to reach friendly settlements between parties. It may also be an institution that has a more specific mandate, for instance an ombudsman, which investigates complaints of abusive or corrupt exercises of governmental authority.[85]

Non-judicial means of ensuring that human rights are protected in a state include public criticism through a free press and mobilising pressure through agents of civil society, such as NGOs and community based organisations ("CBOs").

Neither the international community, nor international human rights norms stand isolated from these domestic processes. In an ideal state, national and supra-national human rights protection will overlap completely. In fact, the extent to which international norms are integrated into domestic law, to a large extent determines how comprehensively rights are realised in that state.

1.2.4.2 International level

Having elaborated upon the importance and immediacy of the national legal system in ensuring human rights to individuals, it must be stressed that this study focuses on the international (or

85 A commission may also have the specific mandate attributed here to ombudsman institutions.

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supra-national) level. The innermost circle of this level is the sub-regional, the middle ring is the regional, and the outer circle the global. These supra-national systems contain minimum standards that all member states undertake to embody domestically. Some of them also provide a forum where nationals of these states may seek redress if their own domestic legal system has not provided them with a remedy.

Two bodies are mainly responsible for human rights standards and their implementation on a **global scale**. They are the ILO and the UN. The Constitution of the ILO dates back to 1919, when it formed part of the Treaty of Versailles. It introduced reporting by states on their obligations in terms of labour conventions and the examination of complaints by states. The UN was formed in 1945, after the Second World War. Its founding Charter elevated respect of human rights to one of the organisation's principles.[86] Starting with the Convention on the Prevention and Punishment of the Crime of Genocide,[87] a plethora of human rights instruments have been adopted under UN auspices.[88]

Despite the extensive provision for human rights under the ILO and the UN, experience has shown that **regional systems** of human rights realisation are more effective than systems with a universal scope. Shared cultural, legal, political and intellectual traditions are more likely to serve as a basis for particularised and effective human rights protection in the regional context. Shame and pressure are also mobilised more effectively in respect of those states that are in constant contact and are forced to co-operate with one another. It was at the regional level, in Europe, that the first system allowing for effective individual complaints against governments was introduced. This system has become the model of human rights realisation worldwide. In the Americas, the Inter-American Commission evolved and the Inter-American Court was established. An African system has been the latest addition. In other regions, such as the Arab and Asian worlds, similar trends are noted.[89]

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86 See eg art 1(3), as well as arts 13(1)(b), 55(1), 62(2) and 68.

87 Adopted by the General Assembly on 9 December 1948, a day before it adopted the Universal Declaration of Human Rights.

88 For a chronology of events, and texts of these instruments, see United Nations (1995).

89 See ch 5 on these regional systems.

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1.2.4.3 Three competences, three levels

Governmental authority is usually portrayed as being channelled through **legislative, judicial and executive** branches of competence. Ideally, these three branches co-exist in the **domestic** sphere. There usually is a **lawmaker** to enact human rights legislation when needed. Furthermore, there usually is a **judiciary** (courts) to assist in interpretation and application of human rights law. Lastly, there usually is an **executive** (with a police force, prisons and armed forces) to ensure immediate compliance with the provisions of the law, including human rights law.

Law making also takes place at the regional level, in the form of human rights standard setting. Examples of regional standards are the European and Inter-American Conventions, and the African Charter. However, standard setting at the **global level is much more elaborate**, as the multiplicity of human rights instruments that have been adopted since 1948 demonstrates.

Some judicial institutions (such as the European and Inter-American Courts of Human Rights) for the application and interpretation of human rights exist at the regional level. **No permanent human rights court** has thus far been created at the global level.[90]

Effective execution of court (or other) orders (or "enforcement" of human rights standards) is lacking at both the regional and global levels. There is no regional or global police force, or prison or "army" to ensure compliance. For this reason, states use indirect means to ensure adherence to human rights standards adopted by inter-governmental arrangements. These measures usually amount to pressure by cutting diplomatic, trade, sport and other ties with the recalcitrant state. Because these ties are stronger in a regional context, such sanctions are bound to be more effective when they are imposed by states in the same region as the target state. For this reason, regional institutions provide greater potential for eventual compliance. Sub-regional institutions should, by the same token, provide even stronger enforcement.

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90 But see ch 2.6.3 below on steps taken towards the establishment of a permanent International Criminal Court.

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1.2.5 "... institutions."

The term "institution" is used in two senses in the title and further on in this study. In one sense, it refers to "an establishment, organisation or association, instituted for the promotion of some object, especially one of public utility".[91] Examples are churches, universities and charitable **organisations** such as the MOTHS[92] and Black Sash (in South Africa). In another sense, the term "institution" is used to refer to something much narrower. In this respect, an "institution" is an organ or body which is caused to come or is brought into existence, or which is set up.[93] Examples are **commissions, courts and committees**. As used in its first (macro) sense, "institutions" (or organisations) at the supra-national level include the **UN**, the **OAU**, and various other sub-regional organisations in Africa. Used in its second (micro) sense, "institutions" (or mechanisms) at the supra-national level include the various UN **treaty bodies**, the African **Commission** on Human and Peoples' Rights, **courts** provided for under regional treaties, and a possible African Court on Human and Peoples' Rights. In other words, the "inter-governmental institutions" of the title not only refers to organisations (or "macro-institutions"), such as the UN and the OAU, but also to mechanisms (or "micro-institutions") created within the ambit of those organisations.

This differentiation overlaps to a large extent with the distinction between the "parent" bodies (macro-institutions), such as the UN, the OAU or the Council of Europe, and the human rights agencies or bodies (micro-institutions), such as the UN Human Rights Committee, the African Commission and the European Commission and Court of Human Rights.[94] In each instance, the "parent" organisation has a broad mandate, which **includes human rights** matters as only one of its different objectives. The "human rights agencies or bodies", on the other hand, have a restricted mandate which relates **exclusively** to human rights issues.

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91 *The Shorter Oxford English Dictionary* (1973).

92 Organisation of War veterans: Memorable Order of the Tin Hats.

93 See the use of the verb "institute" in eg *Webster's Third New Dictionary* (1961).

94 But not totally: Some sub-regional organisations in Africa include human rights as part of their general mandate, but no specific agency or body has been created with an exclusive human rights mandate.

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1.3 Importance of this topic

The following aspects will be highlighted here: the concern of this study with reality, rather than with abstract concepts and theory; its emphasis on the judicial dimension of realising rights; and the pressing relevance of contextualising such a study in Africa.

1.3.1 Analysis and praxis

One of the perennial debates in academic and scientific circles is that between **theory and practice**, between analysis and praxis. This tension is omnipresent in human affairs, from religious teaching[95] to the teaching of law. A nagging concern to observers of the human rights scene has been the inability of supra-national measures to secure observance of human rights.[96] In few areas of law has the said and done become as removed from one another as in this one. A few examples are given:

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95 See eg Qur'an 61:2 and 3: "Oh, believers, why do you preach what you do not practice; it is most hateful to Allah that you preach what you are not practising" and eg James 1: 23-25: "Anyone who listens to the word but does not do what it says is like a man who looks at his face in a mirror and, after looking at himself, goes away and immediately forgets what he looks like. But the man who looks intently into the perfect law that gives freedom, and continues to do this, not forgetting what he has heard, but doing it - he will be blessed in what he does".

96 This does not imply that the same tension is not present within the domestic legal systems and their efforts to protect human rights. A single, but telling, example from a domestic system is the following: During argument before the South African Constitutional Court about the constitutionality of corporal punishment for juveniles, the state conceded that such punishment in the case of adults would be unconstitutional. The court formally declared juvenile whipping unconstitutional in 1995. On 4 August 1996 a newspaper report described how a court of elders in Hammanskraal, near Pretoria, found guilty an alleged thief and how punishment of ten cuts with a home-made sjambok was meted out before a crowd of onlookers: see Khupiso "The Law unto themselves" (4 August 1996) *Sunday Times* 25. A less subtle example is provided by Rwanda when the ethnic violence ripped that society apart. The Rwandese Constitution, then in force, guaranteed all the basic "public liberties", including equality of all citizens (art 16), liberty of association (art 19), and the right to privacy and to an inviolable domicile (art 22).

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- Declarations and treaties on equal rights for women and on the right to development for the downtrodden starkly contrast with the realities of women's subordination and deeply embedded patterns of underdevelopment.

- The ratification by Sudan of ILO Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value means little in a society where female education and participation in the formal employment sector is very low. The fact that Sudan has ratified the Slavery Convention[97] also means nothing to the Dinka children and women held by Rizeigat families in the north.[98]

- Conditions of drought and poverty in countries such as Ethiopia, Mali and Somalia have made the "full realization" of socio-economic rights a very distant ideal in those states, despite their ratification of the CESCR.[99]

- Burundi and Rwanda, sites of ethnic strife and bloodshed, have both ratified the CERD, in terms of which states undertake to "prohibit and bring to an end ... racial discrimination by any person, group or organization".[100]

- The reality of the denial of basic civil and political rights in Zaïre[101] also contrasts sharply with the lofty provisions of the CCPR, which were (and still are) binding on that state.

Human rights protection at the international level in its modern guise is a reaction against the atrocities of the Second World War. Its founding document is the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. The declaration was regarded as non-

97 UN Treaty Series vol 212 at 17, entered into force 7 July 1995.

98 See Mahmud and Baldo (1987).

99 See eg the obligation on states in art 2(1) of CESCR.

100 Art 2(1)(d) of CERD. "Racial discrimination" is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights ..." (art 1(1) of CERD).

101 Now, the Democratic Republic of Congo. In this study, which in most respects sets out the position as at 31 March 1997, reference to the name of the state then (Zaïre) is retained.

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binding, as creating a framework for more effective and binding measures to come. These instruments were slow in materialising. Only in 1966 was consensus reached on the provisions of the CCPR and the CESCR. Only in 1976 was it possible to move from the declaratory and elaborating phase to a **phase of implementation, enforcement and realisation**. In that year, the required number of states had ratified the conventions, allowing them to start operating in respect of states parties. The CERD followed a similar route. It entered into force in 1969. The procedure allowing for individual petition only came into effect much later, in 1982, when the required number of states (only ten) had permitted it officially.[102]

Today there is a widespread sense of **disillusionment**, cynicism and disappointment about the process of converting the noble-sounding ideals expressed in these various documents into reality. Writing at the end of the 1980s, Elias observed that the "expression of the universal aspirations"[103] could hardly be bettered. But he continued: "What is urgently needed now is the establishment of international machinery and techniques for the implementation of human rights".[104] Awareness of these deficiencies has made enforcement a focal point, and has also **inspired reforms**. Attempts at improving implementation of human rights through supra-national mechanisms were high on the agenda of the Vienna Programme of Action.[105] Recent attempts include the adding of a Protocol to CEDAW, giving states an option to accept individual complaints against them.[106] A Protocol to CESCR is also being considered, in terms of which individual complaints may be directed to the Committee on Economic, Social and Cultural Rights.[107]

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102 See Forsythe (1991) at 81 (n 10).

103 (1988) at 216.

104 *Ibid.* In this respect, the UN High Commissioner for Human Rights made the following remarks to UN workers in 1995: "In general, I believe that we all agree that there is no shortage of international human rights standards. Nor, unfortunately, is there a shortage of situations demanding an improvement of respect for human rights. Our basic challenge is to implement human rights standards and make human rights meaningful in people's lives" (UN doc E/CN.4/1996/50/Add.1).

105 See par E of the Vienna Declaration and Programme of Action, UN doc A/CONF.157/23.

106 See eg Steiner and Alston (1996) at 560.

107 The CESCR Committee has submitted draft proposals to ECOSOC for an optional protocol to the Covenant on Economic, Social and Cultural Rights to provide for the consideration of communications by individuals (E/C.12/1996/CPR.2/Add.1 of November 1996). See also (1996) 10 *Interights Bulletin* at 160. On the violations approach to socio-economic rights, see Chapman (1995) 23 *The ICJ Review* 55.

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The same movement from elaboration to implementation also characterises the regional human rights systems. In the European system, for example, it took many years before states accepted individual complaints. Today, new members join the Council of Europe on the understanding that they will accept this competence. In terms of the ECPT, the treaty body undertakes visits to states without their consent.

This study is an attempt to concretise the often abstracted discussion on supra-national human rights in Africa. This is of particular importance because African leaders often employ the rhetoric of adherence, without heeding the practical consequences.

1.3.2 The judicial dimension

The movement toward emphasis on implementation coincides with the institutional progress of judicial mechanisms worldwide. This is true of **regional** human rights protection, in terms of which the European **Court** and Inter-American **Court** have been established.

A tendency to judicialise the resolution of international conflict is underscored by the dispute settlement procedures recently allowed for under the UN Convention on the Law of the Sea. This convention, which entered into force in 1994, provides for non-permanent methods (including arbitration), and permanent judicial structures.[108] The latter is comprised of the **International Tribunal for the Law of the Sea** and a separate Sea-Bed Disputes Chamber. Another example of this trend is the reaction of the international community to the atrocities in former Yugoslavia and Rwanda. What happened was a clear contravention of international human rights law and humanitarian law. Without a mechanism to ensure compliance, the perpetrators would get away with impunity. In reaction to the atrocities in Bosnia and Herzegovina, the Security Council established an *ad hoc* **criminal tribunal**. The same happened in Rwanda.[109] This development exemplifies the international community's commitment to ensure that the perpetrators do not get away with impunity, and strengthens efforts towards establishing a permanent international

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108 See Rosenne (1995) 89 *AJIL* 806.

109 For more on this tribunal, see ch 2.7.3 below.

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criminal tribunal. The intensified calls for a permanent international penal tribunal is confirmation of the perception that human rights can be secured at the supra-national level by a judicial organ.

The **role of courts or judicial institutions in the realisation of human rights** will receive special attention in this study. One should bear in mind that international, especially regional, courts are of relatively recent origin. As other methods of ensuring compliance with human rights at the supra-national level are found wanting, increased recourse may be had to judicial institutions. The International Courts Project, launched as part of the UN Decade of International Law (1990 - 1999), is an attempt at co-ordinating efforts in this direction. The aim of the project is "to contribute to the progressive development of international adjudication in the 21st Century by researching, drafting ... new conventions, statutes and model codes ... which will improve and create new international courts and arbitral tribunals".[110]

This focus on courts implies that **judicial decisions** are accentuated. As far as the UN is concerned, a number of judgments by the ICJ are analysed. At the regional level the "quasi-decisions" of the African Commission, and some decisions of the European and Inter-American Courts are discussed. Decisions given by sub-regional judicial institutions are of relevance, while the domestic incorporation of the African Charter is discussed with reference to judicial pronouncements.

1.3.3 The African context

Human rights realisation through supra-national institutions serves as a "last resort" when national legal systems do not provide redress. The need for such a system is all the more pronounced in Africa, compared to Europe, and partially, to the Americas, and is occasioned by some of the following factors:

- Domestic judicial systems in most African countries are weak, understaffed, institutionally underdeveloped and sometimes non-existent.

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110 Janis (1992) at 1.

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- Courts often lack independence and impartiality in their functioning.

- Legal norms, or the idea of "the rule of law" has permeated inadequately into traditional African society.

- Access to courts is difficult for the many people who still live in rural areas, and do not speak or write the national language.

1.4 Work already done in this field

As for the **UN** and its role in realising rights in African countries, attention in publications on the UN is sometimes devoted to regional groupings, but not to Africa specifically.[111] Despite its promising title,[112] a work by Elias deals with human rights in international law generally, without investigating the specific implications for or implementation in Africa. Recently, some contributions highlighting international human rights realisation have appeared in the *Interights Bulletin*[113] and were expressed at the yearly meeting of the African Society of International and Comparative Law.[114]

Being regarded as almost a non-issue, the human rights record of the **OAU** was not the topic of discussion in the founding years of that organisation. When the African Charter was adopted in 1981, academic writing concentrated on its provisions, their peculiar "African" characteristics and sometimes speculated about their potential application. Publications tended to discuss provisions of the Charter in the abstract, without linking them to the surrounding context. Much emphasis

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111 See eg Bayefsky in Henkin and Hargrove (eds) (1994) and the voluminous compilation about international protection of children by Verhellen (ed) (1996), which contains 4 contributions of an African nature out of a total of 68. More signs of neglect or disregard for Africa in this field is found in the recent publication of Conforti and Francioni (eds) (1997), dealing with the enforcement of international human rights in domestic courts. States from all continents except Africa are included.

112 (1988), the work is entitled *Africa and the Development of International Law.*

113 See eg Odinkalu *et al* (1994) 8 *Interights Bulletin* 67.

114 See the record of proceedings eg (1990) 2 *ASICL Proc*, (1991) 3 *ASICL Proc*, (1992) 4 *ASICL Proc*.

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was also placed on the status of ratification by the OAU member states. Before the Charter entered into force this tendency could be explained. But the trend continued after the African Commission was inaugurated in 1987. The lack of focus on the actual functioning of the system may be explained with reference to the regime of secrecy. This factor impeded academic analysis, especially of the role played by the African Commission. Examples[115] of this earlier trend are found in the writing of Ndiaye,[116] Balanda,[117] Okere,[118] Gittleman,[119] Kannyo,[120] Eze,[121] Benedek,[122] Mbaya,[123] and Gye-Wado.[124]

Notwithstanding these drawbacks, a sizeable literature on the actual performance of the Commission gradually developed, as some commentators endeavoured to emphasise the practical realities of the Charter system. An example is Gutto's *Human and Peoples' Rights for the Oppressed*.[125] A first attempt at analysing the state reporting system under the Charter was undertaken in 1992.[126] This was followed by a work by Astrid Danielsen, *The State Reporting Procedure under the African Charter*,[127] the first detailed analysis of the work of the Commission in this field.[128] Wider access to the reports and the Commission's debates considering these reports has subsequently been facilitated. In 1995 the Danish Centre for Human Rights started publishing

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115 No attempt is made to provide an exhaustive list of publications. The aim here is merely to illustrate tendencies.

116 In Vasak (1982) at 1.

117 In Ginther and Benedek (eds) (1983) at 134.

118 (1984) 6 *HRQ* 141.

119 In Welch and Meltzer (1984) at 152.

120 In Welch and Meltzer (1984) at 125.

121 (1984).

122 In Kunig *et al* (1985) 59.

123 In Bernhardt and Jolowicz (1985) at 77.

124 (1991) 11 *Nigerian Forum* 194.

125 (1993).

126 By Gaer (1992) 10 *NQHR* 29.

127 She was sent to the Secretariat as an intern by the Danish Centre for Human Rights. It was published in 1994 by that Centre.

128 She was able to undertake this project as she had personal experience of the system, and had free access to the materials at the Secretariat.

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transcripts of the examination of the state reports, with copies of the reports annexed.[129] An earlier useful source on the evolution of the African Commission's practice is the session-by-session reports in the *Netherlands Quarterly of Human Rights*, reported by Benedek,[130] Danielsen,[131] Malmström[132] and Oberleitner.[133] In their academic and scholarly contributions some commissioners have also provided important information on and insights into the realities of the Commission's work.[134]

The clearest indication of a paradigm shift away from abstract speculation to reporting of actual activities undertaken by the Commission is Ankumah's work, *The African Commission on Human and Peoples' Rights*, published in 1996. This work does not deal with the potential and possibilities of the Charter, but concerns itself with the concrete ways in which communications have been handled by the Secretariat and the Commission, with the Commission's decisions on "receivability", admissibility, and with the merits of many of these communications.[135] Lindholt's *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique*[136] seeks to gauge the impact of the Charter in the domestic law of the three named countries, but this contribution remains speculative. When decided cases were referred to, they were from the European and the Inter-American systems and not from Africa.[137]

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129 Under the editorship of Astrid Danielsen and Julia Harrington. The publication of these transcripts followed a decision by the Commission to authorise their publication in October 1994, at the 16th session.

130 See eg (1994) 12 *NQHR* 85 and (1994) 12 *NQHR* 469.

131 See (1995) 13 *NQHR* 80.

132 See (1996) 14 *NQHR* 92

133 See (1995) 13 *NQHR* 476.

134 See eg Dankwa (1990) 2 *ASICL Proc* 29; Umozurike (1992). Others have tended to be rather academic or theoretical, see eg Nguema (1992) 2 *Review of the African Commission on Human and Peoples' Rights* 86.

135 See also Murray (1997) 46 *ICLQ* 412, who analysed the Annual Activity Reports in relation to procedure and decisions on admissibility, procedure on the merits, interim measures, decisions on the merits and follow-up measures.

136 Published in 1997.

137 See also the earlier but less elaborate contribution by Neff (1984) 33 *ICLQ* 331.

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When proposals for an **African Human Rights Court** have been raised with new vigour in the 1990s, they were accepted almost without reservation. Academics and commentators, it seems, did not want to be seen to oppose the idea. Their silence may also be due to a fear that they may oppose one of the only attempts at improving the African human rights system. Some authors later examined various aspects of the Court's establishment,[138] and a detailed analysis of the Protocol followed.[139]

Little attention has been directed to the potential role of human rights within **sub-regional** arrangements in Africa. Mvungi's examination of the role of constitutional issues in the process of regional integration in Southern Africa (under SADC), tentatively deals with related matters.[140]

1.5 Modus operandi *and research methodology*

The approach adopted in this study is both **descriptive and prescriptive**. The description of the international human rights system is inevitably influenced by the focus on African aspects. For example, when the ICJ, the UN Human Rights Commission and the International Tribunal for ex-Yugoslavia are discussed, matters of interest from an African perspective are identified and emphasised. The prescriptive aspect, intent on devising strategies for improved realisation of human rights, is premised on the assumption that institutional arrangements have a role to play in such a project. The institutional dimension includes structures created by the international community, the regional arrangements and sub-regional inter-governmental institutions.

The following sources were consulted and avenues were explored:

- An initial **literature search** was made. The major books and journal articles on human rights in Africa, both in English and French, were consulted.

138 See eg Peter (1993) 1 *East Africa Jnl of Peace and Human Rights* 117, Heyns (1994), Sock (1994) 2 *African Topics* 9.

139 Naldi and Magliveras (1996) 8 *RADIC* 944.

140 See Mvungi (1994).

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- In 1995, I went on an **overland tour** of twenty African countries (Zimbabwe, Zambia, Malawi, Tanzania, Kenya, Uganda, Zaïre, CAR, Cameroon, Nigeria, Togo, Benin, Ghana, Côte d'Ivoire, Mali, Senegal, Gambia, Mauritania, Morocco and Egypt). In most of these, I visited a law faculty, the highest court, its registry or library, human rights NGOs and government officials. I was granted access to sources and conducted interviews with people at these institutions.

- Other **African countries visited**, on various other occasions, are Namibia, Botswana, Lesotho, Swaziland, Mozambique and Angola.

- On two occasions (in 1994 and 1995), I **visited the African Commission's Secretariat** in Banjul.

- **I attended the 16th session of the African Commission,** held in Banjul, the Gambia. At that session, held in October/November 1994, the country reports of Benin, Cape Verde, and the second report of Gambia were examined.

- I consulted with **officials of the South African government** (Department of Foreign Affairs) on the draft Protocol adopted at Cape Town and obtained documentation from them on the subsequent process.

- As for modern technology, the **Internet** has also proved a valuable source. This was not so much the case on Africa as such,[141] but certainly on the involvement of the international community in Africa.

1.6 Overview of chapters

The study is presented in the form of eight chapters, following this first one:

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141 Although there are exceptions, such as the information available on Zambia: See web site of Zambia Legal Information Institute http://lii.zamnet.zm:8000/.

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- **Chapter 2** investigates the realisation of rights in Africa in terms of international treaties and declarations under UN and ILO auspices. The focus is on the contribution of this system to the realities in Africa. Africa's contribution to the global framework and the global system's contribution to Africa will be juxtaposed.

- **Chapter 3** deals with regional human rights protection in Africa under the auspices of the OAU. The potential and realised role of the African Commission on Human and Peoples' Rights under the African Charter of Human and Peoples' Rights is investigated. Reference is also made to other regional human rights instruments, such as the OAU Refugee Convention and the African Charter on the Rights and Welfare of the Child.

- In **Chapter 4** sub-regional arrangements in Africa are reviewed. Their past, present and future role in human rights protection is discussed.

- Human rights regimes created by inter-governmental institutional co-operation in Europe, the Americas and in other regions are sketched in **Chapter 5**. Emphasis falls on the institutional arrangements adopted under each system, and the relevance for Africa is investigated.

- In the next three chapters the focus falls on the recent development towards the establishment of a supra-national judicial mechanism in Africa: **Chapter 6** traces the historical background to the proposed Protocol to establish a Human Rights Court for Africa and investigates arguments advanced in favour of such a mechanism. This Protocol forms the basis of discussion and analysis in **Chapter 7**. In **Chapter 8** arguments against the creation of a court along the lines suggested in the Protocol are raised and analysed. Alternative solutions are also suggested and discussed.

- A conclusion on ways to improve human rights realisation at the all-African level is embodied in **Chapter 9**.

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1.7 Difficulties and limitations of this study

1.7.1 Study not comprehensive of African experience

The difficulties inherent in the facile generalised reference to "Africa" are not overlooked. The study is directed towards a view of the main currents running through and characteristics identifiable in Africa. In a thesis such as this one it would be impossible to account for all the nuances of difference. A country-by-country report on issues pertaining to human rights can account for individual differences.[142] The study will refer to individual examples, but does not endeavour to give an overview of the state of human rights in each and every country. The same applies to the views of academics, judgments by courts, journals consulted, interviews conducted and countries visited - these sources had to be selected, sometimes in a haphazard way. This study accepts the premise that conclusions and generalisations can, in any event, never be based on a totality of comprehensive or representative data.

1.7.2 Inaccessibility of sources

One of the major factors impeding free choice of sources in this particular instance, had been their non-existence in written form, their scarcity and inaccessibility.

As for the UN, it is difficult to find access to the most **recent information**. Modern technology has only been partially helpful in bridging these obstacles.

Numerous articles have been written about the **African Charter**, but little detail has been given about its practical functioning. For information about the actual functioning of the African

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142 For such country by country reports, see eg the annual reports by Amnesty International, the *Country Reports on Human Rights Practices for 1992* by the United States Department of State, submitted to the US Senate and the US House of Representatives (1993), Donnelly and Howard (1987) (presenting case discussions of 19 countries) and Baehr *et al* (eds) (1995).

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Commission, one has to rely on the Commission's Secretariat. The Secretariat's location is not favourable to a free exchange of information. Banjul, on the extreme western corner of the continent, is difficult to visit, and communication links are neither technologically advanced nor very reliable. For the first few years of its operation, the Secretariat had also been extremely uncooperative. Such an attitude tied in well with the paralysing interpretation of the Charter's confidentiality provisions by the Commission. Publications, such as the Commission's *Review*, were published irregularly and were poorly distributed. Much the same may be observed about the Commission's reports and communiqués. Fortunately, of late, both the issue of confidentiality and the attitude of the Secretariat have changed favourably.

Finding decisions by **local African courts** involving supra-national human rights has been an arduous task. Very few law reports series are published in African countries. Where such series are in fact published, they are invariably not kept up to date. One has to rely on personal contacts, even if one is a lawyer practising in that country. The foreigner has to rely on the kindness of personnel in the office of the court registrars.

Few publishing houses exist across Africa. South Africa, Egypt, Nigeria and Senegal are noted exceptions. Even where they exist, law books are rarely published. This is both cause and effect of a strong reliance on the legal system and legal sources of ex-colonial masters. In most of francophone Africa, for example, law students rely exclusively on texts written by French lawyers about French constitutional law or Napoleonic private law codes, for consumption primarily in France. Very much the same position persists in most of anglophone Africa, with exceptions in South Africa, Zimbabwe and Nigeria. For insights on African applications and implications, the student has to rely on class notes, presented by lecturers. This ties in with the "oral tradition" which has been celebrated in Africa as source of wisdom and knowledge in all fields of human endeavour. Like the student, the researcher in Africa has to rely to a great extent on the oral dimension, also in respect of human rights law. Interviews, impressions and perceptions become the building blocks of a research project.

New technological advances present Africa with the opportunity to undo backlogs, and to come into step with more advanced societies by leap-frogging over years of building up libraries.

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1.7.3 No catalogue of violations provided

Human rights violations occur in states, also in African states. Because governments infringe upon the rights of their nationals and other persons within the state, the concern of this study is with violations in the domestic jurisdiction of states. But the study does **not** seek to provide a **comprehensive catalogue** of the numerous violations that have in the past occurred and are still today occurring in African states. The reason lies in the limitations imposed by the topic (which concerns itself primarily with **international mechanisms and their role** in domestic situations), and not in the callous disregard of the importance and seriousness of these violations. Likewise, a study with a focus as the present can never stand alone, or claim to provide a comprehensive view.

1.7.4 Focus on secondary and tertiary mechanisms

To the ordinary person, the domestic legal system and its ability or inability to ensure the realisation of human rights is all that matters. However, the focus here is not on domestic mechanisms to realise human rights, but on secondary (sub-regional and regional) and tertiary (global) mechanisms to address these violations. Since the establishment of these secondary and tertiary systems is motivated by the desire to improve the human rights of all individuals globally **within their respective states,** international (or supra-national) human rights systems are supplementary to domestic legal protection, and do not denigrate their role or importance.

1.7.5 The limits of assessing realisation

The phrase "realising human rights" implies continuous assessment. If rights are realised, this fact should be observable in the "real world". This, in turn, requires a gauging mechanism, to measure degrees of realisation. Without such a matrix, all talk will take place in a vacuum. A major problem in the human rights discourse is the lack of such a model. Reasons for this absence are the following:

- There is little agreement on the model state in which rights are in fact "realised". Any assessment process is in need of an idealised image which would serve as the accepted ideal.

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- Once a model had been chosen, specific and detailed indicators would have to be selected. Differences are bound to derail agreement about such indicators.

- Even if a model and indicators could be agreed upon, the method of arriving at any conclusion would present difficulties. Violation of human rights standards is difficult to quantify. Elements of subjectivity will enter the equation. For the assessment of socio-economic rights, but also civil and political rights (such as the right to legal representation, or to an interpreter), extensive empirical data would be required. This may not only pose pragmatic concerns (how is this to be done?), but also principled objections (should valuable resources be directed at assessing aspects that are hardly provided in the first place?).

This difficulty explains why the human rights discourse is often only too content to concentrate on formal mechanisms, on the mere fact of ratification, or on descriptions of the provisions of Constitutions or treaties. Although attempts are made to concentrate on the *de facto* situation pertaining to human rights in Africa, the study will inevitably get bogged down in the *de iure* position.

1.7.6 Emphasis on legal dimension

The concept "human rights" embodies many dimensions that are not legal. It has a very important social dimension, as it clearly affects the way people live their lives. This makes human rights a topic of interest to most social sciences. It has a moral-philosophical dimension, and is also of concern to theology. Viewed by the political scientist, it becomes an important component of the structure of government. Lawyers run the risk of abstracting legal rights from their social, structural, moral and human context. Focusing on cases brought to and decided by judicial institutions may easily give a distorted view.

The legal aspect is almost inevitably highlighted on the supra-national plane, as this level of human rights protection is politico-legal in nature. Supra-national regimes are established and adhered to at the political level through governmental agreement. There is no concrete environment in which supra-national norms exist. Supervisory bodies are mostly *ad hoc* treaty-based artefacts, kept alive only within the treaty framework. These quasi-judicial or judicial institutions have to ensure

state compliance. Ultimately, effective action lies in the field of political decision making. Of these two dimensions, this study will emphasise the "legal", without negating the importance of the "political". Where possible, links will be made to the society involved. This will not be overstated, so as not to sidetrack too far away from the central concern of this study - the realisation of human rights in Africa through inter-governmental institutions.

As the focus falls on the **actual realisation** of human rights through legal means, the study also takes in a "positivistic" stance. For example, an investigation is made about the way in which rights have been given content in concrete cases, rather than developing a theoretical discourse about all possible interpretations of those rights.

1.7.7 The inevitability of time frames

As is the case with the proverbial "buck", the author of a research study "has to stop somewhere". An artificial cut-off mark has to be imposed on the material. This date is March/April 1997. Although this is the cut-off mark, an effort was made to keep information as updated as possible, with the result that there is no exact, single and consistent cut-off date:

- Data on the status of ratification of international human rights and other instruments and on obligations in terms of these obligations are, as far as possible, provided as at 31 March 1997.

- Information about the functioning of the African Commission is based on the First to the Tenth Annual Activity Reports of the Commission. This spans the first ten years since the African Charter entered into force, and the first 21 ordinary sessions of the Commission (1986 to April 1997).[143]

- Developments about the establishment of an African Court on Human and Peoples' Rights include the Protocol adopted at Nouakchott (in April 1997),[144] and the subsequent OAU

143 The Tenth Annual Activity Report was adopted by the OAU Assembly in July 1997, and covers the activities of the Commission up to its 21st session, held 15 - 24 April 1997.

144 For a background and discussion, see ch 7 below.

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Council of Ministers meeting and Assembly of Heads of State and Government summit (June - July 1997).

Even so, the study will inevitably become outdated soon. Obviously, the status of ratifications may change, democratic governments may be toppled by military force, and the Commission may decide many new communications. A new Protocol on the establishment of the Court is also likely to be adopted by a meeting due to take place in December 1997. But one need not despair at these thoughts: This study is a **work in progress**, embedded in the much greater, and more fluctuating context of the project to realise human rights in Africa, which is itself very much a work in progress.