TOWARDS A HUMAN RIGHTS APPROACH TO CITIZENSHIP AND NATIONALITY STRUGGLES IN AFRICA: THE REGIONAL QUANDRY

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I. INTRODUCTION

Three-quarters of the reason I came to Addis relate to the fact that it was Akwasi Aidoo who invited me. I actually hate workshops. And a couple of months ago I was raked over the coals by my activist and academic colleagues for suggesting that workshops in Uganda should actually be banned! However, I must confess that I am extremely happy I came because this event has brought home to me in a fashion that no other occasion has ever done, how the personal and the political are inextricably linked. My last name is Oloka-Onyango, and immediately tells those familiar with Eastern African history where I am from. I belong to the Luo Nation that stretches from the south of the country the colonialists called Sudan, through Northern Uganda, into Western Kenya, and ending in the upper tip of Tanzania. My community is called the Jopadhola—the people of the wound—who were left behind in the great trek south because (you guessed it) one of the brothers developed a wound that forced him to stop. On the Ugandan side we are a tiny community, but closer in every way to our larger Kenyan Luo cousins who lie across the border that split us apart.

Every third Kenyan Luo is called “Onyango,” understandably so because it means ‘born in the morning,’ and reflects the division of the day into three; those born at daytime or in the afternoon are named ‘Ochieng’ or ‘Achieng,’ (for women), those born at night are called ‘Owor’ or ‘Awor.’ Onyango is my father’s name.

My own name—given at birth—is Oloka, which means ‘born away from home.’ I will not tell you where I was born, but the place and the fact of my birth haunted me whenever I came to my country of birth and sought entry. My Ugandan passport would be scrutinized with double efficiency. I would be asked, “were you really born here?” “what was your mother doing here?” “are you sure this is not a forgery?” But the straw that broke the camel’s back came when I was requested to produce my birth certificate as proof that I was actually born in their country. My response was to request the Immigration Officer if she traveled on

holiday with hers! This earned me a 3 hour detention at the airport. In a fit of youthful pique, I returned home determined to fully lay claim to my birthright—the passport that would put an end to these travails. I duly applied and filled in the necessary papers, did the interview, hauled my mother in to verify that she was actually there when she gave birth (presumably because I wasn't), and went through all other manner of humiliating tests and verification. Having received a clean bill of health, the day came for me to collect the passport of my birth-country. I arrived at the Embassy, and was asked to surrender my Ugandan one! I hadn't realized that this was the meaning of the bar against dual nationality. I turned tail and fled, promising to surrender my passport on a later date, and never went back. It is probably the best thing that happened to me.

I want to focus on some general themes relating to the regional response to citizenship and nationality issues. This is in particular regard to both the situation of citizens and non-citizens on the African continent, and especially about the following groups of peoples: minorities, 'so-called' indigenous peoples, forced migrants of varying kinds (i.e. refugees and IDPs), and voluntary migrants.

In my view the following questions are important to this inquiry:

1. What has been the response of regional mechanisms, instruments and institutions?

2. How adequate is that response?

3. What loopholes remain to be filled by civil society actors, states and regional organizations, and how can we who are gathered here go about filling them?

In particular, I would like to adopt a human rights perspective, especially that exemplified in the various instruments (regional and international) that focus on the place of both individuals and groups who may be particularly marginalized by the dominant culture or by discriminating socio-economic and political conditions.

Some preliminary points:

The quest for regional frameworks of governance and economic development in Africa has been fraught with several tensions, not least of which are the colonial legacy that led to the balkanization of what would otherwise have evolved as natural regional groupings. In this respect Africa is forced to start afresh, moreover from very different assumptions dictated by

the colonial arrangement. Thus we are boxed into the Anglo/Franco/Luso legacy, when instead we could have been talking about a Luo, Bantu, Hausa, or Fulaniphone arrangement, or other, more endogenously-reclaimed arrangements derived from different considerations. In light of this colonial legacy, contemporary regional groupings carry forward many of the tensions that African states inherited at independence, among them the following:

(i) Conflicting conceptions of self-determination, both in terms of geopolitical space, as well as in relation to self and community;
(ii) The imposed phenomenon of statehood, and a marginal place for the citizen therein;
(iii) The meaning of 'peoples' and the essential disconnect between the notion of peoples and the states in which they live, and
(iv) The dilemma between positively recognizing the notion of ethnicity, while ensuring that its negative effects (e.g. hate speech, ethnic cleansing, and discrimination) are minimized.

It thus follows that most of the regimes established to bring regional groupings into force (especially the African Charter), duplicate these tensions. From a human rights perspective regional groupings are affected by additional tensions. For example, there is a tension between oversight and self-regulation, manifested in the doctrine of non-interference and the protection of state sovereignty, and the desire to prevent the occurrence of violations of an Amin/Nguema/Bokassa, or Rwandan genocide scale. There is the well known tension between the individual and the state. Lastly, there is the tension between what is described as 'African culture' and western conceptions, or between self-determination and imperialism.

But one tension that is so often evaded in discussions about citizenship and nationality is that between 'protecting' the rights of women and ensuring that women are able to effectively assert their autonomy and equality. There is a particular need to focus on the gendered fashion in which notions of citizenship and ethnicity operate, because they adversely affect women more so than they do men. In other words, the notion of citizenship as we know it is not gender-neutral. For women, we must extend the assertion of citizenship to freedom from sexual, physical and gender violence. It also covers the ability to travel, work, settle and be identified as an autonomous human being; the right to be registered and acknowledged as heiress to familial and even public resources, and the right to confer citizenship on their children. Finally (and by no means of least

importance), there is the right to engage in direct political activity and contestation (including for the highest offices in the land). Whereas for men, these have been basic tents of citizenship since political independence, in many countries around the continent, the same cannot be said to apply to the situation of women. It is odd that while women are easily vested with control and stewardship of that most complex of social units—the family—they are denied management of the state.

My last preliminary point is that there are a proliferation of regional and sub-regional groupings, institutions and mechanisms on the continent, which add to the complexity of addressing the issues of citizenship in terms of competence, competing jurisdictions, divided loyalties, and inadequate capacities. At last count there were at least 14 sub-regional groupings, among them:

NORTHERN AFRICA
Arab Maghreb Union (AMU)
Community of Saharan and Sahelian States (CEN-SAD)

WEST AFRICA
Economic Community of West African States (ECOWAS)
Manu River Union (MRU)
Union économique et monétaire ouest africaine (UEMOA)

CENTRAL AFRICA
Economic & Monetary Community of Central African States (CEMAC)
Economic Community of Central African States (ECCAS)

SOUTHERN AFRICA
Common Market of Eastern & Southern Africa (COMESA)
Southern Africa Development Community (SADC)
Preferential Trade Area (PTA)

EASTERN AFRICA
East African Community (EAC)
Inter-governmental Authority on Development (IGAD)
Kagera Basin Initiative/Organization (KBI/O)

Many of these organizations have developed specific programmes and initiatives designed to address issues concerning the rights of citizens, migrants, women, refugees, etc., and part of the strategy we should discuss is how we can best engage them. It is impossible to make a blow-by-blow account of each institution in this paper, but suffice it to make the following general points:

* The overwhelming majority of these institutions are state-created and state-centred (or statostrophic) with minimal popular involvement in their formation or

their operation.

* Their predominant focus is economic development issues, within the framework of integrated markets and devoted to the faster movement of goods, with attention paid in some cases to conflict prevention and intervention mechanisms.

* References to the individual or to individual or group rights are only scanty. As such the scope for the assertion of citizenship, nationality and identity questions is limited. Access to the institutions and mechanisms by non-state actors varies.

* Most of them give rhetorical attention to the idea of free movement within the region, and (in some instances) to freedom of residence. The degree of actual realization of these rights is of course the subject of constant debate.

The premier pan-continental organization today is the African Union (successor to the Organization of African Unity (OAU), on which there has been considerable discussion regarding the degree to which its formation represents a new wind, or simply a change in the wind's direction. In examining this question, it is impossible to divorce the present from the past—to speak of the AU without looking back to its predecessor, the OAU. This will help us understand both the possibilities portended by the new institution, as well as the limitations dictated by its history.

From inception, the main concentration of the OAU was the liberation of the continent, a preoccupation that marked both its founding charter and its major activities. In this respect, with the final liberation of South Africa in 1994, the OAU could be said to have achieved its primary objective: the removal of colonial domination and control from the continent. More complex, was the OAU's approach to the internal protection of human rights and by implication, the defense of the rights of both citizens and non-citizens from state abuse of a non-colonial character. Thus, the OAU was largely silent or non-committal on the issue of intervention in order to correct situations in which either law and order had broken down, or where human rights violations had reached a peak. Paradigmatic of this approach was the very negative reaction of the OAU to the Tanzanian retaliation and eventual removal of Idi Amin from the Ugandan presidency in 1979.

Nevertheless, it was the OAU that oversaw the promulgation of two instruments that have a radical potential to reinvigorate the approach of both states

and peoples to the violation of the rights of citizens and non-citizens. These were the 1969 Convention Governing the Specific Aspects of the Refugee Problem in Africa, and the 1981 African Charter on Human & Peoples' Rights (The Banjul Charter).

II. RE-READING THE AFRICAN CHARTER AND THE OPERATIONS OF THE AFRICAN COMMISSION

There has been considerable debate and commentary about both the Charter and about the operations of the African Commission—the basic institutional mechanism designed to give effect to the rights and duties of citizens and non-citizens in the African context. The negatives have focused on issues such as public awareness and knowledge about the body; the considerable period of time it takes for issues to be resolved, the lacklustre response of states, its minimal resources, and especially, the influence of African heads of state and government and the lack of enforcement power behind its decisions. Although I am usually a critic of both the Charter and the

Commission, today I want to focus on the more positive aspects of their existence. First, although on initial examination the African Charter may demonstrate that it leans inordinately in favour of states, there is great potential to read the provisions of the text in a subversive (non-state, pro-peoples) fashion. Take for example, the guarantee of the right to property (contained in Article 14) a right that is usually associated with the protection of privilege and corporate (or even colonial) wealth. In fact, in conditions of mass impoverishment, structural adjustment and marginalization and sex-based discrimination, the assertion of the right to property can be a powerful tool in the quest for economic liberation, and against property dispossession, especially for the landless, for minorities and for women.

There is also the issue of the right to self-determination, usually associated in the literature with self-determination from colonial control and hegemony. However, a reinterpretation of the idea of self-determination could be effectively deployed to protect the rights of pastoralists, hunter-gatherers, forest peoples and other indigenous peoples. Lastly, although the African Charter has only one article that speaks directly to the issue of women's human rights (Article 18.3), that provision is perhaps the most far-reaching and broad of any in the instrument. The obligation on states to ensure the removal of 'every discrimination against women' is potentially a powerful instrument of breaking down the artificial divide between the personal and the political and taking serious steps to eliminate both

gender and sexual violence. African activists therefore need to review the Charter and engage it as an instrument with considerable potential for the protection of both citizens and non-citizens.

Concerning the issue of citizen's rights specifically, although the African Charter does not mention either nationality or citizenship explicitly, there are several provisions that speak directly to their protection. Among them we can cite Article 2 on non-discrimination; 3 on equality; 5 on respect for human dignity, protection from torture, inhuman and degrading treatment; 6 (on liberty and security of the person), 9 on freedom of expression, 10 (on freedom of association), and 13 (on the right to participate in government). But the Charter also makes a fundamental contribution with regard to issues that have caused considerable problems to migrants and refugees (non-citizens). These relate particularly to the freedom of movement, the quest for asylum, and the issue of expulsion. Article 12 of the Charter guarantees freedom of movement and the right of every individual when persecuted, 'to seek and obtain asylum.' More fundamentally, it stipulates that the expulsion of a non-national can only follow due process stipulations. The provision expressly prohibits mass expulsions. In giving effect to these provisions, the Commission has made several decisions that are of relevance to this debate. For example, on the issue of the expulsion of immigrants, on claims to citizenship, and in relation to the denationalization and deportation of citizens.

At a minimum, these decisions illustrate that the African Commission is acutely aware of the manner in which states use the issues of nationality and citizenship in order to deal with political dissent and opposition. In sum, the African Charter today, can be read very differently and more progressively than when it was first written in 1981. The challenge thus shits to us to begin re-reading this instrument more aggressively.

III. REFUGEES, INTERNALLY DISPLACED PERSONS (IDPS) AND VOLUNTARY MIGRANTS

Within the international regime of the enforcement of refugee rights, the 1969 OAU Convention is often cited as a path-breaking and even revolutionary instrument. This stems from its definition of the term 'refugee.' Beyond the international definition of a person who has a well-founded fear of returning to his or her country, the OAU Convention extends it to persons who have fled situations of generalized violence, including 'external aggression, foreign domination or events seriously disturbing public order….' In this

respect, the Convention not only expanded the refugee definition, but by implication, the scope of protection afforded to refugees in the African situation.

However, despite the general framework of hospitality exuded by the Convention, there are still many outstanding problems. For example, the Convention is silent on the specific issues of refugee women and children. It is also affected by a security paradigm that seeks to ensure that refugees do not engage in activities that may be considered 'subversive,' and which may ultimately have the effect of stifling their autonomous existence in the country of refuge. In and of itself, the Convention does not include a categorization of the rights that refugees actually have (with the exception of the right against return).

In this respect, the point of reference is the Geneva Convention. What this means is the need for the co-extensive reference to human rights instruments (and especially to the African Charter) in terms of seeking the realization and enforcement of refugee rights. This is particularly important because the OAU Convention lacks a mechanism for enforcement. The Commission on Refugees is confined to resource mobilization and sensitization and hardly plays the monitoring function that would have been the continental equivalent of the UNHCR. On its part, the division of Humanitarian Affairs, Refugees and Displaced Persons is severely constrained in its operations. Once again, we need to revert to the African Charter in order to secure the enhanced protection of the rights of refugees. Many of the sub-regional instruments and mechanisms do not even make reference to refugees.

If the situation of refugees is tenuous, IDPs are in a double bind in the African situation. In the first instance, there is an absence of a legal framework (at the regional level), either defining who an IDP is, or outlining their rights or entitlements to protection. Existing international guidelines provide only a descriptive identification. In contrast to refugees, who have certain legally defined rights such as non-refoulement and the right to international protection, "… an IDP may not claim any additional rights to those shared with his or her compatriots." In sum they are in a legal limbo, and also, judging by the (in)action taken by human groups on IDPs, a political Siberia, especially with respect to regional strategies and action. In sum, there is not only a lack of legal status, but also, the mechanisms of monitoring are poor, and the extent of state accountability with respect to the situation of IDPs are ill-defined. Nevertheless, the African Commission

has not been silent on the issue of IDPs and their rights. Thus, in Malawi African Association & Others v. Mauritania, the Commission stated that Article 23.1 of the Charter (stipulating that 'all peoples have the right to national and international peace and security') included the responsibility for protection of nationals. Quite clearly, however, there is still a great deal that remains to be done at the continental level with respect to the unique situation of IDPs.

While IDPs and refugees are compelled to leave their countries, a phenomenon of concern in the debate about citizenship and nationality relates to those who voluntarily migrate, either in search of work or for other reasons. Africans have migrated since time immemorial. However, voluntary migration has become an issue of considerable concern today, as xenophobia is on the rise, and states erect ever more insurmountable barriers to entry. The provision in the African Charter concerning freedom of movement (Article 12.1) is both imprecise and vague, because it constrains such movement to actions that fall '… within the law.' Unfortunately, there is not much by way of Commission jurisprudence on this subject, and thus we need to look elsewhere. Several sub-regional mechanisms and instruments that we can examine such as those of ECOWAS and SADC provide some guidance. Both regimes (and many of those which are emerging) profess a strong commitment to the free movement of goods and people. The actual reality is different, but this simply means that we must force the rhetoric to more closely meet the reality, and again if non-state actors don't do this, states will continue to neglect their commitments and responsibilities. We also need to pay attention to issues such as trafficking, the rights of migrant workers, and residency rights within these regional groupings.

V. THE SITUATION OF MINORITIES AND INDIGENOUS PERSONS

Despite being a continent of several minorities and indigenous persons, none of the instruments referred to and indeed none of the mechanisms in existence at the continental level attempt to address the situation of minorities or indigenous persons in any explicit or comprehensive fashion. Aside from the broad reference to non-discrimination in Article 2, the African Charter does not use either the term 'minority' or 'indigenous peoples'. The same is true of even newer instruments such as the Women's Protocol which in its substantive provisions speaks of elderly, disabled and widowed women (as specific categories of women requiring special attention), but does not make reference to either minority women, or to women belonging to indigenous groups, or even to women

refugees and IDPs. This partly emerges from what I have elsewhere described as the African schizrophenia about these categorizations: 'we are all minorities,' or 'in Africa who is not indigenous?' Indeed, it is only by the use of creative interpretation that the Commission has in several instances, come to the aid of persons who would be defined as minorities or indigenous persons in international law. The need for attention to issues such as land rights, to the debilitating consequences of bio-piracy and to the appropriation of the cultural rights of indigenous peoples does not require emphasis, particularly in the face of the rampaging forces of globalization.

Connected to the issue of minorities is the phenomenon of hate speech. In contrast to both the American and European instruments, the African Charter does not specifically provide for hate speech restrictions. And yet, as was clearly demonstrated in the Rwandese genocide, hateful speech and invective can be the precursor to serious human rights violations against the citizenry. While restricting speech may run counter to the Charter right guaranteeing the free dissemination of opinions, an issue for discussion should be the nature and character of a strategy that seeks to ensure that the use of media (like Radio Mille Colline) in the promotion of ethnic hatred, xenophobia and racism, is prevented.

Finally, with respect to the issue of minorities and identity is the controversy in many countries around the continent concerning sexual orientation, and specifically the situation of gays and lesbians. Although the African Charter does not specifically refer to the issue of discrimination on grounds of sexual orientation, a question for consideration would certainly be the response of the African Commission to a petition by a sexual minority (gay or lesbian) on the grounds contained in the Charter. Given the forms of persecution that people of alternative sexual preference have faced in Zimbabwe, Namibia, and Uganda (to name only a few countries on the continent), citizenship and identity issues are clearly implicated in the discussion on sexual orientation.

The conclusion that flows from the above observations is that despite the absence of any reference to minorities in the Charter, there are sufficient provisions to which the Commission can have recourse in ensuring that their rights are protected. Perhaps the case that best exemplified the potential of the Commission in this regard, is the SERAC/CESR v. Nigeria case concerning the Ogoni peoples of the Niger Delta. In that case, the Commission found that the Nigerian government had extensively violated the

rights of the Ogoni peoples to life, a healthy environment, shelter and food, among others, through its activities of oil exploitation in the delta region. The decision is important for several reasons, including the articulation it made of the stipulation in the Charter that states that '… all peoples have … the right to a general satisfactory environment favourable to their development.' Also, for the first time it provided more defined interpretation to the notion of peoples' rights in general. Many of the rights that the Commission asserted were violated are not explicitly mentioned in the Charter. Although the Commission stopped short of stating that the Ogoni have the right to self-determination, the Commission decision can be said to be a major advance on both the interpretation of the notion of 'peoples' in the Charter, to the rights of minorities marginalized by adverse conditions of development and political exclusion.

VI. NEW REGIONAL DEVELOPMENTS: THE AFRICAN COURT, NEPAD AND THE PROTOCOL ON WOMEN

Several recent developments on the regional scene deserve critical attention. For example, in contrast to the OAU, the AU has sought to mark conceptual distance with the doctrine of 'non-interference' and has incorporated provisions relating to intervention in the event of 'grave circumstances.' On the face of it, the AU is more attuned to human rights issues, given that it now speaks about respect for democratic principles, human rights, the rule of law and good governance. Among the many structures that will be crucial in this regard is the Central Organ for Conflict Prevention, Management and Resolution. Although predating the establishment of the AU, in line with the stated commitment to ensuring that human rights violations do not go unchecked, this mechanism has a crucial role to play. Provision for an Economic Social and Cultural Council (ECOSOCC) at the AU will also effectively provide for the first time, an avenue for activists within civil society to engage the continental institution. The protocol for the African Court is yet to come into force, but for the first time it will mean that there is a continental mechanism that will provide the necessary enforcement power behind the principles enshrined in the African Charter. It is also hoped that the protocol on the Rights of African Women will be adopted by the ASHG this year, paving the way for a more comprehensive approach to the enforcement of women's human rights via continental mechanisms. Finally in this regard, the 'New Partnership for African Development' (NEPAD) has arrived on the continental scene. Although coming mainly from a developmental and economistic perspective, NEPAD incorporates several provisions

that will be crucial in the struggle to ensure the respect for citizenship and nationality rights. Most prominent among these is the African Peer Review Mechanism (APRM) by which the standards of African countries on democracy and good governance are to be evaluated.

VII. A VERY BROAD CONCLUSION

In human rights struggles, the local is key, but the regional is becoming crucial. The preceding survey illustrates that there are a plethora of regional instruments and mechanisms that can be engaged in a quest to better address the many citizenship and nationality questions with which we are concerned. It is nevertheless a mixed bag and African states and peoples have been much better at creating, than they have at implementing. While remaining fully aware of their limitations, there is a great need for concerted collaborative action by civil society and academic activists in engaging these institutions at the regional level. My focus has principally been the African Charter and Commission because, in the final analysis, dealing with the issues regarding citizenship and nationality in any fundamental and comprehensive fashion requires to some extent, the adoption of a rights perspective. In my view, the Commission (and eventually the Court when it comes into existence) is the regional institution strategically best placed to achieve these goals. Consequently, it will be crucial to monitor the progress towards the establishment and the eventual operation of the African Court which will supplement the Commission's work. Our focus should also review the sub-regional institutions that not only address these issues in their founding instruments, but which have taken the issue further, whether through protocols or other subsidiary instruments. A particular concern should be the activation of these institutions with regard to the plight of the internally displaced, and the situation of a variety of minorities, and to force them to honour commitments they have made, for example, with respect to free movement and residence.

But the African Commission is quite clearly not the only institution of relevance. We therefore need to perform a thorough value-for-effort audit of what engagement with the various regional and sub-regional initiatives (including new ones like NEPAD, and the ECOSSOC of the AU) will ultimately mean in terms of achieving the goals of reducing xenophobia and combating the effects of negative ethnicity. In doing so we need to be careful about the danger of proliferation and duplication that is manifest. Finally, I would like to suggest that in our attempt

to reinvigorate the promise of regional action on citizen and non-citizen rights, we must reconnect with some of the pan-regional instruments that adopt a much more people-centred (as opposed to a statist) approach to the problems Africans have experienced with the assertion of their citizenship rights. I am thinking particularly of instruments such as the Algiers Declaration on the Rights of Peoples, 1976, and the African Charter for Popular Participation in Development and Transformation of 1990.

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