HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER

Heyns and Stefiszyn (editors)
HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER

Edited by
Christof Heyns and Karen Stefiszyn

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Introduction

The Africa Programme of the United Nations-affiliated University for Peace (UPEACE) and the Centre for Human Rights at the University of Pretoria, are pleased to present Human rights, peace and justice in Africa: A reader. This publication introduces the topics covered from an interdisciplinary, and distinctly African perspective. This Reader is part of the evolving Series on Peace and Conflict in Africa published by UPEACE, aimed at making the basic material on issues related to conflict and peace in Africa more accessible.

The Africa Programme of UPEACE endeavours to facilitate the institutionalisation of peace and conflict studies at African universities and the development of increased capacity in this area in Africa. One facet of the work of UPEACE is to develop Africa-specific materials, such as this Reader, in the field of peace and conflict studies to be used by lecturers, students and other researchers. In doing so UPEACE works with partners based in Africa, in this case the Centre for Human Rights. The objective is to provide lecturers who can potentially integrate aspects of peace studies into their courses, as well as their students, with an overview of the field and to help make relevant material — international as well as Africa-specific — accessible to them. Where full courses on this topic already exist, the UPEACE material can serve as a guide for further development. The material provided is multi-disciplinary, and can be used in courses on, for example, law, sociology, political science, and media studies.

The material covered in UPEACE readers, such as the current one, can be presented as a stand-alone course, or as a component of a larger course. In other words, the material provided here can be used on its own, or serve as an introduction or a component of a course on human rights, peace, and justice around which the lecturer can design his or her own course, targeted towards the circumstances of the country in question.

The current Reader, and other readers in the Series, consists mainly of extracts from published texts dealing with the topic under discussion, in this case human rights, peace and justice. The primary focus is on extracts from ‘classic’ or leading texts on the topic, although lesser known, but nevertheless illuminating texts by writers based in Africa are also included. It is foreseen that especially this last component will be expanded upon in future editions, with the addition of extracts not only from Africa-based academic journals, but also newspapers and other sources from the continent.

The material presented in the Reader is linked by an ‘editorial voice’, which introduces the material and attempts to place them in context. The references for the texts are also provided and where applicable, links to websites are given, whereby students are encouraged to locate the full text of the reading. Footnotes from the original texts have been omitted. Questions for discussion are suggested at the end of each chapter along with suggestions for further reading and useful websites.

In addition to publishing extracts from classical secondary texts in readers such as this one, UPEACE also publishes collections of official or primary documents in a series of publications called ‘compendiums of key documents’. So far, a Compendium of key human rights documents of the African Union as well as a Compendium of key documents relating to peace and security in Africa have been published. Both these compendiums should be regarded as accompanying texts to the current reader. In other words, the primary documents referred to in the Reader are accessible in these
compendiums. If the African Charter on Human and Peoples’ Rights, for example, is referred to in the Reader, the student is advised to refer to the *Compendium of key human rights documents of the African Union*, to find a copy of the Charter. Similarly, where the Protocol Relating to the Establishment of the Peace and Security Council of the African Union is referred to in the Reader, the student would turn to the *Compendium of key documents relating to peace and security in Africa*.

This *Reader* is aimed at students in final year undergraduate courses, or postgraduate courses (typically at Master’s degree level), or other students at an equivalent level. If used on its own and in its entirety, the material contained in the readers is designed to sustain a course, which runs for approximately 14 teaching hours. The teaching curriculum could be guided by the following:

Week 1: The concept of human rights  
Week 2: Human rights in Africa and economic, social and cultural rights  
Week 3: The relationship between conflict and human rights  
Week 4: Critiques of the concept of human rights  
Week 5: Concepts related to human rights  
Week 6: Mechanisms for realising human rights  
Week 7: Causes of conflict in Africa  
Week 8: Approaches to peace in Africa  
Week 9: Approaches to peace in Africa continued  
Week 10: Women and peace-building  
Week 11: Introduction to transitional justice  
Week 12: Approaches to transitional justice  
Week 13: Approaches to transitional justice continued  
Week 14: Consideration of case studies related to the local context/possible role-play or simulation

It is suggested that in cases where the *Reader* as well as the compendiums mentioned above are used, students are given the reading material well in advance, and are required to read it before the lecture, to allow teaching to take the form of discussions. It may also be useful to assign the questions at the end of each chapter to students in advance.

As its name indicates, the link between justice (which finds one of its strongest current expressions in the concept of human rights) and conflict and peace is explored in the current *Reader*. The *Reader* proceeds from the view that sustainable and lasting peace can be built only on the foundation of justice, and consequently, that peace, human rights, development, human security, good governance and democracy are all inter-related concepts. In this context it is clear that where a transition from conflict to peace is attempted, transitional justice is a central concern, often with far-reaching implications for the durability of the transition.

At the end of a course covered by this *Reader*, students should be able to:

- provide a description and analysis of the landscape of human rights protection in Africa, on the international (UN and AU) levels, and the domestic levels, and of the mechanisms for conflict prevention, management and resolution in Africa;
- be able to participate meaningfully in a discussion on the relationship between the universality of human rights and claims of cultural relativism, especially in the African context;
- identify explanatory factors which create and sustain pervasive insecurity and conflict;
- critically assess African efforts towards the prevention, containment and resolution of conflicts;
• appreciate the complexity of achieving justice in post-conflict environments;
• discuss the relationship between human rights, peace and justice.

UPEACE is in the process of producing a similar reader focused on conflict prevention, management and resolution, and plans to, in future, publish similar material on peace and development, gender and peace building, media and peace, non-violent transformation of conflicts, regional integration and peace, and endogenous methods of mediation and peace building.

The Africa Programme of UPEACE will soon start with the publication of an academic journal, called the *African Peace and Conflict Review*. The submission of academic articles dealing with justice, human rights and peace in the African context, or any of the topics outlined above, for possible publication in the *Review*, is encouraged. Articles published in the *Review* will be among those considered for inclusion in future UPEACE readers.

Comments on the *Reader* and compendiums, as well as suggestions and potential material for future editions, are most welcome, and can be sent to the address below.

We would like to thank the following people who assisted with the preparation of this Reader: Monica Juma and Charles Villa-Vincencio provided the introductions for chapters two and three respectively, as well as critical comments and suggestions regarding the selection of material. Michelo Hansungule and Magnus Killander assisted with the compilation of materials on human rights and Hye-Young Lim assisted in compiling the material on post-conflict justice. The production of the manuscript was done by Lizette Besaans with the assistance of Rafael Velásquez. We would also like to thank Jean-Bosco Butera, Director of the UPEACE Africa Programme, for his support. We also thank the donors that are supporting the Africa Programme of UPEACE: The Netherlands Government, the Canadian International Development Agency (CIDA), the Swedish International Development Cooperation Agency (SIDA) and the Swiss Agency for Development and Cooperation (SDC).

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Glossary of terms

Civil rights: Rights relating to personal integrity, freedom, and equality, eg the right to life and freedom of expression. Together with political rights, commonly referred to as first generation rights.

Collective rights: The rights of groups to protection of their interests and identities, eg the right to self-determination.

Communication: The term used by the African Commission on Human and Peoples’ Rights to refer to a complaint brought to the Commission alleging a violation of rights under the Charter.

Convention: A legally binding agreement between states, entered into voluntarily, and enforceable to the extent acknowledged by the parties. The term is used more or less interchangeably with the words covenant and treaty. (See also ‘Protocol’.)

Customary international law: A primary source of international law (together with treaties and general principles of law). Formed by state practice and the conviction of states that the practice follows from legal obligation.

Declaration: A non-binding legal instrument containing standards to be observed by states.

Economic and social rights: Rights related to material well-being and livelihood, rather than to individual freedoms, eg the rights to housing, health, and education. Also sometimes referred to as second-generation rights.

Human security: A concept that challenges the precepts of military security, by focusing on the security of people as opposed to that of the state. Democracy, human rights, sustainable development, social equity and the elimination of poverty are seen as essential elements of security.

Instrument: Written legal document; in international law it includes declarations and treaties.

International Bill of Rights: The combined totality of the human rights provisions of the Universal Declaration on Human Rights (UDHR), International Covenant on Economic, Social and Cultural rights (ICESCR), and International Covenant on Civil and Political rights (ICCPR), as well as the optional protocols to the ICCPR.

Justiciable: Referring to an issue that can be decided by a court.

Negative peace: The absence of direct violence. (See also ‘Positive peace’.)

Non-governmental organisations (NGOs): Organisations formed by people outside of government.

Political rights: Citizen’s rights to political participation.

Preventive diplomacy: Action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.
**Peacemaking:** Actions to bring quarrelling parties to agreement through peaceful means as envisioned in Chapter VI of the Charter of the United Nations (Pacific Settlement of Disputes).

**Peacekeeping:** The deployment of a military presence, with the consent of all parties, aimed at preventing, halting or resolving conflicts. Peacekeeping operations are considered to have ‘Chapter VI and a half’ mandates from the Charter of the United Nations. As the nature of international conflict has drastically changed, current peacekeeping operations rely heavily on civilian and police components.

**Peace enforcement:** Operations involving the use of force aimed at compelling combatants to cease fighting and seek peace. Peace enforcement operations require a Chapter VII mandate from the Charter of the United Nations and, hence, consent from the quarrelling parties is not mandatory.

**Positive peace:** The kind of peace which exists in the presence of social justice through equal opportunity, a fair distribution of power and resources, equal protection and impartial enforcement of the law. The concept of positive peace seeks to address the root causes of conflict and structural violence in a preventive way. (See also ‘Negative peace.)

**Protocol:** An addendum to a convention or treaty which modifies it; sometimes used to add further norms (eg the Protocol to the African Charter on the Rights of Women in Africa) or enforcement mechanisms (eg the Protocol on the Establishment of an African Court on Human and Peoples’ Rights) to conventions.

**Ratification:** The formal agreement of a state to be bound by a convention. Through ratification a state becomes a ‘state party’ to a convention and as such is bound by its provisions under international law.

**Reconciliation:** A process that attempts to transform hostilities among parties previously engaged in a conflict or dispute into feelings of acceptance and even forgiveness of past animosities or harmful acts.

**Reparation:** Recognition and redress of a basic harm or injustice.

**Reservation:** When a state ratifies a treaty, but wishes not to be bound by certain provision/s of the treaty, it can submit a document called a reservation to that effect, provided that the reservation is not incompatible with the object and purpose of the treaty.

**Restorative justice:** A process that encourages all those involved in a particular conflict to collectively determine how to deal with the aftermath of the conflict, and the injustices incurred, and its implications for the future.

**Structural violence:** Conditions of indirect and insidious nature typically built into the very system of society and cultural institutions, which do not entail the use of force, but which have comparable effects. Examples could include systems which repress, oppress or exploit, and lack of access to education, health or opportunities among others.

**Transitional justice:** Seeks to address challenges that confront societies within a period of political change and could be characterised by various responses to confront the wrongdoings of repressive predecessor regimes, such as truth commissions, prosecutions, amnesty, and traditional applications of justice.
Treaty: See convention.

Ubuntu: An African philosophy of shared humanity expressed in the Nguni language maxim ‘a person is a person through other persons’.
**Acronyms**

<table>
<thead>
<tr>
<th>简称</th>
<th>全称</th>
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<tbody>
<tr>
<td>ANC</td>
<td>African National Congress (South Africa)</td>
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<tr>
<td>APRM</td>
<td>African Peer Review Mechanism</td>
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<td>AU</td>
<td>African Union</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all Forms of Discrimination against Women</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<tr>
<td>EAC</td>
<td>East African Community</td>
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<tr>
<td>ECCAS</td>
<td>Economic Community of Central African States</td>
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<tr>
<td>ECOMOG</td>
<td>ECOWAS Monitoring Group</td>
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<tr>
<td>ECOSOC</td>
<td>(UN) Economic and Social Council</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<tr>
<td>HDI</td>
<td>Human Development Index</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<td>ICT</td>
<td>Information and Communication Technology</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>IDP</td>
<td>Internally displaced persons</td>
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<tr>
<td>IGAD</td>
<td>Intergovernmental Authority on Development</td>
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<tr>
<td>IHL</td>
<td>International Humanitarian Law</td>
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<tr>
<td>LRA</td>
<td>Lord's Resistance Army (Northern Uganda)</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<tr>
<td>NEPAD</td>
<td>New Partnership for Africa’s Development</td>
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<tr>
<td>NGO</td>
<td>Non-governmental Organisation</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>PAP</td>
<td>Pan African Parliament</td>
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<tr>
<td>RUF</td>
<td>Revoluntary United Front (Sierra Leone)</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UNHCHR</td>
<td>United Nations High Commissioner for Human Rights</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
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SECTION 1:  
HUMAN RIGHTS IN AFRICA

The African continent provides a clear reminder that human rights is a dynamic concept and that it cannot be seen in isolation from the context and environment in which it operates. Adherence to human rights norms could simultaneously be a response to conflict and one of the mechanisms that can be used in the pursuit of a lasting peace. As such conflict is the ever-present shadow, the permanent alternative to human rights, and much is to be learned of human rights by understanding the nature of conflict and methods to combat conflict.

In this first section an introduction to the concept of human rights is provided in order to lay the foundation for the exploration of the relationship between human rights and conflict, which is the crux of this Reader. Although the intent is to illuminate these concepts from an African perspective, we begin with the overall philosophic foundations of human rights, including its historical relationship to struggle, before proceeding to focus specifically on human rights in Africa. The readings provided include criticisms of the concept of human rights including questions as to its universality. Furthermore, concepts related to human rights such as good governance, human security and positive peace are also introduced.

With the above-mentioned background provided, the mechanisms for the protection of human rights — on the domestic as well as international levels — are set out and discussed. On the domestic level this includes the protection of human rights through the courts and national human rights institutions, as well as the role of civil society. The international protection
of human rights includes protection on the global and in particular the United Nations level, as well as regional systems such as the those created by the African Union (the equivalent of systems in Europe and the Americas). The complex regional human rights institutional landscape in Africa is presented as a prerequisite to understanding the role of the regional institutions in conflict prevention, management and resolution.

By the end of this section it should be clear that human rights mechanisms and human rights activism are both integral parts of the pursuit of a lasting, positive peace.
A. THE CONCEPT AND LANGUAGE OF HUMAN RIGHTS AND RELATED IDEAS

Introduction to the concept of human rights

The extracts reprinted here focus on questions such as the following: What are human rights? Why do they matter? Is it a Western concept or a universal concept? How do African philosophical concepts relate to the idea of human rights? What is the link between human rights and conflict?

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The nature of human rights

One of the initial questions in any philosophic inquiry is what is meant by human rights. The question is not trivial. Human beings, as Sartre said, are ‘stalkers of meaning’. Meaning tells one ‘why’. Particularly in the international sphere, where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are fragile, definition can be crucial. Indeed, some philosophic schools assert that the entire task of philosophy centres on meaning. How one understands the meaning of human rights will influence one’s judgment on such issues as which rights are regarded as universal, which should be given priority, which can be overruled by other interests, which call for international pressures, which can demand programmes for implementation, and for which one will fight.

What is meant by human rights? To speak of human rights requires a conception of what rights one possesses by virtue of being human. That does not mean human rights in the self-evident sense that those who have them are human, but rather, the rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit.

Some scholars identify human rights as those that are ‘important’, ‘moral’ and ‘universal’. It is comforting to adorn human rights with those characteristics; but, such attributes themselves contain ambiguities. For example, when one-says a right is ‘important’ enough to be a human right, one may be speaking of one or more of the following qualities: (1) intrinsic value; (2) instrumental value; (3) value to a scheme of rights; (4) importance in not being outweighed by other considerations; or (5) importance as structural support for the system of the good life. ‘Universal’ and ‘moral’ are perhaps even more complicated words. What makes certain rights universal, moral, and important, and who decides?
Intuitive moral philosophers claim that definitions of human rights are futile because they involve moral judgments that must be self-evident and that are not further explicable. Other moral philosophers focus on the consequences of human rights and their purpose. The prescriptivist school says that one should not be concerned with what is sought to be achieved by issuing a moral (human rights) utterance but with that which is actually accomplished.

The definitional process is not easier when examining the term human rights. Certainly rights is a chameleon-like term that can describe a variety of regal relationships. Sometimes ‘right’ is used in its strict sense of the right holder being entitled to something with a correlative duty in another. Sometimes ‘right’ is used to indicate an immunity from having a legal status altered. Sometimes it indicates a privilege to do something. Sometimes it refers to a power to create a legal relationship. Although all of these terms have been identified as rights, each invokes different protections.

For example, when speaking of an inalienable right, does one mean a right to which no expectations or limitations are valid? Or does one mean a prima facie right with a special burden on the proponent of any limitation? Or is it a principle that one must follow unless some other moral principle weighty enough to allow abridgment arises?

If one classifies a right as a claim against a government to refrain from certain acts, such as not to torture its citizens or deny them freedom of speech, religion, or emigration, then other complexities arise. If a particular claim stems from a metaphysical concept such as the nature of humanity, or from a religious concept such as the divine will, or from some other a priori concept, then the claim may really be an immunity to which normative judgments should not apply. If, however, the claim is based on certain interests such as the common good, other problems arise such as the need to determine what constitutes the common good, or the need to balance other societal interests, that may allow a wide variety of interpretations not supportive of individual human rights demands.

If speaking of the ‘rights’ in the International Covenant on Economic, Social and Cultural Rights, such as the right to social security, health, education, fair wages, a decent standard of living, and even holidays with pay, what does one intend? Are these rights that individuals can realistically assert, or are they only aspirational goals? Assuming they are rights as intended, on whom are the correlative duties imposed?

If one speaks of privileges, other concerns arise. If the privileges are granted by the state, then presumably the state is entitled to condition them. Does the right of a state to derogate from rights in an international covenant mean that the rights are, in fact, only privileges? Here too, the answer is connected to the moral strength and inviolability of the ‘right’ or ‘privilege’ that is involved.

The definitional answers to these questions are obviously complex.

To summarise, even where international law has established a conventional system of human rights, a philosophic understanding of the nature of rights is
not just an academic exercise. Understanding the nature of the ‘right’ involved can help clarify one’s consideration of the degree of protection available, the nature of derogations or exceptions, the priorities to be afforded to various rights, the question of the hierarchical relationships in a series of rights, the question of whether rights ‘trump’ competing claims based on cultural rooting, and similar problems. To be sure, the answers to these questions may evolve over time through legal rulings, interpretations, decisions, and pragmatic compromises. But how those answers emerge will be influenced, if not driven by, the moral justifications of the human rights in issue.

A starting point in understanding the moral foundations of human rights law is to examine the sources of human rights claims. From where does one derive the moral justifications that can be urged for or against human rights law? What is their scope or content, and how compelling are they?

Modern human rights theories

*Rights based on natural rights: Core rights*

The aftermath of World War II brought about a revival of natural rights theory. Certainly, this was due in part to the revulsion against Nazism and the horrors that could emanate from a positivist system in which the individual counted for nothing. It was not surprising that a renewed search for immutable principles to protect humanity against such brutality emerged.

Of course, a large variety of presentations and analyses among scholars exist addressing theories of moral philosophy. While the new rights philosophers do not wear the same metaphysical dress as the early expounders of the Rights of Man, most adopt what may be called a qualified natural law approach in that they try to identify the values that have an eternal and universal aspect. They agree that only a positive legal system that meets those values can function as an effective legal system. In a larger sense, the object of much of revived natural rights thought can be viewed as an attempt to work out the principles that might reconcile the ‘is’ and the ‘ought’ in law.

The common theme emerging from a huge family of theories is that a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom or autonomy.

Underlying such foundational or core rights theory is the omnipresence of Immanuel Kant’s compelling ethic. Kant’s ethic maintains that persons typically have different desires and ends, so any principle derived from them can only be contingent. However, the moral law needs a categorical foundation, not a contingent one. The basis for moral law must be prior to all purposes and ends. The basis is the individual as a transcendental subject capable of an autonomous will. Rights then flow from the autonomy of the individual in choosing his or her ends, consistent with a similar freedom for all.
In short, Kant's great imperative is that the central focus of morality is personhood, namely the capacity to take responsibility as a free and rational agent for one's system of ends. A natural corollary of this Kantian thesis is that the highest purpose of human life is to will autonomously. A person must always be treated as an end, and the highest purpose of the state is to promote conditions favouring the free and harmonious unfolding of individuality. Kant's theory is transcendental, a priori, and categorical (all amount to the same thing), and thus overrides all arbitrary distinctions of race, creed, and custom, and is universal in nature.

In variant forms, modern human rights core theories seem to be settling for concepts of natural necessity. By necessity one means prescribing a minimum definition of what it means to be human in any morally tolerable form of society. Put another way, some modes of treatment of human beings are so fundamental to the existence of anything that one would be willing to call a society that it makes better sense to treat an acceptance of them as constitutive of man or woman as a social being, rather than as an artificial convention. This view does not entail verified propositions as science requires. Rather, it views human life as encompassing certain freedoms and sensibilities without which the designation 'human' would not make sense. To use a linguistic metaphor, humanity has a grammatical form of which certain basic human rights are a necessary part. This concept of what one views human beings to be is a profound one, even if it is deemed self-evident.

To be sure, many of the new individualist theories possess a certain vindication aspect. They can be viewed as saying that if one adopts certain human rights as norms (eg freedom of thought, equality), one can produce a certain kind of society; and if one finds that kind of society desirable, one should adopt the norms and call them absolute principles. This reasoning is of course a type of tautology. Then again, tautologies can be significant if society is willing to accept them.

The renaissance of qualified or modified natural rights or core theories has seminally influenced conventional international human rights norms. The Universal Declaration of Human Rights reflects that influence, as seen in the Declaration's opening statement: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. In a similar vein, article 1 provides: 'All human beings are born free and equal in dignity. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood'. The debt that 'inherent dignity' and 'inalienable rights' owe to natural law philosophy is obvious. The key human rights treaties also reflect quite directly the moral universalist foundations discussed above.

The philosophic justification and affirmation of the core principles of human rights as universal principles are highly significant and reassuring for the vitality of human rights in rules for the world of nations. Rights that preserve the integrity of the person flow logically from the fundamental freedom and autonomy of the person. So does the principle of nondiscrimination that must attach to any absolute concept of autonomy. However, affirming such basic or core principles is one thing; working out all the other elements of a complete system of rights such as international law seeks to provide is
something else. What rights derive from those deemed core rights? How are they developed with generic consistency? By what theory does one test the legitimacy of an overall system? The next sections discuss some of the leading rights theories that have wrestled with the methodology and justification of an overall system of rights.

**Rights based on justice**

The monumental thesis of modern philosophy is John Rawls' *A Theory of Justice*. ‘Justice is the first virtue of social institutions’, says Rawls. Human rights, of course, are an end of justice; hence, the role of justice is crucial to understanding human rights. No theory of human rights for a domestic or international order in modern society can be advanced today without considering Rawls' thesis.

Principles of justice, according to Rawls, provide a way of assigning rights and duties in the basic institutions of society. These principles define the appropriate distribution of the benefits and burdens of social co-operation. Rawls' thesis is that:

> [e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override ... Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

But what are the rights of justice? Put another way, what are the principles of morality or the foundation of rules that would be agreed upon by all members of a society? To set the stage for ascertaining the principles of justice, Rawls imagines a group of men and women who have come together to form a social contract. Rawls conceives the contractors in an original position.

The original position is one of equality of the contractor with respect to power and freedom. It is taken for granted that all know the general principles of human psychology, sociology, economics, social organisation, and the theory of human institutions. However, the contractors are under a ‘veil of ignorance’ as to the particular circumstances of their own society or of their individual race, sex, social position, wealth, talents, opinions, aspirations, and tastes. Therefore, they are prevented from making a self-interested decision that otherwise would corrupt the fairness of their judgment. In that hypothetical original position, all of the contractors would consider only their own self-interest, which is to acquire a sufficiency of primary human goods, namely fundamental liberties, rights, and opportunities of income and wealth as social bases of self-esteem. Hence, in the original position, contractors would choose a basic structure for society fairly because they would be abstracted from knowing the detailed facts about their own condition in the real world.

Rawls then tries to show that if these men and women were rational and acted only in their self-interest under a ‘veil of ignorance’, they would choose principles that would be good for all of the members, not simply to the advantage of some. The answers given by those in the original position may then be taken as a blueprint, or as a pattern for the establishment of laws that are worthy of the universal assent of citizens everywhere. In other words,
their choices would be the basis for the ordering of a just society in any time or place. Rawls' system thus allows us to derive universal principles of justice (morality) acceptable to all rational human beings.

What particular principles would be chosen? Rawls claims that the contractors, who are in the original position of choosing their own status and prospects, will choose two principles of justice.

Rawls' First Principle is that ‘each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’. Rawls' principles of justice are arranged in a hierarchy. The first priority is that of liberty. Liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all; (b) a less than equal liberty must be acceptable to those [citizens] with the lesser liberty.

The First Principle focuses on the basic liberties. Rawls does not enumerate them precisely, but indicates, roughly speaking, that they include political liberty, freedom of speech and assembly, liberty of conscience and thought, freedom of the person (along with the right to hold personal property), and freedom from arbitrary arrest and seizure. The First Principle requires that these liberties be equal because citizens of a just society are to have the same basic rights. Rawls applies a value criteria in determining basic liberties. He believes that a liberty is more or less significant depending on whether it serves the full, informal, and effective exercise of the moral powers.

Rawls' Second Principle deals with distributive justice. It holds that: ‘Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity’. The general conception of justice behind these two principles reached in the original position, is one of ‘fairness’.

Rawls' Second Principle is a strongly egalitarian concept which holds that unless there is a distribution that makes both groups better off, an equal distribution is preferred. Thus, the higher expectations of those better situated are just only if they are part of a scheme that improves the expectations of the least advantaged. In Rawls' theory, the Difference Principle is the most egalitarian principle that would be rational to adopt among the various available alternatives.

Rawls recognises that a person may be unable to take advantage of rights and opportunities as a result of poverty and ignorance and a general lack of means. These factors, however, are not considered to be constraints on liberty; rather, they are matters that affect the ‘worth’ or ‘value’ of liberty. Liberty is represented by the complete system of the liberties, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework that the system defines. The basic liberties must be held equally. However, the worth of liberty may vary because of inequality in wealth, income, or authority. Therefore, some have greater means to achieve their aims than others. However, the lesser worth
of liberty is compensated for by the Difference Principle discussed above. Rawls, in short, builds a two-part structure of liberty that allows a reconciliation of liberty and equality.

This philosophy, of course, is highly abstract and not easily digested. When one tries to apply Rawls' principles to the non-metaphorical world, some difficult empirical questions arise.

Consider, for example, the basic civil and political liberties identified by Rawls that involve recognition of individual autonomy. The demands made are of a negative sort; they principally involve non-interference with the equal sharing of basic liberties by individuals. Rawls' overriding principle of justice requires that all citizens share these liberties equally (as indeed, international law provides: Here, the respective positions of modern utilitarian, egalitarian, and natural rights philosophy seem to be in general agreement). Moreover, groupings are not empirically difficult. The inclusion of all persons in these liberties does not negate or reduce the share of any and causes the least chance of a clash with other values. In constructing a rights system, it is therefore appropriate to impose a heavy burden on those who would treat persons unequally by denying any of them basic liberties.

However, in the real world, will clashes not occur between liberty and other interests, such as public order and security, or efficient measures to ensure public health and safety? To solve this conflict, Rawls suggests a Principle of Reconciliation under which basic liberties may be restricted only when methods of reasoning acceptable to all make it clear that unrestricted liberties will lead to consequences generally agreed to be harmful for all. This Principle of Reconciliation is that of the common interest. A basic liberty may be limited only in cases where there would be an advantage to the total system of basic liberty.

With respect to Rawls' Second Principle, the problems are more complex. Here, Rawls holds that a condition of distributive justice is fair equality of opportunity. Opportunity, stated as a principle of nondiscrimination, is easy to put into a legal precept, and international human rights covenants and many domestic constitutions do prohibit discrimination by virtue of sex, race, religion, or national origin. However, empirical knowledge tells one that equality of opportunity is not enough because society creates the conditions of the pursuit, thereby affecting the outcome.

For example, a person who grows up under conditions of discrimination and deprivation has less opportunity to get into a college than someone from the mainstream of society with a good elementary and secondary education. Hence, to provide equality of opportunity one must compensate for unequal starting points. However, the opportunities of others also should be protected. The object, therefore, is to give those who have had an unequal start the necessary handicap points and yet not denigrate the opportunities of others. Whether one utilises subsidies, special courses, quotas, or affirmative action programmes depends on how compelling a society views the obligation to provide equality of opportunity. Here, a utilitarian and egalitarian approach may differ substantially. In some democratic states, for example, affirmative action programmes for minorities have met a utilitarian
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backlash. It is not easy to resolve the differences, but understanding the moral conceptions enables one to focus on reconciliation of competing views.

With respect to a more equal apportionment of economic benefits derived under Rawls’ Second Principle and the Difference Principle, even more difficult problems arise because the demands on society are heavier. Economic benefits may range from modest ones such as free education, aid to the elderly, aid to the handicapped, social security, etc., to major redistributions of wealth. Obviously such benefits are not achieved merely by a negative restraint on government; they require tinkering with distribution.

But how much tinkering with the distribution system is suitable, and to what desirable ends? Reasonable moral persons interested both in the wellbeing of the individual and the common good might recognise that certain economic needs of those at the bottom strata of society present so imperative a claim for relief that they outweigh a larger aggregate of benefits to those higher on the economic scale. One’s moral theory affects what one is willing to accept as relevant facts, as well as the degree of sacrifice one is willing to accept to further egalitarian goals. Rawls’ Difference Principle addresses this issue. However, if one acknowledges the claims for more equitable distribution of economic benefits, one must still decide at what point on the spectrum one draws the line and says that the claims for equality do not outweigh the competing values of liberty or the utilitarian aggregate benefits that will be decreased by meeting the claims. It may be that in any particular social structure the inequalities allowed under the Difference Principle would produce a minimum distribution of goods and benefits too small to satisfy the reasonable demands of the least advantaged, or too large to command acceptance by the advantaged.

Rawls’ thesis presents still more difficult moral issues of distributive justice in the international context. For example, many developing nations are economically disadvantaged and their disadvantages can only be can only be redressed by substantial transfer to them of recourses, technology, and other benefits from developed countries. The sources of those inequalities compete for dominance in determining the appropriate moral response.

One basis put forward for the disadvantages suffered by developing nations is that developed countries caused the disadvantages through colonialism, imperialism, racism, and other exploitation. If developed states accept that claim, then the moral response should be that the entity that caused the harm should remedy it or, at least, contribute substantially to the remedy. If, however, the accusation is rejected, as unfair, too old, inaccurate, etcetera, the moral justification for a response is different. The developed countries may still be willing to help lessen international economic inequality, but that task may be undertaken not out of guilt or the need to make reparations, but out of a utilitarian calculus that includes such values as increasing markets, creating alliances, lessening tension, etcetera. However, the utilitarian calculation may not warrant any substantial reallocation. Or the response may be elicited through the moral obligation to advance a just world order along the Rawlsian Difference Principle. However, here the Rawlsian concept may impose conditions: For example, in the latter case, donor states may require the donors’ to accommodate certain civil and political liberties that
are part of the donors' concept of justice, as a reciprocal element of, or the price for, a more just international system.

These issues are obviously quite complicated with numerous considerations of real politik intersecting, but even this short discussion shows that one cannot divorce the tough issues of fulfilling economic and social rights on both a domestic and international level from the moral issues.

Critics of Rawls' theory maintain that it was designed to support the institutions of modern democracy in a domestic state context. But even if that were the case, the criticism does not refute his moral thesis, nor an international extension of it.

Indeed, even if Rawls' theory was intended as a model for domestic states, its application can further an international just order. This is because in the real world, state parties only reach questions of international justice after dealing first with the basic structure of the state's institutions, and second with the rights and duties of individual members. If Rawls' moral principles produce justice for individuals in a domestic state, that achievement takes a long step toward gaining the domestic state's endorsement and adherence to international human rights principles. In this regard, the international world order is no greater than the sum of its state parts. Hence, if the Rawlsian moral schemata contributes to a realisation of domestic justice by the various state parts, the prescriptions of international human rights will invariably be served.

Rawls himself has suggested that his model can be applied to a world order if one extends the concept of the original position and thinks of the parties as representatives of different states who together must choose the fundamental principles to adjudicate claims among states. But as Thomas M Franck has pointed out, once the actors in the original position are representatives of states, the dynamic changes, and it is not clear that these actors would opt for moral principles that further human rights unless they themselves are representatives of just states. It is a fair point that the implications of Rawls' model on an international level still need to be worked through. In any event, Rawls' moral structure—showing how the values of liberty and equality underlying the nature of the autonomous human can be realised in open institutional forms—should at least be morally compelling for a world in which large segments of humanity suffer oppression, poverty, and deprivation of civil, political, social, and economic rights.

One cannot cover Rawls' highly complex neo-Kantian theory or deal with the considerable critical analysis of it in a few pages, but even brief discussion shows the importance of his theory for the moral justification of a rights-based system of government under a participatory structure. Rawls effects a reconciliation of tensions between egalitarianism and non-interference, as well as between demands for freedom by the advantaged and demands for equality by the less advantaged. His structure of social justice maximises liberty and the worth of liberty to both groups. One may also consider whether Rawls' thesis is reflected in the consensus on human rights found in the international human rights covenants, and whether, in fact, most of the nations have tacitly agreed to a social contract in this area. Rawls' theory is
obviously comforting for the construct of constitutional democracy as well as for the concept of the universality of human rights.

**Rights based on reaction to injustice**

At least brief mention should be made of Professor Edmund Cahn's theory of justice. While Cahn's theory no longer has the influence it once enjoyed, it has a particular appeal to human rights activists. Cahn asserts that although there may be universal *a priori* truths concerning justice from which one may deduce rights or norms, it is better to approach justice from its negative rather than its affirmative side. In other words, it is much easier to identify injustice from experience and observation than it is to identify justice. Furthermore, says Cahn, where justice is thought of in the customary manner as an ideal mode or condition (for example Rawls), the human response will be contemplative, and ‘contemplation bakes no loaves’. But the response to a real or imagined instance of injustice is alive with movement and warmth, producing outrage and anger. Therefore, he concludes, ‘[j]ustice’ ... means the active process of remedying or preventing what would arouse the sense of injustice’. An examination of the instances that will be considered as effecting an injustice thereby allows a positive formulation of justice.

This concept of the need to right wrong has the capacity to produce action. The practical starting point may well be the strongly felt response to words that move one with emotional force and practical urgency to press for the satisfaction or repair of some need, deprivation, threat, or insecurity. Such an approach obviously will find a response in human rights advocates anxious to focus public attention on the injustice of the wide variety of egregious human rights abuses that remain prevalent.

However, with the more sophisticated kinds of entitlements arising from considerations of social justice, there is less agreement on what constitutes injustice, and Cahn's insight offers less help. Here one needs an overall structure of the type presented by moral philosophers such as Rawls, Ackerman, or Gewirth. Still, Cahn’s insight is useful; in the end it may well be that society will secure only those rights for which its members are aroused to fight.

**Rights based on dignity**

A number of human rights theorists have tried to construct a comprehensive system of human rights norms based on a value-policy oriented approach focused on the protection of human dignity. Some religious philosophers, holding dignity to be the inherent quality of the sacredness of human beings, believe that an entire rights system can flow from that concept. A secular exposition of that theory is best presented by Professors McDougal, Lasswell, and Chen.

McDougal, Lasswell, and Chen proceed on the premise that demands for human rights are demands for wide sharing in all the values upon which human rights depend and for effective participation in all community value processes. The interdependent values, which can all fall under the rubric of human dignity, are the demands relating to (1) respect, (2) power, (3)
enlightenment, (4) well-being, (5) health, (6) skill, (7) affection, and (8) rectitude. McDougal, Lasswell, and Chen assemble a huge catalogue of the demands that satisfy these eight values, as well as all of the ways in which they are denigrated.

McDougal, Lasswell, and Chen find a great disparity between the rising common demands of people for values of human dignity and their achievement. This disparity is due to ‘environmental factors’, such as ‘population, resources, and institutional arrangements and also to ‘predispositional factors’, such as special interests seeking short-term pay-offs … in defiance of the common interests that give expression to human dignity values’. The ultimate goal, as they see it, is a world community in which a democratic distribution of values is encouraged and promoted, all available resources are utilised to the maximum, and the protection of human dignity is regarded as a paramount objective of social policy. While they call their approach a policy-oriented perspective, their choice of human dignity as the ‘super value’ in the shaping and sharing of all other values has a natural rights ring to it.

Their approach also has been criticised as having a Western orientation, which it does, but that does not mean it is wrong. A more telling criticism is the difficulty in making use of their system. Their list of demands is huge; no hierarchical order exists, both trivial and serious claims are intertwined; and it has a utopian aspect that belies reality. Still, McDougal, Lasswell, and Chen have shown how a basic value such as dignity — a value on which most people would agree — can be a springboard for structuring a rights system. Even if one disagrees with their formulation, they have opened the door for a simpler and more useful construction to be built on their insights.

Rights based on equality of respect and concern

A striking aspect of modern theorists is their pronounced effort to reconcile different theories of rights. In this regard, in the discussion of modern theories, one must consider the work of Ronald Dworkin, who offers a promising reconciliation theory between natural rights and utilitarian theories. Dworkin proceeds from the postulate of political morality, that is that governments must treat all their citizens with equal concern and respect. No basis for any valid discourse on rights and claims exists in the absence of such a premise.

Dworkin next endorses the egalitarian character of the utilitarian principle that ‘everybody can count for one, nobody for more than one’. Under this principle he believes that the state may exercise wide interventionist functions in order to advance social welfare.

Dworkin believes that a right to liberty in general is too vague to be meaningful. However, certain specific liberties such as freedom of speech, freedom of worship, rights of association, and of personal and sexual relations, do require special protection against governmental interference. This is not because these preferred liberties have some special substantive or inherent value (as most rights philosophers hold), but because of a kind of procedural impediment that these preferred liberties might face. The
impediment is that if those liberties were left to a utilitarian calculation, that is, an unrestricted calculation of the general interest, the balance would be tipped in favour of restrictions.

Why is there such an impediment? Dworkin says that if a vote were truly utilitarian, then all voters would desire the liberties for themselves, and the liberties would be protected under a utilitarian calculation. However, a vote on these liberties would not be truly utilitarian nor would it afford equal concern about and respect for liberties solely by reflecting personal wants or satisfactions of individuals and affording equal concerns to others. This is because external preferences, such as prejudice and discrimination against other individuals deriving from the failure to generally treat other persons as equals, would enter into the picture. These external preferences would corrupt utilitarianism by causing the individual to vote against assigning liberties to others.

Accordingly, the liberties that must be protected against such external preferences must be given a preferred status. By doing so, society can protect the fundamental right of citizens to equal concern and respect because it prohibits ‘decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals’.

The argument is attractive because Dworkin (like Rawls, but in a different way) has minimised the tension between liberty and equality. Dworkin does so not by conceding a general right to liberty (which might exacerbate the tension), but by specifying particular basic liberties that society must protect to prevent corruption of a government’s duty to treat persons as equals.

Dworkin’s theory seems to retain both the benefits of natural rights theory without the need for an ontological commitment, and the benefits of utilitarian theory without the need to sacrifice basic individual rights. Dworkin’s resplendent universe thus seems to accommodate the two major planets of philosophic thought. Dworkin’s theory is also valuable in focusing on the relational rather than the conflicting aspects of liberty and equality. Even if one is not fully convinced at this stage by Dworkin’s analysis, one has the feeling that his reconciling approach should work within the institutions of a participatory democracy.

...
One way of looking at human rights is to see it as the flipside of the coin of legitimate resistance. From this perspective, to say that freedom of conscience is a basic human right is in effect to claim a licence ultimately to take the law into your own hands, should you be forced to pray to a god in which you do not believe. And conversely, the argument that one can justifiably break the law as a last resort if one is excluded from the benefits of society based on your race is tantamount to claiming that equality and non-discrimination are basic human rights, even if the term human rights is not used.

This approach, which I will call the ‘struggle approach’ to human rights, may be captured in the expression human rights/legitimate resistance, indicating that they are seen as two sides of the same coin, and that behind human rights claims there is the possibility, if there are no reasonable alternatives, of resorting to self-help; and conversely, that for self-help to be legitimate, it must be the only option to protect human rights. As will be argued later in this paper, if they are indeed alter egos, some of the problems encountered in debates around human rights issues, such as the universality of human rights, could be placed in a new light by focusing instead on legitimate resistance and asking the same questions about that concept.

It is said that, while it may be difficult to agree about what justice is, we find it easier to identify injustice, and in this way work our way through from human wrongs to human rights. The struggle approach follows this line of thinking and makes empirical experience, rather than theoretical constructions about its foundations, the starting point of trying to understand the concept of human rights. Any perception of human rights therefore reflects an empirical assessment of the ‘fighting causes’ or values so central to human existence that people across the borders of time and space have taken, and will eventually take matters into their own hands should these core interests not be protected. In the language of Goethe (made famous by others): ‘In the beginning was the deed’ — not the word. Practice underlies theory, not the other way around.

Struggle is a valid starting point in this context: It is because of its association with resistance that such power is lent to the concept of human rights; it is this connection that makes human rights a force to be reckoned with. Whether one considers human rights ‘inalienable’, ‘fundamental’ or ‘basic’, or refers to it as ‘trumps’ or ‘natural entitlements’, they are clearly considered to have overriding importance. The concept of human rights represents a countervailing force to the dominant role of the state and state-like entities. Saying that rights are ‘inalienable’ does not imply that they cannot be taken away, but rather that should they be alienated they may be
‘taken back’, either by those whose rights have been violated or by others on their behalf.

Human rights understood in this way are thus not about asking favours and they are not theoretical concepts; they are guides to action and triggers of opposition to the illegitimate use of power, particularly state power. Human rights are therefore not dependant on recognition by the state — people can claim them even when the law, whether made by a dictator or by the majority, denies those rights. As a result, human rights have a potentially revolutionary dimension, as is evidenced by the worldwide clampdown by authoritarian regimes on human rights activism.

The statement that ‘law is a command of a sovereign, backed by a threat’ is widely associated with the positivist John Austin. To turn this language around, according to the human rights/legitimate resistance approach, ‘human rights claims are demands of citizens, backed by a threat’ — the threat of self-help. Or, to adopt and adjust the language of international law, in the same way that state practice and opinio iuris (the conviction of legal obligation), create new legal norms, the practice of ordinary people over centuries who have asserted their rights in defiance of norms which they believe to be laws in name only can also create new law. For them these laws do not possess the qualities that are essential for them to be regarded as binding. ‘Ordinary’ people who assert their human rights through their struggles against unjust laws consequently present a mirror image of the way in which states establish customary international law, in line with the increased recognition that individuals and groups other than states are also to be regarded as subjects — and sources — of international law.

However, it should be noted that the concept of human rights as seen from the struggle perspective does not belong in the anarchist tradition — human rights proceed from the (often unspoken) assumption that there is a general duty of political obedience, whatever the source of that obligation is (which could be seen as the result of a social contract, utilitarian considerations, natural duties and such). To this duty human rights claims constitute potential exceptions. Only a limited number of interests have gained this status, and an increase in the number of rights recognised as human rights risks diluting their impact and undermining their status as exceptions. The concept of human rights does not challenge the existence of the state as an institution; in fact it endorses the state but claims that the protection of these rights is a primary obligation of the state and holds the state accountable to this standard. The human rights/legitimate resistance approach emphasises that, to the extent that the state fails in this regard, the obligation to obey the state lapses.

Human rights therefore challenge the illegitimate use of power and not the institution of the state as such. As seen from a struggle perspective, the concept of human rights reserves a role for disobedience in extreme cases, coming into play against the broader backdrop of an obligation to obedience, to which exceptions must be justified. If constitutions were indeed social contracts, bills of rights would be the escape clauses, the reminders that the alternative to the state as an institution is the state of nature.
Human rights in this sense may be regarded as having a status potentially similar to peremptory norms which cannot be overridden, not even through a social contract or with the consent of the persons concerned. As such, the concept of human rights is the ultimate guarantor of popular sovereignty. To use another analogy: In the same way that the legal systems of the world recognise necessity or self-defence as legitimate grounds for self-help, as a last resort, the struggle approach claims that self-help can be employed, if all else fails, to protect human rights.

While human rights are on the most immediate level about people living in relative harmony with each other, beyond that it has the component of struggle or at least of potential struggle should they be violated. Because conflict is the constant shadow, the permanent alternative to human rights, the test for any political dispensation claiming to be based on human rights must be whether it diminishes conflict and facilitates, in Armatya Sen’s phrase, ‘human flourishing’. Does it anticipate and as far as possible eliminate the need for struggle? It is in this context that the adage ‘if you want peace, work for justice’ comes to the fore — implying that justice (and in our context, the protection of human rights) may be understood to be that which in the long run can bring peace. In the familiar phrase, the evils of slavery cannot be addressed by turning slaves into slave masters, but only by eradicating the practice of slavery itself — by recognising and enforcing a right against slavery.

A strong component of the ‘morality’ of a system based on human rights is therefore an attempt at long-term rationality. Human rights law, as is the case with much of law, can usefully be understood as a collective effort to make self-help unnecessary, based on a hard look at the lessons of history about what human beings regard as fighting causes. As such the struggle approach does not make an appeal to the law of nature, but it does assume that it is possible to draw some general conclusions based on empirical observations about what history tells us about human nature and what we as a species regard as the minimum standards of acceptability. Claims about the universality of human rights can hardly escape an essentialist dimension.

Given the close fit between human rights and legitimate resistance, the human rights instruments of the world can be seen as the closest approximation available to a universally accepted list of grounds for legitimate resistance. Consequently it is no surprise that liberation movements find the legitimacy of their struggles measured by the question whether they break the law as a last resort to pursue human rights objectives, and whether they do so in a way consistent with human rights standards.

There is a strong historical record of the link between human rights and legitimate resistance. Some of the most influential human rights documents have emerged as a defence of opposition to human rights violations; a defence of struggle. For example, John Locke, widely considered the father of human rights in the Western tradition, defended the ‘Glorious Revolution’ of 1688 in his seminal work *Two treatises on civil government* on the grounds that:

> whenever therefore the legislative ... endeavour to grasp ... absolute power over the lives, liberties, and estates of the people; by this breach of trust they
forfeit the power, the people had put in their hands, for quite contrary ends, and
 it devolves to the people, who have a right to resume their original liberty ...

Where ‘natural rights’ are violated, in the view of Locke, even violence is
justified: ‘Force is to be opposed to ... unjust and unlawful force’. In
opposition to the state, considered to be endowed with the authority of
nature, Locke advanced the concept of ‘natural rights’, claiming an equally
powerful authority (nature) for the defence of these rights.

The idea of ‘inalienable rights’ was incorporated into the American
Declaration of Independence of 1776, which states that governments are
formed to secure life, liberty and the pursuit of happiness. However, when a
government becomes ‘destructive of these ends’ it is the right of the people
‘to alter or abolish it’, hence the War of Independence.

Jean-Jacques Rousseau also advanced the idea that freedom may — and
indeed must — be defended: ‘A popular insurrection that ends in the death or
deposition of a sultan is as lawful an act as those by which he disposed, the
day before, of the lives and fortunes of his subjects’. These thoughts found
resonance in the French Revolution of 1789, and in the Declaration of the
Rights of Man and Citizen of the same year, which set forth ‘the natural,
alienable and sacred rights of man’, which include ‘liberty, property,
security and resistance to oppression’.

These examples of the historical link between what is widely regarded as
instances of legitimate resistance and human rights were taken from the
Western experience, where the term human rights primarily gained its
currency. However, it is a widespread practice, also in the broader global
history, that periods of rebellion, revolution, civil war and other forms of
social strife prompt people to ask themselves ‘What went wrong?’ and ‘How
can we prevent this from happening again?’, leading them to embrace the
concept of human rights. In the assemblies where peace treaties and
constitutions are drafted, questions are posed about which interests were
infringed that should be recognised and protected in future to prevent a
recurrence of the conflict.

It is in such situations that seminal bills of rights and human rights instruments
are given life, with one eye on the past and another on the future, embodying
a common sense resolution not to repeat the mistakes of the past. Human
rights have a strong retrospective character. The human rights project is
based on the premise that we can learn from our mistakes, even as new
mistakes are made. New political dispensations often carry the resolution
that the same violations that brought society to the precipice will ‘never,
ever and never again’ be allowed to be repeated. As Frans Viljoen and myself
have tried to show in another study, international human rights instruments
probably have their strongest influence on the domestic level in instances
where new constitutions which are drafted after periods of conflict
incorporate international standards into their bills of rights.

It is no accident that World War II — in many ways a war about human rights
— triggered the current, almost worldwide, acceptance of the idea of human
rights. World War II has been called the ‘constitutional moment’ of
international human rights law. To recount one part of the story: As the process was underway towards the end of the war to set up a new world body to replace the League of Nations, a draft charter for the United Nations that made no reference to human rights was circulated. One of the war generals, the enigmatic Jan Smuts, then premier of South Africa, commented as follows on the document aimed at setting up a body to secure lasting peace in a post-war world:

[The draft] was a legalistic document which did not fit the bill. We had been engaged upon one of the greatest struggles of all history. Fundamental human rights had been at stake ... What the world expected from us was a statement of our human faith; of the things which we had fought for and which we should try to stabilise and preserve in the world.

He advanced the idea of a Preamble to the Charter of the United Nations that would base the pursuit of world peace on the protection of ‘basic human rights’. As a result the final version of the Preamble includes the following as objectives of the United Nations: ‘... to save succeeding generations from the scourge of war ... and to reaffirm faith in fundamental human rights’. A respect for human rights is thus seen as a necessary precondition for peace.

The Preamble of the Universal Declaration of Human Rights of 1948 likewise explicitly establishes a link between human rights and legitimate resistance:

[I]t is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...

The Preambles of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 1966 contain the following common provision, emphasising the foundation of human rights in the quest for world peace:

in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

Articles 1(1) of both Covenants reflect an endorsement of the emerging realisation of the legitimacy of the anti-colonial struggles of the time, using the language of human rights:

[all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

While the link between human rights and legitimate resistance is clear in the above-cited documents, it has often been argued that the international human rights order that emerged after World War II was largely enthused by Western experiences and concepts. Are human rights a Western concept? The concept of human rights also seems to have gained acceptance through instances of endorsed resistance in some cultures dominated less directly by Western concepts.

In Africa the concept of human rights as it is used today has strong roots in the struggle against colonialism and the vestiges of colonialism. For example, part of the Declaration of the 1945 Pan-African Congress reads:
[We] are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment.

The acceptance of the African Charter on Human and Peoples’ Rights in 1981 by the Organization of African Unity (OAU) was partly a reaction specifically to the abuses of human rights in Uganda, Equatorial Guinea and the Central African Republic. The OAU was embarrassed by its failure to bring the horror caused by Idi Amin to an end. This had to be done by the Tanzanian army, and the OAU subsequently wanted to create an institutional mechanism to obviate the need for such unilateral intervention. This led to the creation of a regional human rights mechanism through the African Charter (not surprisingly, in view of this history, with a strong emphasis on inter-state communications, attempting to present a legal route to be followed by countries such as Tanzania in similar cases in the future).

The African Charter clearly shows the link between human rights and struggle. It includes the following provisions:

Article 20(2):
Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.

Article 20(3):
All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The unique emphasis on peoples’ rights in Africa, and in particular in the African Charter, appears to be as much the result of the emphasis in Africa on the importance of the community (the whole being more than the sum of the parts), as it is a response to the fact that in Africa repression has often taken the form of enslavement or repression and even annihilation of entire population groups. The emphasis on a right to development in the African context likewise fits the pattern of a history of anti-colonial struggle, and an attempt to right the wrongs of the past.

One of the prime contemporary instances where human rights have emerged from the crucible of struggle is South Africa, and it is indeed mindful of Nelson Mandela’s famous words ‘[t]he struggle is my life’ that the approach advanced here is called the ‘struggle’ approach to human rights.

Large-scale political resistance in South Africa started approximately a century ago. During the 21 years that Mohandas Gandhi spent in South Africa, he developed satyagraha, or civil disobedience, as an instrument to oppose racist policies aimed against people of Indian origin. (At this time Gandhi did not include Africans in his emancipatory objectives.) In the course of this struggle Gandhi was asked by Jan Smuts (whose approach to human rights at home was very different from his approach on the international stage) to draft a ‘Bill of Rights’, the first document of that name in South African history, setting out the grievances that prompted the struggle of Indians in South Africa.
Through his unique form of struggle — the non-violent breaking of the law — against the enforcers of these policies (including Smuts), Gandhi achieved a measure of recognition of the rights of those whose interests he championed. He used the same instrument to great effect in India's liberation struggle. He showed that it was possible for a brown-skinned person to stand up to colonialism and win: a novel concept at the time.

By demonstrating that rights could be protected through defiance as a political instrument, Gandhi gave oppressed people around the world a powerful tool to be used in their struggle against exploitation. Civil disobedience proceeded to play a central role in the anti-colonial struggles of the mid-20th Century, the civil rights movement in the United States of America and in the liberation struggle in South Africa.

Gandhi's approach was unique in that he tempered the confrontation traditionally associated with defiance of the law by acting in a non-violent way. This made defiance of the law a viable option for the masses, who often are not willing to engage in an all-out confrontation. Gandhi established a third option for protesters, one between legal protest and a resort to violence. Gandhi’s success with non-violent resistance would have far-reaching consequences for the legitimacy of the use of violence in similar situations in the future. Even though many who came after him would not share his categorical adherence to non-violence as a matter of faith, Gandhi established an additional step or alternative that has to be considered before violence may be regarded as the only feasible or reasonable option, namely, non-violent resistance.

If a hallmark of what today is consider ed ‘civilised’ is a reluctance to resort to the use of violence until other plausible avenues have been exhausted in the pursuit of one’s interests, Gandhi’s example constitutes a major contribution to world civilisation by showing that non-violent defiance is a reasonable alternative.

Inspired in part by the Atlantic Charter of 1941, which elaborated the human rights aims of the Second World War, the African National Congress (ANC) in 1945 issued a document entitled ‘African claims in South Africa’. This document included a section entitled ‘Bill of rights’ in which, for the first time, the ANC called for universal franchise and direct representation of Africans in Parliament. When it was considered that there were no other reasonable alternatives, the non-violent Defiance Campaign was launched in 1952. This served to show that apartheid was not ordained by nature and could be challenged.

The Defiance Campaign thus politicised government policies, at a time when many did not believe that they could be changed. This paved the way for the realisation that non-violent defiance would not change the system, and an armed struggle was embarked upon in 1960 in pursuit of the broader vision of a country based on human rights.

The document that more than any other served as a codification of what the South African struggle was all about, the Freedom Charter of 1955, expresses the primary grievances of the time, and sets out a list of freedoms — including
civil and political as well as socio-economic rights — on which the envisioned new South Africa was to be based. It concludes with the following resonating words: ‘[t]hese freedoms we will fight for, side by side, throughout our lives, until we have won our liberty’.

The 1996 Constitution of South Africa may in many ways be understood as a reaction to apartheid, and the culmination of that struggle. The first provision of the Preamble to the Constitution reads as follows: ‘We, the people of South Africa, recognise the injustices of our past …’ The objective of the Constitution is described in the Preamble as to ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights …’ The historical roots of the document are also evident from the fact that the very first substantive provision of the Bill of Rights reads as follows: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’.

Today all African constitutions recognise human rights in one form or another; in many instances reflecting their struggles; colonial as well as against internal, post-independence oppression. Remarkably, a number of the more recent African constitutions also explicitly recognise a right (and in some cases even a duty) of resistance in defence of the constitutional order, for example in the case of a coup d’état, and specifically in defence of human rights. This is the case in respect of the Constitutions of Benin (1990), Burkina Faso (1997), Cape Verde (1992), Chad (1996), Congo (1992), Ghana (1992), Mali (1992), Niger (1992) and Togo (1992). Clearly, self-help is recognised widely as the ultimate guarantor of human rights in modern day Africa.

The position in Benin is of particular interest in view of the influence the constitutional developments there have had on the rest of the continent, especially in Francophone Africa. Article 66 of the 1990 Constitution of Benin provides as follows:

In the case of a coup d’état, of a putsch, of aggression by mercenaries or of any action by force whatsoever, any member of a constitutional agency shall have the right and the duty to make an appeal by any means in order to re-establish the constitutional legitimacy, including recourse to existing agreements of military or defence co-operation. In these circumstances for any Beninese to disobey and organise himself to put a check to the illegitimate authority shall constitute the most sacred of rights and the most imperative of duties.

Coupled with the seminal events of 1991 in Benin when public pressure led to a situation where a military ruler was defeated in elections for the first time in the history of the continent, the Beninoise Constitution sent the message across Africa that human rights violations will not be tolerated and that resistance against such abuse is everyone’s duty.

One becomes aware of a recurring comparison or image in the literature on political obligation and human rights sampled above. Those who defend state power often present the state as something that is natural and necessary — as is evident from the notions of ‘natural law’ and a ‘natural obligation’ to obey the law. In order to stress this point, it is sometimes said that the state has to be endured ‘like the weather’, whether good or bad. Human rights defenders, on the other hand, make precisely the opposite point, namely,
that the state is not ‘like the weather’, and that it can therefore be changed through struggle when it violates human rights, which are in turn characterised as ‘natural’ rights, based in natural law.

The Roman historian Tacitus captured the Stoic emphasis on forbearance in the following words: ‘You endure barren years, excessive rains, and all other natural evils; in like manner endure the extravagance or greed of your rulers.’ The image of the state that generally should be endured, ‘like the weather’, because it lies outside one’s control, reappears in one form or another in the works of many subsequent commentators on political obedience and resistance.

To cite an example: In A lesson from aloes by the South African playwright Athol Fugard, one of the main characters describes his political awakening—prompted by the bus boycotts in South Africa in the 1950s—as follows:

An evil system isn’t a natural disaster. There is nothing you can do to stop drought, but bad laws and social injustice are man made and can be unmade by man.

Reinhold Niebuhr’s yearning was that he would be granted ‘the serenity to accept the things I cannot change; courage to change the things I can, and the wisdom to know the difference’. The nub lies in the last part. How should one react to that which you consider an oppressive government — can it be challenged or should it be endured? The history of human rights is in essence the history of the development and expansion of the idea that, under some circumstances, state power should not be regarded as being ‘like the weather’, as something beyond contestation. For the Stoics, the only exception was related to matters where the state compromises one’s soul or conscience, because that lies in one’s own control. Subsequent generations of human rights activists would claim a much wider scope for the domain for challenges to state power, as will be evident from the consideration of the emergence of the different generations of rights.

It is in this context that the impact of the words of the British Prime Minister Harold MacMillan to the South African parliament in 1960, that ‘the winds of change are blowing’ across Africa, can be understood. His point was that what had been considered natural and necessary before — the dominant role of Europe and Europeans in the former colonies — had come to an end, and that nothing was going to change that.

What are the consequences for the way in which we understand and deal with the concept of human rights if we see legitimate resistance as the conceptual counterpart, the ultimate guarantor and the primary historical source of human rights? The struggle approach may offer a potentially fresh perspective on a number of human rights issues, including the emergence of the different generations of human rights, as well as the universality of human rights. Instead of tracing the emergence of the different generations of rights by looking for the terms civil and political rights, socio-economic rights, and so on, insights into the emergence of the phenomenon of human rights may be gained by investigating the acceptance of the idea that resistance in pursuit of the interests in question may be legitimate. And as an alternative to asking the question whether the term ‘human rights’ is universally recognised,
following the *human rights/legitimate resistance* paradigm, we may ask how widely the notion of legitimate resistance is accepted.

The term ‘human rights’ clearly does not have very wide currency in the grand scheme of things across time and space. Imagine that all the words ever written or spoken in the world were captured in searchable form on a supercomputer, with maps indicating where they were used and when. If one wanted to trace the emergence and acceptance of the idea of human rights in human consciousness, and entered the two English words ‘human rights’, (or alternatively, ‘rights of man’ or ‘natural rights’) and their translations into the search engine, the enquiry is likely to reveal that the terms originated around 300 years ago in the English-speaking world, and spread from there and eventually found its way into the languages of the world, especially after World War II. The recognition of the different ‘generations’ of human rights could then also not be older than that.

Focusing on the use of the term ‘human rights’ only is a very limiting and superficial approach if one wants to establish whether the concept is accepted. The real question is whether the idea that underlies human rights, namely that self-help can under certain circumstances be potentially acceptable, is endorsed.

Let us start an enquiry into the origins of the acceptance of the different generations of human rights through a legitimate resistance lens with an obvious example: The death of Socrates, portrayed so powerfully as political theatre by Plato in *Crito*, conveys the idea that conscience is beyond the control of the state, in a way that has made an indelible impression on Western consciousness. If the ‘wisest man on earth’ says that he is willing to break the law and chooses death rather than complying with political demands to stop questioning conventional wisdom, the message to the rest of humanity is clear: While the state has to be obeyed and disobedience consequently has a price, conscience is a value of overriding importance.

In jail, Socrates told his friends who were urging him to flee Athens that he will again defy the law if he needs to: ‘I cannot mind my own business.’ What he was convicted for — his examination of truth and goodness — ‘is really the very best thing that a man can do ... life without this sort of examination is not worth living’. By voluntarily accepting the punishment of death and as such ‘paying the price’ for his defiance, Socrates confirmed the general duty to obey the state, but through his defiance of the law and subsequent martyrdom he equally confirmed the exception to this rule in respect of what in today's terms would be called freedom of conscience and expression.

In the Judeo-Christian tradition, the Bible contains various endorsements and, indeed, celebrations of what could be described as acts of illegal resistance, centred around conscience. For example, Daniel and his friends defied King Nebuchadnezzar’s order to worship an image of gold that he had set up. Daniel, a hero of Judaism, defied a decree of King Darius not to worship his god. Without using the term, ‘freedom of conscience’ was being supported in such cases.
In this tradition, the central event of the New Testament — the crucifixion — was the result of the defiance by Christ of the prevailing world order in obedience to what is portrayed as a higher authority. While general obedience to worldly authority is called for by St Paul, the examples of Peter and John and the early Christian martyrs, who claimed a duty of higher obedience to God when a clash occurs between divine and secular claims to loyalty, convey the message that the general rule of obedience does not apply in respect of matters of conscience.

The example of Socrates and the Stoic emphasis on the need to be in command of one's soul — nothing more, and nothing less — were fused in Western culture with the message of the Bible into what has been called the Stoic-Christian approach to political obligation. This approach postulates a general duty to accept, and if necessary to endure the state, 'like the weather', coupled with a limited but important exception in respect of matters of (religious) conscience; the ultimate repository of individual autonomy. To put this in different terms: The authority of the state was portrayed as natural and necessary ('like the weather'); but in respect of conscience its actions were seen as subject to critical scrutiny or contestation — as ‘political’, not the final word.

This approach, which dominated Western political thought at least until the Reformation, clearly affirms state power much more than it challenges it. However, it is around the nucleus of this limited notion of legitimate resistance at the time, confined to issues of religious conscience, that a fuller notion of human rights would eventually develop, increasingly 'politicising' also other aspects of state power. Eventually, as human rights became an ideology on its own, it would endow the interests concerned with the same status as state power, by calling these rights 'natural', (like the weather), and, seen from a certain perspective (adopted in many ways by those who stand in the critical tradition) would become similarly inflexible.

Given its historical role in wrestling some aspects of human life from the ultimate control of the state, it is not surprising that freedom of religion is widely regarded as the archetypical civil and political right in Western culture, capturing the essence of this group of rights as freedom of choice, or authentic human agency. The case to regard resistance in this context as legitimate is very strong: When one is required to act contrary to your conscience — as seen from the religious perspective, to commit sin — you suffer immediate and potentially irreparable harm; there is a compelling case that breaking the law is clearly the only real option, leading to the early and widespread recognition of this right.

With the emergence of a more accommodating approach towards acts of resistance prompted by matters not necessarily confined to conscience, associated amongst others with Luther and Calvin, it became clear that the Stoic-Christian position was too restrictive and was suffering some strain. The emergence of the modern state with its vast usurpation of power, coupled with an approach where reason and questioning would play an increasingly important role, basing state authority on the secular notion of the social contract, provided an environment in which what would later be called
human rights thinking would flourish and a wider base for challenging state power could be developed.

This was to some extent foreshadowed by the *Magna Carta* of 1215, essentially a peace treaty between King John and his rebellious barons, where King John recognised certain rights of the barons, and expressly recognised the ‘privilege’ to oppose the royal command should this undertaking not be honoured. The promise of the *Magna Carta*, however, only came to fruition during the Enlightenment.

In the philosophy of Thomas Hobbes, the concept of the social contract as a secular basis for state power was used to justify the near-absolute powers of the state as the ‘sea monster’ (a force of nature) called Leviathan; yet the individual’s ultimate right to self-defence was also recognised by Hobbes. The concept of social contract, in terms of which state power was based on consent, would become a major vehicle for the development of the idea of human rights.

The real shift came when the foundation of the state in consensus was used by John Locke to defend a right of resistance in cases where the core interests which the state had been created to protect — described by him as ‘life, liberty and property’ — are under threat. According to this line of thinking, when the state breaches its contractual obligation to protect these interests, the reciprocal duty of the citizen to obey the state also loses its force. Locke consequently recognised a resort to self-help not only in defence of conscience, but also in respect of other civil and political rights, thereby laying the foundations for the recognition of the so-called first generation of rights.

Karl Marx, of course, rejected the language and concept of human rights, at the time still largely understood as civil and political rights. However, in terms of the *human rights/legitimate resistance* paradigm it could be said that in presenting a radical defence of efforts to bring about change in the material conditions of living - to end economic and social exploitation — Marx in effect argued for the recognition of what would later be called socio-economic rights or a second generation of human rights. According to the struggle understanding of human rights, if resistance in pursuit of these interests could be justified, as was argued by Marx, they are what we would today describe as human rights. Clearly, the concept of human rights understood in this way is much broader than the one that was rejected by Marx.

The modern recognition of socio-economic rights as an indivisible part of the human rights ethos, at least in part reflects an attempt to obviate the need for people to resort to self-help in pursuit of minimum standards of living. Marx’s ideological position may have lost its broad appeal, but, like many others of the same persuasion, he articulated widely-experienced concerns about industrialised societies and the modern state. Many of these concerns were addressed through reforms, for example in the field of labour rights, and through the recognition of other socio-economic rights. This took the wind out of the sails of the world-wide revolution that had been predicted — turning Marx’s warnings into self-defeating prophesies.
Socio-economic rights were included for the first time in a national constitution in the Mexican Constitution of 1917, drafted after the Mexican Revolution. The Bolshevik Revolution of 1917 likewise resulted in the inclusion of socio-economic rights in the Constitution of the USSR of 1924. These dramatic developments, and the ideas they represent, contributed towards the incorporation of second generation or ‘red’ rights into the emerging human rights ethos. In effect, the first set of causes of legitimate resistance, namely attacks on conscience, and subsequently also life, liberty and property, was now being supplemented with a second category of causes of legitimate resistance, namely inhuman material living conditions, based on the emerging awareness that poverty and deprivation could be challenged, or ‘politicised’, and need not be accepted as natural and necessary. Likewise, the anti-colonial, anti-war and pro-environment activist movements of the 20th century would spawn the third generation of rights.

It was suggested above that, instead of asking directly how universal the acceptance of the idea of human rights is, we could ask how widely accepted the idea of legitimate resistance is in pursuit of these interests. The exposition above explored the emergence of the idea of human rights in a largely Western setting. By employing the conceptual tool of human rights/legitimate resistance, observers in non-Western cultures should also be able to locate early examples of what today is called the pursuit of human rights in their own histories and practices by identifying instances of endorsed self-help.

Much of the available literature on the universality of human rights explores and explains the presence of values that support a human rights ethos in Africa, Asia and elsewhere, such as respect for life and dignity, chivalry, amicable resolution of conflict, and the like, and use this as evidence of the universality of human rights. Important as these values may be in supporting a human rights culture, and in providing the oxygen for the development of a human rights ethos, such an enquiry does not reach the heart of the matter, namely, the acceptance of the potential of legitimate resistance, and as such does not prove much about the universality of human rights.

The question should be asked to what extent there are examples of endorsements of struggles against the abuse of power in the myths, narratives, art and culture of these societies, to support the claim that the concept of human rights also has roots in these societies.

Reference was made earlier to the modern constitutions of Africa, which explicitly recognise a right to resistance. In this sense, self-help in defence of human rights and constitutionalism clearly enjoys wide endorsement in contemporary Africa. But there is also evidence of earlier endorsements of such struggles in Africa. There is, for example, wide agreement that the anti-colonial struggles constituted legitimate resistance and as such, asserted human rights, even if the term was not always used. The Charter of the OAU (1963) shows little explicit recognition of the idea of human rights, but it clearly endorses the anti-colonial movement and recognises the right of African states to engage in the liberation struggles of the continent, and may in that sense be seen as a human rights document. The anti-colonial roots of the African Charter were outlined above.
While it is dangerous to make generalisations about a continent as diverse as Africa, where there was nothing approximating a dominant culture, supported by a shared written, or for that matter, a shared oral tradition, it is widely accepted that traditional African societies, like many other traditional societies, were organised on the basis of what Henry Maine called ‘status’ as opposed to ‘contract’. The institution of ‘kingship’ or ‘chiefship’ was at the apex of this hierarchy. Nevertheless, a number of ways have been recorded in which defiance of authority was sanctioned by culture or tradition. According to Nigerian jurist TO Elias, in his book *The nature of African customary law*, if a king abuses his powers, subordinate chiefs have the right to secede from the commonwealth or, in the alternative, to depose him. Anthropologist Max Gluckman has also described ‘rituals of rebellion’ in some African societies in which subordinate members of the group expressed their dissatisfaction with authority and hierarchy through songs. The practice in certain African societies to grant indemnity to the followers of those who had engaged in unsuccessful rebellion — and not, as would be the case in many other legal systems, to punish them for treason — seems to suggest an acceptance of the need for some resistance to be possible if society is to retain its overall equilibrium.

Further research into the role and acceptance of resistance in Africa, but also in other societies, for example in Asia, holds the promise of expanding our understanding of the reach and acceptance of the concept of human rights.

It should be acknowledged that early examples of acceptance of the idea of legitimate self-help in both the Western and non-Western traditions were sporadic, and by no means the general norm, which was the acceptance of the idea of political obligation and the duty to accept state authority irrespective of the way in which it was exercised. There appears to be more evidence of early examples of legitimate resistance in Western than in other societies, but this should be considered in context. Part of the explanation could be that Western examples are better documented than, for example, those in the largely oral tradition of Africa. Also, societies respond to their environments, and in the Western tradition the modern concept of human rights emerged largely as a response to the increasing power of the state. In societies where power is less centrally organised, the need to assert human rights is not as pronounced, and other cultural constructions — such as duties — may play an overriding role in organising society.

Here it should be noted that human rights and concepts such as duties are not, as is often said, opposites in the sense that an emphasis on duties necessarily entails a denial of human rights. Human rights pose minimum standards, and beyond that there is room for the role of duties and other constructs employed in the pursuit of what is regarded as the good life in society. The incidence and prominence of early examples of struggles for human rights may differ between societies and cultures, and the concept of duties does play a central role in traditional and arguably modern African societies, but the point made here is that Western culture is not unique in displaying, and indeed celebrating, instances where people employ self-help to protect those minimum standards.
If human rights are to be regarded as truly universal, increasing notice should be taken of the non-Western examples of the defence of the minimum standards posed by human rights. Universality cannot only mean that the same standards are made applicable to everyone; it must also entail that the struggles of all human societies are reflected in those standards in the first place, before these standards can legitimately be called truly universal. Universality, in other words, refers not only to the application, but also to the origins of the norms in question, and so far the African experience — to cite one clear example — in respect of other rights or struggle has not been given its due.

The universality of human rights is often presented as an incontestable given — an article of faith, adherence to which is required from those who wish to work in the field of human rights. From the point of view of the struggle approach, more modest but hopefully also more substantiated and firm claims can be made than those traditionally accepted about universality. On the one hand, a stronger base than is normally accepted for the notion of universality of human rights can be found in the fact that struggles for certain human values and opposition to tyranny occur worldwide. Claims about the universality of human rights need not be based merely on evidence about cultural adherence to values such as dignity and respect in societies around the world, but may find their foundation in the universality of certain kinds of struggle.

On the other hand, it was argued above that the common understanding of human rights takes scant notice of non-Western experiences and struggles, and as such the concept is not as ‘universal’ in its origins as is often claimed. The often-celebrated core values of the human rights canon that are supposed to enjoy the legitimacy of worldwide acceptance may be more limited, or ‘thin’, than is widely accepted. As a result, it can at most be said that universality is an ongoing project.

How does the human rights/legitimate resistance approach tally with the natural law and positivist approaches to human rights respectively? The attraction of natural law lies therein that an appeal can be made against unjust positive law to a more fundamental set of rules regarded as valid. The problem is that the legitimacy of those rules depends on the convictions of those who assert them, and as such, is open to charges of speculation. The attraction of positivism is that it provides legal certainty, but it does not allow an appeal to more fundamental norms when law are enacted which are patently unjust.

Significantly, Ronald Dworkin, who takes the positivist tradition seriously, argues that an appeal to those general principles that provide a coherent foundation for the rules of positive law is possible, because those principles form part of what should be regarded as the law. In the same way, the struggle approach allows the activist who sees a particular law as unjust, or the judge who has to interpret such a law, to make an appeal to the general principles that underlie historical instances of legitimate struggle in the most coherent way possible, as a limitation on, or modifier of, the rules of positive law. Like the positivists, the struggle approach follows a largely empirical approach, but does not confine the enquiry to law.
From the struggle point of view, the ‘foundations’ of human rights should in the first place be sought in the principles that underlie historical instances of legitimate resistance in the most coherent way, before appeals to theories about morality or natural law are attempted — in the deed first, and then in the word. Nevertheless, even if what could perhaps be described as an ‘agnostic’ approach is followed here as to whether these theories about morality or natural law are valid in the final instance, the significance of such beliefs should not be denied or underestimated, because they are the inspiration and drivers of struggles. The ‘word’ often inspires the ‘deed’. It is the belief that one’s struggle is justified that gives the struggle its power, in the same way that opinio iuris turns state practice into international law.

Beliefs about justice serve as powerful motivators (some may say as useful fictions); however, the point here is that their most reliable manifestation lies in the extent to which such beliefs have been turned into action, into struggle. Has the word become deed — or has it remained word? The struggle approach is based on the conviction that more can be learned about human rights from action based on, as Edmund Cahn calls it, the ‘sense of injustice’ and the history of actual resistance to injustice, than from abstract speculations about the nature of justice. Morality and ethics thus enter the picture in an indirect way, in that it is recognised that people engage in struggle on the basis of their moral convictions. The outrage that sparks the formation of organisations such as the Red Cross and Amnesty International or, for that matter, the United Nations, is the starting point, but the proof lies in the actual establishment and maintenance of these institutions and their human rights work.

The struggle approach emphasises the creative role of human beings in establishing human rights. Human rights are seen as a human construct that does not exist outside time and circumstance. In respect of certain rights, this can be illustrated relatively easily. It clearly means little to say, for example, that the right to work, or the right to paid holidays, and the right of access to information or commercial free speech existed in ancient times. Only when society evolved, and problems were encountered about the way in which these matters were dealt with, were these rights developed. Likewise, the recognition of environmental rights made little sense before the environment was endangered, and environmental activism emerged.

But even more ‘traditional’ rights, such as the right to life, as seen from a struggle perspective, do not exist independently from time and circumstance; they emerged and are sustained as a result of human intervention. These rights came into being through the reaction — and sense of injustice — which the killing of Abel by Kane elicited, and through similar incidents in other cultures, which defined a new wrong and as a result created a new right, and are sustained through the collective outrage and communal rejection of such conduct, amongst other things through the criminal justice system.

In the process of struggle, those whose interests are at stake have a special role to play. It is difficult to see how the recognition, for example, of the rights of women, or of indigenous peoples, could have been advanced if women and indigenous peoples themselves had not engaged in struggle. Beyond a certain point, to endure a vicious dictator casts a reflection on the
citizens of the country where it happens, because they fail to take matters into their own hands. One often hears the comment that the citizens of Robert Mugabe’s Zimbabwe are very patient. This may not be a compliment.

However, there are also cases where those whose interests are at stake need not be the only ones to be engaged in the struggle. Intervention by outside parties, appalled by the suffering they have witnessed, has in many instances served to establish human rights norms. Such intervention will not necessarily be illegal in the traditional sense of the word, in that clear legal norms are flaunted by it, but it nevertheless entails taking matters into one's own hands, as was the case when Tanzanian troops invaded Uganda to bring an end to Idi Amin’s murderous regime (although the official explanation was a different one). The struggle approach endorses, in principle, the acceptance of a notion such as humanitarian intervention, although the application of this notion has been much abused in practice, as can potentially be done with the struggle approach as such.

The human rights/legitimate resistance approach should not be understood as a blanket endorsement of all actions that call themselves ‘struggle’. In assessing whether a new claim should be accorded the status of a human rights claim, the struggle approach emphasises the importance of asking, as the first threshold standard, whether the interest involved is the kind of interest that has inspired those struggles throughout history that have laid the foundation for the current body of human rights law. Are they ‘fighting causes’? To what extent is there a ‘fit’ between the norm in question and the established core of human rights norms? Coherence with such instances of struggle must form an important part of any enquiry into the legitimacy of new struggles for the acceptance of rights that have not been recognised in the past.

Based on their coherence with the established core of human rights norms, human rights standards may be extended further. Through acts of struggle a broad value – such as dignity – may be established, which may then be applied in less obvious cases where those affected – for example children – are unable to engage in a struggle for their acceptance. The question is one of coherence, of ‘fit’ between the values involved, and the rational extension of the values asserted in the first place through the passion of struggle.

For example: The question is sometimes asked why the South African constitutional dispensation provides protection to the value of equality also in respect of issues where it may not be the general continental norm. Although the anti-apartheid struggle was primarily about race, the value of equality was asserted, which was then extended to other similar cases, such as gender issues and gay rights.

The process of recognising that a right of resistance exists in respect of a specific interest is gradual, sometimes developing over thousands of years, although it may take a dramatic intervention to bring it to the fore and to complete the process. Recognising that a specific interest has acquired this status is a response not to the passions of the moment, or to the zeal of an isolated group of zealots, but a response, often over generations, to what eventually has come to be seen as a characteristic of the human species,
namely, that we will resort to self-help to protect the interests in question that have to be accommodated. Understood in this context, all human rights are ‘group rights’ or ‘peoples’ rights’ and inter-generational in nature, in that they are the products of a collective effort over time. That is the ground for their authority.

Part of the requirement of ‘coherence’ between a new struggle and established human rights norms is that there should also be some measure of proportionality between the infringement of the right against which the protest is aimed, and the human rights implications of the measures taken to resist the infringement. This could be seen as the second threshold standard for resistance to be regarded as ‘legitimate’. Whereas the first threshold refers to the need for the norms posed through the new struggle in question to be in substantive coherence with the human rights established earlier, the second requirement is that the method employed must also correspond with these norms. It would be difficult to justify a struggle in pursuit of a particular right, however meritorious, if the methods of struggle employed constitute a much greater violation of the rights of others, and as such become self-contradictory or conflicting with other established rights. The right to life, for example, can hardly be asserted in a legitimate way through the intentional killing of civilians.

As suggested earlier, the question must also be asked whether a resort to self-help is the only reasonable alternative under the circumstances. If this requirement — the third threshold requirement — is not met, the legitimacy of the state as an institution is not accepted, and the realm of anarchy is entered. Legal resistance, in the words of Locke, ‘happen[s] not upon every little mismanagement in public affairs’. Only a small number of rights (often with subsets of rights, or applications in respect of different categories of people) have so far emerged after millennia of human conflict, and it is difficult to imagine that a wide range of new rights will be added. Resorting to self-help can be allowed only after all the other available remedies have been exhausted. Likewise, the use of force can only be justified if peaceful protest is not a reasonable option.

What is meant by the concept ‘struggle'? So far this term has been treated as if its meaning is self-evident, which it is not. It is true that the examples of struggle used in this paper so far have mostly involved instances of the illegal use of force. Indeed, the classical testing ground for interests to gain the status of being protected as human rights have been acts of illegal, violent resistance, such as the storming of the Bastille or the armed struggle in South Africa. The most significant part of the history of human rights is written in blood.

However, the process is not always so dramatic. Self-help can also take the form of non-violent illegal actions as exemplified by Gandhi and Martin Luther King, and the success that they have achieved using these methods has indeed demonstrated that in some instances it is a reasonable alternative that must be explored before more drastic measures are taken. There are many ways — as Bob Marley put it — to ‘get up, stand up for your rights’. Activism, advocacy, sustained effort, continued reinforcement through education and personal example, protest marches — ways of supporting a cause — could also
be seen as forms of ‘struggle’ through which the human rights status of a particular interest could be asserted and supported.

The struggle approach is obviously open to challenges. If history plays a central role in defining human rights in the sense that human rights claims are regarded as those that have emerged through the crucible of historical struggles, one wonders ‘whose history’, or ‘whose understanding of history’ is at stake. There is no single ‘history’, and if there were such a thing, it would be open to different interpretations. ‘Legitimacy’ is clearly a touchstone of the struggle approach, but how much reliance can be placed on this concept? When is a struggle ‘legitimate’? It has often been said that the one person’s terrorist is the other person’s freedom fighter. Does one not again end up in the domain of speculation? The first challenge that can be posed to the human rights/legitimate resistance paradigm is that there is no commonly accepted standard to determine when a struggle is legitimate.

As was said above, the ‘core’ of human rights norms may be thin, but at the same time, in respect of certain issues there appears to be a good measure of agreement. Everything is not relative. We know more now about our own nature as human beings and about what we regard as ‘fighting issues’ than was the case at the dawn of history. After thousands of years it has at least become clear that if a person is forced to abandon his or her religion, this is certain to elicit resistance, either actively or through non-co-operation, and that such resistance is legitimate. This is true not only for Daniel or Socrates, but for members of the human species everywhere. Because so many traditions celebrate and accept this kind of resistance, freedom of conscience clearly has the kind of ‘staying power’ that entitles it to be recognised as a human right.

Likewise, the legitimacy of the struggle against the apartheid state or Nazism or the gulags is not open to much question, and indeed human rights law even recognises the legitimacy or even compulsion of outlawing, for example, the denial of the holocaust. Some indications about what human beings accept and do not accept can be deduced from those instances where the legitimacy of resistance is widely recognised, and some core interests to be protected under the name of human rights can consequently be identified, even if this core may be more restricted than is widely assumed. We are not totally without starting points, at least when we deal with injustice.

Another challenge that could be raised in respect of the struggle approach is that of whether the justice of history is not necessarily a victor’s justice, and whether the ultimate conclusion of those who base their views about human rights on the crucible of history is not bound to be that ‘might is right’.

However, the struggle approach does not only rely on instances where resistance has been successful in any direct sense of the word (eg the South African resistance movement or the Allied forces during World War II) but also on instances where it has not been successful (eg the death of Socrates, or Christ or other martyrs). The decisive factor is not necessarily the immediate success of the resistance, but the legitimacy that it enjoys or gains over time.
Does the struggle approach not encourage extremism, such as is practised by Al-Qaeda? It does endorse activism, but the threshold in respect of legitimate struggle outlined above clearly excludes certain forms of struggle.

The struggle approach could also be viewed as overly positivist in the sense that it places too much emphasis on the empirical facts of struggle as opposed to ideals, and on power as opposed to justice. The reality is that without assertion, either by those whose interests are at stake or others on their behalf, rights will not be recognised. This is not a position promoted through the struggle understanding of rights; this is merely a description of an empirical truth. Those in power normally seem to understand the strength of their position too well, while the oppressed appear to believe that somehow they will be vindicated, either in this life or in the next, because their cause is just, and they thus abandon the arena of political contestation and allow power to go unchallenged. Their fates will change only if they take their lot into their own hands. What has been said above is a call to action to those whose rights are trampled upon, or those who believe the rights of others are violated, to defend and assert them.

To conclude: Throughout this paper much emphasis was placed on the crucible of history, as if history simply lies in the past, and is not ongoing. In truth, one cannot simply rely on precedents from the past or wait for the sympathy of one’s contemporaries. At some point, for new human rights norms to emerge, their proponents need to make charismatic choices aimed at creating a new right and a new wrong, believing that eventually their actions will be vindicated by history. The fact that there is a high level of consensus that a specific historical act of resistance was justified, is a powerful - but not necessarily conclusive — argument in favour of recognition of the right involved as a human right. Like history, the development of human rights norms is a dynamic process, and new aspects are continuously added to the established human rights tradition — through activists, artists, creative judges, martyrs and ordinary people whose actions give life and contents to culture.

Third generation rights have appeared on the scene because environmental groups and indigenous peoples and others in many parts of the world have placed environmental degradation and the suppression of indigenous people squarely on the agenda as an issue that is open to political contestation, even where it was not clear to what extent those norms were coherent with the established corpus of human rights norms. Environmental rights advocates and activists have illustrated quite literally that one does not simply have to accept environmental degradation as being natural — ‘like the weather’. As we see in a time of global warming, even the weather can change, not necessarily for the better, by human intervention. The ‘corpus of accepted human rights norms’ may be less certain than commonly assumed, and even the core aspects must remain open to challenge.

New human rights issues, such as those dealing with the responsibilities of multi-nationals and the effects of globalisation and technology, are knocking on the door. A fourth generation of rights may be emerging. New struggles will be waged to define the human rights standards of the future — to create a new right and a new wrong — and to re-evaluate the norms of the past. Human
rights is the idea of our time, but its contents and indeed the very concept of human rights may have to make way for renewal in the future. In the same way that human rights pioneers fought their causes, members of future generations are not only required to re-assess, and if need be, reassert the outcomes of the struggles of the past if they still make sense, but are continuously being called upon to fight the causes of the future, of history in the making, to continue patrolling and redefining the line between wrong and right. The struggle continues. The deed will continue to lead, and the word will follow. Human rights as we know it may come and go, but, given the human condition, struggle will remain.

HUMAN RIGHTS IN AFRICA

Drawing on the practices of traditional African societies such as the Akans of Ghana, Cobbah characterises what he sees as general African values of relevance to human rights, and contrasts this with some aspects of Western culture.


For the African, a philosophy of existence can be summed up as: ‘I am because we are, and because we are therefore I am’. A comparison of African and Western social organisation clearly reveals the cohesiveness of African society and the importance of kinship to the African lifestyle. Whereas Westerners are able to carry out family life in the form of the nuclear family and often in isolation from other kin, Africans do not have the concept of a nuclear family and operate within a broader arena of the extended family.

Within the organisation of African social life one can discern various organising principles. As a people, Africans emphasise groupness, sameness, and commonality. Rather than the survival of the fittest and control over nature, the African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of co-operation, interdependence, and collective responsibility.

The extended family unit, like family units in nearly all societies, assigns each family member a social role that permits the family to operate as a reproductive, economic, and socialisation unit. These roles of kinship, however, are defined differently than in Western families and the behaviour of kin toward one another is different than that which pertains in the West. In many African societies, for example, there is no distinction between a father and an uncle, or a brother and a cousin. Among the Akans of Ghana the English word ‘aunt’ has no equivalent. For the Akan all aunts are mothers —
that is older mothers and younger mothers. Likewise there is no equivalence for the English word ‘cousin’ in the Akan language. A cousin is simply a brother or a sister. The differences that one finds in responsibilities toward different kin people usually revolve around whether the particular society is matrilineal or patrilineal.

These kinship terminologies, that is, the way relatives are named, are related to the ideals and expected behavioural patterns and norms that govern family members. The kinship terminology defines and institutionalises the family member’s social role. ‘These roles are essentially rights which each kinship member customarily possesses, and duties which each kinship member has toward his kin’. Viewed another way, the rights of one kinship member is the duty of the other and the duty of the other kinship member is the right of another.

Sudarkasa recently remarked that ‘[i]f there is one thing that anthropologists should have learned from their study of African societies, it is that large and complex family groupings do not present to Africans the “problems” that they present to Europeans’. Given the ‘naturalness’ of the extended family to Africans, it is imperative that we seek to explore the implications of this reality rather than attempt to obscure the reality through conceptual analyses that seek to superimpose Western-derived individualistic paradigms.

The cohesion of the African family is derived in a large measure from the existence of explicit rules of appropriate behaviour. As a family member, therefore, the African is made to ‘suffer’ what will be considered as inconveniences by the Westerner, but at the same time the African holds an entitlement to visit the same on his kinsman. Sudarkasa has organised the complexity of rights and duties around four underlying principles: respect, restraint, responsibility, and reciprocity.

‘Respect is the cardinal guiding principle for behaviour within the family and in the society at large’. Although African society is communal, it is hierarchical. Respect governs the behaviour of family members toward the elders in the family. It has been said that the African child learns to respect his elders even before he learns to speak. In Akan society anyone older than you (even if by a day) should command your respect. This respect is manifested in greetings, bows, curtseys, and other gestures that signal recognition of seniority. As one grows up in the society, therefore, one acquires seniority rights and moves up in the hierarchy of the community. Seniority rights bear no relation to one’s other attributes. These rights are strictly guaranteed. Ideally every member of the family with the exception of the very young enjoys some seniority rights.

Restraint is the principle that makes communalism within the family and within the wider society possible. This simply means that a person does not have complete freedom. Individual rights must always be balanced against the requirements of the group. The principle of restraint becomes evident in the differing patterns of communication. It is also evident in the sacrifices expected of parents in order to provide for their children and sacrifices expected of grown children to provide for their parents. In terms of rights, the principle of restraint requires that family members remain flexible in
terms of their own rights and always consider the requirements of the group as a whole.

Responsibility is a much broader concept for African families than Western families, given their larger size. For the African ‘this offers a network of security, but it also imposes the burden of obligations’.

Reciprocity of generosity is expected in African society. It is assumed that acts of generosity among kinsfolk will be reciprocated in the short or long run. Sometimes, obligations of one generation can be carried over into the next generation.

For the African, therefore, entitlements and obligations form the very basis of the kinship system. African observers are therefore quick to consider the hullabaloo over child care and the care of the aged as Western problems. In African societies child care is a communal affair. The busy mother can always count on the entire community for support. The aged and the infirm are guaranteed help and support within the extended family. Among the Akans, a destitute family member is seen as a disgrace to the entire family, and family members bear the responsibility to care for the needs of the disadvantaged through sharing.

In a society like the Akan, the pursuit of human dignity is not concerned with vindicating the right of any individual against the world. The African notion of family seeks a vindication of the communal well-being. The starting point is not the individual but the whole group including both the living and the dead.

Writing on political rights in traditional African society, Wai argued that African political systems were marked by checks and balances, relationships that ensured that rulers did not become dictatorial. Thus among the Akan one finds that the traditional political authority structure still engulfs family heads who have a consultative relationship with the chief. Traditionally, just as every member of the extended family had a distinct role to play as a member of the family, every extended family as a whole performed a given state function within the traditional political structure. The search for appointees to specific state offices took places within specific extended families.

Among the Akan there is a hierarchical political structure comprising an intricate network of chiefs and subchiefs, linguists, state craftsmen, state musicians, and warriors. Thus every individual in the system is predetermined to play a role in the total functioning of the society. Each office or role bears its own privileges. Given the absence of individualism, one accepts one’s role in this network without comparison to the role of one’s neighbour who may belong to another extended family and may thus occupy a ‘higher’ spot in the hierarchy. In effect, the traditional Akan recognises that in the functioning of society (for example in times of war) families may need to fall into a hierarchy to assure the smooth running and survival of the society.

It should be pointed out that many of these traditional roles discussed above were in fact purely ceremonial or sometimes ‘emergency’ roles. In everyday
life people went about their business mainly within their extended families. They lived as farmers, fishermen, or craftsmen, catering to the needs of their families.

An important difference between African and Western cultures is that of the ownership of land. While private ownership of land is considered an inalienable right within Western society, land in African society is communally held. For the human rights scholar, guaranteed access to communal land and the overall spirit of communication should have significance. Through the communal system one is guaranteed social security and at least minimum economic rights.

African communalism is more than a mere lifestyle. It is a worldview. It may indeed be an exaggeration to claim that the individual in African society is completely invisible within the clan or kin. The African jurist, Elias, pointed out that ‘[a]nyone who cares to look into the actual social relations between the individuals who make up the group — whether this is family, clan or tribe — will realise soon enough that disputes do take place in all manner of situations’. The point is that problems revolving around individual disagreements and preferences are present but these disputes are resolved not on the basis of a worldview that posits individual autonomy. The African worldview places the individual within a continuum of the dead, the living, and the yet unborn. It is a worldview of group solidarity and collective responsibility. In effect, in the same way that people in other cultures are brought up to assert their independence from their community, the average African’s worldview is one that places the individual within his community. This worldview is for all intents and purposes as valid as the European theories of individualism and the social contract.

The questions that we should seek to answer are whether Africans need to ‘modernise’ to become individuals in the Western sense and whether the modern liberal state with its Western traditions should be allowed to break up African traditional systems.

In other words, is it possible to enhance human dignity within the worldview of African culture without resorting to the unbridled individualism of the West? The African worldview is not grounded in self-interest, but in social learning and collective survival. In the Western world, however, the theories that have been advanced are those that ground all human motivation on self-interest. This trend is perhaps best illustrated in the psychological literature and in the practice of psychoanalysis. Freudian psychology teaches that everything we do ultimately serves our need to rid ourselves of unpleasant external stimulation and to exploit whatever we can use outside ourselves to satisfy our internal needs. In a Freudian sense, life revolves around the individual’s biological needs. Restraints upon the channelling of all the individual’s energy to self-satisfaction are seen as being fundamentally at odds with the individual’s nature. Thus, Neo-Freudians have been said to approach ‘the individual psyche a little like the way free market conservatives view the economy’. In other words, maximum psychological health is attainable only when ‘we just let everybody do their own thing …’. The modern Western psychologist sees Rousseau’s noble savage and Locke’s man in nature and approvingly seeks to return individuals back to their
romantic state in therapy. Maslow and Rogers could therefore conclude that a process of self-actualisation will inevitably lead to the decline of restraining institutions such as government, the church, the school and marriage. It may in fact be argued that in the framework of mainstream modern Western psychology the African communal spirit can be seen to produce neurosis.

Some psychologists have questioned the basis of these egocentric Freudian assumptions. One wonders whether these assumptions have not indeed become ideological to the extent of making psychologists concoct ‘their own epicycle to save their egocentric theory’. A minority of psychologists, who should have little difficulty appreciating African communal life, do see a social basis of behaviour and an innate capacity for we-thinking that resides in the human species, alongside all other tendencies. Wallach and Wallach posed the question succinctly: ‘Is it not possible, even likely, that evolution has equipped us to act cooperatively — generously as well as in a self-centred fashion?’

Throughout his life the African expresses his humanity in terms of his society. This is not necessarily to say that the African self flows with an overabundance of altruism. As mentioned earlier, the evidence is that African communal structures exhibit a strong element of reciprocity, and that a family responsibility may in fact be passed over from one generation to another. I do not argue here that self-centredness is an entirely European or Western trait. My contention is that such self-centredness is countered in African society by a deep and lasting socialisation towards we-thinking resulting in a conception of the self that is unlike the Western conception. The psychology of such a worldview would be essentially different from a worldview that emphasises and encourages individuality, uniqueness, differences, competition, and independence. Similarly, it can be expected that the conception of human dignity will be different.

...
African jurisprudence, or what is left of it, continues to be fundamentally shaped by the common law and civil law experiences of Europe and to some extent the New World. The critical points of this legal movement include the Magna Carta of 1215, the Bill of Rights of 1688, the French Declaration of the Rights of Man and Citizen of 1789 which in turn was influenced by the American Declaration of Independence of 1776 all of which built on the gains made in the field of human rights by the Jews, the Greeks, and the Romans.

In the earlier phase, these developments were marked by the near exclusiveness of the natural law theory connoting that laws derived from God and were discernible by human reason or that they derived from human nature. The natural law theory was thus not only a response to these conflictual relations, but also an attempt to rationalise them, which proved inadequate particularly with the fall of the Holy Roman Empire, and with the decline of religion as a source of law, as a result of the secularisation of state affairs and the Renaissance which emphasised the scientific method and rejected unverifiable phenomena.

The positivist school of law which followed the Renaissance saw law as a product of human efforts, and thus the school rejected the idea of natural law and metaphysics. In its extreme form, the school was concerned only with pure law and excluded the metalegal factors that shape and ultimately give law its essence. By characterising the source of law as the will of the sovereign or a command of the sovereign, it not only implied the character of law as based on unequal relations, but also negated the utopian naturalist concept of social contract according to which the people transferred the power of governance to the rulers and reserved the residual right to reclaim it when the conduct of rulers became unconscionable. Yet the purity of the positivistic school could not explain the basic inequalities inherent in the capitalist system that gave birth to it.

The sociological school, which is a variation of the positivist school, accepted the impact of metalegal factors and insisted that society should be so organised that law and its implementation should take into account social factors. According to one viewpoint, this involved the notion of social engineering, which implied the building of as efficient structure as possible which should satisfy the maximum wants with minimum friction. However, the sociological school failed to address the state’s critical role in its
interaction with economic and political structures in a capitalist society. It
failed to see that the interests were not merely competing but also
contradictory and that even when some of these interests might not be
antagonistic, antagonistic relations dominate. In effect, the sociological
movement failed to address itself to the class character of state power and
the law that is its creation.

Increasingly, the basic law of constitution and the derivative laws have come
to be influenced and shaped by socialist jurisprudence in some African
countries. These countries include mostly those that waged liberation wars
against the colonialists — Algeria, Mozambique, Angola, and Zimbabwe as well
as Ethiopia under Mengistu, Tanzania, and Congo Brazzaville. The emphasis of
the United Nations' Charter on respect for fundamental human rights and
human dignity without any form of discrimination, even though originally
intended for the Western powers who suffered from Nazi racism, created the
foundation for universalisation of a broad score of human rights. The United
Nations' effort in this area continued with the epoch-making Universal
Declaration of Human Rights of 1948 which was concretised in the two
covenants of 1966. The works carried on by various international
organisations such as the International Labour Organization, the United
Nations Committee for Trade and Development, the World Health
Organization, and UNESCO continue to influence human rights concepts in
various African states as well as the world community at large.

Side by side with the dominant role of Judaeo-Graeco jurisprudence there still
exist, particularly in the field of family law and property ownership, such
concepts deriving from customary and Islamic traditions as were saved by the
imperial powers. Increasing efforts are being made to upgrade and integrate
these two systems into the imposed systems in order to accord with concrete
material and philosophical conditions, as is reflected in many local laws and
The Charter in its preamble takes into consideration ‘the values of their
historical tradition and the values of African civilisation which should inspire
and characterise their reflections of the conception of human rights’.

It is not surprising, therefore, that fundamental provisions on human rights in
African countries, where they exist, may combine principles derived from the
various inherited schools of jurisprudence and the traditional precepts.
Ultimately, the degree to which human rights are violated or protected will
depend on the nature of the socioeconomic system in place in each African
country, their varied levels of development, and the character of the ruling
class and the state. The ruling class plays a dominant role, whether in
socialist- or capitalist-oriented states in influencing the degree of popular
participation and democratisation in all African states.
The discussion above simply underscores two pertinent points about the establishment and expansion of democratic and human rights regimes, certainly in Africa’s experience. First, that historically they are products of concrete social struggles, not simply textual or legal discourse. Second, that they are as much about civil and political rights as they are about economic and social rights. Writings and debates on human rights often suffer from four analytical traps. They tend to be idealistic, legalistic, dualistic, and ethnocentric; idealistic in that human rights are reduced to ideas abstracted from social history, so that they are seen as the outcome of concepts not conflicts, insights not instigations, philosophy not politics; legalistic in that their provenance is primarily located in the courts not culture, procedure not practice, rhetoric not reality, codes not contingency; dualistic in that they either polarise or prioritise civil and political rights against economic and social rights and vice versa; and ethnocentric in that their source is usually located in the West by both the universalists and relativists.

A historical and materialist analysis of human rights clearly shows the limits of these approaches. It is well to remember apartheid was not ended either by a book or a court case neither were colonialism nor slavery, all monumental violations of human rights. To the generations who resisted these atrocities, they did not separate their struggles into neat packages, saying today we fight for civil and political rights, tomorrow for economic and social rights, or in the morning we should focus on the right to food and shelter and in the afternoon the right to free expression. Needless to say, the Europeans perpetrated these particular monstrosities, and many more, including the genocide of the native peoples of the Americas, the two world wars, and the holocaust, which casts doubt on the self-serving myth that the West is the progenitor and proprietor of human rights. European Colonialism did not come with a Bill of Rights, nor later, were structural adjustment programmes introduced through democratic elections.

This is to argue that Africans have their own histories of struggle and human rights preoccupations that, in very complex ways, are linked to, but also distinctive from, struggles and preoccupations in other parts of the world. Issa Shivji contends that while the dominant liberal human rights perspective is important, an African agenda must also be premised on the rights to self-determination and to organisation. Tiyanjana Maluwa is more categorical, arguing that, in their interaction with other states and within the United Nations, African states have shaped or strengthened many principles and rules of modern international law, including international human rights law, such
as the right to self-determination, a principle spawn by the process of decolonisation in Africa.

Writing in the early 1980s, Osita Eze also singled out African experiences with self-determination, racial and ethnic discrimination, the questions of women's and refugee rights, and regional instruments of human rights protection and promotion as areas where Africa has distinctive contributions to make.

The Western appropriation of human rights does grave intellectual and political disservice to the global human rights discourse and movement. Intellectually, it homogenises and oversimplifies the human rights traditions of both the West and the Rest (rest of the world) and undermines theoretical advances that can come from serious and sustained intra- and intercultural comparisons and conversations. Politically, it weakens the human rights movement globally in that in the South human rights advocates waste a lot of energy trying to demonstrate that human rights are indigenous and relevant against charges from arrogant outsiders who insist on imposing Northern models and procedures or dictatorial states which dismiss them as imperialist impositions inimical to national traditions, sovereignty and development, while in the North it forestalls the adaptation of approaches from the South to deal with such challenges as multiculturalism, affirmative action and entitlements, inter-ethnic conflict and relations, and the status of women, which existing institutional and legal arrangements cannot adequately handle. This argument is further developed by David Penna and Patricia Campbell who use the examples of what they call human rights 'symbols' from Africa to show that ‘traditional’ Africa did have a human rights culture whose study and understanding has theoretical and political relevance for both modern Africa and the west. While one can query their ahistorical notion of ‘traditional’ Africa, their general argument, that intercultural dialogue and research offers a way out of the universality and relativism debate, is appealing.

In short, trading, sharing, and incorporating human rights experiences, practices, and symbols across cultures and the enduring West-East and North-South divides, can assist in the development of a truly universal human rights discourse and regime, which at the moment does not yet exist. Abdullah An Na’im argues that a universal human rights regime can only develop out of cross-cultural support for human rights, which requires cross-cultural evaluations inspired by honesty and modesty. To Daniel Bell, theories of human rights based on Western moral aspirations and political practices constitute ‘parochial universalism’, and proposes an ‘interpretive approach’ that seeks to find justification for human rights norms from within diverse cultural traditions in order to develop ‘overlapping consensus’ and arrive at a ‘nonparochial’ universalism. But for this to succeed, Evan Charney argues, fundamental human rights need to be defined clearly. Current universalist claims are based on idealistic and incomplete readings of European and American traditions, which include both the exposition and pursuit of political and civil rights as well as the abrogation of the same rights for many. Let us not forget that the poor, women, and racial minorities got the right to vote and all it entails relatively recently. At the time that the Universal Declaration of Human Rights (UDHR) was being signed in 1948, racial
segregation was constitutional in the United States, native people were poorly treated in Canada, and France and Britain were colonial powers. The expansion of human rights largesse to include women and minorities was not imposed from the top by some benevolent ruling elites, but was the result of pressures and demands from below. It has been argued that it was partly because all the major powers, including the former Soviet Union, had something to be ashamed of in their conduct of human rights at home and abroad that in the Universal Declaration they enunciated rights without explaining why people have them and agreed on high principles — the ‘ought’ and not ‘is’ — while leaving the matter of their enforceability unresolved.

The disjuncture between rhetoric and reality in human rights discourse and practice among the Western countries is evident at both the national and international levels as well as at the theoretical and political levels. The United States, for example — the loudest in denouncing human rights violations in other countries — was instrumental in ensuring that the UDHR was not turned into a binding covenant and has routinely flouted international legal conventions since then. It did not ratify major human rights treaties until the 1948 Genocide Convention in 1987, the last country to do so. The 1965 Convention on the Elimination of All Forms of Racial Discrimination was only ratified in 1992, and the International Covenant on Civil and Political Rights (ICCPR) and the 1948 Convention Against Torture in 1994. But these ratifications were achieved at a high price, in which ‘reservations, understandings, or declarations (RUDs)’, were attached, thereby limiting the impact of these treaties on US law. The United States, for example, has not allowed individual complaints under the ICCPR. Margaret Galey tells us that the RUDs have been so restrictive that the Netherlands has lodged a legal complaint, alleging that they are incompatible with the basic purpose of the treaties, which is to require states to bring their national law into compliance with their terms of the treaties. The United States has yet to ratify the International Covenant on Economic and Social Rights (CESR), which along with the UDHR make up the International Bill of Rights, or the 1967 Declaration on the Elimination of Discrimination Against Women and the 1989 International Convention on the Rights of the Child.

The United States has also led the opposition to the establishment of a permanent international criminal court to try crimes against humanity, which has pitted the US against all its major European partners. Thus, for all the rhetoric about human rights universalism, the United States actually practices a peculiar particularism, a kind of superpower rights narcissism, and resists the emerging global human rights regime and finds itself increasingly isolated from Europe with whom it supposedly shares common values. Commenting on Britain, David Forsythe notes that it has lost the most cases in the European Court on Human Rights ‘laying to rest the old canard that long-standing Anglo-Saxon democracies have no need of international review of their human rights policies’. Interestingly, as the United States goes into what EU External Relations Commissioner Chris Patten once denounced as a ‘unilateralist overdrive’ the only steadfast ally it can find is Britain. No wonder that many people in the South, including human rights advocates, are cynical and sometimes even hostile to American protestations about human rights. They remember only too vividly that during the Cold War relativist interpretations of human rights suited Western interests in dealings with Third World
dictatorships. Also, the human rights crusade was muted because the West sought to blunt Third World efforts, supported by the communist bloc, for the inclusion of economic and social rights as part of an international human rights regime. It was only after the end of the Cold War that the West became uncompromisingly universalist, now in pursuit of its global capitalist agenda, which it was prepared to defend at the cost of violating the same freedom and democracy it purported to advocate. In the meantime, leaders in the South, boxed between Western pressures and popular struggles for the ‘second’ independence, reacted by espousing more and more relativist positions. Thus, different groups have espoused the relativist and universalist perspectives at different times for ideological reasons, rendering each one of them a potential tool of both oppression and liberation depending on the context. The fractures in the moral unanimity of the West about human rights that this shows is by no means new. Different conceptions and emphases have always existed, for example, between religious and secular interpretations, liberal and Marxist perspectives, national and internationalist orientations, philosophical and pragmatic justifications.

Universalist arguments also encourage both orientalist and relativist readings of African and Asian cultures and legal systems, both of which homogenise and oversimplify their histories. Orientalist discourses are based on a racist assumption of fundamental Western superiority and African or Asian inferiority, and posit ineradicable distinctions between the West and the Rest, in which the former is constructed as modern, urbane, and dynamic, while the latter is traditional, rural, and static. And so the world is divided into the creators and recipients of human rights, the monitors and monitored, the viewers and the viewed, the globalists and provincialists, the universalists and relativists. The cultures of Africa and Asia, allegedly characterised by tradition, despotism, communalism, and irrationality, are seen as inherently opposed to human rights.

Take the case of Islam, for example, an important religious and cultural tradition in many parts of Africa and Asia. To legal orientalists, Islam cannot possess a human rights discourse on four grounds: Islamic law is static because it is regarded as divine; Islam upholds an anti–individualism that is contrary to the idea of human rights; Islam thinks in terms of duties not rights; and human rights can only exist in a positive and modernist legal system. Never mind that Muslim scholars mediated the transmission of much classical Mediterranean civilisation to Western Europe, and Muslim empires dominated global civilisation and commerce for centuries and developed impressive cities, nation-states, universities, and discourses about power and politics and progress. As Strawson convincingly argues, legal orientalism proceeds through a process of selection of elements of Islamic law, in which the astonishing pluralism, range, and long history of Islamic jurisprudence on such topics as reason, public and public international law, civil society, sovereignty, and, yes, human rights is ignored, and a few ancient texts stripped of context and history, or some contemporary authoritarian thinkers and leaders in the Muslim world, are privileged to represent an essentialised Islamic law that is read conservatively and contrasted to modern, dynamic and liberal ‘international law’, meaning European law, in order to build an argument that there is intrinsic cultural resistance to human rights in Islam. This is essentially the methodology used in Elizabeth Mayer’s influential text, which
Strawson effectively critiques. Following the end of the Cold War, the search was on for a new evil empire, and given the depravity of Islam in the European imagination, it did not require much to resurrect Islam as the source of the forthcoming clash of civilisations. America's incendiary ‘war on terror’ following the tragic events of 11 September 2001, threatens to spark the clash abroad and erode civil freedoms at home.

If orientalist methodology, marked by essentialism, otherness, and absence, can be used to dismiss human rights discourse in Islam, a religious and cultural system with one of the world’s oldest and continuous textually based legal traditions, the contempt that awaits cultures with oral legal traditions is predictable. Before European colonial conquest at the end of the nineteenth-century, Africa had societies with both written and oral legal traditions, the former mostly found among Islamic and Christian societies in parts of Northern, Western, and Eastern Africa. These traditions are still awaiting comprehensive study to determine the nature and development of what can only be diverse African philosophies and jurisprudence of human rights. Many of the generalisations about African ideas about human rights suffer from spatial, temporal and epistemological myopia. Spatially, there is the notorious Hegelian division of Africa into two, above and below the sands of the Sahara, and the tendency to gaze authoritatively at ‘Africa’ through the narrow prism of one or two societies, a disorder that afflicts Africans and outsiders alike.

Temporally, there is the ubiquitous use of the ahistorical term ‘traditional’ to refer to Africa before European colonial conquest or surviving ‘indigenous’ cultural attributes. Africa’s long history, indeed the longest in the world if it is true that humanity originated there, is permanently frozen and repositioned around the colonial conjuncture, the shortest moment in the continent’s history. Even a cursory historical glance shows that over the millennia and the centuries these societies changed, and that they were characterised by uneven levels of development, which the chimeric term ‘traditional’ cannot possibly capture. In fact, there were as many differences among African societies as there were similarities between them and the societies in Europe and Asia sharing similar modes of production and social systems. Moreover, the ‘traditional’ referent obscures the fact that ‘traditional culture’ no longer exists in any pure form anywhere in the world because cultures evolve and Africa has developed its own modernities in a world of multiple modernities.

This is to suggest that both Africans and outsiders need to wean themselves from the dichotomous and homogenising civilisational times of the ‘traditional’ and the ‘modern’ if we are to advance our understanding of African histories, realities, and conceptions. The epistemological challenge, specifically, entails confronting and abandoning the writing of Africa in terms of lack and becoming-lacking and becoming Europe-always using Europe as the universal referent. In human rights debates this takes two major cracks. First, ... to unapologetic Eurocentrists human rights did not exist in ‘traditional’ Africa; at best, Africans had notions of human dignity, which in any case was typical of the peasant worldview throughout the world, including pre-modern Europe. Human rights are then defined very narrowly to mean not simply normative commitment to the freedom of the individual, but
Concept and Language of Human Rights and Related Ideas 47

primarily the institutional enforcement of individual claims against the state; the notion becomes a negative, not a positive or active one, about protection from, not also of, the state.

Second, human rights abuses in contemporary Africa tend to be attributed largely to ‘traditional’ culture, or bad leaders and the inevitable stresses of modernisation in ‘traditional’ societies. The role of colonialism and imperialism in creating some of the conditions that lead to the cultural perversions and human rights abuses is conveniently overlooked. And attempts by African scholars, or for that matter Muslim and Asian scholars, to find pedigrees for modern human rights principles in their histories and cultures are regarded as exercises in fabrication, the critics forgetting that this is the very essence of the intellectual enterprise constructing connections and cumulative traditions from textual and discursive bits and pieces of the past and the present and that the very notions of the ‘West’ and a ‘Western tradition’ are not eternally revealed truths but relatively recent inventions by European intellectuals. Thus not only do the critics ignore Western intellectual practice itself, but also the fact that African cultural legitimacy is essential, even if it were true — a difficult proposition to make that African societies lack human rights values and norms, if the promotion and protection of human rights is to be increased and the gap between theory and practice lessened.

In contrast, in nationalist and Afrocentric circles, it is argued that ‘traditional’ Africa had a human rights culture that was superior or similar to Europe’s, and their intellectual task becomes one of either searching for conceptual equivalents or distinctive features. The latter often rests on, and results in, the amplification of the dichotomies that are so beloved by both universalists and relativists: collective versus individual rights, duties versus rights, ‘first generation’ civil and political rights versus ‘second generation’ economic, social and cultural rights. The ‘third generation’ rights are often defined as ‘collective’ or ‘solidarity’ rights, including the rights to development, to a healthy environment, to peace, to humanitarian aid, and to the benefits of a common international heritage. These dichotomies fly in the face of the fact that communality in Africa is often as exaggerated as individuality is in Europe for comparable historical periods, and that in both contexts, if they did indeed ever exist as discrete phenomena, individuals and community are mutually constituting and the practice of rights-claiming, consuming, or constraining them — entail a social context, whether co-operative or combative. Ignored, moreover, is that the right to private property, so prized in liberal thought, is an economic right and the welfare state in Europe embodied social and economic rights, while in Africa the cherished right to development incorporates nationalist aspirations for political and civil rights denied under colonialism. Alternatively, some leftist radicals and conservative nationalists — usually in defense of authoritarian socialist or capitalist state agendas — dismiss human rights as an irrelevant Western invention or oppose them as a subversive imperialist ideological ploy.

These positions, which are framed in either historical or contemporary terms, although these moments tend to be oversimplified, are rarely based on a comprehensive examination of African texts, languages and philosophies, as well as the protracted histories of struggle for freedom among African peoples.
on the continent and in the diaspora. After all, were not the struggles against slavery and colonialism, and more recently against postcolonial tyrannies and structural adjustment programmes, not fundamentally struggles for human rights — Africans trying to reclaim their inherent integrity and dignity as human beings, for their right to well-being, actualisation, and meaningful lives? Can it really be maintained that Africans don’t have a conception of human rights, as the Eurocentricists do, or that they don’t want human rights, as some of the nationalists would have us believe, when there have been generations of resistance against colonial and postcolonial state tyrannies and struggles to entrench democratic and human rights in national constitutions and regional and international conventions? And are not these struggles, and others spawned by new conditions including the contemporary processes of capitalist globalisation, continuing throughout the world? Does not that indicate that in theory and practice a universal human rights regime is far from realisation but is in the process of formation?

Thus, the universalist and relativist positions simplify African conceptions and struggles for human rights and the development and possibilities of constructing a global human rights regime. They are both equally guilty of idealism, abstracting human rights from social history, which makes the universalist-relativist discourses part of the ideological armory of Western and African elites — arguments that cannot stand up to closer historical and political scrutiny. Few of their advocates among social scientists and legal scholars, often armed with a little history and a little anthropology, have seriously studied African philosophy, languages, and conceptual schemes. Philosophers such as Kwame Gyekye, Kwasi Wiredu, and Paulin Hountodji, to mention a few, demonstrate the complex conceptions in the African societies they have studied, and the intellectual vigour of debates among leading African thinkers, on issues like personhood, tradition and modernity, cultural universals and particulars, and pluralism that eschew the facile community-individual, tradition-modernity, and universal-relative dichotomies.

This is merely to urge those who make assertions about African human rights values, whether to affirm or dismiss them, based on historical and philosophical claims, to study African history and philosophy seriously. Otherwise the quality of human right discourse on and in Africa, as Shivji, once charged, will remain ‘intellectually backward, even by the standards of the African social sciences’. Clearly, at this historical juncture human rights must be seen in a holistic and integrated manner. To those who prioritise social and economic rights it is well to remember Amartya Sen’s acute observation that no substantial famine has ever occurred in any independent and democratic country with a relatively free press. But it is also apposite to remind those who privilege political and civil rights that deprivation generates debilitating unfreedoms.

...
The African Charter on Human and Peoples' Rights, a product of the Organisation of African Unity, has been ratified by all African states and is the premier African human rights instrument. The Charter in many ways reflects the norms which underlie international human rights law, but in some respects - notably regarding peoples' rights, the inclusion of socio-economic rights and the emphasis on the recognition of duties — the Charter is uniquely African.

In what follows, the focus is mainly on the unique features of the African Charter but it should be emphasised that the Charter recognises almost all the civil and political rights included in other international instruments in addition to socio-economic rights; it recognises individual as well as peoples' rights; and it focuses mainly on rights although duties are also recognised. The norms recognised in the Charter, therefore, do not stand in opposition to other human rights treaties but the Charter does have some special features.

In an address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal from 28 November to 8 December 1979, one of Africa's prominent leaders speaks of the approach to be followed in respect of a regional charter for Africa.

ADDRESS DELIVERED BY LEOPOLD SEDAR SENGHOR, PRESIDENT OF THE REPUBLIC OF SENEGAL (1979)

Ladies and Gentlemen,

The meeting of experts which the OAU is organising in Dakar today is historic in character.

In spite of all pressures, Africans have freely chosen at last to prepare a system of promotion and protection of human rights.

Meeting in its sixteenth Ordinary Session in Monrovia, from 17 to 20 July 1979, the Assembly of Heads of State and Government of the OAU took a decision requesting the Secretary-General of our Organization to convene a restricted meeting of highly qualified experts to prepare a preliminary draft of the 'African Charter on Human and Peoples' Rights'.

Senegal is proud to host the meeting of the African experts whose mission it is to draft the first legal instrument which will enable our continent to organise its own system, and which is intended to safeguard equality, freedom, justice, human and peoples' dignity.

Long ago, since that 15 April date on which the people of the middle class in Saint Louis proclaimed themselves 'Negroes', we, the Senegalese have been trying to make man the finality of our policy. This policy compels us to pursue development work by respecting scrupulously each man's and woman's rights in accordance with the aspirations of the Senegalese ..., as specified by the basic law, [which] they freely adopted. An attempt is being made to make our country a land of law, by daily fighting arbitrariness and tyranny no matter
their sources, and by especially submitting ourselves to law and the decisions of justice.

Our continent suffered much, in the past, on account of colonisation, from the non-recognition of the basic rights attached to human beings.

As Jeanne Hersch puts it: ‘Colonialism, first and foremost, aimed at exploiting its victims and this exploitation was justified through a racial prejudice: The inferior intellectual capacity of the exploited’.

The distinction between ‘citizens’ and ‘subjects’ deprived the large majority of Africans of the enjoyment of their essential rights.

I had to warn, as a member of the French parliament while discussing article 63 of the draft European Convention on Human Rights, the negotiators, who were inclined to draft a Declaration of the Homo Europeus. Article 63 dealt with the automatic application of the provisions of the Convention to overseas territories. Its final draft failed to meet my wish.

In 1951, it had not been thought necessary to purely and simply apply to the peoples of Africa the protective rules designed for the European. It had not even been noticed that the principle of the universalism of public freedoms were thus being demolished.

May I remind you, by going further, of the nineteenth century. In Europe, at that time, people had firmly fixed in their mind states’ and peoples’ sovereignty to such an extent that this led to the 1830 Revolution, ruined the Turkish domination and dislocated the Austro-Hungarian Empire; it became a sacrilege to infringe upon them, Africa was divided in the name of the same sovereignty. The Berlin Agreement was, in fact, signed in 1885 to safeguard the sovereignty of colonising states.

Similar agreements were reached on Tripolitania, Cyrenaica, Sudan, the New Hebrides.

It was after the Second World War that the colonial empires were tackled in pursuance of peoples’ right to self-determination. The OAU, in this respect, plays a major role: It followed and sometimes preceded the action of the United Nations. It undertook since its establishment and, in accordance with its Charter, to ‘eradicate all forms of colonialism from Africa’. The Charter begins with these words: ‘Convinced that it is the inalienable right of all people to control their own destiny’. It goes on to state specifically that the Heads of African States and Governments are ‘determined to safeguard and consolidate the hard-won independence as well as the territorial integrity of their states, and to fight against neo-colonialism in all its forms’. Among the principles of the Organization ‘the absolute dedication to the total emancipation of the African territories which are still dependent’, was recommended supplementing the Charter, the Lusaka Manifesto and the Declaration of Mogadiscio determined the doctrine of our action. In this field, our solidarity should be re-asserted as a state duty.
Thus, nothing was neglected by the OAU to make the principle of the ‘right of the peoples to self-determination’ triumph in our continent. The results obtained so far are important. Today, in Southern Africa, the racist or colonialisit exploitation of the Black borrowed from the racial discrimination, its fallacious prejudices and methods, by throwing the large majority of the population of this part of the world into misery and despair.

Unfortunately, independent Africa can hardly teach a thing or two on human rights. Let us admit our weakness. It is the best method of getting over it.

You have therefore to be careful so that your Charter may not be a Charter of the right of ‘the African Man’. Mankind is one and indivisible and the basic needs of man are similar everywhere. There is neither frontier, nor race when the freedoms and the rights attached to the human beings are to be protected.

That does not mean that we have to give up thinking by ourselves and for ourselves. Europe and America built up their system of rights and freedoms by referring to a common civilisation: To their respective peoples and to specific aspirations.

From a set of norms commonly considered as essential by universal conscience, the international community, for its part, is endowed with the Declaration of Human Rights of 10 December 1948, since enriched by the international covenants of 1966, and by the Protocol thereto relating to civil and political rights.

As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilisation and the real needs of Africa.

Since 1961, some people have been conceiving an organ to protect human rights. Unfortunately, this idea never left the beautiful and many pages doctrine devoted to it [unclear - ed], nor was it discussed beyond the narrow range of the increased number of symposia and seminars on the theme.

If Senegal, through my voice, proposed to the last OAU summit the adoption of Decision 115 (XV), it is because we feel today that Africans need a consistent system to promote and protect their rights and freedoms. People will perhaps expatiate for a long time upon the ‘Peoples’ Rights’ we were very keen on referring to.

We simply meant, by so doing, to show our attachment to economic, social and cultural rights, to collective rights, in general, rights which have a particular importance in our situation of a developing country.

We are certainly not drawing lines of demarcation between the different categories of rights. We are not grading these either. We wanted to show essentially that beside civil and political rights, economic, social and cultural rights should henceforth be given the important place they deserve.
We wanted to lay emphasis on the right to development and the other rights which need the solidarity of our states to be fully met: the right to peace and security, the right to a healthy environment, the right to participate in the equitable share of the common heritage of mankind, the right to enjoy a fair international economic order and, finally, the right to natural wealth and resources.

Our overall conception of human rights is marked by the right to development since it integrates all economic, social and cultural rights, and also civil and political rights. Development is first and foremost a change of the quality of life and not only an economic growth required at all costs, particularly in the blind repression of individuals and peoples. It means the full development of every man in his community, in the way freely chosen by the latter. The definition my friend Malcolm Adiseshish proposed to us corresponds to our own conception of development: ‘A form of humanism; a moral and spiritual fact, both material and practical; an expression of man as a whole meeting his material needs (food, clothes, shelter) as well as his moral requirements (peace, compassion, freedom, charity) …’. In this conception, development, the right of peoples, respects man and his freedoms.

African civilisation, like all other ancient civilisations, always respected man. *Homo sacrae res homini* Seneca proclaimed. *Nit moodi garag u nit* ‘man is man’s remedy’ says a Senegalese proverb. The two thoughts stem from the same basic principle: From the humanism to which we are still attached and cultivate in this country.

Room should be made for this African tradition in our Charter on Human and Peoples’ Rights, while bathing in our philosophy, which consists in not alienating the subordination of the individual to the community, in co-existence, in giving everyone a certain number of rights and duties.

In Europe, human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it.

In Africa, the individual and his rights are wrapped in the protection the family and other communities ensure everyone.

The late lamented Professor Collomb, specialist in African psychiatry, very rightly observed: ‘To live in Africa is to give up being an individual, particular, competitive, selfish, aggressive, concurrent, man is to live with others, in peace and harmony, with the dead and living, with the natural environment and the spirits inhabiting or livening it up’.

Rights in Africa assume the form of rite which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities. Therefore, contrary to what has been done so far in other regions of the world, provision must be made for a system of ‘Duties of Individuals’, adding harmoniously to the rights recognised in them by the society to which they belong and by other men.
If we want to build the *Homo Africanus* of tomorrow, we should, once again assimilate without being assimilated. We should borrow from modernism only that which does not misrepresent our civilisation and deep nature. As regards human rights, Liberarian freedom, irresponsibility and immorality should carefully be avoided.

The work which will be stamped with your respective names is exalting. Africa is watching you: It counts on you to ensure, in the scrupulous respect of freedoms and rights, the harmonious development of its civilisation in the context of the worldwide civilisation.

I declare open the meeting of African experts entrusted with the preparation of the preliminary draft of the ‘African Charter on Human and Peoples’ Rights’.

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*Matua discusses the concept of duties, as captured in the African Charter.*

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...**Prospects and problems for the duty or rights conception**

The idea of combining individual rights and duties in a human rights document is not completely without precedent. No less a document than the Universal Declaration of Human Rights (UDHR) blazed the trail in this regard when it provided, in a rare departure from its individualist focus, that ‘[e]veryone has the duties to the community in which alone the free and full development of his personality is possible’. However, the African Charter is the first human rights document to articulate the concept in any meaningful way. It is assumed, with undue haste, by human rights advocates and scholars that the inclusion of duties in the African Charter is nothing but ‘an invitation to the imposition of unlimited restrictions on the enjoyment of rights’. This view is simplistic because it is not based on a careful assessment of the difficulties experienced by African countries in their miserable attempts to mimic wholesale Western notions of government and the role of the state. Such critics are transfixed by the allure of models of democracy prevalent in the industrial democracies of the West, models which promise an opportunity for the redemption of a troubled continent.

Unfortunately, such a view is short-sighted. Perhaps at no other time in the history of the continent have Africans needed each other more than they do today. Although there is halting progress towards democratisation in some African countries, the continent is generally on a fast track to political and
economic collapse. Now in the fourth decade of post-colonialism, African states have largely failed to forge viable, free, and prosperous countries. The persistence of this problem highlights the dismal failures of the post-colonial states on several accounts. The new African states have failed to inspire loyalty in the citizenry; to produce a political class with integrity and a national interest; to inculcate in the military, the police, and the security forces their proper roles in society; to build a nation from different linguistic and cultural groups; and to fashion economically viable policies. These realities are driving a dagger into the heart of the continent. There are many causes of the problem, and, while it is beyond the scope of this article to address them all, it will discuss one: Namely, the human rights dimensions of the relationship between the individual, the community, and the state.

Colonialism profoundly transformed and mangled the political landscape of the continent through the imposition of the modern state. Each pre-colonial African ‘nation’, and there were thousands of them to be sure, had several characteristics: One ethnic community inhabited a ‘common territory; its members shared a tradition, real or fictitious, of common descent; and they were held together by a common language and a common culture’. Few African nations were also states in the modern or European sense, although they were certainly political societies. In contrast, the states created by European imperialists, comprising the overwhelming majority of the continent, ordinarily contained more than one nation:

Each one of the new states contains more than one nation. In their border areas, many new states contain parts of nations because of the European-inspired borders cut across existing national territories.

The new state contained a population from many cultural groups coerced to live together. It did not reflect a ‘nation’, a people with the consciousness of a common destiny and shared history and culture. The colonialists were concerned with the exploitation of Africa’s human and natural resources, and not with the maintenance of the integrity of African societies. For purposes of this expediency, grouping many nations in one territory was the only feasible administrative option. To compound the problem, the new rulers employed divide-and-conquer strategies, pitting nations against each other, further polarising inter-ethnic tensions and creating a climate of mutual fear, suspicion, and hatred. In many cases, the Europeans would openly favour one group or cluster of nations over others, a practice that only served to intensify tensions. For example, in Rwanda, a country rife with some of the worst inter-communal violence since decolonisation, the Belgians heightened Hutu-Tutsi rivalry through preferential treatment toward the Tutsi.

Ironically, colonialism, though a divisive factor, created a sense of brotherhood or unity among different African nations within the same colonial state, because they saw themselves as common victims of an alien, racist, and oppressive structure. Nevertheless, as the fissures of the modern African state amply demonstrate, the unity born out of anti-colonialism has not sufficed to create an enduring identity of nationhood in the context of the post-colonial state. Since in the pre-colonial era the primary allegiances were centred on lineage and the community, one of the most difficult challenges facing the post-colonial political class was the creation of new nations. This challenge, referred to as ‘creating a national consciousness ... was mis-
leading’, as there was ‘no nation to become conscious of; the nation had to be created concurrently with a consciousness’.

This difficult social and political transformation from self-governing ethno-cultural units to the multi-lingual, multi-cultural modern state — the disconnection between the two Africas: One pre-colonial, the other post-colonial — lies at the root of the current crisis. The post-colonial state has not altered the imposed European forms of social and political organisation even though there is mounting evidence that they have failed to work in Africa. Part of the problem lies in the domination of the continent’s political and social processes by Eurocentric norms and values. As correctly put by Hansen:

African leaders have adopted and continued to use political forms and precedents that grew from, and were organically related to, the European experience. Formal declarations of independence from direct European rule do not mean actual independence from European conceptual dominance. African leaders and peoples have gone through tremendous political changes in the past hundred years. These profound changes have included the transformation of African societies and polities. They are still composed of indigenous African units, such as the lineage, village, tribe, and chieftainship, but they have been transformed around European units, such as the colony, district, political party, and state.

This serious and uniquely African crisis lacks the benefit of any historical guide or formula for its resolution. While acknowledging that it is impossible to recapture and re-institute pre-colonial forms of social and political organisation, this article nonetheless asserts that Africa must partially look inward, to its pre-colonial past, for possible solutions. Certain ideals in pre-colonial African philosophy, particularly the conception of humanity, and the interface of rights and duties in a communal context as provided for in the African Charter, should form part of that process of reconstruction. The European domination of Africa has wrought social changes which have disabled old institutions by complicating social and political processes. Pre-colonial and post-colonial societies now differ fundamentally. In particular, there are differences of scale; states now have large and varied populations. Moreover, states possess enormous instruments of control and coercion, and their tasks are now without number. While this is true, Africa cannot move forward by completely abandoning its past.

The duty or rights conception of the African Charter could provide a new basis for individual identification with compatriots, the community, and the state. It could forge and instil a national consciousness and act as the glue to reunite individuals and different nations within the modern state, and at the same time set the proper limits of conduct by state officials. The motivation and purpose behind the concept of duty in pre-colonial societies was to strengthen community ties and social cohesiveness, creating a shared fate and common destiny. This is the consciousness that the impersonal modern state has been unable to foster. It has failed to shift loyalties from the lineage and the community to the modern state, with its mixture of different nations.

The series of explicit duties spelled out in articles 27 through 29 of the African Charter could be read as intended to recreate the bonds of the pre-colonial era among individuals and between individuals and the state. They represent a rejection of the individual ‘who is utterly free and utterly irresponsible and opposed to society’. In a proper reflection of the nuanced nature of societal
obligations in the pre-colonial era, the African Charter explicitly provides for two types of duties: direct and indirect. A direct duty is contained, for example, in article 29(4) of the Charter which requires the individual to ‘preserve and strengthen social and national solidarity, particularly when the latter is threatened’. There is nothing inherently sinister about this provision; it merely repeats a duty formerly imposed on members of pre-colonial communities. If anything, there exists a heightened need today, more than at any other time in recent history, to fortify communal relations and defend national solidarity. The threat of the collapse of the post-colonial state, as has been the case in Liberia, Somalia, and Rwanda, is only too real. Political elites as well as the common citizenry, each in equal measure, bear the primary responsibility for avoiding societal collapse and its devastating consequences.

The African Charter provides an example of an indirect duty in article 27(2), which states that ‘[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’. This duty is in fact a limitation on the enjoyment of certain individual rights. It merely recognises the practical reality that in African societies, as elsewhere in the world, individual rights are not absolute. Individuals are asked to reflect on how the exercise of their rights in certain circumstances might adversely affect other individuals or the community. The duty is based on the presumption that the full development of the individual is only possible where individuals care about how their actions would impact on others. By rejecting the egotistical individual whose only concern is fulfilling self, article 27(2) raises the level of care owed to neighbours and the community.

Duties are also grouped according to whether they are owed to individuals or to larger units such as the family, society, or the state. Parents, for example, are owed a duty of respect and maintenance by their children. Crippling economic problems do not allow African states to contemplate some of the programmes of the welfare state. The care of the aged and needy falls squarely on family and community members. This requirement — a necessity today — has its roots in the past: It was unthinkable to abandon a parent or relative in need. The family guilty of such an omission would be held in disgrace and contempt pending the intervention of lineage or clan members. Such problems explain why the family is considered sacred and why it would be simply impracticable and suicidal for Africans to adopt wholesale the individualist conception of rights. Duty to the family is emphasised elsewhere in the Charter because of its crucial and indispensable economic utility. Economic difficulties and the dislocations created by the transformation of rural life by the cash economy make the homestead a place of refuge.

Some duties are owed by the individual to the state. These are not distinctive to African states; many of them are standard obligations that any modern state places on its citizens. In the African context, however, these obligations have a basis in the past, and many seem relevant because of the fragility and the domination of Africa by external agents. Such duties are rights that the community or the state, defined as all persons within it, holds against the individual. They include the duties to ‘preserve and strengthen social and national solidarity;’ not to ‘compromise the security of the State;’ to serve
the ‘national community by placing his physical and intellectual abilities at its service;’ to ‘pay taxes imposed by law in the interest of the society;’ and to ‘preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law’.

The duties that require the individual to strengthen and defend national independence, security, and the territorial integrity of the state are inspired by the continent’s history of domination and occupation by outside powers over the centuries. The duties represent an extension of the principle of self-determination, used in the external sense, as a shield against foreign occupation. Even in countries where this history is lacking, the right of the state to be defended by its citizens can trump certain individual rights, such as the draft of younger people for a war effort. Likewise, the duty to place one’s intellectual abilities at the service of the state is a legitimate state interest, for the ‘brain drain’ has robbed Africa of massive intellect. In recognition of the need for the strength of diversity, rather than its power to divide, the Charter asks individuals to promote African unity, an especially critical role given arbitrary balkanisation by the colonial powers and the ethnic animosities fostered within and between the imposed states.

In addition to the duties placed on the state to secure for the people within its borders economic, social, and cultural rights, the Charter also requires the state to protect the family, which it terms ‘the natural unit and basis of society’ and the ‘custodian of morals and traditional values’. There is an enormous potential for advocates of equality rights to be concerned that these provisions could be used to support the patriarchy and other repressive practices of pre-colonial social ordering. It is now generally accepted that one of the strikes against the pre-colonial regime was its strict separation of gender roles and, in many cases, the limitation on, or exclusion of, women from political participation. The discriminatory treatment of women on the basis of gender in marriage, property ownership, and inheritance, and the disproportionately heavy labour and reproduction burdens were violations of their rights.

However, these are not the practices that the Charter condones when it requires states to assist families as the ‘custodians of morals and traditional values’. Such an interpretation would be a cynical misreading of the Charter. The reference is to those traditional values which enhanced the dignity of the individual and emphasised the dignity of motherhood and the importance of the female as the central link in the reproductive chain; women were highly valued as equals in the process of the regeneration of life. The Charter guarantees, unambiguously and without equivocation, the equal rights of women in its gender equality provision by requiring states to ‘eliminate every discrimination against women’ and to protect women’s rights in international human rights instruments. Read in conjunction with other provisions, the Charter leaves no room for discriminatory treatment against women.

The articulation of the duty conception in the Charter has been subjected to severe criticism. Some of the criticism, however, has confused the African conception of duty with the socialist or Marxist understanding. Such confusion is unfortunate. In socialist ideology, states — not individuals — are subjects of
international law. Thus the state assumes obligations under international law, through the International Covenant on Civil and Political Rights (ICCPR) for example, to provide human rights. Under socialism, the state secures economic, cultural, and social benefits for the individual. Hence, the state, as the guardian of public interest, retains primacy in the event of conflict with the individual. Human rights, therefore, are conditioned on the interest of the state and the goals of communist development. There is an organic unity between rights and duties to the state. In this collectivist conception, duties are only owed to the state. In contrast, in the pre-colonial era, and in the African Charter, duties are primarily owed to the family — nuclear and extended — and to the community, not to the state. In effect, the primacy attached to the family in the Charter places the family above the state, which is not the case under communism. In pre-colonial Africa, unlike the former Soviet Union or Eastern Europe, duties owed to the family or community were rarely misused or manipulated to derogate from human rights obligations.

The most damaging criticism of the language of duties in Africa sees them as ‘little more than the formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples’. However, critics who question the value of including duties in the Charter point only to the theoretical danger that states might capitalise on the duty concept to violate other guaranteed rights. The fear is frequently expressed that emphasis on duties may lead to the ‘trumping’ of individual rights if the two are in opposition. It is argued that:

If the state has a collective right and obligation to develop the society, economy, and polity (article 29), then as an instrument it can be used to defend coercive state actions against both individuals and constituent groups to achieve state policies rationalised as social and economic improvement.

While the human rights records of African states are distressingly appalling, facts do not indicate that the zeal to promote certain economic and political programmes is the root cause of human rights abuses. The regime of Daniel Arap Moi in Kenya, for example, has not engaged in the widespread suppression of civil and political rights because of adherence to policies it deems in the national interest; instead, abuses have been triggered by an insecure and narrow political class which will stop at nothing, including political murder, to retain power. Similarly, Mobutu Sese Seko of Zaire has run the country into the ground because he cannot contemplate relinquishing power. Alienated and corrupt elites, quite often devoid of a national consciousness, plunder the state and brutalise society to maintain their personal privileges and retain power. The use of the state to implement particular state policies is almost never the reason, although such a rationale is frequently used as the pretext. Okoth-Ogendo persuasively argues that the attack on the duty conception is not meritorious because the ‘state is the villain against which human rights law is the effective weapon’ and towards which ‘individuals should not be called upon to discharge any duties’. Valid criticism would question the ‘precise boundaries, content, and conditions of compliance’ contemplated by the Charter. It should be the duty of the African Commission in its jurisprudence to clarify which, if any, of these duties are moral or legal obligations, and what the scope of their application ought to be. The Commission could lead the way in suggesting how some of the duties — on the individual as well as the state — might be implemented. The concept of national service, for example, could utilise traditional notions in addressing
famine, public works, and community self-help projects. The care of parents and the needy could be formalised in family or state burden-sharing. The Commission should also indicate how, and in what forum, the state would respond to the breach of individual duties. It might suggest the establishment of community arbitration centres to work out certain types of disputes. As suggested by Umozurike, a former chairman to the Commission, state responsibility for these duties implies a minimum obligation to inculcate the underlying principles and ideals in their subjects.

The duty or rights formulation is also inextricably tied to the concept, articulated in the African Charter, of peoples' rights. Although a long discussion about the concept itself and the controversy it has attracted will not be made here, this article will outline its necessity to the duty conception. Like the duty concept, the idea of peoples' rights is embodied in the African philosophy which sees men and women primarily as social beings embraced in the body of the community. It was pointed out during the drafting of the African Charter that individual rights could only be justified in the context of the rights of the community; consequently the drafters made room in the Charter for peoples' rights.

The concept was not new in a human rights document. For example, common article 1 of the two basic international human rights covenants makes peoples the subject of rights, a departure from Western notions that human rights only attach to individuals. There is recognition of the fact that individual rights cannot be realised unless groups hold collective rights. As clearly noted by Sohn:

One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups, and communities; they are simultaneously members of such units as a family, religious community, social club, trade union, professional association, racial group, people, nation, and state. It is not surprising, therefore, that international law not only recognises inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.

The African Charter distinguishes human rights from peoples' or collective rights, but sees them in co-operation, not competition or conflict. The Charter's preambular paragraph notes this relationship and recognises ‘on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand, that the reality and respect for peoples rights should necessarily guarantee human rights’. This unambiguous statement, notes van Boven, is conclusive proof of the Charter's view: Human rights are inalienable and intrinsic to individuals and are not in conflict with peoples' rights, which they complement. The exercise of sovereignty rights by a ‘people’ or ‘peoples’ as contemplated by the Charter is a necessary precondition for the enjoyment of individual rights. This dialectic between individual and peoples' rights is one of the bases for the Charter's imposition of duties on individuals. Solidarity between the individual and the greater society safeguards collective rights, without which individual rights would be unattainable.
Human rights vs peoples’ rights

The full title of the Banjul Charter raises the controversial question of the difference and relationship between (individual) human rights and (collective) peoples’ rights. The relationship between the two must clearly be appreciated to avoid compromising either. In this connection, Roland Rich’s three-premise approach could be a particularly helpful starting point:

(1) The individual remains the primary subject of international human rights law.
(2) International human rights law recognises the existence of groups.
(3) The enjoyment of individual human rights requires certain human rights to devolve directly upon groups.

The first is now generally accepted and does not require detailed examination. The individual is the cardinal subject of international human rights law. The second premise is rapidly becoming a well-settled principle, as international human rights law has already extended recognition to groups of persons as such. These include minorities, colonised peoples and indigenous populations. It is the third that requires a closer look, for it is the raison d’être of collective rights.

Karel Vasak referred to collective rights, similar to those covered in the Banjul Charter, as belonging to the third generation of human rights and termed them ‘solidarity rights’. According to him, rights under this umbrella:

seek to infuse the human dimension into areas where it has all too often been missing, having been left to the State or States … [T]hey are new in that they may both be invoked against the State and demanded of it; but above all … they can be realised only through the concerted efforts of all the actors on the social scene: The individual, the State, public and private bodies and the international community.

Here we can detect elements of peoples’ sovereignty, not only in the political, but in the economic sphere as well. In addition, and perhaps more importantly, Vasak emphasised the need for concerted action in the effort to deliver certain rights — hence the solidarity tag.

The basic question, however, remains: Are collective rights human rights or not? Part of the problem lies in the terminology itself. This is evident, for example, in the following comment:

Can human rights, as opposed to obligations, be vested in States? … [T]here is no precedent in international law for the vesting of human rights in States. Human rights are vested in the individual. Certain collective rights derive from those individual rights, especially from the right to freedom of association. But does that mean that these rights extend to States or Governments?
On the surface, it appears logical to state that a human right can only be enjoyed by a human being. Louis Sohn perhaps would respond to this observation by reminding us that because collective rights are always ultimately destined for individuals, they are *ipso facto* human rights:

One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups, and communities; they are simultaneously members of such units as a family, religious community, social club, trade union, professional association, racial group, people, nation, and state. It is not surprising, therefore, that International law not only recognises inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.

The drafters of the 1966 International Human Rights Covenants adopted a similar position. That was why they included the collective right to self-determination in the Covenants and gave it pride of place. This strong endorsement, however, did not convince detractors of collective rights. Therefore, I suggest that collective rights be regarded as *sui generis*. They are not individual, but collective; they belong to groups, communities or peoples. When the group secures the rights in question, then the benefits redound to its individual constituents and are distributed as individual human rights. This concept can be illustrated by taking Professor Sohn's example of the club further: In an interclub tennis tournament, only clubs have the right to participate even though individuals actually play the game. Members as skilled as Navratilova or Lendl would not have an automatic right to play in tournaments. Contestants are entered by their clubs in accordance with the internal arrangements of those clubs. The individual's right to play can only be expressed in and through the club. This right is actualised, first, by protecting the club's rights in the wider setting; and then by the individual's rights in the club. International collective and individual rights are no different.

Consequently, the Banjul Charter, by separating peoples' from human rights, does not obfuscate but progressively develops international human rights law. It shows, in clear terms, that there is a conceptual difference between collective (peoples') rights and individual (human) rights.

Furthermore, the Charter approaches the two categories in a balanced manner; it does not give the impression of favouring one category over the other. The fact that individual rights are not as well secured as one would have wished, is due not to a preference for collective rights but to the political realities of the continent and the OAU. Governments were not yet ready in 1981 to have their affairs completely opened to international scrutiny. Moreover, a close examination of the Charter reveals that, in most of the cases, peoples' rights (as opposed to state rights) do not fare much better than individual rights. However, in its own way, the Banjul Charter at least theoretically recognises that all classes of rights (political, economic, individual and collective) are equal and synergetic. This result is a far cry from the position maintained by Eugene Kamenka on the place of the 'new' collective rights:
Human Rights in Africa

The point is to recognise any claim made for this third-generation of rights as valid only in so far as it extends, rather than destroys, first generation rights — i.e. the autonomy of individuals and their civil and political liberties. To say this is to insist that second and third generation rights are to be read through, understood in terms of, first generation rights.

This interpretation, without any doubt, would have the effect of dragging the human rights debate back over mountains already conquered and bridges already crossed; it represents a distinct philosophical and ideological choice. In this regard, the Banjul Charter sought to consolidate the gains made in the interpretation and rationalisation of international human rights.

The meaning of ‘people’

The definition of ‘people’ has primarily been approached in the context of the right to self-determination, where it has been used to indicate an ethnic community or a community that identifies itself as such because of common interests. Yoram Dinstein, writing with Middle Eastern problems in mind, identified subjective and objective qualities of the term:

The objective element is that there has to exist an ethnic group linked by common history ...
... It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such.

Ian Brownlie expanded on that definition but laid more emphasis on identity:

No doubt there has been continuing doubt over the definition of what is a ‘people’ for the purpose of applying the principle of self-determination. Nonetheless, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long existing national identities would be negated on academic grounds as, for example, the United States.

In a report written for the United Nations, Aureliu Cristescu offered a limited definition of the term ‘people’ for the purposes of the right to self-determination. He preceded it by explaining that the United Nations had proceeded cautiously, albeit firmly, in the struggle against colonialism and that it would not be possible to produce a definition covering all possible situations. From the specific situations already witnessed, he believed the following elements had emerged:

(a) The term ‘people’ denotes a social entity possessing a clear identity and its own characteristics;
(b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
(c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in article 27 of the International Covenant on Civil and Political Rights.
Among these three writers, the main attributes of peoplehood are presented, namely, commonality of interests, group identity, distinctiveness and a territorial link. It is clear, therefore, that ‘people’ could refer to a group of persons within a specific geographical entity (for example the Alur of Uganda or the Amandebele of Zimbabwe) as well as to all the persons within that entity (for example Ugandans or Zimbabweans). Both these references are common, but that does not make their use unambiguous. Christescu’s exclusion of minorities depended on certain assumptions that, as we shall soon see, are no longer tenable.

‘People’ as possessors of the right to political self-determination

Under article 20 of the Banjul Charter, the right to self-determination is guaranteed to all peoples. However, paragraph 2 of article 20 singles out colonised and oppressed peoples as the possessors of that right. This is the least problematic of the uses of ‘people’. Under current international law, as evidenced, for example, by the practice of the United Nations, the Organization of African Unity and individual states, political self-determination is generally equated with freedom from colonial-type rule. It does not extend to insistence by one sector of the population of an independent (or majority-ruled) state on its own form of self-determination, culminating, perhaps, in secession.

Following this line of reasoning, Eisuke Suzuki suggested that, in reality, there are only three remaining opportunities for the exercise of this right in Africa: The dismantling of minority rule in South Africa, the achievement of independence for Namibia and the resolution of the problem of the Western Sahara. International law has chosen to deny such groups as the Eritreans the right (privilege?) of designating their struggle as one for the attainment of the right to self-determination. That may be so, but even in the clear-cut cases there remain a few problems. Would the Amazulu, AmaXhosa, Basotho or other peoples of South Africa, for example, be entitled to pursue their own (genuine) independence from the Pretoria regime? By this, I do not mean the type of pseudo-independence that the apartheid Bantustan policy is all about, but rather sovereign independence to the exclusion of all other peoples. Would such independence be a permissible exercise of the right under paragraph 2 of article 20 of the Banjul Charter, entitling the people concerned to the assistance mentioned in paragraph 3 of that article? I think not. The analogy of the ban on secession from independent countries would apply here with equal force. That people would be seceding from a future state. International law already treats the right to self-determination as tied to a specific geographically defined territory. Further subdivisions would not be consistent with that position. Moreover, a people wishing to go its separate way, as, say, in South Africa, would have to renounce the authority of the liberation movement representing it. In our example, this would be the Africa National Congress or the Pan-Africanist Congress, both of which are recognised by the OAU. That organisation would be most unlikely to support any such secessionist aspirations.

From the foregoing, we can conclude that the first meaning of ‘people’ is all the different communities (peoples), in fact, all persons within the boundaries of a country or geographical entity that has yet to achieve
independence or majority rule. Once independence (or majority rule) is achieved, no further independence is permissible. The rights of the different peoples would thereafter be protected as minority rights.

Before leaving this point, I should observe that the rule against secession as an exercise of the right to self-determination is only a general one. Although it is backed by a solid body of UN, AU and state practice, it can still admit a few exceptions. The independence of Bangladesh was one. Ved Nanda, in a definitive article on the subject, demonstrated the existence of a set of circumstances that combined to lend a cloak of legitimacy to what would otherwise have been impermissible in international law. These were the physical separation of East from West Pakistan and the total domination of the former by the latter; the nature of their ethnic and cultural differences; the disparity in their economic growth to the disadvantage of East Pakistan; the electoral mandate to secede; the brutal suppression of dissent in East Pakistan; and the viability of both regions as separate entities. The fact that the United Nations was presented with a fait accompli was also significant.

Although many of the secessionist claims in various parts of Africa have been characterised by some of the elements of the Bengali struggle, few have come close to matching it. For example: The secessionist activities in Katanga and Biafra were roundly condemned by the United Nations and the OAU as threats to sovereignty and territorial integrity. The situation in southern Sudan has not attracted much international legal concern. The conflict in Eritrea has practically been shoved into a closet despite Eritrea's illegal absorption into the Ethiopian Empire in 1962. Finally, the unilateral declaration of independence by the Saharan Arab Democratic Republic (SADR), as well as its subsequent admission into the OAU in 1982, was not an exercise in secession. Moroccan and Mauritanian claims to the territory of Western Sahara had been rejected by the International Court of Justice. Subsequently, Morocco attempted to annex the territory by settling civilians there, which implied that the Spanish were simply being replaced by Moroccans. The ensuing struggle for independence was akin to one against colonial rule. The fact that it did not fit the usual pattern of colonialism is not technically relevant. The admission of the SADR into the OAU was a tribute more to the intense political and diplomatic activity of POLISARIO than to a legal principle. Moreover, the OAU Secretary-General was faced with a 27–19 vote in favour of admission and therefore had no choice in the matter. The SADR, however, subsequently withdrew from the OAU. Some of the interesting conclusions that can be drawn from the whole exercise are that the organisation does not always have to seek compromises that do not address the real issues; that African unity can survive a crisis of that magnitude; and that maybe it could survive a successful assertion of self-determination by way of secession.

‘Peoples’ as the different minorities

The problems of minority protection were of prime concern to the League of Nations. Indeed, the modern international human rights edifice owes much of its character to the minority regimes set up in the aftermath of the Great War. This concern for minorities was inherited by the United Nations. However, the problems facing the United Nations are far more extensive than those of the League, as the modern organisation must operate in an expanded
context with a proliferation of members and minorities. One of these problems was to work out an acceptable definition of who constituted a minority. Several definitions were essayed with varying degrees of success. The most satisfactory and acceptable was the one proffered by Francesco Capotorti in a report commissioned by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. He suggested that:

a minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position whose members — being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

The pertinent question, for present purposes, is whether or not a minority, thus defined, can be referred to as a ‘people’ entitled to enjoy the peoples’ rights contained in the Banjul Charter. If we do not confine ourselves within the straitjacket of assuming that peoplehood and the right to self-determination automatically lead to independent statehood, it is not difficult to appreciate that, indeed, a minority can fulfil all the requirements of a ‘people’. As Felix Ermacora correctly argued:

Unless the United Nations has not developed clear-cut ideas about the holder of the right to self-determination my opinion is that minorities also can be considered holders of the right to self-determination. Minorities must be considered as people. They must live also in a territory or they must have been living in a territory which is now occupied; they must have cultural or religious characteristics; they must be politically organised so that they can be represented; and they must be capable of an economic independence. It does not depend on governments as to how they are describing an entity as a people; it depends on objective and subjective criteria of a group. It depends also on the self-consciousness of identity. I think therefore, that national and racial, perhaps also religious, minorities could be considered peoples in the sense of an autonomous concept of the United Nations instruments. For them self-determination is inalienable.

It must be emphasised that total independence is not the exclusive form in which the right to self-determination is realisable. What is important is that the rights of the group and its members receive recognition and protection.

Since secession is generally impermissible in current international law, all references to political self-determination, in relation to independent states, should mean respect for minority rights. By the injunction of article 19 that ‘[n]othing shall justify the domination of a people by another’, the Banjul Charter proscribes external and internal forms of colonialism. Minorities are entitled not to lose their identity and interests in the aggregation — of the whole. Professor Sohn’s views on common article 1 of the 1966 International Covenants apply here with equal force. He wrote:

The Covenants clearly endorse not only the right of external self-determination, but also the right of internal self-determination: the right of a people to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution ... A people should be free both from interference by other peoples or states and from deprivation of its right to self-determination by a tyrant or dictator.

In this connection, Ermacora was undoubtedly justified in his criticism of Hector Gros Espiell’s assertion that contemporary international law does not recognise the right of minorities to self-determination. Ermacora pointed out that ‘[i]t is not sufficient to state it is peoples as such that are entitled to the
right of self-determination' without analysing the conceptional relationship between 'minority' as a man-made conception and 'people' as an archetypic concept. Plainly, if the term 'people' is understood in context, and the right to self-determination unrestrictively interpreted, it is not difficult to apply the latter to minorities. Professor Gros Espiell's interpretation was an extension of earlier attempts, within the United Nations, ‘to confine the right of self-determination to the peoples of the non-self-governing territories’, which belong to colonial empires that are the objects of specific obligations under article 1(3) of both Covenants, as well as under articles 73 and 76 of the UN Charter. The assumption was also made that emergence into a sovereign nation is the logical conclusion of pursuing the right to self-determination.

The right to existence in article 20 addresses the problem of genocide — perhaps the single worst threat to minorities. In other cases involving self-determination, a people within a state should be sufficiently protected by respect for both its minority rights (for example language, culture, religion) and the human rights of its members. That this protection may break down and that minorities everywhere, especially in the Third World, are constantly in fear of repression are actualities that cannot be assured an unequivocal collective solution by international law. Such violations are regarded as violations of individual and minority rights and treated accordingly. The International Covenant on Civil and Political Rights of 1966 adopted a similar approach. In addition to individual rights and liberties, it made room for the protection of minority rights in article 27.

In light of the problem of pluralism, some of the newer African constitutions have recognised that the best guarantee of harmony and national unity is a serious commitment to minority rights. Article 3 of the 1979 Constitution of Benin (formerly Dahomey) is a good example of this trend:

The Popular Republic of Benin is a unified multi-national state. All nationalities are equal in rights and duties. Consolidating and developing their union is a sacred duty of the State, which shall assure to each one a full development in unity through a just policy toward nationalities and an inter-regional balance.
All acts of regionalism shall be rigorously prohibited.
All nationalities shall be free to use their spoken and written language and to develop their own culture.
The State shall actively aid those nationalities living in undeveloped areas to attain the economic and cultural level of the country as a whole.

Where minority and individual rights are respected, there will not be many motives for secession. The concept of ‘people’, in this sense, is designed to achieve that objective.

‘People’ as the state (economic self-determination)

Rights falling under the category of economic self-determination are set forth in articles 21 and 22. These articles vest the rights concerning the exploitation and disposal of natural resources in peoples and states. The problems addressed by the right to self-determination in the economic sense are determined by internal and external factors. This is the justification for vesting the right in both the people and the state. The Westphalian international order of the current epoch requires peoples to act through
states when dealing with other peoples, states and entities. In the field of development, the state is an inevitable intermediary. This arises from the fact that:

Underdevelopment is a structural phenomenon linked to a given mode of international economic relations, and to a certain international division of labour. Indeed, underdevelopment is the direct result of this division. Even under the best conceivable government, in a country of outstanding wealth and resources, this international division of labour will indubitably, through the machinery of the international order, act like a leech, draining the country of its life-blood.

These circumstances render it imperative to equate ‘peoples’ with the state where the right to development is concerned. An entity less than the state cannot effectively contest the right to development in the international arena. The argument posited by Judge Bedjaoui against an individualistic extrapolation of the right to development would also apply to groups of people: The individual's pursuit of the right to development vis-à-vis his State can only weaken the State and would occur at the very time when the State needs to be strengthened if it is to neutralise the negative effects of the international factors which counteract its collective development.

The internal laws of many African countries give the state control over the major means of development, especially over the exploitation of natural resources. For example, article 4 of the 1977 Constitution of the Democratic Republic of Sao Tome and Principe provides in part:

(1) In the economic realm, the State shall have as its objective the destruction of the colonial economic structure and the abolition of unjust privileges established in favour of foreign nations or individuals, the abolition of the underdeveloped state of the nation, and the creation of conditions suitable for elevating the standard of living of the workers and the general well-being of the entire population.

(2) The land and the natural resources of the soil and subsoil, in territorial waters and on the continental shelf of the islands, shall be the property of the State, which shall determine the conditions of their improvement and their use.

Some other constitutions vest natural resources in the people, as opposed to the state or government. These include the Constitutions of Benin, the Congo and Egypt. In practice, however, there is very little difference between the two approaches as natural resources are usually managed by the state through the government of the day. Whether the people benefit or not depends on the propensities of that government.

The ‘state-centric’ character of the Banjul Charter reflects the position adopted by the proponents of the ‘New International Economic Order’ (NIEO). For example, the Charter of Economic Rights and Duties of States of 1974 deals with state rights, which is why the right to permanent sovereignty over natural resources was vested in states. The United Nations, however, had already created a precedent for the vesting of economic rights in states. General Assembly Resolution 1803 (XVII) of 1962 recognised the right of peoples and nations to permanent sovereignty over natural resources.

As was mentioned above, the alternative of letting peoples contest the right to development directly in the international economic arena is not viable. However, equating states with ‘peoples’ assumes that the interests of the people are adequately represented by their state — a rarity in most
developing countries, as we all know. In consequence, equating peoples and states further strengthens the state and subjects the rights of the people to the whims of whoever controls the political process. This was the major valid criticism of the NIEO and one of the reasons it has not been a success. For example, according to Shadrack Gutto:

> [P]rovisions such as those requiring transnational corporations to exchange industrial and trade information are absurd and unworkable; the same applies to the principles that attack concession gained by coercion. The latter principle is worthless in most third world countries where the leaders are dependent on these same foreign interests for their social and political survival. It should be recognised that foreign investors are inherently part and parcel of the political economies within which they operate. To say that they should not ‘intervene’ in the internal affairs of the countries they operate in is absurd and demonstrates the nature of legal thinking that fails to recognise the integrated nature of foreign capital. Provisions on the duty of states to regulate the activities of transnational corporations are also only relevant if one assumes a political leadership whose social interests and ideology stands in contradiction to those of such foreign institutions.

In sum, the apparently progressive introduction of the concept of ‘peoples’ into the Banjul Charter could actually turn out to be counterproductive in some respects, that is, where the rights and interests of the people are not respected by the state. In such situations, peoples’ rights might initially be treated as state rights and then degenerate into sectarian, class, government, regime and clique rights. In the extreme, they could become certain individuals’ rights. This ultimate perversion has already come to pass in many African countries, such as Zaire, where the incumbents have unfettered control over the disposal of natural resources and state wealth. In situations of despotic misrule, one of the first casualties is usually the economy, as the governors embark on orgies of personal enrichment. The outrageous exploits of such dictators as Amin, Bokassa and Nguema are legendary. Indeed, politics in Africa, and the developing world generally, sometimes seems like a business venture.

The intention of this third sense of ‘peoples’ is not to take the ownership of natural resources away from the people; it is to give control to the country, so as to enable it effectively to protect and administer those resources for and on behalf of the people. Antonio Cassese, commenting on article 1(2) of the Covenants, insisted on the need for popular sovereignty even in the economic arena:

> Article 1(2) - ... is not merely a reaffirmation of the right of every state over its own natural resources; it clearly provides that the right over natural wealth belongs to peoples. This has two distinct consequences. For dependent peoples, the right implies that the governing authority is under the duty to use the economic resources of the territory in the interest of the dependent people. In a sovereign state, the government must utilise the natural resources so as to benefit the whole people. The right of the people over natural resources, and the corresponding duty of the government, are but a consequence, in economic matters, of the people's right to (internal) self-determination in the political field. Just as the people of every sovereign state have a permanent right to choose their own form of government ..., so the people are entitled to insist that the natural resources of the nation be exploited in the interest of the people.

There is no necessary contradiction between the third meaning noted above, which equates ‘people’ with the state, as long as the state acts for the benefit
of all the people, and Professor Cassese’s view, which underlines the need for
democracy in the economic realm. This third meaning refers to the external
application of the right to economic self-determination. The state would
control the commanding heights of the economy so as to minimise leakage and
benefit the people, that is, all the peoples. Under present circumstances,
however, to achieve this goal, it is imperative that the state be controlled by
the people in the democratic sense. This is the message of the Algiers
Declaration. It deals seriously with the relationship between peoples and
their state in a way the Banjul Charter does not. This omission needs urgent
correction; otherwise, the whole basis of peoples’ rights in the economic
sense will hang in doubt.

‘People’ as all persons within a state

The corporate status of the state works very well, provided one is dealing with
external matters and entities. Its misuse and abuse internally leads to the
problems alluded to in the previous section. Because of the inherent nature
of states and governments, at this point in time, a distinction must be drawn
(internally, that is) between the people and their state. This distinction,
although not well demarcated in the Banjul Charter, is important to
recognise. The meaning of ‘people’ it conveys is close to that discussed in
section A above, the difference being that the state in question is
independent or majority ruled. It is through this meaning that one can easily
appreciate the duties of states toward their people, duties provided for in the
Banjul Charter.

Furthermore, ‘people’ in this sense amounts to the aggregate of the different
peoples in the sense noted in section B, referring to minorities. As such, the
people have collective rights against their state. One of these is the
uninterrupted enjoyment of the right to self-determination, which should
protect the people against oppression and exploitation. To quote from
another of Professor Cassese’s numerous contributions on the subject:

It should be added — with the force and clarity that can be found in the Algiers
Declaration — that when the rights and fundamental freedoms of members of a
people are systematically denied this means that that people’s right of self-
determination is also infringed. From this point of view ‘internal’ political self-
determination is, therefore, the synthesis and the summa of human rights. Thus,
‘internal’ political self-determination does not generically mean ‘self-
government’ but rather (a) the right to choose freely a government, exercising all
the freedoms which make the choice possible (freedom of speech, of association,
etc) and (b) the right that the government, once chosen, continues to enjoy the
consensus of the people and is neither oppressive nor authoritarian.

The Banjul Charter provides for a set of individual rights and liberties, which
should complement and reinforce the rights of peoples. However, the
timorous approach to the protection of individual rights (or, indeed, any
rights claimable against a state party) does not offer much hope for this
meaning of peoples to be significantly asserted.

Provided the Commission is allowed to function effectively, it could redeem
some of the grounds apparently conceded to states and governments. It will
be in the interest of all African countries and their peoples for popular
democracy to be given a chance. The lofty ideals of the peoples’ rights in the
Banjul Charter — such as peace and development — depend, in large measure, on respect for individual rights. Peoples' rights cannot be substitute for individual human rights.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS


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A point very often missed in human rights praxis is that economic, social, and cultural rights (ESCR) ‘are the only means of self-defense for millions of impoverished and marginalised individuals and groups all over the world’. Despite the international rhetoric on the equal relevance, interdependence, and indivisibility of all human rights, in practice states have paid less attention to the enforcement and implementation of ESCR, and their attendant impact on the quality of life and human dignity of the citizenry, than other rights. African states, still living with the nightmares of slavery and colonial exploitation, are perhaps unsurpassed in this dreamy, rhetorical exercise.

African states ought to take the lead in the enforcement of ESCR, given Africa’s deplorable socio-economic conditions. They ought not to emulate the industrialised states of the North which can afford the luxury of hollow rhetoric in the implementation of ESCR. Regrettably, African states have so far failed to match their words with appropriate, sufficient action. Where African leaders have asserted the importance of satisfying ESCR as part of protecting other rights, some have done so with the intention of using this rhetoric as a ploy to suppress civil and political rights.

Africa’s worsening socio-economic conditions, and resulting exacerbation of civil and political strife coupled with the current lack of interest in the enforcement of ESCR, renders the effective realisation of human rights on the continent a remote possibility. Even if largely unintended, the neglect of ESCR, a substantial part of an indivisible whole, has brought about this sad state of affairs. This article contends that there is an urgent need for a change of attitude and a relocation of emphasis from neglect and discriminatory enforcement of human rights to respect and balanced, holistic enforcement.
Given the prevailing socio-economic circumstances in Africa, ESCR remain the cardinal means of self-defense available to the majority of Africans.

In the 1993 Vienna Declaration, the consensus opinion recognised the futility inherent in entrenching civil and political rights without the corresponding ESCR. This consensus emerged despite the bipolar (East-West) ideological differences, which then dominated international relations, and led to the implementation of the Universal Declaration of Human Rights (UDHR) by means of two international covenants, and continue to have grave implications for ESCR. Long before the Vienna Declaration, the UDHR set the parameters for evaluating the legitimacy of governmental actions by codifying ‘the hopes of the oppressed, [and] supplying authoritative language to the semantics of their claims’. The euphoric ‘Never Again’ declaration by the victorious powers after World War II was intended to encapsulate humanity's resolve to banish human misery in all its ramifications, whether arising from physical abuse or from want.

If the purpose of government is to provide for the welfare and security of all citizens, governments fail to fulfil this purpose when they commit to enforcing only civil and political rights. Such an ostrich-like posture denies the various forms of state abuse against which the citizen must be protected: Above all, the state's neglect of its citizens. Even opponents of enforceable ESCR recognise this axiom. The de facto commitments of many Western states to a welfare ethos, despite their official opposition to ESCR, assures a high degree of compliance in protecting the rights of their citizens.

Modern governments are active participants, not passive spectators, in events that fundamentally impact the ability of the people to lead a meaningful and dignified life. Governance ceases to be meaningful when the majority of the people is put in a situation where it cannot appreciate the value of life, let alone enjoy its benefits, and where it lacks the appropriate mechanisms to compel change. Where human survival needs frequently go unmet, as in Africa, protection of human rights ought to focus on ‘preventing governments from neglecting their citizens’.

A point that is often overlooked in contemporary human rights discourse and practice is that the greatest benefit of guaranteeing enforceable rights is the assurance it gives to people that effective mechanisms for adjudicating violations or threatened violations of their rights are available. As events in many parts of Africa have shown, the absence of such mechanisms gives the impression that resort to extra-legal means, such as armed rebellion, is the only way to improve one's condition or challenge governmental abuse and neglect. Most current African conflicts consist of people who are fighting not against themselves but against poverty and governmental inaction in the face of destitution. This conflict usually is due to many years of impoverishing neglect and to the absence of other viable ways of compelling meaningful change. Because governments are increasingly expected to meet the basic needs of their citizens, there is a growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action. As Callisto Madavo, World Bank Vice President for the African region, observes, ‘Africa's wars are not driven ... by ethnic differences. As elsewhere, they reflect poverty, lack of jobs and education,
These are, for the most part, socio-economic and political conflicts among ethnically differentiated peoples. Although holistic protection of all rights will not prevent every conflict, it will defuse the majority of conflicts that are triggered or sustained by those who exploit abject socio-economic conditions. Scholars have demonstrated a causal link between these conflicts, which can be seen as a people's violent resistance to their deplorable socio-economic conditions, and the absence of perceived modes of effecting a peaceful change. On the psychological level, it has been observed that:

[T]he gap between what a people expect as being just and fair and what they actually have can heighten a sense of unfair treatment and so develop a sense of deprivation ... Feelings of deprivation ... provide fertile grounds for mobilising opposition and the affected group with the real potential for collective violence and social instability. Economic, social and political institutions that are perceived to have failed to address the conditions producing deprivation become victims of vicious campaigns that can lead to [violence] ... [T]he fear of unemployment and the strain of reduced economic security in people's private lives can create tremendous anxiety and agitation. Psychologically, reactions to unemployment, especially when it is rising, and its attendant strain of reduced economic security may create fear, frustration and aggression ... Conceivably, the fear of social instability may increase the potential for violence.

This relationship between deprivation and conflict underscores the fundamental link between protection of human rights and stability. The intimate relation between stability and human rights, in turn, reinforces the necessity of guaranteeing the enforcement of all human rights without exception. Since the different rights are interconnected and operate in support of each other, it logically follows that the full realisation of one set remains dependent on the realisation of the other. In a state of instability resulting from the denial of basic ESCR, it becomes difficult, if not impossible, to realise civil and political rights, and vice versa.

Apart from the instability it causes, the non-realisation of ESCR creates insurmountable obstacles to the enjoyment of civil and political rights. People can only be free from abuse and exploitation when they have what it takes to assert their rights and free themselves from exploitative rule. Because the majority of Africans are illiterate and poor, they lack the requisite knowledge and means to assert their rights, let alone enjoy them. As UO Umozurike observes:

A great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. To the many rural dwellers in any African state, and indeed to the urban poor, the lack of awareness or means make it impossible for them to assert their rights. They are very much at the mercy of their rulers.

Thus, even a society interested in protecting only civil and political rights should give equal priority to ESCR as a practical means to achieving the former. An absence of the latter commitment deepens a collective feeling of injustice. The majority, comprised of the more vulnerable members of society, cannot but feel that it has been denied an accepted forum for the recognition and redress of injustices. Moreover, the non-enforcement of ESCR ridicules the so-called autonomy of the individual, a concept that is the
Adequate socio–economic conditions must exist as a precondition to personal autonomy. As Joseph Raz illustrates:

A person whose every major decision was coerced, extracted from him by threats to his life or that of children, has not led an autonomous life. Similar considerations apply to a person who has spent the whole of his life fighting starvation and disease, and has no opportunity to accomplish anything other than to stay alive ...

According to Raz, autonomy ‘affects wide-ranging aspects of social practices and institutions ... Almost all major social decisions and many of the considerations both for and against each one of them (whether civil and political rights or ESCR) bear on the possibility of personal autonomy, either instrumentally or inherently’.

African states have not failed to recognise the dangers of a selective — as opposed to holistic — recognition of human dignity. The African Charter remains a testament to the collective recognition of the indivisibility of human rights and dignity. As parties to the Charter, African states apparently appreciate the necessity of a holistic approach to enforcement. While this must be pursued at the international and regional levels — as the African Charter seeks to do — the locus of active enforcement must be the domestic arena where the mechanisms of enforcement will be within easy reach of aggrieved citizens and thus more widely utilised. Moreover, international protection or mechanisms are designed to complement the domestic protection of human rights. As Theo van Boven persuasively argues, international procedures ‘can never be considered as substitutes for national mechanisms and national measures with the aim to give effect to human rights standards. Human rights have to be implemented first and foremost at national levels’.

Anything short of a holistic enforcement of human rights at the domestic level belies the African Charter's recognition that ‘the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights’.

Bifurcated enforcement is not in keeping with the virtues of Africa's historical tradition and the values of African civilisation, which are among the founding philosophies of the Charter. African states subscribed to a Charter that acknowledges the importance traditionally attached to these rights, and, therefore, ought to do more than pay them lip service.

Rather than the existing approach to enforcement, which marginalises ESCR, action should be taken across the board to ensure a minimum level of enjoyment of all human rights. As argued in the next section, the excuse of impossibility of performance due to underdevelopment, often put forward by African leaders and some scholars, does not represent the whole truth. It is too often a rationalisation for a lack of political will and the continued elevation of luxury over necessity.

... Unless there is a committed rejection of the dominant Western paradigm that has historically viewed civil and political rights as the rights that are most worthy of enforcement, substantial progress towards the enforcement of ESCR in Africa may continue to elude African states. The West may be able to
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maintain such a model, because its attainment of an appreciable standard of living provides an environment that enables the enjoyment of civil and political rights. African states do not enjoy this luxury. They cannot afford this model without facing widespread civil and social strife. Already, by adopting a charter that departs markedly from the European Convention and Inter-American Convention, African states demonstrated an understanding of the inadequacies of the two systems for their purposes. A rejection of the Western model, therefore, merely requires a practical commitment to the noble intentions expressed in the African Charter.

This practical commitment does not necessarily entail guaranteeing the maximum enjoyment of all the Charter’s provisions on ESCR. Rather, it requires judicial (including quasi-judicial and other forms of independent review), legislative, and executive actions to ensure a baseline, minimum protection of all rights equally. A truly African approach is one that practically parallels the African Charter or one that critically reflects the South African model.

Rejection of the Western model, as advocated here, presupposes a complete rejection of ideologies that subordinate ESCR. It does not, however, advocate a puritanical isolationist movement that heedlessly rejects the obvious achievements of the institutional structures of Western human rights regimes. As the next section demonstrates, the institutional mechanisms of these older regimes have something important to offer in spite of their normative and ideological shackles.

Alternative enforcement approach

The best way to effectuate any human rights provision may be to subject it to direct judicial scrutiny in the way that many systems currently protect certain human rights. For ESCR, such procedures are lacking in many African states. Given the necessity of ensuring effective protection of human dignity — the enjoyment and protection of all rights without discrimination — additional means ought to be utilised to give effect to ESCR provisions.

In recommending the adoption of the following approaches, I am wary of appearing to advocate subjugation of ESCR to other rights. I do not. Rather, these approaches are put forward as interim measures pending the adoption by state authorities of a regime of directly enforceable (justiciable) ESCR. Ironically perhaps, I draw insights from the jurisprudence of Western human rights systems (European and Inter-American) that place ESCR in a subservient position and whose ideological foundations I partially reject. However, if, as I have argued, it is true that ESCR and other rights are inseparable, it should not be surprising that effective systems set up to protect the latter will find their way into the territory of the former. These regimes have recently demonstrated an ability to adjust to the challenges of addressing basic violations of ESCR. In particular, the European Court on Human Rights offers a rich insight into how a progressive judicial, quasi-judicial, or administrative body can transcend normative hurdles in finding solutions to serious human rights problems. Its jurisprudence is, therefore, relevant for immediately effectuating ESCR in African states where these rights are still not
domestically justiciable, notwithstanding the provisions of the African Charter.

... Human rights in Africa should be a quintessence of Africa’s attempt to reclaim humanity following its devaluation by the most invidious abuses, especially the slavo-colonial, tentacular reach of some European states. Full reclamation of humanity entails equal emphasis on what it takes to be human. This equal emphasis translates into equal enforcement of all human rights, whether civil and political or ESCR, without discrimination. It requires a change of attitude towards ESCR in contemporary Africa. Protecting and enforcing only civil and political rights in a situation of exacerbated civil and political strife occasioned by worsening socio-economic conditions ‘projects an image of truncated humanity’. It ‘excludes those segments of society [the overwhelming majority] for whom autonomy means little without the [basic] necessities of life’. As the South African Constitutional Court underlined in Grootboom: ‘A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality and freedom’. The solution lies in adopting a truly holistic view of human dignity: One that is ‘pursued in light of both the overarching purposes and underlying values of human rights protection, rather than under the constraint of false dichotomies’.

...
economic and human needs, or is it a self-serving justification for the centralised power of an elite? May civil and political rights ever justifiably be suspended, even in the pursuit of economic justice and equality?

\[\text{Au fond,}\\text{the debate over priorities or non-priorities of civil or political vs economic human rights is a debate about human nature. The ‘full-belly’ thesis is that a man’s belly must be full before he can indulge in the ‘luxury’ of worrying about his political freedoms. Yet there is an alternate view that human dignity, or perhaps self-respect, is a fundamental requirement of human nature ... To achieve such dignity, each individual needs a certain amount of order, physical security, and personal freedom.}\\]

\[\text{Civil and political rights are necessary for economic development and redistribution of wealth.}\\

According to Meltzer, there are two competing paradigms of how civil political rights and economic development interact in the Third World:

\[\text{Development requires significant economic growth and social stability. Such growth and stability often require limiting civil and political rights. Therefore, development often requires the limitation of civil liberties and political participation to succeed.}\\

\[\text{or}\\

\text{Development requires active participation of people and the fulfilment of basic economic and social needs to be effective. Deprivation of civil and political rights and human needs destroys that possibility. Therefore, failure to provide for human rights and basic needs makes development impossible.}\\

\text{Which paradigm one considers correct depends to a large extent on one’s definition of the term ‘development’. Most serious discussions of development in Africa refer to some combination of absolute growth, redistribution of wealth in a more egalitarian manner, and increased national autonomy or self-sufficiency, as for example in the rhetoric of ‘African socialism’ in Kenya, of ‘ujamaa’ in Tanzania, and of ‘humanism’ in Zambia. For such development, civil and political liberties are necessary both to ensure that proper development policies are implemented and inappropriate policies changed, and to ensure that wealth is distributed equitably among all a country’s citizens. Such civil and political rights are necessary to ensure that political participation is effective as well as active; that is, that ordinary people’s wishes are communicated to political leaders and that they actually affect policy. As Hayward remarks:}\\

\text{Participation of this sort — participation which is designed to be instrumental — is seldom tried ... This is because of failures at various leadership levels or, more often, because it is not allowed to be effective. Those in power feel that they have too much at stake to delegate or share their authority ...}\\

\text{According to the first paradigm quoted above, economic stability requires cessation of civil and political freedoms. There is some truth to the argument that African nation-states are very fragile, and that ethnic, linguistic, or regional particularisms might threaten their political existence, hence also their economic integrity. A country might become so involved in political competition that nothing else gets done; suppose, for example, that the Nigerian Electoral Commission had not reduced that country’s original nineteen political parties to five national parties in 1979. But in sub-Saharan}
English-speaking Africa the problem is not too much political freedom; rather, it is that, with the present exception of Nigeria, there is so little political freedom that economic development policies must evolve in an intellectual vacuum; a vacuum, moreover, that ensures the continued privilege of the ruling elite.

There is no known successful model of economic development which can be applied without substantial modification to sub-Saharan Africa. African states cannot imitate the development history of the Western world, with its empires and colonies. Nor do African states have the centralised bureaucracies and nationalist sentiments which aided Russia and China. Small, ethnically diverse states with mixed economies, such as Yugoslavia, are probably the closest models which African countries could follow. But no model is perfect. Comprehensive economic policy-making, therefore, requires flexibility and freedom of debate, as well as a real understanding of African complexities, rather than ideological myths whether of right or left.

... Furthermore, insofar as Africa lacks human capital, it is unwise to alienate those experts it does have by consistently violating their rights to freedom of expression. Those people who are best equipped with the expertise necessary to implement development policies are also those who are least likely to keep quiet when they see errors being made. Yet governments often react to criticism from academics by closing down universities, sometimes for considerable periods of time. Professors who are exiled or jailed cannot contribute to economic development. There has, for example, been a flight of professionals from Ghana in the late 1970s and early 1980s, partly as a result of political repression and partly because poor economic planning contributed, with worsening world economic conditions, to a severe decline in their standard of living. Furthermore, students who are expelled from a university or whose education is interrupted (in many disciplines, irrevocably) are a national disinvestment. Countries with very little human capital cannot afford to alienate those who possess knowledge in the interests of party loyalty or of spurious consistency of development policy, especially considering that elite individuals can also foment coups d’état.

Originally mass-based political regimes can become narrowed into cliquish control of the organs of state (as, I suggest, would probably have happened in Zambia [1980 and 1981] and Kenya [1982] had the attempted coups in those countries succeeded). Again, the long-run costs of denial of political participation are both the inefficient implementation of economic policies, and the undermining of what little political freedom exists by even more repressive successor regimes.

So far, this discussion has assumed that economic policies are formulated in good faith; that is, that the rhetoric of national development is what impels economic decisions. This assumption is, of course, erroneous. A serious analysis of the relationships between civil or political and economic human rights must confront the fact that sub-Saharan African societies, like all other societies, are stratified by social class, and that the elites who formulate economic policy may well be doing so in their own interests, not in the interests of the malnourished masses. Many Third World elite spokespeople are highly supportive of the proposed policies of the New International
Economic Order, which deals with inequalities among nation states, but quite touchy about the ‘basic needs’ development proposals, which deal with inequalities within nation-states. In some countries, corruption among such elites is rampant. The Kenyatta family, for example, apparently profited substantially from Jomo Kenyatta’s executive powers until his death in 1978. Criticisms of their economic power in British newspapers resulted in the papers being seized in Kenya in 1975.

... The ‘right to development’, touted by African elites as a prerequisite to the more traditional human rights, may well be merely a cover for denial of those basic civil and political liberties which will allow the dispossessed masses to act in their own interests. To wait for economic development, including a ‘basic needs’ oriented redistribution of wealth, to occur before allowing for civil and political liberties is to invite the possibility that such redistribution will never occur. Even in socialist societies, elites entrench and perpetuate themselves. Without human rights, the evidence suggests, economic growth may occur but economic development will not. ‘Fullbellies’ require political participation and civil liberties.

Civil and political rights are necessary to preserve social order, and social and cultural rights

In the introduction to this paper I noted that the position that civil or political liberties can be left in abeyance until basic economic rights are secured is based on a view of human nature which assumes that the individual whose belly is not full has no interest in dignity, self-respect, or personal freedoms. I believe, rather, that while individuals need physical security (both physical integrity and economic subsistence), they also need a sense of social order and of belonging to that social order; that is, a sense of belonging expressed in their cultural, linguistic, and ethnic ties to their community.

Interestingly, those rights which would preserve the peoples’ sense of belonging to a community, of having the self-respect which comes from fulfilling one’s role in society, are guaranteed, in international law, not in the Economic, Social and Cultural Rights Covenant of 1966, but in the Civil and Political Rights Covenant. Especially important is article 27, guaranteeing to Minorities the right ‘to enjoy their own culture, to profess and practice their own religion ... [and] to use their own language’. Both the 1966 Covenants also contain articles protecting the family. These rights are the basis for the protection of the community against the centralised, bureaucratic State.

They are paralleled in the African Charter of Human and Peoples’ Rights by article 17(2) guaranteeing each individual the freedom to take part in the cultural life of his community, and 17(3) asserting that ‘the promotion and protection of morals and traditional values recognised by the community shall be the duty of the State’ and by article 18, protecting the family. That these rights, essential to the preservation of society and culture, actually are included in the Civil and Political, rather than in the Economic, Social and Cultural Covenant, shows the irrelevance of the legalistic separation of the two ‘kinds’ of rights.
Christian Bay believes that there is a fundamental human ‘need to belong and be accepted in a (non exploitive) human community: In this position he is supported by African philosophers who maintain that ‘personhood’ in Africa is attained by one’s belonging to, and fulfilling one’s role in, the community. There is strong sociological evidence to support these philosophical suppositions. In all known societies, similarities of social structure create similar human beings with similar human ‘natures’. These common social structures include kinship systems which place each individual in society; rituals which reinforce the individual’s sense of belonging and basic systems of exchange, law and order, and legitimate authority which regulate the individual’s relations with others within a mutually-recognised framework. Such a framework is a necessary part of the individual’s environment; its legitimacy and predictability offer him security in his everyday life. The sudden elimination of, or interference in, such structures can result in the destruction of entire communities, even if their individual members survive in a physical sense. Therefore, it is the first duty of the emerging centralised African state to preserve the basic organisation of communal societies. 

All communal groups need means to defend themselves against encroaching power of the centralised state; each individual needs means to protect him or herself against violations of laws or discrimination in cases in which his or her original membership group is powerless, or unwilling, to act.

Civil and political rights are necessary in and of themselves

In section II, I made the pragmatic argument that civil and political liberties will enhance the possibilities for economic development and equitable distribution of wealth. In this section I make a sociological argument, based on empirical examples, that along with, or even prior to, economic security, ordinary people may wish to have the kinds of rights which we consider under the rubric of civil and political liberties. In some cases, ordinary people will ‘trade off’ their full bellies for freedoms of a non-material nature.

In making this argument, I am referring not to the fundamental security rights such as freedom from torture and arbitrary execution (which I take for granted are desired by all individuals), but to the less physically necessary rights of intellectual freedom and political participation. Some African scholars argue that the assertion that people need individual liberties such as freedom of expression or association is a Eurocentric position. Inasmuch as such a position evolves from the Enlightenment tradition of human nature and human rights, it inadequately reflects, or indeed does not reflect at all, the culture of Third World societies. But there is debate among African scholars over this question. Others take the view that civil and political freedoms are an absolute necessity within Africa. Indeed, Adegbite goes so far as to assert that the contention that Africans have lesser needs for liberty than Europeans is merely another manifestation of racism. In any case, the African Charter of Human and Peoples’ Rights does include a number of the common civil and political freedoms, and the original Charter of the Organization of African Unity ‘commits its members to support the 1948 Universal Declaration of Human Rights’. One might reply, however, that such formalistic recognitions of human rights merely represent an intellectually-colonised, elite view of society (in theory, if not in practice). What is the evidence that ordinary
people will value their civil or political freedoms over a ‘fullbelly?’ The actions and decisions of ordinary Africans are not normally recorded. Even survey data on political participation or basic needs will not necessarily ask the kind of question which will let us know, for example, whether ordinary people would be willing to stop reading newspapers in return for a guarantee that they would receive twelve yards of new cloth a year, or whether they would be willing to stop speaking their ethnic language in return for better access to education.

... Without indulging in idealism, one can hypothesise that there is a universal belief in fairness and justice which permeates all societies. The content of what is fair may differ, but all societies have a rule of law and a system of legitimating authority. In large-scale, heterogeneous modern societies, an efficient means of guaranteeing that law is just and authority legitimate is to implement civil and political freedoms which protect the individual against abuse of law, and allow the individual effective participation in the choosing and operations of government. When non-elite Africans are confronted by the centralised modern state, they ‘need’ the same sorts of protections to preserve their sense of justice and fairness as the elites ‘need’. Their belief in fairness and legitimacy will result in demands for civil and political freedoms simultaneously with demands for economic development. Such freedoms cannot merely be put aside until all bellies are full.

... Is there a hierarchy of human rights?

A number of attempts have been made to establish a hierarchy of human rights or, alternately, a list of basic human rights which cannot be violated under any circumstances, as opposed to human rights which are of secondary importance and which may be delayed until economic development occurs. In this section, I suggest not a hierarchy, but rather a categorisation of different kinds of rights. This categorisation will show that basic needs and hence basic ‘rights’ (accepting that basic rights ought to be derived from basic needs) are both civil or political and economic, social or cultural in content; the separation of the two ‘kinds’ of rights is a false distinction arising out of ideological and political disputes.

Firstly, it appears that there is a basic right to personal or physical integrity; in Shue’s term, to security and subsistence. This right is both political and economic in nature. In political terms it means the right to freedom from execution and torture, as well as perhaps freedom from arbitrary arrest and imprisonment. In economic and social terms it means the right to freedom from execution and torture, as well as perhaps freedom from arbitrary arrest and imprisonment. In economic and social terms it means the right to adequate nutrition and a minimal standard of health care (though there are difficulties in defining what such a minimum means; Brockett defines it as health care for children. The economic right of adequate nutrition has, of course, its own political dimension. Nutritional standards are a result as much of the distribution as of the ultimate supply of food. Similarly health care in Africa varies by social class and by urban or rural location. In Nigeria, for example, there are seventeen times as many doctors and thirteen times as many nurses in the capital, Lagos, as in the rural areas; and seven times as many doctors and five times as many nurses overall in the urban as in the rural area. To obtain basic economic rights requires political clout.
Secondly, there are two kinds of ‘human dignity’ rights which, I believe, any person living in a small-scale, communal, non-modern society would want, even if (hypothetically) such a person were unconcerned with ‘Western’ individual rights. The first is a right to an historically and culturally defined minimum absolute wealth; that is, to a fair share of the community’s economic resources. Along with this there is the need for the ‘right of belonging’ or the right to community; that is, the need to feel secure in one’s kinship or social system and in one’s exercise of custom, ritual, culture; the need to feel that those who have power have some legitimacy and are not arbitrary.

Thirdly, there are two kinds of rights stressed in the Western political tradition but not confined to it: Individual civil and political freedoms, and socialist equality. As Hodgkin rightly points out, the Western political tradition includes socialism as well as liberal capitalism. The socialist ideal is that of relative, not absolute, wealth, and is grounded in the belief that inequalities of wealth should be eliminated. I believe that relative wealth is less important than absolute wealth. As Barrington Moore argues, people do not mind economic inequality, so long as they feel that they themselves are getting their fair share; that is, equity is more important to them than equality. Christian Bay agrees:

*The general issue of equality of incomes is not as important as it has been supposed to be ... First, there must be a right to a minimum income ... enough to achieve security for everyone ... Second, there must be a right to equal pay for equal work ... [But] [w]hat matters concerning equality is equal respect and equal dignity, not the dollars and cents value of equal pay ... What matters is not equal treatment ... what matters is treatment as equals.*

This means, for example, that levelling types of economic tactics such as practiced in the villagisation programme in Tanzania may not only be detrimental to long-run economic growth, but may also not be in accord with ordinary people’s perceptions of what is wrong with their society. Nyerere’s statement in 1963 that ‘Tanganyika would reject the creation of a rural class system even if it could be proved that it would give the largest overall production increase’ may reflect his own admirable moral principles, but not the beliefs of his poverty-stricken countrymen, for whom he ostensibly speaks. As long as the inequalities are not so severe as to be ‘degrading’, they may be tolerable.

Similarly, with regard to the Western tradition of civil and political liberties, people will accept what they consider to be legitimate authority. They are not necessarily interested in a levelling or absolute sharing of all political power. Legitimation of government through competitive elections within a one-party system, as in Tanzania, Zambia, or Kenya may indeed satisfy their desires for political input at the national level, as long as such elections are fairly and freely conducted, and as long as their representatives have a genuine right to free speech and criticism. But people are also concerned with a right to freedom of social intercourse (assembly and association) and speech; they do not want their day-to-day lives interfered with and they want the right to speak out on their own as well as through representatives. The state which spies on its citizens in a totalitarian manner is therefore more oppressive than an elite which merely monopolises the formal trappings of power, without much interference in what ordinary people do or think. (in
this respect, one wonders if Tanzania’s ten-household cell system may be regarded as oppressive by its ordinary members. In this system, everyone, whether or not a member of the ruling and only political party, is integrated into a local structure which allegedly facilitates communication and feedback from the base to the leadership. But in practice, top down communication is the norm. Moreover, the cell leader has the duty to urge his or her members to pay taxes and join the Party, and to mediate — interfere? — in local disputes.

The ‘full belly’ may not always precede moral integrity, the right to community, or political freedom in the value system of an individual. Indeed, Bay goes so far as to assert that ‘many, perhaps most, human beings tend to be prepared for extremes of self-sacrifice for family, friends, comrades, or a cause’. There is no reason to think that ordinary Africans have less capacity for moral speculation than members of the African or Western elite, although they may have less capacity to articulate or act on their beliefs. As an anonymous participant in the 1966 Dakar seminar on human rights put it, ‘To sacrifice the liberties inherent in the human personality in the name of economic development... [is] to reduce the individual to the role of producer and consumer of goods, which ... [is] far too high a price to pay for improving the material conditions of existence’.

THE RELATIONSHIP BETWEEN CONFLICT AND HUMAN RIGHTS

Parlevliet explores the link between conflict and human rights.


11 Track Two: Constructive Approaches to Community and Political Conflict

Human rights abuses are both symptoms and causes of violent conflict

The relationship between human rights abuses and conflict is a useful starting point for assessing how the fields of human rights and conflict management are linked. Violent and destructive conflict can lead to gross human rights violations, but can also result from a sustained denial of rights over a period of time. In other words, human rights abuses can be a cause as well as a consequence, or symptom, of violent conflict. The symptomatic nature of human rights violations is well known, as news agencies continually report on armed conflict around the world and recount its consequences in terms of loss
of life and the mass movements of people trying to escape from violence and
destruction. The 1994 genocide in Rwanda, in which some 800,000 people died
in just 100 days, stands as one of the most chilling illustrations of the scope
of atrocities that conflict can generate. The protracted conflicts in Angola
and Sudan demonstrate that this kind of abuse does not only flare up in the
short-term: In both countries, the population has experienced decades of
human rights violations resulting from the wars taking place. One could argue
that a culture of abuse has become entrenched. At times, specific human
rights abuses have deliberately been used as a strategy of war to fight and
intimidate opponents and terrorise civilians. The mutilation and amputation
of people’s hands and other body parts by the rebels of Foday Sankoh’s
Revolutionary United Front in Sierra Leone is a case in point, as was the
systematic use of rape in ‘ethnic cleansing’ in Bosnia. Human rights may also
be affected in more indirect ways, through, for example, the destruction of
people’s livelihoods or the refusal of belligerent parties to allow humanitarian
relief activities in areas under their control.

The causal nature of human rights violations, on the other hand, can be
illustrated by the case of South Africa under the former apartheid regime. A
sustained denial of human rights gave rise to high-intensity conflict, as the
state’s systemic oppression of the civil and political liberties of the majority
of the population, and its restraints on their social, economic, and cultural
rights, resulted in a long-lasting armed liberation struggle. Jarman argues
that the situation in Northern Ireland was similar. Claims of systematic abuse
of the civil and political rights of the Catholic nationalist community after
partition in 1921 (related to the manipulation of electoral boundaries, voting
rights, access to housing and employment) led to the rise of non-violent civil
rights movement in the 1960s. When this failed to generate an adequate
response and reforms, violent conflict erupted. Numerous conflicts have been
caused by human rights issues such as limited political participation, the
quest for self-determination, limited access to resources, exploitation,
forced acculturation, and discrimination. For example, the conflict in the
Delta Region in Nigeria is not only due to the oil-related pollution in the
traditional living areas of the Ogoni people, but also to the fact that they seek
a larger degree of autonomy and greater control of the oil production and
profit. Rights-related concerns also motivated the uprising of the
Banyamulenge Tutsi minority in Eastern Zaire in 1996 and their overthrow of
Mobutu. These included, among other things, discrimination at the hands of
Mobutu’s regime over three decades, the decision of a provincial governor to
expel this minority from Zaire where they had lived for 200 years, and
Mobutu’s support for Hutu Interahamwe (militia) who had been involved in
the Rwandan genocide. It should be noted here that denial of human rights
does not only occur through active repression, but can also come about
through the inability of the state to realise the rights of its citizens, especially
in the socio-economic domain. Such ‘passive violation’ also deepens social
cleavages and rivalries, thus enhancing the potential for destructive conflict.
In several African countries, this is reflected in the way in which access to the
political system is highly contested: In societies marked by abject poverty,
control of the state is often the only way to achieve economic security.

For both human rights actors and conflict management practitioners, it
matters whether gross human rights violations resulting from conflict is the
main concern, or whether the focus is on conflict resulting from a denial of human rights. The problems to be addressed are different and so are the desired outcomes. If human rights violations as a symptom of conflict are the issue, the primary objective is to protect people from further abuses. International humanitarian law is an important instrument in this regard, as it seeks to limit the excesses of war and to protect civilians and other vulnerable groups. Activities of intermediaries are then aimed at mitigating, alleviating, and containing the destructive manifestation of conflict. They include peacekeeping, peacemaking, peace-enforcement, humanitarian intervention, humanitarian relief assistance, human rights monitoring, negotiating cease-fires, and the settlement of displaced persons.

On the other hand, when human rights violations are causing violent conflict, the main objective of activities by both human rights and conflict management actors is to reduce the level of structural violence through the transformation of the structural, systemic conditions that give rise to violent conflict in a society. Galtung introduced the term structural violence to refer to situations where injustice, repression, and exploitation are built into the fundamental structures in society, and where individuals or groups are damaged due to differential access to social resources built into a social system. As explained further below, human rights standards are primary instruments in this regard, as the protection and promotion of human rights are essential in addressing structural causes of conflict. Activities can include peacemaking, peacebuilding, reconciliation, development and reconstruction, institution-building, and accommodation of diversity by protecting minorities. Thus, whereas direct, physical violence is the main concern when one focuses on human rights violations as symptoms of destructive conflict, considering rights violations as a cause relates to structural violence. The desired outcome of the former is peace in the sense of an absence of direct violence — so-called negative peace. However, in the case of the latter the goal is to achieve positive peace. This refers to the absence of structural violence, or, framed differently, the presence of social justice, including harmonious relationships between parties that are conducive to mutual development, growth, and the attainment of goals.

The figure above shows that the distinction between human rights violations as a symptom and as a cause of destructive conflict relates specifically to the focus and the aim of interventions, not to different scenarios. In other words, both aspects of the human rights or conflict relationship can be present in the same situation; this is generally the case in civil wars.

Moreover, it should be noted that these aspects are closely related in a number of ways, even though the distinction between causes and symptoms is made here for analytical purposes. The ways in which human rights abuses as both a cause and a symptom of violent conflict are related are briefly mentioned here, and will be discussed further below. First, violent, high-intensity conflicts are largely manifestations of deeper-lying, structural problems. If the latter are not addressed, people’s frustration, anger, and dissatisfaction may rise to such an extent that they mobilise to confront real or perceived injustice. In other words, in situations where human rights violations occur as a consequence of conflict, a sustained denial of rights often lies at the heart of that conflict (as exemplified by the case of South
Africa under the apartheid regime). Second, activities aimed at conflict mitigation and alleviation can have an impact on the prospects for longer-term efforts towards peacebuilding and conflict resolution. If the symptoms of conflict are effectively and constructively addressed, this can provide a basis for parties to work on the more structural issues, particularly if trust has developed between them. Third, the desired outcomes for human rights abuses as a cause or symptom of destructive conflict, influence one another. Negotiated agreements that address the symptoms of violent conflict — thus pursuing negative peace — must include provisions for future processes towards institution-building and transformation if they are to be sustainable. If they are merely concerned with ending hostilities but do not address the core causes underlying the conflict, they will only be of temporary value. Fourth, efforts to achieve positive peace are fundamentally tied to the ability of parties to end hostilities and to prevent violations of human rights. Peacebuilding processes and efforts to alter structural conditions in society are long-term undertakings. Securing negative peace is necessary to create the space and stability for such processes to take effect.

...
Our understanding of conflict at a general level has a critical bearing on our response to its emergence in specific situations. If we consider conflict to be inherently destructive, then our efforts are bound to be directed towards suppressing or eliminating it. Such efforts are more likely to heighten than lower the level of tension. On the other hand, if we view conflict as normal and inescapable, then the challenge lies in managing it constructively. States which are stable are not free of conflict. Rather, they are able to deal with its various manifestations in a stable and consensual manner.

In the national context, conflict management is the essential, ongoing business of governance. It is the formal responsibility of the executive, parliament, the judiciary, the police, local authorities, and other state structures. Crises arise when states do not have the institutional capacity to fulfil that responsibility. Where a state lacks the resources and expertise to resolve disputes and grievances, manage competition, and protect the rights of citizens, individuals and groups may resort to violence. If the state is too weak to maintain law and order, then criminal activity and private security arrangements may flourish. Somalia and Liberia are often cited as typical examples of this problem in Africa but they are better seen as extreme cases on a continuum of weak states throughout the continent.

Crises also arise when states lack popular legitimacy, either because they are wholly authoritarian or because they exclude ethnic minorities from full participation in a democratic political system. Oppressed and marginalised communities may seek to resolve the crisis through armed rebellion. Hostilities are likely to be intense and sustained because the stakes are high. Exclusion from formal governance may have a profoundly negative impact on physical security, basic rights, cultural identity, economic opportunity, and access to resources.

Just as our understanding of conflict informs the nature of peace initiatives, so too does our notion of ‘peace’. For the governments and inhabitants of stable Western democracies, this concept is not problematic. Defined as the absence of widespread physical violence, peace is deemed to be an unqualified good in terms of orderly politics and the sanctity of life. Since civil wars lead to extensive suffering and loss of life, it would seem to be obvious that the prevention and termination of warfare is a paramount goal.

The protagonists in a civil war have an entirely different outlook, however. Oppressed groups may prize freedom and justice more than peace. They may consequently be prepared to provoke and endure a high level of physical violence in order to achieve the rights of citizenship. Insofar as mass resistance threatens the status quo, peace serves the interests of the ruling elite and its foreign backers. In these circumstances, the cessation of hostilities is less a goal in its own right than an outcome of the belligerents’ willingness to reach a political settlement that addresses the substantive causes of violence.

Put differently, the absence of justice is frequently the principal reason for the absence of peace. Acute injustice invariably leads to popular struggles that are met by repression. Foreign powers that support dictators in the interests of ‘stability’, as in the case of former President Mobutu of Zaire, are
simply postponing the inevitable conflagration. Both ethically and analytically, the primary goal of external and local endeavours to prevent and end civil wars is best formulated as the establishment of peace with justice. This formulation reflects Johan Galtung’s conception of peace as encompassing both ‘negative peace’ (defined as the absence of personal violence) and ‘positive peace’ (defined as the absence of structural violence or the presence of social justice). In situations of systemic injustice, the attainment of peace entails radical change rather than the preservation of order.

The goal of ‘peace with justice’ is neither simplistic nor absolute. In the course of negotiating the termination of a civil war, the belligerents have markedly different perceptions of a just settlement. The tension revolves around the need to meet both the aspirations of the majority and the fears of minorities; the redistribution of limited resources, such as land; the debate over amnesty versus prosecution in respect of past human rights violations; the future composition of the security forces; and the accommodation of ‘villains’ who might otherwise thwart a transition to democracy. The disputant parties are obliged to compromise their maximalist demands in order to resolve these tensions. What matters greatly is whether the parties and their constituencies consider the final settlement to be sufficiently just.

Justice in the socio-economic sphere is no less important than in the political arena. Where underdevelopment is coupled with extreme inequality, sporadic acts of violence may occur as expressions of anger, frustration, and fear. The pattern of urban riots in African countries suggests that the risk of violence increases when poor socioeconomic conditions deteriorate rapidly and suddenly; when government is corrupt and unresponsive to the needs of citizens; and when poverty and unemployment are linked to an inequitable distribution of wealth. In 1998 Archbishop Desmond Tutu issued the following warning to the South African government: ‘The surest recipe for unrest and turmoil is if the vast majority have no proper homes, clean water, electricity, good education and adequate health care ... If the disadvantaged, the poor, the homeless and unemployed become desperate, they may use desperate means to redress the imbalance’.

Whereas political actors equate a crisis with actual or imminent hostilities, the argument here is that crises and violence are related but distinct phenomena. A society that is vulnerable to being overwhelmed by violence is already a society in deep crisis. As indicated above, violence is typically a manifestation of a structural crisis, being either a deliberate and organised reaction thereto or a spontaneous and sporadic outcome thereof. Michael Brecher draws a similar distinction at the interstate level: ‘In short, a crisis can erupt, persist and terminate with or without violence. War does not eliminate or replace crisis. Rather, crisis is accentuated by war. Viewed in these terms, war is a continuation of crisis by other means’.

The argument can be illustrated by the Banyamulenge uprising, which began in eastern Zaire in 1996 and resulted in the overthrow of Mobutu. The international community regarded the rebellion as a major political and humanitarian crisis. The UN secretary-general and a number of Northern states and relief agencies called for the rapid deployment of a multinational
military force to protect Hutu refugees encamped in eastern Zaire. For the Banyamulenge, a minority Tutsi community, the crisis lay elsewhere: A provincial governor's decision to expel them from Zaire where they had lived for 200 years; the revocation of their citizenship in 1981; the genocide of Tutsi in neighbouring Rwanda in 1994; and the brutality and neglect of Mobutu's reign over three decades. For the Tutsi government of Rwanda, which orchestrated and drove the insurrection, the principal threat was Mobutu's support for the genocidal Interahamwe and the presence of these Hutu militia in the refugee camps. The rebellion was thus an attempt, albeit unsuccessful, to resolve a set of crises of significant proportions.

In summary, an intrastate crisis can be defined as a set of structural conditions that pose a fundamental threat to human security and the stability of the state, and that create the potential for large-scale violence. The critical structural conditions in Africa are authoritarian rule; the marginalisation of ethnic or religious minorities; socioeconomic deprivation and inequity; and weak states that lack the institutional capacity to manage political and social conflict effectively.

The potential for violence rises when these conditions are present simultaneously, mutually reinforcing, and exacerbated by other structural problems. In Africa such problems include the lack of coincidence between nation and state as a result of the colonial imposition of borders; the colonial legacy of ethnic discrimination and favouritism; unstable civil-military relations; land, environmental, and demographic pressures; arms supplies and other forms of foreign support to authoritarian regimes; the debt burden; and the imbalance in economic power and trade between the South and the North.

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**CRITICISM OF THE CONCEPT OF HUMAN RIGHTS**

*The concept of human rights is seen by these authors as an inappropriate imposition by some Western countries and the rest of the world.*

**POLLIS, A AND SCHWAB, P ‘HUMAN RIGHTS: A WESTERN CONSTRUCT WITH LIMITED APPLICABILITY’ (1979)**


... Human rights and the non-Western world: Cultural, developmental, and ideological differences
An interrelated and interdependent set of factors account for the limited viability and applicability of the Western concepts of human rights and human dignity in the non-Western world. Broadly speaking these factors can be divided into two categories: The cultural patterns and the developmental goals of new states including the ideological framework within which they were formulated. Traditional cultures did not view the individual as autonomous and possessed of rights above and prior to society. Whatever the specific social relations, the individual was conceived of as an integral part of a greater whole, of a ‘group’ within which one had a defined role and status. The basic unit of traditional society has varied the kinship system, the clan, the tribe, the local community—but not the individual. (This notion of the group defining the self, it should be mentioned, was equally valid in the West prior to the advent of individualism.) The colonial experience in the Third World did little to alter traditional conceptualisations of the social order. Regardless of specific colonial policies and political structures, all colonised peoples were subject to ultimate authority in the form of the colonial ruler, and doctrines of inalienable rights—clearly a threat to the interests of the colonial powers—were not disseminated.

With independence a multiplicity of new ‘sovereign’ nation-states were established and at least in theory these new entities defined group membership. The notion of the primacy of the group and the submission of the individual to the group persisted, although the confines and boundaries of the group had changed to become coterminous with the state. As a consequence whatever rights an individual possesses are given to him by the state, and this state retains the right and the ability to curtail individual rights and freedoms for the greater good of the group. Inevitably constitutional government has come to be identified with a particular set of democratic political institutions but not with the doctrines of individualism or inalienable rights which constitute the philosophic underpinnings of democracy in the West.

The pervasiveness of the notion of the ‘group’ rather than the ‘individual’ in many cultures is evident even in concepts of property ownership. The Universal Declaration maintains in article 17 that ‘everyone has the right to own property ...’. Yet in many cultures, among them the Gojami-Amhara of Ethiopia, land is owned communally and there is no ‘right’ to individual ownership of holdings. This conception of social ownership predates by centuries my Marxist or socialist doctrines, but it is evident how such traditional conceptions can be incorporated into the different ideological frameworks of Third World countries. Furthermore, article 16 states that the ‘family is the fundamental group unit of society’. For many societies the nuclear family (as implied in this article) clearly is not the fundamental unit; in hunting and gathering societies the kinship group, and in China the clan, have been more ‘natural’.

The irrelevance of the Western conception of human rights founded on natural rights doctrines is not rooted solely in traditional cultural patterns, but is also a consequence of the articulated modernisation goals of Third World countries. The ideology of modernisation and development that has attained universal status has come to be understood primarily in terms of economic development. The colonial experience of economic exploitation
gave credence to the notion of human dignity as consisting of economic rights rather than civil or political rights. Freedom from starvation, the right for all to enjoy the material benefits of a developed economy, and freedom from exploitation by colonial powers became the articulated goals of any Third World countries. The strategies that evolved for the attainment of these goals incorporated an admixture of old concepts and values frequently reinterpreted and redefined in light of contemporary realities and goals. Thus the state was to replace traditional group identities but was to retain the same supremacy as traditional groups. By the same token the state's responsibility is to free its people from colonial exploitation and to attain economic betterment. Essentially this is the conceptual framework that has structured the world view of many Third World countries and within which human rights and human dignity are understood. Democratic government is perceived as an institutional framework through which the goals of the state are to be achieved, and if it fails or becomes an impediment it can be dispensed with impunity. Individual political rights, so revered in the West, at most take second place to the necessity of establishing the legitimacy of the new group—the state—and to the priority of economic rights that necessitate economic modernisation.

It is within this context that the doctrines and policies of many African states can be understood. As early as the 1960s such leaders as Nkrumah, Toure, and Nyerere rejected democratic political institutions as undesirable for their societies. They argued forcefully that a one-party state, by contrast to a multiparty state, was necessary because Ghana, Guinea, and Tanzania needed to prevent political dissension among their populations. The multiparty state was perceived as counterproductive both to the development of a nation-state and to the development of the economy; parties represented classes or ethnic or tribal groups and would foster political dissension at a time when those states had to concentrate on national unity and on social and economic change. As Nkrumah said, the Convention People's Party (CPP) is Ghana and Ghana is the CPP. Thus the CPP could do no wrong because it spoke for the entire population. With the establishment of priorities and of one-party ideologies in the new states, politically restrictive statutes were adopted.

The conjunction of a traditional culture that defined the individual in terms of group membership, the need to transpose this group identity to the nation-state level, a definition of modernisation in terms of economic development, and the evolution of the notion of a one-party state as the embodiment of the people facilitated the adoption of decrees limiting freedom of speech, the adoption of preventive detention laws, the outlawing of rival political parties, the placing of the judiciary under party control, and the incorporation of all voluntary associations under the rubric of the one party. These actions were not viewed as antidemocratic but as requisites whereby ethnically diverse, extremely poor states could create the unified political framework essential for economic development. As Nkrumah and Nyerere often said, if political differences were permitted to rule the state the economy would be stymied as the unity necessary for development would be absent. Social change, a process fraught with political problems, was the major priority, and its perceived importance is evident in the national leaderships' argument that the maintenance of order becomes necessary if national goals are to be
concentrated upon and achieved. Democratic political institutions were to be sacrificed to some future time, while economic development was to be concentrated upon. The fact that many of these states (Ghana as a case in point) have failed to attain their articulated goals does not invalidate the conceptual framework in terms of which Third World leaders perceive their goals and the strategy for their attainment.

It is perhaps instructive to keep in mind the experience of Turkey which more than 50 years ago was one of the first states to consciously and explicitly embark on a programme of ‘westernisation’ (as Kemal Ataturk labelled it). Ataturk attempted to transform the Ottoman Empire into a modern Turkish nation-state. His concept of modernisation did not include an ideology of individual political rights or even democratic government. In reaction to the defeat and dismemberment of the Ottoman Empire at the hands of advanced industrial states, just as African states reacted to colonial exploitation and domination, Ataturk was concerned with secularising society, introducing a modern educational system, adopting Western technology and industry, creating new political structures, and defining Turkish nationalism. On the question of even a formally democratic polity he argued that the above-mentioned goals had priority over such institutions as a multiparty system; only after Turkey had attained the goals of modernisation and the unity of the state could it afford and risk a democratic political system. Ataturk, who led his revolution in the aftermath of defeat in World War I, predated the post-World War II universalisation of the goal of economic growth through economic planning. Even so, he did not consider individual human rights or a multiparty system as ingredients in the modernisation efforts.

The role of the state in the contemporary non-Western world cannot be overemphasised. Regardless of articulated ideology the underlying conceptual framework views the state-sometimes but not always equated with the party-as the communal group through which the goals of economic development and modernisation (which will provide for human dignity) will be attained. The state or party is the dispenser of all political and economic goods and economic goods have the highest priority. In fact, in the Nkrumah's school of thought democracy itself was seen as having an economic meaning: It enabled masses of poverty-stricken people to secure minimal economic liberties. The dominant role of the state and restrictions on political liberties were not consequences only of the incorporation of traditional values into a new framework and of the ideological rhetoric of socialism, but also of the empirical realities facing many new countries. The new African states were inadequate in infrastructure, had little capital for development, had extraordinarily high rates of unemployment and underemployment, were basically one-crop economies at the mercy of Western capital, and had a history of oppression through the slave trade. Colonialism left them bereft of viable political and economic structures, concurrently disrupting and distorting traditional institutions. Toure and Nkrumah saw little choice but to make the state or party the instrument of change, and economic development the primary goal. Freedom from want, from hunger, and from economic deprivation necessitated limiting political liberties that could destroy the party or state in its initial stages. Developmental success was seen as dependent on preventing opposition by those who propagated alternative political and economic models. In this context human rights were of limited
importance or were directly related to the attainment of self-sufficiency, which in turn was a function of the state. In some cases this led to state capitalism, in some to state socialism. The impact of the Nkrumah ideology was widespread; even pro-Western states such as Senegal adopted a similar political framework premised on a similar conceptualisation. By the 1970s African leaders generally perceived this ideology of economic statism not as pro-Western or pro-Eastern but as a specifically African solution to their monumental problems.

In state constitutions and in the OAU Charter, African states have given lip service to the Universal Declaration of Human Rights, and they have affixed their signatures to United Nations documents that reinforce the Declaration. It is evident from the above analysis, however, that human rights are not perceived along Western lines by African leaders. The world is seen in economic terms that are more akin to those of Karl Marx than to the classical economists and liberal political thinkers. Human rights as formulated in the West, at least in their political and legal aspects can come into existence only after a stable economic life with a minimum of economic prosperity is assured to the African population. Furthermore, it is critical to realise that the Western-based notions of human rights, to the extent that they are articulated by Third World political elites, reflect these elites ‘westernisation’. It cannot be assumed that the mass of people hold these concepts.

The Western conception of human rights is not only inapplicable to Third World countries or to socialist states, but also to some states that profess to adhere to democratic precepts and to states that are considered part of the West. The cultural heritages of Spain, Portugal, and Greece do not include a Western conception of inalienable human rights, any more than do the African. All three countries have recently emerged from periods of dictatorial rule. Democracy is understood as a particular set of political institutions, including a multiparty system, but the philosophic underpinnings differ from those of the West. Rights are political and legal, and not attributes of individuals \textit{qua} individuals. The state retains a preeminent position and has an existence other than and prior to the individuals that compose it.

In fact the absence of a concept of inalienable human rights indirectly facilitated the military takeover of Greece in 1967 and the subsequent dictatorial rule. The justification that the military officers used the threat of chaos stemming from demonstrations, strikes, and protest marches-seemed valid ground to many Greeks for the abrogation of political freedoms. Democracy is seen by the Greeks and other peoples as a set of formal institutions and individual rights that emanate from and are granted by the state, rather than being inalienable and natural. No rights exist except those specified by law, and if there is no law protecting a particular right that right does not exist and hence there is no question of its violation or infringement, illustrative were the trials of torturers held after the collapse of the Greek military dictatorship in 1974. The torturers were not charged with gross violations of human rights, but with ‘misuse of authority;’ there was and is no law specifically making torture illegal. Furthermore, the absence of a notion of the autonomous individual and of individual rights, and the communal basis
of traditional Greek society has led in Greece to an exalted view of the state — which is perceived as the embodiment of the Greek people.

In summary then, it is evident that in most states in the world, human rights as defined by the West are rejected or, more accurately, are meaningless. Most states do not have a cultural heritage of individualism, and the doctrines of inalienable human rights have been neither disseminated nor assimilated. More significantly the state— as a substitute for the traditional communal group— has become the embodiment of the people, and the individual has no rights or freedoms that are natural and outside the purview of the state. It is a Platonic world in that Plato justified the ultimate right of the state to suppress dissidents since the individual owes his existence to and was a product of, the state. As Indira Gandhi said, ‘it is not individuals who have rights but states’. Further limiting the significance for Third World countries of Western conceptions of human rights are the societal goals and priorities set by their leaderships. Economic development is the primary objective, for it is only through this that economic rights can be attained, and these provide for human dignity by freeing individuals from exploitation and dependence. Perhaps the best that can be expected in the political realm is what may be happening in India — the establishment of political institutions that define the rights of individuals not under the rubric of natural law but under the structure of political law.

Toward a re-evaluation of human rights

The cultural patterns, ideological underpinnings, and developmental goals of non-Western and socialist states are markedly at variance with the prescriptions of the Universal Declaration of Human Rights. Efforts to impose the Declaration as it currently stands not only reflect a moral chauvinism and ethnocentric bias but are also bound to fail. In fact, the evidence of the last few decades shows increasing violations of the Declaration rather than increasing compliance.

The conceptualisation of human rights is in need of rethinking. It should be recognised that the Western notion of human rights evolved historically, under a particular set of circumstances, in the most highly industrialised and developed areas of the world—areas that subsequently have dominated the remainder of the world. While espousing and to a great extent implementing human rights doctrines domestically, the Western industrial states nonetheless denied them to peoples they controlled for generations. In large measure both the nationalist movements — efforts to create new nations — and socialist revolutionary movements are reactions and responses to this domination and control. Hence, rather than focusing on additional legal mechanisms for imposing the West's philosophic doctrines of the individual and inalienable human rights on the non-Western world, discussion of the issue of human rights should begin with the differing historical and contemporary circumstances of non-Western societies. Given differences in historical experience and contemporary conditions, what was a ‘natural’ evolution in the West may not appear so ‘natural’ in the Third World.

Realisation that differing historical experiences and cultural patterns have led to differing notions of human nature and to marked differences in the
articulated goals of political elites should facilitate investigation and analysis of those fundamental aspects of society from which may be derived a new conceptualisation of universal human rights. All societies cross-culturally and historically manifest conceptions of human dignity and human rights. If the notion of human rights is to be a viable universal concept it will be necessary to analyse the differing cultural and ideological conceptions of human rights and the impact of one on the other. There are many societies in which human dignity is culturally defined in terms of excelling in the fulfilment of one’s obligation to the group, a concept that has been incorporated in a radically altered form in socialist ideology.

In many states human rights are ideologically defined in terms of one’s being a functionally useful member of society—through guaranteed employment and provision of the basic needs of life: Food, shelter, and clothing. From this perspective, clearly, Western countries can be accused of gross violations of human rights.

In the international arena and among many human rights advocates the argument is couched in terms of political versus economic rights; which of the two has, or should have, priority. Such a simplistic categorisation is reductionist and overlooks the philosophic and cultural premises underlying such a division. The Western notion of inalienable rights, whose substance is predominantly political and civil, nevertheless includes the right to private property, a right that is central to an understanding of the development of Western pluralist and capitalist societies. Similarly, despite their apparent emphasis on economic rights, socialist societies incorporate notions of political participation. Thus although the ontology and ideology of societies differ, they incorporate the totality of what is and what should be.

Despite divergences in conceptions of what constitutes the substance of human dignity there seem to be certain shared commonalities that warrant further investigation. All societies impose restraints on the use of force and violence by their members and all apply sanctions on those who, within their particular cultural or ideological context, violate their norms and values. Hence it is important to analyse both issues further. What are the societal and political limits on the use of force or violence, and to what extent and in terms of what criteria is individual or group behaviour restrained? No cultural or ideological system, for example, condones arbitrary and indiscriminate destruction of life or incarceration. Thus the killings in Uganda and Ethiopia, genocide in Paraguay, and torture in Iran and Chile are not justifiable in terms of any philosophical system. Such actions, in addition to raising the basic moral question of the right to life, are arbitrary and without any specification, as to the violations that lead to such extreme sanctions. If a differentiation were made in terms of the ideological or cultural context in which violations of human rights took place, then it would be easier, for example, to obtain broad African support for sanctions against Idi Amin. He would be hard pressed to justify his mass killings and torture in terms of any ideology.

Clearly there are marked differences in the specification of the areas where conformity is demanded by a polity. In the West violations of property rights are considered crimes justifying sanctions and punishment for the
transgressor; in socialist societies dissent from the official ideology is considered a crime and elicits sanctions; and in many traditional societies ostracism is the consequence when norms are violated.

If a meaningful conception of human rights is to be formulated, the interrelationship between human rights and socioeconomic developments must be scrutinised. Historically Western Europe underwent an era of absolute monarchy and state-building before any notion of individual human rights was extant. Given the fact that many non-Western countries are currently undergoing the process of state-building — in fact attempting to form a state and a nation simultaneously — and therefore lack consensus regarding the state and the rules of the game, is a Western conception of human rights feasible? To what extent have social, political, and economic ferment eroded traditional conceptions of rights and human dignity without the formulation and implementation of alternative or reinterpreted concepts of human rights? Historical analysis of the dissemination of human rights doctrines in the West, and the question of requisites for their existence, may shed some light on the conditions prevailing in non-Western societies today.

In the contemporary world, where the legitimate order is one of sovereign nation-states, all, societies regardless of ideological commitments violate their particular conceptions of human rights and human dignity under certain conditions. A more extensive investigation of the situational and empirical factors both internal and external to the state that may constrain the implementation of human rights would seem critical. In the United States, for example, the perceived threat of communism was used as the justification for the infringement and violation of the civil and political rights of many individuals, particularly during the McCarthy era. Hence an investigation of the restraints, ‘perceived’ or ‘real’, under which Western and non-Western countries operate in implementing human rights may lead to a clarification of what societies believe constitute ‘emergencies’ justifying restrictions of human rights however defined.

Several developments not only in Third World countries but in the West itself raise fundamental issues regarding the boundaries within which doctrines of human rights are applicable. Human rights, whatever their ideological or cultural content, are largely viewed as extant within the confines of the state. The Western emphasis on individual rights vis-à-vis the state has resulted by and large in ignoring the entire question of communal rights. Yet in the West itself — in Great Britain with the resurgence of Scottish and Welsh nationalisms, in France with the movement for autonomy in Brittany, in the United States with the American Indian Movement, and in Canada with the demand for independence by the French Canadians — charges of violations of human rights are heard with increasing frequency. This challenge in the West to individual rights operative within the state to the neglect of communal rights acquires heightened importance in the Third World. A significant philosophic and empirical question is the extent to which granting legitimacy to the state has enabled central governments to diffuse and destroy the authority of traditionalism and the rights incorporated within traditional societies without providing adequate alternatives. Concomitantly the universal legitimacy accorded to the state and the demands it places on all citizens — primarily but not limited to loyalty to the state and all the
attendant requisite behaviour — by definition limits and restricts individual political freedoms.

The many fundamental questions that have been raised in the previous pages should be more thoroughly analysed if the prospects for a world community geared toward enhancing human dignity are to improve. Unfortunately not only do human rights as set forth in the Universal Declaration reveal a strong Western bias, but there has been a tendency to view human rights ahistorically and in isolation from their social, political, and economic milieu. What is being advocated here is a rethinking of the conception of human rights that both takes into account the diversity in substance that exists and recognises the need for extensive analysis of the relationship of human rights to the broader societal context. Through this process it may become feasible to formulate human rights doctrines that are more validly universal than those currently propagated.

Donnelly addresses aspects of the cultural relativity challenge to the notion of universal human rights, in the context of the question whether there is a difference between ‘global human rights’ and ‘African human rights’.

DONNELLY, J ‘CULTURAL RELATIVISM AND UNIVERSAL HUMAN RIGHTS’ (1984) 6 Human Rights Quarterly 400

... Defining ‘cultural relativism’

The two extreme positions on cultural relativism can be called radical cultural relativism and radical universalism. Radical cultural relativism would hold that culture is the sole source of the validity of a moral right or rule. Radical universalism would hold that culture is irrelevant to the validity of moral rights and rules, which are universally valid.

These radical views are ideal types that mark the end points of a continuum. The body of that continuum, those positions involving varying mixes of relativism and universalism, can be roughly divided into what we can call strong and weak cultural relativism.

Strong cultural relativism holds that culture is the principal source of the validity of a moral right or rule. In other words, the presumption is that rights (and other social practices, values, and moral rules) are culturally determined, but the universality of human nature and rights serves as a check on the potential excesses of relativism. At its furthest extreme, just short of radical relativism, strong cultural relativism would accept a few basic rights with virtually universal application, but allow such a wide range of variation for most rights that two entirely justifiable sets might overlap only slightly.
Weak cultural relativism holds that culture may be an important source of the validity of a moral right or rule. In other words, there is a weak presumption of universality, but the relativity of human nature, communities, and rights serves as a check on potential excesses of universalism. At its furthest extreme, just short of radical universalism, weak cultural relativism would recognise a comprehensive set of *prima facie* universal human rights and allow only relatively rare and strictly limited local variations and exceptions.

Strong and weak are relative terms referring to the extent of cultural variation permitted. We must be careful, however, not to use merely quantitative measures of relativism; qualitative judgments of the significance of different cultural variations must also be incorporated.

Across the continuum of strong and weak relativisms there are several levels or types of relativity. In a rough way, three hierarchical levels of variation can be distinguished, involving cultural relativity in the substance of lists of human rights, in the interpretation of individual rights, and in the form in which particular rights are implemented. The range of permissible variation at a given level is set by the next higher level. For example, ‘interpretations’ of a right are, logically, limited by the specification of the substance of a right. The range of variation in substance is set by the notions of human nature and dignity, from which any list of human rights derives. In other words, as we move ‘down’ the hierarchy we are in effect further specifying and interpreting, in a broad sense of that term, the higher level.

*Levels and types of relativism*

In discussing foreign practices, we can distinguish between what can be called ‘internal’ and ‘external’ evaluations. An internal judgment asks whether the practice is defensible within the basic value framework of that society; the issue here is whether a plausible and coherent defense of the practice can be made in response to universalistic criticism. Practices that do not even stand up to such evaluations can in no sense be defended on cultural terms. An external judgment applies the standards of the evaluator (modified, as appropriate, by relativistic arguments) in order to determine whether the practice can or should be accepted or defended, all things considered. Clearly the most important controversies are likely to arise over practices that are defensible according to internal standards but unacceptable by external standards; these are the practices we are most concerned with in the discussion of cultural relativism and universal human rights.

To a considerable degree this distinction between internal and external evaluations matches up with, and further elaborates, the distinction between strong and weak cultural relativism; the stronger one’s relativism, the greater one’s reliance on internal evaluations. It also helps to elucidate the dilemma we face in judging culturally specific practices, torn between the demands of relativism and universalism, demands that require us to renounce radical relativism and radical universalism in favor of some combination of internal and external judgments.

As I have already emphasised, relativism rests on the notions of moral autonomy and communal self-determination. Respect for autonomous moral
communities would seem to demand internal evaluations. But to rely entirely on internal judgments would seem to abrogate one's moral responsibilities as a member of the cosmopolitan moral community; such membership would seem to demand the application of universal standards in external judgments. Membership in one's own national or local moral community also might demand (a different type of) external judgments. Furthermore, moral judgments by their nature are universal, or at least universalisable, even though we know that moral values and particular judgments are, at least in part and in their genesis, historically specific and contingent.

The choice between internal and external evaluations thus is itself a moral choice. However, the choice is not entirely free or simply a matter of personal moral judgment. Within each system — the ‘universal’ standards of the cosmopolitan moral community, the standards of one's home community, and those of the foreign community whose practice is being evaluated — we can rank practices in terms of their moral worth. As a general rule, we can suggest that the more ‘important’ a practice within a particular system, the greater the force of internal standards, which can be overridden only by particularly strong external judgments.

Such a general rule hardly solves all our problems. Besides the obvious difficulties of providing even a very crude system for weighing competing internal and external standards, in some instances at least ‘important’ values, judged by external standards, will compete with internally ‘important’ values or practices, presenting a dilemma of immense proportions. However, such a rule can greatly simplify the process of evaluation — assuming we are able to make at least rough internal judgments of ‘importance’.

As I noted above, strong and weak relativism cannot be distinguished solely by the number of deviations they allow from ‘universal’ standards; some qualitative measure also is required. The distinction between variations in substance, interpretation, and form is a useful place to begin discussing this issue.

Even very weak cultural relativists — that is, relatively strong universalists — are likely to allow considerable variation in the form in which most rights are implemented. For example, whether free legal assistance is required by the right to equal protection of the laws is best viewed as a technical issue of the form in which the right is implemented, and thus largely beyond the legitimate reach of universal standards. Important differences between strong and weak relativists are likely to arise, however, when we move to the levels of interpretation and substance.

While the distinction between variations in form and in interpretation is difficult to draw with precision, it is fairly clear and quite important, as we can see by looking at a particular right, such as the right to political participation. In specifying the right to political participation, we can begin by distinguishing electoral from non-electoral forms of participation. We can also distinguish direct democracy from representative government, and both of these from participation through occasional plebiscites. Representative elections can be further divided into relatively open and closed multiple-
party and one-party elections. We can also distinguish elections where voting is a basic right from those where it is a privilege or even a duty, elections intended to determine the will of the people from elections that serve principally to mobilise popular support for government policy, and so forth. All of these variations in ‘interpretation’ clearly are qualitatively different from questions of form such as how often elections, town meetings, or plebiscites will be held.

But while all these mechanisms represent plausible interpretations of the right to political participation, we need not — and should not — hold that all ‘interpretations’ are equally plausible or defensible. They are interpretations, not free associations or arbitrary stipulations; the meaning of ‘the right to political participation’ is controversial, but the range of controversy is limited by the concept. For example, an election in which a people were allowed to choose an absolute dictator for life — ‘one man, one vote, once’, as a West African quip puts it — in no way represents a defensible interpretation of the right.

Particular human rights are like ‘essentially contested concepts’, in which there is a substantial but rather general consensus of meaning, coupled with a no less important, and apparently unresolvable, conflict of interpretations. In such circumstances, culture provides one plausible and defensible mechanism for selecting interpretations (and forms). Nonetheless, there are strong conceptual limits on the acceptable range of variation.

In addition to essential contestability, scarcity also implies permitting variations in form and interpretation. The effective political implementation of virtually all human rights consumes resources. While frequently noted for economic and social rights, this is equally true of many civil and political rights. For example, there are significant direct costs, as well as indirect costs such as the diversion of resources, in running an election, operating a legal system in accord with principles of due process, and protecting citizens against arbitrary or inhumane and degrading treatment by officials of the state.

Fiscal constraints may also require difficult decisions concerning priorities, decisions that are in part tied to culture. In setting such priorities, however, an especially extreme emphasis or de-emphasis of a right (or set of rights) brings us to the edge of the third type of relativity, namely, variations in substance, differences in lists of human rights.

Rights that vary in form and interpretation still are clearly ‘universal’ in an important sense, particularly if the substantive list of rights is relatively universal. But while variations in substance involve much more extreme relativity, even here talk of universality can be meaningful.

If we look at complete lists rather than particular rights, there may be an essential universality even in the midst of considerable substantive diversity. Such universality may take the form of a large common core with relatively few differences ‘around the edges’. It may involve strong statistical regularities, in which outliers are few and are clearly overshadowed by the central tendency. There may be clusterings, or lesser but still significant
overlaps, that allow us to speak of ‘universality’ in a very extended sense. And if we distinguish between ‘major’ and ‘minor’ rights, we might have still another sort of universality amidst substantive diversity: The definition of such categories is of course extremely controversial, but to the extent that variations in substance are concentrated among ‘minor’ rights, a fundamental universality would be retained.

The extent to which the listed rights are aggregated is another important consideration. At the level of broad categories such as civil, political, economic and social rights, there is widespread agreement — except for a very small minority that still rejects economic and social rights — that ‘universality’ is required; any defensible list must include rights from all these categories. As we disaggregate, however, the permissible range of relativity expands, in part because each listed right is more minor, and in part because disaggregation is largely a process of interpretation, in a broad sense of that term.

Consider, for example, the right to work, which is almost universally recognised in disaggregations of economic rights. This right might be interpreted as a right to seek employment, to be compensated for unemployment, to be employed, or even a right to employment appropriate to one’s interests and talents. Certain rights specified at this level, however, will be missing from some defensible lists of human rights, including many lists that recognise a right to work. Further disaggregation — for example, specifying the length and amount of unemployment benefits, or the extent of vocational training or retraining made available — is likely to bring us into the realm of formal variation, where universality usually is an inappropriate demand.

Thus in considering the various levels and types of relativism, we see once more, and now more deeply and in greater detail, that the problem of cultural relativism and universal human rights cannot be reduced to an either-or choice. Claims of cultural relativism show a great diversity in meaning, substance, and importance. Therefore, any evaluation of such claims must be sensitive to this diversity, which is all too often overlooked when the issue of cultural relativism is raised in the discussion of human rights.

**Culture and relativism**

So far we have focused on relativism, in general. The cultural basis of cultural relativism also must be considered, especially in light of the fact that numerous contemporary arguments against universal human rights standards strive for the cachet of cultural relativism but in fact are entirely without cultural basis.

Standard arguments for cultural relativism rely on examples such as the pre-colonial African village, Native American tribes, and traditional Islamic social systems. Elsewhere I have argued that human rights — rights or titles held against society equally by all persons simply because they are human beings — are foreign to such communities, which instead employed other, often quite sophisticated, mechanisms for protecting and realising defensible conceptions of human dignity. The claims of communal self-determination
are particularly strong here, especially if we allow a certain moral autonomy to such communities and recognise the cultural variability of the social side of human nature. It is important, however, to recognise the limits of such arguments.

Where there is a thriving indigenous cultural tradition and community, arguments of cultural relativism based on the principle of the self-determination of peoples offer a strong defense against outside interference — including disruptions that might be caused by the introduction of ‘universal’ human rights. But while autonomous communities that freely decide their destiny largely according to traditional values and practices still do exist throughout the Third World, they are increasingly the exception rather than the rule. They are not, for example, the communities of the teeming slums that hold an ever-growing proportion of the population of most states. Even most rural areas have been substantially penetrated, and the local culture ‘corrupted’, by foreign practices and institutions ranging from the modern state, to the money economy, to ‘Western’ values, products, and practices.

In the Third World today, more often than not we see dual societies and patchwork practices that seek to accommodate seemingly irreconcilable old and new ways. Rather than the persistence of traditional culture in the face of modern intrusions, or even the development of syncretic cultures and values, we usually see instead a disruptive and incomplete westernisation, cultural confusion, or the enthusiastic embrace of ‘modern’ practices and values. In other words, the traditional culture advanced to justify cultural relativism far too often no longer exists.

Therefore, while recognising the legitimate claims of self-determination and cultural relativism, we must be alert to cynical manipulations of a dying, lost, or even mythical cultural past. We must not be misled by complaints of the inappropriateness of ‘Western’ human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous culture; communitarian rhetoric too often cloaks the depredations of corrupt and often westernised or deracinated elites. In particular, we must be wary of self-interested denunciations of the excessive individualism of ‘Western’ human rights.

Human rights are inherently ‘individualistic’; they are rights held by individuals in relation to, even against, the state and society. But while traditional cultures, both Western or nonwestern, usually view persons primarily as parts of a family or community, rather than as autonomous individuals, not all forms of non-individualistic or anti-individualistic politics are based in traditional culture — even where that culture remains vital. In particular, communitarian defenses of traditional practices usually cannot be extended to modern nation states and contemporary nationalist regimes.

Arguments of cultural relativism are far too often made by economic and political elites that have long since left traditional culture behind. While this may represent a fundamentally admirable effort to retain or recapture cherished traditional values, even in such cases it is at least ironic to see largely westernised elites warning against the values and practice they have adopted. At their best, such arguments tend to be dangerously paternalistic
— for example, villagisation, which was supposed to reflect traditional African conceptions, was accomplished in Tanzania only by force, against the vocal and occasionally even violent opposition of much of the population — and even such a troubling sincerity is unfortunately rare.

Arguments of cultural relativism regularly involve urban elites eloquently praising the glories of village life — a life that they or their parents or grandparents struggled hard to escape, and a life to which they have not the slightest intention of returning. Government officials denounce the corrosive individualism of Western values — while they line their pockets with the proceeds of massive corruption, drive imported luxury automobiles, and plan European or American vacations. Leaders sing the praises of traditional communities, which they claim as the source of their political practices — while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks.

In other words, appeals to traditional practices and values all too often are a mere cloak for self-interest or arbitrary rule. For example, the All Africa Council of Churches has condemned the fact that ‘some’ leaders have even resorted to picking out certain elements of traditional African culture to anaesthetise the masses. Despite what is said, this frequently has little to do with a return to the positive, authentic dimensions of African tradition. While this cynical manipulation of tradition occurs everywhere, let me mention just a few African illustrations.

In Malawi, President Hastings Kamuzu Banda utilises ‘traditional courts’ in order to deal with political opponents outside of the regular legal system. For example, Orton and Vera Chirwa, after being kidnapped from Zambia, were brought before a ‘traditional court’ made up of five judges and three tribal chiefs, all appointed directly by Banda. While there was a prosecutor, no defense attorney was allowed, and the only possible appeal was to Banda personally. Such procedures have not the slightest connection with authentic traditional practices.

In Zaire, President Mobutu has created the practice of salongo, a form of communal labour with a supposedly traditional basis. In fact, it has little or no connection with indigenous traditional practices; rather, it is a revival of the colonial practice of corvee labour. In Niger, samarias, traditional youth organisations, have been ‘revived’ — but not so much out of a respect for traditional culture as ‘to replace party organisations so as to channel youthful energies away from politics’. And Macias Nguema of Equatorial Guinea, probably the most vicious ruler independent black Africa has seen, called himself ‘Grand Master of Popular Education, Science and Traditional Culture’ a title that would be comical if it weren’t so tragic.

The cynicism of many claims of cultural relativism can also be seen in the fact that far too often they are for external consumption only. The same elites that raise culture as a defense against external criticisms based on universal human rights are often ruthless in their suppression of inconvenient local customs, whether of the majority or a minority. National unification certainly will require substantial sacrifices of local customs, but the lack of local
cultural sensitivity shown by many national elites that strongly advocate an international cultural relativism suggests a very high degree of self-interest. Furthermore, numerous and regretfully common practices, such as disappearances, arbitrary arrest and detention, or torture, are entirely without cultural basis. Idi Amin, Pol Pot, and the death squads of El Salvador cannot be attributed to local culture; while these names have become justly synonymous with modern barbarism, such practices are not an expression of established cultural traditions. Rigged elections, military dictatorships, and malnutrition caused by government incentives to produce cash crops rather than food are just a few of the widespread abuses of generally recognised human rights that are in no sense a positive expression of indigenous cultures. Such practices can be condemned on the basis of both internal and external evaluations and thus are in no sense capable of plausible defense.

In traditional cultures — at least the sorts of traditional cultures that would readily justify cultural deviations from international human rights standards — people are not victims of the arbitrary decisions of rulers whose principal claim to power is their control of modern instruments of force and administration. In traditional cultures, communal customs and practices usually provide each person with a place in society and a certain amount of dignity and protection. Furthermore, there usually are well-established reciprocal bonds between rulers and ruled, and between rich and poor.

The human rights violations of most Third World regimes are as antithetical to such cultural traditions as they are to ‘Western’ human rights conceptions. In fact, authentic traditional cultural practices and values can be an important check on abuses of arbitrary power. Traditional African cultures, for example, usually were strongly constitutional, with major customary limits on rulers; as a Basothomaxim says, ‘a chief is a chief by the people’. Not only are these traditional checks a resource that human rights advocates may be able to tap, but it has even been argued that transgressions of traditional limits have figured in the collapse of some recent regimes.

Finally, as I argued above, there are substantive human rights limits on even well-established cultural practices, however difficult it may be to specify and defend a particular account of what those practices are. For example, while slavery has been customary in numerous societies, today it is a practice that no custom can justify. Likewise, sexual, racial, ethnic, and religious discrimination have been widely practiced, but are indefensible today; the depth of the tradition of anti-Semitism in the West, for example, simply is no defense for the maintenance of the practice.

This is not to say that certain cultural differences cannot justify even fundamental deviations from ‘universal’ human rights standards; I have already argued that they may. However, if cultural relativism is to function as a guarantee of local self-determination, rather than a cloak for despotism, we must insist on a strong, authentic cultural basis, as well as the presence of alternative mechanisms guaranteeing basic human dignity, before we justify cultural derogations from ‘universal’ human rights.
Resolving the claims of relativism and universalism

Despite striking and profound international differences in ideology, levels and styles of economic development, and patterns of political evolution, virtually all states today have embraced — in speech if not in deed — the human rights standards enunciated in the Universal Declaration of Human Rights and the International Human Rights Covenants. This consensus presents a strong prima facie case for a relatively strong universalism; that is, for weak cultural relativism. Even if this ‘consensus’ is largely the complement of vice to virtue, it reveals widely shared notions of ‘virtue’, an underlying ‘universal’ moral position compelling at least the appearance of assent from even the cynical and corrupt.

While human rights — inalienable entitlements of individuals held in relation to state and society — have not been a part of most cultural traditions, or even the Western tradition until rather recently, there is a striking similarity in many of the basic values that today we seek to protect through human rights. This is particularly true when these values are expressed in relatively general terms. Life, social order, protection from arbitrary rule, prohibition of inhuman and degrading treatment, the guarantee of a place in the life of the community, and access to an equitable share of the means of subsistence are central moral aspirations in nearly all cultures.

This fundamental unity in the midst of otherwise bewildering diversity suggests a certain core of ‘human nature’ — for all its undeniable variability, and despite our inability to express that core in the language of science. And if human nature is relatively universal, then basic human rights must at least initially be assumed to be similarly universal.

In the conditions of modern society, rights, especially human rights, are a particularly appropriate mechanism for protecting this basic, relatively universal core of human nature and dignity. The modern state, the modern economy, and associated ‘modern’ values tend to create communities of relatively autonomous individuals, who lack the place and protections provided by traditional society. Furthermore, regardless of the relative degree of individual autonomy, people today face the particularly threatening modern state, and the especially fierce buffeting of the ever-changing modern economy. Rights held equally by all against the state, both limiting its legitimate range of actions and requiring positive protections against certain predictable economic, social, and political contingencies, are a seemingly natural and necessary response to typically modern threats to human dignity, to basic human values, traditional and modern alike.

Such an analysis seems to be confirmed by an examination of, for example, the Universal Declaration of Human Rights. In the Universal Declaration we can see a set of rights formulated to protect basic human — not merely cultural — values against the special threats posed by modern institutions.

The stress on equality and nondiscrimination, particularly in articles 1, 2, and 7, reflects an essentially individualistic modern view of man, state, and society. Autonomous individuals are easily viewed as essentially equal. Basic equality, however, is likely to be an incoherent or incomprehensible notion.
where people are defined, as they usually are in traditional society, by ascriptive characteristics such as birth, age, or sex. Much the same is true of the guarantees in articles 4 and 6 of an individual’s fundamental status as a person and full member of the community by outlawing slavery and assuring to all equal recognition as a person before the law.

Articles 3 and 5 guarantee life, liberty, and security of the person, and prohibit torture and cruel, inhuman, or degrading treatment or punishment. These rights reflect basic, very widely shared values, expressed in the modern form of rights held against the state; they represent a minimal modern consensus on certain virtually universal guarantees against the state.

Articles 8 through 11 list fundamental legal guarantees such as access to legal remedies and impartial judges, protection against arbitrary arrest and detention, and the presumption of innocence. These rights can be seen as specifications of seemingly universal ideas of fairness, again formulated with a special eye to the threat to individual dignity posed by the modern state, especially in the absence of the constraining web of customary practices characteristic of traditional society.

Article 12, which recognises a limited right to privacy, is peculiarly modern. Privacy is of great value to the relatively autonomous individual; it helps to protect his individuality. It is, however, fundamentally foreign to traditional, communitarian societies, as we can see even in English in the etymological connection between privacy and privation. Articles 13, 14, and 15, which recognise rights to freedom of movement, asylum, and nationality, are likewise basic in the relatively fluid, individualistic modern world, but probably would seem odd, at least as basic rights, in most traditional societies.

Article 16, which deals with the right to marry and found a family, is in part of universal applicability, but the requirement of ‘free and full consent of the intending spouses’ reflects a peculiarly modern view of marriage as a union of individuals rather than a linking of lineages. The right to private property, articulated in article 17, also is of some universal validity — virtually all societies permit individual ownership of at least some goods — although in the modern sense of a right to individual ownership of the means of production it is clearly appropriate only in economies with a large capitalist sector.

The rights to freedom of thought, conscience and religion, opinion and expression, assembly and association, and participation in government, laid out in articles 18 through 21, are clearly based on modern individualistic conceptions of man and society. For example, traditional societies often do not distinguish clearly between the religious and the political, require conformity of thought and belief, enforce deference, restrict association, and deny popular political participation, all of which are incompatible with such rights. Within the modern framework, however, these rights represent minimum guarantees of basic personal dignity; they are essential guarantees of individual autonomy.

Finally, the economic and social rights recognised in articles 22 through 27 guarantee, as individual rights, basic protections that in traditional society
usually are provided by the family or the community as a whole: Social security, work, rest and leisure, subsistence, education, and participation in the cultural life of the community. But not only are these rights directed against the modern state, they are held by individuals simply as human beings, and thus correspond to the individualisation of the person in modern society. And article 28, which guarantees a social and international order in which the previously listed rights can be realised, clearly reflects a peculiarly modern notion of international responsibility for the protection and provision of basic rights.

This review of the rights in the Universal Declaration is perhaps simultaneously superficial and overly long. However, if my argument is correct and the Universal Declaration does represent a minimal response to the convergence of basic cross-cultural human values and the special threats to human dignity posed by modern institutions, then this set of rights has a very strong claim to relative universality. Therefore, the presumption must be that these rights apply universally, although that presumption can be overcome by particular cultural arguments. This, of course, is the position I have called weak cultural relativism.

...
discourage the invocation of legal rights that are premised on an adversarial relationship between the rights holder and the infringer. More complex still are rights designed to apply to women only such as the rights to reproductive freedom and to choose abortion.

In addition, although they respond to general societal imbalances, formulations of rights are generally cast in individual terms. The invocation of rights to sexual equality may therefore solve an occasional case of inequality for individual women but will leave the position of women generally unchanged. Moreover, international law accords priority to civil and political rights, rights that may have very little to offer women generally. The major forms of oppression of women operate within the economic, social and cultural realms. Economic, social and cultural rights are traditionally regarded as a lesser form of international right and as much more difficult to implement.

A second major criticism of the assumption that the granting of rights inevitably spells progress for women is that it ignores competing rights: The right of women and children not to be subjected to violence in the home may be balanced against the property rights of men in the home or their right to family life. Furthermore, certain rights may be appropriated by more powerful groups: Carol Smart relates that provisions in the European Convention on Human Rights on family life were used by fathers to assert their authority over ex nuptial children. One solution may be to design rights to apply only to particular groups. However, apart from the serious political difficulties this tactic would raise, the formulation of rights that apply only to women, as we have seen in the international sphere, may result in marginalising these rights.

A third feminist concern about the ‘rights’ approach to achieve equality is that some rights can operate to the detriment of women. The right to freedom of religion, for example, can have differing impacts on women and men. Freedom to exercise all aspects of religious belief does not always benefit women because many accepted religious practices entail reduced social positions and status for women. Yet attempts to set priorities and to discuss the issue have been met with hostility and blocking techniques. Thus, at its 1987 meeting the CEDAW Committee adopted a decision requesting that the United Nations and the specialised agencies promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in public life of the society, taking into consideration the principle of El Ijtihad in Islam.

The representatives of Islamic nations criticised this decision in ECOSOC and in the Third Committee of the General Assembly as a threat to their freedom of religion. The CEDAW Committee’s recommendation was ultimately rejected. The General Assembly passed a resolution in which it decided that “no action shall be taken on decision 4 adopted by the Committee and requested that the Committee … review that decision, taking into account the views expressed by delegations at the first regular session of the Economic and Social Council of 1987 and in the Third Committee of the General Assembly”. CEDAW later justified its action by stating that the study was
necessary for it to carry out its duties under the Women's Convention and that no disrespect was intended to Islam.

Another example of internationally recognised rights that might affect women and men differently are those relating to the protection of the family. The major human rights instruments all have provisions applicable to the family. Thus, the Universal Declaration proclaims that the family is the ‘natural and fundamental group unit of society and is entitled to protection by society and the State’. These provisions ignore that to many women the family is a unit for abuse and violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children.

The development of rights may be particularly problematic for women in the Third World, where women's rights to equality with men and traditional values may clash. An example of the ambivalence of Third World states toward women's concerns is the Banjul Charter, the human rights instrument of the Organization of African Unity. The Charter, unlike 'Western' instruments preoccupied with the rights of individuals, emphasises the need to recognise communities and peoples as entities entitled to rights, and it provides that people within the group owe duties and obligations to the group. ‘Peoples’ rights in the Banjul Charter include the right to self-determination, the right to exploit natural resources and wealth, the right to development, the right to international peace and security, and the right to a generally satisfactory environment.

The creation of communal or ‘peoples’ rights, however, does not take into account the often severe limitations on the rights of women within these groups, communities or ‘peoples’. The Preamble to the Charter makes specific reference to the elimination of ‘all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion’. Article 2 enshrines the enjoyment of all rights contained within the Charter without discrimination of any kind. But after article 2, the Charter refers exclusively to ‘his’ rights, the ‘rights of man’. Articles 3–17 set out basic political, civil, economic and social rights similar to those contained in other instruments, in particular the International Covenants, the Universal Declaration of Human Rights (which is cited in the Preamble) and European instruments. Article 15 is significant in that it guarantees that the right to work includes the right to ‘receive equal pay for equal work’. This right might be useful to women who are employed in jobs that men also do. The difficulty is that most African women, like women elsewhere, generally do not perform the same jobs as men.

Articles 17 and 18 and the list of duties contained in articles 27-29 present obstacles to African women's enjoyment of rights set out elsewhere in the Charter. Article 17(3) states that ‘[t]he promotion and protection of morals and traditional values recognised by the community shall be the duty of the State’. Article 18 entrusts the family with custody of those morals and values, describing it as ‘the natural unit and basis of society’. The same article requires that discrimination against women be eliminated, but the conjunction of the notion of equality with the protection of the family and
‘traditional’ values poses serious problems. It has been noted in relation to Zimbabwe and Mozambique that:

[...]
The official political rhetoric relating to women in these southern African societies may be rooted in a model derived from Engels, via the Soviet Union, but the actual situation they face today bears little resemblance to that of the USSR. In Zimbabwe particularly, policy-makers are caught between several ideological and material contradictions, which are especially pertinent to women-oriented policies. The dominant ideology has been shaped by two belief-systems, opposed in their conceptions of women. Marxism vies with a model deriving from pre-colonial society, in which women's capacity to reproduce the lineage, socially, economically and biologically, was crucial and in which lineage males controlled women's labour power.

This contradiction between the emancipation of women and adherence to traditional values lies at the heart of and complicates discussion about human rights in relation to many Third World women. The rhetoric of human rights, on both the national and the international levels, regards women as equal citizens, as ‘individuals’ subject to the same level of treatment and the same protection as men. But the discourse of ‘traditional values’ may prevent women from enjoying any human rights, however they may be described.

Despite all these problems, the assertion of rights can exude great symbolic force for oppressed groups within a society and it constitutes an organising principle in the struggle against inequality. Patricia Williams has pointed out that for blacks in the United States, ‘the prospect of attaining full rights under the law has always been a fiercely motivational, almost religious, source of hope’. She writes:

‘Rights’ feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate restructuring ... at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power ...

The discourse of rights may have greater significance at the international level than in many national systems. It provides an accepted means to challenge the traditional legal order and to develop alternative principles. While the acquisition of rights must not be identified with automatic and immediate advances for women, and the limitations of the rights model must be recognised, the notion of women's rights remains a source of potential power for women in international law. The challenge is to rethink that notion so that rights correspond to women's experiences and needs.

The public or private distinction

The gender implications of the public or private distinction were outlined above. Here we show how the dichotomy between public and private worlds has undermined the operation of international law, giving two examples.

The Right to Development. The right to development was formulated in legal terms only recently and its status in international law is still controversial. Its proponents present it as a collective or solidarity right that responds to the phenomenon of global interdependence, while its critics argue that it is an aspiration rather than a right. The 1986 United Nations Declaration on the Right to Development describes the content of the right as the entitlement ‘to participate in, contribute to, and enjoy economic, social, cultural and
political development, in which all human rights and fundamental freedoms can be fully realised’. Primary responsibility for the creation of conditions favourable to the right is placed on states:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

The right is apparently designed to apply to all individuals within a state and is assumed to benefit women and men equally: The preamble to the declaration twice refers to the Charter exhortation to promote and encourage respect for human rights for all without distinction of any kind such as of race or sex. Moreover, article 8 of the declaration obliges states to ensure equality of opportunity for all regarding access to basic resources and fair distribution of income. It provides that ‘effective measures should be undertaken to ensure that women have an active role in the development process’.

Other provisions of the declaration, however, indicate that discrimination against women is not seen as a major obstacle to development or to the fair distribution of its benefits. For example, one aspect of the right to development is the obligation of states to take ‘resolute steps’ to eliminate ‘massive and flagrant violations of the human rights of peoples and human beings’. The examples given of such violations include apartheid and racial discrimination but not sex discrimination.

Three theories about the causes of underdevelopment dominate its analysis: Shortages of capital, technology, skilled labour and entrepreneurship; exploitation of the wealth of developing nations by richer nations; and economic dependence of developing nations on developed nations. The subordination of women to men does not enter this traditional calculus. Moreover, ‘development’ as economic growth above all takes no notice of the lack of benefits or disadvantageous effects this growth may have on half of the society it purports to benefit.

One aspect of the international right to development is the provision of development assistance and aid. The UN General Assembly has called for international and national efforts to be aimed at eliminating ‘economic deprivation, hunger and disease in all parts of the world without discrimination’ and for international co-operation to be aimed, inter alia, at maintaining ‘stable and sustained economic growth’, increasing concessional assistance to developing countries, building world food security and resolving the debt burden.

Women and children are more often the victims of poverty and malnutrition than men. Women should therefore have much to gain from an international right to development. Yet the position of many women in developing countries has deteriorated over the last two decades: Their access to economic resources has been reduced, their health and educational status has declined, and their work burdens have increased. The generality and apparent universal applicability of the right to development, as formulated in the UN declaration, is undermined by the fundamentally androcentric nature of the international economic system and its reinforcement of the public or
private distinction. Of course, the problematic nature of current development practice for Third World women cannot be attributed simply to the international legal formulation of the right to development. But the rhetoric of international law both reflects and reinforces a system that contributes to the subordination of women.

Over the last twenty years, considerable research has been done on women and Third World development. This research has documented the crucial role of women in the economies of developing nations, particularly in agriculture. It has also pointed to the lack of impact, or the adverse impact, of ‘development’ on many Third World women’s lives. The international legal order, like most development policies, has not taken this research into account in formulating any aspect of the right to development.

The distinction between the public and private spheres operates to make the work and needs of women invisible. Economic visibility depends on working in the public sphere and unpaid work in the home or community is categorised as ‘unproductive, unoccupied, and economically inactive’. Marilyn Waring has recently argued that this division, which is institutionalised in developed nations, has been exported to the developing world, in part through the United Nations System of National Accounts (UNSNA).

The UNSNA, developed largely by Sir Richard Stone in the 1950s, enables experts to monitor the financial position of states and trends in their national development and to compare one nation’s economy with that of another. It will thus influence the categorisation of nations as developed or developing and the style and magnitude of the required international aid. The UNSNA measures the value of all goods and services that actually enter the market and of other nonmarket production such as government services provided free of charge. Some activities, however, are designated as outside the ‘production boundary’ and are not measured. Economic reality is constructed by the UNSNA’s ‘production boundaries’ in such a way that reproduction, child care, domestic work and subsistence production are excluded from the measurement of economic productivity and growth.

This view of women’s work as nonwork was nicely summed up in 1985 in a report by the Secretary-General to the General Assembly, ‘overall socio-economic perspective of the world economy to the year 2000’. It said: ‘Women’s productive and reproductive roles tend to be compatible in rural areas of low-income countries, since family agriculture and cottage industries keep women close to the home, permit flexibility in working conditions and require low investment of the mother’s time’.

The assignment of the work of women and men to different spheres, and the consequent categorisation of women as ‘non-producers’, are detrimental to women in developing countries in many ways and make their rights to development considerably less attainable than men’s. For example, the operation of the public or private distinction in international economic measurement excludes women from many aid programmes because they are not considered to be workers or are regarded as less productive than men. If aid is provided to women, it is often to marginalise them: Foreign aid may be available to women only in their role as mothers, although at least since 1967
it has been recognised that women are responsible for as much as 80 per cent of the food production in developing countries. The failure to acknowledge women's significant role in agriculture and the lack of concern about the impact of development on women mean that the potential of any right to development is jeopardised from the start.

Although the increased industrialisation of the Third World has brought greater employment opportunities for women, this seeming improvement has not increased their economic independence or social standing and has had little impact on women's equality. Women are found in the lowest-paid and lowest-status jobs, without career paths; their working conditions are often discriminatory and insecure. Moreover, there is little difference in the position of women who live in developing nations with a socialist political order. The dominant model of development assumes that any paid employment is better than none and fails to take into account the potential for increasing the inequality of women and lowering their economic position.

As we have seen, the international statement of the right to development draws no distinction between the economic position of men and of women. In using the neutral language of development and economics, it does not challenge the pervasive and detrimental assumption that women's work is of a different and lesser-order than men's. It therefore cannot enhance the development of the group within developing nations that is most in need. More recent UN deliberations on development have paid greater attention to the situation of women. Their concerns, however, are presented as quite distinct, solvable by the application of special protective measures, rather than as crucial to development.

The right to self-determination. The public or private dichotomy operates to reduce the effectiveness of the right to self-determination at international law. The notion of self-determination as meaning the right of 'all peoples' to 'freely determine their political status and freely pursue their economic, social and cultural development' is flatly contradicted by the continued domination and marginalisation of one sector of the population of a nation-state by another. The treatment of women within groups claiming a right to self-determination should be relevant to those claims. But the international community's response to the claims to self-determination of the Afghan and Sahrawi people, for example, indicates little concern for the position of women within those groups.

The violation of the territorial integrity and political independence of Afghanistan by the Soviet Union when it invaded that country in 1979, and other strategic, economic, and geopolitical concerns, persuaded the United States of the legality and morality of its support for the Afghan insurgents. In deciding to support the rebels, the United States did not regard the policies of the mujahidin with respect to women as relevant. The mujahidin are committed to an oppressive, rural, unambiguously patriarchal form of society quite different from that espoused by the socialist Soviet-backed regime. Indeed, Cynthia Enloe notes that 'one of the policies the Soviet-backed government in Kabul pursued that so alienated male clan leaders was expanding economic and educational opportunities for Afghanistan's women'. A consequence of the continued support for the insurgents was the creation
of a vast refugee flow into Pakistan. Of these refugees, 30 per cent were women and 40 per cent were children under thirteen. The mullahs imposed a strict fundamentalist regime in the refugee camps, which confined women to the premises, isolated them, and even deprived them of their traditional rural tasks. There is no indication that any different policy would be followed if the mujahidin were successful and able to form a government in Afghanistan. Indeed, this marginalisation and isolation of Afghan women is being projected into the future, as the educational services provided by the UN High Commissioner for Refugees are overwhelmingly for boys. The vital impact of education on women and its effect in undermining male domination have been well documented.

Morocco's claims to Western Sahara and the Polisario resistance to those claims have led to the establishment of Sahrawi refugee camps in Algeria that are mainly occupied by women and children. In these camps, however, women have been able to assert themselves: They have built hospitals and schools, achieved high rates of literacy, and supported ‘the right of the woman and the mother’, as well as the ‘fight for independence’. The international community, through the International Court of Justice and the General Assembly, has reiterated the right of the people of Western Sahara to self-determination. Despite this legal support, the Sahrawis' only backing comes from Algeria, while Morocco is backed, \textit{inter alia}, by France and the United States. The determination of these women to keep alive a ‘democracy, based on proportional representation, with centralised and equal distribution, full employment, and social and political parity between the sexes’ in the adverse conditions of refugee camps has received little international support.

The international community recognises only the right of ‘peoples’ to self-determination, which in practice is most frequently linked to the notion of the independent state. Women have never been viewed as a ‘people’ for the purposes of the right to self-determination. In most instances, the pursuit of self-determination as a political response to colonial rule has not resulted in terminating the oppression and domination of one section of society by another.

States often show complete indifference to the position of women when determining their response to claims of self-determination; the international invisibility of women persists. Thus, after the Soviet Union vetoed a Security Council resolution on the invasion of Afghanistan, the General Assembly reaffirmed ‘the inalienable right of all peoples ... to choose their own form of government free from outside interference’ and stated that the Afghan people should be able to ‘choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever’. The General Assembly's concern was with ‘outside’ intervention alone. Women arguably suffer more from ‘internal’ intervention: Women are not free to choose their role in society without the constraints of masculine domination inside the state and are constantly subject to male coercion. The high-sounding ideals of noninterference do not apply to them, for their self-determination is subsumed by that of the group. The denial to women of the freedom to determine their own economic, social and cultural development should be taken into consideration by states in assessing the legitimacy of
requests for assistance in achieving self-determination and of claims regarding the use of force.

A short list of pragmatic worries and polemical charges

This is not a list of things unknown. All of these criticisms have been around for a long time, and the human rights movement has responded to them in a wide variety of ways. Attention is routinely given to previously under-represented rights, regions, modes of enforcement, styles of work. The human rights movement is, in many ways, now moving beyond rights, broadening its engagements and terms of reference. In many ways the movement has developed precisely by absorbing waves of criticism, often from those passionate about its possibilities and importance who cast their doubts in one or another of these terms. It would be interesting to list the reactions and reforms that these and other doubts have generated.

Sometimes, of course, reflecting on this sort of criticism can itself become part of the problem. If the costs turn out to be low or speculative, any time spent fleshing them out is time lost to the project of using human rights for emancipation — although having ‘been through’ criticism might also strengthen the movement’s ability to be useful. We are all familiar, moreover, with the periodic hand-wringing about possible errors and limits that accompanies the professional practice of human rights. This practice might well do more to stabilise the profession’s sense of engagement, entitlement, confidence, than to undermine it, even where it turns out the costs far outweigh the benefits. Nevertheless, I can imagine good hearted legal professionals coming to these criticisms fresh, in a pragmatic spirit. How, and how adequately, has the movement responded to its critics? Have we done all we can to eliminate these down-side costs? Are we right to conclude that overall human rights is more part of the solution than the problem?

*Human rights occupies the field of emancipatory possibility*

*Hegemony as resource allocation*. The claim here is that this institutional and political hegemony makes other valuable, often more valuable, emancipatory strategies less available. This argument is stronger, of course, when one can

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*Kennedy, who writes in the critical tradition, discusses some of the reservations that have been expressed about the human rights movement.*
say something about what those alternatives are — or might be. But there may be something to the claim that human rights has so dominated the imaginative space of emancipation that alternatives can now only be thought, perhaps unhelpfully, as negations of what human rights asserts — passion to its reason, local to its global, etc. As a dominant and fashionable vocabulary for thinking about emancipation, human rights crowds out other ways of understanding harm and recompense. This is easiest to see when human rights attracts institutional energy and resources that would otherwise flow elsewhere. But this is not only a matter of scarce resources.

Hegemony as criticism. Human rights also occupies the field by implicit or explicit delegitimation of other emancipatory strategies. As an increasingly dominant emancipatory vocabulary, human rights is also a mode of criticism, among people of good will and against people of good will, when pursuing projects that, by comparison, can seem ‘too’ ideological and political, insufficiently universal, objective, and so on. Where this is so, pursuing a human rights initiative or promoting the use of human rights vocabulary may have fully untended negative consequences for other existing emancipatory projects. Of course this takes us directly to a comparative analysis — how do we compare the gains and losses of human rights to the (potential) gains and losses of these other vocabularies and projects?

Hegemony as distortion. To the extent emancipatory projects must be expressed in the vocabulary of ‘rights’ to be heard, good policies that are not framed that way go unattended. This also distorts the way projects are imagined and framed for international consideration. For example, it is often asserted that the international human rights movement makes an end run around local institutions and strategies that would often be better — ethically, politically, philosophically, aesthetically. Resources and legitimacy are drawn to the centre from the periphery. A ‘universal’ idea of what counts as a problem and a solution suffuses out all sorts of promising local political and social initiatives to contest local conditions in other terms. But there are other lost vocabularies that are equally global — vocabularies of duty, of responsibility, of collective commitment. Encouraging people concerned about environmental harm to rethink their concerns as a human rights violation will have bad consequences if it would have turned out to be more animating, for example, to say there is a duty to work for the environment, rather than a right to a clean environment.

The ‘right to development’ is a classic — and well known — example. Once concerns about global poverty are raised in these terms, energy and resources are drawn to developing a literature and an institutional practice at the international level of a particular sort. Efforts that cannot be articulated in these terms seem less legitimate, less practical, less worth the effort. Increasingly, people of good will concerned about poverty are drawn into debate about a series of ultimately impossible legal quandaries — right of whom, against whom, remediable how, and so on — and into institutional projects of codification and reporting familiar from other human rights efforts, without evaluating how these might compare with other uses for this talent and these resources. Meanwhile, efforts that human rights does not criticise are strengthened. International economic policy affecting global
poverty is taken over by neo-liberal players who do not see development as a special problem.

*Human rights views the problem and the solution too narrowly*

*Narrow in many ways.* People have made many different claims about the narrowness of human rights. Here are some: The human rights movement foregrounds harms done explicitly by governments to individuals or groups — leaving largely unaddressed and more legitimate by contrast harms brought about by governments indirectly or by private parties. Even when addressing private harms, human rights focuses attention on public remedies — explicit rights formalised and implemented by the state. One criticises the state and seeks public law remedies, but leaves unattended or enhanced the powers and felt entitlements of private actors. Human rights implicitly legitimates ills and delegitimates remedies in the domain of private law and nonstate action.

*Insulating the economy.* Putting these narrowings together often means defining problems and solutions in ways not likely to change the economy. Human rights foregrounds problems of participation and procedure, at the expense of distribution, implicitly legitimating the existing distributions of wealth, status and power in societies once rights have been legislated, formal participation in government achieved, and institutional remedies for violations provided. However useful saying ‘that’s my right’ is in extracting things from the state, it is not good for extracting things from the economy, unless you are a property holder. Indeed, a practice of rights claims against the state may actively weaken the capacity of people to challenge economic arrangements.

Whether progressive efforts to challenge economic arrangements are weakened by the overwhelming strength of the ‘right to property’ in the human rights vocabulary, or by the channelling of emancipatory energy and imagination into the modes of institutional and rhetorical interaction that are described as ‘public’, the imbalance between civil or political and social or economic rights is neither an accident of politics nor a matter that could be remedied by more intensive commitment. It is structural, to the philosophy of human rights, to the conditions of political possibility that make human rights an emancipatory strategy in the first place, to the institutional character of the movement, or to the ideology of its participants and supporters.

*Foregrounding form.* The strong attachment of the human rights movement to the legal formalisation of rights and the establishment of legal machinery for their implementation makes the achievement of these forms an end in itself. Elites in a political system — international, national — which has adopted the rules and set up the institutions will often themselves have the impression and insist persuasively to others that they have addressed the problem of violations with an elaborate, internationally respected and ‘state of the art’ response. This is analogous to the way in which holding elections can come to substitute for popular engagement in the political process. These are the traditional problems of form: Form can hamper peaceful adjustment and necessary change, can be over or underinclusive. Is the right to vote a
floor — or can it become a ceiling? The human rights movement ties its own hands on progressive development.

**Backgrounding the background.** The effects of a wide array of laws that do not explicitly condone violations but nevertheless affect the incidence of violation in a society are left unattended. As a result, these background laws — which may well be more important in generating the harm than an absence of rights and remedies for victims — are left with clean hands. Moreover, to maintain the claim to universality and neutrality, the human rights movement practices a systematic lack of attention to background sociological and political conditions that will determine the meaning a right has in particular contexts, rendering the evenhanded pursuit of ‘rights’ vulnerable to all sorts of distorted, and distinctly non-neutral outcomes.

Even very broad social movements of emancipation — for women, for minorities of various sorts, for the poor — have their vision blinkered by the promise of recognition in the vocabulary and institutional apparatus of human rights. They will be led away from the economy and toward the state, away from political or social conditions and toward the forms of legal recognition. It has been claimed, for example, that promoting a neutral right to religious expression in Africa without acknowledging the unequal background cultural, economic and political authority of traditional religions and imported evangelical sects will dramatically affect the distribution of religious practice. Even if we limit our thinking to the laws that influence the distribution of wealth, status, and power between men and women, the number of those laws that explicitly address ‘women’s issues’, still less ‘women’s rights’, would form an extremely small and relatively unimportant percentage. However much the human rights movement reaches out to address other background considerations affecting the incidence of human rights abuse, such ‘background’ norms remain, well, background.

**Human rights generalises too much**

**Universal goods and evils.** The vocabulary and institutional practice of human rights promotion propagates an unduly abstract idea about people, politics and society. A one-size-fits-all emancipatory practice under recognises and reduces the instance and possibility for particularity and variation. This claim is not that human rights are too ‘individualistic’. Rather, the claim is that the ‘person’, as well as the ‘group’, imagined and brought to life by human rights agitation is both abstract and general in ways that have bad consequences.

Sometimes this claim is framed as a loss of the pre-existing diversity of experience — as a vocabulary for expressing or representing experience, human rights limits human potential. In this view, limits on pre-existing potentials and experiences are themselves bad consequences. For others who make this argument, the loss of a prior, more authentic, humane, diverse real experience is not the issue. Even if it turns out that behind modes of expression there is no authentic experience, much less an edenic one, this particular vocabulary is less useful in encouraging possibility or hope or emancipation than others that generalise less or differently.
Becoming free only as an instance of the general. To come into understanding of oneself as an instance of a pre-existing general — ‘I am a “person with rights”’ — exacts a cost, a loss of awareness of the unprecedented and plastic nature of experience, or a loss of a capacity to imagine and desire alternative futures. We could term this ‘alienation’. The human rights movement proposes itself as a vocabulary of the general good — as knowledge about the shape of emancipation and human possibility that can be ‘applied’ and ‘enforced’. As an emancipatory vocabulary, it offers answers rather than questions, answers that are not only outside political, ideological and cultural differences, but also beyond the human experience of specificity and against the human capacity to hope for more, in denial of the tawdry and uncertain quality of our available dreams about and experience with justice and injustice. Rather than enabling a discussion of what it means to be human, of who is human, of how humans might relate to one another, it crushes this discussion under the weight of moral condemnation, legal adjudication, textual certainty and political power.

Not just bad for victims. The articulation of concrete good and evil in abstract terms is not only limiting for victims. The human rights vocabulary makes us think of evil as a social machine, a theatre of roles, in which people are ‘victims’, ‘violators’, and ‘bystanders’. At its most effective, human rights figures victims as passive and innocent, violators as deviant, and human rights professionals as heroic. Only the bystanders are figured in ambivalent or uncertain terms. To enter the terrain of emancipation through human rights is to enter a world of uncivilised deviants, baby seals and knights errant. There is a narrowing here — other evils and other goods receive less attention. Privileging the baby seals delegitimises the suffering of people (and animals) who are, if anything, more typical in the complexity of their ethical and political posture, and renders the broader political culture less articulate about, and less able to engage, suffering that is embedded in or understood to express a more ambivalent constellation of characters. But this vocabulary also exacts a cost from those who fit most easily into its terms. No number of carefully elaborated ‘rights’ is sufficient to recover a complex sense for a ‘violator’s’ human possibility and ambivalent experience. Differences among ‘victims’, the experience of their particularity and the hope for their creative and surprising self-expression, are erased under the power of an internationally sanctified vocabulary for their self-understanding, self-presentation and representation as ‘victims’ of human rights abuse.

Even bad for advocates. To come into experience of oneself as a benevolent and pragmatic actor through the professional vocabulary of legal representation has costs for the human rights advocate, compared with other vocabularies of political engagement or social solidarity. Coming into awareness of oneself as the representative of something else — heroic agent for an authentic suffering elsewhere — mutes one’s capacity for solidarity with those cast as victims, violators, bystanders, and stills the habit of understanding oneself to inhabit the world one seeks to affect. This claim is often put in ethical or characterological terms: Human rights promotes emancipation by propagating an unbearably normative, earnest, and ultimately arrogant mode of thinking and speaking about what is good for people, abstract people, here and there, now and forever. This is bad for people in the movement — it can demobilise them as political beings in the
world while encouraging their sanctimony — as well as those whose sense of the politically possible and desirable is shrunk to fit the uniform size.

**Human rights particularises too much**

*Emancipating the ‘right holders’*. The specific way human rights generalises is to consolidate people into ‘identities’ on the basis of which rights can be claimed. There are two issues here: A focus on individuals and a focus, whether for individuals or groups, on right-holding identity. The focus on individuals and people who come to think of themselves as individuals blunts articulation of a shared life. The focus on discrete and insular right holding identities blunts awareness of diversity, of the continuity of human experience, of overlapping identities. Together these tendencies inhibit expression of the experience of being part of a community.

Again we find two types of claims. For some, the key point is that human rights reduces and distorts a more promising real experience, of more shifting, less bounded identities, at times fused with a general will or co-participating in identities and social arrangements for which one will turn out to have no corresponding right or privilege. For others, the point is that compared to other vocabularies, human rights renders those who use it inarticulate about and less capable of solidarity and open-ended possibility. Either way, the human rights movement intensifies the sense of entitlement in individuals and groups at great cost to their ability to participate in collective political life and to their understanding of own lives as part of a more diverse community.

**Strengthening the state**. Although the human rights vocabulary expresses relentless suspicion of the state, by structuring emancipation as a relationship between an individual right holder and the state, human rights places the state at the centre of the emancipatory promise. However much one may insist on the priority or pre-existence of rights, in the end rights are enforced, granted, recognised, implemented, their violations remedied, by the state. By consolidating human experience into the exercise of legal entitlements, human rights strengthens the national governmental structure and equates the structure of the state with the structure of freedom. To be free is … to have an appropriately organised state. We might say that the right-holder imagines and experiences freedom only as a citizen. This encourages autochthonous political tendencies and alienates the ‘citizen’ from both his or her own experience as a person and from the possibility of alternative communal forms.

**Encouraging conflict and discouraging politics among right-holders**. Encouraging each person and group wishing to be free to tally the rights he or she or it holds in preparation for their assertion against the state reduces inter-group and inter-individual sensitivity. In emancipating itself, the right holder is, in effect, queue jumping. Recognising, implementing, enforcing rights is distributional work. Encouraging people to imagine themselves as right holders, and rights as absolute, makes the negotiation of distributive arrangements among individuals and groups less likely and less tenable. There is no one to triage among rights and right holders — except the state. The absolutist legal vocabulary of rights makes it hard to assess distribution among
favoured and less favoured right holders and forecloses development of a political process for tradeoffs among them, leaving only the vague suspicion that the more privileged got theirs at the expense of the less privileged.

‘Refugees’ are people too. For fifty years the human rights movement, and the legal departments (often in opposition to the ‘humanitarian assistance’ departments) of the great international institutions have struggled for legal recognition of the status of ‘refugee’, helping to generate millions of people who think of themselves as ‘refugees’, and whose status has often been so certified by one or another institution in the human rights family. Formalising a status of disconnection from the state of ‘origin’, the ‘host’ state and the state in whose location one seeks ‘settlement’, has taken an enormous toll on everyone’s ability to think about and affect either the causes or consequences of refugee status. It is a status defined by its detachment from both. The thirty year stillborn effort to codify a ‘right to asylum’ as an entailment of refugee status illustrates the difficulty of addressing solutions as matters of legal entitlement. Illustrates it so strikingly that we should question whether the effort to define the identity and rights of ‘the refugee’ is more part of the problem than the solution.

Human rights expresses the ideology, ethics, aesthetic sensibility and political practice of a particular Western eighteenth-through twentieth-century liberalism

Tainted origins. Although there are lots of interesting analogies to human rights ideas in various cultural traditions, the particular form these ideas are given in the human rights movement is the product of a particular moment and place. Post-enlightenment, rationalist, secular, Western, modern, capitalist. From a pragmatist point of view, of course, tainted origins are irrelevant. That human rights claims to be universal but is really the product of a specific cultural and historical origin says nothing – unless that specificity exacts costs or renders human rights less useful than something else. The human rights tradition might itself be undermined by its origin – be treated less well by some people, be less effective in some places – just as its origin might, for other audiences, accredit projects undertaken in its name. This is the sort of thing we might strategise about – perhaps we should downplay the universal claims, or look for parallel developments in other cultural traditions, etc.

The movement’s Western liberal origins become part of the problem (rather than a limit on the solution) when particular difficulties general to the liberal tradition are carried over to the human rights movement. When, for example, the global expression of emancipatory objectives in human rights terms narrows humanity’s appreciation of these objectives to the forms they have taken in the nineteenth- and twentieth-century Western political tradition. One cost would be the loss of more diverse and local experiences and conceptions of emancipation. Even within the liberal West, other useful emancipatory vocabularies (including the solidarities of socialism, Christianity, the labour movement, and so forth) are diminished by the consolidation of human rights as the international expression of the Western liberal tradition. Other costs would be incurred to the extent the human
rights tradition could be seen to carry with it particular downsides of the liberal West.

**Downsides of the West.** That the emancipations of the modern West have come with costs has long been a theme in critical writing — alienation, loss of faith, environmental degradation, immorality, etc. Seeing human rights as part of the Western liberal package is a way of asserting that at least some of these costs should be attributed to the human rights tradition. This might be asserted in a variety of ways. If you thought secularism was part of what is bad about the modern West, you might assert that human rights shares the secular spirit, that as a sentimental vocabulary of devotion it actively displaces religion, offering itself as a poor substitute. You might claim that the enforcement of human rights, including religious rights, downgrades religion to a matter of private and individual commitment, or otherwise advances the secular project. To the extent human rights can be implicated in the secular project, we might conclude that it leaves the world spiritually less well off. Other criticisms of the modern liberal West have been extended to human rights in a parallel fashion.

In particular, critics have linked the human rights project to liberal Western ideas about the relationships among law, politics, and economics. Western enlightenment ideas that make the human rights movement part of the problem rather than the solution include the following: The economy pre-exists politics, politics pre-exists law, the private pre-exists the public, just as the animal pre-exists the human, faith pre-exists reason, or the feudal pre-exists the modern. In each case, the second term is fragile, artificial, a human creation and achievement, and a domain of choice, while the first term identifies a sturdy and natural base, a domain outside human control.

Human rights encourages people to seek emancipation in the vocabularies of reason rather than faith, in public rather than private life, in law rather than politics, in politics rather than economics. In each case, the human rights vocabulary overemphasises the difference between what it takes as the (natural) base and as the (artificial) domain of emancipation, and underestimates the plasticity of what it treats as the base. Moreover, human rights is too quick to conclude that emancipation means progress forward from the natural passions of politics into the civilised reason of law. The urgent need to develop a more vigorous human politics is sidelined by the effort to throw thin but plausible nets of legal articulation across the globe. Work to develop law comes to be seen as an emancipatory end in itself, leaving the human rights movement too ready to articulate problems in political terms and solutions in legal terms. Precisely the reverse would be more useful. The posture of human rights as an emancipatory political project that extends and operates within a domain above or outside politics — a political project repackaged as a form of knowledge — delegitimizes other political voices and makes less visible the local, cultural, and political dimensions of the human rights movement itself.

As liberal Western intellectuals, we think of the move to rights as an escape from the unfreedom of social conditions into the freedom of citizenship, but we repeatedly forget that there is also a loss. A loss of the experience of belonging, of the habit of willing in conditions of indeterminacy, innovating
collectively in the absence of knowledge, unchanneled by an available list of rights. This may represent a loss of either the presence of experience itself, experience not yet channeled and returned to the individual as the universal experience of a right holder, or of the capacity to deploy other vocabularies that are more imaginative, open, and oriented to future possibility.

The West and the rest. The Western or liberal character of human rights exacts particular costs when it intersects with the highly structured and unequal relations between the modern West and everyone else. Whatever the limits of modernisation in the West, the form of modernisation promoted by the human rights movement in third world societies is too often based only on a fantasy about the modern/liberal/capitalist west. The insistence on more formal and absolute conceptions of property rights in transitional societies than are known in the developed West is a classic example of this problem — using the authority of the human rights movement to narrow the range of socio-economic choices available in developing societies in the name of ‘rights’ that do not exist in this unregulated or compromised form in any developed Western democracy.

At the same time, the human rights movement contributes to the framing of political choices in the third world as oppositions between ‘local or traditional’ and ‘international or modern’ forms of government and modes of life. This effect is strengthened by the presentation of human rights as part of belonging to the modern world, but coming from some place outside political choice, from the universal, the rational, the civilised. By strengthening the articulation of third world politics as a choice between tradition and modernity, the human rights movement impoverishes local political discourse, often strengthening the hand of self-styled ‘traditionalists’ who are offered a common-sense and powerful alternative to modernisation for whatever politics they may espouse.

Human rights promises more than it can deliver

Knowledge. Human rights promises a way of knowing — knowing just and unjust, universal and local, victim and violator, harm and remedy — which it cannot deliver. Justice is something that must be made, experienced, articulated, performed each time anew. Human rights may well offer an index of ways in which past experiences of justice-achieved have retrospectively been described, but the usefulness of this catalogue as a stimulus to emancipatory creativity is swamped by the encouragement such lists give to the idea that justice need not be made, that it can be found or simply imported. One result is a loss of the habit of grappling with ambivalence, conflict and the unknown. Taken together, belief in these various false promises demobilises actors from taking other emancipatory steps and encourages a global misconception of both the nature of evil and the possibilities for good.

Justice. Human rights promises a legal vocabulary for achieving justice outside the clash of political interest. Such a vocabulary is not available: Rights conflict with one another, rights are vague, rights have exceptions, many situations fall between rights. The human rights movement promises that ‘law’ — the machinery, the texts, the profession, the institution — can
resolve conflicts and ambiguities in society by resolving those within its own materials, and that this can be done on the basis of a process of ‘interpretation’ that is different from, more legitimate than, politics. And different in a particularly stultifying way — as a looser or stricter deduction from a past knowledge rather than as a collective engagement with the future. In particular, the human rights movement fetishises the judge as someone who functions as an instrument of the law rather than as a political actor, when this is simply not possible — not a plausible description of judicial behaviour — given the porous legal vocabulary with which judges must work and the likely political context within which judges are asked to act.

Many general criticisms of law’s own tendencies to overpromise are applicable in spades to human rights. The absoluteness of rules makes compromise and peaceful adjustment of outcomes more difficult. The vagueness of standards makes for self-serving interpretation. The gap between law in the books and law in action, between legal institutions and the rest of life, hollows promises of emancipation through law. The human rights movement suggests that ‘rights’ can be responsible for emancipation, rather than people making political decisions. This demobilises other actors and other vocabularies, and encourages emancipation through reliance on enlightened, professional elites with ‘knowledge’ of rights and wrongs, alienating people from themselves and from the vocabulary of their own governance. These difficulties are more acute in the international arena where law is ubiquitous and unaccompanied by political dialog.

Community. The human rights movement shares responsibility for the widespread belief that the world’s political elites form a ‘community’ that is benevolent, disconnected from economic actors and interests, and connected in some diffuse way through the media to the real aspirations of the world’s people. The international human rights effort promises the ongoing presence of an entity, a ‘community’, which can support and guarantee emancipation. This fantasy has bad consequences not only when people place too much hope in a foreign emancipatory friend that does not materialise. The transformation of the first world media audience, as that audience is imagined by the media, into ‘the international community’ is itself an astonishing act of disenfranchisement. We might think the loss as one of ‘real’ politics — such as that available in the context of a legislature, or at the national level. But even if we conclude that these are also fantastic — vocabularies of emancipation and oppression and opportunities for their expression — they are more useful vocabularies, more likely to emancipate, more likely to encourage habits of engagement, solidarity, responsibility, more open to surprise and reconfiguration.

Neutral intervention. The human rights vocabulary promises Western constituencies a politics-neutral and universalist mode of emancipatory intervention elsewhere in the world. This leads these constituencies to unwarranted innocence about the range of their other ongoing interventions and unwarranted faith in the neutral or universalist nature of a human rights presence. They intervene more often than they might otherwise. Their interventions are less effective than they would be if pursued in other vocabularies. Effective or not in their own terms, these interventions-
without responsibility-or-engagement have unfortunate consequences that are neither acknowledged nor open to contestation.

*Emancipator as emancipation.* Human rights offers itself as the measure of emancipation. This is its most striking — and misleading — promise. Human rights narrates itself as a universal/eternal/human truth and as a pragmatic response to injustice — there was the Holocaust and then there was the Genocide Convention, women everywhere were subject to discrimination and then there was CEDAW. This posture makes the human rights movement itself seem redemptive — as if doing something for human rights was, in and of itself, doing something against evil. It is not surprising that human rights professionals consequently confuse work on the movement for emancipatory work in society. But there are bad consequences when people of good will mistake work on the discipline for work on the problem. Potential emancipators can be derailed — satisfied that building the human rights movement is its own reward. People inside the movement can mistake reform of their world for reform of the world. What seem like improvements in the field’s ability to respond to things outside itself may only be improvements in the field’s ability to respond to its own internal divisions and contradictions. Yet we routinely underestimate the extent to which the human rights movement develops in response to political conflict and discursive fashion among international elites, thereby overestimating the field’s pragmatic potential and obscuring the field’s internal dynamics and will to power.

Think of the right to development, born less in response to global poverty than in response to an internal political conflict within the elite about the legitimate balance of concerns on the institutional agenda and to an effort by some more marginal members of that elite to express their political interest in the only available language. The move from a world of ‘rights’ to ‘remedies’ and then to ‘basic needs’ and on to ‘transnational enforcement’ reflected less a changing set of problems in the world than a changing set of attitudes among international legal elites about the value of legal formalism. The result of such initiatives to reframe emancipatory objectives in human rights terms is more often growth for the field — more conferences, documents, legal analysis, opposition and response — than decrease in violence against women, poverty, mass slaughter and so forth. This has bad effects when it discourages political engagement or encourages reliance on human rights for results it cannot achieve.

*The legal regime of ‘human rights’, taken as a whole, does more to produce and excuse violations than to prevent and remedy them.*

*Treating symptoms.* Human rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself. This is most likely where signing up for a norm — against discrimination — comes to substitute for ending the practice. But even where victims are recompensed or violations avoided, the distributions of power and wealth that produced the violation may well come to seem more legitimate as they seek other avenues of expression.
Humanitarian norms excuse too much. We are familiar with the idea that rules of warfare may do more to legitimate violence than to restrain it — as a result of vague standards, broad justifications, lax enforcement, or prohibitions that are clear but beside the point. The same can often be said about human rights. The vague and conflicting norms, their uncertain status, the broad justifications and excuses, the lack of enforcement, the attention to problems that are peripheral to a broadly conceived programme of social justice — all this may, in some contexts, place the human rights movement in the uncomfortable position of legitimating more injustice than it eliminates. This is particularly likely where human rights discourse has been absorbed into the foreign policy processes of the great powers, indeed, of all powers.

Humanitarian norms justify too much. The human rights movement consistently underestimates the usefulness of the human rights vocabulary and machinery for people whose hearts are hard and whose political projects are repressive. The United States, The United Kingdom, Russia — but also Serbia and the Kosovar Albanians — have taken military action, intervened politically, and justified their governmental policies on the grounds of protecting human rights. Far from being a defense of the individual against the state, human rights has become a standard part of the justification for the external use of force by the state against other states and individuals. The porousness of the human rights vocabulary means that the interventions and exercises of state authority it legitimates are more likely to track political interests than its own emancipatory agenda.

Background norms do the real damage. At the same time, the human rights regime, like the law concerning war, is composed of more than those legal rules and institutions that explicitly concern human rights. The human rights movement acts as if the human rights legal regime were composed only of rights catalogues and institutions for their implementation. In fact, the law concerning torture, say, includes all the legal rules, principles, and institutions that bear on the incidence of torture. The vast majority of these rules — rules of sovereignty, institutional competence, agency, property and contract — facilitate or excuse the use of torture by police and governments.

The human rights bureaucracy is itself part of the problem

Professionalises the humanitarian impulse. The human rights movement attracts and demobilises thousands of good-hearted people around the globe every year. It offers many thousands more the confidence that these matters are being professionally dealt with by those whom the movement has enlisted. Something similar has occurred within academic life — a human rights discipline has emerged between fields of public law and international law, promising students and teachers that work in the public interest has an institutional life, a professional routine and status. Professionalisation has a number of possible costs. Absolute costs in lost personnel for other humanitarian possibilities. As the human rights profession raises its standards and status to compete with disciplines of private law, it raises the bar for other pro-bono activities that have not been as successful in establishing themselves as disciplines, whose practices, knowledge and projects are less systematic, less analogous to practice in the private interest. Professionalisation strengthens lawyers at the expense of priests, engineers,
politicians, soothsayers and citizens who might otherwise play a more central role in emancipatory efforts. At the same time, professionalisation separates human rights advocates from those they represent and those with whom they share a common emancipatory struggle. The division of labour among emancipatory specialists is not merely about efficient specialisation. We need only think of the bureaucratisation of human rights in places like East Timor that have come within the orbit of international governance — suddenly an elaborate presence pulling local elites away from their base, or consigning them to the status of local informants, attention turning like sunflowers to Geneva, New York, to the Centre, to the Commission. To the work of resolutions and reports.

**Downgrades the legal profession.** Sometimes the concern here is for the legal profession itself. The human rights movement degrades the legal profession by encouraging a combination of overly formal reliance on textual articulations that are anything but clear or binding and sloppy humanitarian argument. This combination degrades the legal skills of those involved, while encouraging them to believe that their projects are more legitimate precisely because they are presented in (sloppy) legal terms. Others have argued that human rights offers the profession, particularly at its most elite sites, a fig leaf of public interest commitment to legitimate the profession’s contributions to global emiseration in its daily practice, in part by making all other legal fields, and particularly commercial legal fields, seem outside politics by contrast. For this, the sloppiness of human rights practice is itself useful — marking a line between the political redemptive profession and the apolitical workaday world of other legal professionals.

**Encourages false solidarity.** Of course there are many different types of people in the human rights movement and bureaucracy — different generations, different nationalities, different genders. To be a male human rights lawyer in Holland in your thirties is to live a different life altogether from that of a female human rights lawyer in Uruguay in her sixties. The human rights vocabulary encourages a false sense of the unity among these experiences and projects. As a vocabulary for progressive elite solidarity, human rights is particularly ham-handed, making it more difficult to articulate differences in the projects of male and female Palestinian human rights lawyers, Americans and Nigerians, etc.

**Promotes bad faith.** One thing these professionals do share, however, is a more or less bad faith relationship to their professional work. Every effort to use human rights for new purposes, to ‘cover’ new problems, requires that they make arguments they know to be less persuasive than they claim. Arguments about their representative capacity — speaking for a consensus, a victim, an international community — and about the decisiveness of the vocabularies they invoke. Professional bad faith accumulates the more the movement tries to torque its tools to correct for its shortcomings — to address background conditions that affect the incidence of abuse as if they were themselves violations, for example. We need only think of the earnest advocate re-describing torture or the death penalty or female genital mutilation as a problem of ‘public health’ to feel the movement’s characteristic professional deformations at work.
Speaking law to politics is not the same thing as speaking truth to power. The human rights professional’s vocabulary encourages an overestimation of the distinction between its own idealism and the hard realpolitik motivations of those it purports to address. Professional human rights performances are, in this sense, exercises in de-solidarisation. One intensifies the ‘legal’ marks in one’s expression as if one thought this would persuade an actual other person who one imagines, paradoxically, to inhabit an altogether different ‘political’ world. In this, the human rights intervention is always addressed to an imaginary third eye — the bystander who will solidarise with the (unstated) politics of the human rights speaker because it is expressed in an apolitical form. This may often work as a form of political recruitment — but it exacts a terrible cost on the habit of using more engaged and open ended political vocabularies. The result is professional narcissism guising itself as empathy and hoping to recruit others to solidarity with its bad faith.

Perils of ‘representation’. The professionalisation of human rights creates a mechanism for people to think they are working on behalf of less fortunate others, while externalising the possible costs of their decisions and actions. The representational dimension of human rights work — speaking ‘for’ others — puts the ‘victims’ both on screen and off. The production of authentic victims, or victim authenticity, is an inherently voyeuristic or pornographic practice that, no matter how carefully or sensitively it is done, transforms the position of the ‘victim’ in his or her society and produces a language of victimisation for him or her to speak on the international stage. The injured-one-who-is-not-yet-a-victim, the ‘subaltern’ if you like, can neither speak nor be spoken for, but recedes instead before the interpretive and representational practices of the movement. The remove between human rights professionals and the people they purport to represent can reinforce a global divide of wealth, mobility, information and access to audience. Human rights professionals consequently struggle, ultimately in vain, against a tide of bad faith, orientalism and self-serving sentimentalism.

Irresponsible intervention. The people who work within the human rights field have no incentive to take responsibility for the changes they bring about. Consequences are the result of an interaction between a context and an abstraction — ‘human rights’. At the same time, the simultaneously loose and sanctified nature of the vocabulary and the power of the movement itself opens an enormous terrain for discretionary action — intervening here and not there, this way and not that, this time and not that time. There is no vocabulary for treating this discretion as the responsible act of a person, creating intense psychic costs for human rights professionals themselves, but also legitimating their acts of unaccountable discretion. Belief in the nobility of human rights places blame for whatever goes wrong elsewhere — on local politicians, evil individuals, social pathologies. This imposes ethical, political and aesthetic costs on people in the movement — but also on those elsewhere in the elite who must abide them, and in those who, as the terrain of engagement and the object of representation, become the mirror for this professional self regard.
The human rights movement strengthens bad international governance

Weakest link. Even within international law, the modes of possible governance are far broader than the patterns worn by human rights professionals. The human rights movement is the product of a particular moment in international legal history, which foregrounded rules rather than standards and institutional rather than cultural enforcement. If we compare modes of governance in other fields we find a variety of more successful models — a standards or culture based environmental regime, an economic law regime embedded in private law, and so forth. The attachment to rights as a measure of the authenticity, universality, and above all as the knowledge we have of social justice binds our professional feet, and places social justice issues under the governance of the least effective institutional forms available.

Clean hands. More generally, international governance errs when it imagines itself capable of governing, ‘intervening’ if you will, without taking responsibility for the messy business of allocating stakes in society — when it intervenes only economically and not politically, only in public and not in private life, only ‘consensually’ without acknowledging the politics of influence, only to freeze the situation and not to improve it, ‘neutrally’ as between the parties, politically or economically but not culturally, and so forth. The human rights movement offers the well–intentioned intervener the illusion of affecting conditions both at home and abroad without being politically implicated in the distribution of stakes that results, by promising an available set of universal, extra–political legal rules and institutions with which to define, conduct and legitimate the intervention.

Fantasy government. International governance is often asked to do globally what we fantasise or expect national governments to do locally — allocate stakes, constitute a community, articulate differences and similarities, provide for the common good. The human rights movement, by strengthening the habit of understanding international governance in legal rather than political terms, weakens its ability to perform what we understand domestically to be these political functions. The conflation of the law with the good encourages an understanding of international governance — by those within and without its institutions — which is systematically blind to the bad consequences of its own action. The difficulty the human rights movement has in thinking of itself in pragmatic rather than theological terms — in weighing and balancing the usefulness of its interventions in the terms like those included in this list — is characteristic of international governance as a whole. The presence of a human rights movement models this blindness as virtue and encourages it among other governance professionals by presenting itself as insurance of international law’s broader humanitarian character.

Governing the exception. Human rights shares with the rest of international law a tendency to treat only the tips of icebergs. Deference to the legal forms upon which human rights is built — the forms of sovereignty, territorial jurisdictional divisions, subsidiarity, consensual norms — makes it seem natural to isolate aspects of a problem that ‘cross borders’ or ‘shock the conscience of mankind’ for special handling at the international level - often entrenching the rest of the iceberg more firmly in the national political
background. The movement’s routine polemical denunciations of sovereignty work more as attestations to its continuity than agents of its erosion, limiting the aspirations of good hearted people with international and global political commitments. The notion that law sits atop culture as well as politics demobilises people who understand their political projects as ‘intervention’ in a ‘foreign’ ‘culture’. The human rights vocabulary, with its emphasis on the development of law itself, strengthens the tendency of international lawyers more broadly to concern themselves with constitutional questions about the structure of the legal regime itself rather than with questions of distribution in the broader society.

**Human rights promotion can be bad politics in particular contexts**

It may be that this is all one can say — promoting human rights can sometimes have bad consequences. All of the first nine types of criticism suggested that human rights suffered from one or another design defect — as if these defects would emerge, these costs would be incurred, regardless of context. Perhaps this is so. But so long as none of these criticisms have been proven in such a general way (and it is hard to see just how they could be), it may be that all we have is a list of possible downsides, open risks, bad results that have sometimes occurred, that might well occur. In some context, for example, it might turn out that pursuing emancipation as entitlement could reduce the capacity and propensity for collective action. Something like this seems to have happened in the United States in the last twenty years — the transformation of political questions into legal questions, and then into questions of legal ‘rights’, has made other forms of collective emancipatory politics less available. But it is hard to see that this is always and everywhere the destiny of human rights initiatives. We are familiar, even in the United States, with moments of collective emancipatory mobilisation achieved, in part, through the vocabulary of rights. If we come to the recent British Human Rights Act, it seems an open question whether it will liberate emancipatory political energies frozen by the current legislative process and party structure, or will harness those political possibilities to the human rights claims of de-politicised individuals and judges. The point of an ongoing pragmatic evaluation of the human rights effort is precisely to develop a habit of making such assessments. But that human rights promotion can and has had bad consequences in some contexts does seem clear.

**Strengthens repressive states and anti-progressive international initiatives.**

In some places, human rights implementation can make a repressive state more efficient. Human rights institutions and rhetoric can also be used in particular contexts to humanise repressive political initiatives and co-opt to their support sectors of civil society that might otherwise be opposed. Human rights can and has also been used to strengthen, defend, legitimate a variety of repressive initiatives, by both individuals and states. To legitimate war, defend the death penalty, the entitlements of majorities, religious repression, access to (or restriction of) abortion, and so forth. The recent embrace of human rights by the international financial institutions may serve both functions — strengthening states that will need to enforce harsh structural adjustment policies while co-opting local and international resistance to harsh economic policies, and lending a shroud of universal or rational inevitability to economic policies that are the product of far narrower
political calculations and struggles. As deployed, the human rights movement may do a great deal to take distribution off the national and international development agendas, while excusing and legitimating regressive policies at all levels. These difficulties are particularly hard to overcome because the human rights movement remains tone-deaf to the specific political consequences of its activity in particular locations, on the mistaken assumption that a bit more human rights can never make things worse. This makes the human rights movement particularly subject to capture by other political actors and ideological projects. We need only think of the way the move to ‘responsibilities’ signalled by the Universal Declaration on Human Responsibilities of 1998 was captured by neo-liberal efforts to promote privatisation and weaken the emancipatory potentials of government.

Condemnation as legitimation. Finally, in many contexts, transforming a harm into a ‘human rights violation’ may be a way ofcondoning or denying rather than naming and condemning it. A terrible set of events occurs in Bosnia. We could think of it as a sin and send the religious, as illness and send physicians, as politics and send the politicians, as war and send the military. Or we could think of it as a human rights violation and send the lawyers. Doing so can be a way of doing nothing, avoiding responsibility, simultaneously individualising the harm and denying its specificity. Thinking of atrocity as a human rights violations captures neither the unthinkable or the banal in evil. Instead we find a strange combination of clinically antiseptic analysis, throwing the illusion of cognitive control over the unthinkable, and hysterical condemnation, asserting the advocate’s distance from the quotidian possibility of evil. Renaming Auschwitz ‘genocide’ to recognise its unspeakability, enshrining its status as ‘shocking the conscience of mankind’ can also be a way of unthinking its everyday reality. In this sense, human rights, by criminalising harm and condensing its origin to particular violators, can serve as denial, apology, legitimisation, normalisation, and routinisation of the very harms it seeks to condemn.

...
Muslim positions on human rights today

Conservative arguments

When the General Assembly of the United Nations had to decide on the Universal Declaration on Human Rights, in 1948, the Saudi Arabian ambassador strongly objected to religious liberty, particularly to the right to change one's religion, a right explicitly mentioned in article 18. Saudi Arabia eventually joined South Africa and six communist states and abstained from the vote; no state rejected the declaration outright. Saudi Arabia's abstention reflects the reluctance of a conservative Islamic government to endorse the emancipatory concept of human rights, a concept that is perceived to be alien and detrimental to the Islamic tradition.

Meanwhile, different conservative approaches have arisen. Instead of rejecting human rights altogether, the emphasis is more on redefining these rights in an exclusively Islamic framework. A prominent representative of this tendency is the Pakistani author Abu l–Ala Mawdudi, an influential source of inspiration for Pakistani and international fundamentalist movements. In his book, *Human Rights in Islam*, Mawdudi blames the West for claiming human rights to be an exclusively Occidental heritage. He writes: ‘The people in the west have the habit of attributing every good thing to themselves and try to prove that it is because of them that the world got this blessing, otherwise the world was steeped in ignorance and completely unaware of all these benefits’. This polemical criticism might be partly justified because Western arrogance often has presented an obstacle to cross-cultural discourse. Nevertheless, Mawdudi's approach deserves a similar critique, because he merely harmonises human rights with the traditional *Shari’a* without addressing the possible tensions and conflicts between the two. In his view, human rights thus merely form an inherent part of the Islamic tradition.

In this uncritical amalgamation, the emancipatory content of human rights gets distorted, if not completely lost. It is striking, for instance, that in his section on ‘equality of human beings’, Mawdudi only precludes distinctions in rights based on ‘colour, race, language or nationality’ without mentioning gender and religion in this context. He seems to ignore the fact that the idea of human rights, as it has been enshrined in international standards, implies the universal recognition of equal liberty. This is a concept that goes beyond the limited recognition of equality within the classical *Shari’a*, because the universal concept of human rights explicitly includes equal rights between men and women, and between adherents of different religions. By contrast, Mawdudi holds a much more restricted idea of equality and, accordingly, fails to address critically the ongoing discrimination against women and against religious minorities in many Islamic countries.

It is revealing that Mawdudi addresses the issue of women's rights primarily in a section entitled: ‘Respect for the Chastity of Women’. Referring to Mawdudi's book, the Pakistani feminist Riffat Hassan points out sarcastically: ‘Many Muslims, when they speak of human rights, either do not speak of women's rights at all or are mainly concerned with the question of how a woman's chastity may be protected’.
With regard to religious liberty, Mawdudi makes reference to the Qur'anic verse 2:256 which forbids coercion in matters of faith. In accordance with traditional Islamic tolerance, he affirms: ‘No force will be applied in order to compel [non-Muslims] to accept Islam. Whoever accepts it, he does so by his own choice’. Mawdudi fails, however, to address crucial issues, such as the ban on conversion from Islam to another religion and the restrictions on interreligious marriages, that still stand as obstacles to the full recognition of religious liberty in most contemporary Islamic countries.

More outspoken on the latter question is Ahmad Farrag, a journalist from Saudi-Arabia, who unequivocally denies the right to marry without restrictions based on religious difference, a right that is guaranteed in article 16 of the Universal Declaration on Human Rights. He writes: ‘As a Muslim I reject that article’. In line with the classical Shari’a, he concedes that a Muslim male may marry a Jewish or Christian woman. However, marriages between Muslim women and non-Muslim males as well as all marriages between Muslims and polytheists are considered to be illegitimate. In an attempt to justify this, Farrag argues that a Muslim woman would not receive due respect for her religious beliefs by a non-Muslim husband. Furthermore, he claims that a marriage between persons of completely different faiths, such as Islam and polytheism, would necessarily break down.

Some international Islamic statements on human rights also reflect this conservative disposition. This holds true for both the ‘Universal Islamic Declaration of Human Rights’, issued by the Islamic Council for Europe in 1981, and the ‘Cairo Declaration on Human Rights in Islam’, adopted by the Organization of the Islamic Conference in August 1990. While the Islamic Council for Europe is a non-governmental organisation whose statements are by no means binding, the Organization of the Islamic Conference brings together representatives of the Islamic states. Hence the Cairo Declaration, albeit not legally binding, does carry some political authority.

Like Mawdudi, the authors of the Cairo Declaration seem to integrate the language of human rights into the preexisting framework of the Shari’a in such a way that the latter never is questioned critically. On the contrary, the Shari’a acts as the exclusive yardstick used to determine the scope and content of human rights. The concluding article 25 emphasises: ‘The Islamic Shari’a is the only source of reference for the explanation or clarification of any of the articles of this Declaration’.

Despite the fact that article 1 affirms the equal dignity of all human beings, ‘without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations’, differences in terms of basic rights continue to exist. Thus, article 6 apparently presupposes the traditional understanding of gender relations, including the predominant role of the husband as head of the family. Article 6 states: ‘Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage. The husband is responsible for the support and welfare of the family’. Equality in dignity, which is asserted in the declaration, apparently does not amount to equal
rights for women and men, as they are claimed by Muslim feminists today with reference to international standards of human rights.

Although the Cairo Declaration does not explicitly mention traditional hadd-punishments, it is revealing that article 2, which deals with the right to life, makes a caveat on behalf of the Shari’a saying that ‘it is prohibited to take away life except for a Shari’a prescribed reason’. The same caveat applies to ‘safety from bodily harm’ which also is granted only by allowing exceptions on a ‘Shari’a prescribed reason’. In any case, the legitimacy of corporal punishment is not challenged critically and might even receive reinforcement from the Cairo Declaration.

Article 5, which deals with marriage and family matters, states: ‘Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right’. Nondiscrimination on the basis of religion is absent from this list of precluded restrictions on marriage. Accordingly, the traditional Shari’a obstacles to interreligious marriages are not addressed critically.

Even more problematic is article 10 which unambiguously violates the principle of equality by giving Islam a privileged status above all other religions. It reads: ‘Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism’. The Cairo Declaration, thus, seems to ban conversion from Islam and, more clearly, all missionary work among Muslims. Undoubtedly, this is at odds with religious liberty as it has been enshrined in international legal standards within the UN framework. Hence, the Cairo Declaration actually weakens or denies some basic international human rights by claiming a general priority for the traditional Shari’a.

Liberal arguments

Whereas conservative Islamic documents like the Cairo Declaration tend to ‘Islamise’ human rights at the expense of their universality and their emancipatory content, liberal Muslim reformers consider human rights a genuine challenge. Liberal Muslim reformers admit that in modern circumstances a normative consensus across cultural and religious boundaries is imperative to promote international peace and co-operation. Abdullahi Ahmed An-Na’im, a leading figure in the Islamic discourse on human rights, writes: ‘Under contemporary economic and political conditions, no country in the world is religiously monolithic, however traditional and ‘closed’ it may wish to be’. Consequently, Muslims, like people of other cultures, are called upon to engage in cross-cultural dialogue on human rights.

Understanding human rights to be an international and cross-cultural demand is tantamount to the insight that these rights cannot be simply integrated into the existing normative framework of the Shari’a. It has indeed to be admitted that there are fundamental tensions between traditional Shari’a norms and the requirements of human rights. These tensions need careful assessment, rather than premature harmonisation. What is at stake is a self-critical re-evaluation of the Shari’a and its underlying principles: An opportunity to seek
out ways to genuinely mediate between and reconcile the competing normative requirements.

Some scholars, like the Egyptian judge Muhammad Said al-Ashmawy, focus on the original significance of the Shari’ā which etymologically means, a ‘path leading to the fountain in the desert’. In this view, the Shari’ā does not form a comprehensive legal system, but consists mainly of general religious and ethical principles, such as prayer and fasting, solidarity within the community, respect between the genders, and tolerance towards minorities. The conjoining of these ethical principles with medieval legal reasoning appears to be a historic process that calls for critical evaluation. Only such criticism can help to recapture the essential normative requirements of Islam that have been overshadowed by a historic body of detailed regulations. As the Lebanese philosopher Subhi Mahmasani puts it, ‘this great body of particulars often dominated the general principles, and, with repeated imitation, took a rigid and formalistic taint alien to the original substance’. Mahmasani blames the medieval jurists for having ‘mixed religion with the daily ways of life’ to such an extent that, finally, ‘incidental worldly matters were placed on the same level with the original, essential and immortal provisions of religion’.

Liberal Muslim reformers advocate for an emancipated understanding of the Shari’ā, stressing its original meaning as a ‘path’ or guide, rather than a detailed legal code. They do not attempt to deny the binding character of the Shari’ā. On the contrary, at stake is a critical form of obedience that seems even more demanding because it requires active efforts of interpretation by the faithful. Such active reasoning – ‘ijtihad’ – was originally regarded as an independent source of Islamic law that, only after increasing petrification of the Shari’ā, became replaced by obedience to the established teachings of the Sunna law schools. Hence, many Muslim reformers demand the recovery of ijtihad in order to do justice both to modern needs and to the original spirit of the Islamic Shari’ā. Mahmasani writes: ‘The door of ijtihad should be thrown wide open for anyone juristically qualified. The error, all the error, lies in blind imitation and restraint of thought. What is right is to allow freedom of interpretation ...’.

Ali Merad, a historian from Algeria, describes the task as follows:

We must therefore strive to peer through the contingencies of history, in order to discover the direction in which revelation points, to formulate normative criteria, and to find out what God’s intention is. But this is a hazardous route to take.

Abdullahi Ahmed An-Na’im goes a step further, subjecting the Qur’anic text itself to critical scrutiny. In keeping with traditional exegesis, he distinguishes between Suras that were revealed in Mecca from Suras that were revealed in Medina. However, following his teacher Mahmoud Muhammad Taha, An-Na’im holds that these two stages of revelation imply a kind of theological ranking. Whereas the Suras of the Mecca period contain the eternal theological message of Islam, the Medina parts of the Qur’an mostly refer to the particular needs of the first Muslim community and cannot be immediately applied to modern circumstances. An-Na’im suggests that an Islamic reformation can be achieved by reading the Qur’anic normative rules of the Medina period in light of the theological principles that form the first and most important message of Islam.
The critical approaches of liberal Muslims, such as Ashmawy, Mahmasani, and An-Na’im, facilitate reforms both in the field of law and in theology. These critical approaches pave the way for political and legal changes. They also lead to a new awareness of the humane character of the Qur’anic revelation which is the most important source of the Shari’a. It is no coincidence, in that context, that modern Muslim thinkers place a great deal of emphasis on human dignity as an essential part of the Qur’anic teaching. For instance, they invoke the idea of each human’s vocation as God’s deputy on earth (Sura 2:30); they cite Sura 17:70 which says that God has honoured the children of Adam; and they point out that, according to Sura 33:72, God has bestowed a special trust upon humankind, elevating the human person above all cosmic powers.

Riffat Hassan refers to the main dogma of Islam, that is, the uniqueness and transascendence of God, in order to contest traditional hierarchies. As there is only one God and no mediator between God and the human being, each individual stands immediately before God — all human pretensions of religious guardianship over fellow persons must be condemned as illegitimate from a Qur’anic perspective. As Sura 12:40 emphasises, the ultimate judgment of a person’s vocation and destiny lies exclusively with God. The monotheistic creed thus yields emancipatory consequences because it challenges all claims of absolute obedience among human beings. Such claims of absolute obedience by which a human being takes a quasi-divine role would indeed come close to polytheism that is strictly condemned in Islam. Applying this insight to the traditional gender roles, Hassan critically points out: ‘The husband, in fact, is regarded as his wife’s gateway to heaven or hell and the arbiter of her final destiny. That such an idea can exist within the framework of Islam — which totally rejects the idea of redemption, of any intermediary between a believer and the Creator — represents both a profound irony and a great tragedy’.

The Tunisian scholar Mohamed Talbi, a member of the Honourary Committee of the ‘International Association for the Defence of Religious Liberty’, invokes the very same argument in order to demand unambiguous and full recognition of religious liberty beyond the boundaries of the traditional concept of limited tolerance. Talbi argues that a faithful Muslim’s submission to the unfathomable divine will should lead to the mutual recognition of human beings in their freedom of conscience, because no one can pretend to know God’s plans concerning his or her fellow persons. Thus Talbi writes:

From a Muslim perspective, and on the basis of the Qur’anic teachings, religious liberty is fundamentally and ultimately an act of respect for God’s sovereignty and for the mystery of His plan for man, who has been given the terrible privilege of building on his own responsibility, his destiny on earth and for the hereafter. Finally, to respect man’s freedom is to respect God’s plan. To be a true Muslim is to submit to this plan. It is, in the literal sense of the word, to put oneself, voluntarily and freely, with confidence and love, in the hands of God.

With regard to the traditional forms of corporal punishment, Talbi, like many reformers, applies the critical distinction between the essential Qur’anic principles and the historic circumstances in which they were first implemented. While the principles remain valid, the modes of their implementation may change, in accordance with new experiences and possibilities. That is why Talbi regards corporal punishment as an anachronism that cannot be justified in modern circumstances. He writes:
When the Qur'an refers to justice and equality as the ultimate goals underlying amputation punishments, this means that the true purpose to be pursued is life, not mutilation as such or death. Were it possible for us today to ensure a life of justice and equality in a different way, this would certainly be a way pointing in the same direction as the Qur'an does.

From a liberal Islamic point of view, it seems possible that the traditional obstacles to the endorsement of human rights can be overturned critically. For many liberal Muslims, no inherent contradiction exists between Islamic principles and the emancipatory claims of human rights as embodied in the existing international standards. Moreover, the Qur'anic idea of human dignity, in the opinion of Talbi, requires a political commitment to human rights, in solidarity with people of different religious beliefs and philosophical convictions. Referring to the ongoing atrocities occurring worldwide, he insists: ‘In a world where giant holocausts have been perpetrated, where human rights are manipulated or blatantly ignored, our Muslim theologians must denounce all forms of discriminations as crimes strictly and explicitly condemned by the Qur’an’.

‘Pragmatic’ reconciliation?

The contrast between conservative and liberal Islamic interpretations of human rights, as sketched above, does not cover the entire spectrum of the debate. Between both positions range a large number of ‘pragmatic’ approaches that often combine liberal and conservative attitudes. Apart from fundamentalist movements that certainly do not represent the majority of Muslims today, Islam has always accommodated a pragmatic humanitarianism, in keeping with the Qur'anic promise that, ‘God intends every facility for you; he does not want to put you to difficulties’. Sura 2:185. Hence, rigidity and puritanism are atypical of the Islamic tradition as a whole. As a matter of fact, the Islamic tradition appears capable of dealing flexibly with human needs and shortcomings. Such pragmatism also has shaped the Shari’a from its very beginning. Therefore, some reconciliation between the traditional Shari’a and the modern idea of human rights conceivably could be accomplished in accordance with this well established Islamic pragmatism.

Actually, such steps already have been taken in many Islamic countries. Legal reforms, even those involving sensitive matters of family law, can be traced back to the early twentieth century. Although not breaking away from the traditional Shari’a completely, these legal reforms, nonetheless, facilitated some changes towards a better social and legal status for women. Such reforms have restricted practices such as child marriage, polygamy, and the husband's right to repudiate his wife unilaterally.

The 1917 Ottoman Law of Family Rights, for instance, tried to curb polygamy by explicitly recognising stipulations that, on a voluntary basis, can be inserted into the marriage contract to bestow the wife with the right to judicial divorce once the husband takes a second wife. The possibility of negotiating and inserting such conditions or stipulations into a marriage contract traditionally has been acknowledged, at least by some of the established Islamic law schools. However, under the Ottoman Law of Family Rights, those marriage contracts, that effectively can impede polygamy, now receive official political and judicial support. Although polygamy still remains
legally permissible in theory, it becomes officially discouraged. At the same
time, women’s rights concerning divorce have improved, partly because the
clauses and conditions included in marriage contracts can provide new
criteria for suing the husband for judicial divorce.

It is noteworthy, in this context, how Muhammad Abduh, Grand Mufti of late
nineteenth century Egypt, advocated restrictions on polygamy. His argument,
based on the Qur’an, is as follows: Although the Qur’an allows a man to marry
more than one woman, it adds the caveat that this may not be done unless
the husband is able to treat all his wives with full equal justice. Sura 4:3. In
another place, however, the Qur’an states that this requirement can hardly
ever be satisfied: ‘You are never able to be fair and just as between women,
even if it is your ardent desire’. Sura 4:129. Muhammad Abduh and many of
his Muslim followers, therefore, read the Qur’an as forbidding polygamy
implicitly. Up until now, however, Tunisia is the only Arab state that has
abolished polygamy completely by making reference to this interpretation of
the Qur’an.

With regard to religious liberty, mainstream Islam clearly accepts religious
pluralism but still seems reluctant to endorse an unrestricted right to
interreligious marriage and to conversion from Islam to another religion.
Thus, converts continue to face social ostracism and are viewed by some as
‘renegades’ or ‘apostates’. On the other hand, it is worth mentioning that
Khomeini’s *fatwa* against the novelist Salman Rushdie failed to get support
from international Islamic organisations which also condemned Rushdie’s
*Satanic Verses*, but did not back up Khomeini’s death sentence against the
author. The execution of Mahmoud Muhammad Taha, leader of a liberal
Islamic movement in Sudan, on the charge of heresy in January 1985, shocked
most Sudanese. As Ann E Mayer reports: ‘Outrage and disgust over the
execution and televised heresy trial prevailed, even among Sudanese Muslims
who had no personal sympathy for Taha’s theological positions … Owing to the
policies of Nimeiri, Islam became associated with an act of medieval
barbarism, but many Muslims considered the execution a violation of
fundamental Islamic values’.

While traditional *Shari’a* norms continue to mark family structures all over
the Islamic world, the *Shari’a* criminal law is applied only in a few Islamic
countries today. As mentioned earlier, the emphasis of the *Shari’a* has always
been much more on family matters than on criminal law. The portrayal of the
*Shari’a* as primarily consisting of a set of cruel punishments, as it is sometimes
presented in Western media, therefore, is at least one-sided.

Moreover, the ‘*hadd*-punishments’, which in theory stand out as the most
prominent part of the classical criminal law because they are based on the
Qur’an and the Sunna, had only a minor practical importance in the history of
Islamic societies. There is no doubt that these corporal punishments —
amputation of limbs, decapitation, stoning — are utterly cruel. In keeping
with the humane character of the Islamic tradition, however, they were only
rarely carried out, even in the past. Indeed, in many parts of the Islamic world
they have not been applied since time immemorial.
In his analysis of the classical Shari’a, Joseph Schacht concludes: ‘There is a strong tendency to restrict the applicability of hadd punishments as much as possible …’. Narrow definitions of the crimes in question, short statutes of limitation, and extremely high evidentiary requirements ensured that those punishments would be executed only in exceptional cases.

Hand amputation, for instance, did not apply to ordinary theft; rather hadd-theft was determined in such a narrow way that actual crimes seldom would fit the definition. Moreover, the second Caliph Omar reportedly ruled out the application of amputation for theft in times of starvation. Hence, many Muslims assume that this penalty, if it is applicable at all, will be applicable only in an ideal Islamic society that can provide fully the basic needs of all of its members eliminating any excuse for theft. For the time being, however, these cruel penalties are inappropriate and must therefore be suspended. This type of reasoning might be typical of many moderately conservative Muslims who are reluctant to contest the validity of hadd-punishments in theory, but nevertheless, want to avoid their actual implementation by invoking practical obstacles to their reintroduction.

Actually, reports from the Sudan indicate that the vast majority of the population, including conservative Muslims, were opposed to the reintroduction of amputation punishments in 1983. It is revealing that many Sudanese called these new criminal sanctions only the ‘september laws’, rather than recognising them as Shari’a. This suggests a widespread awareness among the Muslim population that the restoration of such cruel punishments is an abuse of political power and not a legitimate expression of religious or cultural tradition. Resistance against the reintroduction of amputation punishments has been reported from other countries as well. In Pakistan, for instance, amputation sentences could not be carried out because physicians generally refused to assist.

According to the classical Shari’a, stoning for adultery (which is not based on the Qur’an) cannot be imposed unless four male Muslim eyewitnesses with a good reputation give a detailed account of the act of penetration. (According to some law schools, one or two of the males could be replaced by a double number of female witnesses.) The question that naturally arises in that case is whether it is conceivable that people could observe such an act of sexual intercourse without thereby jeopardising their requisite good reputation. Even a conservative author like Aly Aly Mansour has to admit: ‘It is nearly impossible to satisfy the prerequisite for eyewitnesses …’. The only conceivable possibility is that the act of adultery is committed publicly, leading to the presumption that the people involved are insane and, consequently, cannot be punished.

Whatever the traditional Shari’a might require in theory, most contemporary Muslims will presumably feel that such a cruel punishment like stoning can never be applied in practice. This attitude seems to prevail even among conservative Muslim scholars. It might be worth mentioning, in this context, that Pakistan’s Federal Shari’a Court resisted the reintroduction of stoning in Pakistan, in the early 1980s, by repeatedly refusing to apply this form of punishment. Only by replacing some of the judges with his own allies, prime
minister Zia ul-Haq finally succeeded in having stoning judicially confirmed as being in accordance with the *Shari’a*.

These examples may suggest that, not only in consciously liberal approaches, but also in moderately conservative strains of Islam, a reconciliatory mediation between tradition and modernity seems conceivable. Certainly, one should be aware of the possible misunderstandings that easily can occur in such a mediation: It can amount to a superficial harmonisation between Islam and human rights, whereby the emancipatory and cosmopolitan claims of human rights get unilaterally amalgamated with the existing *Shari’a* tradition. In order to overcome such misunderstandings, the relationship between *Shari’a* and human rights needs to be further clarified. In any case, one should not underestimate the potential for Islam to cope with new challenges and demands in a pragmatic way. In conformity with the humane flexibility that has largely marked the *Shari’a*, some of the conflicts between different normative requirements might be settled.

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**DEMOCRACY AND GOOD GOVERNANCE**

*Human rights, democracy and good governance are often grouped together, but what are the links?*

**TOMUSCHAT, C HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2003)**

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... Democracy

Democracy may not be a panacea to cure all ills, but it has its origins in the political rights of the individual as they are laid down in all conventional instruments, and on its part it also contributes to stabilising and strengthening human rights. Article 21 UDHR contains everything that is conceivable in terms of political rights of the citizen in a democratic polity.

However, the word ‘democracy’ itself was carefully avoided. Concerning article 25 CCPR, which reflects almost textually the earlier provision, the same observation can be made. Although the rights of democratic participation are fully covered, one vainly looks for the word ‘democracy’. In some other places, though, in a somewhat hidden fashion, democratic standards are referred to. In the limitation clauses complementing the rights set forth in articles 14(1), 21, and 22 CCPR, the requirements of a democratic society are mentioned as the criteria for the degree to which governmental interference may affect the substance of the rights concerned. Strangely
enough, this yardstick makes no appearance in article 19 CCPR, the guarantee of freedom of speech, which constitutes the paradigm of a democratic right. On this point, article 10(2) ECHR is more consistent. Whatever the reasons for the apparent lack of logic in the CCPR may be, it makes clear that in 1966 the United Nations had not yet evolved a coherent concept of democratic governance.

In recent years, this state of affairs has changed dramatically. Democracy is now explicitly acknowledged as the only legitimate form of governance. The origins of this development go once again back to the HRCion. At its spring session in 1999, the Commission adopted a resolution which affirmed in a fairly succinct way the basic principles of a democratic polity, stressing in particular the interconnection between the democratic form of government and human rights by stating that ‘democracy fosters the full realisation of all human rights, and vice versa’. One year later, the HRCion expanded the text considerably and included almost all the rights which are granted to citizens in a liberal state. It is remarkable that the journey of this text did not end in the HRCion, which in spite of its expertise is a subordinate body within the World Organization, but found its way to the General Assembly where it was reviewed and eventually approved with only minor modifications. A large majority supported this historic decision. A considerable number of states, however, abstained. The list of these abstentionists is highly revealing. It includes the following countries: Bahrain, Bhutan, Brunei, Dar es Salaam, China, Cuba, Democratic Republic of the Congo, Honduras, Laos, Libya, Maldives, Myanmar, Oman, Qatar, Saudi Arabia, Swaziland, Vietnam. Traditional monarchies march hand-in-hand with communist dictatorships and one or the other country which may have received wrong instructions from its capitals.

Given the weight of these 16 countries, it would be difficult to contend that democracy has become a binding standard under international customary law. China, in particular, cannot be brushed aside in the same way as an isolated vote of the Maldives would be ignored. Nonetheless, the posture taken by a large and almost overwhelming group of nations is a clear indication of the importance the international community attaches to the necessary environment of human rights. Human rights are part of a system of mutually supportive elements. To rely on them alone does not suffice to protect the human being from encroachments on his or her rights. A proper constitutional structure must provide the foundations of a polity where a life in dignity and self-fulfilment becomes an actual opportunity for everyone.

At the European level, too, it was recognised that the complex mechanisms of the ECHR needed to be complemented by political monitoring efforts and expert advisory services in order to ensure the general framework within which human rights are located. For this purpose, in 1990 the Venice European Commission for Democracy was founded. It has assisted in particular the new member states of the Council of Europe in building institutions that are permeated by a new spirit of democratic openness. Within the narrower context of the European Union, democracy figures prominently in the clause providing for structural homogeneity (article 6(1) TEU).
Good governance

The considerations set out above are also the background of two more recent developments which seek to build up a framework for securing full enjoyment of human rights. It has been realised that a ‘good life’ depends not only on the basic principles upon which a system of government is predicated, but that the conduct of governmental elites and bureaucrats is a decisive factor in bringing the prevailing societal climate in a given state up to the level of the expectations raised by those principles. In this regard, international organisations and, in particular, the financial agencies of the international community have rightly started playing a role as defenders of public interest. Since 1989, the World Bank has evolved a doctrine of ‘good governance’, which it has described in the following terms:

Good governance is epitomised by predictable, open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law.

Other institutions have followed suit. For the International Monetary Fund, it was an almost natural move to adopt similar strategies. It uses negotiations for orderly exchange arrangements according to article IV of its Statute to prevail upon member states to adjust their policies to the requirements of good governance. The African Development Bank has recently adopted a ‘Policy on Good Governance’ which lists exactly the same headings, namely accountability, transparency, combating corruption, political participation of citizens, as well as legal and judicial reforms. This was done in response to the Grand Bay Declaration, adopted on 16 April 1999 by a summit meeting of the OAU, which affirms the interdependence of the principles of good governance, the rule of law, democracy, and development. Likewise, the European Community has included a clause to that effect in its latest agreement with the ACP (Africa, the Caribbean and the Pacific region) States (article 9(3)). Recently, the doctrine of good governance received its definitive benediction by its inclusion in the United Nations Millennium Declaration. It is clear that a framework of good governance, if actually established, leads to a significantly increased effectiveness of human rights.

...
POSITIVE PEACE AND HUMAN SECURITY

Galtung introduces the concept of positive peace — peace not merely as the absence of war, but a situation in which people can realise their potential.

GALTUNG, J ‘VIOLENCE, PEACE AND PEACE RESEARCH’ (1969)
6 Journal of Peace Research 167

On the definition and dimensions of violence

As a point of departure, let us say that violence is present when human beings are being influenced so that their actual somatic and mental realisations are below their potential realisations. This statement may lead to more problems than it solves. However, it will soon be clear why we are rejecting the narrow concept of violence—according to which violence is somatic incapacitation, or deprivation of health alone (with killing as the extreme form) at the hands of an actor who intends this to be the consequence. If this were all violence is about, and peace were seen as its negation, then too little is rejected when peace is held up as an ideal. Highly unacceptable social orders would still be compatible with peace. Hence, an extended concept of violence is indispensable but that concept should be a logical extension, not merely a list of undesirables.

The definition points to at least six important dimensions of violence. But first some remarks about the use of key words above: ‘Actual’ and ‘potential’. Violence is here defined as the cause of the difference between the potential and the actual, between what could have been and what is. Violence is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance. Thus, if a person died from tuberculosis in the eighteenth century it would be hard to conceive of this as violence since it might have been quite unavoidable, but if he dies from it today, despite all the medical resources in the world, then violence is present according to our definition. Correspondingly, the case of people dying from earthquakes today would not warrant an analysis in terms of violence, but the day after tomorrow, when earthquakes may become avoidable, such deaths may then be seen as the result of violence. In other words, when the potential is higher then the actual is, by definition, avoidable and when it occurs when it is avoidable, then violence is present.

When the actual is unavoidable, then violence is not present even if the actual is at a very low level. A life expectancy of only thirty years during the neolithic period was not an expression of violence, but the same life expectancy today (whether due to wars, or social injustice, or both) would be seen as violence according to our definition.

The meaning of ‘potential realisation’ is highly problematic, especially when we move from somatic aspects of human life, where consensus is more readily
obtained, to mental aspects. Our guide here would probably often have to be whether the value to be realised is fairly consensual or not, although this is by no means satisfactory. For example, literacy is held in high regard almost everywhere, whereas the value of being Christian is highly controversial. Hence, we would talk about violence if the level of literacy is lower than what it could have been, not if the level of Christianity is lower than what it could have been. We shall not try to explore this difficult point further in this context, but turn to the dimensions of violence.

The first distinction to be made is between physical and psychological violence. The distinction is trite but important mainly because the narrow concept of violence mentioned above concentrates on physical violence only. Under physical violence human beings are hurt somatically to the point of killing. Psychological violence includes lies, brainwashing, indoctrination of various kinds, threats, etc that serve to decrease mental potentialities.

The second distinction is between the negative and the positive approach to influence. Thus a person can be influenced not only by punishing him when he does what the influencer considers wrong, but also by rewarding him when he does what the influencer considers right.

The third distinction to be made is on the object side: Whether or not there is an object that is hurt. Can we talk about violence when no physical or biological object is hurt? When a person, a group, or a nation is displaying the means of physical violence, whether by throwing stones around or testing nuclear arms, there may not be violence present in the sense that anyone is hit or hurt, but there is nevertheless the threat of physical violence and the indirect effect of mental violence that may even be characterised as some type of psychological violence since it constrains human action. Indeed, this is also the intention: The famous balance of power doctrine is based on efforts to obtain precisely this effect.

The fourth distinction to be made, and the most important one, is on the subject side: Whether or not there is a subject (person) who acts. Again it may be asked, can we talk about violence when nobody is committing direct violence, that is, acting. We shall refer to the type of violence where there is an actor that commits the violence as personal or direct, and to violence where there is no such actor as structural or indirect. In both cases individuals may be killed or mutilated, hit or hurt in both senses of these words, and manipulated by means of ‘stick-or-carrot’ strategies.

The important point here is that if people are starving when this is objectively avoidable, then violence is committed, regardless of whether there is a clear subject-action-object relation, as during a siege yesterday, or no such clear relation, as in the way world economic relations are organised today. We have baptised the distinction in two different ways, using the word-pairs ‘personal-structural’ and ‘direct-indirect’ respectively. Violence with a clear subject-object relation is manifest because it is visible as action. It corresponds to our ideas of what drama is, and it is personal because there are persons committing the violence. It is easily captured and expressed verbally since it has the same structure as elementary sentences in (at least Indo-European) languages: Subject-verb-object, with both subject and object being persons.
Violence without this relation is structural, that is built into structures. Thus, when one husband beats his wife there is a clear case of personal violence, but when one million husbands keep one million wives in ignorance there is structural violence. Correspondingly, in a society where life expectancy is twice as high in the upper as in the lower classes, violence is exercised even if there are no concrete actors one can point to as directly attacking others, as when one person kills another.

The fifth distinction to be made is between violence that is intended or unintended. This distinction is important when guilt is to be decided, since the concept of guilt has been tied more to intention, both in Judaeo-Christian ethics and in Roman jurisprudence, than to consequence (whereas the present definition of violence is entirely located on the consequence side). This connection is important because it brings into focus a bias present in so much thinking about violence, peace and related concepts: Ethical systems directed against intended violence will easily fail to capture structural violence in their nets — and may hence be catching the small fry and letting the big fish loose. From this fallacy it does not follow, in our mind, that the opposite fallacy of directing all attention against structural violence is elevated into wisdom. If the concern is with peace, and peace is the absence of violence, then action should be directed against personal as well as structural violence.

Sixth, there is the traditional distinction between two levels of violence, the manifest and the latent. Manifest violence, whether personal or structural, is observable; latent violence is something which is not there, yet might easily come about. For personal violence this would mean a situation where a little challenge would trigger considerable killing and atrocity, as is often the case in connection with racial confrontations. It indicates a situation of unstable equilibrium. Similarly with structural violence, we could imagine a relatively egalitarian structure insufficiently protected against sudden feudalisation, against crystallisation into a much more stable, even petrified, hierarchical structure.

If peace is now regarded as absence of violence, then thinking about peace (and consequently peace research and peace action) will be structured the same way as thinking about violence. And the violence cake can evidently be cut a number of ways. It has been traditional to think about violence as personal violence only, with one important subdivision in terms of ‘violence vs the threat of violence’, another in terms of ‘physical vs psychological war’, still another (important in ethical and legal thinking) about ‘intended vs unintended’, and so on. The choice here is to make the distinction between personal and structural violence the basic one; justification has been presented firstly in terms of a unifying perspective (the cause of the difference between potential and actual realisation) and secondly by indicating that there is no reason to assume that structural violence amounts to less suffering than personal violence.

On the other hand, it is not strange that attention has been focused more on personal than structural violence. Personal violence shows. The object of personal violence perceives the violence, usually, and may complain — the object of structural violence may be persuaded not to perceive this at all.
Personal violence represents change and dynamism — not only ripples on waves, but waves on otherwise tranquil waters. Structural violence is silent, it does not show — it is essentially static, it is the tranquil waters. In a static society, personal violence will be registered, whereas structural violence may be seen as about as natural as the air around us. Conversely, in a highly dynamic society, personal violence may be seen as wrong and harmful and still somehow congruent with the order of things, whereas structural violence becomes apparent because it stands out like an enormous rock in a creek, impeding the free flow, creating all kinds of eddies and turbulences. Thus, perhaps it is not so strange that the thinking about personal violence (in the Judaeo-Christian-Roman tradition) took on much of its present form in what we today would regard as essentially static social orders, whereas thinking about structural violence (in the Marxist tradition) was formulated in highly dynamic northwest-European societies.

In other words, we conceive of structural violence as something that shows a certain stability, whereas personal violence (for example, as measured by the tolls caused by group conflict in general and war in particular) shows tremendous fluctuations over time.

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The Commission on Human Security was established as an initiative of the government of Japan in response to a call by the UN Secretary-General, Kofi Annan, at the UN Millineum Summit, for the world powers to advance the twin goals of ‘freedom from want’ and ‘freedom from fear’. The following extract, clarifying the concept of human security and its relationship with other human centred concepts such as human development and human rights, is from their final report.

**THE FINAL REPORT OF THE COMMISSION ON HUMAN SECURITY (2003)**


... Development, rights and human security

Human security is concerned with reducing and — when possible — removing the insecurities that plague human lives. It contrasts with the notion of state security, which concentrates primarily on safeguarding the integrity and robustness of the state and thus has only an indirect connection with the security of the human beings who live in these states.

That contrast may be clear enough, but in delineating human security adequately, it is also important to understand how the idea of human security relates to — and differs from — other human centred concepts, such as human development and human rights. These concepts are fairly widely known and have been championed, with very good reason, for a long time, and they too
are directly concerned with the nature of human lives. It is thus fair to ask what the idea of human security can add to these well-established ideas.

**Human development and human security**

The human development approach, pioneered by the visionary economist Mahbub ul Haq (under the broad umbrella of the United Nations Development Programme, UNDP), has done much to enrich and broaden the literature on development. In particular, it has helped to shift the focus of development attention away from an overarching concentration on the growth of inanimate objects of convenience, such as commodities produced (reflected in the gross domestic product or the gross national product), to the quality and richness of human lives, which depend on a number of influences, of which commodity production is only one.

Human development is concerned with removing the various hindrances that restrain and restrict human lives and prevent its blossoming. A few of these concerns are captured in the much-used ‘human development index’ (HDI), which has served as something of a flagship of the human development approach. But the range and reach of that perspective have motivated a vast informational coverage presented in the UNDP’s annual *Human Development Report* and other related publications that go far beyond the HDI.

The idea of human development, broad as it is, does, however, have a powerfully buoyant quality, since it is concerned with progress and augmentation. It is out to conquer fresh territory on behalf of enhancing human lives and is far too upbeat to focus on rearguard actions needed to secure what has to be safeguarded. This is where the notion of human security becomes particularly relevant.

Human security as an idea fruitfully supplements the expansionist perspective of human development by directly paying attention to what are sometimes called ‘downside risks’. The insecurities that threaten human survival or the safety of daily life, or imperil the natural dignity of men and women, or expose human beings to the uncertainty of disease and pestilence, or subject vulnerable people to abrupt penury related to economic downturns demand that special attention be paid to the dangers of sudden deprivation. Human security demands protection from these dangers and the empowerment of people so that they can cope with — and when possible overcome — these hazards.

There is, of course, no basic contradiction between the focus of human security and the subject matter of the human development approach. Indeed, formally speaking, protection and safeguarding can also be seen as augmentations of a sort, to wit that of safety and security. But the emphasis and priorities are quite different in the cautious perspective of human security from those typically found in the relatively sanguine and upward-oriented literature of the human focus of development approaches (and this applies to human development as well), which tend to concentrate on ‘growth with equity’, a subject that has generated a vast literature and inspired many policy initiatives. In contrast, focusing on human security requires that serious attention be paid to ‘downturns with security’, since downturns may
inescapably occur from time to time, fed by global or local afflictions. This is in addition to the adversity of persistent insecurity of those whom the growth process leaves behind, such as the displaced worker or the perennially unemployed.

Even when the much-discussed problems of uneven and unequally shared benefits of growth and expansion have been successfully addressed, a sudden downturn can make the lives of the vulnerable thoroughly and uncommonly deprived. There is much economic evidence that even if people rise together as the process of economic expansion proceeds, when they fall, they tend to fall very divided. The Asian economic crisis of 1997–99 made it painfully clear that even a very successful history of ‘growth with equity’ (as the Republic of Korea, Thailand, and many other countries in East and Southeast Asia had) can provide very little protection to those who are thrown to the wall when a sharp economic downturn suddenly occurs.

The economic case merely illustrates a general contrast between the two perspectives of expansion with equity and downturn with security. For example, while the foundational demand for expanding regular health coverage for all human beings in the world is tremendously important to advocate and advance, that battle has to be distinguished from the immediate need to encounter a suddenly growing pandemic, related to HIV/AIDS or malaria or drug-resistant tuberculosis.

Insecurity is a different — and in some ways much starker — problem than unequal expansion. Without losing any of the commitment that makes human development important, we also have to rise to the challenges of human security that the world currently faces and will long continue to face.

**Human rights and human security**

There is a similar complementarity between the concepts of human rights and human security. Few concepts are as frequently invoked in contemporary political debates as human rights. There is something deeply attractive in the idea that every person anywhere in the world, irrespective of citizenship or location, has some basic rights that others should respect. The moral appeal of human rights has been used for varying purposes, from resisting torture and arbitrary incarceration to demanding the end of hunger and unequal treatment of women.

Human rights may or may not be legalised, but they take the form of strong claims in social ethics. The idea of pre-legal ‘natural’ or ‘human’ rights has often motivated legislative initiatives, as it did in the US Declaration of Independence or in the French Declaration of the Rights of Man in the 18th century, or in the European Convention for the Protection of Human Rights and Fundamental Freedoms in the 20th century. But even when they are not legalised, affirmation of human rights and related activities of advocacy and monitoring of abuse can sometimes be very effective through the politicisation of ethical commitments.

Commitments underlying human rights take the form of demanding that certain basic freedoms of human beings be respected, aided and enhanced.
The basically normative nature of the concept of human rights leaves open the question of which particular freedoms are crucial enough to count as human rights that society should acknowledge, safeguard and promote. This is where human security can make a significant contribution by identifying the importance of freedom from basic insecurities — new and old. The descriptive richness of the considerations that make security so important in human lives can, thus, join hands with the force of ethical claims that the recognition of certain freedoms as human rights provides.

Human rights and human security can, therefore, fruitfully supplement each other. On the one hand, since human rights can be seen as a general box that has to be filled with specific demands with appropriate motivational substantiation, it is significant that human security helps to fill one particular part of this momentous box through reasoned substantiation (by showing the importance of conquering human insecurity). On the other, since human security as an important descriptive concept demands ethical force and political recognition, it is useful that this can be appropriately obtained through seeing freedoms related to human security as an important class of human rights. Far from being in any kind of competition with each other, human security and human rights can be seen as complementary ideas.

One of the advantages of seeing human security as a class of human rights is the associative connection that rights have with the corresponding duties of other people and institutions. Duties can take the form of ‘perfect obligations’, which constitute specific demands on particular persons or agents, or of ‘imperfect obligations’, which are general demands on anyone in a position to help. To give effectiveness to the perspective of human security, it is important to consider who in particular has what obligations (such as the duties of the state to provide certain basic support) and also why people in general, who are in a position to help reduce insecurities in human lives, have a common — though incompletely specified — duty to think about what they can do. Seeing human security within a general framework of human rights can, thus, bring many rewards to the perspective of human security.

To conclude, it is important, on one side, to see how the distinct ideas of human security, human development and human rights differ, but also to understand why they can be seen as complementary concepts. Mutual enrichment can go hand in hand with distinction and clarity.

...
The founders of the United Nations clearly recognised the connection between the struggle for peace and security — where victory spells freedom from fear — and the struggle for economic and social progress, where victory spells freedom from want.

Since then there have been five decades of real progress on both fronts. The world as a whole is both more peaceful and more prosperous than it was in 1945. But that progress has not been equally shared.

Nearly half the human race — an estimated 2.8 billion people — is still struggling to survive on less than two dollars a day.

And according to one estimate, five and a half million people have died in war during the 1990s. Many times that number have had their lives ruined — by injury, by the loss of their loved ones, by being driven from their homes, or by the destruction of their property.

The vast majority of these conflicts occur in the developing world. Most of the world's twenty poorest countries have experienced significant violent conflict in the past decades. In Africa, out of 45 countries where the United Nations has development programmes, eighteen are experiencing civil strife and eleven are in varying stages of political crisis.

Clearly, war is not the only cause of poverty, and poverty by itself does not cause war. If it did, all poor countries would be at war. Thank God, most of them are not.

Nor is inequality in itself a sufficient explanation for conflict. The relationship is much more complex than that.

But one thing is indisputable: Development has no worse enemy than war.

Prolonged armed conflicts don't only kill people: They destroy a country's physical infrastructure, divert scarce resources and disrupt economic life, including food supplies. They radically undermine education and health services.

A war of national liberation or self-defence may sometimes bind a nation together — albeit at a cruel and unacceptable human cost. But almost all today's conflicts are civil wars, in which civilian populations are not incidental casualties but direct targets. These wars completely destroy trust between

In this extract, UN Secretary-General Kofi Annan reinforces the notion of the indivisibility of development and peace and argues for the need for human rights as the key to conflict prevention.
communities, breaking down normal social relations and undermining the legitimacy of government — not to mention investor confidence. They are also harder to end, because the opposing sides have to live together after the peace, rather than withdrawing behind state borders.

Wars between states, fought with expensive modern weaponry, are very destructive but do at least tend to be short-lived: Think of the Gulf War in 1991 or the Kosovo conflict this year. But today's more typical wars are fought in poor countries, with weapons which are cheap and easy to obtain. The misery of these wars can be sustained for years, or even decades: Think of Afghanistan, Angola, Sudan.

Much of our work at the United Nations is devoted to coping with the immense suffering caused by these conflicts, and the search for ways to settle them peacefully.

The search is always long, and often thankless — but not as hopeless as the headlines might make you think. During the past nine years, three times as many peace agreements have been signed as in the previous three decades. Some have failed, often amid great publicity, but most have held.

Success, however, brings with it new tasks and problems: What we in the United Nations call ‘post-conflict peacebuilding’. This has been a major innovation of the 1990s, and something of a growth industry.

From Namibia and El Salvador to Kosovo and East Timor, you and we are working side by side, along with local government officials, NGOs and citizens' groups, to help provide emergency relief, demobilise combatants, clear mines, organise elections, encourage reconciliation, build impartial police forces, and re-establish basic services. Most difficult but most important of all, we are trying to rebuild relationships — that precious capital of trust within and between communities which is the first casualty of every war, and the hardest thing to restore.

There has been much talk of ‘bridging the gap’ or ‘managing the transition’ between these tasks and longer-term development efforts. But increasingly, I think, we understand that the two are not separate. Crisis management and peacebuilding have to be part of a development strategy. If countries wait until all their conflicts and crises are settled before embarking on such a strategy they are likely to wait forever.

But how much better it would be, Ladies and Gentlemen, if we could prevent these conflicts from arising in the first place.

I shall not waste time trying to persuade you of that with facts and figures, because none of you would disagree. No one doubts that prevention is desirable. What some question is whether it is feasible, or whether decision-makers will ever have long enough time horizons to take it seriously. It is even said that ‘convincing politicians to invest in conflict prevention is like asking a teenager to start saving for a pension’.
I believe such cynicism is misplaced, but there is a need for humility. Even if we did receive all the resources we need for prevention, we should not overestimate our powers. Unless the government and people of a country are genuinely willing to confront the problems that may cause conflict, there is not much that even the best informed and most benevolent outsiders can do.

This is not a counsel of despair, simply a note of necessary caution.

What is clear is that to succeed in preventing wars we need to understand the forces that create them. Of course these are complex, and — as usual — there is a lot of disagreement among scholars who have studied them. But on some key points a consensus is beginning to emerge.

First, no one single factor can explain all conflicts — and therefore no simple nostrum can prevent them all. Prevention policies must be tailored to the particular circumstances of the country or region, and must address many different issues at the same time.

Secondly, most researchers agree that it is useful to distinguish ‘structural’ or long-term factors, which make violent conflict more likely, from ‘triggers’, which actually ignite it.

The structural factors all have to do with social and economic policy, and the way that societies govern themselves. It is here that the link between security and development policy is most obvious.

A major study by the United Nations University, to be published later this year, suggests that simple inequality between rich and poor is not enough to cause violent conflict. What is highly explosive is what the authors of the study call ‘horizontal’ inequality: When power and resources are unequally distributed between groups that are also differentiated in other ways — for instance by race, religion, or language. So-called ‘ethnic’ conflicts occur between groups which are distinct in one or more of these ways, when one of them feels it is being discriminated against, or another enjoys privileges which it fears to lose.

Economic stagnation or decline — sometimes caused by factors quite outside a government’s control, such as a deterioration in the terms of trade — do make conflict more likely. As resources get scarcer, competition for them gets fiercer, and elites use their power to retain them at everyone else’s expense.

And when economic decline is prolonged — especially when it starts from an already low base — the result can be a steady degeneration of the state’s capacity to govern, until the point where it can no longer maintain public order.

So the fact that political violence occurs more frequently in poor countries, has more to do with failures of governance, and particularly with failure to redress ‘horizontal’ inequalities, than with poverty as such. A well-governed poor country can avoid conflict. It also, of course, has a better chance of escaping from poverty.
Even where these long-term factors are present, actual conflict requires a short-term ‘trigger’. Often this takes the form of a deliberate mobilisation of grievances by rival elites, with the careful cultivation of dehumanising myths within one group about another group, propagated and amplified by hate-media.

At the very edge of war, relatively small events which appear to confirm these myths can provide the spark to ignite full-scale violence. And once it has started, whole communities become gripped by hate and fear. Each action by one tends to reinforce the fears of the other.

Often it is the state, or the group that controls the state, which initiates large-scale violence, as a response to non-violent protests by opposition groups. This is not surprising, because governments are usually better armed than their opponents, at least at the beginning of a conflict. However strong their grievances, people seldom take up arms in sufficient numbers to defeat the state unless they are driven to it by violent repression.

But many wars have more to do with greed than with grievance — as several recent studies have shown, including one done here in the Bank’s Research Department. War can be profitable for some, especially where it involves control over valuable export commodities like diamonds, drugs or timber. Where governments are weak, and legitimate economic opportunities are few, resort to violent crime may seem a logical alternative to destitution, especially for unemployed youth. And when such criminal violence occurs on a large scale — and is resisted, as it must be, by the state — it can all too easily escalate into civil war.

So what can we do about all this?

First of all, if ‘horizontal’ inequality is indeed a major cause of conflict, then obviously our policies must seek to reduce it. Yet until very recently, development policy tended to ignore this problem. As a result, some policies which were meant to enhance growth have had the unintended consequence of aggravating this kind of inequality, thus increasing the risk of instability and violence.

That is one reason why I welcome Jim Wolfensohn’s call for the Bank and its partners to start asking hard questions about ‘how we can best integrate a concern for conflict prevention into development operations’. And I am interested to hear that the British government is now actively discussing the idea of ‘conflict impact assessments’. The idea is that before adopting a particular policy, or imposing a particular type of conditionality, you would check, through a process of consultation, that that policy will reduce the danger of conflict in a country — or at least not actually increase it. Like a lot of good ideas, this seems common sense once you have thought of it. But in the past it has not been done.

Secondly, if conflict is often caused by different groups having unequal access to political power, then it follows that a good way to avoid conflict is to encourage democracy — not the winner-takes-all variety, but inclusive democracy, which gives everyone a say in decisions that affect their lives.
During the 1990s, largely as a result of the end of the Cold War, there have been two remarkable changes in the international system. First, the number of democratic states in the world almost doubled between 1990 and 1998. And second, the number of armed conflicts in the world declined — from fifty-five in 1992 to thirty-six in 1998.

That second statement may seem surprising, when each of us can reel off a list of horrific conflicts, from Bosnia to Sierra Leone to East Timor. But the truth — so far entirely missed by the media — is that more old wars have ended than new ones have begun.

Of course the increase in the number of democracies is not the sole cause of the decline in the number of wars. Other factors, not least the ending of Cold War ideological conflicts, have also played a role. And in some cases peace may have made democratisation possible, rather than the other way round. But a number of studies do show that democracies have very low levels of internal violence compared with non-democracies.

When you think about it, that is what you would expect. Democracy is, in essence, a form of non-violent conflict management. But a note of caution is in order. While the end result is highly desirable, the process of democratisation can be highly destabilising — especially when states introduce ‘winner-take-all’ electoral systems without adequate provision for human rights. At such times different groups can become more conscious of their unequal status, and nervous about each other’s power. Too often, they resort to pre-emptive violence.

But that should not discourage us from urging the right sort of democratisation, as part of our development policies.

Good governance, of course, means much more than democratisation in a formal political sense. Another very important aspect of it is the reform of public services — including the security sector, which should be subject to the same standards of efficiency, equity and accountability as any other public service. This has rightly become an issue of increasing concern to the Bank, the OECD and several important donor states. Conflict is much less likely to occur in a state if all its inhabitants feel that their lives and property are made safer by the work of the security services. Conflict is more likely when a significant group of citizens feels excluded from the security services, and exploited or terrorised by them.

If I could sum up my message this afternoon in one sentence, it is that human security, good governance, equitable development and respect for human rights are interdependent and mutually reinforcing. If war is the worst enemy of development, healthy and balanced development is the best form of conflict prevention.

The case for allocating more time and resources to development policies such as I have outlined is compelling. It is cost-effective, and it can save millions of lives. But it will not be easy. The costs of prevention have to be paid in the present, while its benefits lie in the distant future. Moreover, the benefits are intangible: They are the wars and disasters that do not happen. Yet there has
been a great upsurge of interest in prevention over the past few years, among donor states as well as international organisations. We must build on it.

ANNAN, K IN LARGER FREEDOM (2005)


(1) Five years into the new millennium, we have it in our power to pass on to our children a brighter inheritance than that bequeathed to any previous generation. We can halve global poverty and halt the spread of major known diseases in the next 10 years. We can reduce the prevalence of violent conflict and terrorism. We can increase respect for human dignity in every land. And we can forge a set of updated international institutions to help humanity achieve these noble goals. If we act boldly — and if we act together — we can make people everywhere more secure, more prosperous and better able to enjoy their fundamental human rights.

(2) All the conditions are in place for us to do so. In an era of global interdependence, the glue of common interest, if properly perceived, should bind all States together in this cause, as should the impulses of our common humanity. In an era of global abundance, our world has the resources to reduce dramatically the massive divides that persist between rich and poor, if only those resources can be unleashed in the service of all peoples. After a period of difficulty in international affairs, in the face of both new threats and old ones in new guises, there is a yearning in many quarters for a new consensus on which to base collective action. And a desire exists to make the most far-reaching reforms in the history of the United Nations so as to equip and resource it to help advance this twenty-first century agenda.

(3) In the Millennium Declaration, world leaders were confident that humanity could, in the years ahead, make measurable progress towards peace, security, disarmament, human rights, democracy and good governance. They called for a global partnership for development to achieve agreed goals by 2015. They vowed to protect the vulnerable and meet the special needs of Africa. And they agreed that the United Nations needed to become more, not less, actively engaged in shaping our common future.

(4) Five years later, a point-by-point report on the implementation of the Millennium Declaration would, I feel, miss the larger point, namely, that new circumstances demand that we revitalise consensus on key challenges and priorities and convert that consensus into collective action.
(5) Much has happened since the adoption of the Millennium Declaration to compel such an approach. Small networks of non-State actors — terrorists — have, since the horrendous attacks of 11 September 2001, made even the most powerful States feel vulnerable. At the same time, many States have begun to feel that the sheer imbalance of power in the world is a source of instability. Divisions between major powers on key issues have revealed a lack of consensus about goals and methods. Meanwhile, over 40 countries have been scarred by violent conflict. Today, the number of internally displaced people stands at roughly 25 million, nearly one third of whom are beyond the reach of United Nations assistance, in addition to the global refugee population of 11 to 12 million, and some of them have been the victims of war crimes and crimes against humanity.

(6) Many countries have been torn apart and hollowed out by violence of a different sort. HIV/AIDS, the plague of the modern world, has killed over 20 million men, women and children and the number of people infected has surged to over 40 million. The promise of the Millennium Development Goals still remains distant for many. More than one billion people still live below the extreme poverty line of one dollar per day, and 20 000 die from poverty each day. Overall global wealth has grown but is less and less evenly distributed within countries, within regions and in the world as a whole. While there has been real progress towards some of the Goals in some countries, too few Governments — from both the developed and developing world — have taken sufficient action to reach the targets by 2015. And while important work has been done on issues as diverse as migration and climate change, the scale of such long-term challenges is far greater than our collective action to date to meet them.

(7) Events in recent years have also led to declining public confidence in the United Nations itself, even if for opposite reasons. For instance, both sides of the debate on the Iraq war feel let down by the Organization — for failing, as one side saw it, to enforce its own resolutions, or as the other side saw it, for not being able to prevent a premature or unnecessary war. Yet most people who criticise the United Nations do so precisely because they think the Organization is vitally important to our world. Declining confidence in the institution is matched by a growing belief in the importance of effective multilateralism.

(8) I do not suggest that there has been no good news in the last five years. On the contrary, there is plenty we can point to which demonstrates that collective action can produce real results, from the impressive unity of the world after 11 September 2001 to the resolution of a number of civil conflicts, and from the appreciable increase of resources for development to the steady progress achieved in building peace and democracy in some war-torn lands. We should never despair. Our problems are not beyond our power to meet them. But we cannot be content with incomplete successes and we cannot make do with incremental responses to the shortcomings that have been revealed. Instead, we must come together to bring about far-reaching change.

(9) Our guiding light must be the needs and hopes of peoples everywhere. In my Millennium Report, ‘We the peoples’ (A/54/2000), I drew on the
opening words of the Charter of the United Nations to point out that the United Nations, while it is an organisation of sovereign States, exists for and must ultimately serve those needs. To do so, we must aim, as I said when first elected eight years ago, ‘to perfect the triangle of development, freedom and peace’.

(10) The framers of the Charter saw this very clearly. In setting out to save succeeding generations from the scourge of war, they understood that this enterprise could not succeed if it was narrowly based. They therefore decided to create an organisation to ensure respect for fundamental human rights, establish conditions under which justice and the rule of law could be maintained, and ‘promote social progress and better standards of life in larger freedom’.

(11) I have named the present report ‘In larger freedom’ to stress the enduring relevance of the Charter of the United Nations and to emphasise that its purposes must be advanced in the lives of individual men and women. The notion of larger freedom also encapsulates the idea that development, security and human rights go hand in hand.

(12) Even if he can vote to choose his rulers, a young man with AIDS who cannot read or write and lives on the brink of starvation is not truly free. Equally, even if she earns enough to live, a woman who lives in the shadow of daily violence and has no say in how her country is run is not truly free. Larger freedom implies that men and women everywhere have the right to be governed by their own consent, under law, in a society where all individuals can, without discrimination or retribution, speak, worship and associate freely. They must also be free from want — so that the death sentences of extreme poverty and infectious disease are lifted from their lives — and free from fear — so that their lives and livelihoods are not ripped apart by violence and war. Indeed, all people have the right to security and to development.

(13) Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalisation and dramatic geopolitical change. While poverty and denial of human rights may not be said to ‘cause’ civil war, terrorism or organised crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development. Again, catastrophic terrorism on one side of the globe, for example an attack against a major financial centre in a rich country, could affect the development prospects of millions on the other by causing a major economic downturn and plunging millions into poverty. And countries which are well governed and respect the human rights of their citizens are better placed to avoid the horrors of conflict and to overcome obstacles to development.

(14) Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed. In this new millennium, the work of the United Nations must move our world closer to the day when all people have the freedom to choose the
kind of lives they would like to live, the access to the resources that would make those choices meaningful and the security to ensure that they can be enjoyed in peace.

...
or goods are available for exchange, the breakdown of river transport links further limits access to markets. In the country as a whole almost three-quarters of the population — some 35 million people — are undernourished.

Children have been in the front line of casualties resulting from the conflict. Diseases like measles, whooping cough and even bubonic plague have re-emerged as major threats. In 2002 the infant mortality rate in the eastern provinces was 210 deaths per 1 000 live births — nearly double the average for Sub-Saharan Africa and more than 70% higher than the national average for the country. The infant mortality rate in the eastern provinces fell in 2003/04, demonstrating a ‘peace premium’ in terms of lives saved and providing an indication of the costs of conflict. Conflict has also taken a toll on education. School enrolment rates in the country fell from 94% in 1978 to 60% in 2001.

Daily insecurities persist. Despite the All-Inclusive Peace Agreement signed in 2003, hundreds of thousands of people have still not been able to resume normal lives. In fact, since November 2004 nearly 200 000 people have fled their homes in North and South Kivu provinces, seeking safety in the forests. The ongoing costs of conflict point to weaknesses in the peace agreement. Armed forces from other countries still operate widely in the Democratic Republic of the Congo, along with rebel groups. The eastern region has become a military base for the Democratic Forces for the Liberation of Rwanda (FDLR) — Hutu rebels linked to the 1994 genocide. It is also a magnet for forces from neighbouring states seeking to exploit the region’s vast mineral wealth. Disarming the FDLR, expelling the armed forces of foreign states and bringing mineral exploitation under effective state control are immediate requirements for extending real security …

HIV/AIDS is a human security issue. This International Crisis Group report uses Botswana to illustrate that although HIV/AIDS does not cause wars, insurgencies and communal violence, it is profoundly destabilising in several important ways, and it contributes to an environment in which individuals and communities are much more vulnerable to conflict.

ICG Issues Report Number 1
Full report available at http://www.crisisgroup.org/home/index.cfm?id=1831&l=1

Prologue: An ugly war

The war in Botswana rages unabated. While the origins of the conflict remain murky, the appalling devastation is painfully clear. Estimates vary, but more than 100 000 have died as a result of the fighting, and that figure continues to escalate by the day. One in three adults in Botswana have been wounded,
and if fighting continues at this pace, it is estimated that life expectancy could fall to an almost medieval age 29. At Gaborone’s main hospital, up to 80 per cent of the beds in the male ward are filled with wounded who are not expected to survive, and more than a third of those in the children’s ward are also victims of the conflict. The war has already created more than 28 000 orphans. Grimly, Botswana’s morgues complain that they have no space for the incoming bodies, and the situation is now so bad that corpses sometimes are laid on the floor at the country’s largest medical facility, Princess Marina Hospital. Private funeral homes are turning bodies away.

The toll on the beleaguered Botswanan military continues to be alarmingly high, with more than one-third of the forces suffering casualties, the majority of which have proven fatal. Such attrition causes loss of continuity at command level and within the ranks, increases costs for the recruitment and training of replacements, and reduces military preparedness, internal stability and external security. This situation has led the CIA to suggest that Botswana (and some of its neighbours) ‘face a demographic catastrophe’ that will ‘further impoverish the poor, and often the middle class, and produce a huge and impoverished orphan cohort unable to cope and vulnerable to exploitation and radicalisation’.

The conflict represents a painful reversal for one of Africa’s brightest success stories. At independence, Botswana was one of the least developed countries in Africa. Thanks to a flourishing diamond industry and a stable, forward-looking government, it grew into one of the continent’s wealthiest. Mineral resources are abundant, including diamonds, copper, nickel and coal. Much of the 1980s and 1990s saw impressive gains in education, health and other social indicators.

The war has changed all that. For sixteen years Botswana had a budget surplus; in 2001, the once economically successful country will record its second deficit in a row. The government finds that it must devote more and more of its budget to hospitals, medicines and other costs associated with the war. In a recent report, the Botswana Institute for Development Policy Analysis predicted that the war will reduce government revenue by seven per cent at the same time as expenditure on the conflict increases by 15 per cent. Government spending on the war may reach 20 per cent of the total government budget by the end of the decade. Botswana’s economy may shrink by as much as 30 per cent as a result of the conflict, and foreign investment will likely continue to be constrained. Agriculture has also been hard hit, with more than one in seven farm workers killed and labour shortages expected to be increasingly acute.

Unfortunately, Botswana’s educated and young labour force — particularly civil servants — has been a frequent target of this violence, sapping the country of some of its most valued leadership and ensuring that the country will have fewer and fewer qualified managers as the conflict wears on. Indeed, 50 per cent of the students at the University of Botswana — the only university in the country — have already been wounded or killed. Botswanan President Festus Mogae declared to Reuters that his country faces a fundamental national crisis. ‘We are threatened with extinction ... People are dying in chillingly high numbers’.
But there is no war in Botswana, simply a disease. The war raging in Botswana is AIDS. All the statistics are true, but not a single shot has been fired. However, AIDS is taking a toll as profound as any military confrontation around the globe, and it is a security threat to countries it assaults as well as their neighbours, partners and allies.

... The scope and magnitude of the AIDS security crisis

Over the 20 years since AIDS was first identified, researchers, health workers and advocates have sought to confront the disease as it moved rapidly from a scientific mystery to a global pandemic. Despite their best efforts, the disease has produced a pattern of death and destruction that, as UNAIDS head Peter Piot puts it, ‘is devastating the ranks of the most productive members of society with an efficacy history has reserved for great armed conflicts’.

More than 36 million individuals are infected, 22 million have died, and 13 million children have been orphaned by the disease. Experts project that AIDS will eventually kill one in four adults in Sub-Saharan Africa; and at least seven countries, including regional power South Africa, have more than 20 per cent of adults HIV-positive.

David Gordon of the US National Intelligence Council notes that AIDS ‘has already killed more people than all the soldiers killed in the major wars of the twentieth century, and equals the toll taken by the bubonic plague in 1347’. He adds, ‘The bad news about AIDS is that unless something is done in the near future, we’re on a trajectory for things to get much, much worse’.

Much is now known about the epidemiology of the disease and how it spreads to the population at large: From beginnings among intravenous drug users, prostitutes, and others with many sex partners; to young people, frequent travellers, recipients of blood transfusions, and wives and children; to attacking broad swathes of society. Yet predictions to date have again and again underestimated the epidemic’s force around the world. In 1989, leading epidemiologists predicted that there would be 2-3 million people living with AIDS by 1996; in 1996, they in fact found 10.4 million. AIDS is understood as a serious health threat, but it is also much more. AIDS can be so pervasive that it destroys the very fibre of what constitutes a nation: Individuals, families and communities; economic and political institutions; military and police forces. The UN Security Council and a growing number of world leaders have suggested that the impact of AIDS is profound enough to challenge fundamentally the security and stability of a growing number of states around the globe, and the UN Security Council defined it as an issue of human security.

The term human security, first coined by the UN Development Programme, is used by a growing number of experts and leaders to stress that security is more than the presence or absence of armed conflict. Security, at its most basic level, is personal — the life and health of the individual, family and community; hunger, safety, and the security of the environment all play a role. The theory of human security stresses taking preventive action to reduce vulnerability and minimise risks to human rights, human safety and human lives. It stresses the importance of acting early — because it is more humane, but also because it is more effective.
Looking at AIDS through the lens of human security points up the slowness of governments across the globe to appreciate the powerful social, economic and political ramifications associated with widespread infection rates. The disease has most often remained within the domain of health ministries. And the conclusions that logically flow from the identification of such a threat have not yet been drawn. Perhaps nowhere are the ramifications as difficult to draw out, or as potentially serious, as in the area of security. HIV/AIDS does not itself cause wars, insurgencies or communal violence. But it is profoundly destabilising in several important ways, and it contributes to an environment in which individuals, communities and nations are much more vulnerable to conflict.

**AIDS is a personal security issue.** As 5, 10, 20 per cent or more of adults become fatally ill, gains in health, longevity and infant mortality are wiped out. Agricultural production and food supply become tenuous; families and communities break apart; and surviving young people cease to have a viable future. Divisions among ethnic and social groups may be exacerbated. Economic migration and refugee seekers increase.

**AIDS is an economic security issue.** A World Bank study suggests that even an adult prevalence rate of 10 per cent may reduce the growth of national income by up to a third. At infection levels above 20 per cent, studies show that a nation can expect a decline in GDP of 1 per cent per year. At least seven Sub-Saharan African countries have now passed that threshold.

**AIDS is a communal security issue.** It impacts directly on police capability, and more generally on community stability: Desperation makes criminality rise. It breaks down governance, striking hardest at the educated and mobile, civil servants, teachers, health care professionals. Spiralling health care costs drain public resources. Public administration is weakened when its leadership is most needed. And institutions of government and civil society can no longer be counted upon to mediate disputes and maintain unity.

**AIDS is a national security issue.** In Africa, many military forces have infection rates as much as five times that of the civilian population. There are fears of underrecruiting, impaired readiness, and a lack of experienced officers. The vulnerability it creates in militaries as well as in the pillars of economic growth and institutional endurance can make nations more vulnerable to both internal and external conflict.

**AIDS is an international security issue.** It has this effect both in its capacity to contribute to international security problems and by its ability to undermine international capacity to resolve conflicts.

...
INTERNATIONAL HUMANITARIAN LAW

International humanitarian law plays an important role in curbing some of the worst abuses associated with armed conflict.

PEJIC, J ‘HUMANITARIAN LAW AND HUMAN RIGHTS IN ARMED CONFLICT’ (2005)
in Smith, R and van den Anker, C The essentials of human rights London: Arnold

International humanitarian law (IHL) is a body of rules specifically intended to solve humanitarian problems caused by armed conflicts. Its principal aim is to protect people and property that are, or may be, affected by an armed conflict and to limit the rights of the parties to use methods and means of warfare of their choice. While rules regulating warfare have existed in various forms for centuries, modern IHL is associated with the adoption, in 1864, of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. International humanitarian law is today made up of dozens of treaties, the most commonly referred to being the Four Geneva Conventions of 1949 and their two Additional Protocols of 1977. There is also a large body of customary international humanitarian law rules.

In contrast to human rights law, which is in principle applicable at all times, IHL is applicable only in situations of armed conflict, whether international or non-international. International armed conflicts (wars) are those involving two or more states, regardless of whether a declaration of war has been made or whether the parties involved recognise that there is a state of war. Non-international armed conflicts are those involving government forces and organised armed groups, or organised armed groups among themselves.

International humanitarian law governs the protection of people and property, as well as the conduct of hostilities, once an armed conflict has occurred. It does not regulate the right to resort to force, an area of international relations governed by the UN Charter. There are no ‘just’ or ‘unjust’ wars in terms of IHL. Its application is triggered whenever an armed conflict happens in practice, regardless of any justification that may be given.

International humanitarian law aims primarily to protect people who do not or are no longer taking part in hostilities. As their very titles indicate, the four Geneva Conventions of 1949 deal with the treatment, in international armed conflict, of wounded and sick members of the armed forces on land (Geneva Convention (GC) I), wounded, sick and shipwrecked members of the armed forces at sea (GC II), prisoners of war (GC III) and civilians (GC IV). Similarly, the rules applicable in non-international armed conflict (article 3 common to the Geneva Conventions and Additional Protocol II) deal with the treatment of people not taking, or no longer taking part in the hostilities, taking account of the fact that the people involved are nationals of the same state. In all circumstances IHL prohibits acts of violence against people in enemy hands,
including murder, torture, rape, inhuman treatment, collective punishments, the taking of hostages, denial of the right to a fair trial and a range of other assaults on human life, health and dignity.

International humanitarian law protects civilians not only by specifying the treatment they must be accorded once they are in the power of the enemy but by means of norms on the conduct of hostilities (Additional Protocol I). It is a fundamental rule of IHL that parties to an armed conflict must at all times distinguish between civilians and combatants and between military objectives and civilian objects. Neither the civilian population as a whole nor individual civilians may be the object of attack. Attacks against military objectives are also prohibited if they would cause disproportionate harm to civilians or civilian objects. In short, the beneficiaries of international humanitarian law are civilians and others — including combatants — who are or may be subject to the effects of an armed conflict.

The common underlying purpose of international humanitarian and international human rights law is the protection of the life, health and dignity of human beings, albeit in different circumstances. It is therefore not surprising that the content of some of the rules is similar. Both bodies of law aim, for example, to protect human life, prohibit torture or cruel treatment, prohibit discrimination, prescribe basic rights for persons subject to criminal process, include provisions for the protection of women and children and regulate aspects of the right to food and health.

On the other hand, IHL deals with many issues that are outside the purview of human rights law, such as the already mentioned principles on the conduct of hostilities, combatant and prisoner of war status, the use of weapons in armed conflict and the protection of the Red Cross and Red Crescent emblems. Likewise, human rights law deals with aspects of life in peacetime that are not governed by international humanitarian law, such as freedom of the press, the right to assembly, the right to vote, the right to strike, etc. What is important to know is that the comprehensive protection of persons in armed conflict requires the complementary application of IHL and human rights, as well as of other bodies of law.

The similarity of purpose and, to an extent, of content between international humanitarian and human rights law is evidenced by several treaties containing a mix of international humanitarian law and human rights provisions. The Convention on The Rights of The Child and, in particular, its Protocol on the Involvement of Children in Armed Conflict are cases in point. The Rome treaty establishing a permanent International Criminal Court also pools together violations of separate bodies of law — war crimes, genocide and crimes against humanity.

Even though international humanitarian and human rights law share certain features, there are important distinguishing characteristics stemming from their distinct scope of application. Humanitarian law is the special law (lex specialis) specifically designed for situations of armed conflict. An exceptional circumstance such as war by its very nature demands that no derogations from any of the obligations of the parties be allowed if humanitarian law is to serve its protective purpose. Thus, in contrast to
certain human rights treaties, the totality of humanitarian law norms is non-derogable. Just as importantly, international humanitarian law binds all parties to an armed conflict, which may include both state and non-state armed actors. As is well known, international human rights law governs relations between a state and individuals; whether non-state actors can be responsible for violations of human rights that do not reach the level of international crimes remains controversial.

Another distinguishing feature of international humanitarian law is the extraterritorial applicability of its norms. There is no question that the parties to an armed conflict remain bound by their humanitarian law obligations regardless of where hostilities may take place. The extraterritorial application of international and regional human rights treaty law, by contrast, is still being clarified by means of human rights jurisprudence.

The duty to implement international humanitarian law lies first and foremost with states. States have a duty to take a number of legal and practical measures — both in peacetime and in armed conflict situations — aimed at ensuring full compliance with international humanitarian law. States must, for example, adopt national legislation implementing their treaty obligations, disseminate the rules of international humanitarian law, train military and other personnel to apply them, translate the relevant texts and have legal advisers guiding them in the application of norms. They also have a duty to search for persons suspected of having committed or having ordered the commission of ‘grave breaches’ and to bring such persons either before their own courts or to hand them over to another state for trial. They should also enable their courts to exercise universal jurisdiction over other serious violations of the laws and customs of war, i.e. war crimes, whether committed in international or non-international armed conflict.

As regards international implementation, states have a collective responsibility under article 1 common to the Geneva Conventions ‘to respect and to ensure respect for’ the Conventions ‘in all circumstances’. The supervisory system also comprises the Protecting Power mechanism, the enquiry procedure and the International Fact-Finding Commission envisaged in article 90 of Additional Protocol I. Pursuant to that Protocol state parties also undertake to act in co-operation with the United Nations in situations of serious violations of the Protocol or of the Conventions.

The ICRC is a key component of the international supervisory system by virtue of the mandate entrusted to it under the Geneva Conventions and their Additional Protocols, as well as under the Statutes of the International Red Cross and Red Crescent Movement. These texts contain numerous provisions specifically mandating or allowing ICRC to perform a variety of tasks aimed at protecting and assisting victims of war, at encouraging states to implement their humanitarian law obligations and at promoting and developing the law. As a neutral, independent and impartial humanitarian organisation, the ICRC also has a right of initiative which permits it to offer its services or to undertake any action which it deems necessary to ensure the faithful application of international humanitarian law.
B. MECHANISMS FOR REALISING HUMAN RIGHTS AT THE DOMESTIC LEVEL

Human rights can be protected through law on the domestic (or 'national' or 'local') level, or on the international (which can be either 'global' or 'regional') level. In addition to the legal protection of human rights, the role of civil society in the protection of human rights has to be recognised. Here we look at the domestic mechanisms that law offers for human rights protection.

CONSTITUTIONAL PROTECTION

An–Na‘īm comments on the role of the state with regard to the realisation of human rights norms.


... The basic concept of human rights as claims to which all people are entitled as of right by virtue of their humanity firmly locates these rights and their implementation in the social and political realm of human affairs. Whatever these rights are, their implementation will necessarily require collective and sustained efforts that require the allocation of resources over extended periods of time. The realisation of human rights also presupposes the existence of an authority that can mediate among rights in case of conflict and adjudicate the competing demands of claimants of rights. Therefore, the basic concept of human rights can only be realised through some form of wide-scale political organisation that is capable and willing to undertake these functions. The state is the form of political organisation that is universally established today, indeed assumed by the present system of international human rights. This reality not only involves the apparent paradox of expecting the state to vindicate human rights against its own organs and officials, but also to be able to act affirmatively in the implementation of these rights.

...
CONSTITUTION OF THE REPUBLIC OF GHANA (1992)

Chapter five: Fundamental human rights and freedoms

12(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution ...

13(1) No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.

(2) A person shall not be held to have deprived another person of his life in contravention of clause (1) of this article if that other person dies as the result of a lawful act of war or if that other person dies as the result of the use of force to such an extent as is reasonably justifiable in the particular circumstances; (a) for the defence of any person from violence or for the defence of property; or (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) for the purposes of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission of a crime by that person.

14(1) Every person shall be entitled to his personal liberty ...

15(1) The dignity of all persons shall be inviolable.

(2) No person shall, whether or not he is arrested, restricted or retained, be subjected to; (a) torture or other cruel, inhuman or degrading treatment or punishment; ...

16(1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour ...

17(1) All persons shall be equal before the law.

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status ...

18(1) Every person has the right to own property either alone or in association with others.

(2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

19(1) A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court ...

21(1) All persons shall have the right to; (a) freedom of speech and expression, which shall include freedom of the press and other media; (b) freedom of thought, conscience and belief, which shall include academic
Mechanisms for Realising Human Rights at the Domestic Level

freedom; (c) freedom to practice any religion and to manifest such practice; (d) freedom of assembly including freedom to take part in processions and demonstrations; (e) freedom of association, which shall include freedom to form or join trade unions or other associations, national or international, for the protection of their interest; (f) information, subject to such qualifications and laws as are necessary in a democratic society; (g) freedom of movement which means the right to move freely in Ghana, the right to leave and to enter Ghana and immunity from expulsion from Ghana.

22(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will ...

24(1) Every person has the right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind ...

25(1) All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right; (a) basic education shall be free, compulsory and available to all; ...

26(1) Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.

(2) All customary practices which dehumanise or are injurious to the physical and mental well being of a person are prohibited.

27(1) Special care shall be accorded to mothers during a reasonable period before and after childbirth; and during those periods, working mothers shall be accorded paid leave.

(2) Facilities shall be provided for the care of children below school-going age to enable women, who have the traditional care for children, realise their full potential.

(3) Women shall be guaranteed equal rights to training and promotion without any impediments from any person ...

28(2) Every child has the right to be protected from engaging in work that constitutes a threat to his health, education or development ...

29(3) If the stay of a disabled person in a specialised establishment is indispensable, the environment and living conditions there shall be as close as possible to those of the normal life of a person of his age ...

33(1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

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CONSTITUTION OF THE REPUBLIC OF CAMEROON (1996)

Preamble

We, people of Cameroon,
Declare that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights;
Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples’ Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles:

- all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
- the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law;
- freedom and security shall be guaranteed to each individual, subject to respect for the rights of others and the higher interests of the State;
- every person shall have the right to settle in any place and to move about freely, subject to the statutory provisions concerning public law and order, security and tranquillity;
- the home is inviolate. No search may be conducted except by virtue of the law;
- the privacy of all correspondence is inviolate. No interference may be allowed except by virtue of decisions emanating from the Judicial Power;
- no person may be compelled to do what the law does not prescribe;
- no person may be prosecuted, arrested or detained except in the cases and according to the manner determined by law;
- the law may not have retrospective effect. No person may be judged and punished, except by virtue of a law enacted and published before the offence committed;
- the law shall ensure the right of every person to a fair hearing before the courts;
- every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence;
- every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, to cruel, inhumane or degrading treatment;
- no person shall be harassed on grounds of his origin, religious, philosophical or political opinions or beliefs, subject to respect for public policy;
- the State shall be secular. The neutrality and independence of the State in respect of all religions shall be guaranteed;
- freedom of religion and worship shall be guaranteed;
- the freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike shall be guaranteed under the conditions fixed by law;
- the Nation shall protect and promote the family which is the natural foundation of human society. It shall protect women, the young, the elderly and the disabled;
- the State shall guarantee the child’s right to education. Primary education shall be compulsory. The organisation and supervision of education at all levels shall be the bounden duty of the State;
- ownership shall mean the right guaranteed to every person by law to use, enjoy and dispose of property. No person shall be deprived thereof,
save for public purposes and subject to the payment of compensation under conditions determined by law;
- the right of ownership may not be exercised in violation of the public interest or in such a way as to be prejudicial to the security, freedom, existence or property of other persons;
- every person shall have a right to a healthy environment. The protection of the environment shall be the duty of every citizen. The State shall ensure the protection and improvement of the environment;
- every person shall have the right and the obligation to work;
- every person shall share in the burden of public expenditure according to his financial resources;
- all citizens shall contribute to the defence of the Fatherland;
- the State shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the Constitution.

Udombana sets out the importance of the constitutional protection of human rights to ensure accountability of governments.

UDOMBANA, NJ ‘INTERPRETING RIGHTS GLOBALLY: COURTS AND CONSTITUTIONAL RIGHTS IN EMERGING DEMOCRACIES’
(2005)
5 African Human Rights Law Journal 47

... Any approach to the protection of human rights in Africa must take the constitution as its point of departure because a constitution is the foundation of the legal system and a protocol of survival and continuity for any social group, ensuring that no one attains salvation or offers a programme of salvation to the populace by another route. It is a blueprint of intragovernmental relations, setting forth the general parameters of executive, legislative and judicial powers and embodying fundamental rights granted to individuals under the law. It provides both a framework of government for a society in a continual process of transition and a framework of fundamental principles of humanity and respect for human rights to control and guide the exercise of all governmental power. It provides a measure of rationality or consistency in decision-making, both in relation to the individual and society.

The constitutions of most emerging democracies in Africa begin by affirming faith in the universal values of justice, democracy, freedom, equality and the dignity of the human person. Of course, this does not mean that all constitutions share the same values, but each system shares most of them. Section 1 of the South African Constitution, for example, provides that the Republic of South Africa shall be founded, *inter alia*, on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution
and the rule of law. Similarly, the Preamble to the Constitution of Burundi affirms the country’s:

... commitment to construct a political order and a system of government inspired by ... and founded on the values of justice, democracy, good governance, pluralism, respect of the freedoms and basic rights of the individual, unity, solidarity, mutual understanding, tolerance and co-operation between the different ethnic groups ...

Almost all of these constitutions contain lofty human rights provisions. While some constitutions guarantee primarily only civil and political rights, others guarantee economic, social and cultural rights as well. Civil and political rights underscore the fact that the nature and dignity of the human person have to be absolutely protected and indicate the inviolable, imprescriptible and inalienable rights to be promoted and protected by the state. Socio-economic rights have the aim of giving people the possibility of receiving help from the state, thus guaranteeing equality and social justice. Provisions guaranteeing civil and political rights typically begin with a solemn declaration concerning the principle of non-discrimination, that is, equality before the law and equal protection under the law.

... Beyond equality and non-discrimination, most constitutions guarantee the right to life and personal integrity, the right to develop one’s personality (physically, morally, socially and culturally), freedom from cruel and inhuman treatment and freedom from slavery or forced labour. These provisions usually precede a detailed or concise list of rights, such as the right to liberty and security of the person, freedom of domicile, the right to respect for a person’s correspondence, freedom of movement and residence, freedom of expression and religion (except for Islamic countries where Islam is the state religion), freedom of assembly, demonstration and association, including the right to form or join a political party or a trade-union as well as political and citizens’ rights.

However, certain rights that are often emphatically declared on the basis of universal principles only exist on paper, due to the legal constraints that they are dependent on, constraints which are either vague and indeterminate or, in contrast, extremely precise. Consequently, rights previously declared in such a solemn manner are deprived of any real meaning, a ready example being the fundamental right to life — often implicit in Western constitutions. Various constitutions in Africa — Equatorial Guinea, Ghana, Libya, Malawi, Nigeria, Seychelles and Uganda — contain provisions on the death penalty which directly or indirectly deny the right to life. The death penalty is permitted for numerous reasons: As a sanction or if the life of a person constitutes a danger to society or according to a law reasonably justified in a democratic society or to fulfil a death sentence imposed by a competent court of justice or confirmed by the highest court of appeal.

The second class of rights usually protected in national constitutions is social, economic and cultural rights. This is sometimes positioned under a special title in the part of the constitution concerning freedoms in general, as is the case in the Constitutions of Cape Verde, Madagascar, Mozambique and São Tomé and Príncipe. In others, they are arbitrarily placed with civil and political rights and sometimes they are positioned after them. Yet, in some African constitutions, such as that of Nigeria, these ‘second generation’ rights
match the principles concerning policy or the fundamental directives of the state. Those social and economic rights that are protected in most constitutions include family and labour rights, the right to health and to a healthy environment, the right of ownership (individual or collective), economic freedom and cultural rights. Some systems provide for claims so as to eliminate sex discrimination deriving from historical customs and traditions and to guarantee equal political, social, economic and cultural rights, including labour rights and rights concerning personal matters. Such is the case with the Constitutions of Chad, Egypt, Ethiopia, The Gambia, Malawi, Namibia, South Africa and Uganda.

In the past, Africa’s judiciary lacked institutional independence and financial autonomy, with judges holding their offices at the sufferance of the executive. Emerging constitutions contain formal commitments to the independence of courts. Almost all constitutions are cast in nearly the same mould, so that these guarantees are generally similar. But the difference in structure between federal and unitary states results in variations in procedures of judicial review and the organisation of the judiciary. These constitutions are characterised by the following main principles: Due process of law, legislative authority over the administrative structure of the judiciary, the obligation of the judiciary to uphold the constitution and the law and its immunity from dismissal and independence from the legislative and executive branches.

Some constitutions, such as those of Cape Verde and Ghana, contain specific clauses on the independence of the judiciary. Others, such as those of Benin, Central African Republic, Equatorial Guinea, Gabon, Mali and Togo, refer to judges and constitutional courts as ‘the guardians of fundamental freedoms’ and mandate them to enforce fundamental rights. Seventeen constitutions designate the judicial power as the ‘guardian of human rights’, including, randomly, Algeria, Burkina Faso, Burundi, Congo, Mali, Rwanda, Senegal and Togo. Other constitutions, such as those of South Africa and Uganda, confer a right of access to justice both on individuals and groups, thus mirroring the African Charter on Human and Peoples’ Rights (African Charter). In some countries, like Benin, Central African Republic, Egypt and South Africa, the Constitutional Court is independent and autonomous; but in others, as in Burkina Faso and Nigeria, it is an appendage of the Supreme Court. The guarantees under the Bill of Rights are protected in some cases by enabling individuals to appeal to the Constitutional Court or the Supreme Court against laws or public acts or omissions believed to be detrimental to those rights. This is the case in Benin, Burundi, Cape Verde, Central African Republic, Congo, Djibouti, Liberia and Seychelles.

A number of countries, including Benin, Ghana, Mali, Namibia, Nigeria, South Africa and Uganda, have established other institutions to complement the judiciary, with the mandate to protect the public from abuses by government and quasi-government bureaucracies. These institutions, which are variously called Public Defender, Public Complaint Commission or simply Ombuds-person, are also given investigatory and prosecutorial powers and are expected to liaise with the judiciary and other appropriate national institutions. Other countries — like Ethiopia, Ghana, Nigeria, South Africa and Uganda — have established national human rights institutions with the
mandate to promote and protect human rights and further the cause of social justice. Still others, such as South Africa, have gender commissions to promote, protect and uphold the fundamental tenets of gender equality.

It is not certain if the constitutionalisation of rights guarantees their respect in practice, but it provides, at least, an important mechanism for mainstreaming respect for the values that are associated with those rights, both in law and in policy making. It provides the basis for holding governments accountable and provides an instrument for political action and mass mobilisation. Meanwhile, the manner in which courts interpret these rights goes a long way to mainstreaming the values inherent in them.

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An-Na‘im discusses the limitations of human rights litigation before the courts as a strategy for improving the human rights situation in Africa.

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AN-NA‘IM, A ‘THE LEGAL PROTECTION OF HUMAN RIGHTS IN AFRICA: HOW TO DO MORE WITH LESS’ (2001)

Recent studies of the legal protection of human rights in some fifteen African countries (representing a cross-section of cultures, colonial and postcolonial experiences, and legal systems) identified the following common problems:

Despite differences between the two systems, common law and continental civil law, followed in almost all African countries today, regimes suffer from similar problems of poor legitimacy and accessibility, as well as lack of human material resources. Neither common law nor civil law, both of which are foreign colonial legal systems, has gained public confidence as a means of protection.

Most current African constitutions provide for the protection of civil and political rights, including broad non-discrimination and equal protection clauses. Some constitutions, such as those of Ghana, Namibia, and Uganda, include economic, social and cultural rights as ‘Directive Principles of State Policy’. There is also a good level of ratification of international treaties on human rights. But at this normative level, effective implementation is hampered by such factors as the lack of the incorporation of treaty obligations into domestic legislation, where it is required in common law jurisdiction; frequent and prolonged states of emergency; and claw back clauses permitting restriction on constitutional provisions by ordinary legislation.

At a practical level, the protection of human rights is seriously impeded by its reliance on judicial enforcement that is weak for civil and political rights and
inappropriate for economic, social and cultural rights. Because of their conceptual complexity and procedural formality, both common and civil law are incomprehensible and financially inaccessible for the vast majority of African peoples. Moreover, state courts and law enforcement mechanisms are incapable of addressing massive violations of human rights that occur under customary and religious laws and practice at the local, rural level.

These difficulties are compounded by general structural and contextual factors, such as political instability, economic underdevelopment, and lack of independence for, and poor training of, the judiciary, as well as poor quality and unavailability of legal services. These features, in turn, lead to inadequacy of courtroom facilities, lack of essential material resources, and rampant corruption. In Nigeria, for example, litigants have to provide the stationery (writing materials and file folders) required for their cases and are routinely subjected to extortion by magistrates and court personnel. Since the vast majority of the two hundred legal practitioners in the whole of Mozambique are concentrated in the capital Maputo, the role of legal council in district courts is left to ad hoc ‘public defenders’ who have no legal training.

THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS

Adjami discusses the role of international law in different legal orders in the context of a well-known human rights case from Botswana, Attorney-General v Dow.


Two alternative theories define the relationship between municipal law and international law. According to the monist theory, international law and municipal law comprise a single legal order within a national legal system, with international law superior to national law. In this system, national courts must give effect to principles of international law over superceding or conflicting rules of domestic law. Under the dualist theory, international law and municipal law form two separate and independent legal systems. International law prevails in regulating the relations between sovereign States in the international system, whereas municipal law takes precedence in governing national legal systems. According to the dualist theory, for a
municipal legal system to give effect to international law, national legislatures must incorporate international law into domestic law, thereby creating justiciable rights suitable for enforcement by domestic courts.

Under article 1 of the [African] Charter on Human and Peoples’ Rights parties must ‘recognise the rights, duties and freedoms [of the] Charter and ... undertake to adopt legislative or other measures to give effect to them’. This creates a treaty obligation of domestic incorporation of the Charter for States Party. The failure to do so constitutes a breach of the Charter ... Of the dualist, African common law countries, only Nigeria has enacted implementing legislation to incorporate the African Charter of Human and Peoples' Rights into its municipal legal system.

Several African constitutions include specific provisions that define the role of international law in the municipal legal order. Although Namibia and Malawi have constitutions that have been described as ‘international law friendly’, South Africa is best known for its constitutional embrace of international law. The Interpretation Clauses of the South African Constitution mandate that courts take international law into consideration when interpreting the South African Bill of Rights, resulting in the emergence of a body of human rights jurisprudence that has gained international prominence.

It may seem as if African courts face insurmountable obstacles in developing a domestic human rights jurisprudence. Given the widespread non-incorporation of international human rights law into national legislation, the limitations on the status of international law in domestic courts, and the precarious cultural balance between indigenous African values and universal human rights norms, it is surprising that national courts in Africa have interpreted the fundamental rights enshrined in their postcolonial legal systems in light of international norms.

Judicial activism is not without its critics. The most common complaint is that the free license to stray from a national legal text leads to judicial arbitrariness. A particularly harsh critic of the new South African Constitutional Court's extensive use of international and comparative sources called this methodology ‘rainbow jurisprudence’, claiming that ‘we have as much chance of finding genuine instruction about substantive reasoning in these wishy-washy pronouncements as we have of touching a rainbow’.

Proponents of judicial activism counter such criticism. First, as long as a judge's reasoning is transparent, that judge will be held accountable and will not act arbitrarily. Second, insofar as claims are raised under national constitutions, it is still within the judges' powers to look beyond the text to the values underlying the constitution ...

Not only do judges have an activist role in advancing human rights in Africa, so too do the lawyers in national legal systems. Lawyers determine when to raise claims under constitutional guarantees of fundamental rights and have the ability to draw international and comparative law parallels in their briefs and arguments before the courts. This encourages judges in the national court systems to take these sources into account in their adjudication ...
In [Attorney-General v Dow] the Attorney-General of Botswana appealed a decision of the High Court, which struck down provisions of the Citizenship Act challenged by petitioner Unity Dow as unconstitutionally discriminatory. Unity Dow, a citizen of Botswana had three children of an American father. Their first child, born out of wedlock, was entitled to Botswanan citizenship, yet the two born after their marriage, were denied citizenship under the Act, which confers citizenship in mixed marriages to children of Botswanan fathers only. Dow challenged the Act as violative of sections 3 and 14 of the Botswana Constitution.

The Court of Appeal, through Justice Amissah, framed its analysis of the case as a question of constitutional construction and nondiscrimination. First, Justice Amissah established that the court must adopt a liberal approach in construing the Constitution. He cited two Botswanan cases as precedent for this policy of constitutional interpretation, and stated that ‘[w]ith such pronouncements from our own court as a guide, we do not really need to seek outside support for the views we express. But just to show that we are not alone in the approach ... towards constitutional interpretation, I refer to ... dicta of judges from various jurisdictions’.

Next, Justice Amissah turned to an analysis of the substantive rights at issue, deciding to analyse the Citizenship Act in light of section 15, the Botswana Constitution's antidiscrimination provision. This provision does not explicitly guarantee freedom from discrimination based on sex. Nevertheless, Justice Amissah read section 15 in conjunction with section 3 to hold that the Constitution prohibits discrimination based on sex. In reaching this conclusion, he drew a parallel to the scope of the Fourteenth Amendment of the US Constitution, which has been read to cover discrimination despite the fact that the text refers to ‘equal treatment’ rather than discrimination.

As for the tension between custom and fundamental rights, Justice Amissah proclaimed: ‘A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is custom, not the Constitution which must go’. In reaching this conclusion, Amissah also contended that the court's decision is bringing Botswanan law in compliance with his country's international obligations under the Universal Declaration and the African Charter.
INTERNATIONAL HUMAN RIGHTS LAW IN NIGERIA

While the French and, in general, the continental tradition is that international treaties, once ratified, become part of the law of the land (so-called ‘monist’ approach), in countries that follow the British or common law tradition they only become part of domestic law if they have been ‘incorporated’, that is, if the legislature has taken an explicit decision to that effect. Nigeria is the only common law country in Africa that has incorporated the African Charter into its national legislation.

SECTION 12(1) OF THE 1999 CONSTITUTION

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

SECTION 1 OF CAP 10

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples’ Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

In the following case the Supreme Court of Nigeria discusses the status of the African Charter in Nigerian law.

ABACHA AND OTHERS v FAWEHINMI

Supreme Court of Nigeria, 28 April 2000, per Ogundare JSC

... Where ... the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (for example domestic) law by the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990 (hereafter is referred to simply as Cap 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these
rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions.

No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provision will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their lordships of the Court below that the Charter possesses ‘a greater vigour and strength’ than any other domestic statute. But that is not to say that the Charter is superior to the Constitution. ...

THE ROLE OF THE JUDICIARY IN THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS

A small number of African constitutions provide that complaints over economic and social rights recognised in the Constitution can be adjudicated by the courts. The most prominent example is South Africa. After an introduction by An-Na’im, the provision in the South African Constitution dealing with the right to housing is set out, followed by an extract of a judgment of the South African Constitutional Court dealing with this right.

in Ghai, Y and Cottrell, J (eds) Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights London: Interights

... [C]ertain fundamental entitlements are recognised as human rights precisely in order to protect them from the contingencies of the normal political and administrative processes of any country. While it is generally accepted that this function requires some degree or form of judicial enforcement for civil and political rights, there has so far been little effort to explore similar possibilities for Economic, Social and Cultural Rights (ESCR), except in India and South Africa. Moreover, it is sometimes claimed that judicial enforcement is neither appropriate nor feasible for ESCR, because their implementation requires allocation of resources among competing objectives of social policy, and other forms of affirmative action, that should be left to the discretion of politically accountable public officials. For example, it is said that the judges are unqualified by their training and requirements of political neutrality from, and within the judicial process render it inherently inappropriate for, evaluating and determining issues of social and economic policy raised by a right to housing or education. However, the fact that such objections are not raised against the judicial enforcement
of civil and political rights which also involve vital questions of social policy, and risks of political controversy, indicates to me that the issue is more ideological or cultural than being inherent to ESCR as such.

CONSTITUTION OF SOUTH AFRICA, SECTION 26

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstance. No legislation may permit arbitrary evictions.


Constitutional Court of South Africa CCT 11/00

[42] The state is required to take reasonable legislative and other measures to achieve the progressive realization of the right of access to housing. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.

[45] ... The term ‘progressive realisation’ shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: Legal and administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made
more accessible not only to a larger number of people but also to a wider range of people as time progresses ...

The order:

[99] ... It is declared that:
Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing. The programme must include reasonable measures, such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

As at the date of the launch of this applications, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.

Budlender here discusses the importance of socio-economic rights litigation, even if the situation for the complainant in a specific case might not always improve much as a result of the judgment.


... The impact of the Grootboom judgment has been varied. Government has started shifting its housing programme to have regard to the needs of people in intolerable conditions, or threatened with eviction — a process which has been accelerated by a highly publicised land invasion. When local councils seek to evict homeless people, they no longer obtain a court order for the asking — courts increasingly ask the councils what they are going to do to meet their Grootboom obligations in respect of the people concerned. But the Grootboom community, and many others are still living under highly unsatisfactory circumstances ... What Grootboom tells us is that the positive obligation to ‘fulfil’ the right to housing is justiciable even in resource constrained situations. A judgment may not always result in an order for provision of specific benefits to specific individuals, but even where this does
not happen, it can have results of a far-reaching and fundamentally important nature in the achievement of the right to housing.

THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

National human rights institutions — institutions created by the state with some independence to monitor the human rights situation in a particular country — have a role both in the promotion and the protection of human rights. In Africa there are more than 30 countries with such institutions. However, independence and effectiveness vary greatly among the national human rights institutions that have been established in Africa. Human Rights Watch has been very vocal about the role — and limitations — of these institutions.

HUMAN RIGHTS WATCH PROTECTORS OR PRETENDERS?
GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA
(2001)


Throughout the 1990s, one African government after another set up its own national human rights commission. Increased UN and international donor support for the creation of human rights commissions by the mid-1990s served as a further impetus to African governments. In most countries it was part of some sort of political transition either to a new government or to promises of a more open political system following a history of repressive or authoritarian single party rule. While some of these transitions have brought real change, others have been incomplete. By the end of the 1990s, it was clear that many of these political transitions had stagnated and some governments were backsliding on their previously stated commitments.

In some countries, the creation of a human rights commission appears to be a genuine expression of the government’s pledge to bring more transparency and government accountability, such as in Benin, Ghana, Malawi, Senegal, South Africa, and Uganda. Rwanda’s human rights commission was established as part of the 1993 Arusha Peace Accord between the government of the time and the Rwandan Patriotic Front, which was then making war against it. In other countries, the creation of the commission seemed to be motivated more by a desire to deflect criticism of the government’s recalcitrance to political liberalisation, that being the case in Cameroon, Chad, Kenya, Nigeria, Togo, and Zambia. This apparent hypocrisy was not restricted to governments being forced to concede to a multiparty system. Sudan’s human rights body was set up in 1994 in the midst of severely repressive policies. Algeria and Tunisia formed commissions to offset criticism after crackdowns against Islamist-based political organisations. In the late 1990s, the post-war governments of
Liberia and Sierra Leone created human rights commissions after flawed peace accords that granted amnesty to their fighters, responsible for the killings and torture of thousands of civilians. The question which remains is: Can these institutions that are set up by governments with less than pure motives be transformed into independent and effective human rights bodies? ... 

The development of state institutions to promote and protect human rights is a critical safeguard to ensure that people can obtain recourse and redress in the face of injustice. A dynamic and autonomous human rights commission can play a role in this process. For that reason, it is important that existing human rights commissions are encouraged to play an active and central role in the upholding of human rights. In some cases, where the political will is present, this task requires only training and funding opportunities. In other cases, greater pressure on a government is required for it to allow formal and actual independence of its human rights commission. Human rights commissioners also need to be supported and pushed by the international community to push the limit of their boundaries and to withstand the inevitable resistance from other government agencies. This is a process that can only be achieved with sustained national and international attention over a period of time.

The success by a human rights commission can only be measured through its actions. Some of the questions that need to be asked are:

Does it have the will and the means to perform the tasks given it by law?

Has it succeeded in gaining public as opposed to formal legitimacy?

What are the conditions for it to become an effective and trusted part of the human rights machinery?

How does it make itself accessible to the most vulnerable sections of society?

How far does its effectiveness derive from the bridges it is able to build with other institutions in society, governmental and non-governmental?

More importantly, are the individuals who serve within a human rights commission able to institutionalise their contribution in a lasting fashion or does a dynamic commission fade with the departure of the person heading it? Building an enduring human rights institution that will become an integral part of government is the greatest challenge for human rights commissioners and their proponents. That long-term contribution has yet to occur in Africa. In many cases it is still too soon. In other cases, it is clear that the human rights commission is falling short of achieving this goal. At this time, the independence and effectiveness of the human rights commissions within Africa depend heavily on the personality of the individuals heading the commission.

Another question that needs to be asked is whether the international community is playing as constructive a role as it can in contributing towards strong and sustainable national human rights institutions. It is a mistake to view the creation of a human rights commission, in and of itself, as a
contribution towards human rights. The ability of a national human rights commission to function effectively is enhanced by independent judicial and legislative branches as well as a vocal civil society. A more nuanced approach by the international community is required. International support should be based on the records of the commissions, and weak or compliant institutions should be pushed to play a stronger role. A weak human rights commission that seeks to absolve or shield a government of its abuses through inaction may do more harm than its token or potential presence may justify. Additionally, international support for human rights commissions should be given as part of an integrated system of support for judicial independence and independent human rights NGOs.

Finally, it should be noted that a human rights commission is not a prerequisite for a government to uphold the human rights of its citizens. Other state institutions, such as an independent judiciary or a representative legislature, can equally provide oversight to ensure recourse and redress to human rights abuses. In fact, many countries with strong records of respect for human rights do not have such commissions. The creation of a national human rights commission can be an important mechanism for strengthening human rights protection, but it is not enough. It can never replace or diminish the safeguards inherent in an independent legal system and disciplined law enforcement forces.

The Ghanaian Commission on Human Rights and Administrative Justice (CHRAJ) is widely regarded as one of the more exemplary human rights institutions in Africa.

HUMAN RIGHTS WATCH GHANA: WORKING WITH NGOs AND TRADITIONAL CHIEFS ON WOMEN’S RIGHTS (2001)


The Ghanaian Commission on Human Rights and Administrative Justice (CHRAJ) has proactively worked to address harmful traditional practices against women and girls. Not only is its work in this regard illustrative in its decision to address this frequently overlooked human rights abuse, but also because of its advocacy approach in working closely with both traditional authorities who wield a lot of power in local matters as well as local NGOs to seek solutions.

As elsewhere in Africa, some traditional practices still result in considerable discrimination against women and girls in Ghana. Although the Ghanaian Constitution and 1997 amendments to the 1960 Penal Code outlaw discrimination and slavery, harmful traditional practices continue largely because of deeply entrenched community beliefs that are unlikely to be eliminated by legislative prohibitions alone. This is precisely why attention to
such an issue by a state body, which can conduct sustained education and advocacy work, is valuable.

In 1995, the commission undertook a joint project with a local NGO for the abolition of the practice of Trokosi. Trokosi, a traditional practice found among the Ewe ethnic group primarily in the Volta region, is a violation of children's and women's rights. It is a system in which a young girl, usually under the age of ten, is made a slave to a fetish shrine for offenses allegedly committed by a member of the girl's family. The belief is that if someone in that family has committed a crime, such as stealing, members of the family may begin to die in large numbers unless a young virgin girl is given to the local fetish shrine to atone for the offense. Most Trokosi girls and women are condemned to a lifetime of hard labour, sexual servitude, and perpetual childbearing at the service of the village priest. There are an estimated 3 500 girls and women bound to various shrines in the Trokosi system, a figure that does not include the slaves' children. Even if released, generally without skills or hope of marriage, a Trokosi woman often has continued obligations to the shrine for the duration of her life. In some cases when the fetish slave dies, the family is expected to replace her with another young girl for the fetish shrine. Some women in the shrines today represent the fifth successive generation to pay for a crime.

Over the past few years, the CHRAJ has conducted an awareness campaign with traditional leaders and practitioners in an effort to bring the practice to an end. Since 1997, a new law passed by Parliament bans the practice of ‘customary servitude’. The CHRAJ's educational and advocacy efforts, taken in conjunction with International Needs Ghana, a local NGO, to approach village authorities and fetish priests have been effective. The work of the CHRAJ and other non-governmental organisations has resulted in the release of approximately 1 200 slaves by the end of 1998, many of whom were given counselling and retrained for new professions.

Another traditional abuse that occurs in Ghana is the practice of banishment and forced labour by traditional village authorities of predominantly rural elder women for suspected witchcraft. Hundreds of women accused of witchcraft were sent to penal villages in the northern region by traditional authorities. According to reports, two villages contained 400 elderly women and one village contained 2 000 women and family members, all sentenced by a village male or chief who claimed to have the power to divine witches. Although the women face no formal legal sanction if they leave, most fear that they would be beaten to death if caught. The CHRAJ issued a report on its investigations of a ‘witches’ camp in northern region. The report detailed the living conditions of the women in the camps and proposed ways to reintegrate them into society, through an educational campaign in conjunction with the Centre for National Culture and the House of Chiefs. The CHRAJ and human rights NGOs have mounted a campaign not only to persuade custodians of the ‘witches’ homes to abolish the practice, but also to educate communities to allow the women to return safely to their homes.

The CHRAJ's willingness to work closely with the NGO community as an ally and its approach in fostering a constructive dialogue with traditional leaders, a constituency often overlooked by human rights activists, are both
approaches that should be lauded. Through its efforts the CHRAJ has built awareness of human rights standards among chiefs and other traditional authorities, sent a message that a government body will not condone traditional practices that violate constitutional and international law, has legitimised and strengthened local NGO efforts on this issue, and has fostered a constructive working relationship with the NGO movement.

THE ROLE OF CIVIL SOCIETY

While acknowledging some of the limitations set out by other authors, Welch paints a more positive picture of the possible impact of NGOs on the realisation of human rights in Africa.


... Millions of refugees and displaced persons eke out wretched lives in squalid camps. African women continue to labour longer and with far less reward than African men. Rural development of the Tostan sort remains confined to a few villages. Clogged court systems seem to apply one brand of justice for the few who can afford lawyers, another brand for the many with limited funds or knowledge. Despite veneers of democratisation, transparency and accountability in government operations remain limited. Almost everywhere, the unresolved problems far outnumber the successful solutions.

It would have been impossible for human rights NGOs to have corrected all these situations. That is not their responsibility. Their major tasks are to document and publicise problems and to press for an open political process through which the issues could be addressed. ‘Solutions’ should be sought by governments. But it is not easy. African governments themselves face major obstacles, given their limited resources, given the short period of time during which human rights has been prominent on their political agendas, and given the links between many issues and deep-rooted cultural norms (for example, early marriages and other harmful traditional practices leading to higher rates of maternal and infant mortality; limited employment opportunities interacting with family obligations that exacerbate corruption). I am not sanguine, however, that all governments in Africa can effectively and rapidly create rights-protective settings. But the attempt needs to be made. The crucial point is to see them launched in the directions pointed by NGOs, international treaties, and (increasingly) the desires of their citizens.

Human rights NGOs work at the margins, in gradual, cumulative ways. Small groups with handfuls of staff labouring mostly in the capital cities cannot transform popular attitudes and governmental practices in a short time. Let
us be realistic. African human rights NGOs ameliorate rather than transform situations. They monitor and analyse, rather than achieve rapid, blanket changes. They take gradual steps rather than massive leaps. Their consciousness-raising and help for individual victims can have cumulative effects, however. Over time, the reforms they encourage may add up to a fundamental change in attitude and practices. The ‘NGO revolution’ — in the sense of their contribution to human rights — merits our attention.

Rather than point to weaknesses and problems, accordingly, I prefer to accentuate strengths and possibilities.

... Effective implementation of international treaty obligations will assuredly diminish the number and severity of abuses over time. As already pointed out, ratification is but the first step, however. National laws and practices must be adjusted, adapted, brought into conformity — a continuous, on-going process. Long-standing customs must be consciously changed. Thus, while there is a finite period for negotiating and ratifying a convention, the period for implementing it stretches into the indefinite future. What the treaty sets as goals must be translated as rapidly as possible into realities.

Strengthening NGOs will rest, in this long-term perspective, on the concurrent development of civil society. Vigorous associational life should emerge, free of the confining cocoons of jealous governments or narrow ethnicity. More human rights NGOs would help. The most effective results seem likely to emerge from multiplicity. Many organisations to promote and protect human rights would both broaden and deepen the basis for the ‘human rights consciousness’ I have been advocating. Professional associations, women’s groups, trade unions, cooperatives: The possibilities are endless. If human rights are seen as the exclusive province of self-defined organisations, they will suffer. Far better to have a profusion of NGOs with a broad basic consensus on human rights than a small number of highly focused organisations that risk being marginalised. Others may disagree; and certainly there will always be an important place for entities like the Constitutional Rights Project (Nigeria) or the Legal Assistance Centre (Namibia). But if the foundation of understanding is achieved, then a hundred diverse blooms (even including some weeds) will serve better than a few exotic, specialised plants.

...
The anti-apartheid and anti-colonial independence movements in Africa, along with the American civil rights movement, are examples of successful human rights initiatives that gained a popular following. They tell us that the realisation of human rights is an inclusive enterprise. Throughout history, the protection of human rights has been won by struggle, and struggle requires mobilisation. The process of mobilisation validates the movement, connecting it with the needs of the people and earning their commitment. To be successful, such struggles must be biased without being unfair and political without being wedded to a particular party. However, it is the practice of today's human rights organisations to claim to be ‘impartial’, ‘unbiased’, ‘neutral’, and ‘non-political’. Fashionable though they may be, and donor-friendly though they certainly are, such expressions do not describe the complex realities of the struggle for human rights in Africa.

Africa is living through a human rights crisis and a crisis for human rights. It is impossible to locate any African country in which the hope held out by the Universal Declaration of Human Rights (UDHR), or any of the standards that have mushroomed under it, is not habitually assaulted by a combination of abuse of public power, private privilege, and resulting popular destitution.

While Africa’s human rights problems are immense, even ubiquitous, most of our people do not describe their problems in human rights terms. Many communities and groups involved in social justice movements and initiatives in Africa are reluctant to make the Universal Declaration, or language inspired by it, their mascot or medium. To seek to explain this by reference to the high illiteracy level in Africa — itself a denial of several human rights — is to avoid the problem. Nor is it enough to wish this alienation away by inveighing against the unfortunate historical fact, true though it is, that Africa was hardly represented when the Universal Declaration was negotiated or adopted. After all, the struggle for independence in Africa predated the UDHR and remains, with the anti-apartheid campaign, the most popular and successful human rights movement known to African peoples. Although in some African languages there is no direct equivalent to the phrase ‘human rights’, neither the notion of justice that underlies human rights nor the experience of struggle to realise these rights is unknown to Africa.

What then explains the current crisis of human rights and the retreat from the human rights paradigm as an engine of struggle? The search for an
understanding of this crisis begins with an examination of the evolution and practices of the organisations and institutions that espouse the protection of human rights around Africa.

In Africa, the realisation of human rights is a very serious business indeed. In many cases it is a life and death matter. From the child soldier, the rural dweller deprived of basic health care, the mother unaware that the next pregnancy is not an inexorable fate, the city dweller living in fear of the burglar, the worker owed several months arrears of wages, and the activist organising against bad government, to the group of rural women seeking access to land so that they may send their children to school with its proceeds, people are acutely aware of the injustices inflicted upon them. Knowledge of the contents of the Universal Declaration will hardly advance their condition. What they need is a movement that channels these frustrations into articulate demands that evoke responses from the political process. This the human rights movement is unwilling or unable to provide. In consequence, the real life struggles for social justice are waged despite human rights groups — not by or because of them — by people who feel that their realities and aspirations are not adequately captured by human rights organisations or their language.

The current human rights movement in Africa — with the possible exception of the women’s rights movement and faith–based social justice initiatives — appears almost by design to exclude the participation of the people whose welfare it purports to advance. Most human rights organisations are modelled after Northern watchdog organisations, located in an urban area, run by a core management without a membership base (unlike Amnesty International), and dependent solely on overseas funding. The most successful of these organisations only manage to achieve the equivalent status of a public policy think–tank, a research institute, or a specialised publishing house. With media–driven visibility and a lifestyle to match, the leaders of these initiatives enjoy privilege and comfort, and progressively grow distant from a life of struggle.

In the absence of a membership base, there is no constituency-driven obligation or framework for popularising the language or objectives of the group beyond the community of inward–looking professionals or careerists who run it. Instead of being the currency of a social justice or conscience–driven movement, ‘human rights’ has increasingly become the specialised language of a select professional cadre with its own rites of passage and methods of certification. Far from being a badge of honour, human rights activism is, in some of the places I have observed it, increasingly a certificate of privilege.

Part of the responsibility for this sad state of affairs lies with the overseas sponsors of our human rights organisations. Unlike the groups they support, donor agencies and philanthropies that fund human rights work are accountable to their trust deeds and the laws of the countries (in the North) where they are incorporated. While exhorting national human rights groups in Africa to think globally and act locally, these agencies think locally and act globally. With overseas donors as sources of reference and accountability, the only obligations local human rights groups have are reporting requirements
arising under grant contracts where these exist. The *raison d'être* of the African human rights movement is primarily to fulfil such contracts rather than to service a social obligation or constituency. Local human rights groups exist to please the international agencies that fund or support them. Local problems are only defined as potential pots of project cash, not as human experiences to be resolved in just terms, thereby delegitimising human rights language and robbing its ideas of popular appeal.

All this is not to say that we should do away with the norms of human rights or with groups that purport to promote or defend them. Human rights norms articulate values that are truly universal and essential. There is a distinction, however, between human rights norms and human rights institutions, which, as organisations of human beings, are necessarily imperfect. In an ideal world, we can envisage human rights norms without taking account of the deficiencies of the groups that promote them. But no such world exists.

Human rights organisations are probably here to stay with their imperfections. But they can do well to adopt the strategies and values of the successful social justice movements of the past, such as popular mobilisation and inclusivity. People will struggle for their rights whether or not the language of human rights is accessible to them. But they will not build their struggle around the notion of human rights unless that language and those who wish to popularise it speak directly to their aspirations and survival.

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*In this declaration African human rights NGOs set out a strategy for strengthening the human rights movement in Africa.*

THE KAMPALA DECLARATION ON STRENGTHENING THE HUMAN RIGHTS MOVEMENT IN AFRICA (2003)
Also available at www.wmd.org/documents/demnews-nov2003/kampala_declaration_on_human_rights.doc

We the delegates to the Africa Human Rights NGO Summit on ‘Strengthening the Human Rights Movement in Africa; Prospects and challenges’, representing human rights organisations from Africa and International human rights organisations; having met at the Grand Imperial Hotel in Kampala, Uganda from 22 to 26 September 2003;
HAVING examined the human rights movement in Africa including:
Civil society priority needs and agendas in democratising Africa;
The critical question of NGO leadership development and management for the human rights movement in Africa;
The global campaign against terrorism and its implications on the respect for human rights in Africa;
The relationship between international NGOs and their African NGO counterparts in the promotion of human rights and democracy;
MECHANISMS FOR REALISING HUMAN RIGHTS AT THE DOMESTIC LEVEL

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NOTING that a strong human rights movement is a precondition for the promotion of democracy, human rights, the rule of law, peace and stability in Africa;

ENCOURAGED by the continuing growth and strength of African Human Rights NGOs in:

Networking with local and international NGOs in the promotion of human rights, democracy and the rule of law;

Mobilising and managing human and material resources in creating awareness about human rights on the continent;

Building expertise and professionalism in the struggle for human rights;

The evolving International human rights institutions, norms and standards;

CONCERNED that in spite of these strengths there are still perceivable weaknesses in:

Over reliance on the global north for financial and material support;

Developing closer linkages between human rights NGOs and their target constituencies, particularly the rural poor;

Accountability systems both to the target population and the donor community;

AWARE of the challenges that lie ahead for the human rights movement in Africa in terms of:

Sustainability of the Advocacy campaign;

Enforcement and observance of human rights and Constitutional reforms;

Ensuring full implementation of treaties signed by our respective governments and making these work in our domestic environment;

Threats to human rights posed by recent attempts of nations to counter terrorism;

Protecting human rights defenders on the continent;

(Re)-defining our platform of engagement with the state;

The ineffectiveness of regional human rights institutions and the absence of an African Court on Human Rights;

FURTHER AWARE of the challenges faced by human rights organisations in terms of:

Improving transparency and accountability in the work of human rights NGOs;

Capacity building of human rights organisations including improvement in the management and leadership skills of human rights activists;

Restrictive legislation regarding the registration and operations of human rights NGOs in some countries;

Enhancing effective partnerships between African NGO’s and their northern counterparts.

DO HEREBY recommend as follows:

African human rights NGOs and their international counterparts should strengthen their relations based on the principles of;

Co-operation in the exchange of information and expertise.

Joint ownership of projects and recognition of the same.

Avoidance of duplication, including substitution of local capacity, in projects of local NGOs by International NGOs.

Human rights NGOs should define a platform of constructive engagement with the state based on:

Principled co-operation and non-patronage.

Strong networking among the key stakeholders in the promotion of democracy - the judiciary, legislature, the executive and wider civil society.
Human rights NGOs should create and seek opportunities for organisational capacity building and leadership training for activists.

Human rights NGOs should take stock of best practices with the view to replicating them across the continent.

Human rights NGOs should co-operate more towards developing strategies for the protection of human rights defenders, especially those working in conflict situations.

Human Rights NGOs should advocate for Democratic Reforms to strengthen pluralism and the respect for the separation of power and the rule of law.

Both African NGOs and their international counterparts should explore ways of reducing donor dependence.

An Africa Human Rights Day should be declared to highlight the state of human rights and the work of human rights NGOs on the continent.

Human Rights NGOs should urge African states to speedily ratify both the Optional Protocol establishing an African Court on Human Rights and the Optional Protocol of Women’s Rights in Africa.
C. MECHANISMS FOR THE ENFORCEMENT OF HUMAN RIGHTS AT THE INTERNATIONAL LEVEL

Because domestic systems often fail to protect human rights, international human rights mechanisms on the global as well as the regional level, have been developed to serve as ‘safety nets’. International human rights law has made a huge contribution to the development of human rights as a universal concept. Some of the mechanisms currently in place are discussed here.

HUMAN RIGHTS IN THE UNITED NATIONS

This contribution provides a birds-eye view of the constantly changing United Nations system in respect of human rights. New developments, such as the replacement of the Commission on Human rights by the Council on Human Rights, are not reflected here.

SMITH, R ‘THE UNITED NATIONS SYSTEM OF HUMAN RIGHTS PROTECTION’ (2005)

in Smith, R and van den Anker, C (eds) The essentials of human rights
London: Arnold

... The United Nations has, since its inception in 1945, pioneered international standard setting on human rights issues. Under its auspices, a number of human rights instruments have been adopted and a comprehensive monitoring system has been instituted with the aim of promoting compliance by states. A number of bodies are involved with human rights as the following diagram illustrates.

The principal UN institutions are the Security Council, the General Assembly and the International Court of Justice. These bodies were established in terms of the UN Charter which clearly explains their functions and powers. The Secretary-General is also included as his offices are central to the successful functioning of the United Nations. The Security Council, which operates at the highest level, has primary responsibility for the maintenance of international peace and security. It comprises five permanent members (France, People’s Republic of China, Russia, United Kingdom and United States of America) and a further ten members drawn from other states. A range of enforcement measures may be applied against states by the Security Council, ranging from diplomatic pressure through sanctions to military action. Given the principle of non-intervention in internal affairs of any state, the Security Council is most likely to be involved in human rights issues when friction caused by human rights threatens international peace. Examples of this include intervention in the former Yugoslavia in the 1990s. Given the failure to intervene timeously in Rwanda, it is possible that the Security Council will prove more willing to act in the future when evidence of gross violations of
rights emerge, even if there is no inter-state element. In its early years, the Security Council spearheaded decolonisation, transforming the map of the world in barely 30 years. At the heart of decolonisation is a belief of self-determination, one of the recognised fundamental rights. (Now with decolonisation almost complete, the scope of the right to self-determination is being explored in greater detail.)

The General Assembly comprises representatives of all member States of the United Nations. The Charter of the United Nations imbues it with responsibility in a number of areas including studies and making recommendations which promote the realisation of international human rights and fundamental freedoms. Probably the most significant success of the Assembly was the Proclamation of the Universal Declaration on Human Rights in 1948. In furtherance of the principles entrenched therein, the General Assembly has been instrumental in proclaiming a series of profile-raising international decades, not least that on human rights education. It has also instituted special investigations into areas of concern, for example reform of the UN Human Rights system. A number of resolutions on human rights issues have been adopted by the General Assembly. Although not legally binding, such resolutions have strong moral force, representing as they do the expressed will of the majority of the international community. Such mechanisms are sometimes termed ‘soft law’ by international lawyers.

The International Court of Justice is the principal court of the UN system. However, it does not have competence to hear complaints from individuals. Its primary objective is as a venue for inter-state complaints. In a few occasions, this has overlapped with human rights issues — most notably in the proceedings brought by Croatia and Bosnia-Herzegovina against Yugoslavia concerning alleged violations of the Genocide Convention. The jurisdiction of the Court can be contrasted with the International Criminal Court which entered operation in July 2002. Individuals alleged to have been involved in war crimes could be brought to justice through this avenue. Obviously the crimes are serious infringement of human rights. Not all states have agreed to the terms proposed in the Statute of Rome.

As a figurehead of the United Nations, the Secretary-General, at the time of writing currently Kofi Annan, can perform a valuable function raising the profile of human rights issues. Moreover, the current Secretary-General has also been instrumental in introducing the current reform agenda for the United Nations and human rights.

In addition to these principal bodies, a number of other bodies were created under the auspices of the United Nations. The various councils and commissions with responsibility for human rights will be considered next. In each instance, the functions and powers of the body can be traced through to the UN Charter.

Turning to specific human rights bodies, the United Nations has one Council and two Commissions with particular responsibility for human rights. Thereafter, a number of lesser bodies are established with specific responsibility — most notably monitoring the compliance of contracting states with various human rights treaties. The Economic and Social Council has 54
individual members, elected by the General Assembly. It can initiate reports on a range of issues and make recommendations for, *inter alia*, the purpose of promoting respect for, and observance of, human rights and fundamental freedoms (article 62, UN Charter). In general, the Council coordinates activities within its area of competence. For human rights, it thus receives reports from the Treaty monitoring bodies and from the Commissions. It also delegates areas for investigation to its Commissions and associated sub-bodies.

Two of the Council’s Commissions impact on human rights: The Commission on the Status of Women and the Commission on Human Rights. Established in 1946, the Commission on the Status of Women has expanded from 15 to 45 members, imbued with responsibility preparing recommendations and report to the Council on the promotion of women’s rights globally. The Commission on Human Rights, in contrast has a broader remit. Originally its goal was to draft the Universal Declaration of Human Rights (adopted 1948). Since then, its role has been redefined. Today, it has power not only to organise technical assistance for those states in need and appoint rapporteurs to investigate areas of concern, it also can action individual complaints. Should a pattern of systematic or gross violations of human rights emerge from studies, the Commission may investigate the matter further through a specific procedure (Resolution 1503 (XLVIII) 1970). The investigation is carried out in private but the names of states involved are published: Vietnam and Zimbabwe are recent examples. Perhaps the greatest problem with the system is that the consent of the state concerned is required for a full investigation. However, as the United Nations is based on a principle of respect for the sovereignty of states, such a requirement is perhaps inevitable. Under the auspices of the Commission on Human Rights is the Sub-Commission on the Promotion and Protection of Human Rights, originally with a remit restricted to minority rights — a throwback to the system advocated by the League of Nations.

International human rights exists in its present form through a range of international treaties. Compliance with each of the principal UN treaties is monitored by a special committee. These committees only enjoy such powers and functions as are specified in the treaty concerned. In addition to these organs and bodies, a number of treaty-monitoring bodies have been established, essentially to oversee the implementation of specific treaties. For example, the Human Rights Committee was established to oversee the implementation of the International Covenant on Civil and Political Rights. All these committees, known as conventional mechanisms as they are established pursuant to specific instruments (the terms treaties and conventions can be used almost interchangeably), report to the Economic and Social Council and the General Assembly.

Finally, the ‘public face’ of international human rights in the UN is the High Commissioner for Human Rights. Just as the Secretary-General is the figurehead of the United Nations, the High Commissioner for Human Rights, an appointment at the level of Under-Secretary-General, has primary responsibility for human rights activities. The Office of the UN High Commissioner for Human Rights was created to protect and promote human rights for all. Based in Geneva, the Office now coordinates and provides
secretarial support for much of the UN's human rights activities. The fourth High Commissioner, Louise Arbour, assumed the post in summer 2004.

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*This report of the 637th and 638th meetings of the Committee tasked with the supervision of the Convention on the Discrimination Against Women illustrates how state reporting is used in the UN treaty system.*

**COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (20 JANUARY 2004)**

... Acting in their personal capacities, the Committee’s 23 expert members monitor compliance with the Convention on the Elimination of All Forms of Discrimination against Women, which entered into force in 1981. Nigeria ratified the Convention in 1985 and signed its Optional Protocol, which allows individual women or groups of women to petition the Committee, in 1999.

Expressing concern about contradictions and inconsistencies created by the application of Nigeria’s three legal systems, namely, Islamic Shari’a, customary law and common law, in its six geopolitical zones, experts cautioned against the perpetuation of customary and religious practices which negatively affected the situation of Nigerian women. Given the country's size, complex political system and rich cultural heritage, experts stressed the need for Nigeria to set the example for neighbouring African nations by fully implementing its obligations under the Convention.

Many experts emphasised the need for the Government to take urgent action to harmonise its legal framework to ensure the uniformity of human rights protections. Noting that harmonising the legal system was complicated by customary, religious and common law practices, the expert from Benin asked if the Government intend to adopt uniform laws with respect to marriage and family. She also asked whether diversity took precedence over international rights and commitments, and if the legislative reforms would be only partial.

The slow process of domesticating the Convention in Nigeria’s national legislation was delaying women’s rightful enjoyment of their human rights, experts stated. Noting that the situation of Nigerian women did not require gradual, but fast and radical change, the expert from the Republic of Korea, commenting on the recent acquittal of women in danger of being stoned to death for adultery, said it was the Government’s obligation to ensure that states did not have those discriminatory laws in the first place. The acquittals were not, in her view, a question of ‘celebration’, but of shame.

Responding to experts’ comments, Rita Akpan, Nigeria’s Minister for Women Affairs, noted that the Government had taken some concrete steps to realise its commitments under the Convention.
Recent examples included the passage, in 2003, of the Trafficking in Persons Law Enforcement and Administration Act and the Child Rights Act. Acknowledging the slow pace of domesticating the Convention, she added that although Nigeria had ratified the Convention in 1985, during the time of the military government, it had been taboo to discuss the Convention. With the start of a democratic process, she believed that it would not be long before the Convention was fully implemented in Nigeria’s legislation.

...
explicitly recognise a direct right, located in the people, to protect constitutional and human rights norms, if need be through political struggle, should they be violated. The Constitutive Act of the African Union uniquely provides for a right of humanitarian intervention in member states by the Union, in cases of grave human rights violations.

As is well known, the struggle for human rights on the African continent is far from over or complete. The continent is plagued by widespread violations of human rights, often on a massive scale. The process to establish effective institutional structures, that will help to consolidate and protect the hard earned gains of the freedom struggles of the past, has become a struggle in its own right. No doubt, the most important task in this regard is to establish legal systems on the national level that protect human rights. At the same time regional and global attempts to change the human rights practices of the continent, and to create safety nets for those cases not effectively dealt with on the national level, are assuming increased importance.

This contribution first introduces the main legal instruments relevant to the continental protection of human rights in Africa, then discusses the norms recognised (individual and peoples’ rights and duties etc) and thereafter turns to the regional institutional structures set up to achieve the implementation of the norms. This institutional overview focuses primarily on four important pillars of the African human rights system: The organs of the African Union, the African Commission on Human and Peoples’ Rights, the yet to be established African Court on Human and Peoples’ Rights and the newly established African Peer Review Mechanism.

THE AFRICAN UNION AND HUMAN RIGHTS

Background

The African regional system has been developed under the auspices of the Organization of African Unity (OAU), established in 1963, which was transformed in 2001 into the African Union (AU). All the states of Africa are members of the AU, except Morocco which withdrew in 1984 when the OAU recognised Western Sahara bringing the membership to 53. While the Charter of the OAU of 1963 made only passing reference to the concept of human rights, the Constitutive Act of the AU of 2000 (entered into force 2001) has now placed human rights squarely on the agenda of the new regional body.

The Constitutive Act

The Constitutive Act of the AU, in its Preamble, refers to the African struggles for independence and human dignity ‘by our peoples’ and the determination of the Heads of State and Government ‘to promote and protect human and peoples’ rights’. Article 3 sets out the ‘Objectives’ of the AU as follows: ‘The objectives of the Union shall be to ... (e) encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;’ and to ‘... (h) promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments ...’.
Article 4 deals with ‘Principles’, and provides that:

The Union shall function in accordance with the following principles: ... (g) non-interference by any member state in the internal affairs of another; (h) the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; (i) peaceful co-existence of member states and their right to live in peace and security; (j) the right of member states to request intervention from the Union in order to restore peace and security ... (l) promotion of gender equality; (m) respect for democratic principles, human rights, the rule of law and good governance; (n) promotion of social justice to ensure balanced economic development; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (p) condemnation and rejection of unconstitutional changes of governments.

There are no entry requirements in terms of their human rights records and practices for states to join the African Union (as is the case for example with the Council of Europe), and all the members of the OAU became members of the AU without scrutiny of their human rights records. There is, however, at least a theoretical chance that violations of AU human rights standards may lead to suspension from the AU; certainly lesser forms of sanctions are possible.

According to article 23(2):

... any member state that fails to comply with the decisions and policies of the Union may be subjected to ... sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

Art 30 provides: ‘Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.’

The African Union has seen the establishment of a number of new institutions, many with relevance for the implementation of human rights, which will be discussed below.

**African human rights instruments**

The central document of the African regional human rights system, the African Charter on Human and Peoples’ Rights (African Charter), was opened for signature in 1981 and entered into force in 1986. It has been ratified by all 53 member states of the OAU/AU. The sole supervisory body of the African Charter currently in existence is the African Commission on Human and Peoples’ Rights (African Commission). The African Commission was constituted and met for the first time in 1987. The Commission has adopted its own Rules of Procedure (amended in 1995). The work of the African Commission will be discussed later in this article.


In addition to these instruments the African regional human rights system is comprised of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 which entered into force in 1974 (45 ratifications); and the African Charter on the Rights and Welfare of the Child (African Children’s Charter) of 1990, which came into force in 1999 (38 ratifications). A special monitoring body for the African Children’s Charter, the African Committee on the Rights and Welfare of the Child, discussed further below, held its first meeting in 2002.


THE NORMS RECOGNISED IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS

As alluded to earlier, the 1963 OAU Charter did not recognise the realisation of human rights as such as one of the objectives of that body. It would only be in 1979 that a meeting of experts was gathered by the OAU in Dakar, Senegal, to prepare a preliminary draft of an African human rights charter. This culminated in the Draft African Charter on Human and Peoples’ Rights, finalised in Banjul, The Gambia in 1981 (resulting in the name ‘Banjul Charter’, which is sometimes used for the African Charter). The African Charter was formally adopted by the OAU in Kenya later that year.

A number of reasons have been advanced why the OAU changed its approach and gave the concept of human rights the prominence offered by the Charter during the late 1970s and the early 1980s. These include the increased emphasis on human rights internationally at the time (as in the foreign policy of President Carter of the United States of America), the use to which the concept of human rights was put in international bodies such as the UN and the OAU to condemn the apartheid practices in South Africa, and abhorrence at the human rights violations that had taken part in some member states in particular Uganda, Central Africa and Equatorial Guinea.

The African Charter recognises a wide range of internationally accepted human rights norms, but also has some unique features. The Charter recognises not only civil and political rights, but also economic, social and cultural rights, not only individual but also peoples’ rights, not only rights but also duties, and it has a singular system for the restrictions on rights. The Charter also contains provisions concerning interpretation which are very generous towards international law.
Civil and political rights

The civil and political rights recognised in the African Charter are in many ways similar to those recognised in other international instruments, and these rights have in practical terms received most of the attention of the African Commission.

The Charter recognises the following civil and political rights: the prohibition of discrimination (article 2); equality (article 3); bodily integrity and the right to life (article 4); dignity and prohibition of torture and inhuman treatment (article 5); liberty and security (article 6); fair trial (article 7); freedom of conscience (article 8); information and freedom of expression (article 9); freedom of association (article 10); assembly (article 11); freedom of movement (article 12); political participation (article 13); property (article 14); and independence of the courts (article 26).

A number of possible shortcomings in respect of civil and political rights in the African Charter could be noted. There is for example no explicit reference in the Charter to a right to privacy; the right against forced labour is not mentioned by name; and the fair trial rights and the right of political participation are given scant protection when measured against international standards. However, the Commission has in resolutions and in cases before it interpreted the Charter protection to encompass some of the rights or aspects of rights not explicitly included in the Charter.

An overview of some Commission decisions in respect of individual communications provides a sample of the Commission’s approach:

- In a number of cases the Commission has held that there is a positive duty on state parties to protect those in their jurisdictions against violations by non-state actors. In a case concerning Mauritania, the Commission found that, although slavery had officially been abolished in that country, this was not effectively enforced by the government. In a case involving Chad, the Commission likewise held that the state’s failure to protect people under its jurisdiction during a civil war against attacks by unidentified militants, not proven to be government agents, constituted a violation of the right to life.

- The imposition of Shari’a law on non-Muslims in Sudan has been held to violate freedom of religion.

- In Media Rights Agenda and Others v Nigeria the Commission ruled against the Abacha government’s clampdown on freedom of expression, and determined that politicians should be provided less protection from free expression than other people. As with many of the seemingly more bold decisions of the Commission, this decision was unfortunately handed down only after the Abacha regime had fallen. Nevertheless, a positive precedent was set.

- The suspension of national elections was held to violate the right to political participation in Constitutional Rights Project and Another v Nigeria.

- The Commission has held that decrees ousting the jurisdiction of courts to examine the validity of such decrees, violate the fair trial provision of the Charter, and also that the creation of special tribunals, dominated by members of the executive, violated the same right.
• The Commission has held that an execution after an unfair trial is a violation of the right to life, but that the death penalty in itself does not violate the African Charter.
• A constitutional amendment providing that anyone who wanted to stand for office in the presidential election in Zambia would have to prove that both parents were Zambians by birth or descent was found to be in violation of the Charter in *Legal Resources Foundation v Zambia*.

**Socio-economic rights**

A unique feature of the Charter is the inclusion of socio-economic rights in a regional human rights treaty, alongside the civil and political rights mentioned above. The inclusion of socio-economic rights in the Charter is significant, in that it emphasises the indivisibility of human rights and the importance of developmental issues, which are obviously important matters in the African context.

At the same time, the fact that only a modest number of socio-economic rights are explicitly included in the Charter, should be noted. The Charter only recognises ‘a right to work under equitable and satisfactory conditions’ (article 15), a right to health (article 16) and a right to education (article 17). Some prominent socio-economic rights are not mentioned by name, such as the right to food, water, social security and housing.

The socio-economic rights in the Charter have received scant attention from the Commission, but in one case the Commission has dealt extensively with the issue, and has in effect held that some internationally recognised socio-economic rights which are not explicitly recognised in the Charter should be regarded as being implicitly included.

The so-called *SERAC v Nigeria* decision dealt with the destruction of part of Ogoniland by Shell, acting in collaboration with the government of Nigeria. The Commission held that the presence of an implicit right to ‘housing or shelter’ in the Charter has to be deduced from the explicit provisions on health, property and family life in the Charter. Similarly, a right to food has to be read into the right to dignity and other rights. It was accepted, without argument or reasoning, that the Ogoni’s constituted a ‘people’.

The approach of the Commission of filling in the gaps in the Charter as was done in the *SERAC* case could be seen as a creative and bold move on the part of the Commission, but it could also be argued that a too wide divergence between the Commission’s interpretation of the Charter and the Charter itself could compromise legal certainty.

**Women’s rights**

The way in which the Charter deals with gender issues has been a bone of contention. Article 18(3) provides as follows:

> The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
This lumping together of women and children, in an article which deals primarily with the family, reinforces outdated stereotypes about the proper place and role of women in society and has been partially responsible for the drive to adopt the Protocol to the African Charter on the Rights of Women in Africa. The Protocol was adopted by the AU Assembly in 2003 and received the required 15 ratifications on 26 October 2005 thereby entering into force on 25 November 2005.

The Protocol on the Rights of Women is detailed with 24 substantive articles, some dealing with specific issues affecting women, while others deal with rights that should apply equally to men and women, some of which are not included in the African Charter. The rights in the Protocol include elimination of discrimination against women (article 2); right to dignity (article 3); right to life, integrity and security of person (article 4); elimination of harmful practices (article 5); marriage (article 6); separation, divorce and annulment of marriage (article 7); access to justice and equal protection of the law (article 8); political participation (article 9); peace (article 10); protection of women in armed conflict (article 11); education (article 12); economic and social welfare rights (article 13); health and reproductive rights (article 14); food security (article 15); adequate housing (article 16); positive cultural context (article 17); healthy and sustainable environment (article 18); right to sustainable development (article 19); widows’ rights (article 20); inheritance (article 21); special protection of elderly women (article 22); women with disabilities (article 23); and women in distress (article 24).

The African Commission (and after its establishment also the African Court) is responsible for monitoring the implementation of the Charter and as a result also for the Protocol, thereby avoiding the duplication that exists with regard to children’s issues, where as mentioned above a separate Committee on the Rights and Welfare of the Child has been established.

Peoples’ rights

In its protection of peoples’ rights the Charter goes further than any other international instrument.

All ‘peoples’, according to the Charter, have a right to be equal (article 19); to existence and self-determination (article 20); to freely dispose of their wealth and natural resources (article 21); to economic, social and cultural development (article 22); to peace and security (article 23); and to a satisfactory environment (article 24). Clearly part of the motivation for the recognition of ‘peoples’ rights’ lies in the fact that entire ‘peoples’ have been colonised and otherwise exploited in the history of Africa.

The concept of ‘peoples’ has been referred to in some of the cases before the Commission, including the following:

• In a case concerning Katangese secessionists in the former Zaire, a complaint was brought on the basis that the Katangese people had a right, as a people, to self-determination in the form of independence. The Commission ruled that there was no evidence that a Charter provision had been violated, because widespread human rights violations or a lack of political participation by the Katangese people
had not been proven. This could be understood to suggest that if these conditions were met, secession by such a ‘people’ could be a permissible option. On the other hand the Commission was careful to emphasise that self-determination can also take forms other than secession, such as self-government, local government, federalism, or confederalism.

- In a case concerning the 1994 coup d’état against the democratically elected government of The Gambia, the Commission held that this violated the right to self-determination of the people of The Gambia as a whole. The same conclusion was reached when the Abacha government in Nigeria annulled internationally recognised free and fair elections.

- In the abovementioned SERAC case the Commission held that the right to a satisfactory environment in article 24 requires the state ‘to take reasonable ... measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’. Significantly, here the rights of peoples are also used outside the context of self-determination.

Limitations, derogation and duties

The way in which the African Charter deals with restrictions on all rights, including civil and political rights, presents a significant obstacle. The African Charter does not contain a general limitation clause (although, as is noted below, article 27(2) is starting to play this role). This means that there are no general guidelines spelled out in the Charter on how its rights should be limited — no clear ‘limits on the limitations’, so to speak. A well-defined system of limitations is important. A society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations.

A number of the articles of the Charter setting out specific civil and political rights do contain limiting provisions applicable to those particular rights. Some of these internal limitations clearly spell out the procedural and substantive norms with which limitations should comply, while others only describe the substantive requirements which limitations must meet.

A last category of these internal limitation clauses merely poses the apparently procedural requirement that limitations should be done ‘within the law’. An example of this category of internal limitations is article 9(2), which provides as follows: ‘Every individual shall have the right to express and disseminate his opinions within the law’. This kind of limitation is generally known as a ‘claw-back clause’. They seem to recognise the right in question only to the extent that such a right is not infringed upon by national law.

If that was the correct interpretation, the claw-back clauses would obviously undermine the whole idea of international supervision of domestic law and practices and render the Charter meaningless in respect of the rights involved. Domestic law will in those cases have to be measured according to domestic standards; a senseless exercise. What is given with the one hand is seemingly taken away with the other.
As has been noted above, however, the Charter has a very expansive approach in respect of interpretation. In terms of articles 60 and 61, the Commission has to draw inspiration from international human rights law in interpreting the provisions of the Charter. The Commission has used these provisions very liberally in a number of instances to bring the Charter in line with international practices, and the claw-back clauses are no exception.

In the context of the claw-back clauses, the African Commission has held that provisions in articles that allow rights to be limited ‘in accordance with law’, should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards.

Through this interpretation, the Commission has gone a long way towards curing one of the most troublesome inherent deficiencies in the Charter. However, it remains unfortunate that the Charter, to those who have not had the benefit of exposure to the approach of the Commission, will continue to appear to condone infringements of human rights norms as long as it is done through domestic law.

The African Charter does not contain a provision either allowing or disallowing derogation from its provisions during a state of emergency. This has led the Commission to the conclusion that derogation is not possible. This could mean that in real emergencies the Charter will be ignored, and will not exercise a restraining influence.

The Charter recognises, in addition to rights, also duties. For example, individuals have duties towards their family and society, and state parties have the duty to promote the Charter.

Perhaps the most significant provision under the heading ‘Duties’ is article 27(2), which reads as follows: ‘The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’. This provision has now in effect been given the status by the African Commission of a general limitation clause. According to the Commission: ‘The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2) ...’.

The Commission’s use of article 27(2) as a general limitation clause seems to confirm the view that the concept of ‘duties’ should not be understood as a sinister way of saying rights should first be earned, or that meeting certain obligations is a precondition for enjoying human rights. Rather, it implies that the exercise of human rights, which people have simply because they are human beings may be limited by the duties which they also have. Rights precede duties, and the recognition of certain duties is merely another way of signifying the kind of limitations that may be placed on rights.
NORMS RECOGNISED IN OTHER TREATIES

OAU Convention Governing Specific Aspects of Refugee Problems in Africa

The definition of refugee in article 1 of the OAU Refugee Convention is broader than in the UN Refugee Convention. In addition to ‘well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion’ the OAU Convention also stipulates that anyone who is compelled to leave his country because of ‘external aggression, occupation, foreign domination or events seriously disturbing public order’ shall be considered a refugee. The OAU Convention does not provide for any supervisory system but the African Commission has considered a number of communications dealing with refugees.

African Charter on the Rights and Welfare of the Child

The African Children’s Charter, adopted in 1990, in many respects has similar provisions to the UN Convention on the Rights of the Child (CRC), adopted less than a year prior to the African instrument. In some respects the African Children’s Charter goes further than the CRC. No person under 18 years should be recruited or take part in direct hostilities. The CRC sets the age-limit at 15 years, though a Protocol adopted in 2000 raises it to 18 years. The African Children’s Charter goes further than the CRC also in other aspects, for example in prohibiting child marriages. The implementation of the African Children’s Charter lies with the African Committee of Experts on the Rights and Welfare of the Child, discussed further below.

AU Convention on Preventing and Combating Corruption

Corruption depletes the resources necessary for a state to be able to fulfil its human rights obligations. This is recognised in the AU Convention on Preventing and Combating Corruption which provides as one of the objectives of the Convention to ‘[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights’. The Convention also provides for rights linked to the fight against corruption such as access to information. The Convention provides for an Advisory Board on Corruption as a follow up mechanism.

ORGANS ESTABLISHED FOR THE ENFORCEMENT OF HUMAN RIGHTS

The establishment of the African Union has seen an unprecedented institutional proliferation of bodies with a human rights mandate.

The role of the main organs of the AU in protecting human rights

The African Union has the following main organs: The Assembly of Heads of State and Government, the Executive Council, the Permanent Representative Committee, the Pan-African Parliament, the African Court of Justice, the AU Commission, Specialised Technical Committees, the Economic, Social and Cultural Council, financial institutions and the Peace and Security Council.
The Pan-African Parliament shall ‘ensure the full participation of African peoples in the development and economic integration of the continent’. The Parliament has as one of its objectives to ‘promote the principles of human rights and democracy in Africa’. The Parliament held its first session in 2004. Each state party to the Protocol establishing the Parliament sends five national parliamentarians to the Parliament that meets twice a year in Midrand, South Africa. Currently its powers are purely consultative and advisory.

The Economic, Social and Cultural Council (ECOSOCC) is ‘an advisory organ composed of different social and professional groups’. Its purpose is to provide a role for civil society in the AU. ECOSOCC has as one of its objectives to ‘Promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice’. The statutes of ECOSOCC were adopted by the AU Assembly in July 2004 and the Council held its first meeting in Addis Ababa in March 2005.

The African Court of Justice, one of the main organs of the AU, has not yet been established as the Protocol setting up the court had only received eight of 15 ratifications required to enter into force by November 2005. The Court of Justice will be further discussed below in relation to the African Court on Human and Peoples’ Rights.

The attempts to develop mechanisms to deal with conflict in Africa are also of importance in trying to prevent massive human rights violations. The Protocol on the Peace and Security Council (PSC), adopted in 2002, entered into force in 2003. The PSC is composed of 15 members. The criteria for membership include ‘respect for constitutional governance ... as well as the rule of law and human rights ...’.

Article 4 of the PSC Protocol provides that the Council shall be guided by the AU Constitutive Act, the UN Charter and the Universal Declaration of Human Rights. The Protocol further provides as one of the objectives of the Council to:

- promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.

Article 19 of the Protocol provides that:

The Peace and Security Council shall seek close co-operation with the African Commission on Human and Peoples’ Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples’ Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandates of the Peace and Security Council.

From its Annual Activity Reports it appears that the Commission has not made use of this provision, though it has made reference to PSC resolutions in its own country specific resolutions.

The development programme of the AU, the New Partnership for Africa’s Development (NEPAD), links human rights to development and provides for the African Peer Review Mechanism, (APRM), discussed below.
The African Commission on Human and Peoples’ Rights

As was mentioned earlier, the African Charter, as adopted in 1981, provided only for the creation of a Commission and not a Court on Human Rights, in contrast with the other two regional systems in the world — in Europe and in the Americas, which, at the time, had both. The Commission is not formally an organ of the AU, as it was created by a separate treaty.

The commissioners

The African Commission consists of 11 commissioners, who serve in their individual capacities. The Commission meets twice a year in regular sessions for a period of up to two weeks. They are nominated by state parties to the Charter and elected by the Assembly. The Secretariat of the Commission is based in Banjul, The Gambia. The Commission alternates its meetings between Banjul and other African capitals. The Commission has a protective as well as a promotional mandate.

Although the Charter provides that the Commissioners should be independent there have been many instances where the independence of individual Commissioners has been questioned. The fact that many Commissioners have been serving civil servants or ambassadors has received criticism. For example a Commissioner from Mauritania elected in 2003 became a minister in his home country shortly thereafter. An important step was, however, taken when the AU requested nominations to fill the post of four Commissioners in 2005. In a note verbale to the member countries in April 2005 the AU Commission provided guidelines that excluded senior civil servants and diplomatic representatives. The four new Commissioners elected at the July 2005 summit all hold positions which are independent from government.

The main mechanisms employed by the Commission to fulfil its task of supervising compliance with Charter norms by state parties are the following:

The complaints procedure

Both states and individuals may bring complaints to the African Commission alleging violations of the African Charter by state parties.

The procedure by which one state brings a complaint about an alleged human rights violation by another state is not often used. Currently one such case is pending before the Commission, between the Democratic Republic of Congo and three neighbouring countries.

The so-called individual communication or complaints procedure is not clearly provided for in the African Charter. One reading of the Charter is that communications could be considered only where ‘serious or massive violations’ are at stake, which then triggers the rather futile article 58 procedure, described below. However, the African Commission has accepted from the start that it has the power to deal with complaints about any human rights violations under the Charter even if ‘serious or massive’ violations are not at stake, provided the admissibility criteria are met.
The Charter is silent on the question who can bring such complaints, but the Commission practice is that complaints from individuals as well as NGOs are accepted. From the case law of the Commission it is clear that the complainant does not need to be a victim or a family member of a victim. The Commission in the SERAC case expressed its thanks to:

The two human rights NGOs which brought the matter under its purview ... This a demonstration of the usefulness to the Commission and individuals of actio popularis, which is wisely allowed under the African Charter.

The individual complaints procedure is used much more frequently than the inter-state mechanism of the African Charter, although not as frequently as one would have expected on a continent with the kind of human rights problems that Africa has. This could to some extent be attributed to a lack of awareness about the system, but even where there is awareness, there is often not much faith that the system can make a difference.

According to a recent study on the compliance of states with the findings of the Commission there has been full state compliance in six of the 44 cases where the Commission found state parties in violation of the African Charter. The study finds that there has been non-compliance in 13 cases, partial compliance in 14 cases, seven cases of situational compliance (through change of government) and unclear compliance in four cases. Viljoen and Louw finds that:

In the analysis of cases of full and clear non-compliance, it appears that the most important factors are political, rather than legal. The nature of the case, the elaborateness of reasoning or the type of remedy required seems to have little bearing on the likelihood of adherence by states. The only factor of relevance that relates to the treaty body itself is follow-up activities undertaken by the Commission.

As with other complaints systems, the African Charter poses certain admissibility criteria before the Commission may entertain complaints. These criteria include the requirement of exhausting local remedies. The Commission may be approached only once the matter has been pursued in the highest court in the country in question, without success, or a reasonable prospect of success.

The Commission has stated that for a case not to be admissible local remedies must be available, effective, sufficient and not unduly prolonged. In Purohit and Moore v the Gambia, a case dealing with detention in a mental health institution, the Commission gave a potentially far-reaching decision on the exhaustion of local remedies when it held that:

The category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.

The Charter also has a requirement that the communications are ‘not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity’.

When a complaint is lodged, the state in question is asked to respond to the allegations against it. If the state does not respond, the Commission proceeds on the basis of the facts as provided by the complainant. If the decision of the
Commission is that there has indeed been a violation or violations of the Charter, the Commission sometimes also makes recommendations that continuing violations should stop (for example prisoners be released); or specific laws be changed, but often the recommendations are rather vague, and the state party is merely urged to ‘take all necessary steps to comply with its obligations under the Charter’. Sometimes there is no provision at all as to remedies, while in other cases the remedies provided are elaborate. Recently the Commission required some states to report on measures taken to comply with the recommendations in their state reports to the Commission.

Article 58 provides that ‘special cases which reveal the existence of serious or massive violations of human and peoples’ rights’ must be referred by the Commission to the Assembly, which ‘may then request the Commission to undertake an in-depth study of these cases’. Where the Commission has followed this route, the Assembly has failed to respond, but the Commission has nevertheless made findings that such massive violations have occurred. Today, the Commission does not seem to refer cases anymore to the Assembly in terms of article 58.

The Charter does not contain a provision in terms of which the Commission has the power to take provisional or interim measures requesting state parties to abstain from causing irreparable harm. However, the Rules of Procedure of the Commission grant the Commission the power to do so. The Commission has used these provisional or interim measures in a number of cases. One such case concerned Ken Saro-Wiwa and other Ogoni activists, who had been sentenced to death by a special tribunal, set up by the military government in Nigeria. In that particular case, the interim measures requesting the Nigerian government not to execute them were ignored. The execution of Saro-Wiwa and the others caused a worldwide outcry. The Commission said in its decision that it had tried to assist Nigeria to meet its obligations under the Charter by means of the interim measures, and the execution in the face of the interim measures consequently violated article 1.

Consideration of state reports

Each state party is required to submit a report every two years on its efforts to comply with the African Charter. Although it is not provided for in the African Charter that the reports should be submitted specifically to the African Commission, the Commission recommended to the Assembly that the Commission be given the mandate to consider the reports. The Assembly has endorsed this recommendation. NGOs are allowed to submit shadow or alternative reports, but the impact of this avenue is diminished by the lack of access of NGOs to the state reports to which they are supposed to respond. The reports are considered by the Commission in public sessions. Reporting by state parties should be done in accordance with guidelines adopted by the Commission. Currently there are two sets of guidelines; one, adopted in 1988 is long and complex and one, adopted in 1998 which is overly brief. The relationship between these guidelines is unclear and it should be a priority of the Commission to clarify the situation as regards guidelines on state reporting.
Reporting under the Charter, as in other systems, is aimed at facilitating both introspection and inspection. ‘Introspection’ refers to the process when the state, in writing its report, measures itself against the norms of the Charter. ‘Inspection’ refers to the process when the Commission measures the performance of the state in question against the Charter. The objective is to facilitate a ‘constructive dialogue’ between the Commission and the states.

Reporting has been very tardy, and 18 of the 53 state parties to the African Charter have never submitted any report. In 2001 the Commission started to issue concluding observations in respect of reports considered. Their usefulness is diminished by the fact that neither the state reports nor the concluding observations are published by the Commission.

Special rapporteurs and working groups

The Commission has appointed a number of special rapporteurs, with varying degrees of success. There is no obvious legal basis for the appointment of the special rapporteurs in the Charter; it has been described as another innovation of the Commission. The special rapporteurs are all members of the Commission.

There has been widespread criticism of the lack of effective action on the part of the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions, while the same is true of at least the first incumbent of the position of Special Rapporteur on the Conditions of Women in Africa. In contrast, the Special Rapporteur on Prisons and Conditions of Detention in Africa has set the standards for years to come.

The Commission has recently appointed special rapporteurs on freedom of expression; refugees and internally displaced persons; and human rights defenders. The Commission has also established a committee to monitor the implementation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). In addition a Working Group on Indigenous People or Communities and a Working Group on Economic, Social and Cultural Rights have been established. Some of the members of these working groups are not members of the Commission.

On-site visits

The Commission has since 1995 conducted a number of on-site visits. These involve a range of activities, from fact finding to good offices and general promotional visits. Many mission reports have never been published.

Resolutions

The Commission has adopted resolutions on a number of human rights issues in Africa. In addition to country-specific and other more ad hoc resolutions, they have adopted resolutions on topics such as the following: Fair trial; freedom of association; human and peoples’ rights education; humanitarian law; contemporary forms of slavery; anti-personnel mines; prisons in Africa; the independence of the judiciary; the electoral process and participatory
governance; the International Criminal Court; the death penalty; torture; HIV/AIDS; and freedom of expression.

Relationship with NGOs

NGOs have a special relationship with the Commission. Large numbers have registered for observer status. NGOs are often instrumental in bringing cases to the Commission; they sometimes submit shadow reports; propose agenda items at the outset of Commission sessions; and provide logistical and other support to the Commission, for example by placing interns at the Commission and providing support to the special rapporteurs and missions of the Commission. NGOs often organise special NGO workshops just prior to Commission sessions, and participate actively in the public sessions of the Commission. NGOs also collaborate with the Commission in developing normative resolutions and new protocols to the African Charter.

Interaction with AU political bodies

The Annual Activity Reports of the Commission, which reflect the decisions, resolutions, and other acts of the Commission, are submitted each year for permission to publish to the meetings of the Assembly of Heads of State and Government (‘Assembly’) of the OAU/AU that have traditionally taken place in June or July of the following year. The Assembly has now delegated the authority to discuss the Activity Report to the Executive Council. However, it is still formally adopted by the Assembly as this is required by the Charter. The AU has recently started to have summits twice a year and it remains to be seen whether the African Commission will submit a report to each summit.

In practice the Assembly has served as a rubber stamp for the publication of the report by the Commission containing its decisions, but the principle that the very people in charge of the institutions whose human rights practices are at stake — the heads of state — should take the final decision on publicity undermines the legitimacy of the system. When the 17th Annual Activity Report was considered by the Executive Council at the AU summit in July 2004, Zimbabwe complained that it had not had the opportunity to respond to allegations contained in the report concerning a fact-finding mission undertaken by the Commission to Zimbabwe. The Council suspended the publication of the report and its publication was only finally authorised at the summit in January 2005.

Information on the Commission

The decisions of the Commission are published in the *African Human Rights Law Reports* (AHRLR). A small but growing number of secondary publications on the work of the Commission have appeared. Information on the work of the Commission is available on a number of websites. It is unclear why the Commission makes little use of its own web site which should be the main resource on information on the work of the Commission. In December 2005 the Commission published the 18th Annual Activity Report, adopted by the AU Assembly in July 2005 on its web site. However, the 17th Annual Activity Report, adopted by the AU Assembly in January 2005 had as of February 2006 not been published on the web site.
The African Court on Human and Peoples’ Rights

Several reasons have been advanced why only a Commission, and not a Court, was provided for in the African Charter in 1981 as the body responsible for monitoring compliance of state parties with the Charter. On the one hand there is perhaps the more idealistic explanation that the traditional way of solving disputes in Africa is through mediation and conciliation, not through the adversarial, ‘win or lose’ mechanism of a court. On the other hand there is the view that the member states of the OAU were jealous of their newly founded sovereignty.

The notion of a human rights court for Africa would be taken up by the OAU 13 years after the adoption of the African Charter when, in 1994, the Assembly adopted a resolution requesting the Secretary-General of the OAU to convene a Meeting of Experts to consider the establishment of an African Court on Human and Peoples’ Rights.

Ostensibly, the concept of human rights was accepted widely enough in Africa in the early 1990s for the decision to be taken to give more ‘teeth’ to the African human rights system, in the form of a Court. This came in the wake of the different waves of democratisation on the national level, epitomised by the watershed elections in Benin in 1991, and the advent of democracy in South Africa in 1994. Worldwide, of course, the idea of human rights also gained prominence after the end of the Cold War.


The AU Assembly decided at its summit in July 2004 that the African Human Rights Court should merge with the African Court of Justice. The protocol establishing the latter court had been adopted by the Assembly in July 2003, without any reference to a merger with the human rights court. The Protocol on the African Court of Justice had as of February 2006 not received the required 15 ratifications to enter into force. A draft merger protocol has been circulated and at the AU summit in July 2005 the Assembly decided that:

(2) ... a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be completed for consideration by the next ordinary sessions of the Executive Council and the Assembly ...
(3) ALSO DECIDES that all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalisation of the Registry;
(4) FURTHER DECIDES that the Seat of the merged court shall be at a place to be decided upon by the member states of the Eastern Region, which shall also serve as the seat of the Human Rights Court pending the merger.

Once the African Human Rights Court is in place, it will ‘complement’ the protective mandate of the Commission under the Charter. Under the 1998 Protocol the Court will consist of 11 judges, serving in their individual capacities, nominated by state parties to the Protocol, and elected by the Assembly. Only the president will be full-time. The judges were elected by
the Assembly in January 2006. The seat of the Court is still to be determined, but as is clear from the above resolution it will be in the Eastern Region.

The Protocol provides that the judges will be appointed in their individual capacities, and their independence is guaranteed. Special provision is made that ‘[t]he position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge ...’.

Judges will not be allowed to sit in a case if that judge is a national of a state which is a party to the case.

In respect of the Court’s findings, the Protocol determines that ‘[i]f the Court finds that there has been a violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation’. The Court is explicitly granted the powers to adopt provisional measures.

By ratifying the Protocol, states accept that the Commission and the states involved will be in a position to take a case that has appeared before them to the African Human Rights Court, to obtain a legally binding decision. Individuals and those who act on their behalf will be able to take cases to the Court only in respect of those states that have made an additional declaration specifically authorising them to do so. In such instances the case will have to be taken ‘directly’ to the Court, presumably bypassing the Commission or, if the Commission was approached first, the case can be taken to the Court without requiring the authorisation of the Commission.

Article 3(1) reads as follows:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.

The phrase ‘any other relevant human rights instrument ratified by the states concerned’, according to most commentators, means that adjudication in respect of even UN and sub-regional human rights instruments will fall within the jurisdiction of the African Human Rights Court, provided that such treaties have been ratified by the states concerned.

It is submitted that nothing is wrong with the African Human Rights Court interpreting the Charter in view of international standards. Advisory opinions could also deal with other treaties. However, if contentious cases could be brought to the African Human Rights Court on the ground that for example UN treaties have been violated, with no reference to the African Charter, this could lead to conflicting decisions in the different systems.

The jurisdiction of the African Human Rights Court to give advisory opinions was mentioned above. In addition to member states and AU organs any ‘African organisation recognised by the [AU]’ can request an advisory opinion from the Court. Advisory jurisdiction has proved useful in the Inter-American human rights system and could potentially play a similar role in the African system.
African Committee on the Rights and Welfare of the Child

The African Children’s Charter adopted in 1990 entered into force in November 1999. The 11 members of the African Committee on the Rights and Welfare of the Child, provided for under the Charter were elected in July 2001. The Committee held its first meeting in 2002. The Committee has adopted its Rules of Procedures and Guidelines for State Reports. States shall report to the Committee within two years from the entry into force of the Convention for the state party concerned and thereafter every three years. Apart from state reporting the African Children’s Charter, uniquely among international instruments for the protection of the rights of children, also provides for a communication procedure. The Committee has recently received one communication but it remains unclear how the Committee will handle this.

The Committee does not have its own secretariat, and is serviced by the Department for Social Affairs. The AU is in the process of recruiting a Secretary to the Committee. The Committee suffers from a serious lack of resources and the question could be asked whether the Committee should not be merged with the African Commission.

The African Peer Review Mechanism

In July 2002 in Durban the OAU/AU Assembly of Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration). The Governance Declaration provided for the establishment of an African Peer Review Mechanism (APRM) ‘to promote adherence to and fulfilment of the commitments’ in the Declaration. The initiative grew out of the New Partnership for Africa’s Development (NEPAD), adopted by the AU in 2001 as the development framework for the Union.

The Governance Declaration in section 10 provides as follows:

In the light of Africa’s recent history, respect for human rights has to be accorded an importance and urgency all of its own. One of the tests by which the quality of a democracy is judged is the protection it provides for each individual citizen and for the vulnerable and disadvantaged groups. Ethnic minorities, women and children have borne the brunt of the conflicts raging on the continent today. We undertake to do more to advance the cause of human rights in Africa generally and, specifically, to end the moral shame exemplified by the plight of women, children, the disabled and ethnic minorities in conflict situations in Africa.

Under the heading ‘Democracy and Good Political Governance’, section 13 provides:

In support of democracy and the democratic process, We will: ensure that our respective national constitutions reflect the democratic ethos and provide for demonstrably accountable governance; promote political representation, thus providing for all citizens to participate in the political process in a free and fair political environment; enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and other decisions of our continental organisation aimed at promoting democracy, good governance, peace and security; strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies, in our respective countries and provide the necessary resources and capacity to conduct elections which are free, fair and
credible; reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures; and heighten public awareness of the African Charter on Human and Peoples’ Rights, especially in our educational institutions.

At the Durban summit the Assembly also adopted a document specifically dealing with the APRM process, the so-called APRM Base Document:

The process will entail periodic reviews of the policies and practices of participating states to ascertain progress being made towards achieving mutual agreed goals and compliance with agreed political, economic and corporate governance values, codes and standards as outlined in the Declaration on Democracy, Political, Economic and Corporate Governance.

The APRM process consists of a self-evaluation by the country that has signed up to being reviewed and a review by an international review team. It is in this respect similar to the state reporting under the African Charter. However, there are also clear differences such as country visits by the APRM review team and the political stage, when the leader of the country discusses the outcome of the review with his peers in other participating countries.

The highest decision making body in the APRM is the APR Forum consisting of the heads of state and government of the participating states. A panel of eminent persons with seven members oversees the review process and a member of this panel is chosen to lead the review team on its country mission.

The international review process consists of five stages. First a background study is carried out by the secretariat assisted by consultants. This stage also includes a support mission to the country that will be reviewed. In the second stage a review team led by one of the eminent persons visits the country for discussions with all stakeholders, after which the team prepare its report (third stage). A number of partner institutions and independent consultants assist in the process. The fourth stage consists of the submission of the report to the APRM Forum and the discussion among the peers. The last stage is the publication of the report and further discussion in other AU institutions such as the Pan-African Parliament.

The APRM deals with political, economic and corporate governance and socio-economic development. Initially, there was some debate as to the inclusion of political governance aspects, including human rights, but as pointed out by Cilliers: ‘Without making political governance the core focus of NEPAD, the Partnership is unlikely to make an impact on the continent’.

The APRM is voluntary and as of February 2006, 26 out of 53 AU member states have signed the Memorandum of Understanding (MOU) that forms the legal basis for the review. In paragraph 24 of the MOU the signatory state agrees to ‘take such steps as may be necessary for the implementation of the recommendations adopted at the completion of the review process ...’ The MOU does not deal with the substantive undertakings of the signatories, but instead refers to the Governance Declaration. The Governance Declaration makes reference to standards that have already been accepted by the participating states in other declarations and treaties, including global and regional human rights instruments. The Governance Declaration comprises of only 28 paragraphs and covers all the areas that are being reviewed, ie political, economic and corporate governance as well as socio-economic
development. Further documents have been developed with regard to standards and indicators, including a questionnaire to help participating states complete their self-assessments.

Many observers have emphasised the necessity for civil society to engage the APRM if the mechanism is to make any difference on the ground. The possibilities for such engagement varies greatly between participating countries, as do the approaches to the independence of the national process from government interference.

The APRM integrates the political level of the AU/NEPAD in a way that other parts of the African human rights system have not done. The situation could to some extent be compared to the role, by many perceived as successful, of the Committee of Ministers of the Council of Europe with regard to the European Convention on Human Rights and the European Social Charter. However, as shown by the activities of the political bodies of the United Nations involved with human rights, the direct involvement of other states in the protection of rights is not without its problems.

As in other parts of the world African leaders have not shown a great interest in criticising their peers. Hence there are reasons to be sceptical about whether ‘peer pressure’ will be employed in the process. However, to solely focus on the pressure exercised at this level would be to underestimate the process as a whole. The APRM Base Document provides for sanctions as a last resort if peer pressure is not enough to convince governments with a lack of political will to rectify identified shortcomings.

There has not been much co-operation between the APRM and the African Commission, which is unfortunate. A look at the composition of the missions to Ghana and Rwanda, the first two states to be subject to the APRM process, also makes it clear that the focus is more on economic than political governance.

CONCLUSION

It is not difficult to criticise the African regional human rights system, and many have done so. Some have argued that given the fact that the African Charter was adopted 25 years ago and the African Commission has been in operation for 20 years, the track record of the Commission is less than impressive. The Commission has been poorly managed by its Secretariat for many years. The Commission suffers from a lack of resources, but questions have been asked about the way in which available resources have been managed.

The perceived lack of impartiality of some Commissioners has been a constant bone of contention, as has been the lack of political will in the OAU/AU on a political level to ensure the effectiveness of the Charter system.

The Charter itself has its own internal limitations and thus has required extensive creative interpretation by the Commission. For example, the main mandates of the Commission – receiving individual communications and state reports – are not clearly recognised in the Charter. Some of the
internationally accepted rights are recognised only in a cursory form in the Charter.

Moving beyond the Charter system, the need to have established a separate system for the protection of children’s rights (complete with a complaints and reporting mechanism) has been questioned. There is a danger of a proliferation of mechanisms, each one depleting the scarce resources even further, instead of establishing one or two truly effective mechanisms before more are created.

Some commentators have also focused on the potential weaknesses of the APRM, which relies on heads of state — who often don’t have much interest in promoting a system of finger-pointing about human rights violations — to police each other.

There is undeniably some truth in these criticisms, and much room for improvement. At the same time the merits of the African regional human rights system also need to be recognised.

The fact that Africa has a regional human rights system in the first place — only one of three regions to have that — provides an entry point for international human rights to play a role which would otherwise not have existed. The arguments about a possible ‘African exception’ to the concept of human rights — the idea that human rights is a foreign concept with little applicability to the African situation — are considerably weaker than they would otherwise have been. The regional human rights system provides the possibility of imminent critique through a mechanism created by African states themselves, which cannot be shrugged off as easily as critique expressed by far-away capitals.

The current make-up of the African regional system in terms of the norms recognised and the enforcement mechanisms followed — largely the result of recent changes to the system — are probably well suited to the African environment. The fact that the norms recognised also reflect socio-economic rights, duties and people’s rights does not detract from the recognition of civil and political rights, and the rights of individuals, in the system. Their addition ensures that norms that play a strong role on the continent are also reflected. It should be noted in this regard that the jurisprudence of the African Commission so far by and large reflects internationally accepted standards, and constitutes a valuable point of reference also for national courts.

A wider range of enforcement mechanisms than that which is used elsewhere is followed in Africa. While the European regional human rights system places a strong emphasis on the judicial enforcement of individual civil and political rights through the European Court of Human Rights, the African system, operates on a number of levels simultaneously. While the African Human Rights Court (under whatever name that may be used) will provide for a component of judicial suspension, the APRM on the other side of the spectrum has a more political character. This is complimented by the quasi-judicial mechanism of the African Commission, which occupies a place somewhere between the other two mechanisms.
On a continent as diverse as Africa, with its multi-layered landscape of human rights issues, employing an enforcement mechanism with such diverse components seems to be a wise approach. Each component of the collective mechanism plays a different and equally important role. Courts can address individual cases in a strong and decisive manner, but they have a more limited role to play in respect of mobilising a political consensus or dealing with widespread human rights violations. A commission on human rights, which can consider state reports and conduct on site visits, can play an important role in identifying human rights issues that need to be addressed in a systematic way and in working towards negotiated solutions which courts cannot always do. To the extent that such a commission functions and is perceived as an independent body, it can to some extent play a role which those placed inside the confines of power politics will have difficulty in playing.

At the same time there is also a role for human rights supervision in the political processes of the continent. A mechanism such as the APRM, although it has limitations because of its political nature, can also precisely for that reason have an impact on aspects of political life which the other mechanisms cannot reach. Standing alone the APRM would probably not have made much of a difference, but as part of a broader network of mechanisms aimed at the protection of human rights the APRM has the potential to play a significant role — and the same probably applies also to the Court and the Commission.

The issue of political will remains, and it cannot be denied that much remains to be done to turn the potential offered by the available systems and mechanisms into reality. At the same time, the new institutional focus of the African Union on human rights, as reflected in its Constitutive Act, and in the mandates of its organs provides a starting point. Increasingly, individuals are encountered within the system in governments and in civil society in Africa who take this orientation seriously. Clearly, it is on their input that the full implementation of an effective African regional human rights system will depend. Much will depend in this regard on the increased realisation of human rights on the domestic level — an international human rights system cannot survive without a critical mass of building-blocks of state parties that take human rights seriously internally at home.

...
The African Commission on Human and Peoples’ Rights faces many challenges, some of which are set out in this Report. The Commission has established a working group to study its working methods.

Facilitated by the Office of the High Commissioner for Human Rights

...The African Commission is faced with problems of lack of capacity. The current number of commissioners (11 members) is too small and their meeting period of 30 days per year is grossly inadequate to meet the responsibilities linked to the mandate of the African Commission.

The African Union’s responsibility for ensuring that the African Commission functions in an autonomous and sustainable way has not been fully met.

In the election of commissioners the provisions of the African Charter relating to possession of human rights knowledge, expertise and incompatibility, which have a bearing on the independent functioning of the African Commission have not been coherently adhered to by member states.

The level of expertise and number of legal staff in the African Commission’s Secretariat is inadequate to meet the expected level of efficiency and professionalism ...

The budgetary allocation to the African Commission from the AU is grossly inadequate and extra-budgetary funds are not properly planned for or managed ...

The relationship between the African Commission and its Secretariat, between the African Commission and the AU Commission, and between the Secretariat of the African Commission and the AU Commission are not clearly defined. This affects co-ordination, transparency and accountability as well as efficiency of the African Commission and its Secretariat.

Secretariat services provided to backstop the Commission have been inadequate. For example, there are no regular minutes of meetings of the Commission.

...A number of evaluations and studies have been conducted on the African Commission and its management in the past but their recommendations have not been fully implemented.

...
At its 35th ordinary session, in May to June 2004, the African Commission considered the second state report of Sudan. The examination of the report lacked focus and consideration for the urgency of the situation in Darfur. Instead, detailed technical and routine questions were posed about issues such as institutional mechanisms, for instance the Civil Service Board, freedom of expression, personal status laws and the rights of prisoners to vote. Although some incisive questions were also posed about Darfur, the misallocation of time caused these to be neglected: It took the commissioners about two and a quarter hour to ask questions, but after less than an hour the Sudanese representative was asked to wrap up and summarise his answers. As a result, a number of questions were left unanswered, allowing the representative to brush over alleged government involvement in the Darfur conflict.

Significantly, though, the Sudanese representative invited the Commission to undertake a mission to Sudan, and undertook to provide the mission with every possible aid and assistance. In its private session, the Commission decided to send a fact-finding mission to the region. This fact-finding mission visited Sudan from 8 to 18 July 2004.

At the end of the mission, the Chairperson of the African Commission sent a request to President Bashir of Sudan, regarding the necessity to take urgent provisional measures in respect of security, the protection of women, access to displaced persons and the supply of humanitarian assistance, the need to reassure a safe return of displaced persons to their villages, the deployment of human rights observers and to ensure the right to fair trial for political prisoners.

The Commission met in Pretoria on 19 September 2004 for its extraordinary session. The main purpose of the meeting was to discuss and adopt the report of the Commission’s fact-finding mission to Darfur. This report also remains confidential until adoption by the Assembly. Even if it agreed on the report, and made recommendations, the Commission interpreted its mandate to mean that it can only make this report public once it has been contained in the Annual Activity Report, and once the Assembly has adopted that report.
Throughout its existence over little more than a decade, non-governmental organisations (NGOs) have provided crucial support in strengthening the mandate of the African Commission on Human and Peoples’ Rights (the Commission) and in improving its efficiency. Even prior to the establishment of the Commission, NGOs played a role in the drafting of the African Charter on Human and Peoples’ Rights (the African Charter), its adoption by the Organization of African Unity (OAU) and its ratification by African States.

The African Charter recognises the role of NGOs in the work of the Commission, albeit without specifically referring to NGOs. Article 45(1)(a) of the African Charter requires the Commission to promote human and peoples’ rights by encouraging (national and local institutions concerned with human rights), and article 45(1)(c) requires the Commission to (co-operate with other African and international institutions concerned with the promotion and protection of human rights). The important role of NGOs in bringing complaints of human rights violations before the Commission is given recognition in article 55 of the African Charter, although the drafters of the treaty refer to ‘communications other than those from States Parties to the present Charter’. The Rules of Procedure of the Commission are explicit about the role to be played by NGOs in its work from proposing items for the agenda of its sessions, to the granting of observer status, and consultations with NGOs. Although the previous Rules of Procedure of the Commission specifically referred to the submission of complaints by NGOs, the current Rules of Procedure make no reference to NGOs in its provisions relating to ‘other communications’.

The African Commission clearly recognises the excellent relationship it has with NGOs and the important contribution that they provide to its work. Its plan of action for 1996-2001 includes the establishment of an exchange and communications network and the strengthening of links with NGOs. In its most recent report the Commission acknowledges the contribution of NGOs to its work including through the provision of funding for additional staff and promotional visits of Commissioners and the organisation of meetings and seminars.

An NGO seeking observer status applies in writing to the Commission providing information about its constitution, by-laws, a list of officers, sources of
funding, publications and other relevant information. While well-known African and international organisations may not require scrutiny, with the proliferation of NGOs it became necessary for the Commission to scrutinise the applications being presented. The Commission often considered applications for observer status without a representative being present to answer questions or present additional information that may be required. In some instances, representatives of NGOs simply handed to a member of the Commission all the relevant documents during a session and had their applications granted during the session without the information being processed by the Secretariat, whereas in other instances applications have been inexplicably lost or the granting of observer status delayed without reasons.

The most visible role of NGOs has been during the sessions of the Commission. They have availed themselves of the provision of the Rules of Procedure of the Commission that permits NGOs to suggest items for the agenda of the Commission and have suggested topics pertaining to human rights situations in African countries, for example Sierra Leone, and thematic issues such as economic, social and cultural rights. Besides presenting information on the agenda item they have suggested, NGOs often make concrete proposals to the Commission on measures it could adopt to investigate the specific country situation or violations or mechanisms it could establish to deal with thematic issues. Examples of such initiatives include urging the Commission to undertake investigative missions to countries where serious human rights violations have been occurring, and the establishment of the mechanism of Special Rapporteur to investigate specific recurring human rights violations NGOs have identified.

International organisations such as Amnesty International present an oral statement at each session in which they highlight the human rights situation in a few African countries and address a thematic issue. African NGOs often deal with the human rights situation in their own countries and make recommendations to the Commission to adopt resolutions or undertake investigative missions. The close co-operation among NGOs ensures that they present different perspectives of the same message, which results in greater impact on the Commission. For example, at the 26th Session in November 1999 in Rwanda, Amnesty International, Human Rights Watch, Interights and representatives of the Sierra Leone Bar Association teamed up to present information to the Commission on the serious human rights situation in Sierra Leone. The Commission acted upon that information by undertaking a mission to Sierra Leone in February 2000. Although the representatives of several Nigerian NGOs attend each session of the Commission, there is always a collaborative effort among them and they often present a single joint statement. While the relationship between most NGOs that attend the Commission’s sessions is cordial and co-operative, sometimes competitiveness and confrontation between NGOs from the same country is also evident. Such confrontations emanate from some NGOs seeking legitimacy, competition for funding and the stance of the NGO, especially those that may be perceived to be pro- or anti-government. Many resolutions adopted by the Commission have been the result of the close collaboration between NGOs and the Commission. Even in instances where draft resolutions have not been proposed by NGOs, representatives of NGOs have assisted in the drafting of
resolutions. For example, at the 26th Session representatives of Amnesty International, the African Society for International and Comparative Law and Prisoners Rehabilitation and Welfare Action assisted the Special Rapporteur on extrajudicial, summary or arbitrary executions in drafting a resolution on the death penalty which was adopted by the Commission. Since its 17th Session, the Commission has tried to act independently of NGOs in the drafting of resolutions after the Government of Algeria protested against a resolution on that country and as more governments began sending representatives to the Commission’s sessions. While it is important that the Commission acts independently from NGOs as much as it does from governments, the expertise and often firsthand experience of NGOs proves invaluable in encapsulating in a resolution the concerns regarding human rights in a particular African country or human rights theme.

The Commission's sessions provide the ideal opportunity for NGOs to share their information with members of the Commission, other NGOs and government representatives. The information, in the form of documents, reports and press releases, is presented mainly in English and French and sometimes in Arabic and languages indigenous to Africa. The array of publications distributed at each session of the Commission attests to the efforts being made by NGOs to promote and protect human rights in Africa. Many publications promote the African Charter and the work of the Commission, while others report on the human rights situation in different African countries. The Commission has on several occasions called on NGOs to create a body to ensure better co-ordination of their activities at each session. While there has been informal co-ordination among NGOs at each session, many NGOs, especially African ones, have been reluctant to form a body for co-ordination of their activities. This reluctance is based on several uncertainties: Whether the Commission would communicate with NGOs only through the co-ordinating body; whether NGOs would be required to present a composite oral statement to each session; whether northern NGOs would play a dominant role in the co-ordinating body; and whether the co-ordinating body would assist the Commission in the consideration of applications for observer status. Some NGOs such as the International Commission of Jurists (ICJ) have suggested that in order to improve the relationship between the Commission and NGOs a specific post for liaison with NGOs should be established within the Secretariat, similar to that in the UN and the Council of Europe. The Commission has yet to act on this suggestion.
THE IMPORTANCE OF INTERNATIONAL HUMAN RIGHTS LAW

A major theme in the current discussion about international human rights law is whether it actually makes a difference on the ground. In this extract it is argued that the impact of international human rights treaties has been more significant through their use at the national level than through the supervisory measures that they provide for, such as state reporting and individual complaints. They argue that the main function of the treaty system is to affect the human rights situation in the countries that are not engaged with the system.

HEYNS, CH AND VILJOEN, F ‘THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL’ (2001)

23 Human Rights Quarterly 483

The success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices on the domestic (country) level. At the beginning of the new millennium, it is clear that the concept of human rights is widely accepted as the ‘idea of our time’. The conceptual battle is over, and the focus has shifted to the implementation of human rights. Universal ratification of the main human rights treaties might be appearing on the horizon, but ratification in itself is largely formal, and in some cases an empty gesture. The challenge now is to ensure that the promises contained in the treaties and affirmed through ratification are realised in the lives of ordinary people around the world. A paradigm shift to the true ‘customers’ of the system is necessary.

... All the available evidence suggests that the treaties have had an enormous influence in shaping the present understanding throughout the world of what are to be regarded as basic human rights and the limits of these. The influence of the treaties is likely to increase in the future. The new generation of lawyers, government officials, and human rights activists are more aware of the treaties, and the conditions under which the treaties operate have improved dramatically over the last decade. These include rapid advances in the dissemination of information and the formation of strong international NGOs in the context of a shrinking world.

Nevertheless, two aspects regarding the influence of the treaty system are particularly striking. The first is the fact that the international system has had its greatest impact where treaty norms have been made part of domestic law more or less spontaneously (for example as part of constitutional and legislative reform), and not as a result of norm enforcement (through reporting, individual complaints, or confidential inquiry procedures). The second is that insofar as international norm enforcement plays a role, its influence is very unevenly spread among countries that are part of the system. These aspects pose important challenges and questions.
Beginning with the first point, the treaties have had their greatest influence domestically in shaping the understanding of government officials and members of civil society as to what is to be considered basic human rights. Although a causal link cannot always be proven, it could hardly be considered coincidental that the very language of human rights in the parliaments and courts of the surveyed countries is largely that which the treaty system has been introducing and reinforcing since the middle 1960s. As will be pointed out, even in cases in which the treaties have not yet been ratified, they have informed processes in which human rights provisions of new constitutions were drafted. The treaty system has largely defined the international consensus on human rights norms, which in many instances are simply adhered to because they are considered to be appropriate.

Continuing with the second point, international enforcement mechanisms used by the treaty bodies appear to have had a very limited demonstrable impact thus far. This is partly due to the fact that the system has taken a number of decades to develop to its present level and partly the result of inefficiencies in the system (backlogs, overlaps, vagueness in findings, etc). However, it is also true that focused and relevant concluding observations and views still are routinely ignored when domestic convenience so requires.

One obvious response to this state of affairs would be to focus on ways to strengthen the monitoring mechanisms in order to ensure greater efficiency and to attempt to turn the international enforcement screws tighter. However, it will be a central thesis of this study, however, that such attempts, although important, must be supplemented by creative efforts to ensure that treaty norms are internalised in the domestic legal and cultural system, and that they are enforced on that level. The challenge is to harness the treaty system to domestic forces — ‘domestic constituencies’ — that will ensure its realisation.

The second aspect mentioned above is the discrepancy in the actual and potential impacts of the system of international norm enforcement (insofar as it does play a role) with respect to the state parties to the treaties. Some countries are highly engaged with the system. They submit substantial reports, their NGOs bring individual complaints, their newspapers and academics publish information on the system, etc. With respect to these countries, the enforcement system can and does have an impact. However, other countries do very little of the above, and as a result, the system has a very weak hold on them. Disengaged countries — those that do not submit reports, discuss concluding observations, or allow an environment in which individual complaints can be lodged — can largely escape criticism from the treaty system, which is, after all, based on consent. The unfortunate result is that the countries that most often end up being singled out as human rights violators are those that are engaged. Within the system, more criticism seems to be the reward for a higher level of engagement.

The question will have to be asked whether under such circumstances, one could expect the international enforcement system to be strengthened. Disengaged countries will obviously not pursue such a result — they are already shying away from what little pressure the system exercises. It is also unrealistic to expect the countries that are engaged to push very hard for a
stronger line to be taken with respect to violations, as they are the ones who are most likely to be singled out as human rights violators, and when they know worse perpetrators get away virtually without punishment.

... There are two possible ways of moving forward on this issue. One is to argue that the focus should be on moving forward with those who are engaged. The other approach is to focus specifically on those who are not engaged, in order to get them to become engaged, so that the entire system may move forward.

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Cassel further explores the difference between the direct and indirect impact of international human rights law.

CASSEL, D ‘DOES INTERNATIONAL HUMAN RIGHTS LAW MAKE A DIFFERENCE?’ (2001) 2 Chicago Journal of International Law 121

... International articulation of rights norms have reshaped domestic dialogues in law politics, academia, public consciousness, civil society, and the press. International human rights law also facilitates international and transnational processes that reinforce, stimulate and monitor these domestic dialogues. While reliable quantitative measurement is probably impossible, by strengthening domestic rights institutions, international human rights law has brought incalculable benefits for rights protection.

In addition, international enforcement mechanisms have more limited, but nonetheless important, direct benefits for right protection. They protect lives, free prisoners, rescue reputations, prompt legislative reform, and afford otherwise unattainable justice in the form of truth telling, reparations, and condemnation and punishment of rights violators. Still, direct international interventions are limited in impact. Over time, the extent to which international law serves as a useful tool for protection of human rights will depend mainly on its contribution to a broader set of transnational processes that affect the ways people think and institutions behave — whether governments, state security forces, guerrilla groups, or corporations.

... The 'rope' that pulls human rights forward

As one strand in the rope that pulls rights forward, the value of international human rights law depends mainly on its interaction with the other strands. The central strand in the rope is the global growth in human rights consciousness. This in turn interweaves the concept of rights, as entitlements of individuals or groups on which claims or demands may be based, together with the notion that some rights are so fundamental they are inherent birthrights of all human beings, regardless of nationality or culture.
Other strands of the rope include non-governmental human rights organisations, whose numbers, activities, and sophistication in international human rights law norms and institutions have grown dramatically at both national and international levels and rapidly evolving communications and transportation technology that makes possible far more effective transnational organising by these human rights groups than was possible only two decades ago. Both communications and faster and lower cost transportation technology, by making possible frequent, well attended international conferences, have contributed to the growth of another strand in the rights revolution, transnational issue networks, energised by ‘epistemic communities’ of like-minded rights advocates in non-governmental groups, sympathetic governments, academia, and the media, who work together across national and professional boundaries to promote shared values and agendas.

Some remaining strands include domestic constitutions and laws, which increasingly incorporate international norms, national human rights institutions, established in dozens of countries in the last fifteen years, spreading democratisation, and gradually extended rule of law. This list is not all-inclusive but merely points out some of the strands comprising this ‘rope’. The purpose here is to recognise how international human rights law interweaves with these other strands, all growing both independently and in their relations with each other, to create an ever stronger rope that pulls international human rights forward. Other strands in the rope include the growing levels of affluence and education in most parts of the world, expansion in the number and reach of non-binding international norms, and, of course, the explosive growth of international human rights law itself.

**Indirect effects of international human rights law on rights protection**

Does the necessity to bring in other factors suggest that international law, by itself, counts for little? For that matter, with all these other rights-protecting processes, who needs international law?

What such questions overlook is that all the foregoing processes of rights protection — including international human rights law — are interrelated and, over time, growing stronger. All the others are strengthened by international human rights law, which in turn is strengthened by each of them. Human rights groups, for example, make constant use of international human rights law in their organising. National human rights ombudsmen regularly appeal to international norms in opposing local efforts to legislate lower standards. Constitutional courts increasingly look to international treaties and the jurisprudence of international courts in interpreting national constitutional rights.

In this process of mutual reinforcement, international law plays several distinctive roles:

(A) Provides a common language. Rights groups in Thailand and Chile, New York and Johannesburg, can invoke the same set of rights expressed in the same language, interpreted by the same UN human rights bodies. In theory, this function could be played by non-legal instruments. Indeed, at the outset
of the modern rights revolution, it was played by the Universal Declaration, that instrument arguably evolved into customary international law. This function, then, is a by-product rather than a necessarily unique function of international human rights law. Nonetheless, in practice, the instruments of international law supply most of the vocabulary for transnational rights discourse.

(B) Reinforces the universality of human rights. Three quarters or more of all governments accept the main international human rights treaties: The International Covenant on Civil and Political Rights; UN treaties on rights of women and children and against racial discrimination; basic ILO treaties on labour rights; and the Geneva Conventions and Protocols on international humanitarian law. The numbers grow every year. Such broad participation in formally binding international instruments reinforces the claim that human rights are universal. This, in turn, strengthens their claim to being fundamental and hardens their currency in domestic and international political debate.

While most widely adopted instruments are legally binding, not all are. For example, the Universal Declaration not only asserts its universality, but has repeatedly been adopted without formal dissent, first by the UN General Assembly in 1948, and later by widely attended, UN-sponsored diplomatic conferences in 1968 and 1993. Thus, again, the contribution of international human rights law to universality, even if not unique, is an important by-product.

(C) Legitimises claims of rights. Because international human rights treaties are adopted by governments, usually after prolonged and contested negotiations and followed in many countries by lengthy processes of ratification, they confer legitimacy on claims of rights, especially when those claims are asserted (as they usually are) against governments. Human rights groups can (and regularly do) say to governments, ‘It is not we who say that torture is illegal and must be investigated and punished; it is you who so declare, as parties to the Convention Against Torture’.

(D) Signals the perceived will of the international community. Because of broad participation by governments, via formally serious processes of negotiations and ratifications, international human rights treaties are often perceived as expressing the will of the international community. While that perception may matter little in a powerful country such as the United States, it often carries considerable weight in smaller and weaker countries — which is to say, most of the world’s nations.

During peace negotiations in Guatemala in the mid-1990s, for example, the military pressed for a blanket amnesty for its wartime violations of human rights. Human rights groups had few cards to play in opposition, other than the argument that under international law, amnesties could not be conferred for certain crimes against humanity. In need of international approval and financial support for post-war recovery programmes, the government ultimately agreed to leave such crimes out of the amnesty. The perception that violating international law would flout the will of the international community — or at least that it could be so characterised by opponents — was
a major factor in this decision. Only crimes whose prosecution is arguably required by international law were exempted. Those for which amnesty would merely offend international sensibilities were not exempted.

Perceived international will also plays a role in the tendency of newly democratic regimes to ratify human rights treaties and accept international enforcement mechanisms, as a kind of insurance policy against the return of authoritarian rule. Most recently, no sooner did Peru oust the regime of President Alberto Fujimori, who had purported to withdraw the country from the contentious jurisdiction of the Inter-American Court of Human Rights, than the new government promptly re-joined the Court.

(E) Provides juridical precision. Especially when international human rights law is put in treaty form, by which governments expect to be bound, negotiators strive to give it a degree of juridical precision generally lacking in political declarations and philosophical pronouncements. The room for debate as to its meaning — and hence pretense for evasion, or grounds for needless disagreement — is narrowed.

(F) Creates increased expectations of compliance. Because international human rights law is expressed as law, it generates increased expectations of compliance. This gives human rights claimants stronger ground to demand compliance, and narrows the defenses available to violators: They may deny that violations were committed, but they cannot easily deny their obligation to respect the relevant norm. A government may well have accepted an international obligation with no intention to comply, but this is a difficult thing to admit publicly. The government may find itself trapped by its own hypocrisy.

(G) Encourages domestic judicial enforcement. International human rights law, especially in treaty form, is susceptible to domestic judicial enforcement, whereas non-legal instruments generally are not. Many constitutions, for example, expressly incorporate treaties into domestic law, and some accord special, higher domestic legal status to human rights treaties.

(H) Encourages enforcement by international courts or agencies. Because international human rights law is couched as law, it also lends itself to potential enforcement by international courts or agencies — a trend growing in practice. Outside Europe such enforcement is rare and even more rarely effective. Still, the mere threat or perception (even mistaken) of its potential gives human rights groups added leverage. Indeed, the very uncertainty of enforcement makes governments nervous. The uncertainty is aggravated by the trend toward increasing enforcement in new and unexpected ways — witness the surprise arrest of Chile’s General Pinochet on a Spanish arrest warrant in London, or credit denials by the World Bank on human rights grounds, after decades of contending that the Bank could not consider human rights. Risk-averse diplomats and bureaucrats often treat slaps on the wrist, administered by toothless international human rights bodies, as if they were matters to be taken seriously, precisely because they never know when such seemingly empty words may come back to haunt them.
(I) Creates additional stigma. International human rights law, especially international criminal law norms such as those proscribing crimes against humanity, adds to the moral sting and shame of violation. Granted, atrocities generate broad condemnation on moral grounds alone. Even so, in many cultures — including the culture of international diplomacy — criminal conduct carries its own, additional stigma, undermining the capacity of violators to defend their conduct, while enhancing the force of condemnations.

(J) Avoids moral relativism. State violence does not always provoke moral outrage. Populations victimised by opposing ethnic or rebel groups may tolerate, if not applaud, brutal retaliation. Yet in such situations international law, written for universal application, can keep its bearing. Even while few Peruvians, for example, protested the prison massacre of rebellious Shining Path guerrillas, the Inter-American Court of Human Rights ruled against Peru’s resort to excessive force. Similarly, after the Knesset failed to stop torture of Palestinian security suspects, the Israeli Supreme Court finally ended the practice. And while few Israelis today protest their government’s selective assassinations of security suspects, Amnesty International rightly denounces these violations of international law. Where moral clarity may be lost in the passions of the moment, international law can not only condemn, but also teach, helping morality to regain its compass.

Direct impact

Account should also be taken of the growing, non-negligible, direct impact of international human rights law. Unquestionably the direct impact has been greatest in Europe, where it has grown recently and rapidly in a hospitable climate of democratic values and regional unification.

In the Council of Europe, which has grown from the post-war democracies of Western Europe to its current embrace of some forty European states, the European Convention on Human Rights was adopted in 1950 and came into force in 1953. Not until the 1970s, however, did its enforcement institutions — the European Commission and Court of Human Rights — have much business. After gaining public and governmental trust, they expanded their dockets and effectiveness from the mid-1970s on. By 1990 the European Court had come to play for Europe approximately the same role in safeguarding approximately the same set of basic rights, as the US Supreme Court plays in enforcing constitutional rights among the fifty states, with comparable substantive outcomes and degrees of compliance.

As a result of judgments of the European Court of Human Rights, not only have individual plaintiffs been awarded damages, but European governments have revised legislation on such sensitive matters as media criticism of judicial proceedings, national security measures against terrorists, gay rights, family rights, and criminal justice procedures. The direct impact of international human rights law in Europe is not only comparable to that of domestic constitutional law in developed democracies, but greater than that of domestic law in nations where the rule of law has yet to take hold or is crippled by corruption.
While the European Court of Justice of the European Union mainly deals with economic and regulatory issues, it, too, has rendered important and effective rulings on such matters as gender discrimination and rights of immigrants.

Outside Europe, however, the direct impact of international human rights law has been sporadic. The UN human rights system — developed largely since the mid-1970s through state reporting requirements, special rapporteurs and experts who investigate and publish reports, and individual complaint procedures under several treaties — has been a useful strand in the rope of human rights protection. It indirectly protects rights by reinforcing public awareness, exposing violations, legitimising efforts by non-governmental organisations and keeping issues of human rights on diplomatic agendas. Beyond a few exceptions — its contribution to the fall of apartheid in South Africa; human rights components of peacekeeping missions in countries ranging from El Salvador to East Timor; \textit{ad hoc} international or partly international criminal tribunals for the former Yugoslavia, Rwanda and Sierra Leone; and occasionally successful interventions in individual cases by rapporteurs and treaty committees — the UN's direct impact on rights protection has been exceedingly modest.

Two other regional systems merit mention. During the Cold War it could fairly be said that the Organization of American States had an ineffectual human rights declaration since 1948, a mostly ineffectual Inter-American Commission on Human Rights since 1959, and an Inter-American Court of Human Rights with no contentious caseload since 1979. Such successes as the system could claim — for example, documentation and exposure of Argentina’s ‘dirty war’ in 1980 — were more diplomatic than legal in nature.

By the late 1980s, however, the Inter-American Human Rights legal system began to make claims of direct impact. In 1988, ruling under the American Convention on Human Rights, the Inter-American Court delivered the first of what are now a score of significant damage awards against states for violations of the right to life, and there are many more cases currently on its docket. Governments also began to accept substantial damage awards in settlement negotiations with the commission. In the 1990s the commission and court began regularly to issue requests and orders for ‘precautionary measures’ by governments to protect the lives of dozens of human rights defenders and witnesses. In nearly all these cases, security measures were taken or offered, and in nearly all, the intended beneficiaries were not thereafter killed.

Conclusion

The direct impact of international human rights law on practice in most of the world remains weak and inconsistent. But both this incipient body of law, and to a lesser degree its direct and even more its indirect influence on conduct, have grown rapidly in historical terms, and appear to be spreading in ways that cannot be explained by a worldview based solely on state power and rational calculations of self-interest. To appreciate its effectiveness and potential, international human rights law must be understood as part of a broader set of interrelated, mutually reinforcing processes and institutions — interwoven strands in a rope — that together pull human rights forward, and
to which international law makes distinctive contributions. Thus understood, international law can be seen as a useful tool for the protection of human rights, and one which promises to be more useful in the future.
QUESTIONS

(1) Is it fair to say that human rights are a Western invention and imposition?

(2) Some writers see a direct link between human rights on the one hand and conflict on the other. Do you agree?

(3) The idea that human rights are entitlements of individuals limiting the power of the state is challenged when consideration is given to economic and social rights as well as cultural and so called ‘third generation’ rights, normally said to be ‘collective’ in their content and orientation. Elaborate on this dichotomy.

(4) Identify, if possible, some human rights norms that you think may be amenable to characterisation as ‘relative or particular’ and those that are clearly universal. Motivate.

(5) A bid to protect some of the norms recognised by the modern concept of human rights, for example, the rights of women in Africa, could lead to conflict with time-tested traditions, beliefs and practices. How are such clashes to be resolved?

(6) Some argue that there is a proliferation of terms in the field, causing confusion. Do the terms ‘human security’ and ‘good governance’, for example, add anything not covered by the concept ‘human rights’?

(7) What are the comparable advantages and added value of having an international system for the protection of human rights in addition to a domestic system? Does a regional system for the protection of human rights offer anything that cannot be achieved through the United Nations system? Is the global, regional or domestic protection of human rights more important?

(8) Is there a proliferation of supervisory mechanisms within the African Union? Motivate.

(9) In the Fawehinmi case the Nigerian Supreme Court states that ‘the rights ... in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution’. What are the additional benefits of the inclusion of international human rights in a domestic legal system?

(10) Professor An-Na‘im talks of the paradox of the state as one of the main perpetrators of violations of human rights also being the main protector. Do you agree?

(11) In some countries there is an increased reliance on courts to take decisions with far-reaching social consequences. It has been argued that such decisions should be left to the legislature, as representatives of the people. In light of this, discuss the advantages and disadvantages of the justiciability of socio-economic rights. Also, should parliament and the courts decide whether the death penalty is permissible?
(12) Discuss the performance of the national human rights institution in your country, if such an institution exists. Is it a ‘pretender’ or a ‘protector’?

(13) Odinkalu argues that human rights NGOs in Africa exclude the ‘participation of the peoples whose welfare it purports to advance’. In your opinion, is this a correct description, and if so, what can be done to achieve a more inclusionary approach? Are the measures as set out in the Kampala Declaration sufficient?

(14) What international instruments have been ratified by your country? Can you point to any results they have achieved in relation to your country? Try to find some of the concluding observations of treaty bodies regarding state reports submitted by your country, and investigate which of those recommendations have been implemented. Follow up on the views expressed by treaty bodies in terms of some individual complaints - have they been given effect?

(15) Do you think the judicial approach to human rights issues of a human rights court for Africa, the quasi judicial approach of the African Commission on Human and Peoples’ Rights, and the political process of the African Peer Review Mechanism is more likely to yield results in Africa?

(16) The number of complaints received by the African Commission on Human and Peoples’ Rights is very small in comparison with other regional human rights systems. At the same time there is no lack of human rights violations to report. Discuss possible explanations for the limited use made of the individual complaint mechanism of the Commission. Will the establishment of a human rights court for Africa improve the situation?

(17) Propose how the work of the African Human Rights Commission within the African Union can be made more effective.

(18) To what extent are Kennedy’s criticisms — which have largely emerged in the North American context where there is a general acceptance of the idea of rights and specifically human rights — applicable in other societies where this is not necessarily the case?
FURTHER READING


Heyns, CH; Baimu, E and Killander, M ‘The African Union’ (2003) 96 German Yearbook of International Law 252


Mamdani, M (ed) (2000) Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture Cape Town: David Philip


Further Reading


## USEFUL WEBSITES

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SECTION 2:
CONFLICT IN AFRICA

Part Two of the Reader addresses itself to conflict in Africa: its causes, and the various conflict prevention, management and resolution mechanisms employed at local, regional and continental levels.

A look at the current peace and security terrain in Africa indicates a desire to deal both with the underlying causes as well as the consequences of conflicts. This flows from a paradigm shift that has crystallised into a vision to create an enabling environment for Africa’s regeneration. Central to this shift is an emphasis on the nexus between peace, security and development, and the privileging of the expanding notion of human security, which embraces the need to free people from fear and want. Key here is respect for human rights, guarantees for justice, particularly in post war countries where numerous injustices have been committed, and sustainable peace. The broad objective of this vision is to improve peoples’ participation in their governance, and to ensure sustainable livelihoods as well as the protection of their rights. This section of the Reader demonstrates this inextricable link between human rights, justice and peace.

Beyond looking at the causes of conflicts — which include the violation of human rights, poverty, underdevelopment, international and other factors — it addresses mechanisms that seek to prevent, manage and resolve conflicts. These mechanisms are being guided in their formulation by the conception of security as people-centred. Thus, while they are grounded on universal standards, they seek to be context-specific and are increasingly being judged by their relevance to the peculiarities of each conflict situation. Increasingly,
there is recognition of the value of local, traditional mechanisms in responding to the myriad challenges thrown up by conflicts. Such mechanisms embrace innovative definitions and operative frameworks of human rights, justice and peace that contribute to the reconciliation of fractured communities. The challenge facing these mechanisms is one of obtaining a balance between reconciliation, justice and sustainable peace.

Drawing from the acknowledgment that peace is a prerequisite for development is the move to enhance the capacity of sub-regional organisations, initially conceived as vehicles for sub-regional integration and economic development, to become instruments for conflict prevention, management and resolution. Both continental and international frameworks are increasingly depending on sub-regional arrangements and approaches for the delivery of peace and security. Critical in this development is the role of sub-regional organisations as standard setters and coordinators for coherent implementation of the vision for sustainable development in all its components.

Sub-regional structures are buttressed by continental mechanisms that are based on their acknowledgment of past deficiencies in dealing with challenges in Africa; and they attempt to reform in order to respond more appropriately to Africa’s needs and aspirations. Change at the continental level is reinforced by movements, campaigns and advocacy that are pushing for increased visibility of traditionally marginalised groups such as women and youth in the search for peace, justice and protection of human rights. More than ever before the significant roles of women and youth, among others, are being lauded as the critical success factors in the protection of rights, justice and the guarantee for sustainable peace.
A. CAUSES OF CONFLICT IN AFRICA

This celebrated report of the UN Secretary-General, Kofi Annan on the causes of conflict and the promotion of durable peace and sustainable development in Africa focuses attention to the need to deal with the underlying causes of conflict and to establish a comprehensive framework to prevent conflict and enhance human security. It also stresses the indivisibility of peace in Africa and global security.


(2) Africa as a whole has begun to make significant economic and political progress in recent years, but in many parts of the continent progress remains threatened or impeded by conflict. For the United Nations there is no higher goal, no deeper commitment and no greater ambition than preventing armed conflict. The prevention of conflict begins and ends with the promotion of human security and human development. Ensuring human security is, in the broadest sense, the cardinal mission of the United Nations. Genuine and lasting prevention is the means to achieve that mission.

(3) Conflict in Africa poses a major challenge to United Nations efforts designed to ensure global peace, prosperity and human rights for all. Although the United Nations was intended to deal with inter-state warfare, it is being required more and more often to respond to intra-State instability and conflict. In those conflicts the main aim, increasingly, is the destruction not just of armies but of civilians and entire ethnic groups. Preventing such wars is no longer a matter of defending States or protecting allies. It is a matter of defending humanity itself.

(4) Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-state in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons. The consequences of those conflicts have seriously undermined Africa's efforts to ensure long-term stability, prosperity and peace for its peoples.

(5) By not averting these colossal human tragedies, African leaders have failed the peoples of Africa; the international community has failed them; the United Nations has failed them. We have failed them by not adequately addressing the causes of conflict; by not doing enough to ensure peace; and by our repeated inability to create the conditions for sustainable development. This is the reality of Africa's recent past. It is a reality that must be confronted honestly and constructively by all concerned if the people of Africa are to enjoy the human security and economic opportunities they seek.
and deserve. Today, in many parts of Africa, efforts to break with the patterns of the past are at last beginning to succeed.

(6) It is my aspiration, with this report, to add momentum to Africa's renewed quest for peace and greater prosperity. The report strives to do so by offering an analysis of conflicts in Africa that does justice to their reality and seeks answers in their sources. It strives to do so by proposing realistic and achievable recommendations which, in time, may reduce if not entirely end those conflicts. It aims to summon the political will of Africans and non-Africans alike to act when action is so evidently needed — the will without which no level of assistance and no degree of hope can make the difference between war and peace in Africa.

The sources of conflict

(7) Africa is a vast and varied continent. African countries have different histories and geographical conditions, different stages of economic development, different sets of public policies and different patterns of internal and international interaction. The sources of conflict in Africa reflect this diversity and complexity. Some sources are purely internal, some reflect the dynamics of a particular sub-region, and some have important international dimensions. Despite these differences the sources of conflict in Africa are linked by a number of common themes and experiences.

Historical legacies

(8) At the Congress of Berlin in 1885, the colonial powers partitioned Africa into territorial units. Kingdoms, States and communities in Africa were arbitrarily divided; unrelated areas and peoples were just as arbitrarily joined together. In the 1960s, the newly independent African States inherited those colonial boundaries, together with the challenge that legacy posed to their territorial integrity and to their attempts to achieve national unity. The challenge was compounded by the fact that the framework of colonial laws and institutions which some new States inherited had been designed to exploit local divisions, not overcome them. Understandably, therefore, the simultaneous tasks of State-building and nation-building preoccupied many of the newly independent States, and were given new momentum by the events that followed the outbreak of secessionist fighting in the Congo. Too often, however, the necessary building of national unity was pursued through the heavy centralisation of political and economic power and the suppression of political pluralism. Predictably, political monopolies often led to corruption, nepotism, complacency and the abuse of power. The era of serious conflict over State boundaries in Africa has largely passed, aided by the 1963 decision of the Organization of African Unity (OAU) to accept the boundaries which African States had inherited from colonial authorities. However, the challenge of forging a genuine national identity from among disparate and often competing communities has remained.

(9) The character of the commercial relations instituted by colonialism also created long-term distortions in the political economy of Africa. Transportation networks and related physical infrastructure were designed to satisfy the needs of trade with the metropolitan country, not to support the
balanced growth of an indigenous economy. In addition to frequently imposing unfavourable terms of trade, economic activities that were strongly skewed towards extractive industries and primary commodities for export stimulated little demand for steady and widespread improvements in the skills and educational levels of the workforce. The consequences of this pattern of production and exchange spilled over into the post-independence State. As political competition was not rooted in viable national economic systems, in many instances the prevailing structure of incentives favoured capturing the institutional remnants of the colonial economy for factional advantage.

(10) During the Cold War the ideological confrontation between East and West placed a premium on maintaining order and stability among friendly States and allies, though super-Power rivalries in Angola and elsewhere also fuelled some of Africa's longest and most deadly conflicts. Across Africa, undemocratic and oppressive regimes were supported and sustained by the competing super-powers in the name of their broader goals but, when the Cold War ended, Africa was suddenly left to fend for itself. Without external economic and political support, few African regimes could sustain the economic lifestyles to which they had become accustomed, or maintain the permanent hold on political power which they had come to expect. As a growing number of States found themselves internally beset by unrest and violent conflict, the world searched for a new global security framework.

(11) For a brief period following the end of the Cold War, the international community was eager to exercise its newly acquired capacity for collective decision-making. Beginning in the early 1990s, the Security Council launched a series of ambitious peacekeeping and peacemaking initiatives in Africa and elsewhere. Despite a number of important successes, the inability of the United Nations to restore peace to Somalia soured international support for conflict intervention and precipitated a rapid retreat by the international community from peacekeeping worldwide. An early and direct consequence of this retreat was the failure of the international community, including the United Nations, to intervene to prevent genocide in Rwanda. That failure has had especially profound consequences in Africa. Throughout the continent, the perception of near indifference on the part of the international community has left a poisonous legacy that continues to undermine confidence in the Organization.

Internal factors

(12) More than three decades after African countries gained their independence, there is a growing recognition among Africans themselves that the continent must look beyond its colonial past for the causes of current conflicts. Today more than ever, Africa must look at itself. The nature of political power in many African States, together with the real and perceived consequences of capturing and maintaining power, is a key source of conflict across the continent. It is frequently the case that political victory assumes a ‘winner-takes-all’ form with respect to wealth and resources, patronage, and the prestige and prerogatives of office. A communal sense of advantage or disadvantage is often closely linked to this phenomenon, which is heightened in many cases by reliance on centralised and highly personalised forms of
governance. Where there is insufficient accountability of leaders, lack of transparency in regimes, inadequate checks and balances, non-adherence to the rule of law, absence of peaceful means to change or replace leadership, or lack of respect for human rights, political control becomes excessively important, and the stakes become dangerously high. This situation is exacerbated when, as is often the case in Africa, the State is the major provider of employment and political parties are largely either regionally or ethnically based. In such circumstances, the multi-ethnic character of most African States makes conflict even more likely, leading to an often violent politicisation of ethnicity. In extreme cases, rival communities may perceive that their security, perhaps their very survival, can be ensured only through control of State power. Conflict in such cases becomes virtually inevitable.

External factors

(13) During the Cold War, external efforts to bolster or undermine African Governments were a familiar feature of super-Power competition. With the end of the Cold War, external intervention has diminished but has not disappeared. In the competition for oil and other precious resources in Africa, interests external to Africa continue to play a large and sometimes decisive role, both in suppressing conflict and in sustaining it. Foreign interventions are not limited, however, to sources beyond Africa. Neighbouring States, inevitably affected by conflicts taking place within other States, may also have other significant interests, not all of them necessarily benign. While African peacekeeping and mediation efforts have become more prominent in recent years, the role that African Governments play in supporting, sometimes even instigating, conflicts in neighbouring countries must be candidly acknowledged.

Economic motives

(14) Despite the devastation that armed conflicts bring, there are many who profit from chaos and lack of accountability, and who may have little or no interest in stopping a conflict and much interest in prolonging it. Very high on the list of those who profit from conflict in Africa are international arms merchants. Also high on the list, usually, are the protagonists themselves. In Liberia, the control and exploitation of diamonds, timber and other raw materials was one of the principal objectives of the warring factions. Control over those resources financed the various factions and gave them the means to sustain the conflict. Clearly, many of the protagonists had a strong financial interest in seeing the conflict prolonged. The same can be said of Angola, where protracted difficulties in the peace process owed much to the importance of control over the exploitation of the country's lucrative diamond fields. In Sierra Leone, the chance to plunder natural resources and loot Central Bank reserves was a key motivation of those who seized power from the elected Government in May 1997.

Particular situations

(15) In addition to the broader sources of conflict in Africa that have been identified, a number of other factors are especially important in particular situations and subregions. In Central Africa, they include the competition for
Causes of Conflict in Africa

scarce land and water resources in densely populated areas. In Rwanda, for example, multiple waves of displacement have resulted in situations where several families often claim rights to the same piece of land. In African communities where oil is extracted, conflict has often arisen over local complaints that the community does not adequately reap the benefit of such resources, or suffers excessively from the degradation of the natural environment. In North Africa, the tensions between strongly opposing visions of society and the State are serious sources of actual and potential conflict in some States.

Against the backdrop of the complex causes and dynamics of conflicts, Cilliers examines the influence of the lack of capacity to manage conflict and insecurity in Africa. Specifically, he examines state incapacity to deal with conflicts.

CILLIERS, J HUMAN SECURITY IN AFRICA: A CONCEPTUAL FRAMEWORK FOR REVIEW (2004)

African Human Security Initiative

Full text available at www.africanreview.org

Africa and security today

Some characteristics

As Max Weber and others have repeatedly noted, the critical characteristic of a state is its monopoly on the legitimate use of physical force in the territory it claims to control. This is not the situation in most of Africa where it is generally recognised that conflicts are of a regional and unregulated character (more so because state capacity to regulate the amount of weapons in society is virtually non-existent and the existence of a myriad of sub-state groups that increasingly are able to challenge and threaten the authority of the state). In the absence of administration, and the application of any rule of law, the nexus between the legitimate and illegitimate activities of business, government, criminals and conflict triggers are often difficult to distinguish from one another. These flow across national borders and involve numerous national and international actors. Insecurity and instability in much of Africa has become a single, complex and interrelated problem that is an intrinsic part of the debate about the nature and capability of the African state. While there are only a few collapsed or failed states in Africa, most African states are weak, as governance has contracted rather than expanded in recent decades — parallel with the acute economic crises experienced by the continent.

Thus, in Liberia some 250 000 people are believed to have died in war related circumstances since 1989 — about ten per cent of the country’s three million
Conflict in Africa

population. Liberia returned to war shortly after the carnage in neighbouring Sierra Leone was brought under control, after free and fair elections in 2002, and at a time when francophone West Africa saw its most prosperous country, Ivory Coast, divided between a rebel-held north and government-controlled south after conflict broke out in September 2003. That widening regional conflict has threatened Guinea and Liberia, and affected Mali, Niger and even Ghana.

In the DRC, an estimated three million people have died during the past three years as a result of conflict. In neighbouring Rwanda, 40 per cent of the population have been killed or displaced since 1994. In Burundi, some 300,000 people have been killed over the past decade and fighting between the government and Hutu militias force about 100,000 to flee their homes each month. In Uganda, the war with the Lord’s Resistance Army (LRA) that started in 1986 has displaced an estimated one million people since 1986. To the north, the 20 years of civil war in Sudan have claimed the lives of two million people and caused the greatest displacement of people in Africa. Recently, 110,000 people have crossed the border into Chad to escape the conflict between rebel movements, militias and the Government of Sudan, while an estimated one million people have been displaced inside Darfur. Elsewhere in the Horn, the war between Ethiopia and Eritrea between 1998 and 2000 cost around 100,000 lives. Neighbouring Somalia, with the limited exception of Somaliland and the region of Puntland, has had no government since the abortive UN peacekeeping mission ended in failure in 1993.

Although most contemporary writing on the subject focuses on the international dimensions or manifestations of terrorism, sub-national terror, and even state terror, has been a longstanding feature of Africa. In fact, by any objective standard, Africa is the continent most afflicted by terrorism — albeit not yet by international terrorism. At the one extreme, those figures provided by the US State Department’s ‘Patterns of Global Terrorism’ indicate that international terrorism is on the increase in Africa — although from a very low base with only six per cent of international terrorist incidents committed on African soil between 1990 and 2002. Evaluating the costs of international terrorism in terms of human casualties presents a different and more alarming picture. Africa recorded 6,177 casualties from 296 acts of international terrorism during the same period, second only to Asia in terms of continental casualties, with 1998 as the year with the highest number (5,379) due to the bombings in Kenya and Tanzania.

Terrorism in Africa is widespread. It is overwhelmingly of a domestic, sub-state nature that kills, maims and affects millions of people. Many latter-day insurgent movements and government forces have adopted practices that rely heavily on the use of fear and terror. These included União Nocional para a Independência Total de Angola (UNITO) and RENAMO in Angola and Mozambique, the Mai Mai, the LRA, the Liberians United for Democracy and Reconciliation (LURD), the Movement for Democracy in Liberia (MODEL), and so on. The list is almost endless and grows even longer if state-sponsored terror is added. While Algeria presents the country in Africa most closely intertwined with international terrorism, in much of Africa rebels and governments alike had been terrifying civilians in many civil wars for years. For decades, these had caused much more death and destruction than
Causes of Conflict in Africa

international terrorism. Databases on international terrorism reflect the reality that shootings — not explosives, assassinations, kidnappings or hijackings — are the dominant *modus operandi* for terror in Africa. It is a statement of the obvious that small arms and light weapons are not in short supply in Africa, with an estimated 100 million in present circulation.

In the aftermath of the Cold War, large sections of the state-run networks engaged in transport, training, provision of arms and equipment, money laundering and the like were privatised — not only in the hope of a more peaceful globe, but as part of the downsizing of the defence and security sectors that followed the collapse of the Berlin Wall. Not dissimilar to Afghanistan, failed or collapsed states such as the DRC, Liberia and Somalia have become free-trade zones for the underworld, where the black market in arms and in diamonds, and also trafficking in human beings, passports, gold and narcotics, connects local players to the global underworld economy.

The legal and illegal, the formal and informal, are blurred in conditions of neo-patrimonialism. The more informal the nature of local political and economic transactions, the easier they can be used for ‘other’ activities — with the result that the distinction between licit and illicit, between legal and criminal, between corruption, business and politics is opaque. Deeply embedded in these informal and hidden networks are the networks that supplied LURD, UNITO in Angola, the RUF in Sierra Leone, the Mai Mai, Interahamwe, and others in the DRC, the Sudan People’s Liberation Movement/Army (SPLM/A), the Sudan People’s Defence Force (SPDF), and others fighting in southern and central Sudan.

In Western Uganda, the armed rebellion by the Allied Democratic Forces (ADF) would not have been possible without sympathetic government support and the ability to access arms and supplies. Nor would the LRA have been able to execute its campaign in northern Uganda and southern Sudan without the commodities for war (including food, fuel, arms, ammunition, training, proviant, tyres, clothing, medical supplies and the like), operating with impunity across borders, which are in any case unregulated and uncontrolled. The same mechanisms provide the means to exacerbate and intensify communal violence, such as that between local farming communities and nomadic Fulani herders in Mambilla plateau, north-eastern Nigeria, as well as the clashes between Kenyan Turkana herdsmen and Toposa cattle rustlers near the border with Sudan in north-west Kenya.

In their controversial study ‘The criminalisation of the state in Africa’, Bayart, Ellis and Hibou argued that ‘politics in Africa is becoming markedly interconnected with crime’. Their prognosis for Africa is not optimistic:

The multiplication of conflicts, the main political logic of which is simply predation and which tend to be accompanied by a growing insertion in the international economy of illegality, as in the case of Chad, Liberia and Sierra Leone, the spread of a culture of institutional neglect, systematic plunder of the national economy and the uncontrolled privatisation of the state (for example in former Zaire, Kenya, Cameroon, Congo, Guinea, Togo, Central African Republic, São Tomé, Madagascar and Zambia) all suggest that a slide towards criminalisation throughout the sub-continent is a strong probability.
These linkages represent a global security problem. In a country where flight plans, customs, and immigration and passport control can easily be avoided, crime is difficult to combat — and subversive activity hard to detect. Thus, the terrorists that bungled an effort to down a commercial airliner with a SAM 7 surface-to-air missile in Mombassa earlier this year could smuggle their arms into Kenya with impunity.

These are trends that have long been noted but largely ignored by the leaders of the rich nations — until the events of 11 September 2001 brought into stark focus the threat the global backyard could have on the affluent suburbs of New York, London and Paris.

Poverty, security and neo-patrimonialism

According to some, the political behaviour of people in the majority of African countries is distinctly derived from the continent’s material poverty. Where resources are scarce, as is the case across much of the continent, the object of political contestation is to secure economic consumption — which in turn is best guaranteed by capturing state power or replacing the state in a particular region, such as in the Kivu’s in eastern DRC. Thus, politics easily degenerates a life-and-death struggle over private access to limited public resources. The zero-sum nature of the struggle compels would-be political leaders to obtain material benefits in order to wield influence over followers and competitors. Accordingly:

What all African states share is a generalised system of patrimonialism and an acute degree of apparent disorder, as evidenced by a high level of governmental and administrative inefficiency, a lack of institutionalisation, a general disregard for the rules of the formal political and economic sectors, and a universal resort to personal(ised) and vertical solutions to societal problems.

Other analysts point to the essential continuity in Africa, from pre-colonial to colonial and post-colonial eras, and the recent trend towards retraditionalisation. Both schools of thought agree that contemporary African politics is best understood as the exercise of neo-patrimonial power.

As a consequence of systematic clientelism, the reliance on the award of personal favour in return for political support, and the use of state resources for this purpose, neo-patrimonial regimes demonstrate very little developmental capacity, and do not provide security. Accordingly:

The real institutions of politics in Africa are the formal relations of loyalty and patronage established between ‘big men’ and their personal followers. The unwritten rules of neopatrimonial politics shape the decisions of leaders, engender compliance from citizens, and pervade the performance of bureaucratic organisations. Formally, the domination of political patrons and the subordination of their clients is expressed in the monopolistic political organisations of military oligarchies and civilian one-party states. The constitutional and electoral rules decreed by personalistic leaders, as well as the systems of party and civic organisations that they permitted, embody and express the constrained expectations of the African political game.

At the extreme level, some state and sub-state actors may have a vested interest in continued war and disorder, since it allows them additional opportunities to extract and conceal rewards and thereby serve the various patrimonial networks that provide their legitimacy. In the absence of any
other viable means to sustain neo-patrimonialism, there is inevitably a tendency to link politics to realms of greater disorder, be it war or crime under conditions of resource constraints. Violence is necessary to secure or maintain a slice of the pie. In this manner, disorder becomes a necessary resource and opportunity for reward while there is little incentive to work for a more institutionalised ordering of society. The use of violence and terror is a logic consequence and necessary requirement with the built-in escalation dynamic of basic survival politics. Since resources decline and competition is increasingly fierce and violent, few have any choice but to side with larger groups — and protect their interests through force of arms.

Unrecognised by many is the extent to which the provision of development aid inadvertently supports the development of patronage politics, and undermines state capacity and sustainable development in Africa. Where a country, such as Malawi, receives the vast majority of its funds from donors, not through taxation of its citizens, accountability moves offshore. Since there is no incentive to build a functioning accountable state, based on mutual accountability between rulers and the ruled, it comes as little surprise that it does not happen.

Underpinning Africa’s security crisis is, of course, the continent’s severe developmental failure. Undeniably the common denominator of civil war and conflict in Africa is poverty, and much of that poverty the result of bad policy and poor governance. As economic and social conditions have steadily worsened, so insecurity and instability have increased — thus affecting the general populace. A dramatic reduction in agricultural output, upon which much of Africa is dependent, is but one factor that illustrates the failure of economics and politics in much of the continent. Manufacturing output has fallen, and balance of payment difficulties followed shortly thereafter. Almost all sub-Saharan countries have been confronted with an endemic financial and debt crisis — leading to external indebtedness and high debt-service ratios. Physical infrastructure has been crumbling and public services have broken down. Unemployment has escalated, while skilled professionals emigrate to seek a better life abroad. Private capital has been disinvesting and substantial amounts of private wealth transferred overseas. Although GDP is no accurate indicator of human development, the severity of the African crisis is reflected in the static levels of GDP per capita in Africa, compared to that of other regions in the world.

Africa’s share of global trade in 1950 was seven per cent and, in 2002, it was two per cent. Africa’s share of global capital in 1950 was six per cent and, in 2002, it was one per cent. Left behind in international investment and globalisation, Africa’s share of global foreign direct investment in the 1980s was 30 per cent and in 2002, it was 7 per cent — in spite of its oil and gas output. One export that Africa can ill afford is people. According to the Geneva-based International Organisation for Migration, Africa has been losing 20 000 doctors, university teachers and other professionals each year, since 1990. The continent is producing expertise it badly needs, at considerable cost, without getting the benefits.

While African countries have generally failed to diversify and attract investors, their terms of trade have worsened. Average output per head was
lower at the end of the 1990s than it was 30 years earlier, when Africa was widely thought to be on the way to new prosperity.

Sub-Saharan Africa’s disappointing performance is even worse when compared to that of other regions of the world over time. The Middle East and North Africa, and East Asia and the Pacific — both of which were poorer than Africa in the early 1960s — have long since surpassed continental indicators. South Asia, a region that was significantly poorer than Africa in the early 1960s, has now almost caught up, and will probably surpass Africa in the near future.

Recent years have seen a limited turn-around in previous trends — largely through improvements in macro-economic policy. The picture in 2004 is, therefore, necessarily a mixed one. Recently Omar Kabbah, president of the African Development Bank, categorised Africa in three groups. About 20 countries were raising average income significantly and tackling poverty; a similar number growing more slowly and failing to reduce the number living below the poverty line; and the remainder stagnating or falling back through bad government or war. Thus, half of Africa’s population now live on less than US$1 per day, and the absolute number of Africans in this category has increased from 241 million in 1990 to 314 million in 1999 — reflecting the decline in the average African per capita income over this period. Yet the average rate of economic growth has accelerated since 1995, and some 16 African countries grew at more than four per cent a year over the last decade. Amidst these harsh circumstances, primary school enrolments have improved from a low of 56 per cent in 1991 to 59 per cent a decade later — admittedly far short of the millennium development goals set in 1990.

Broad statistics obscure more complex realities, for example: Gambia, with almost 60 per cent of its citizens in absolute poverty, is one among five countries in the world to reduce child mortality; while Senegal and Uganda have dramatically reduced HIV infection rates through education and prevention programmes. While overall levels of international aid per head has almost halved in real terms in the last decade (and stabilised at about 1990 levels), about US$7 billion per annum is flowing into Africa, as direct foreign investment. Nigeria alone will stand to benefit from an estimated US$110 billion, and Angola from US$40 billion, in oil income over the next six years. African countries that have taken advantage of the provisions of the African Growth and Opportunity Act (Agoa), notably Lesotho and Swaziland, have enjoyed an enormous increase in formal employment. Perhaps most significantly, tenuous democracy continues to hold in Nigeria (124 million people), a peace agreement is in place in the DRC (50 million people), while resource-rich Angola is preparing for elections and Sudan is on the verge of an agreement that will end Africa’s longest running war.

...
Cote d'Ivoire — horizontal inequalities unravel the ‘African miracle’

Ten years ago few people would have considered Côte d’Ivoire a candidate for fragile state status. The country appeared to have institutions and political structures capable of accommodating the interests of different groups and regions. Today, after several bouts of violent conflict, Côte d’Ivoire’s political stability remains uncertain. What went wrong?

Côte d’Ivoire has five main ethnolinguistic communities. The Akan (42.1% of the population) and Krou (11%), concentrated in the south and west, are Christian. The Northern Mandé (16.5%) and Voltaic (17.6%) groups live largely in the north and are predominantly Muslim. The fifth group is the Southern Mandé (10%). The country also has a large population of foreign origin who came during the 1940s from the current Burkina Faso to work on coffee and cocoa plantations. Many of these migrants settled permanently in Côte d’Ivoire. In 1998 one quarter of the population was of foreign origin, though they were born in Côte d’Ivoire.

After independence in 1958 President Felix Houphouet-Boigny instituted a one-party state. But he carefully nurtured a balance among regions and ethnic groups through a system of quotas for government positions. He also enfranchised immigrants and eventually introduced a multiparty system. During the first 20 years after independence Côte d’Ivoire experienced political stability and sustained high growth — a rare achievement in West Africa.

This relative success started to unravel in the 1980s. Falling coffee and cocoa prices increased economic vulnerability, inequalities between the north and the south widened and tensions between locals and economic migrants in the southern regions increased. The 1990s witnessed the rise of Ivorian nationalism. ‘Foreigners’ were no longer allowed to vote, a move that excluded political leaders from the north from contesting elections. The ethnic group of whichever regime was in power came to be increasingly overrepresented in state institutions, including the military.

Social and economic inequalities widened, partly through economic pressures and partly as a result of the use of state power to support favoured groups and regions. By the end of the 1990s five of the six regions with the lowest primary school enrolment rates were in northern areas. As measured by the Socio-Economic Prosperity Index, the period 1994-98 saw the southern groups (Akan and Krou) improve their positions relative to the national average,
especially the Baoulé tribe, while the Northern Mandé and Voltaic remained far below the national average. The Northern Mandé’s position worsened from 1.19 times the national average in 1994 to 0.93 times the national average in 1998.

The rising inequalities interacted with simmering grievances linked to political exclusion and the perceived use of state power to favour certain groups and regions. A coup in December 1999 led to the establishment of a military-dominated government. While this government agreed to hold new elections, it also introduced constitutional changes that barred those whose nationality was ‘in doubt’ from holding political office. Disagreements over election results in October 2000 led to widespread protests and another change of government. The new government continued to favour southern groups, prompting an uprising in 2001 led by the northern-based Patriotic Movement of Côte d’Ivoire, which extended its control over half the country’s territory.

Under strong encouragement from France and the Economic Community of West African States, the rival groups signed a peace agreement in January 2003. But implementation lagged, with deadlock over disarmament of rebels, eligibility criteria for presidential candidates and nationality laws. Political fighting has started up again in recent months, together with growing resentment against French peacekeeping troops. The current president recently announced that the opposition leader could contest elections later in the year, but core issues remain unresolved.

Côte d’Ivoire’s descent into state fragility is a product of complex social, economic and political forces. However, the failure of the state to redress rising inequalities based on region and on group membership has been an important contributory factor. So has the failure of the state to ensure that it was perceived as reflecting a fair balance among different groups. The conclusion: Horizontal economic and political inequalities can destabilise states.

...
Causes of Conflict in Africa

central argument is that although the genealogy and dimensions of conflicts and civil wars in Africa are quite complex and varied; underlying most of these conflicts, especially those that erupted within the last decade, is the issue of citizenship and rights. The construction and nature of the state in Africa, which is rooted in the colonial pedigree, tend toward the institutionalisation of ethnic entitlements, rights, and privileges, which create differentiated and unequal status of citizenship. This tendency de-individualises citizenship and makes it more of a group phenomenon. Rather than the state providing a common bond for the people through the tie of citizenship, with equal rights, privileges, and obligations, both in precepts and practice, people's loyalties are bifurcated. The result is usually tension and contradictions in the public sphere as claims of marginalisation, exclusion, and domination among individuals and groups are rife. The consequence is mostly conflicts and civil wars in Africa.

... Struggles for social inclusion and citizenship rights have been waged in different ways in different African countries. In some countries, they have taken the form of armed expression in which ethnic groups take up arms against each other or against the state in the quest to claim their ‘rights’ as citizens, as occurred in Rwanda and Burundi. In other cases, the struggle has taken a more inclusive dimension with the clamour and popular agitation for democratisation. Democratisation in Africa is a struggle by the people for civil, political, and social rights, which are the substantive social values embodied in citizenship.

The Rwandan experience serves as an empirical illustration of this problem. There are two reasons why the case of Rwanda is quite intriguing and lends itself to a curious enquiry on the problem of citizenship. First, Rwanda is a relatively compact country in terms of social composition, which ordinarily should make the evolution of a nation-state less arduous and inter-group relations less conflictual. Second, the level of human tragedy that has occurred in Rwanda from its inception as an independent state in 1962, peaking with the genocide of 1994, has been alarming. The Rwanda narrative depicts how colonial construction of group identity was factored into the structures and processes of the state system, a phenomenon that thwarted the logic of a common national identity and equal citizenship for the people of Rwanda. This virus continues to plague Rwanda into the present.

In social composition and identity, Rwanda is a fairly homogenous country. Its three ethnic categories — the Tutsi, the Hutu, and the Twa — share the same language, type of social organisation, and often the same lifestyles, and have lived together peacefully for centuries while sharing the same collective commitment to monarchical symbols. Colonialism radically transformed the social structures and identity formation of this society. It created rigid identity differentiation and sharp social distinction among those groups. The background to this was the colonial cultural mythology and historiography of the Rwandan people, which sought to reconstruct social reality and identity in Rwanda. Colonial historians and anthropologists were the precursor of this historical reconstruction. Using differences in physical traits, they claimed that the groups in Rwanda were of different historical origins. The Tutsi were classified as being of Hamitic origin, the Hutu as Bantu, and the Twa as pygmies. A logic of racial superiority was therefore injected into these
scholars’ analysis with the claim that the Tutsi were superior *homo sapiens* than others. This dubious historical reconstruction, as Gerald Prunier noted, became a kind of ‘unquestioned scientific canon’ which actually governed the decisions made by the Germans and even more later by the Belgian colonial authorities.

For the colonial regimes (both the Germans and the Belgians), the Tutsi were considered to be ‘the white man in black skin in Rwanda’. As such, they were formally designated as the ‘first class natives’ to whom decentralised local power and resources were to be devolved. The Hutu, though more numerous, were conferred with the identity of second-class natives, with the Twa completely relegated to the background. This identity reconstruction by the colonial state underwent the three processes of social influence which Herbert Kelman identifies as being central to identity formation and consolidation. These are compliance, identification, and internalisation. All the social groups complied with the new identities, acquiesced to them (with an initial threat of force) and internalised them through a socialisation and generational cycle. In addition, those identities were codified with the colonial policy of separate identity cards for the groups.

The colonial ideology of racial or group superiority among the native population had both normative and social consequences. In the former regard, the Tutsi identity became the standard or optimal identity by which other forms of social identities were to be measured. Its signs, symbols, and meanings assumed the cultural base for the society. In the latter regard, Tutsi identity came to be synonymous with power, wealth, and influence. The Tutsi controlled the native authorities, were in charge of land in the localities, and were the major recipient of colonial education policy. For example, by 1959, forty-three out of the forty-five local chiefs and 549 out of 559 sub-chiefs in Rwanda were Tutsi.

The colonial state transformed what were flexible and complementary social categories into rigid ethnicities, engineered group identity competition through an inverse process of the domination of one group by another, and gradually undermined the basis of a common national identity and equal citizenship among the Rwandese.

However, as the politics of decolonisation unfolded, contradictions began to set in, in the colonial state policy on ethnicities. The Tutsi elites, armed with the weapon of Western education, were at the vanguard of the clamour for self-rule. The Belgian colonial authorities were apparently dissatisfied with the position of their ethnic clientele, the Tutsi, and therefore decided to shift support to the Hutu in state policy. This is not a new politics of power control by the colonial authorities. The tendency by colonial powers is to give political support to groups that are least susceptible to nationalist agitation. The same thing happened in Nigeria. In Rwanda, this resulted in the gradual displacement of the Tutsi from the control of the state machinery. Hutus swiftly replaced most of the Tutsi chiefs, and overt support was given to the Hutu political party.

The decolonisation era saw the emergence of ethnic based political parties in Rwanda. The major parties were the PARMEHUTU (Rwandan Democratic Party
Causes of Conflict in Africa

for the Movement and of Hutu Emancipation) and the UNAR (Rwandese National Union), which represented the Tutsi. By 1960, when local elections were organised, the Hutu emerged as the new local power elite in Rwanda. They won about 80 per cent of the seats and took control of the local state; 210 communes came under Hutu control, while the Tutsi had only nineteen. As the transfer of power gradually proceeded, the sphere of political control by the Hutu also expanded progressively. In September 1961, the legislative elections were held, with the Hutu party winning about 78 per cent and having thirty-five seats out of a total of forty-four. The process of constructing Hutu hegemony in the political process was capped with the ascendancy to power of Gregoire Kayibanda, a Hutu, as president in 1962. Rwanda became independent in July 1962.

While the Belgian colonial authorities considered their apostasy on ethnic clientele in Rwanda as a ‘grand revolution’, the process generated intense inter-group conflicts in Rwanda. The declining identity group in the political process fought back with a weak capacity, while the ascending power, the Hutu, unleashed their pent-up aggression and psychological demeaning of the colonial period on the Tutsis. Between 1959 and 1962, no less than 130,000 Tutsis were driven into exile in the neighbouring countries of Tanzania, Uganda, Zaïre, and Burundi. Right from independence, the stage appeared set for intergroup conflagration in Rwanda.

From 1962 to 1994, when the pogrom occurred, an ethnic republic in all ramifications except name was instituted in Rwanda. Hutu nationalism took the centre stage in which the Hutu sought to make up for the historical gap of inadequate social identity and recognition of the Hutu ethnic group. The process involved the ethnic appropriation of the state and the establishment of a regime of social exclusion on citizenship rights. During this period, to be Hutu was to be a recognised as a Rwandan citizen, de facto and de jure, by the state. This qualified one to have access to state employment, military service, right of association, participation in state affairs, and security. A uni-ethnic military formation was established in Rwanda, which was a Hutu preserve. Uni-ethnic military formation is a system of institutionalised inequality based on group domination and control of the military. It has a potential destabilising effect on the state, as the excluded groups often have real and psychological fear of insecurity that usually prompts them to recruit, train, and organise their own ‘unofficial armies’. However, the idea of a uni-ethnic army in Rwanda was not because of what Cynthia Enloe regarded as the penchant of authoritarian regimes to construct an ‘ethnic security map’, but fundamentally because a logic of state ethnicisation had been set in motion and institutionalised in Rwanda from the colonial era. The structure of power in post-colonial Rwanda is a janus-face of its colonial background.

Also, in the post-colonial era, the Hutu elite turned colonial cultural mythology of the Rwandan society on its head, with the argument that if the Tutsi were of a superior race, then they could not have been part of the original local population or the natives, thus they are at best ‘foreigners’ and should not be regarded as bona fide citizens of Rwanda. This is the intellectual platform on which the institutional discrimination against the Tutsi was justified. Gerald Prunier puts it quite poignantly:
Tutsi were still ‘foreign invaders’ who had come from afar, but now this meant that they could not really be considered as citizens. Their government had been grandiose and powerful: In the new version of the Rwandese ideology, it had been a cruel and homogenously oppressive tyranny. The Hutu had been the ‘native peasants’, enslaved by the aristocratic invaders: They were now the only legitimate inhabitants of the country. Hutu were the silent demographic majority, which meant that a Hutu controlled government was now not only automatically legitimate but also ontologically democratic.

The Rwandan state under both the Kayibanda (1962–1973) and Habyarimana (1973–1994) regimes mirrored its colonial ancestry. The state was the enforcer of exclusive group rights and privileges and provided the institutional context and legitimacy for the discrimination and domination of one group by another. Citizenship was not defined on an individual or common national basis, but from a group dimension. The ethnic identity card policy, which the colonial state instituted, was retained. (It was later to serve as the basis of easy identification of the target group during the human pogrom of 1994.) A perverse policy of ‘quota democracy’ or ‘majoritarian rule’ was enforced by the state, which reserved 80 per cent of all public goods to the Hutus. This policy was the flip side of the colonial one which emphasised the rule or governance by the ‘superior specie’ or ‘qualitative rule’. Group identity and social stratification were fused into the state system.

The phenomenon of group exceptionalism or exclusivity became bizarre when Hutu extremists took control of the state or began to exercise overwhelming influence on it. The Hutu irredentists insisted that the Tutsi were not Rwandese and must be forced out of the country. In 1992, a journalist, Hassan Ngeze, published a political catechism known as the Ten Commandments, which was to serve as the Manifesto of the Hutu nationality. Those commandments include:

(i) Every Hutu should know that a Tutsi woman, wherever she is, works for the interest of her ethnic group. As a result, we shall consider a traitor any Hutu who: marries a Tutsi woman, befriends a Tutsi woman or employs a Tutsi woman as a secretary or concubine.

(ii) Every Hutu should know that our Hutu daughters are more suitable and conscientious in their race as women, wife and mother of the family.

(iii) Hutu women be vigilant and try to bring your husbands, brothers and sons back to reason.

(iv) Every Hutu should know that every Tutsi is dishonest in business. His only aim is the supremacy of his ethnic group. As such, any Hutu who does the following is a traitor: makes partnership with a Tutsi in business, invests his money or Government’s money in Tutsi enterprise, lends or borrows money from a Tutsi or gives favours to a Tutsi in business.

(v) All strategic positions, political, administrative, economic, military, and security should be entrusted to Hutu.

(vi) The education sector (school, pupils, students, teachers) must be majority Hutu.

(vii) The Rwanda armed forces should be exclusively Hutu. No member of the military should marry a Tutsi.

(viii) The Hutu should stop having mercy on the Tutsi.

(ix) The Hutu, wherever they are must have unity and solidarity and be concerned with the fate of their Hutu brothers.
The social revolution of 1959, the referendum of 1961, and the Hutu ideology must be taught to every Hutu. Every Hutu must spread this ideology widely. Any Hutu who persecutes his brother Hutu for having read, spread, or taught this ideology is a traitor.

Group exclusion from citizenship rights, as Anthony Marx rightly observed, tends to define subordinate identity and usually provokes a struggle for inclusion by the dominated groups. In other words, ‘citizenship thus creates the “social construct” of relevant identities, with “oppositional consciousness” forged in reaction to the frame of domination’. The Tutsi who have largely become immigrants in neighbouring countries, persecuted at home and vilified abroad by their hosts, were compelled to countermobilise for political action. They realised that a ‘stateless’ individual or group has few rights or claims in a state-driven international system. Between 1980 and 1990, the Tutsi immigrants formed various movements and links abroad, with a view to sharpening their focus and organisation for effecting political change in Rwanda. The result of this was the birth of the Rwandan Peoples Front (RPF) in 1990, which waged a ceaseless war against the Habyarimana regime and seized political power in 1994. In the context of the war, no less than 800 000 hapless civilian Tutsis were murdered, in what is today referred to as the Rwandan genocide.

How is the Rwandan tragedy to be problematised? In my conception, what happened in Rwanda transcends the issue of elite manipulation of ethnicity. It is also not simply a case of shared material deprivation. It is a destructive phenomenon of social identity competition grounded in historical trappings of the construction of citizenship and rights in Rwanda. Rights and citizenship have been largely defined and institutionalised as a group affair, which are synthesised into the cultural and historical processes of the Rwandan society as reconstructed and legitimised by the colonial state. Citizenship in its normative and instrumentalist dimensions, both in the colonial and post-colonial era, as I have shown in the above narrative, was not a ‘universal’ and common public good in Rwanda. It was exclusionary and bifurcated. This is the basis of the intractable political conflicts and civil war which enveloped Rwanda.

Engendering peace, security, and stability in Africa are tasks which must be accomplished by Africans if the quest for development is ever to gain meaning and take firm root on the continent. Clearly, war and debilitating conflicts are antithetical to development. Negotiating peace and stability will require reconceptualising citizenship from a group to a national or ‘universal’ perspective and re-individualising it. Citizenship is destructive of the social and political processes of a political community when conceived in group terms. It undermines national identity and attenuates the loyalty and commitment of the citizen to the state.

Putting things back together in Africa will require policy changes in two major areas. First is to begin to take liberal democracy very seriously. It is a means through which some of the values embodied in citizenship can be realised. Liberal democratic norms like elections, political participation, the rule of law, and the rights of association and expression, could provide the base for the expression of citizenship in its substantive form. However, this should be
an all-inclusive process in which all state structures and institutions are to be
democratised. This process should transcend the rural urban and the central-
local state dichotomies. In other words, there should be the evolution of what
Elizabeth Jelin described as a new ‘culture of citizenship ‘from below’’,
tertwined with formal institutional changes and the expansion of
democratic practices and norms.

Second is to tackle the normative dimension of citizenship, which the liberal
democratic project cannot guarantee. Who qualifies to be a citizen, and who
does not, even in the juridical sense? How is national identity to be forged
over and above sub-national or group identities? How is the state to be the
primary and terminal point of citizens’ loyalty and commitment? These are
issues, which, though related to it, transcend the liberal democratic project.
These questions have a bearing on how the state is constituted and how the
direction of state policy ensures that the state affects the life-chances of the
citizens in a just and equitable manner, such that subordinate identities do
not contest the legitimacy or relevance of the state in the society.

Renner looks at the role of natural resources in causing and particularly sustaining
conflicts, as evidenced in Liberia and Sierra Leone. This phenomenon has gene-
rated a huge literature captured by the notion of ‘greed and grievance’.

RENNER, M THE ANATOMY OF RESOURCE WARS (2002)
Worldwatch Paper No 162
Full text available at http://www.worldwatch.org

... Diamonds played a central role in the conflict that devastated Sierra Leone
during the 1990s. Ibrahim Kamara, Sierra Leone’s UN ambassador, said in July
2000, ‘We have always maintained that the conflict is not about ideology,
tribal, or regional difference ... The root of the conflict is and remains
diamonds, diamonds, and diamonds’.

Even prior to the 1990s, corruption, cronysim, and illegal mining had
squandered the country’s diamond riches, to the point where few government
services were functioning and educational and economic opportunities were
scarce. Sierra Leone became a ‘model’ shadow state. Pressure from
international lenders for financial austerity and cuts in the government
workforce only worsened the situation. The International Rescue Committee
has reported that one-third of all babies in the diamond-rich Kenema District
die before age one. UNDP ranked Sierra Leone last on its Human Development
Index in 2001.

Throughout the 1990s, Sierra Leone suffered from rebellion, banditry, coups
and coup attempts, and seesawing battle fortunes. In March 1991, the
Revolutionary United Front (RUF) invaded Sierra Leone from Liberia and
seized control of the Kono diamond fields. The RUF had strong backing from
Liberian warlord Charles Taylor. The ranks of the RUF contained disaffected young men from slum areas, illicit diamond miners, Liberian and Burkinabe mercenaries, and others who welcomed the opportunity for pillage and violence. But many others (including a large number of children) were forcibly recruited. Though the RUF professed to act on unresolved grievances, its principal aim was to gain control over the country's mineral wealth. Characterised by banditry and brutality, the rebellion claimed more than 75,000 lives, turned a half-million Sierra Leoneans into refugees, and displaced half of the country's 4.5 million people.

Faced with the RUF rebellion, the government expanded its armed forces from 3,000 to 14,000. This undisciplined, ineffective, ragtag army brought together ill-trained soldiers, militiamen from neighbouring Liberia, urban toughs, and street children involved in petty theft. Mary Kaldor of the University of Sussex comments about the latter that 'they were given an AK47 and a chance to engage in theft on a larger scale'. Government soldiers often supplemented their meagre pay through looting and illegal mining.

Rebel forces and parts of the government army actually collaborated at times. Government soldiers by day sometimes became rebels by night. This co-operation between supposed adversaries culminated in May 1997 when disgruntled government soldiers staged a coup against a government that had been elected just a few months earlier, and invited the RUF to join the new junta.

Sierra Leone is a comparatively small diamond producer, but a large share of its gemstones are of very high quality and therefore sought after. The RUF purchased arms and sustained itself through its control of the diamond fields, but diamond wealth has also been a constant source of internal friction. At first, RUF fighters did the mining, but later the group relied more on forced labour, including that of children. The group’s annual income has been estimated at $25 to $125 million. RUF diamonds have entered the world market disguised as Liberian, Guinean, and Gambian gemstones.

A UN investigative panel reported conclusive evidence in December 2000 that Burkina Faso is a key conduit in facilitating small arms shipments to Liberia and the RUF. In addition, arms have been transferred through Senegal, Gambia, and Guinea. And Côte d’Ivoire has directly assisted the RUF. Weapons originated primarily in Libya, Ukraine, Slovakia, and Bulgaria, and sometimes were shipped with the help of Western air cargo companies.

Charles Taylor’s Liberia has played a pivotal role. The UN panel reported that it had found ‘unequivocal and overwhelming evidence that Liberia has been actively supporting the RUF at all levels, in providing training, weapons and related material, logistical support, a staging ground for attacks and a safe haven for retreat and recuperation, and for public relations activities’. Under Taylor, Liberia became a major centre for diamond smuggling, arms and drug trafficking, and money laundering. The country exported diamonds to Belgium far in excess of the quantity and quality available in Liberia, with gems originating from illicit sources in Sierra Leone and elsewhere.
To the degree that international sanctions succeeded in clamping down on the trade in conflict diamonds, the importance of timber rose in Taylor’s calculus. The warlord-turned-president managed to claim Liberia’s natural resources as his private domain. Close Taylor associates received the largest concessions in Liberia’s forest-rich southeast, where 10 companies control more than 85 per cent of the country’s total timber production. Liberian timber has been sold primarily in China, but also in France and Italy and to a lesser extent in Spain and the Netherlands. Global Witness estimated that the timber trade was worth at least $100 million in 2000. Only $7 million went to government coffers, even as civil servants went unpaid and the only university remained closed for lack of funds. Most of the money instead went directly to Taylor, into patronage payments, to Taylor-connected paramilitary units that terrorise the population, and to pay for arms purchases.

At least seven of the logging concessionaires have been involved in procuring arms for the RUF and importing weapons into Liberia in defiance of a UN embargo. One of the concessionaires is Exotic Tropical Timber Enterprise, run by Ukrainian arms and diamond dealer Leonid Minin, who was arrested in Italy in July 2001 for gun-running. But the key player appears to be the Oriental Timber Company (OTC). Controlling 40 to 50 per cent of Liberia’s forests and its timber production, the company has been implicated in smuggling weapons to the RUF along its timber roads. OTC has not only engaged in rapacious clear-cutting methods, it has also bulldozed homes and entire villages with little warning and no compensation. Meanwhile, social and economic benefits from logging for local communities are close to non-existent. Unemployment is rampant, poverty widespread, and general living conditions desperate. The city of Buchanan, a provincial capital and OTC’s base, has no electricity and its sole hospital lacks running water.

Liberia and Charles Taylor are now coming full circle. Having caused havoc in Sierra Leone, his regime is now falling victim to similar dynamics. In April 1999, anti-government rebels crossed into Liberia from Guinea. The insurgency grew, recruiting fighters from Liberia, Guinea, Sierra Leone, Côte d’Ivoire, and Ghana, and combined with other groups into Liberians United for Reconciliation and Democracy (LURD) in February 2000. Fighting flared up in late 2001, and as in Sierra Leone, the victims are mainly civilians. To weaken the Taylor regime, the rebels are not only destroying timber company equipment, but also attacking or occupying many diamond mining districts, and appear to have smuggled diamonds out via Guinea, Gambia, and Sierra Leone. The loss of revenue is making it more difficult for Taylor to pay his military and there is evidence that Liberian army units have been encouraged to plunder certain areas to supplement government payments.

In June 2002, a report by UN Secretary-General Kofi Annan warned of the risk that Liberia and Sierra Leone could be trapped in a vicious cycle, with civil war swinging back and forth between the two countries. With fighting in Liberia escalating, refugee movements and incursions by armed groups from Liberia into Sierra Leone could destabilise the latter country just as it struggles to emerge from a decade of devastation.
Though each crisis is distinct, most of Africa’s post–Cold War conflicts possess a bundle of common features that defy the logic and assumptions of those who mediate them and those who claim that the wars will only end when one side wins. Specifically, most of Africa’s contemporary conflicts have had a political economy dimension that until recently was poorly understood. The political economy interpretation of the ‘news wars’ in Africa can be summed up as follows. Though these conflicts may have initially been fuelled by grievances and defined by conventional military objectives, over time they have mutated partially or principally into wars waged not to win, but rather to create conditions of ‘durable disorder’ from which key actors benefit economically or politically. Far from being senseless or irrational, these wars have been perpetuated by conflict constituencies with vested interests in maintaining certain levels of armed violence and in blocking efforts to promote reconciliation and effective government. These spoilers or veto coalitions may be relatively small in number and not at all representative of the wishes of the majority of the population, but are well–positioned to block efforts to end hostilities and re-establish rule of law. This explains the otherwise puzzling phenomenon of protracted conflicts in Africa, which, on the surface, appear ‘ripe’ for resolution either via victory or negotiated settlement, but which continue for years. Economic interests feature prominently in these conflicts and can transform war into ‘an instrument of enterprise’ via pillaging, protection money, trade monopolies, labour exploitation, land expropriation, and diversion of relief aid. Fortunes made by warlords — and in the case of the DRC, several neighbouring states — in this ‘noxious cocktail of commerce and violence’ are generated mainly by the leaders’ capacity to monopolise both legal and illicit trade of valuable primary products into the global market, colluding with international firms. Because armed conflict produces profitable war economies for both government army officers and rebels, collusion between combatants is commonplace.

War in this context is virtually unrecognisable in the conventional (modern) sense. Parties to conflicts do not fight to win; direct armed clashes are avoided, minimised, or simulated; strategic towns are not taken; and armed violence is mainly directed at unarmed civilians, who constitute the vast majority of casualties. Looting of civilians is the primary form of payment for both soldiers and rebels, leading to what in Sierra Leone was called Operation Pay Yourself and producing the phenomenon of ‘sobels’ — soldiers by day and rebels or bandits by night. Militias often replenish their ranks by kidnapping young boys from villages and forcing them to commit atrocities, leading to an epidemic of child soldiering in Liberia, Sierra Leone, Angola, and northern...
Uganda. Militias in both government and rebel forces operate virtually independent of a command structure, pursuing their own interests locally, frequently switching sides, and fighting against one another. This multiplies the number of non-state actors on the scene, few of which have knowledge of or interest in the Geneva Conventions and humanitarian law. Finally, humanitarian crises are in some cases transformed from being a tragic consequence of the fighting to an integral part of the war economy. Humanitarian crises are opportunities for enrichment by warlords and their supporters; famine can be provoked and/or exploited by parties to the conflict, as was seen in the 1991-1992 famine in Somalia and in the current crisis in Darfur, Sudan. Relief aid is a prized commodity over which warring parties and militias fight; camps of internally displaced persons are controlled and used as bait to attract international relief; and small fortunes are made via contracts for transportation, money changing, security, and other services provided to international aid organisations.

This interpretation of Africa’s new wars has increasingly made its way into mainstream analysis. Its attractiveness lies in the fact that it has been able to provide a compelling explanation for the most puzzling aspects of Africa’s civil wars — why they have been so protracted in nature, and why they are so impervious to external mediation and peacekeeping. A recent World Bank study on civil wars finds the political economy explanation persuasive:

The expected duration of conflict is now double that of conflicts that started prior to 1980. One possible explanation is that sustaining a conflict is now easier than it used to be ... Another possibility is that rebellions have gradually changed their character, becoming less political and more commercial. Violence entrepreneurs, whether primarily political or primarily economic, may gain from war to such an extent that they cannot credibly be compensated sufficiently to accept peace ... Asking a rebel leader to accept peace may be a little like asking a champion swimmer to empty the pool.

The explanation is also attractive for its capacity to move us past the presumption of irrationality or ‘Mad Max anarchy’, which informs so many analyses of Africa’s wars. Indeed, this rethink of the nature of contemporary civil wars turns the table on Western-centric notions of what constitutes rational behaviour in wartime. As David Keen observes:

If contemporary civil wars have been widely labelled as mindless, mad, and senseless, in some ways nineteenth and twentieth century Western notions of war may be closer to madness. When war is seen as an occasion for risking death in the name of the nation-state and with little prospect of financial gain, it may take months of brainwashing and ritual humiliation to convince new recruits of the notion. A war where one avoids battle, picks on unarmed civilians, and makes money may make more sense.

Finally, this explanation has the added merit of focusing our attention on the interests of nonstate actors as key drivers of the conflicts. Interest-based analysis both goes some way toward explaining why the conflicts persist and provides clues as to when and under what conditions the wars are likely to end. By highlighting the interests perpetuating conflicts and by tracking changes in these interests over time, a political economy analysis of Africa’s wars has the potential to identify opportunities for external strategies to shape those interests to promote peace.
The problem for analysts is that the very theory that appears best able to deliver a reasonably persuasive, parsimonious, and cross-national explanation for why Africa's wars persist is less well-equipped to provide a compelling explanation for why many of these wars suddenly appear to be ending. One possibility is that the wars are in fact not ending; what we are now witnessing could merely be a lull. The underlying interests driving these crises remain in place, according to this view, and will soon reignite the wars. A more hopeful political economy interpretation is that the interests of a number of key war entrepreneurs have changed over time. As they accumulate fortunes from war and plunder, they come to possess a greater appreciation of the benefits of rule of law and wish to protect their new wealth in a way that allows them to shift into quasi-legitimate business and political activities. This notion of warlords mutating into landlords is an intriguing possibility, and draws on an impressive body of historical research about state formation in Europe and elsewhere. A third interpretation is that the war entrepreneurs are simply adapting to new circumstances — mainly changes in the international environment — which are placing penalties on those who openly wage war. In this case, we could be witnessing a shift in tactics as warlords seek to create the appearance of peace, reconciliation, and governance, even to the point of accepting positions in a government of national unity, while quietly working to ensure that underlying conditions of lawlessness and violence continue to provide them with opportunities to engage in illicit war economies — what William Reno calls a ‘shadow state’. Charles Taylor's behaviour, when he switched hats from warlord to president in Liberia but continued to foment violence and predation, is one piece of evidence to support this interpretation.

...
B. APPROACHES TO PEACE IN AFRICA

TRADITIONAL CONFLICT RESOLUTION

What were the traditional conflict resolution mechanisms employed in Africa? Can they still be used?

In the following article, Mazrui identifies four African sources that, in his view, need to be tapped for future conflict resolution and for the enhancement of peace in Africa. These are: Africa’s limited memory of animosity; the value of elders; Africa’s ecumenical spirit; and African women.

MAZRUI, A ‘TOWARDS CONTAINING CONFLICT IN AFRICA: METHODS, MECHANISMS AND VALUES’ (1995)
2 East African Journal of Peace and Human Rights 81

Relevant African values and ethics

Short memory of hate

What cultural resources or traditional mores does Africa have which may be tapped to help contain or resolve conflict? Perhaps the most important is Africa’s short memory of hate. Africans have frequently displayed a remarkable capacity to ‘let bygones be bygones’.

Jomo Kenyatta was imprisoned for years by the British and denounced by a British Governor as a ‘leader unto darkness and death’. However, when he was finally released from detention to lead a newly emerging independent Kenya, Kenyatta became one of the country’s leading Anglophiles. He turned the foreign policy of independent Kenya towards Britain and the West, and crowned his metamorphosis with the publication of a book entitled Suffering without bitterness.

Nelson Mandela lost nearly three decades of the best years of his life imprisoned under the white man’s laws. But he came out of prison in 1990 ready to forgive and forget provided apartheid was ended. Mandela was even capable of feeling compassion for three white terrorists ostensibly ‘fasting unto death’ in protest against their own white government. Mandela personally visited the white terrorists to beg them to eat. A short memory of hate indeed.

Ian Smith in the old Rhodesia unleashed the horrors of a Unilateral Declaration of Independence (UDI) upon his people, and was therefore instrumental in initiating a war in which thousands of Africans were killed. When the war ended, and Zimbabwe became independent in 1980, this architect of the blood-letting UDI was not tried before the equivalent of a Nuremburg trial, but became a member of parliament of the new Zimbabwe and proceeded to
abuse the new Black government of the day. In some parts of the world Ian Smith would have been killed or assassinated as a ‘war criminal’. In Africa he became a beneficiary of the African’s short memory of hate.

As the Nigerian civil war was coming to an end, many people expected ‘rivers of blood’ in the former Biafra resulting from vengeance perpetrated by the victorious Federal side. The Pope in the Vatican was among those who were deeply concerned about the likely fate of the Catholics in Iboland. Moreover, Nigerians generally were not known for exceptional discipline or self-restraint. Would the euphoria of military victory result in an orgy of blood-letting? None of these fears were borne out by what happened. Unruly as Nigerians sometimes can be, they found self-restraint at the supreme moment of the conclusion of the civil war. There was no free-for-all orgy of revenge. There were no Nuremburg trials. On that occasion, Nigerians were tested for moral discipline-and they were not found wanting. They were the carriers of Africa’s short memory of hate.

Interestingly, while African civil wars and fratricide receive considerable global attention from the international media, Africa’s rapid moments of forgiveness are not a matter for headlines. From the point of view of global journalism, to kill is news, to forgive is not. A shot is a story, an embrace seldom worth recounting. Africa’s short memory of hate is therefore not celebrated internationally. Nevertheless, this limited memory of animosity is an important cultural resource, a valuable traditional more, for future conflict resolution. Africa should find ways of tapping it to enhance the consolidation of Pax Africana.

Ecumenicalism and the elder tradition

Another cultural resource and value worth tapping is the elder tradition in Africa. The proposed Pan-African Senate of Elders consisting of former presidents who voluntarily stepped down to give way to democratically selected successors such as Kenneth Kaunda, Leopold Senghor, Julius K. Nyerere and Olusegun Obasanjo, could be requested from time to time to serve as mediators or conciliators in certain conflicts. General Olusegun Obasanjo is already performing some of those mediating tasks outside the purview of the Organization of the African Unity. Former US President Jimmy Carter has also attempted comparable mediating roles from time to time. If a Pan-African Senate of Elders is institutionalised, it could provide a pool of roving conciliators and mediators. Africa’s respect for elders could be tapped to help the success of such roles.

The third cultural resource which may be tapped for conflict prevention, containment, or resolution is Africa’s ecumenical spirit. On the whole, religion in Africa is divisive only when it reinforces other divisions. In Nigeria almost all Hausa are Muslims, almost all Igbo are Christians, while the Yoruba are split between the two religions. Christianity thus tends to reinforce Igbo identity while Islam tends to reinforce Hausa identity. The imported religions help to sharpen pre-existent differences. In the Sudan, Islam and Christianity also reinforce other immense ethno-cultural differences between the north and the south of the country. The two Semitic religions (Christianity and
Islam) are additional catalysts to regional discord, rather than being the main causes of differentiation.

Senegal, on the other hand, is over 80 per cent Muslim. And yet for twenty years the country had a Roman Catholic President (Senghor) without Islamic fundamentalist riots in the streets of Dakar protesting ‘Christian minority domination’. Senegal was at once one of the most open African countries and one of the most ecumenical. Since Leopold Senghor voluntarily retired from power, Senegal at last had a Muslim President. But even then, the First Lady of Senegal was a Roman Catholic. This is a record of presidential ecumenicalism which has no equivalent in the Western world or anywhere else outside Africa.

In Tanzania the Muslim half of the population had a better record of accepting the leadership of Julius K Nyerere (a Roman Catholic) than the Christian half have had of accepting the leadership of Ali Hassan Mwinyi (a Muslim). However, on balance Tanzanians are still a fairly good illustration of the ecumenical spirit at work in Africa. Indeed, many African families in several parts of the continent are multi-religious without breaking up — a Sunni father, a Unitarian mother, a Catholic uncle, an Ahmadiyya son, an Anglican daughter, perhaps all of them with a partial allegiance to African traditional religion.

If the ecumenical spirit is indeed one of Africa’s cultural resources, how can it be employed in the struggle for containment or conflict resolution in the continent? There has been an under-utilisation of religious leaders in Africa even in those conflicts which are perceived as being, in part, sectarian.

Until the visit of Pope John Paul II to the Sudan in 1993, there had in fact been very limited participation by major religious leaders in finding a solution to the Sudanese problem. The tendency was to look almost exclusively towards such political mediators as Ibrahim Babangida of Nigeria, Yoweri Museveni of Uganda, and Jimmy Carter of the United States. Should there not be a more systematic use of Africa’s religious wisdom in the quest for a solution to Africa’s sectarian problems? Archbishop Desmond Tutu has been used to help resolve political problems as far away as Thailand and Burma.

But has his wisdom been used to help solve problems in the Sudan and Nigeria? Is Desmond Tutu a prophet in Asia, but not in Africa? The proposed Pan-African Senate of Elders should include a few select religious figures from Africa such as Bishop Tutu, or the Sheikh of Al-Azhar University (the most senior representative of the Islamic wing of this ancient University), the most senior Roman Catholic Cardinal in Africa, the Head of the Orthodox Church of Ethiopia, and a distinguished exponent of the indigenous religions of Africa. Just as the House of Lords in Britain includes Bishops as members, the Pan-African Senate of Elders should include a selection of Africa’s religious leaders.

*Women in warfare*

The traditional involvement of women in consultations about war and peace is yet another cultural or traditional more which may be relevant for conflict
resolution. The liberation wars in Southern Africa in the second half of the twentieth century produced many strong women, both among fighters in the bush and political activists. In spite of her subsequent legal and political setbacks, Nomzamo Winifred Mandela of South Africa was often a beacon of hope and struggle especially in the 1980s. A less controversial but equally militant activist was Nohtsikelelo Albertina Sisulu, who was also subjected by the apartheid regime to recurrent harassment, banning, and detention.

In recent indigenous culture, some women became soldier-priestesses, leading men into battle. In the late 1980s the Government of Yoweri Museveni in Uganda had to contend with the rebellion led by Alice Lakwena, who had convinced tough Acholi warriors that she had religious powers that would protect them from bullets. Alice Lakwena was briefly the Joan of Arc of the Acholi and, like Joan of Arc, she was defeated. But it was sociologically significant that a woman could convince members of one of the most martial ‘tribes’ in Uganda to follow her into battle.

In the 1960s it was Alice Lenshina in Zambia who was leader priestess in defiance of the government of President Kenneth Kaunda. Although she and her Lumpa Church were militarily defeated, her leadership role was manifest. Are there ways of tapping Africa’s female wisdom towards prevention, containment or resolution of conflict? Again at this stage we can only make a start. So far we have mentioned two categories of members of the proposed Pan-African Senate of Elders comprising of democratically replaced former presidents and major religious leaders. The third category of members should be outstanding African women, such as Angie Brooks of Liberia, who in 1969 served as one of the first women presidents of the United Nations General Assembly. How such women will be chosen to serve on the Pan-African Senate of Elders is something yet to be thought through. One possibility would be for the OAU Summit of Heads of State to create an electoral college consisting exclusively of independent women, which would then elect women to serve on the Senate of Elders. Members of the electoral college would themselves be disqualified from being elected to the Senate.

Malan highlights the necessity of examining conflicts within their social contexts. Such an approach would provide deeper understanding of the origin and nature of conflict, the role of elders, and social involvement throughout the process of resolving the conflict.
Taking the social context of conflicts seriously

When Africa's ways of dealing with conflicts are studied, most of the attention of researchers is almost magnetically attracted to real life. This does not only apply to researchers from Africa itself, but also to those from abroad.

Theoretical approaches seem to be out of place on African soil. Nothing can prevent games theorists from calculating statistical scenarios and from including Africa in their experiments. Other theorists, like those in the fields of bargaining or decision making, may also apply their paradigms to examples from Africa. Researchers in the entire field of the human sciences may rightfully use the theoretical approaches of their various disciplines when examining relevant topics in Africa. In all these ways meaningful insights and recommendations may indeed be reached. But still, when focusing on Africa, theorists should respond as far as possible to the pull towards real life in all its vibrant practicality. Abstract ideas (whether they originate from left-hand or right-hand sectors of researchers' brains) may be harbourd and explored, but preferably not in life-estranged ways.

One of the major lessons the rest of the world may learn from Africa is precisely that social reality should be taken seriously. To call this a mere lesson, is an understatement, however. Many people, in many parts of the world, may need a long-term course in order to unlearn their inherited and indoctrinated individualism. People who tend to opt for the line of least resistance may prefer to avoid the challenge of wider social thinking. They may therefore need persistent encouragement to take the extra ‘trouble’ of getting themselves, or their research project, involved in a network of social complexities.

There is also the possibility, however, of learning this ‘lesson’ in a moment of sudden insight. After all, it is not a matter of acquiring knowledge. Essentially it is a breakthrough to a social way of thinking and living. It is like learning to swim in the sea of social life. When this skill has once been mastered, one's social orientation is no longer a duty that has to be remembered and observed from day to day. It has become a permanent ingredient of one's entire mode of thinking, speaking and acting.

For Conflict Studies the obvious implication is to view conflicts as non-isolated events in their social context. Such a perspective is not narrowly focused on a conflict and its resolution. It takes into account the cultural context setting and the social context. It looks at the history of preceding events which have led up to the conflict concerned. And while concentrating on the conflict itself and the process of resolving it, it takes possible implications for the future seriously. A wider look is taken than one which just includes the disputing parties. Possible consequences for others in their families and social networks are also taken into consideration. Potential effects on relationships and interests are envisaged.

This way of viewing conflicts and their resolution as events in the comprehensive continuum of social life is definitely distinctive of Africa. When Africans sit down to talk about a conflict, the talking usually covers all sorts of relevant background. It also explores the thoughts and intentions of
others. Those taking part in the talks normally try to gauge how others are perceiving and interpreting their own actions. When an elder from a family, village or clan becomes involved in the talks, the traditional objectives are to move away from accusations and counter-accusations, to soothe hurt feelings and to reach a compromise that may help to improve future relationships. Precisely in this characteristic spirit of Africa the secretary-general of the Organization of African Unity recently emphasised the broader set of goals of which negotiations form part: political reform, economic development and greater social opportunities for all. With regard to the social context he also highlighted the important aspects of values and aspirations, perceptions and visions.

This earnestness about the social context of conflicts is not only practised and proclaimed by the people and leaders of Africa. It is emphatically endorsed by researchers in the fields of both sociology and anthropology. In fact, the need to take the social context of conflicts seriously should be absolutely self-evident to anyone who surveys the elements operating in the social dimension.

Social life is the area in which values and norms function. It is the environment in which cultural traditions are formed and handed down from generation to generation. Often, however, the cultural milieu is not just monopolised by one set of values, principles, norms and customs. It may be filled by a bi-, tri- or multi-cultural complexity, and the adherents of the various traditions may tend either to segregate or to integrate themselves. When it comes to religious beliefs, cults and prescriptions, differences (sometimes peripheral distinctions, but sometimes core contrasts) may lead to tensions or hostilities.

It should be obvious that the specifically religious or the wider cultural setting of a conflict deserves proper recognition and attention. This may be easier when the values are explicitly mentioned and discussed. It becomes more complicated when values, especially contradicting ones, are implicitly assumed. Values should never be ignored, however. All over Africa people have deeply rooted cultural commitments, and in many of the conflicts in Africa this cultural heritage may form at least a noteworthy background, or may even play a decisive role.

The other key element functioning throughout all social life is the fascinating network of human relations. This is obviously a world-wide phenomenon, but in Africa it has always received special attention. Family ties and community networking are constantly respected, maintained and strengthened. Whenever kinship or social relationships are disturbed by a dispute, priority is given to their restoration. When the disputing parties, their supporters and the elders concerned engage in talking a matter through, it is usually the issue of relationships which receives prime attention. The relationships of the past are reviewed, the tense relationships of the current conflict are investigated, and a settlement is sought that would improve future relationships. Not only direct and obvious relationships are taken into account, but also the more indirect relationships that may have a cross-stitching potential. If, for instance, each of two divergent groups happens to have members with a
strong interest in music, this commonality may be utilised as a converging factor.

A noteworthy leadership policy of reaching out to the group or individual farthest from the leader concerned, is well described and discussed by Deng. The idea behind this approach is that the interests of the culturally or ethnically distant, even of strangers, should be duly considered. Their interests should be safeguarded as far as possible, without contravening justice of course. When such a method is followed from a position of strength and magnanimity, it cannot be interpreted as weakness or meekness.

Such reaching out is a striking example of an essential part of the orientation towards human relations: a special sense for interests and attitudes. These inner elements of our human existence are not always readily discernible by others. Usually a keen sensitivity and a genuine interest are needed to fathom and identify them. In a conflict situation, as in any situation, they are of vital importance, however. Like values and beliefs, interests and attitudes function at deep levels, either to draw different people closer together or to drive them further apart. As mentioned above, similar interests can help to merge groups or individuals. But conflicting interests can exaggerate already existing divisions.

Attitudes too, can be of an integrative or a segregative nature. In a typical African community, where social solidarity is highly valued, all signs of tolerance and co-operativeness will be observed and nurtured. When settlement-directed talks take place in such a community, the attitude of reconciliation will be promoted as far as possible.

We have to be honest, however, about divisive attitudes which are also found in socially-minded Africa. There are traditions which are centred on a preoccupation with honour. In such a context attitudes of competitiveness and retaliation are obviously taken for granted. Attitudes are not easily changed, however. Neither are traditions. Both are deeply embedded in the social and individual life of the people concerned. Still, it can make an important difference if such attitudes, as well as the traditions on which they may be based, are duly recognised as part of the social context of a particular conflict.

Another attitude that can help cause and intensify a conflict situation is fear. Here too, we have to admit frankly that, in spite of all the social cohesiveness found in Africa, the people of Africa are not exempt from fear. In some cases people seem to be living in fear of being rejected. The prospect of being excluded from association and co-operation in the social group you belong to, is indeed intimidating. But it can become even more frightening when it is coupled with a threat of sorcery or divine punishment.

When all these ethical, relational and attitudinal elements of a social setting are taken into consideration, it can provide a meaningful, comprehensive perspective of a conflict. But such a sensitivity for social phenomena may and its stages also be a valuable asset at all stages in the process of resolving a conflict.
From the very beginning of trying to approach and identify the root cause of a conflict, the involvement of the social context can make a crucial difference. A professional conflict resolver from abroad, using a well designed method of conflict analysis, may begin the exploration by retracing the steps of the parties to the point of initial tension. But an experienced elder from Africa, thinking along the life-related lines of social reality, may begin from a vantage point further back and try to form a frame of social reference. From this perspective questions like the following may be put to the individuals concerned (or the key members of the parties): Who are you, and where are you from? How do you form part of your (close and extended) family? In which environment did you grow up? What do you like doing? What are you living for?

Approaching a conflict from such a background may provide important clues, not only about immediate causes, but also with regard to long-standing grievances. Such a probing into the social context may lead to a wider and deeper insight into differences and similarities between the parties. Parties often have fairly similar needs, but rather different interests. Parties may be adherents of similar or different ideologies, and of similar or different beliefs. There may be important age and power differences, which have to be taken into account.

In all these ways insights derived from the social context may greatly increase the understanding of the origin of a conflict. A further advantage is that this understanding can develop as a shared understanding. If the exploring of the social context takes place in a genuinely social way, which is properly transparent and participatory, it helps all who are involved in the discussion to experience a growing awareness of remote and immediate causes.

It is not only the beginnings of a conflict that are illumined by the social context. The social context can also play its role to improve the end of the conflict resolution process. It can make an important difference if the purpose of the process is formulated in social, relational language. Both short-term objectives and long-term aims may benefit from Africa’s concern with relationships.

A typical immediate goal is to reach an agreement which includes more than merely solving the problem or rectifying the injustice. What is specifically aimed at in the search for durable peace, is genuine reconciliation and, where necessary, restitution and rehabilitation.

Relationships that have been broken or damaged should be repaired. Wrongs should be rectified, and justice restored. After their conflict the parties should be fully integrated into their community or communities again. If they have been in competition with each other, they should adopt the mood of cooperation again. In societies where reciprocal obligations are expected to be honoured, such responsibilities should be resumed. Usually reciprocal goodwill is also hoped for, in spite of the general knowledge that it can never be instilled into a stubborn party.

Aims for the longer term are usually centred on an ubuntu nurturing harmony in the community. Such an aim may be regarded as superfluous in societies who take the social context seriously. The realities of ‘human-natured’
behaviour, also in Africa, deprive us of this illusion, however. Experience teaches us the lesson that even in socially oriented communities tolerance is not maintained automatically. It should purposefully be aimed at and worked for. Conditions that are favourable for sustaining and promoting a forbearing co-existence should be promoted. In this regard four extremely relevant objectives were highlighted in the Kampala Document: Security, stability, development and co-operation. To these socio-political and socio-economic key words a few others, having a more specific social thrust, may be added: mutual understanding, mutual respect, and constructive interaction.

When a conflict resolution process is directed toward short- and long-term goals which really extend into the field of human relations, at least a double advantage can result. Not only will the eventual stages of implementation and follow-up be more far and wide-reaching. The whole procedure of resolving the conflict will also be regarded to be what it actually is: an event in the continuum of social life.

This broad, socially minded perspective on the complex realities of life has important implications for any actual process of conflict resolution. It prevents us from having convenient illusions about straightforward methods of resolving conflict. Africa does not provide us with any simple recipe, nor with a recipe book. What does happen, however, is that Africa's orientation towards the social context makes us aware of a whole variety of approaches which are indeed found in societies of people with their respective histories, traditions and inclinations. Here too we may think in terms of a continuum of methods, ranging from violent fighting to gentle talking.

After all, on a continent which always had a large and growing number of nations or groups, and which currently accommodates more than 500 million people speaking over 800 languages and co-existing in 53 countries, one could expect quite a diversity of methods.

We have to be honest, therefore, about the fact that not all these methods have been versions of talking. The history of Africa does include examples of regulated fighting. As elsewhere in the world, fighting as an organised method is a rare exception, however.

We also have to admit that some ways of talking found in Africa differ from the way we usually have in mind nowadays when we refer to 'talks'. Past and present practices of conflict resolution in Africa include examples of adjudication and arbitration. In cases of adjudication the social context may not figure prominently. Some form of court proceedings is usually followed, in which an appointed 'judge', or perhaps a judicial panel, hears a case and decides about right and wrong, vindication and punishment. When arbitration is used, however, the social environment often plays an important role. After all, an arbitrator has to maintain the support of the community concerned, and therefore has to be more sensitive to the assessment of his or her decisions by others.

Examples are also found of adjudication and/or arbitration as one option, linked to a second option of informal talking. Here the classic example seems to be the two methods of the Kpelle in West Africa: institutionalised courts
making and enforcing arbitral verdicts, and *ad hoc* local meetings (‘moots’ or ‘house palavers’) arriving at mediated settlements. In another classic example from Africa (the Ndendeuli of Tanzania) these two methods have been combined into one: Mediators play an active role by suggesting an agreement and even pressurising the parties to accept it.

Africa’s emphasis on attitudes validates the use of two other ways of pressurising by talking and singing: shaming and ridiculing. Such special methods can obviously only be used in contexts where they are acceptable, and in cases where the cause of a dispute is self-evident. Either in a ritualised way or through ordinary conversation the persons guilty of anti-social and conflict-causing conduct are put to shame. Or individuals gifted with the knack of poking fun at others play their jocular role in an effort to change the behaviour of the trouble makers.

Apart from such more coercive modes of talking, however, the method of talking generally used in Africa is the one of negotiation in the neighbourhood. It is a method which can be most effective, and therefore duly deserves the attention of the whole world.

Much of its success may be ascribed to its elemental simplicity, participatory involvement, adaptable flexibility and complete relevancy. Its commonsensical beginning is usually that individuals within their social context start discussing an emerging dispute. According to the circumstances the context can be a condensed family or an extended family, immediate neighbours or a larger neighbourhood, or a combination of family and neighbourhood. It can also be a smaller or larger organisation, like a school or a religious grouping. Since all the people involved happen to be human-natured individuals, they will always have to contend with the temptation to degrade the discussion to ill-disposed gossip. If the social context is indeed taken seriously, however, this danger may be diminished. Instead of steering the discussion towards spite, or the apportioning of blame, it may be directed at a solution.

From its very beginning this process may be kept moving in a direction which differs from both adjudication and arbitration. Judges and umpires make decisions based on rules. They investigate past events, and their whole orientation is towards the past. But concerned family members and neighbours could envisage outcomes based on interests. They could maintain an orientation towards the future, looking forward to improved relations — not only between the disputants but also in the whole community who happens to be involved. And in most cases they will grant the disputing parties scope to make their own decisions. This forms a marked contrast with the judgemental procedure of imposing decisions on the parties.

Such interest related and forward looking discussions can move quite naturally into the mode of negotiating. But, just as the initial discussions, negotiation itself can begin and continue in a rather informal way. Effective negotiating talks are not dependent upon professionally designed methods and step-by-step manuals of instruction. However useful these may be, they may entice us to forget the unpredictable complexity of actual negotiations. Informal, receptive and flexible ways of negotiating should therefore never be frowned upon. Even those who have a great deal of experience (and even
book knowledge) of negotiation may do well to keep an open mind when
involved in a negotiating event in real life. It does happen that experts,
struggling to make something out of an untidy but perhaps fragile process, are
surprised by the contributions of members of a family or a neighbourhood.

It can also happen, however, that all the informal discussions and
negotiations do not lead to a satisfactory solution of the underlying problem.
Then real mediating expertise may be enlisted more formally. But this
formality is not one derived from professional accreditation. It is a formality
that takes shape within the immediate social context. Its first implication is
that mediators are sought within the family or families concerned and/or
within the neighbourhood concerned. The second implication is that people
are looked for who enjoy social recognition for their experience and integrity.
(If these qualities are present in a mediator, the issue of uninvolvedness is
usually not regarded as important. A mediator from a particular family or
neighbourhood will inevitably be associated with one of the disputing
disputants.) A third, obvious implication is that more than one mediator must be
found. Usually a smaller or larger group is used, which may consist of people
selected to help resolve a particular conflict, or of an already existing
assembly or council of mediators.

All over Africa elders are respected as trustworthy mediators. Elderly people
obviously have more decades of accumulated experience, and usually also a
greater treasure of practical wisdom. Traditionally preference was given to
men, but nowadays gender equity is becoming more widely accepted.

Depending on traditions, circumstances and personalities, mediators are
found in various roles. Apart from the pressurising or manipulating role
already referred to, there are various leading roles in which mediators are
allowed to make recommendations (like reciprocal offers or package deals),
give assessments (of information or of proposals), or convey a suggestion on
behalf of a party (who for face-saving reasons refrains from suggesting it
themselves). Mediators may fulfil a facilitating role, by clarifying information,
promoting clear communication, interpreting standpoints, summarising
discussions, emphasising relevant norms or rules, envisaging the situation if
an agreement is not reached, or repeating points of agreement already
attained. Mediators may even limit themselves to a passive role, as when they
are simply there to represent important shared values. Moreover, since the
process of mediation does not have to follow a predetermined model,
mediators are entitled to change their roles from time to time according to
the needs they sense at various times.

This does not mean that mediators may allow their personal preferences to
determine their behaviour. It does mean, however, that the social context
may at certain times imply shifts in approach or emphasis.

Although the entire process, from discussion through negotiation to
mediation, is unprescribed, flexible and dynamic, and although it defies
analysis, we may tentatively think in terms of constituent parts. This may give
us a stimulating overview of the way in which each contributing part of the
conflict resolution talks is related to and influenced by the social context.
When the background and causes of a conflict are explored, the social situation of each individual or party is considered. This may of course be done in an apathetic way or in a prejudiced way, but often it is indeed done quite sympathetically and honestly. The idea is to form an impression of the interests and needs, aspirations and motivations of each party.

In all fairness to conflict resolution methods from abroad, we have to add that the probing of interests and needs is duly emphasised in most methods. There is, however, a subtle difference which may be spotted. According to the perspective of many imported models it is seen as an effort that has to be undertaken. It is usually listed as an important item of the information gathering stage. When social perspectives are taken seriously, however, there may be an already existent sensitivity to interests and needs. From the beginning of the conflict resolution process there may be an automatically present inclination to understand more about the inner motives of the parties.

As the talking proceeds, an openness to feedback or influence from the social surroundings is maintained. This may lead to a modification of perceptions or positions. It is not only the mediators that can be receptive to new input, but also the parties themselves. It is not only the constituencies of the parties whose reactions are acknowledged; the entire social group is regarded as a major constituency whose response is to be respected. After all, the solution that is worked out during the talks will have to be implemented in families or neighbourhoods that form part of the social network in the community.

Another important contribution which the community can make while the talks are in progress, is that of empowerment. It may become clear that a particular party feels insecure and acts unassertively in spite of the fact that they have a just case. At the talks the mediators may play their part to help such a party realise which power they and their just case are indeed wielding. If the mediators’ efforts are then also endorsed by the community, it can strongly enhance the party’s sense of empowerment and confidence, and increase the self-assertiveness of their behaviour.

As the point of actual decision making is approached, even more attention could be given to considerations of social importance. Ongoing social relations and internal solidarity are crucial elements. Reasonable reciprocity is an option that can be strongly propagated from the social perspective. This too, is a possibility that is well known in models of negotiation and mediation used outside Africa. But there it is usually called by a name taken from the language of bargaining: trade-offs. The way of thinking seems to be more or less as follows: We (the one party) want you (the other party) to lower your demand, and so we offer you something which will hopefully induce you to do what we want. Africa’s social approach may change the way of thinking to the following: Having looked at both sides, your community is suggesting that you (the one party) make this concession, and that it would then be fair to expect you (the other party) to respond by a reciprocating concession from your side. Here the overtones are not those of pressurising for own gain, but rather those of fair exchange for public recognition.
As a consequence of the social approach, the method generally preferred is to work towards consensus. This may develop into an extended search, for which much patience is needed. But when the goal has been reached, the reward is real satisfaction. Every new consensual outcome confirms the validity and value of the time-proven tradition of consensus seeking. It gives all who participated the feeling that they have been involved in a thorough and worthwhile process. And it creates confidence that such a jointly developed decision will prove to be effective and long lasting.

When an agreement has eventually been reached, the good news should be shared with the groups and communities concerned. Each particular society may have its appropriate ritual way of affirming such an agreement as a social contract. It could vary from a handshake in public to an elaborate ceremony as required by tradition. This event obviously serves a dual purpose. It spreads the news about the satisfactory conclusion of the conflict resolution process. And it places an additional obligation on the parties to observe the agreement, which has now become public knowledge.

The society can therefore play a very important role when the agreement is implemented. From the beginning of this final stage, members of the families and the neighbourhood can check whether the parties are really doing everything to which they have committed themselves. If a party needs some face-saving, or empowerment, or encouragement, sympathetic members of the community can render their valuable assistance.

The advantages of all this social involvement throughout the conflict resolution process should be obvious. It can lead to a more profound and shared understanding of the conflict as it has arisen in a particular relational and socio-cultural context. It can encourage the acceptance of aims which deliberately include the relational life after the resolving of the conflict. It can make the conflict resolving talks participatory in a fuller sense of the word than just the inclusion of the parties and the mediators. It can promote a sense of belonging, which, in turn, may contribute to the restoring, maintenance and building of relationships.

...
The Gada system

The Gada system may be the most studied indigenous African institution. The first writer on the Gada system on record is a sixteenth-century Abyssinian ecclesiastic by the name of Bahrey. Other travellers, diplomats, and social scientists studied the Gada system during the nineteenth and twentieth centuries, many of them considering it uniquely democratic. For example, W Plowden, who travelled in the region in the nineteenth century, stated that among republican systems, Gada is superior. Atsime Giorgis, another Abyssinian writer at the end of the nineteenth century, wrote that the Gada system unites and mobilises all members of Oromo society into a formidable and invincible force. Paul Baxter, a contemporary British anthropologist, wrote, ‘They [Oromos] have especially captured the imagination of travellers and ethnographers because of their ancient, enduring and complex system of age-grading, Gada, which, it has been consistently reported, has also served as the basis of a uniquely democratic political system’. Asmarom Legesse, an Eritrean anthropologist who is considered to have written the most definitive interpretation of the Gada system, observed:

The Gada system is an institution that appears so exaggerated that it is readily dismissed by laymen and scholars alike as a sociological anomaly. Anomalous though it may lie, it is one of the most astonishing and instructive turns the evolution of human society has taken ... Gada seems to be one of the universals that binds the entire nation into a coherent system and gives people a common political basis for understanding each other. It constitutes a shared political idiom. This, then, is the philosophical vantage point from which we view the character of Oromo democracy. What is astonishing about this cultural tradition is how far the Oromos have gone to ensure that power does not fall into the hands of war chiefs and despots. They achieve this goal by creating a system of checks and balances that is at least as complex as the systems we find in the Western societies.

In the Gada system, men are organised along two sets of five categories. The first set is a chronologically based age-grade designation. In this set each male goes through five grades of eight years each where he performs a set of duties and responsibilities prior to moving to the next period. Ideally, a male enters into this generation-grade system on the day he is born and stays in the system through his life, completing the cycle when his active duties are completed at age forty-eight. After that, he retires from active duties but remains an elder statesman who counsels and makes peace within the society. However, Oromo society being a polygamous society, children are born at different parental age periods, which creates major gaps in the age-grade system. The two major purposes in this differentiation in the generation-grade system are to provide the necessary human power for the society all the time and also to prevent sons and fathers from entering into the ruling period at the same time. Each eight year period in the cycle has a name for the generation grade: (1) Iti Mako (8-16 years); (2) Daballe (16-24 years); (3) Folle (24-32 years); (4) Qondala (32-40 years); (5) Luba (40-48 years).

The second critical component in the Gada institution is the luba system. The equivalent concept for luba in the English language is ‘party’. Men are organised into five luba (party) sets. The luba system is known by other names, such as misenssa and gogsa, among Oromos. Scholars have used the
term ‘classes’ or ‘age-sets’. Thus, each male is born into a party and each party goes through the five periods (generation set system) as described above...Thus Gada, as a system, is conceived as a unity of interacting parts. The system organises the social order by dividing all men into groups and providing a blueprint that specifies an arrangement of strategies (grades); the relationships among different grades; rights, rules of behaviour, and the tasks to be performed in each grade; and the process by which groups (parties) move from grade to grade.

The result is a hierarchical system of authority or legitimate power. Authority is transferred to a new generation grade every eight years; authority is held in balance, and corruption and nepotism are prevented through the institution of succession; the party in power for eight years assumes responsibility in military, economics, politics, rituals, and peace and reconciliation; the leadership of the ruling party is chosen through open and fair elections; the system has pluralistic characteristics; the system prohibits the political leadership from amassing wealth while in office; and there is a mechanism to recall officers in case of incompetence or corruption. The nature of the system forces every party to enter new generation grades every eight years when the party acting as luba (the ruling party) retires at the end of the forty-year cycle. Thus, for example, sons and fathers cannot be in the same or even successive ruling generation grade.

The Gada system of conflict management moves through thirteen identifiable steps on its way to managing and resolving conflict and arriving at arara (reconciliation) so that harmonious relations can be restored among conflicting parties, God the Creator, the community, and the surrounding world. These steps are in regard to the most dramatic and emotional of any kind of social conflict, violence leading to loss of life.

As soon as the community learns that there has been violence that has caused the death of an Oromo, male or female, it is shaken by the news and becomes mobilised. The kin (up to the clan level) both of the person who committed the crime and of the dead person want to avoid the escalation of the conflict into a cycle of violence. Whether accidental or intentional, the death of an Oromo is treated by both kin groups with the same level of anxiety and vigilance. Of course, if it is learned early on that the death was accidental tensions are lessened since Oromos are usually willing to look at such accidents as the will of Waaqa and are much more disposed to give the reconciliation process the matter of due course. If, however, the killing is shown to be an intentional act, then the pressure to mobilise the resources for the purpose of revenge would be enormous and, indeed could escalate so much that the conflict could get out of hand.

Thus, the community members, being cognisant of this enormous danger, move with great speed, essentially to achieve three critical goals at this stage: to mobilise the community leadership for immediate intervention; to warn the killer’s kin that they should conform to the Oromo traditional law of collective responsibility in the case of death caused by a kinsman, considering every kinsman of the killer to be a party to the killing and therefore liable for revenge by the kin of the victim; and finally to avoid spilling more blood. The Oromo believe that spilling Oromo blood would poison the total environment,
risking health to all the communities concerned; in Oromo mythology for example, if a person touches or steps upon spilled blood, even when he or she has no part in the incident, he or she in due course, would develop leprosy or a similar disease.

Thus it becomes important to recruit jarsa biya (elders) of the killer’s kin groups to assure the kin of the dead person that they are working on the case in compliance with the law (sera) and custom (adda), that they will soon begin criminal procedures (gumma), and that they are eager to work earnestly on reconciliation (arara).

In step two of the process, the appropriate jarsa biya are selected. The qualification of jarsa biya are many, and steps required for the selection of the elders to serve at this level of societal responsibility are rigorous. At the philosophical level, they must have a commitment to the Oromo societal ideology, which encompasses the five major themes of effort, truth, justice, punishment, and reconciliation. The key qualifications for eldership in such matters include: thorough knowledge of both law and custom; intellectual ability to grasp issues and interpret them according to the sera and adda; skills in managing group dynamics including communication; absolute integrity of character; commitment to the Oromo ideology relative to the cause of truth, justice, and reconciliation; and earned trust from one’s peers and the community.

The process of selecting the jarsa biya may be initiated at different levels. Usually members of the family of the person who committed the crime approach the elders of their community and ask for assistance. In cases where family leadership does not exist, the elders of the clan or subclan may come forward with the initiatives in selecting the jarsa biya. Usually two elders are selected from each side and one person from each representing the Gada institution. The persons representing the Gada institution physically sit between the elders representing the parties at conflict. The jarsa biya meet to develop a common understanding of the crisis at hand and the strategy to take. They use a legal inquiry procedure known as qorra, in which they are allowed to ask any question with respect to the law and custom relating to the case at hand, sifting information and establishing basic facts. Once consensus is reached as to the nature of the problem, they send a message to the other party that the kin of the defendant wish to settle the matter in accordance with the sera and adda and respectfully request to meet with the jarsa biya from the other side as soon as possible.

In a case where no one has admitted to the act, if the family of the dead person knows the killer or suspects someone, a member will approach the kin and clan to begin the process of charging the suspected person. In such cases, the process of identifying the jarsa biya and developing strategy could be laborious and time-consuming, but once agreements have been reached on the selection of the elders, the next steps are the same.

In step three, the selected elders and the representatives of the Gada institution meet by themselves for the first time to exchange ideas and work out procedures and to select haiyu (judge) from among themselves. For a person to be selected haiyu, one needs to have qualities as a member of the
**jarsa biya**, plus a superior ability to use proverbs and metaphors, leadership ability to steer the discussion and keep tempers cool, and a record of success in making peace in the community. Once the **jarsa biya** and the **Gada** representatives meet, they usually go to the clan (**gossa**) of the dead person to ask that the matter be given to the **jarsa biya** and the **Gada** representatives and to give permission for the use of three critical places by the family and clan of the person who committed the crime: residence (that means they do not have to flee from their homes), river, and the market. In the meantime they assist the family in burying the dead and stay with the family during the entire period of mourning, ranging from one to four weeks. These activities and gestures are designed to ensure de-escalation of the conflict by both demonstrating sympathy and exercising surveillance, so that no one would take the matter in one's own hands and seek revenge.

In step four, the **jarsa biya** deliberate on the nature of the conflict, the law that was broken and the customs that have been violated, and the laws and customs that could be applied in resolving the case. Essentially, they begin to move from the stage of diagnosis to that of finding a formula for resolution.

In step five, the elders meet separately with conflicting parties. This is a very critical strategy for the purpose of controlling the tempers of the parties and the process, consistent with the Oromo philosophy of forestalling escalation and maintaining civility. They listen carefully to the concerned parties and make inquiries. If need be, they may break to caucus (**maqqo**) and discuss it privately.

After meeting with the parties, step six is to meet with the witnesses. The presiding elders instruct the witnesses to tell the whole truth and examine the responses point by point as they interrogate the witnesses.

In step seven, the elders then recess again to debate among themselves on the issues that remain unresolved. If there is still uncertainty or if they feel that the defendant is not telling the truth, the elders (with the plaintiff, in accordance with Oromo tradition) will require the entire family, subclan, and clan of the defendant to swear in accordance with the Oromo law and customs that every person in the community has been socialised through family, civic, and religious teachings to tell the truth and do justice, to keep harmony in the society and the environment; they are placed before their social responsibility, failure in which would lead to the loss of blessings from Waaqa. If the family and clan believe that their member has been accused unfairly or he or she is telling the whole truth, they defend him or her. After all, to defend a family and clan member against any unfair treatment and false accusations is part of their moral and social obligation.

Everyone looks forward to the verdict (**murtte**) — step eight — that will produce **arara** between the parties and restoration of peace and harmony among the spirits of the people, the deity, and the ecosystem. To the elders who have accepted the responsibility of peacemaking and to the presiding **haiyu** this is a very critical moment too, for their task is not only to declare their findings but to do so in such a manner as to bring the expected peace and reconciliation. The presiding **haiyu** will cite an Oromo prayer to Waaqa that their efforts will bear fruit and ask that the spirit move the parties to
accept the *murttte* and move forward in peace and reconciliation. He then provides a brief summary as to the reasons why they had come together, the work the elders have done and their readiness to declare a *murttte* and facilitate peacemaking and reconciliation between the parties at conflict. Then the elders will begin *qorra* (legal inquiry) into the issues, the laws and customs, investigations, and the process of reaching the *murttte* (verdict).

Once the process of *qorra* is completed, the *haiyu* will begin carefully declaring the *murttte* followed by the appropriate course of action in response to the findings. If, for example, murder was involved, there will be a determination of the blood payment price (*gumma*). Usually in such a case, the family members of the dead person, with assistance of the kin and clan wise men, will put forward the demands for the *gumma*. However, the guilty party may petition for lenience, and the elders usually support moderation in such matters and may lean toward recommending more symbolic gestures in paying the *gumma* rather than profit making. All of these things are sorted out ahead of time (perhaps in step seven).

In step nine, the *haiyu* representing the elders will proceed and implore the guilty party to accept *balessa* (wrongdoing). In this process, they repeat their findings and remind the party to consider the *sera* and *adda*. The guilty party usually accepts such *murttte* rather readily, as his relatives and wise people from his community will urge him to do.

Once the guilty party accepts his wrongdoing, the elders will turn their attention to the grieved party, in step ten, and implore him to accept the *dhuga* (truth), to forgive, and to be reconciled. Since the aggrieved party has been represented in the composition of the *jarsa biya* by the elders he and his party selected, and since it is in everyone's vital interest to complete *ibis* process and move toward reconciliation, he too usually readily accepts the essence of the *murttte*, including the acceptance of the *dhuga* decided by the elders.

Step eleven is the administration of penalty. In the Oromo traditional system, human life is considered precious, and the penalties (*guma*) for committing a crime against another Oromo are designed to reinforce this social value. They are intended to serve as a deterrent. This is shown by the amount of cattle one is required to pay and the quality of the animals designated as fitting for such purpose. Symbolically, the amount is usually referred to as *kuma toko* (one thousand) cattle; however, in reality, it may be about a hundred. Only cows and horses are acceptable, not other animals such as donkeys, mules, or goats. Cows and horses are the most loved and respected in Oromo society, and one hundred is a sizable number for an average person in that economy. In step eleven, the task is to announce the penalty to the parties in public, and agree on the nature, amount, and time of its payment.

The twelfth step in the long and arduous process of conflict resolution in the Oromo cultural system is a legal as well as a religious service for the conflicting parties and for the entire community. It is aimed at reconciliation between the parties and between the community and the divine, the earth and the entire psychological and spiritual ecology. It is aimed at cleansing the anger and ill feelings from everyone concerned. At the spiritual level, Oromos
believe that receiving continued blessings from Waaqa is dependent upon their forgiving, forgetting, and totally reconciling, making sure that family and clan members will not inherit bitterness and animosity as the result of the conflict.

Thus the conflicting parties and members of their respective communities gather for the ceremony of arrara. Some kind of drink is prepared for the occasion — bulbula (honey mixed with water) or dadhi (soured bulbula) or coffee. The participants share the drink as the elders conduct the ceremony. A variant of the blessing offered on such occasions, as captured by Rinnant, from his work among the Gugi Oromos, contains the central themes of blessings delivered at such ceremonies:

- biyya arrara (let the country be reconciled)
- guda arrara (let the big, senior, powerful be reconciled)
- dikka arrara (let the little, junior, weak be reconciled)
- loni arrara (let the cattle be reconciled)
- nu arrara (let us be reconciled)
- nu nagaes (let us be at peace)
- nu itit (let us be thick like yogurt)

The last step is bonding. The activities the conflicting parties undertake during the post-reconciliation ceremony are also very critical. For example, if the conflict has involved the loss of human life, family members usually will take further steps to overcome the memory of bitterness and animosity resulting from the conflict. Such actions may involve marriage arrangements or gudifachaa (child adoption) between the family members. Another type of activity involves providing lifelong services to a family member whose livelihood has been affected seriously as the consequence of the death of a person in the conflict. For example, if a mother has lost her son, depriving her of the natural help she would normally receive from him, the person and the family responsible for the death will provide lifelong assistance on the farm and other areas of her needs.

The processes discussed thus far are dominated by men. However, Oromos have developed a complex system relating to the role of women in conflict resolution. In the Oromo social system, women are the only group that are protected from physical attack by any party in any conflict. They are sacred humans. Thus, women play important roles as messengers of peace; they organise themselves and physically intervene between the conflicting parties in case of violence; they mobilise the community to respond to the situation of conflict quickly and appropriately; and they serve as a moral voice in times of social turmoil.
For proponents of contextual conflict management, who seem to have received a great boost from the failure of conventional peacekeeping operations in Somalia and Rwanda, there can be no question about the relevance of traditional practices and the need to incorporate them into mainstream conflict management strategies. An examination of the larger question of the relevance of traditional thought systems and institutions to modern times leads to the conclusion that notwithstanding the phenomenal transformations of African societies and the introduction of new state structures and (peripheral) capitalist formations, traditional thought and institutions provide a necessary backdrop for present political practices and can as such be selectively put to positive use. Making a similar point, the historian Afigbo argues that the relevance of the African past can be assured only when historians succeed in reconstructing a usable and problem-solving-oriented past rather than ferreting out facts and more facts about a glorious Africa of old. That he says is both the poverty and challenge of African historiography. In other words, as much of what is said to be traditional is invented, the ‘traditional’ can be constructed in such a way as to give prominence to the most expedient and positive aspects, while discarding, if possible, the negative aspects of the past.

It can be argued that traditional means of dealing with conflicts are mainly applicable to, and useful in, resolving simple disputes: matrimonial disputes, intra-family quarrels, land disputes, and the like, which are not as complex or threatening as the conflicts of national and even supranational proportions. This argument underestimates the volatility of so-called simple conflicts that can quickly degenerate to involve most groups in the community because of the organic character of traditional communities. One lesson to be learned from the social fabric approach to conflicts and their management that characterises traditional management in Africa is that simple and larger scale or complex conflicts are actually two sides of the same coin and mutually reinforcing. Consequently, resolution of day-to-day conflicts helps to ensure the stability needed for the prevention or resolution of more serious and expansive ones — in short, resolution of more serious conflicts is impossible without management of less serious conflicts at the lower levels.

A good example of this was the resolution of the crisis in the eastern regional branch of the National Council of Nigerian Citizens, one of the major political parties of colonial and immediate postcolonial Nigeria, that threatened the constitutional order in the country in 1952 and 1953, through recourse to the
Igbo Igobandu system, under which the party leaders swore on oath to be loyal to Nnamdi Azikiwe. Besides, experience gained from familiarity with resolving conflicts at lower levels is always found useful at higher levels of engagement, which probably explains the preference of the warlords in Liberia for reconciliatory bodies headed and composed mainly by chiefs and other traditional authorities. But usefulness is a function of ultimate goals—reconciliation versus dominance—which explains the severe attitudes of warlords to local conflict management mechanisms in southern Somalia, as reported by Menkhaus in the preceding chapter.

Attempts have indeed been made to apply traditional strategies of conflict management to modern conflicts of a more complex nature at national levels with varying degrees of success. Examples include the centrality of the Baganda kingdom to the resolution of political conflicts in Uganda, the statutory involvement of traditional rulers in conflict management bodies at the local, state, and federal levels in Nigeria, and the attempts by the post-apartheid government of South Africa to employ the good offices of the king of Zululand to resolve the violent conflicts in the KwaZulu/Natal Province. One of the most recent of these, which has become the standard reference point, is the role played by clan elders in reconciling warring factions in northern Somalia, as noted by Menkhaus. At several points in the Liberian civil war, traditional rulers were involved in the search for peace along the lines of the famous ‘palaver hut’ reconciliatory meetings. Although this had limited success, there is no doubt that the intervention of traditional leaders, with all the mythical powers they are assumed to have, made negotiations among the warlords possible.

On the other hand, there seem to be serious and even insurmountable obstacles to the application of traditional strategies to modern conflicts. These limits derive for the most part from the characteristics of conflict management in traditional societies as discussed in the previous section. The first of these is that management strategies were localised and particularistic, and that in spite of the similarities and common assumptions they involved, few, if any, strategies were generalised beyond local boundaries.

The absence of a generalised model of conflict management may indeed be regarded as one of the weaknesses of traditional systems, but this does not prevent us from elaborating on and extending successful models if some of the difficulties discussed below can be overcome. In the alternative, a wholly new and eclectic model, built from composite elements of various relevant models, can be constructed, as is suggested in the concluding section of this paper.

In the postcolonial period, traditional conflict management strategies remain localised, although the exigencies of colonial rule necessitated the generalisation of practices among enlarged ethnic groups. This was how, for example, the Ogbon society, which was originally Oyo, became a Yoruba institution, extending to the Egba, Ekiti, Ibadan, and so on. In effect, the strategies remain located in ethnic groups and this, in the circumstances of intense ethnic rivalry in African states, makes the adoption of one strategy more likely to be seen as a continuation of ethnic hegemony (especially where
the strategy adopted comes from the ethnic group of the incumbent head of state). Forster points to the experience of Malawi where President Banda's so-called cultural nationalism was seen by many as an attempt to perpetuate the domination of his Chewa group. In circumstances like this, the adoption of supposedly traditional strategies of conflict management is more likely to worsen and exacerbate, rather than ameliorate, political conflicts.

The relevance and applicability of traditional strategies have been greatly disenabled by the politicisation, corruption, and abuse of traditional structures, especially traditional rulership, which have steadily delegitimised conflict management built around them in the eyes of many, and reduced confidence in their efficacy. Kofele-Kale's finding from his Cameroonian study that most people in urban and rural areas prefer modern judicial approaches — courts, police, and gendarmerie — to customary-traditional approaches in resolving disputes is reflective of this growing tendency. The co-optation of traditional rulers as agents of the state, and their manipulation to serve partisan ends, which dates back to colonial times, not to mention the corruption of modern traditional rulers, have considerably reduced the reverence and respect commanded by this institution and, therefore, the ability of traditional rulers to resolve conflicts.

To take an interesting example, attempts by the African National Congress (ANC) — led government of national unity in South Africa to employ the good offices of the king of Zululand in resolving the violent wars in the KwaZulu Province of the country had very limited success because of fears by the Zulu-based opposition Inkatha Freedom Party (IFP) that the king supported the ANC and was being used by the party. A similar situation exists in Nigeria, where successive governments, but especially military governments that lack grassroots support, have struggled to keep traditional rulers (labelled as ‘fathers of the nation’) on their payrolls as mobilisers of support. This has obliterated the perceived neutrality of these rulers, which was a crucial requirement in their traditional conflict resolving roles, in the eyes of opposition groups. Even in cases of land dispute where, being the traditional custodians of land, traditional authorities are the key arbitrators, their neutrality has been compromised by their miscarriage of justice in favour of those offering the highest pay-offs or bribes.

The limit placed by localisation is reinforced by the fact that modern states in Africa, with the diverse groups that compose them, do not have the common moral and customary order on which conflict management is hinged in the traditional society (a similar point is made by Gluckman in his consideration of the possibility of applying Nuer feuding strategy to resolving international conflicts). The experience of Somalia, whose uniethnic situation was for a long time regarded as a recipe for unity, peace, and stability, has demonstrated the whole point about localisation and absence of a moral order: National consensus was difficult precisely because of the interclan differences reinforced, as they were, by religious cleavages. It was even more difficult to find common grounds for reconciling the warlords from diverse groups who were the major actors in the conflicts in Liberia, Sudan, Somalia, Sierra Leone, and so on — the Charles Taylors and Alhaji Kromahs, John Garangs, Farah Aideeds, and Foday Sankohs. This in turn points to another area where traditional conflict management systems had shortcomings, since
contests for power were often only resolved through splitting the polity and vanquishing the rivals.

Finally, the expansive nature of modern conflicts also limits the extent to which traditional strategies can be applied. Although most present-day conflicts, like those in traditional society, centre on struggles for power and succession disputes among powerful individuals and groups, the wide range of actors and forces, including external ones, as well as the national and sometimes regional scope of the conflicts, render expedient traditional strategies inadequate. This partly explains why the traditional strategies applied in northern Somalia have had only limited success. The same can be said for Liberia, Sierra Leone, Burundi, Rwanda, Uganda, and Angola, where the involvement of peacekeeping forces and other foreign interests has removed the primary responsibility for resolution from the domestic arena.

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**REGIONAL CONFLICT RESOLUTION**

Kindiki assesses the capacity of the African Union to protect human rights and maintain international peace and security. He also highlights contradictions that may arise out of the interpretation of this normative framework and the mandate of the UN, and the potential of strong countries within the continent for manipulating the interpretation of normative standards, among others.


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By the middle of the 1990s, threats to peace, security and the preservation of human rights posed by armed conflicts in Africa became a source of concern for African leaders and the broader international community. This concern was reflected by the myriad conferences and summits held by the OAU to discuss the issue of conflicts and the array of treaties, protocols, declarations, and communiqués that emanated from these meetings. It was soon realised that amidst armed conflicts, it would be difficult to achieve the objectives of the 1991 Treaty Establishing the African Economic Community (the Abuja Treaty), which was intended to set the stage for greater economic co-operation amongst African states.

In order to address the challenges posed by armed conflicts, the OAU Mechanism for Conflict Prevention, Management and Resolution was
established in 1993. Despite any normative and institutional developments that the regime of the Mechanism may have brought, it has been criticised for the apparent failure to halt the genocide in Rwanda, stop the civil war in Liberia, mitigate the crisis in Burundi or put an end to the conflict in the Democratic Republic of Congo (DRC). The end of the millennium presented an opportunity for re-positioning the OAU in order to set the African continent as a whole on a firm path to development, peace and the respect for human rights. On 8 and 9 September 1999, 44 Heads of State and Government of the OAU met in Sirte, Libya, in an extraordinary session of the OAU Assembly requested by Libyan leader Muammar Gaddafi, to discuss the formation of a ‘United States of Africa’. The theme of this summit, ‘strengthening OAU capacity to enable it to meet the challenges of the new millennium’, was intended to provoke the leaders to seek solutions for the myriad political, economic and social problems confronting the continent.

At this meeting the leaders adopted the ‘Sirte Declaration’, which called for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty, and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of justice and the Pan-African Parliament.

The details regarding the designing of this Union was to be left to the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Abuja Treaty. The Declaration further stated that the decision to establish the AU had been reached after ‘frank and extensive discussions’. The OAU legal unit then drafted the Constitutive Act of the African Union (the AU Act). The OAU Assembly of Heads of State and Government in Lomé, Togo, on 11 Jury 2000, adopted the Act. All members of the OAU had signed the Act by March 2001, and therefore the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001, declared the establishment of the AU.

The Constitutive Act had to be ratified by two-thirds of the member states of the OAU. After this had been achieved, the AU became legal and political reality a month thereafter (on 26 May 2001), when the Constitutive Act entered into force. The Union was eventually launched in Durban, South Africa, on 10 July 2002.

The AU Act clearly departs from the regime of the OAU Charter in the area of human rights. The importance of human rights was sparingly recognised under the OAU Charter, which only made reference to the United Nations (UN) Charter and to the Universal Declaration of Human Rights (Universal Declaration), but further established through the adoption of the African Charter on Human and Peoples’ Rights (African Charter or Charter) in 1981. The OAU 4th extraordinary summit held in Sirte did not specifically address the issue of human rights.

However, the protection of human rights was captured in the Summit’s general determination to ‘eliminate the scourge of conflicts’ in Africa and to ‘effectively address the new social, political and economic realities in Africa and the world’. The Summit also pledged ‘to play a more active role and continue to be relevant to the needs of our peoples and responsive to the
demands of the prevailing circumstances’. The above provisions of the Sirte Declaration was a reaffirmation of the OAU Ministers’ Grand Bay Declaration of 16 April 1999, which acknowledged that:

[O]bservance of human rights is a key tool for promoting collective security, durable peace and sustainable development as enunciated in the Cairo Agenda for Action on relaunching Africa’s socio-economic transformation.

The AU Act confirms a growing attachment to the importance of human rights in Africa by providing that it shall be the objective of the AU to ‘encourage international co-operation, taking due account of the [UN Charter] and the Universal Declaration of Human Rights’. The Act provides that the AU shall strive to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’. The principles of the AU include the ‘promotion of gender equality, respect for democratic principles, human rights, the rule of law and good governance’ as well as ‘respect for the sanctity of human life’.

The AU Act contains provisions that are of relevance to humanitarian intervention, consisting of, the use of force by states or states to pre-empt or halt gross human rights violations leading to massive loss of lives, without the consent of the target state. Since humanitarian intervention is a response to human rights atrocities that may amount to breaches of peace and security, this section discusses some of the AU Act provisions, which could be invoked to support, a right of humanitarian intervention under the auspices of the AU.

The Act states that the AU shall ‘promote peace, security and stability on the continent’. Furthermore, it is provided that the AU shall function in accordance with the principles of the ‘establishment of a common defence policy for the African Continent’, the right of member states ‘to live in peace and security’, and the right of any member state of the AU ‘to request intervention from the [AU] in order to restore peace and security’.

A cursory evaluation of the above provisions prompts an impression that they contradict the time-honoured customary international law principle of non-intervention forming part of the AU Act. Article 4(g) enshrines the non-intervention principle, stating that the AU shall function according to the principle of ‘non-interference’ by any member state in the internal affairs of another. Arguably, this provision completely negates those discussed in the previous paragraph.

However, a closer examination of the wording of article 4(f) reveals otherwise. The AU provision differs fundamentally from its UN Charter ‘equivalent’ contained in article 2(7) of the UN Charter, which provides, inter alia, that:

Nothing contained in the present Charter shall authorise the [UN] to intervene in matters which are essentially within the domestic jurisdiction of any state.

The UN Charter provision above is addressed to the UN acting as such, and not to the member states. In contrast, article 4(f) of the AU Act is directed at member states, by requiring that no member state should interfere in the ‘internal affairs’ of another. Thus it is argued that article 4(f) does not have the same effect as article 2(7), because the former provision does not restrain the AU from intervening in the internal affairs of individual states. An
additional argument to support the view that the AU provisions permitting intervention do not contradict article 4(f) is that human rights issues are not matters falling within the description of ‘internal affairs’.

A provision of the AU Act of prime relevance to this contribution is article 4(h). Importantly, it gives the AU the ‘right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’. Article 4(h) is couched in terms of a ‘right’, meaning that the AU Assembly has the discretion to decide whether or not to intervene. The consent of the target state will not be required. It would have been better if the provision required the AU to intervene as a matter of ‘duty’ because a sense of obligation to intervene is more likely to move the AU into action. Nevertheless, the provision raises at least two general legal issues, which are discussed below.

First, a question might arise whether or not article 4(h) is in conflict with article 2(4) of the UN Charter, which states that:

All members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN.

It may be argued that the above provision precludes any consent that African states have given the AU to intervene in their internal affairs. In such a situation, then article 4(h) would be void for incompatibility with article 2(4), which is regarded as jus cogens. Such a view would be strengthened by the fact that the UN Charter provides that obligations of member states under the UN Charter supersede their obligations under any other treaty. Furthermore, the Vienna Convention on the Law of Treaties provides that ‘[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law’.

A response to such a concern would be that the means of force prohibited by article 2(4) is that which is ‘against the territorial integrity or political independence of states’. Intervention under article 4(h) would not infringe upon the territorial integrity or political independence of the African states that are members of the AU. Had the provision been designed to allow such interference, the member states may not have agreed to allow the provision in the Act. The provision in article 4(h) presumes prior consent by every member state of the AU to the effect that the Union is allowed to intervene in their respective territories. One recent study adopts this reasoning, and argues as follows:

What the AU members contracted out of by giving their consent to intervention by AU is the principle of ‘non-intervention’ … By ratifying the AU Act, African states must be understood to have agreed that the AU can intervene in their affairs accordingly. In empowering the Union [AU] to that effect under article 4(h), the states must be taken to have conceded a quantum of their legal and political sovereignty to the African Union [AU].

Second, article 4(h) does not clarify who determines when to intervene and by what means. Indeed, the article is quite clear that it is the AU Assembly of Heads of State and Government that will make a decision for intervention. The means of intervention are not stated, but considering that the intervention under this provision will be responding to ‘grave circumstances’, of which are specified as ‘war crimes, genocide and crimes against humanity’,
one may plausibly presume that the intervention will be by use of armed force. War crimes, genocide and crimes against humanity are most likely to be committed in the context of armed conflicts. Therefore, only proportional use of armed force is likely to address these ‘grave circumstances’.

It must be accepted that it is the AU Assembly of Heads of State and Government that decides when to intervene, and that the intervention is likely to involve the use of armed force. Two subsidiary issues arise from this proposition. The first is that the Assembly’s power to determine the existence of war crimes, genocide and crimes against humanity may be ‘hijacked’ by more powerful states within the AU. These states may want to politicise the interpretation of these terms.

Fortunately, these terms have already been defined in the 1998 Rome Statute of the International Criminal Court (ICC). This means that it may be difficult to develop other definitions. Furthermore, a decision to intervene will only require an endorsement of two-thirds of the member states, and no single member of the AU has the power to veto. This will ensure that no single state can control the decision making process in respect of the operation of article 4(h) and the AU Act in general.

The second subsidiary issue arising from the above concern is that the AU Act does not envisage the AU’s supervision by the Security Council. Yet, the UN Charter provides that the UN Security Council has ‘primary responsibility’ concerning the maintenance of international peace and security. Indeed, the UN Security Council in exercising its primary responsibility has the mandate to supervise the AU, which is a regional arrangement or agency within the meaning of article 52 of the UN Charter. Under such supervision, the AU would be bound by article 53 of the UN Charter, which states as follows:

The Security Council shall, where appropriate, utili[s]e such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authori[s]ation of the Security Council ... The above provision restraints all activities of regional organisations with regard to the use of force, unless the Security Council has authorised such action. Yet, the AU Act in article 4(h) purports to authorise the AU to intervene without the authority of the Security Council. The AU Act does not anticipate the supervision of the UN Security Council, at least with regard to intervening in AU member states where war crimes, genocide or crimes against humanity are being committed. This may imply that the AU considers that it will not be expedient to wait for UN Security Council authorisation before responding to situations of war crimes, genocide and crimes against humanity.

The omission by the AU Act of the requirement that the Security Council should supervise article 4(h) interventions is arguably intentional. This is because the same year the AU Act was adopted, the OAU Solemn Declaration on Security Stability Development and Co-operation in Africa expressly recognised that the primary responsibility for the maintenance of international peace and security [lies] with the [UN] Security Council [with] the OAU in close co-operation with the [UN] and [sub-regional intergovernmental organisations] remaining the premier organi[s]ation for promoting
security, stability, development and co-operation in Africa. In this Declaration, the ‘primacy’ of the UN Security Council in matters of international peace and security was recognised, although even then, the framers carefully added that the OAU remained the ‘premier’ organisation for the same purpose when it comes to the OAU’s region of competence — Africa.

An approach similar to that of the AU had been taken in the past. The Economic Community of West African States (ECOWAS) intervened in Liberia and in Sierra Leone in 1990 and 1997 respectively, without the authority of the Security Council. In both cases, ECOWAS authorities invoked the doctrine of humanitarian intervention, as well as the provisions of the Protocol on Mutual Assistance and Defence. ECOWAS is likely to continue with this trend under the provisions of the 1999 Mechanism for Conflict Prevention, Management and Resolution. Similarly, NATO's use of force in Kosovo was not authorised by the Security Council.

The reason behind the increasing tendency by regional organisations to acquire power to intervene in member states, to use the words of the AU Act, in ‘grave circumstances’, arises from the fact that the UN Security Council’s bureaucratic procedures cannot guarantee a quick response in cases of gross human rights violations. Furthermore, the Council has either ignored some conflicts or has shown discrepant standards in those conflicts to which it has responded. Weller, for instance, notes that in Liberia, the Council first declined to intervene, then intervened, only after ECOWAS did, with considerably less vigour than it did in the Former Yugoslavia. Thus, it may be argued, that where the UN Security Council refuses to intervene in a crisis of a UN member state, this enables concerned regional arrangements or agencies to undertake whatever actions deemed necessary.

The right conferred upon the AU under article 4(h) can serve to complement the powers of the African Commission under article 58 of the African Charter. Under this article, the Commission may draw to the attention of the Assembly of Heads of State and Government any ‘existence of a series of serious or massive violations of human and peoples’ rights’ that may be revealed by communications before the Commission. The Assembly may then request the Commission to ‘make an in–depth study’ of these cases and to make findings and recommend specific action.

However, the mandate of the Commission under article 58 is limited to the extent that it can only be exercised with the consent of the state where the violations are reportedly occurring. Under the AU dispensation, article 4(h) will enable the Assembly to intervene, without the consent of the target state, in situations of gross violations of human rights, so long as the violations constitute the ‘grave circumstances’ specified in the article.

In light of the foregoing discussion, we conclude that the AU Act presents an opportunity for the AU to engage in treaty-based humanitarian intervention without the authority of the UN Security Council or of the target state. The AU Act, unlike the OAU Charter, has clear provisions relating to the protection and promotion of human rights. The AU has taken the right decision in incorporating into the AU framework, the main OAU human rights organs. This
not only ensures continuity, but also avoids duplicity and the dissipation of resources.

Article 4(h), which permits intervention to pre-empt or stop war crimes, genocide and crimes against humanity, envisages humanitarian intervention under the auspices of the AU. Moreover, the restriction of the circumstances in which the AU can intervene in such matters, is considered to be of ‘the greatest concern to the international community.

Finally, it is likely that the norm of humanitarian intervention may be espoused by further enactments by the AU in the future. This is so because of the fundamental difference between the contents of article 3 and that of article 4 of the AU Act. The provisions of the former article are expressed, as ‘objectives’ while those of the latter are expressed as ‘principles’. Maluwa has stated that ‘principles’ form the main process by which the OAU embarked on lawmaking. Arguably, this trend is likely to continue under the new dispensation of the AU.

The Protocol Relating to the Establishment of the Peace and Security Council of the AU (the protocol) was adopted at the 1st ordinary session of the AU Heads of State and Government in Durban, South Africa. Ratification by a simple majority of member states is required for its entry into force.

The Protocol seeks to establish an African Peace and Security Council to take over the work of the OAU Mechanism for Conflict Prevention, Management and Resolution, which, as stated earlier, is now part of the institutional structure of the AU.

The Peace and Security Council of the AU shall be composed of 15 member states of the AU elected for a term of two years with due regard to equitable geographical representation, and provided that five of the members shall be elected for a term of three years to ensure continuity. To qualify for election, the prospective member state shall manifest among others commitment to uphold the principles of the Union, including humanitarian intervention.

Such member states should also demonstrate respect for constitutional governance, the rule of law and human rights. If these criteria are followed, it is likely that the humanitarian intervention envisaged in article 4(h) of the AU Act will be realised. Indeed, states constituting the Peace and Security Council are bound to be relatively democratic. These states should not shield those states involved in massive violations of fundamental human rights, as was the case during the existence of the OAU.

Moreover, the provision in the Protocol for decisions to be made by a simple majority if they concern procedural matters and by two-thirds majority if they relate to any other matter, will empower the Council to make decisions, which may be contested by some members. One of the obstacles on the functioning of the 1993 OAU Mechanism, as stated earlier, is the requirement that decisions are to be made by consensus.

The AU Protocol also provides that decisions of the Peace and Security Council shall be guided by the principle of consensus, but in cases where consensus
cannot be reached, decisions must conform to the manner described above. Each member of the Peace and Security Council shall have one vote. The Peace and Security Council shall meet at the Addis Ababa Headquarters of the AU at the level of Permanent Representatives, Ministers or Heads of State and Government.

The Council is required to be so organised to enable it to function continuously. For this purpose, the Council shall, at all times, be represented at the Headquarters of the AU. This provision envisages that most of the decisions of the Council will be made at the level of Permanent Representatives for referral to the Council of Ministers and Heads of State and Government who, according to the Protocol will meet less frequently. With regard to humanitarian intervention, the continuity of the work of the Peace and Security Council is particularly important. The Council may be required to take decisions to intervene to pre-empt mass loss of life or massive violations of human rights on short notice.

The objectives of the Peace and Security Council will include the anticipating and pre-empting of armed conflicts, and preventing massive violations of fundamental human rights. It will also aim at the promotion and encouragement of democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law.

Among the principles to govern the Peace and Security Council is the principle in article 4(h) of the AU Act, by which the AU may intervene pursuant to a decision of the Assembly of Heads of State and Government, in member states with respect of genocide, war crimes and crimes against humanity. Also, the functions of the Council shall include ‘intervention, pursuant to article 4(h) of the [AU Act]’.

In order to enable the Peace and Security Council to perform this and other responsibilities, the Protocol provides for the establishment of the African Standby Force, composed of standby contingents ‘for rapid deployment at appropriate notice’. Such standby contingents shall be established by member states of the AU, in terms of ‘standard operating procedures’ of the AU. It appears from these provisions that the African Standby Force shall be an ad hoc force, constituted as need arises. The functions of the African Standby Force shall include ‘intervention in member states in respect of grave circumstances in order to restore peace and security, in accordance with article 4(h) [of the AU Act]’.

The Protocol defines the role of the AU Chairperson with regard to conflict prevention and resolution including the maintenance of peace, security and stability on the continent. His role includes bringing to the attention of the AU Peace and Security Council or the Panel of the Wise, any matter that is relevant for the promotion of peace, security and stability in Africa. He may also use his good offices to prevent potential conflicts, resolve actual conflicts and promote peacebuilding and post-conflict reconstruction. The Protocol requires the Chairperson to use the information gathered under the Protocol’s ‘early warning system’ to advise the AU Peace and Security Council.
on potential conflicts and threats to peace and security in Africa and recommend the best course of action.

The Protocol, once in force, will clarify at least three issues that the AU Act has left open for interpretation. First, as stated earlier, the Act is silent on who determines when the ‘grave circumstances’ justifying intervention in a state, and by what means is the intervention to be carried out. We argued that the specified ‘grave circumstances’ of genocide, crimes against humanity and war crimes have already been defined in the Rome Statute of the ICC, and that these definitions may offer guidance. The Protocol supports this view, by providing that the AU Peace and Security Council will have the power to recommend to the AU Assembly of Heads of State and Government, intervention pursuant to article 4(h) of the AU Act in respect of ‘war crimes, genocide and crimes against humanity as defined in relevant international conventions and instruments’.

Concerning the means of intervention under article 4(h) of the AU Act, we argued earlier that the use of force is envisaged. This position is supported by the provision of the Protocol requiring the establishment of an African Standby Force with both ‘military and civilian contingents’ for purposes of ‘rapid deployment at appropriate notice’.

Second, we observed in the discussion of article 4(h) of the AU Act that neither the provision nor the rest of the Act clarifies the relationship between the AU and the UN in relation to issues touching on international peace and security. We concluded that the drafters of the Act deliberately left out any definition of this relationship, in order to ensure that the AU can act in emergency cases of the ‘grave circumstances’ and to attend to massive violations of fundamental rights. The protocol appears to discount this assumption by detailing out how the Peace and Security Council of the AU will work together with the UN Security Council.

In its preamble, the Protocol recognises the ‘provisions of the Charter of the [UN] on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer co-operation and partnership between the [UN], other international organisations and the [AU], in the promotion and maintenance of international peace, security and stability in Africa’.

Also, the Peace and Security Council of the AU shall be guided by the principles of the AU Act and those of the UN Charter and the Universal Declaration. The AU Council also has power to ‘promote and develop a strong partnership for peace and security between the [AU] and the [UN] and its agencies ...’. Furthermore, the AU Peace and Security Council is enjoined by the Protocol to ‘co-operate and work closely with the [UN] Security Council’, which has the primary responsibility for the maintenance of international peace and security.

The above provisions manifest a sustained effort by the drafters of the Protocol to provide for an African regional mechanism for the maintenance of international peace and security that is subservient to the UN Security Council. Therefore, it may be argued that the Protocol clarifies that the AU
will only intervene militarily in member states with the approval and under the supervision of the UN Security Council. However, it is possible that the drafters of the Protocol were either oblivious of the relevant provisions of the AU Act, or they intended to define the relationship between the AU and the UN Security Council, which the AU Act had omitted.

It is interesting to note that there exists an internal contradiction regarding the provisions of the Protocol on the relationship between the AU Peace and Security Council and the UN Security Council. The Protocol states that the AU ‘has the primary responsibility for promoting peace, security and stability in Africa’.

Despite the elaborate provisions by the Protocol recognising the primacy of the UN Security Council in the promotion of international peace and security, that primacy only relates to peace and security in other parts of the world. Within Africa, the Protocol adopts the position taken under the AU Act — that of according the AU the primary role in matters of international peace and security, including the use of force in the maintenance thereof. This argument is supported by the fact that the Protocol does not provide anywhere that the AU Peace and Security Council or the AU Assembly of Heads of State and Government will require the authorisation of the UN Security Council before engaging in humanitarian intervention under article 4(h) of the AU Act.

The third and final issue in respect of the AU Act that the Protocol has clarified relates to the relationship between the Peace and Security Council of the AU and the African Commission on Human and Peoples’ Rights. The Protocol provides that the Council ‘shall seek close co-operation’ with the Commission in all matters relevant to the mandate and objectives of the Council. The Commission is obliged under the Protocol to bring to the attention of the Council ‘any information relevant to the objectives and mandate of the [Council]’. These provisions are likely to ‘give teeth’ to the Commission’s mandate under article 58 of the African Charter, by attracting the attention of the OAU (AU) Assembly situations of gross and systematic violations of human rights. Information provided by the Commission under the Protocol may be a basis of a recommendation by the Council to the AU Assembly for humanitarian intervention under article 4(h) of the AU Act.

Finally, the prominent role of eminent personalities that was prominent in the functioning of the AU has also been recognised in the Protocol. A ‘Panel of the Wise’ is established with the mandate to ‘advise the [Peace and Security Council of the AU] and the Chairperson of then [AU] Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa’. The Panel of the Wise is to be composed of ‘five highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent’.

The advice on the Panel of the Wise is likely to be headed by the machinery. The personal intervention of the Panel in situations of armed conflicts where massive violations of fundamental human rights are taking place may succeed in reconciling the warring parties, given Africa’s respect for elders. The
provision for the Panel of the Wise is an important development, as it will ensure that the use of force will only be resorted to if the Panel’s mediation, conciliation and other peaceful methods of intervention have failed. 

In line with the vision captured by the AU normative framework and the vision for peace and security, African leaders, during the launching of the AU Peace and Security Council in 2004, expressed their commitment to the promotion of a stable, secure, peaceful and developed Africa.

STATEMENT OF COMMITMENT TO PEACE AND SECURITY IN AFRICA, ISSUED BY THE HEADS OF STATE AND GOVERNMENT OF MEMBER STATES OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION (25 MAY 2004)

Also available at http://www.africa-union.org

We, the Heads of State and Government of the member states of the Peace and Security Council (PSC) of the African Union (AU), meeting in Addis Ababa, Ethiopia, on 25 May 2004, for the solemn ceremonial launching of our new Council and having reviewed the state of peace and security on our continent, have adopted the following Statement:

(1) The establishment of the Peace and Security Council of the African Union marks an historic watershed in Africa’s progress towards resolving its conflicts and the building of a durable peace and security order. Our meeting today is both a reaffirmation of our commitment to the promotion of a stable, secure, peaceful and developed Africa, as well as a significant step towards realising the ideals enshrined in the Constitutive Act of the Union and the Protocol relating to the Establishment of the Peace and Security Council. It is also a reflection of our desire to assume a greater role in the maintenance of peace and security in Africa.

(2) Over the years, we have signed and ratified several Protocols and Declarations that signalled our collective commitment to peace, as well as the rejection of the use of force in settling disputes. Unfortunately, some of these have not been fully implemented. The continental peace and security architecture that we are putting in place needs to be nurtured and strengthened, to enable our Union to meet the aspirations of our people for sustainable development. To this end, we shall ensure that the authority vested in the Peace and Security Council is fairly and proactively exercised.

(3) We undertake to ensure that we shall at all times move first, in a timely manner, to address conflicts in our continent. We, therefore, realise that this endeavour must be backed by the resources and commitment of our member states, with the full and active support of our peoples and international
Partners. We are determined to deal effectively and objectively with each and every conflict as it arises, using every means at our disposal.

(4) To achieve our objective of creating the conditions for durable peace and development on the African continent, we are determined to address the root causes of such conflicts in a systematic and holistic manner. We are mindful of the fact that to accomplish these goals, we must set for ourselves and achieve ever-higher standards in the areas of human rights, democracy, good governance and conflict prevention, which are a prerequisite for achieving the socio-economic development and integration of our continent.

(5) We recognise that the foundation for peace and security in Africa is intrinsically linked to the concept of human security. Accordingly, we reaffirm our commitment to the promotion of a comprehensive vision of human security.

(6) We shall also move speedily, to implement Africa's Common Security and Defence Policy, and strengthen the common values underpinning peace and security in the continent.

(7) We shall not shrink from decisive actions to overcome the challenges confronting the continent. Henceforth, there will be no conflict on our continent that will be considered to be out of bounds for the African Union. Where grave abuses of human rights, crimes against humanity and genocide occur, the Peace and Security Council must be the first to condemn, and take swift action, consistent with the letter and spirit of the Constitutive Act of the Union and other relevant instruments that we subscribe to.

(8) Our member states should commit themselves to support the African Union Peace Fund in concrete terms, including raising the statutory contribution from the AU regular budget to the Fund.

(9) We are resolved to establish the African Standby Force, and to ensure that sufficient troops and observers are made available for rapid deployment when and where they are required.

(10) As we take stock of the landscape of conflicts and peacemaking initiatives on our continent, we remain gravely concerned at the prevalence of conflicts in different parts of Africa. However, we note that there are encouraging signs of progress in the efforts towards resolving some of these conflicts. We, therefore, urge that the relevant principles from the Constitutive Act of the African Union and the Protocol establishing the PSC, serve as the basis for a continental renewal plan, to tackle conflicts on the continent.

(11) Against the backdrop of these challenges that we are confronted with, we are committed to fostering political dialogue as the essential mechanism for preventing recourse to insurrection and armed struggle. We shall also address ourselves to the other underlying issues that have contributed to: conflict and insecurity, including ethnic and religious extremism; corruption; exclusionary definitions of citizenship; poverty and disease, with special attention on the HIV/AIDS epidemic, which has now become a security
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problem on our continent; the illegal exploitation of Africa’s renewable and non-renewable natural resources; mercenarism; the illicit proliferation, circulation and trafficking of small arms and light weapons; and the continuing toll exacted by anti-personnel landmines.

(12) We shall also work tirelessly to prevent and combat the phenomenon of terrorism through the effective implementation of the relevant international and AU instruments, including in particular the Algiers Convention of 1999 and the Plan of Action of 2002. We equally undertake to work with the international community combating terrorism.

(13) We shall continue to strengthen our close working relations with the United Nations Security Council, bearing in mind that the UN Security Council has the primary responsibility for the maintenance of global peace and security, and Africa is part of that international community.

(14) We welcome the establishment of the Peace Support Operations Facility by the European Union and look forward to its support for initiatives to be undertaken under the authority of the African Union. We shall continue to rely upon our major partners in the Americas, Asia and Europe, to show solidarity with our efforts in the spirit espoused by NEPAD, the African Union programme that seeks to build a partnership based on indivisibility of peace, security, good political and economic governance.

(15) On the occasion of the solemn launching of our Peace and Security Council, which has coincided with the celebration of the Africa Day, we, the Heads of State and Government of member states of the Council, hereby commit ourselves to the building of an African continent that is not only at peace with itself but is also at peace with the rest of the world.

Moni explores some of the challenges facing the AU in responding to the Darfur crisis, including the lack of capacity and faltering political will among many actors.

MONI, R ‘THE UN REPORT ON DARFUR: WHAT ROLE FOR THE AU?’ (2005)
Pambazuka News 193

The UN International Commission of Inquiry established by Security Council Resolution 1564 on 18 September 2004 to ‘investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred’ completed its work and submitted its findings to the UN Secretary-General on 31 January 2005.
Although the report did not find genocide to have occurred in Darfur, it confirms that serious violations of international human rights law and humanitarian law by all parties have taken place and are continuing. In particular, the Commission found that government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.

These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The Commission recommends that the International Criminal Court (ICC) should prosecute those persons allegedly responsible for the most serious crimes as part of the solution to the Darfur crisis.

It is notable that the report sparingly mentions the AU and does not prescribe any role it should play in the punishment of the violators of international human rights law and humanitarian law. The AU on its part has steered clear of the definition game of what is or is not ‘genocide’.

When the then US Secretary of State Colin Powell announced on 9 September 2004, that the killing, raping and displacement of black Africans by horse-mounted Arab fighters amounted to genocide, the AU called it a ‘big mistake’ and criticised Powell for ‘undermining the AU’. The AU wiggled out of intervening in Darfur by arguing that it will ‘call it genocide’ after carrying out a ‘full investigation’.

However, it would be wrong to assume that the AU’s refusal to acknowledge, despite the teeming evidence in its field reports, that genocide has taken place in Darfur is the decision of one official.

In a communiqué issued in July, the AU Peace and Security Council (PSC) stated that even though the crisis in Darfur was grave with unacceptable levels of deaths, human suffering, and destruction of homes and infrastructure, the situation could not be defined as ‘genocide’.

The AU’s highest organ, the Assembly of Heads of State and Government, also reiterated this position during the 6-8 July 2004 Summit, when it noted ‘that, even though the humanitarian situation in Darfur is serious, it can not be defined as a genocide’.

Indeed, the UN Commission has concluded that although inhuman acts may have been committed ‘with genocidal intent no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control’.

But the AU should not rest on its laurels and feel that it has been exonerated from intervening in Darfur to protect civilians who are being victimised by the Government-supported armed militia groups, the Janjaweed. According to article 4(h) of the Constitutive Act, the AU has ‘the right ... to intervene in a Member State pursuant to a decision of the Assembly (of Heads of State and Government) in respect of grave circumstances, namely war crimes, genocide and crimes against humanity’.
If we accept the findings of the UN Commission report that ‘war crimes and crimes against humanity’ are taking place in Darfur, then the AU should be urged to invoke article 4(h) to intervene in Darfur and protect the civilian population. However, for the following reasons, the AU is incapable of invoking article 4(h) to intervene in Darfur.

Lack of political will

African leaders at the moment have no political will to authorise the AU to intervene in one of its most important member-states. As the Darfur decisions of the July 2004 and January 2005 Summit show, African leaders are not interested in ordering actions that would set precedents. Africa is replete with Darfurs. There are at least half a dozen African states that are currently facing serious political crisis that could lead to civil wars. If the AU intervenes in Darfur, it must prepare to intervene in the near future in Zimbabwe and Nigeria, which have simmering civil conflicts, and in Ivory Coast and Uganda, which are embroiled in seemingly intractable civil wars.

It would be a form of poetic justice for Nigerian President Olusegun Obasanjo, to preside over the AU intervention in Sudan and in 2006 have the same organisation, under the chairmanship of Omar al-Bashir, intervene in Nigeria, assuming the situations in the Delta and Plateau regions are not contained. Likewise, AU leaders, particularly South African president Thabo Mbeki, would find it difficult to authorise AU intervention in Zimbabwe or Uganda to protect civilian populations of those countries.

AU lacks institutional capacity

Assuming that African leaders had the political will to intervene in Darfur pursuant to article 4(h) of the AU Constitutive Act, the AU would still not be able to do so as it does not have the requisite capacity.

As the chaotic deployment of the AU Mission in Sudan (AMIS) has proven, poor logistical planning and lack of trained personnel, funds, and experience in intervening to protect civilians have exposed the AU to be a mere child that has not even learned to walk on its own. It has been more than six months since the AU made the decision to send 3,300 troops to protect its own civilian monitors in Darfur.

So far, it has been unable to deploy half the troops. The haphazard way in which AMIS was conceived, planned, deployed and is being operated has brought back the sad memories of the OAU peacekeeping mission in Chad in early 1980s.
The Sudan factor

Even if African leaders had the political will and the AU had the capacity to intervene in Sudan to protect the civilian population of Darfur, it would still find it difficult to make the decision and marshal regional, continental and international support needed for such an intervention.

Regionally, such an intervention will need the support of the Intergovernmental Authority on Development (IGAD). A decision by IGAD supporting such an intervention will have to be made by the IGAD Assembly of Heads of State and Government, which is chaired by President Yoweri Kaguta Museveni, who will not allow IGAD to make such a decision for reasons pointed out above. Were IGAD to make such a decision it would have to be implemented by the Executive Secretary, Dr Attala Hamad Bashir, who is Sudanese.

Continently, the AU would have to rely on the expert advice of the African Commission on Human and People’s Right (ACHPR) on matters relating to international human rights and violation of the African Charter on Human and People’s Rights. The ACHPR would not easily and expeditiously arrive at recommendations on violations of human rights in Sudan as its vice chairman is Yassir SA El Hassan, who is an official of the Sudan Ministry of Justice. The inability of the ACHPR to conduct an investigation of human rights violations in Darfur is now apparent as the resolution it adopted on 4 June 2004 to do so has yet to be implemented.

Were the ACHPR to come up with a report showing that human rights violations were taking place in Darfur and that urgent action was needed to protect civilians, that report would be presented to the PSC, the AU body with the responsibility of deciding on matters of intervention. The PSC has 15 members without veto powers. Sudan is a member of the PSC. However, it is an open secret in Addis Ababa that Sudan has ‘veto power’ on the PSC through its powerful Permanent Representative, Osman Said, who is the dean of the diplomatic corps and former head of the national intelligence service.

Sudan is also a member of the Bureau of the Assembly of the AU, the leadership body that includes Mali, Senegal, Burundi, Chad, Libya, Saharawi Arab Democratic Republic, Ethiopia, Botswana, Equatorial Guinea and Swaziland. The Bureau decides on important matters of the Assembly including the venue and the agenda.

Originally Sudan was supposed to host the AU Summit in July 2005 but this venue has been changed to Libya. However, Sudan will still host the January 2006 Summit. It is traditional that the country that hosts the AU Summit also assumes the organisation’s Chairmanship and it is most likely that Sudan would do so when it host the January 2006 Summit.

Internationally, an intervention in Darfur would have to get the Security Council’s stamp of approval, under article VIII of the UN Charter. Sudan has powerful friends, Russia and China, in the Security Council who are most likely to veto such a decision. Russia is the main supplier of arms to the Khartoum government while China has secured lucrative oil deals in Sudan.
It is apparent that the time has come for the role of the AU in Darfur to be evaluated, as the above facts have clearly pointed to one conclusion: It is time the UN Security Council assumed its primary responsibilities of maintaining peace and security in the whole of Sudan. The AU should be thanked for the role it has played so far and be asked to back out now with grace before things get messier.

The following report examines the capacity of African institutions on the continental, sub-regional, national and local levels to engage in peacebuilding activities. It recommends, among other things, the urgency of creating both state and non-state capacities to bolster work in conflict prevention, management and resolution.


Conceived as an organisation for promoting economic development, ECOWAS was untested in the 1970s when West Africa experienced relative calm akin to a Pax West Africana. Guinea-Bissau’s war of liberation ended in 1974, while brief border clashes between Burkina Faso and Mali in 1975 and 1985 were managed through local mediation efforts. However, insecurity began to loom large with the outbreak of the Liberian civil war in December 1989. In July 1990, invoking the Protocol on Mutual Assistance on Defense (1981), Liberian autocrat Samuel Doe requested ECOWAS to send a peacekeeping force to Liberia to end a civil war that had led to mass killings and massive refugee flows. ECOMOG’s intervention would profoundly change the security landscape in West Africa.

ECOMOG in Liberia, Sierra Leone and Guinea-Bissau

Liberia and Sierra Leone both endured almost a decade of civil wars that resulted in over 250,000 deaths and over one million refugees. Liberia’s civil war lasted from December 1989 to early 1997 and was mainly fought by eight factions. The Sierra Leone war lasted from March 1991 until a cease-fire in July 1999, and was fought between successive civilian and military governments in Freetown, in alliance with civil defense groups including local hunters, the Kamajors, against the RUF. It took 18 peace agreements (14 in Liberia and four in Sierra Leone) to end — at least temporarily — both conflicts. ECOMOG’s involvement in Sierra Leone’s civil war was inextricably linked to its eight-year peacekeeping effort in Liberia’s civil war.
In March 1991, the Revolutionary United Front (RUF) invaded Sierra Leone with the assistance of Charles Taylor’s National Patriotic Front of Liberia (NPFL). Several hundred Nigerian, Ghanaian, and Guinean troops were sent to Sierra Leone to defend the government. A second ECOMOG mission was established in Sierra Leone after Nigerian leader, General Sani Abacha, diverted peacekeepers from the successful Liberia mission to Sierra Leone in an attempt to crush a military coup by the Sierra Leonean army in Freetown in May 1997. They were later joined by contingents from Ghana, Guinea and Mali. The military junta invited the RUF to join its administration. Nigerian troops reversed the coup in February 1998 and restored President Ahmed Tejan Kabbah to power. However, the unsuccessful but devastating rebel invasion of Freetown in January 1999 showed that ECOMOG has been unable to eliminate the RUF as a military threat. In both cases, an ill-equipped and poorly funded ECOMOG has been unable to defeat the rebels in guerrilla warfare or prevent violations including rapes, killings, kidnappings and disarming of UN peacekeepers.

ECOMOG launched a third intervention into Guinea-Bissau between December 1998 and June 1999 to end the civil conflict between President João Vieira, backed by Senegalese and Guinean military forces, and his former army chief, General Ansumane Mane. The ECOMOG intervention involving troops from Benin, Gambia, Niger, and Togo, and funded entirely by the French government, failed to achieve its peacekeeping objectives and had to be withdrawn prematurely. The difficulties of peacemaking in Guinea-Bissau can be explained by three main factors. First, Guinea-Bissau’s two main protagonists, Vieira and Mane, were unwilling to settle their differences through peaceful means and sought to manipulate the support of external forces. Second, Senegal and Guinea were compromised as neutral peacekeepers and had to be replaced by troops from other West African states with no prior involvement in the fighting. But the size of ECOMOG’s contingent – 712 men – was insufficient to protect the capital from attack and to disarm the combatants, a situation exacerbated by its logistical weaknesses. Finally, though external actors like the UN, the World Bank, the EU and several bilateral donors supported some peacebuilding efforts in Guinea-Bissau, continuing instability in the country has made donors reluctant to deliver on most of the pledges made at a conference in Geneva in May 1999.

The ECOWAS security mechanism

The ECOWAS Mechanism for Conflict Prevention, Management Resolution, Peacekeeping and Security was adopted at the ECOWAS summit in Lomé in December 1999. The Mechanism expanded two previous subregional security initiatives: a Protocol on Non-Aggression signed in 1978, and a Protocol Relating to Mutual Assistance on Defense (MAD) in 1981. The first Protocol called on members to resolve their conflicts peacefully through ECOWAS. The second promised mutual assistance for externally instigated or sponsored aggression and called for the creation of an Allied Armed Force of the Community, consisting of standby forces from ECOWAS states. The Mechanism of 1999 was also shaped by ECOMOG’s experiences in Liberia, Sierra Leone and Guinea-Bissau. This Mechanism evolved out of the activities of ECOMOG’s
Standing Mediation Committee (SMC) established in 1990 following the outbreak of the civil war in Liberia.

The ECOWAS Mechanism of 1999 comprises six distinct bodies, designed to help contain and defuse impending conflicts. The first is the Mediation and Security Council, the main decision-making body on all matters concerning conflict prevention, peacekeeping, security and other areas of operation. It is made up of ten members who are elected to two-year terms. The second important body of the new Mechanism is the Defense and Security Commission, which examines all technical and administrative issues and assesses logistical requirements for peacekeeping operations. The Commission consists of military technocrats and advises the Mediation and Security Council on mandates, terms of reference and the appointment of Force Commanders for military missions. One pressing need of the ECOWAS Secretariat is to appoint more staff to oversee its Mechanism. Until recently, this responsibility fell largely on three overworked Legal Affairs officers. General Cheikh Diarra was appointed Deputy Executive Secretary for Political Affairs, Defense and Security in early 2001 and is in the process of increasing his staff.

The third body of the Mechanism is the Council of Elders, a group of eminent persons mandated to use their good offices in the prevention, management and resolution of conflicts. The Council of Elders is to consist of eminent persons from Africa and outside the continent, including women, traditional, religious, and political leaders appointed on an ad hoc basis. Seventeen of its thirty-two members met for the first time in Niamey, Niger, from 2 to 4 July 2001. The fourth body of the mechanism is the Executive Secretariat and particularly the Executive Secretary, who coordinates the activities of the various bodies of the Mechanism and the implementation of its decisions. The fifth body of the new Mechanism is the Early Warning Observation System, which collects and transmits data to the ECOWAS Secretariat on impending signs of conflict. Finally, ECOMOG, a body that will consist of standby forces from member states, is to be the peacekeeping and monitoring arm of the Mechanism. ECOWAS' new Mechanism also calls for improved co-operation among its members in the areas of early warning, conflict prevention, peacekeeping operations, cross-border crime, and the trafficking of small arms and narcotics. Many of these ideas were based on ECOMOG's experiences in Liberia, Sierra Leone, and Guinea-Bissau.

Since it has already undertaken three military missions, it is important to discuss ECOWAS' military arm in more detail. The ECOWAS Mechanism calls for the establishment of a brigade-size standby force, consisting of specially trained and equipped units of national armies, ready for deployment at short notice. The force’s main tasks involve observation and monitoring, peacekeeping, humanitarian intervention, enforcement of sanctions and embargoes, preventive deployment, peacebuilding operations, disarmament and demobilisation, and policing activities including anti-smuggling and anti-criminal activities. These were many of the tasks that ECOMOG performed in Liberia and Sierra Leone. The proposed subregional force is expected to embark on periodic training exercises to enhance the cohesion of the troops and the compatibility of equipment. It will undertake exchange programmes in West African military training institutions, as well as external training.
involving the UN and OAU. Four thousand troops from Benin, Burkina Faso, Chad, Côte d’Ivoire, Niger, Togo and Ghana took part in war games in the Burkinabé town of Kompienga and northern Togo in May 1998, with Nigeria involved in the military planning for these exercises.

The ECOMOG force is mandated to intervene in four cases: first, a situation of internal armed conflict within a member state; second, conflicts between two or more member states; third, internal conflicts that threaten to trigger a humanitarian disaster or pose a serious threat to subregional peace and security, and situations that result from the overthrow or threat to a democratically elected government; and fourth any other situation that the council deems ‘appropriate’. While the first two scenarios were included in the ECOWAS Protocol Relating to Mutual Assistance on Defense of 1981, the third scenario was a conscious effort to provide legal cover for future interventions, again, based on the Liberia, Sierra Leone, and Guinea-Bissau experiences. In Liberia and Guinea-Bissau, ECOMOG intervened by arguing that the situation posed a humanitarian disaster and a threat to subregional peace and security. In Sierra Leone, ECOMOG restored a democratically elected government to power after its overthrow by soldiers. The interventions in Liberia and Sierra Leone were controversial and questioned on legal grounds, even by some ECOWAS members.

The ECOMOG interventions in Liberia, Sierra Leone, and Guinea-Bissau exposed the logistical weaknesses of West Africa’s armies. For the foreseeable future, such logistical support will have to come from external donors until the subregion develops its own capabilities. The issue of financing is particularly important to the building of ECOMOG’s standby force. The ECOWAS security mechanism foresees troop-contributing countries bearing financial costs for the first three months of military operations, before ECOWAS takes over the costs. The initial agreement for the ECOMOG mission in Liberia was for each contingent to fund its own troops for the first month of the mission, after which time the full ECOWAS would assume responsibility for ECOMOG. But Nigeria ended up footing about 90 per cent of the costs (over US$1.2 billion) while francophone countries opposed to ECOMOG were unwilling to contribute to a mission they did not support. France entirely financed the ECOMOG mission to Guinea-Bissau. Under the ECOWAS security mechanism, a Special Peace Fund is to be established to raise revenue. Funding will be raised from member states, corporate bodies, the UN, multinational organisations, the OAU and the rest of the international community.

The three ECOMOG missions demonstrated the importance of securing financial support before embarking on an intervention. Such costs can prove a disincentive to future interventions in a subregion saddled with a crippling debt burden. OAU peacekeepers from Tanzania and Uganda withdrew from ECOMOG’s mission in Liberia in 1995 in large part because their financial and logistical needs were not being met. Other ECOWAS states, like Togo, declined to contribute troops to ECOMOG due to the costs of maintaining peacekeepers in Liberia. The Nigerian-led OAU intervention force in Chad between 1979 and 1981 was forced to withdraw largely because it lacked the funding and logistical support to sustain it. All these experiences underscore
the significance of financial and logistical support for future subregional efforts at conflict management.

The ECOWAS security mechanism has so far received funding from the AU and several donor governments. The OA U gave ECOWAS $300 000 for its deployments in Sierra Leone and Liberia. The European Union (EU) (2 million Euros), the US Agency for International Development (USAID) ($250 000) and the governments of the United Kingdom, Japan (US$100 000) and Germany have also made contributions in support of the ECOWAS security mechanism. Canada has contributed $300 000 for the establishment of an ECOWAS Child Protection Unit. The government of the Netherlands has also expressed an interest in funding the mechanism.

Beside ECOWAS, the Mano River Union (MRU), comprised of Guinea, Liberia, and Sierra Leone also works to resolve conflict in the region, through the Joint Security Committee (JSC), which was created at the Summit of MRU Head of State in Conakry in April 2000. The JSC Committee was born out of the need to address the deteriorating security situation along the borders of the three MRU states. The JSC consists of a Technical Committee and a Border Security, and Confidence-Building Unit, with a mandate to address and monitor joint security and border issues. One of the first tasks undertaken by the JSC was to investigate the persistent cross-border incursions between Guinea and Liberia. However, since the conclusion of this investigation, the MRU states have not been able to implement the recommendations made by the JSC, as the security situation along the borders between Liberia and Guinea has deteriorated and tensions between the two countries have increased.

A further factor complicating the resolution of the Liberia/Guinea conflict is the fact that members of the JSC are parties to the dispute. More fundamentally, political differences among ECOWAS member states, relating to disagreements over conflict management strategies, continue to test the capacity and resolve of ECOWAS to address conflicts in the subregion. ECOWAS leaders have often not spoken in unison on these issues. Although ECOWAS appeared at first to support a plan by the international community to impose sanctions on Liberia in 2001 in order to deter its support for Sierra Leonean RUF rebels, it later called for a two-month moratorium before such sanctions could be imposed. Following the imposition of sanctions on Liberia by the UN Security Council in May 2001, some ECOWAS leaders have publicly questioned the wisdom of punishing Charles Taylor while seeking his cooperation for the disarmament of RUF rebels in Sierra Leone. We next turn to the role of SADC in managing regional conflicts.

The Southern African Development Community (SADC)

An understanding of the role of the Southern African Development Community in responding to conflicts and crises is impossible without recognising a key feature of security in this subregion: the overwhelming military and financial preponderance of South Africa. SADC’s predecessor, the Southern African Development Co-ordination Conference (SADCC), was established in 1980 specifically to counter the economic, military and political dominance of South Africa. While its creation symbolically signaled a shift from defence
against apartheid to regional co-operation, the specter of South African economic and military power continues to affect the dynamics within SADC.

SADC set itself an ambitious regional development agenda: working toward creating a free trade area; establishing frameworks to ensure macroeconomic stability; facilitating financial and capital markets; encouraging public-private partnerships (PPPs); and building regional infrastructure. Thus far, this commitment has remained largely rhetorical. While some progress has been made on bilateral (and in rare cases multilateral) co-operation on specific issues (such as aspects of cross-border policing), progress toward regional integration remains minimal. The entire SADC Secretariat currently stands at only 50 persons — this includes professional and support staff. SADC is therefore clearly both understaffed and overstretched. Only about five officers are directly involved in SADC’s security work. The organisation envisaged that, after the completion of an ongoing restructuring process, its staff would be increased to 200 people. But this is more a medium- to long-term goal. In the short term, SADC is aiming to increase its staff to 60 people. On the issue of funding, SADC member states, through the SADC Fund and other regional funds, are responsible for the operational costs of its Secretariat. As with other regional organisations in Africa, however, SADC members do not always pay their dues on time or in full, and 80 per cent of SADC funding comes from external donors, largely from the European Union (EU).

The SADC Organ on Politics, Defense and Security

Since its creation in 1996, the SADC Organ on Politics, Defense and Security (OPDS) has not achieved much in terms of promoting collective security in the region. Its strategic vision on how to address the insecurity facing southern Africa is still undefined, and it has been wrecked by divisions among its members. The organ remains captive to the political rivalry between South Africa and Zimbabwe, countries which represented the two opposing conceptions of the functioning of the organ. Zimbabwe felt that incorporating security within the SADC Secretariat in Botswana, rather than leaving it as a specialised task for the chair in Harare, would divert the organisation’s attention from its main objective of economic development and integration. In contrast, South Africa argued that the organ should be placed within the structure of the SADC and run by the SADC chair.

These differences have paralysed the operation of the OPDS. At the SADC summit in August 1997, President Nelson Mandela of South Africa, then acting Chairman of the organisation, threatened to resign from the SADC chairmanship if the OPDS was not brought under the central SADC chair. This dispute between Mandela and Zimbabwe’s President Robert Mugabe, who had held the chair of the SADC organ since its creation, led the SADC summit to suspend the organ. SADC leaders then appointed a committee composed of a ‘troika’ of Malawi, Mozambique and Namibia to identify a suitable solution to this problem. The SADC Treaty provides little direction in resolving this problem since it does not contain any details about the nature and functioning of a security organ. Since 1997 SADC has struggled to find a solution to this impasse. Two main proposals emerged: first, to transform the organ into separate committees and work on an ad hoc basis to integrate the organ into
the SADC framework under a deputy chairperson from one of the troika countries; and second, to operate the organ on the basis of specific protocols signed by member states. The SADC summit held in 2001 finally rotated the chairmanship of the organ from Zimbabwe to Mozambique.

With the paralysis of the organ, SADC’s Interstate Defense and Security Committee (IDSC), established in the mid-1980s, often coordinated SADC’s security efforts. SADC leaders proposed the establishment of a brigade-level standby force to which member states would contribute with units and Headquarters staff to intervene in regional conflicts. But progress on this issue has remained stalled. SADC states did, however, undertake joint military exercises called ‘Operation Blue Crane’, funded by EU states. SADC has also undertaken police operations involving Mozambique, South Africa, and Zambia.

The SADC organ needs to be operationalised and strengthened if the organisation is to play an effective role in conflict management. Dealing with security requires addressing three main issues. First, a common vision of security must be nurtured and strengthened within SADC. This can be facilitated through the signing of defence and non-aggression pacts, promoting the protection of human rights, having a moratorium to limit arms smuggling, and creating pacts for environmental protection and the protection of vulnerable groups during conflicts. Second, the region needs to embark on institutional development at both national and subregional levels to implement and monitor the various accords established by SADC. Finally, SADC must set priorities, establish a programme of action in security matters, and draw up a calendar to be ratified by national governments.

**South Africa: The giant on the Limpopo**

South Africa has the largest, most diversified and advanced economy in the region with a GDP three times that of Nigeria and Egypt. It possesses a modern financial and industrial sector with excellent infrastructure and accounts for some eighty per cent of the region’s economic output. Trade flows between it and the rest of Southern Africa are disproportionately in Pretoria’s favour at a ratio of four to one. South Africa possesses the fourth largest electricity utility in the world, ESKOM, and accounts for sixty per cent of Africa’s electricity generation. Its military is larger and better equipped than that of any of its neighbours, although military sophistication should not be confused with military readiness, as South Africa’s intervention in Lesotho in 1998 clearly demonstrated.

The Southern African Customs Union (SACU), which supplies some of its members with almost 50 per cent of their government’s revenues, will be undermined by the newly negotiated Free Trade Pact between South Africa and the EU. Notably, Botswana, Lesotho, Namibia and Swaziland will lose 3.5 billion Rand a year. The South Africa/EU pact could also have a fundamental bearing on SADC, forcing states to make substantial adjustments to cope with the new trade regime. Some analysts argue that the likely negative economic spin-offs of the agreement for Southern Africa may make it more difficult to negotiate equitable SACU and SADC economic relations. This situation has generated tension between South Africa and its neighbours, most of whose
economies depend overwhelmingly on Pretoria. SADC states are vulnerable to the penetration of South African capital, particularly since its democratic transition between 1990 and 1994.

This economic dominance tends to undermine a spirit of subregional co-operation within SADC, with other states expressing skepticism about Pretoria’s professions of not wanting to bully or dominate its neighbours. In the case of relations between South Africa and Zimbabwe, SADC’s second largest economy, tensions emanating from the failure of Nelson Mandela’s government between 1994 and 1999 to renew an existing existing bilateral preferential trade agreement contributed to an atmosphere of tension that spilled over into disputes over the chairmanship of SADC. It remains to be seen if the SADC Trade Protocol, establishing an asymmetrical Free Trade Area within the region, can help reverse the economic imbalances feeding such tensions. The resulting tensions between South Africa and its neighbours have complicated the attempt by this subregion to co-operate in managing and resolving conflicts that have affected its member states in places like Angola, DRC and Lesotho. SADC continues to confront problems in its efforts at extending democracy, maintaining peace, and strengthening weak states. In recent times, attempts to address these challenges have tended to highlight divisions and rivalries among SADC members. South Africa has also experienced challenges from regional rivals like Zimbabwe and Angola.

**SADC: A house Balkanised?**

Southern Africa is a deeply divided subregion, a situation that threatens stability in the SADC subregion. These tensions and threats have forced SADC to prioritise political co-operation and conflict resolution over economic integration. The most striking example is the war in the DRC, following its admission to SADC in 1997, which has polarised SADC. Although SADC states remain theoretically committed to co-operation, their solidarity and cohesion is frayed and may be beyond repair, at least in the short term. The conflict in the DRC has split SADC into at least three groupings.

The first group consists of countries seen as the proponents of democracy in SADC: South Africa, Botswana, and Mozambique. Apart from their democratic credentials, these states are bound by close economic relationships. While this group of states has as its objective the promotion of democracy, respect for human rights and the political settlement of disputes, their pursuit of these goals is inhibited by fear of dominance by South Africa and the failure to build an effective regional coalition. These states declined to support military engagement in the Congo, arguing that only an inclusive political settlement could resolve the conflict, a theme often repeated by Pretoria in its response to African conflicts. However, South Africa and Botswana intervened militarily in Lesotho in 1998, reviving, despite Botswana’s participation in the exercise, fears of South Africa’s ‘giantism’ and accusations of ‘double standards’ from rival SADC camps, given Pretoria’s refusal to intervene militarily in Congo.

The second group of countries consists of Zimbabwe, Namibia, and Angola — states that intervened militarily in the DRC to prevent the toppling of Laurent Kabila by Ugandan- and Rwandan-backed rebels in 1998. These three
countries seem to be united by what they perceive to be the continuation of South Africa’s apartheid policies. This is illustrated by Zimbabwe’s claim that after ten years of fighting in Mozambique alongside Frelimo against the apartheid regime, South Africa is reaping the benefits of peace by securing large investments in that country. Mugabe has also attempted to maintain his subregional influence, which he felt was threatened by the emergence of a black-led government in South Africa in 1994. Even after the assassination of Laurent Kabila in 2001, Mugabe embraced Joseph Kabila and continued to exercise significant influence in the DRC.

As further evidence of the balance-of-power politics that continues to play itself out in the southern and central African subregions, Angola has a strong security interest in opposing South Africa’s foreign policy. Despite the strong ties between the African National Congress (ANC) and Angola’s ruling MPLA, built up during the years of struggle against apartheid, bilateral relations between Pretoria and Luanda since South Africa’s 1994 elections have been less cordial than expected. The Movimento Popular de Libertasão de Angola (MPLA) saw the continuation of the supply of arms from South Africa to territory held by União Nacional pela Independencia Total de Angola (UNITA) as a betrayal, and this has been a source of tension between the two governments. Contrary to the widespread belief that Angola’s concern in the DRC related exclusively to its security, there are clear indications that economic interests are high on the agenda: Angola, whose troops occupy the oil towns on the DRC’s coast, has formed a joint oil-exploration company with the Kinshasa government called Sonangol-Congo. Namibia’s involvement in the DRC war is based on its close security and political relationship with Angola and Zimbabwe forged during the struggle for independence in all three countries.

The third group of states in SADC comprises ‘neutral’ SADC members: Zambia, Tanzania, Mauritius, Seychelles, Lesotho, Swaziland, and Malawi. Mauritius and Seychelles do not feel the direct impact of the conflicts in the subregion. Malawi, Lesotho, and Swaziland are too small militarily, financially, and in terms of human resources to be able to play an influential ‘balance-of-power’ role in SADC. Zambia and Tanzania share borders with the DRC and are directly affected by the conflicts. Though Zambia was reported to have provided free passage to pro-Kabila rebels, enabling them to attack areas in Southern Congo during the first rebellion that ousted Mobutu in 1997, Lusaka has since refused to take sides in the conflict. Former Zambian leader Frederick Chiluba emerged as a key mediator in the conflict. Three reasons best explain this situation. First, Chiluba was constrained from supporting Kabila, as his domestic political opponents could have linked such support to his perceived Congolese origins. Second, the Chiluba government was keen to maintain Zambia’s international prestige built up during Kenneth Kaunda’s 27 year leadership. Third, Chiluba recognised that the DRC war would be long, costly and unsustainable. With Angolan president Eduardo Dos Santos accusing Zambia of aiding late UNITA leader Jonas Savimbi in Angola’s civil conflict, the relationship between Luanda and Lusaka was another weak link in SADC’s security chain.

The interventions by SADC states in the DRC and Lesotho and their non-intervention in Angola have revealed fundamental differences of perception
and conduct in the security arena within SADC. Interveners in Congo and Lesotho have claimed that their interventions were legitimised by SADC. But in both cases, there were disputes over SADC legitimisation of the interventions. The two military interventions highlight SADC’s weakness as a guarantor of peace and security in the subregion. For many observers, this confirms the fear that SADC’s Organ on Politics, Defense and Security can be used as a political tool by subregional leaders to pursue their own narrowly-defined interests.

Several SADC states portrayed the Angolan conflict as a clash between ‘good’ and ‘evil’, between an elected MPLA government committed to peace and UNITA, a recalcitrant guerrilla movement. In reality, the conflict was one between two elites, one of which (the MPLA) has a near monopoly on oil, while the other (UNITA) had a seemingly unlimited supply of diamonds. The epicentre of this conflict repeatedly spilled over Angola’s borders. SADC’s inability to contain or resolve the conflict until Savimbi’s death in February 2002 had threatened subregional stability.

**Challenges for conflict resolution and peacebuilding**

Conflict over water resources in Southern Africa remains a potential source of future conflicts because water is in short supply even as the subregion is experiencing increasing population growth. Already Namibia and Botswana are engaged in serious disputes over shared water sources. South Africa uses some 80 per cent of water consumed in Southern Africa. Pretoria also shares many rivers with neighboring countries, thereby increasing the potential for future conflicts. A further source of conflict — over gemstones — might emerge in SADC. Diamonds cross the Angola-Zambia border with impunity and are, for some informal dealers, a key source of income. Here, and perhaps in other areas of economic activity, efforts at more effective control could lead to conflicts between states and could also involve diamond traders. The security environment in Southern Africa remains fluid, and the DRC conflict remains the greatest challenges confronting SADC and its embryonic security architecture. Joseph Kabila’s succession to the leadership of the Kinshasa government following his father’s assassination in January 2001 has presented the greatest challenge to the subregion. Although withdrawals of foreign troops from areas in the DRC have begun and UN peacekeepers have been deployed, there remains uncertainty about the commitment of the government in Kinshasa and other parties to implement the Lusaka accord of 1999. Without the backing of Angolan, Zimbabwean and Namibian troops the balance of military power in Congo would shift to the Rwandan-backed faction of the RCD and to the Ugandan-backed faction of Jean Pierre Bemba’s Congolese Liberation Front (FCL). The UN report detailing the plundering of the DRC’s resources by Rwanda and Uganda, and Ugandan leader Yoweri Museveni’s threat to opt out of the Lusaka peace process, further complicated the peace process in the DRC. The FCL appears to have strengthened its position with its reported pact with the Mai Mai aimed at policing and pacifying the DRC’s Northeastern border with Uganda, Rwanda and Burundi.

Ironically, the improving prospects for peace in the Congo are not a guarantee of regional stability. This is particularly true in the case of the Congo’s neighbours, Rwanda and Burundi. If peace breaks out in the Congo, rebels
from both countries fighting in the DRC are likely to take their wars back home so that ‘any Congolese deal could spell trouble for Congo's smaller neighbours’. This carries the unsettling possibility of destabilising both countries and leading to a regional conflagration. This situation would seem to require a need to link the Lusaka peace process to that of the Central Africa and Great Lakes regions.

An accelerated peace process in the DRC should enable Zimbabwe to undertake an honourable exit from a commitment that has exacerbated that country’s economic decline. But it is not clear whether bringing the troops back home would contribute to or detract from Zimbabwe’s internal tensions. The genuine land issue in Zimbabwe has been manipulated by the ruling ZANU–PF as a way of remaining in power at all costs. It does appear though that SADC is gradually disengaging from Mugabe’s leadership by its decision in 2001 to rotate the chairmanship of the SADC Organ on Politics, Defence and Security and to replace Zimbabwe with Mozambique. Continuing instability in Zimbabwe following controversial elections in March 2002, which saw Mugabe retain power, are a continuing source of concern.

The Economic Community of Central African States (ECCAS)

Recognising the need to co-operate to solve common problems within a wider subregional grouping, the member states of the Central African Customs and Economic Union created in 1981, and of the defunct Economic Community of the Great Lakes States (CEPGL), combined to establish the Economic Community of Central African States in 1983. Conceived as a tool to pursue economic development, promote regional co-operation and establish a Central African Common Market, ECCAS brought together eleven countries: Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Rwanda, and São Tomé and Principe. In an attempt to address the perennial conflicts in Central Africa, ECCAS leaders decided to create an Early Warning Mechanism in 1996. At a meeting in Libreville in 1997, called to discuss the political crisis in what was then Zaire, ECCAS leaders proposed the idea of an interstate security co-operation mechanism for the prevention and management of conflicts in the subregion. The aim of the mechanism was to establish a legal and institutional framework to promote and strengthen peace and security in Central Africa. Thereafter the Conseil de Paix et de Securité de l’Afrique Centrale (COPAX) was established under the auspices of the UN standing committee for Security Questions in Central Africa. COPAX had a dual mandate: to prevent, manage and resolve conflicts in Central Africa; to undertake any necessary action to deal effectively with political conflicts; and to promote, preserve and consolidate peace and security in the subregion.

Over the years, however, technical problems associated with creating ECCAS’s structures, coupled with the pursuit of narrow national interests, have blocked the effective operation of the security mechanism. ECCAS members, for instance, do not agree on the relationship between ECCAS, COPAX and its Early Warning Mechanism. Some states argue that since ECCAS is a weak organisation, the security mechanism should be an independent body, while others advocate that the mechanism work within existing institutions. This suggests a general lack of political will among countries in a
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region afflicted by conflicts. The political and security environment in Central Africa has made it difficult for ECCAS to become institutionalised as a regional organisation. States in the subregion have responded to this failure by seeking membership in alternative subregional organisations. For instance, the DRC is a member of SADC, while Burundi and Rwanda have applied to join the East African Community. Any revitalisation of ECCAS would have to resolve how to deal successfully with multiple memberships of regional organisations, a phenomenon that is not peculiar to this subregion.

The Common Market for Eastern and Southern Africa (COMESA)

Established in 1994, the Common Market for Eastern and Southern Africa was the successor organisation to the Preferential Trade Area for Eastern and Southern Africa. COMESA is currently Africa’s largest intergovernmental organisation, with twenty members: Angola, Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. COMESA seeks to create a fully integrated and competitive region where goods, services, capital and people move freely. But the organisation has increasingly acknowledged the importance of peace and security as critical components in regional integration. COMESA is currently developing a peace and security policy to enhance its overall objectives. At its fourth summit in August 1999, COMESA decided to deal with the many devastating conflicts among its member states without compromising its agenda of economic development and subregional integration or duplicating the work of other organisations.

The COMESA summit in 2000 linked the issue of sustainable development to peace and security. This meeting discussed the resources needed to address the causes of conflicts, and sought to draw lessons from other subregional organisations in Africa engaged in various aspects of conflict management. Before designing their strategy, COMESA leaders requested its secretariat to develop a co-ordination mechanism with the OAU and Africa’s subregional organisations and to recommend a division of labour and responsibilities between different subregional institutions in order to avoid duplication of tasks. COMESA leaders insisted during its 2000 summit that other stakeholders, including NGOs, civil society, the business community, and parliamentarians, be involved in the development of a viable security policy in East and Southern Africa. This initiative led to the first COMESA Workshop on ‘The Role of the Private Sector, the NGOs and the Civil Society in the Promotion of Peace and Security in the COMESA Subregion’. Recommendations from this workshop form an integral part of the COMESA policy on peace and security.

In order to execute its policy, COMESA developed a three-tier structure consisting firstly of the Bureau, made up of Heads of State and Government, as the supreme policy organ responsible for peace and security issues. The second body, the Bureau of Ministers of Foreign Affairs on Peace and Security, meets once a year to consider ways of promoting peace and security in the COMESA region. Under the rules and procedure of the Authority, the Bureau of Ministers is to carry out the function of conflict prevention and resolution. It performs these tasks taking into account the need to consult the Central
Organ of the OAU/AU Mechanism for Conflict Prevention, Management and Resolution and other African subregional organisations. COMESA’s Council of Ministers is its second highest policy organ and makes policy decisions on its programmes and activities, including monitoring and reviewing its financial and administrative management. The third body, the Committee of Officials on Peace and Security, comprising high-level officials of regional Ministries of Foreign Affairs, meets regularly to ensure the effective discharge of COMESA’s security responsibilities.

The COMESA secretariat initiates actions, convenes meetings and utilises information from non-governmental sources in its security work. The secretariat undertakes research and studies as a basis for implementing the decisions adopted by its policy organs. COMESA’s Secretary-General, assisted by two Assistant Secretaries-General, directs its security operations. The Office of the Secretary-General includes the Legal and Institutional Affairs Division, a Strategic Planning and Research Section, a Public Relations Unit, and an Audit Section. A consultant has been hired to undertake the COMESA Peace and Security Study with the assistance of a legal adviser. As the policy on peace and security is fairly new and still awaiting further input from other actors such as parliamentarians, there is no staff in the COMESA secretariat responsible solely for peace and security issues. A major challenge for COMESA is to begin to operationalise its peace and security policy. It will need urgently to increase its staff to achieve this goal. The organisation’s security mechanism is still very much a work in progress.

The Intergovernmental Authority on Development (IGAD)

The Intergovernmental Authority on Drought and Desertification (IGADD), comprising Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda, was established in 1986. Eritrea joined after its independence in 1993. Initially IGADD was established to act as an early-warning mechanism for alerting the international community of impending humanitarian emergencies and to coordinate resources in responding to crises on the Horn of Africa. Cooperation was thus confined to issues of drought, desertification and food security. IGADD avoided addressing issues related to military security, then conceived as a prerogative of individual states and, therefore, as falling outside the arena of collective action. However, as insecurity continued to curtail economic, social and political developments, IGADD member states started to confront these problems collectively. Out of these efforts emerged a decision to begin to transform the security architecture in the subregion. In March 1996, subregional leaders signed an agreement transforming IGADD into the Intergovernmental Authority on Development (IGAD). The organisation’s mandate was expanded to include conflict management, prevention and resolution. Under the new agreement, IGAD prioritised the pursuit of peace and security, and had as its principal aim the maintenance of peace, security and stability on the Horn of Africa. Specifically, the agreement provided for: the creation of a subregional mechanism for the prevention, management and resolution of inter- and intrastate conflicts through dialogue; and collective action to preserve peace, security and stability, defined as an essential prerequisite for economic development and social progress. The agreement proposed dealing with conflicts by eliminating threats to security; called for the establishment of a mechanism for
consultation and co-operation for the pacific settlement of disputes; and agreed to deal with disputes among member states within the subregion before referring them to other regional or international organisations. Demonstrating unprecedented political commitment, IGAD states pledged themselves to resolving outstanding security problems and conflicts, and to preserving subregional stability.

In seeking security and peace, IGAD pursued a dualtrack approach. To deal with conflicts likely to polarise the organisation, IGAD often creates semiautonomous ad hoc mechanisms, outside of its Secretariat, which are then mandated to deal with a particular issue. The secretariat on the Sudan Peace Process, based in Nairobi, is one such mechanism. The process that led to the restoration of a transitional government in Somalia in 1999 was another such mechanism. IGAD’s second peacemaking track revolves around its secretariat in Djibouti, which addresses issues on which its members have forged a consensus, such as the establishment of a Conflict Early Warning and Response Mechanism (CEWARN) (discussed below), a campaign against small arms, and a diverse range of humanitarian issues.

The Sudan peace process

In 1993, IGAD leaders established a Standing Committee of Foreign Ministers of Eritrea, Ethiopia, Kenya and Uganda to draw up an agenda and programme of work for a negotiated peace settlement in Sudan. The following year, Kenya was mandated to chair this committee and led the drafting of the Declaration of Principles (DOP), adopted by the parties as a basis for negotiations. However, the effective working of this committee was stalled by disputes over the question of the separation of state and religion and the right to self-determination of the South. This stalemate continued until 1997 when IGAD convened an extraordinary summit to revive the peace process. This meeting led to several positive developments, four of which are particularly significant. First, the IGAD Partners Forum (IPF), composed of Norway, the United States, Canada and the EU, agreed to fund the peace process. Second, the parties to the conflict committed themselves to the self-determination of the South within an (unspecified) interim period, supervised by international observers. Third, both sides agreed to facilitate the free and unimpeded flow of humanitarian assistance to areas affected by famine. Fourth, it was agreed that the boundaries of southern Sudan would be set at those existing on 1 January 1956. However, the parties in Sudan disagreed over the interpretation of the Declaration of Principles, stalling the implementation of the peace accord.

To ensure continued engagement with the parties to the conflict, IGAD leaders established a secretariat for the Sudan peace process, otherwise referred to as the Nairobi Secretariat, in 1999. Seeking to engage at both political and technical levels, the secretariat created two committees: a political committee that seeks to reach a political settlement, and a transitional committee to deal with interim arrangements prior to the exercise of self-determination by southern Sudan.

In spite of these initial steps, the ability of the Nairobi Secretariat to resolve the Sudan conflict is limited by several constraints. Among the greatest
challenges is the lack of expertise within the committees to interpret the technical details of areas of agreement and points of difference in the Declaration of Principles. Particularly problematic are issues related to: the relationship between the state and religion; the delineation of borders; self-administration; and the sharing of wealth and power. For instance, in the first meeting that explored the question of wealth-sharing, agreement was reached about an equitable distribution of resources between North and South Sudan. However, this plan was never fully elaborated and led to two contradictory interpretations by both sides. The position of the Sudan Peoples Liberation Army/Movement (SPLA/M) is that there should be a halt to the drilling of oil. The government of Sudan, which refuses to cease oil drilling, prefers to share the proceeds from oil exploration with the SPLA, an offer the latter rejects. Any further negotiations will require assisting the parties to reach a common interpretation and understanding of this issue.

The Nairobi secretariat receives limited support from Djibouti and relies on third-party support, in particular the IGAD Partners Forum. However, resources have been insufficient, averaging $1 million between 1999 and 2000. This lack of funding has greatly limited the secretariat’s activities. Although the IGAD Partners Forum reiterated its support for the Sudan peace process in June 2000 (Oslo) and March 2001 (Rome), it failed until April 2002 to provide substantial funds to the process. Responding to this constraint, IGAD leaders have agreed to allow the secretariat to undertake its own fundraising.

In addition to being cash-strapped, the Nairobi secretariat has to contend with an inflexible structure in using its available funds. IPF funds are earmarked for costs related to facilitating meetings and cannot be used for any activities. These funds cannot pay for resource persons, consultations, and gathering of information, all necessary for IGAD’s preparatory work. Nor can such funds be used for diplomacy or for negotiations before and after meetings. This type of funding limits the operations of the secretariat which, owing to its limited capacity, must depend on contracted resource persons. Furthermore, this situation denies the secretariat the flexibility it needs to take advantage of opportunities in the Sudan peace process. The short-term disbursement of funds, in periods of between three to six months, further accentuates the effects of limited resources.

Institutionally, the Nairobi secretariat lacks structures to support negotiations. It comprises three core staff: the special envoy and two rapporteurs. While IGAD ambassadors in Nairobi and advisers from the countries designated to guide the peace process also support the core staff, their input is small. Further, co-ordination is poor between the IGAD secretariat in Djibouti and the Nairobi secretariat. IGAD procedures require that the Special Envoy report to IGAD Foreign Affairs ministers, who then report to the IGAD Council and Summit, leaving the secretariat out of the chain of command. The disbursement of funds for the Nairobi Secretariat also comes through Djibouti, creating major tensions between the two institutions.

The secretariat needs to have funds for core expenditure, in particular to pay the salaries of its main staff. In June 2001, staff had not received salaries for
five months and their morale was very low. Resources are also required to enable the Special Envoy to travel and mobilise support for the peace process. Currently, the Secretariat is in need of experts to advise on borders, on models of governance such as federalism or confederacy, and on the sharing of resources. Such a pool of experts would make it possible for the secretariat to put together a variety of consultants who can, at short notice, undertake studies and in-depth analyses of issues.

Seeking peace and reconciliation in Somalia

Following the failed international effort to restore peace to Somalia in the early 1990s, responsibility for ending the Somali civil war increasingly came to rest on subregional actors. Compared to the Sudan peace process, the Somali process was fluid and less structured. However, this process did reveal the potential of state and civil society actors playing complementary peacebuilding roles. Between 1991 and 1998, a dozen failed attempts were made to restore peace to Somalia. Finally, in October 1998, in co-operation with the IGAD Forum Partners Liaison Group, IGAD member states created a Standing Committee on the Somali peace process, chaired by Ethiopia. Based on the format of the Sudan peace process, this committee was mandated to organise a peace process in Somalia by providing a consultative forum for negotiations aimed at reconciliation and restoration of a government in Somalia.

The ensuing process involved initial consultations among state and intergovernmental actors, namely IGAD, the Arab League, the OAU and the UN, as well as a broad spectrum of Somalis including clan leaders, Muslim clerics, warlords and members of civil society. From March through to May 2000, a series of consultations with Somali intellectuals, professionals, former politicians and representatives from the business community was organised in Djibouti by IGAD. The last of these meetings involved 200 Somali traditional leaders and 100 women delegates. The Somali National Peace Conference took place on 4 June 2000, in Arta, Djibouti. This meeting identified arms control, disarmament of militias, restoration of looted property, and determining the status of Mogadishu as priority issues. Special committees were created to address each issue. By the time the national peace conference ended on 13 August 2000, a Transitional National Assembly (TNA), composed of 245 members, had been established. A week later, members of the TNA elected Mr. Abdul-Kassim Salat Hassan as president of Somalia. After his inauguration in Djibouti, Salat moved his government to Mogadishu. Shortly thereafter, a new legislative assembly and a cabinet were formally established. The government continues to face serious difficulties, including the challenging of its authority by warlords controlling different areas in Mogadishu and the non-participation of representatives from Somaliland and Puntland. Despite these problems, Somalia was readmitted to IGAD during its November 2000 summit.
The IGAD Conflict Early Warning and Response Mechanism (CEWARN)

The IGAD secretariat’s work in the peace and security field is located in two divisions, namely the Conflict Prevention, Management and Resolution (CPMR) division and the Humanitarian Affairs division. Four critical projects have emerged within the CPMR since 1996. The first, focusing on the strengthening of capacity within the IGAD secretariat and of key actors within member states, is funded by the EU and the government of Sweden. The second project deals with demobilisation and post-conflict reconstruction, including the control of illicit trafficking in small arms and light weapons. Conducted in partnership with Saferworld, this activity is funded by the UK’s Department for International Development (DFID) to the tune of 300 000 pounds sterling. The third project seeks to promote a culture of peace and tolerance on the Horn of Africa. The fourth, and by far the most developed project, is the development of IGAD’s Conflict Early Warning and Response Mechanism, which requires closer scrutiny.

Keen to address crises before they erupt into full-blown conflicts, IGAD Heads of State mandated the secretariat in Djibouti to establish a Conflict Early Warning and Response Mechanism in 1998. Following this decision, the secretariat contracted the Forum on Early Warning and Early Response (FEWER) as its partner in March 2000 to establish the mechanism. This process led to three CEWARN workshops. The first, held in July 2000, drew participants from a wide range of state and nonstate actors and discussed conceptual issues related to developing the early warning system. A decision was reached to contract consultants from all IGAD states to reflect on the recommendations from the workshop. The consultants were mandated to: identify national systems of early warning and conflict management; assess their strengths and weaknesses; and examine the possibility of linking such systems to similar mechanisms at the subregional, regional, and international levels.

The findings from the country-based studies were discussed at the second CEWARN workshop held in September 2000. Among the significant outputs of this meeting was the identification of four entry focus areas for IGAD’s early warning work: pastoral communities and cattle rustling; small arms and environmental security; peace processes; and civil society. The meeting agreed to locate national early warning systems in each country’s Ministry of Foreign Affairs. An examination of the agreement establishing IGAD revealed two principal problems: First, the treaty does not link CEWARN to other regional and early warning systems; and second, there is no clear decision making process within both the IGAD secretariat and the CEWARN mechanism itself. The September 2000 meeting recommended engaging a team of legal experts to examine and draw lessons from other early warning mechanisms, and to inform IGAD governments about the legal and institutional issues related to the establishment of CEWARN. The meeting also recommended the drafting of a Declaration of General Principles on the establishment of CEWARN and a protocol on early warning.

The third IGAD workshop on this issue was held in October 2000 and discussed both the Draft Declaration of Principles as well as the Draft Protocol on CEWARN. The meeting established a Bureau to facilitate the adoption of the
CEWARN programme and a Draft Declaration and Protocol on CEWARN. The proposed CEWARN protocol was discussed by IGAD’s Council of Ministers and signed at its summit in January 2002. Still in its infancy, the IGAD early warning system faces two critical challenges: shaky political will and lack of technical capacity. Given that a CEWARN system will be based on the availability of information, some of which is sensitive, there is no provision for dealing with a state that is unwilling to facilitate the collection of relevant information. The chances of the mechanism succeeding depend almost entirely on the political cooperation of member states. Aside from the issue of political cooperation, IGAD’s early warning system also lacks much of the infrastructural support and technical capacity needed to collect and analyse relevant information and disseminate such information to its members. The CEWARN process has been funded by the US and German governments to the amount of $700 000.

The East African Community (EAC)

In November 1999, the Heads of State of Kenya, Uganda and Tanzania signed the treaty that reestablished the East African Community, which entered into force in July 2000. The three East African countries have a long history of regional cooperation dating back to the colonial period. Most significant among these organizations was the East African Community, which collapsed in 1977. The new treaty of 2000 was driven largely by the economic imperative to ‘improve the standard of living of the population by facilitating an adequate and economically, socially and ecologically sustainable development process ... that allows an optimal utilisation of the available resources’. But the EAC also recognized that security and political stability are a prerequisite for sustainable development. Cooperation was partly conceived by EAC leaders as a strategy for conflict prevention. In their view, regional integration is a vehicle for regional peace. The ultimate aim of EAC cooperation is the establishment of a political federation to ensure ‘a peaceful neighborhood’. Underpinning the EAC treaty is the notion that economic prosperity and regional integration will have the multiplier effect of reducing the possibility of conflict and enhancing security. Hence, a number of provisions in the treaty cast the EAC as an instrument of regional peace and security.

Security cooperation in the EAC

A Memorandum of Understanding on Common Defence and Security issues was drafted by EAC leaders in April 1998. At the time, it was thought that this memorandum could develop into a military pact. However, citing constraints relating to command structures and procedural irregularities, the Heads of State suggested that defense matters were best left for the last phase of cooperation. Nonetheless the EAC secretariat in Arusha, Tanzania has engaged in a range of confidence-building measures in the security sectors of its three members. While the Heads of State were reluctant to undertake common defense initiatives, they allowed the creation of a Defence Liaison unit within the secretariat, manned by three military defense attaches from each country. In 2000, EAC leaders signed a Memorandum of Understanding on Interstate Security, calling for the establishment of border committees.
between countries that experience cross-border clashes. EAC leaders have also called for harmonising policies on the treatment of refugees.

The EAC secretariat has facilitated regular visits by military personnel and has undertaken joint military training and exercises between its members. Together, these activities have introduced minimal elements of common procedure among armies with different histories. For instance, a series of joint natural fires training sessions organised in 1999, 2000 and 2001 enhanced the sharing of experiences and generated case studies to guide responses to disasters and to improve civil-military relations. The Defence College in Karen, Kenya, which trains senior officers from a number of countries in East, Central and Southern Africa, has introduced peacekeeping into its curriculum. For students from EAC countries, such training is useful for common operations and creates the possibility of the subregion contributing a regional force for future peacekeeping operations.

**Operationalising a preventive model**

The EAC secretariat is confining itself to facilitating meetings, selecting experts, and hosting deliberations between technical personnel from the three EAC countries on issues of mutual security concern. This method has two major advantages: first, it does not overwork the lean secretariat allowing to develop, design and implement its programmes; second, it ensures that ownership of the process remains with partner states. Networking between the EAC and other subregional organisations in Africa has been limited and has so far been confined largely to economic matters. In conflict-related issues, the EAC is attempting to learn from more experienced organisations such as ECOWAS and SADC. In March 2001, EAC officials visited Abuja to consult with their ECOWAS counterparts. The EAC secretariat has had more frequent exchanges of views with IGAD on a range of common security issues. The two organisations have produced a draft joint protocol on Small Arms and Light Weapons (SALW).

The EAC’s emphasis on conflict prevention means that it can concentrate on a diplomatic approach to conflicts and avoid becoming embroiled in military conflicts. This is as much out of choice as necessity: the EAC, in any case, lacks the mechanism for dealing with armed conflicts. The organisation, however, provides an opportunity for NGOs to seek observer status in order to enhance their participation in its work. The challenge for the EAC’s preventive model of conflict management is how to change negative state attitudes toward NGOs, some of which have the potential to complement government efforts in the area of conflict prevention. This task will require establishing a division of labour between the EAC secretariat, partner states and other actors. The EAC treaty provides for partnerships with civil society and observer status for NGOs interested in working with the secretariat. The EAC could also establish an NGO liaison office to mediate the relationship between governments and civil society. Currently, the EAC public relations office is expected to coordinate NGO-related activities. But this office is clearly too overburdened to perform this task effectively. There is also limited networking between the EAC’s information unit and the defense liaison unit. Furthermore, there is an urgent need to strengthen the EAC’s outreach programme, possibly through the hiring of an information officer...
who focuses solely on NGO activities, collects information on conflict management, and disseminates such information to member states and officials.

Having assessed the seven main regional and subregional organisations engaged in conflict management in Africa, we will now turn our attention to assessing the security capacity of semiformal organisations in Africa.

INTERNATIONAL CONFLICT RESOLUTION

Turning to the role of international conflict resolution mechanisms, the following extract by former UN Secretary-General Boutros Boutros Ghali outlines the various activities encompassed in preventive diplomacy, peacemaking, peacekeeping and post-conflict peacebuilding.

GHALI, BB AN AGENDA FOR PEACE: PREVENTATIVE DIPLOMACY, PEACEMAKING AND PEACEKEEPING (1992)


Definitions

(20) The terms preventive diplomacy, peacemaking and peacekeeping are integrally related and as used in this report are defined as follows:

*Preventive diplomacy* is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.

*Peacemaking* is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.

*Peacekeeping* is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.

(21) The present report in addition will address the critically related concept of post-conflict peacebuilding action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict. Preventive diplomacy seeks to resolve disputes before violence breaks out; peacemaking and peacekeeping are required to halt conflicts and
preserve peace once it is attained. If successful, they strengthen the opportunity for post-conflict peacebuilding, which can prevent the recurrence of violence among nations and peoples.

(22) These four areas for action, taken together, and carried out with the backing of all Members, offer a coherent contribution towards securing peace in the spirit of the Charter. The United Nations has extensive experience not only in these fields, but in the wider realm of work for peace in which these four fields are set. Initiatives on decolonisation, on the environment and sustainable development, on population, on the eradication of disease, on disarmament and on the growth of international law — these and many others have contributed immeasurably to the foundations for a peaceful world. The world has often been rent by conflict and plagued by massive human suffering and deprivation. Yet it would have been far more so without the continuing efforts of the United Nations. This wide experience must be taken into account in assessing the potential of the United Nations in maintaining international security not only in its traditional sense, but in the new dimensions presented by the era ahead.

**Preventive diplomacy**

(23) The most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict — or, if conflict breaks out, to act swiftly to contain it and resolve its underlying causes. Preventive diplomacy may be performed by the Secretary-General personally or through senior staff or specialised agencies and programmes, by the Security Council or the General Assembly, and by regional organisations in cooperation with the United Nations. Preventive diplomacy requires measures to create confidence; it needs early warning based on information gathering and informal or formal fact-finding; it may also involve preventive deployment and, in some situations, demilitarised zones.

**Measures to build confidence**

(24) Mutual confidence and good faith are essential to reducing the likelihood of conflict between States. Many such measures are available to Governments that have the will to employ them. Systematic exchange of military missions, formation of regional or subregional risk reduction centres, arrangements for the free flow of information, including the monitoring of regional arms agreements, are examples. I ask all regional organisations to consider what further confidence-building measures might be applied in their areas and to inform the United Nations of the results. I will undertake periodic consultations on confidence-building measures with parties to potential, current or past disputes and with regional organisations, offering such advisory assistance as the Secretariat can provide.

**Fact-finding**

(25) Preventive steps must be based upon timely and accurate knowledge of the facts. Beyond this, an understanding of developments and global trends, based on sound analysis, is required. And the willingness to take appropriate preventive action is essential. Given the economic and social roots of many
potential conflicts, the information needed by the United Nations now must encompass economic and social trends as well as political developments that may lead to dangerous tensions.

(a) An increased resort to fact-finding is needed, in accordance with the Charter, initiated either by the Secretary-General, to enable him to meet his responsibilities under the Charter, including article 99, or by the Security Council or the General Assembly. Various forms may be employed selectively as the situation requires. A request by a State for the sending of a United Nations fact-finding mission to its territory should be considered without undue delay.

(b) Contacts with the Governments of member states can provide the Secretary-General with detailed information on issues of concern. I ask that all member states be ready to provide the information needed for effective preventive diplomacy. I will supplement my own contacts by regularly sending senior officials on missions for consultations in capitals or other locations. Such contacts are essential to gain insight into a situation and to assess its potential ramifications.

(c) Formal fact-finding can be mandated by the Security Council or by the General Assembly, either of which may elect to send a mission under its immediate authority or may invite the Secretary-General to take the necessary steps, including the designation of a special envoy. In addition to collecting information on which a decision for further action can be taken, such a mission can in some instances help to defuse a dispute by its presence, indicating to the parties that the Organization, and in particular the Security Council, is actively seized of the matter as a present or potential threat to international security.

(d) In exceptional circumstances the Council may meet away from Headquarters as the Charter provides, in order not only to inform itself directly, but also to bring the authority of the Organization to bear on a given situation.

Early warning

(26) In recent years the United Nations system has been developing a valuable network of early warning systems concerning environmental threats, the risk of nuclear accident, natural disasters, mass movements of populations, the threat of famine and the spread of disease. There is a need, however, to strengthen arrangements in such a manner that information from these sources can be synthesised with political indicators to assess whether a threat to peace exists and to analyse what action might be taken by the United Nations to alleviate it. This is a process that will continue to require the close co-operation of the various specialised agencies and functional offices of the United Nations. The analyses and recommendations for preventive action that emerge will be made available by me, as appropriate, to the Security Council and other United Nations organs. I recommend in addition that the Security Council invite a reinvigorated and restructured Economic and Social Council to provide reports, in accordance with article 65 of the Charter, on those economic and social developments that may, unless mitigated, threaten international peace and security.

(27) Regional arrangements and organisations have an important role in early warning. I ask regional organisations that have not yet sought observer status
at the United Nations to do so and to be linked, through appropriate arrangements, with the security mechanisms of this Organization.

Preventive deployment

(28) United Nations operations in areas of crisis have generally been established after conflict has occurred. The time has come to plan for circumstances warranting preventive deployment, which could take place in a variety of instances and ways. For example, in conditions of national crisis there could be preventive deployment at the request of the Government or all parties concerned, or with their consent; in inter-State disputes such deployment could take place when two countries feel that a United Nations presence on both sides of their border can discourage hostilities; furthermore, preventive deployment could take place when a country feels threatened and requests the deployment of an appropriate United Nations presence along its side of the border alone. In each situation, the mandate and composition of the United Nations presence would need to be carefully devised and be clear to all.

(29) In conditions of crisis within a country, when the Government requests or all parties consent, preventive deployment could help in a number of ways to alleviate suffering and to limit or control violence. Humanitarian assistance, impartially provided, could be of critical importance; assistance in maintaining security, whether through military, police or civilian personnel, could save lives and develop conditions of safety in which negotiations can be held; the United Nations could also help in conciliation efforts if this should be the wish of the parties. In certain circumstances, the United Nations may well need to draw upon the specialised skills and resources of various parts of the United Nations system; such operations may also on occasion require the participation of non-governmental organisations.

(30) In these situations of internal crisis the United Nations will need to respect the sovereignty of the State; to do otherwise would not be in accordance with the understanding of member states in accepting the principles of the Charter. The Organization must remain mindful of the carefully negotiated balance of the guiding principles annexed to General Assembly Resolution 46/182 of 19 December 1991. Those guidelines stressed, inter alia, that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality; that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations; and that, in this context, humanitarian assistance should be provided with the consent of the affected country and, in principle, on the basis of an appeal by that country. The guidelines also stressed the responsibility of States to take care of the victims of emergencies occurring on their territory and the need for access to those requiring humanitarian assistance. In the light of these guidelines, a Government's request for United Nations involvement, or consent to it, would not be an infringement of that State's sovereignty or be contrary to article 2, paragraph 7, of the Charter which refers to matters essentially within the domestic jurisdiction of any State.
(31) In inter-State disputes, when both parties agree, I recommend that if the Security Council concludes that the likelihood of hostilities between neighbouring countries could be removed by the preventive deployment of a United Nations presence on the territory of each State, such action should be taken. The nature of the tasks to be performed would determine the composition of the United Nations presence.

(32) In cases where one nation fears a cross-border attack, if the Security Council concludes that a United Nations presence on one side of the border, with the consent only of the requesting country, would serve to deter conflict, I recommend that preventive deployment take place. Here again, the specific nature of the situation would determine the mandate and the personnel required to fulfil it.

Demilitarised zones

(33) In the past, demilitarised zones have been established by agreement of the parties at the conclusion of a conflict. In addition to the deployment of United Nations personnel in such zones as part of peacekeeping operations, consideration should now be given to the usefulness of such zones as a form of preventive deployment, on both sides of a border, with the agreement of the two parties, as a means of separating potential belligerents, or on one side of the line, at the request of one party, for the purpose of removing any pretext for attack. Demilitarised zones would serve as symbols of the international community's concern that conflict be prevented.

Peacemaking

(34) Between the tasks of seeking to prevent conflict and keeping the peace lies the responsibility to try to bring hostile parties to agreement by peaceful means. Chapter VI of the Charter sets forth a comprehensive list of such means for the resolution of conflict. These have been amplified in various declarations adopted by the General Assembly, including the Manila Declaration of 1982 on the Peaceful Settlement of International Disputes and the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field. They have also been the subject of various resolutions of the General Assembly, including Resolution 44/21 of 15 November 1989 on enhancing international peace, security and international co-operation in all its aspects in accordance with the Charter of the United Nations. The United Nations has had wide experience in the application of these peaceful means. If conflicts have gone unresolved, it is not because techniques for peaceful settlement were unknown or inadequate. The fault lies first in the lack of political will of parties to seek a solution to their differences through such means as are suggested in Chapter VI of the Charter, and second, in the lack of leverage at the disposal of a third party if this is the procedure chosen. The indifference of the international community to a problem, or the marginalisation of it, can also thwart the possibilities of solution. We must look primarily to these areas if we hope to enhance the capacity of the Organization for achieving peaceful settlements.
The present determination in the Security Council to resolve international disputes in the manner foreseen in the Charter has opened the way for a more active Council role. With greater unity has come leverage and persuasive power to lead hostile parties towards negotiations. I urge the Council to take full advantage of the provisions of the Charter under which it may recommend appropriate procedures or methods for dispute settlement and, if all the parties to a dispute so request, make recommendations to the parties for a peaceful settlement of the dispute.

The General Assembly, like the Security Council and the Secretary-General, also has an important role assigned to it under the Charter for the maintenance of international peace and security. As a universal forum, its capacity to consider and recommend appropriate action must be recognised. To that end it is essential to promote its utilisation by all member states so as to bring greater influence to bear in pre-empting or containing situations which are likely to threaten international peace and security.

Mediation and negotiation can be undertaken by an individual designated by the Security Council, by the General Assembly or by the Secretary-General. There is a long history of the utilisation by the United Nations of distinguished statesmen to facilitate the processes of peace. They can bring a personal prestige that, in addition to their experience, can encourage the parties to enter serious negotiations. There is a wide willingness to serve in this capacity, from which I shall continue to benefit as the need arises. Frequently it is the Secretary-General himself who undertakes the task. While the mediator's effectiveness is enhanced by strong and evident support from the Council, the General Assembly and the relevant member states acting in their national capacity, the good offices of the Secretary-General may at times be employed most effectively when conducted independently of the deliberative bodies. Close and continuous consultation between the Secretary-General and the Security Council is, however, essential to ensure full awareness of how the Council's influence can best be applied and to develop a common strategy for the peaceful settlement of specific disputes.

The World Court

The docket of the International Court of Justice has grown fuller but it remains an under-used resource for the peaceful adjudication of disputes. Greater reliance on the Court would be an important contribution to United Nations peacemaking. In this connection, I call attention to the power of the Security Council under articles 36 and 37 of the Charter to recommend to member states the submission of a dispute to the International Court of Justice, arbitration or other dispute-settlement mechanisms. I recommend that the Secretary-General be authorised, pursuant to article 96, paragraph 2, of the Charter, to take advantage of the advisory competence of the Court and that other United Nations organs that already enjoy such authorisation turn to the Court more frequently for advisory opinions.

I recommend the following steps to reinforce the role of the International Court of Justice:
(a) All member states should accept the general jurisdiction of the International Court under article 36 of its Statute, without any reservation, before the end of the United Nations Decade of International Law in the year 2000. In instances where domestic structures prevent this, States should agree bilaterally or multilaterally to a comprehensive list of matters they are willing to submit to the Court and should withdraw their reservations to its jurisdiction in the dispute settlement clauses of multilateral treaties;
(b) When submission of a dispute to the full Court is not practical, the Chambers jurisdiction should be used;
(c) States should support the Trust Fund established to assist countries unable to afford the cost involved in bringing a dispute to the Court, and such countries should take full advantage of the Fund in order to resolve their disputes.

Amelioration through assistance

(40) Peacemaking is at times facilitated by international action to ameliorate circumstances that have contributed to the dispute or conflict. If, for instance, assistance to displaced persons within a society is essential to a solution, then the United Nations should be able to draw upon the resources of all agencies and programmes concerned. At present, there is no adequate mechanism in the United Nations through which the Security Council, the General Assembly or the Secretary-General can mobilise the resources needed for such positive leverage and engage the collective efforts of the United Nations system for the peaceful resolution of a conflict. I have raised this concept in the Administrative Committee on Co-ordination, which brings together the executive heads of United Nations agencies and programmes; we are exploring methods by which the inter-agency system can improve its contribution to the peaceful resolution of disputes.

Sanctions and special economic problems

(41) In circumstances when peacemaking requires the imposition of sanctions under article 41 of the Charter, it is important that States confronted with special economic problems not only have the right to consult the Security Council regarding such problems, as article 50 provides, but also have a realistic possibility of having their difficulties addressed. I recommend that the Security Council devise a set of measures involving the financial institutions and other components of the United Nations system that can be put in place to insulate States from such difficulties. Such measures would be a matter of equity and a means of encouraging States to co-operate with decisions of the Council.

Use of military force

(42) It is the essence of the concept of collective security as contained in the Charter that if peaceful means fail, the measures provided in Chapter VII should be used, on the decision of the Security Council, to maintain or restore international peace and security in the face of a ‘threat to the peace, breach of the peace, or act of aggression’. The Security Council has not so far made use of the most coercive of these measures — the action by military force foreseen in article 42. In the situation between Iraq and Kuwait, the Council chose to authorise member states to take measures on its behalf. The
Charter, however, provides a detailed approach which now merits the attention of all member states.

(43) Under article 42 of the Charter, the Security Council has the authority to take military action to maintain or restore international peace and security. While such action should only be taken when all peaceful means have failed, the option of taking it is essential to the credibility of the United Nations as a guarantor of international security. This will require bringing into being, through negotiations, the special agreements foreseen in article 43 of the Charter, whereby member states undertake to make armed forces, assistance and facilities available to the Security Council for the purposes stated in article 42, not only on an ad hoc basis but on a permanent basis. Under the political circumstances that now exist for the first time since the Charter was adopted, the long-standing obstacles to the conclusion of such special agreements should no longer prevail. The ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace since a potential aggressor would know that the Council had at its disposal a means of response. Forces under article 43 may perhaps never be sufficiently large or well enough equipped to deal with a threat from a major army equipped with sophisticated weapons. They would be useful, however, in meeting any threat posed by a military force of a lesser order. I recommend that the Security Council initiate negotiations in accordance with article 43, supported by the Military Staff Committee, which may be augmented if necessary by others in accordance with article 47, paragraph 2, of the Charter. It is my view that the role of the Military Staff Committee should be seen in the context of chapter VII, and not that of the planning or conduct of peacekeeping operations.

Peace-enforcement units

(44) The mission of forces under article 43 would be to respond to outright aggression, imminent or actual. Such forces are not likely to be available for some time to come. Cease-fires have often been agreed to but not complied with, and the United Nations has sometimes been called upon to send forces to restore and maintain the cease-fire. This task can on occasion exceed the mission of peacekeeping forces and the expectations of peacekeeping force contributors. I recommend that the Council consider the utilisation of peace-enforcement units in clearly defined circumstances and with their terms of reference specified in advance. Such units from member states would be available on call and would consist of troops that have volunteered for such service. They would have to be more heavily armed than peacekeeping forces and would need to undergo extensive preparatory training within their national forces. Deployment and operation of such forces would be under the authorisation of the Security Council and would, as in the case of peacekeeping forces, be under the command of the Secretary-General. I consider such peace-enforcement units to be warranted as a provisional measure under article 40 of the Charter. Such peace-enforcement units should not be confused with the forces that may eventually be constituted under article 43 to deal with acts of aggression or with the military personnel which Governments may agree to keep on stand-by for possible contribution to peacekeeping operations.
(45) Just as diplomacy will continue across the span of all the activities dealt with in the present report, so there may not be a dividing line between peacemaking and peacekeeping. Peacemaking is often a prelude to peacekeeping — just as the deployment of a United Nations presence in the field may expand possibilities for the prevention of conflict, facilitate the work of peacemaking and in many cases serve as a prerequisite for peacebuilding.

**Peacekeeping**

(46) Peacekeeping can rightly be called the invention of the United Nations. It has brought a degree of stability to numerous areas of tension around the world.

**Increasing demands**

(47) Thirteen peacekeeping operations were established between the years 1945 and 1987; 13 others since then. An estimated 528,000 military, police and civilian personnel had served under the flag of the United Nations until January 1992. Over 800 of them from 43 countries have died in the service of the Organization. The costs of these operations have aggregated some $8.3 billion till 1992. The unpaid arrears towards them stand at over $800 million, which represents a debt owed by the Organization to the troop-contributing countries. Peacekeeping operations approved at present are estimated to cost close to $3 billion in the current 12-month period, while patterns of payment are unacceptably slow. Against this, global defence expenditures at the end of the last decade had approached $1 trillion a year, or $2 million per minute.

(48) The contrast between the costs of United Nations peacekeeping and the costs of the alternative, war — between the demands of the Organization and the means provided to meet them — would be farcical were the consequences not so damaging to global stability and to the credibility of the Organization. At a time when nations and peoples increasingly are looking to the United Nations for assistance in keeping the peace — and holding it responsible when this cannot be so — fundamental decisions must be taken to enhance the capacity of the Organization in this innovative and productive exercise of its function. I am conscious that the present volume and unpredictability of peacekeeping assessments poses real problems for some member states. For this reason, I strongly support proposals in some member states for their peacekeeping contributions to be financed from defence, rather than foreign affairs, budgets and I recommend such action to others. I urge the General Assembly to encourage this approach.

(49) The demands on the United Nations for peacekeeping, and peacebuilding, operations will in the coming years continue to challenge the capacity, the political and financial will and the creativity of the Secretariat and member states. Like the Security Council, I welcome the increase and broadening of the tasks of peacekeeping operations.
New departures in peacekeeping

(50) The nature of peacekeeping operations has evolved rapidly in recent years. The established principles and practices of peacekeeping have responded flexibly to new demands of recent years, and the basic conditions for success remain unchanged: a clear and practicable mandate; the cooperation of the parties in implementing that mandate; the continuing support of the Security Council; the readiness of member states to contribute the military, police and civilian personnel, including specialists, required; effective United Nations command at Headquarters and in the field; and adequate financial and logistic support. As the international climate has changed and peacekeeping operations are increasingly fielded to help implement settlements that have been negotiated by peacemakers, a new array of demands and problems has emerged regarding logistics, equipment, personnel and finance, all of which could be corrected if member states so wished and were ready to make the necessary resources available.

Personnel

(51) Member states are keen to participate in peacekeeping operations. Military observers and infantry are invariably available in the required numbers, but logistic units present a greater problem, as few armies can afford to spare such units for an extended period. Member states were requested in 1990 to state what military personnel they were in principle prepared to make available; few replied. I reiterate the request to all member states to reply frankly and promptly. Stand-by arrangements should be confirmed, as appropriate, through exchanges of letters between the Secretariat and member states concerning the kind and number of skilled personnel they will be prepared to offer the United Nations as the needs of new operations arise.

(52) Increasingly, peacekeeping requires that civilian political officers, human rights monitors, electoral officials, refugee and humanitarian aid specialists and police play as central a role as the military. Police personnel have proved increasingly difficult to obtain in the numbers required. I recommend that arrangements be reviewed and improved for training peacekeeping personnel — civilian, police, or military — using the varied capabilities of Member State Governments, of non-governmental organisations and the facilities of the Secretariat. As efforts go forward to include additional States as contributors, some States with considerable potential should focus on language training for police contingents which may serve with the Organization. As for the United Nations itself, special personnel procedures, including incentives, should be instituted to permit the rapid transfer of Secretariat staff members to service with peacekeeping operations. The strength and capability of military staff serving in the Secretariat should be augmented to meet new and heavier requirements.

Logistics

(53) Not all Governments can provide their battalions with the equipment they need for service abroad. While some equipment is provided by troop-contributing countries, a great deal has to come from the United Nations,
including equipment to fill gaps in under-equipped national units. The United Nations has no standing stock of such equipment. Orders must be placed with manufacturers, which creates a number of difficulties. A pre-positioned stock of basic peacekeeping equipment should be established, so that at least some vehicles, communications equipment, generators, etc., would be immediately available at the start of an operation. Alternatively, Governments should commit themselves to keeping certain equipment, specified by the Secretary-General, on stand-by for immediate sale, loan or donation to the United Nations when required.

(54) Member states in a position to do so should make air- and sea-lift capacity available to the United Nations free of cost or at lower than commercial rates, as was the practice until recently.

Post-conflict peacebuilding

(55) Peacemaking and peacekeeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.

(56) In the aftermath of international war, post-conflict peacebuilding may take the form of concrete cooperative projects which link two or more countries in a mutually beneficial undertaking that can not only contribute to economic and social development but also enhance the confidence that is so fundamental to peace. I have in mind, for example, projects that bring States together to develop agriculture, improve transportation or utilise resources such as water or electricity that they need to share, or joint programmes through which barriers between nations are brought down by means of freer travel, cultural exchanges and mutually beneficial youth and educational projects. Reducing hostile perceptions through educational exchanges and curriculum reform may be essential to forestall a re-emergence of cultural and national tensions which could spark renewed hostilities.

(57) In surveying the range of efforts for peace, the concept of peacebuilding as the construction of a new environment should be viewed as the counterpart of preventive diplomacy, which seeks to avoid the breakdown of peaceful conditions. When conflict breaks out, mutually reinforcing efforts at peacemaking and peacekeeping come into play. Once these have achieved their objectives, only sustained, cooperative work to deal with underlying economic, social, cultural and humanitarian problems can place an achieved peace on a durable foundation. Preventive diplomacy is to avoid a crisis; post-conflict peacebuilding is to prevent a recurrence.

(58) Increasingly it is evident that peacebuilding after civil or international strife must address the serious problem of land mines, many tens of millions
of which remain scattered in present or former combat zones. De-mining should be emphasised in the terms of reference of peacekeeping operations and is crucially important in the restoration of activity when peacebuilding is under way: Agriculture cannot be revived without de-mining and the restoration of transport may require the laying of hard surface roads to prevent re-mining. In such instances, the link becomes evident between peacekeeping and peacebuilding. Just as demilitarised zones may serve the cause of preventive diplomacy and preventive deployment to avoid conflict, so may demilitarisation assist in keeping the peace or in post-conflict peacebuilding, as a measure for heightening the sense of security and encouraging the parties to turn their energies to the work of peaceful restoration of their societies.

(59) There is a new requirement for technical assistance which the United Nations has an obligation to develop and provide when requested: support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions. The authority of the United Nations system to act in this field would rest on the consensus that social peace is as important as strategic or political peace. There is an obvious connection between democratic practices — such as the rule of law and transparency in decision-making — and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities.

...
sovereign states. Others felt that it might encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions that would aid their cause. Still others noted that there is little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests — except that weak states are far more likely to be subjected to it than strong ones.

I recognise both the force and the importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?

We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.

Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle — not even sovereignty — can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.

...
(1) **Basic principles**

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself;
B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) **Foundations**

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:
A. Obligations inherent in the concept of sovereignty;
B. The responsibility of the Security Council, under article 24 of the UN Charter, for the maintenance of international peace and security;
C. Specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
D. The developing practice of states, regional organisations and the Security Council itself.

(3) **Elements**

The responsibility to protect embraces three specific responsibilities:
A. The responsibility to prevent: To address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk;
B. The responsibility to react: To respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention;
C. The responsibility to rebuild: To provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

(4) **Priorities**

A. Prevention is the single most important dimension of the responsibility to protect: Prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it;
B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.
Principles for military intervention

(1) The just cause threshold

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:
A. Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
B. Large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) The precautionary principles

A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned;
B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded;
C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective;
D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) Right authority

A. There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has;
B. Security Council authorisation should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under article 99 of the UN Charter;
C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention;
D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support;
E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

(i) consideration of the matter by the General Assembly in Emergency Special Session under the ‘Uniting for Peace’ procedure; and

(ii) action within area of jurisdiction by regional or sub-regional organisations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation — and that the stature and credibility of the United Nations may suffer thereby.

(4) Operational principles

A. Clear objectives; clear and unambiguous mandate at all times; and resources to match;
B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command;
C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state;
D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law;
E. Acceptance that force protection cannot become the principal objective;
F. Maximum possible co-ordination with humanitarian organisations.

2.1 Millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse. This is a stark and undeniable reality, and it is at the heart of all the issues with which this Commission has been wrestling. What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.

2.2 But all this is easier said than done. There have been as many failures as successes, perhaps more, in the international protective record in recent years. There are continuing fears about a ‘right to intervene’ being formally acknowledged. If intervention for human protection purposes is to be accepted, including the possibility of military action, it remains imperative that the international community develop consistent, credible and enforceable standards to guide state and intergovernmental practice. The experience and aftermath of Somalia, Rwanda, Srebrenica and Kosovo, as well as interventions and non-interventions in a number of other places, have provided a clear indication that the tools, devices and thinking of international relations need now to be comprehensively reassessed, in order to meet the foreseeable needs of the 21st century.

2.3 Any new approach to intervention on human protection grounds needs to meet at least four basic objectives:
to establish clearer rules, procedures and criteria for determining whether, when and how to intervene;
- to establish the legitimacy of military intervention when necessary and after all other approaches have failed;
- to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimise the human costs and institutional damage that will result; and
- to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.

In the later chapters of this report we spell out in detail how these objectives might be met. But there is a significant preliminary issue which must first be addressed. It is important that language — and the concepts which lie behind particular choices of words — do not become a barrier to dealing with the real issues involved. Just as the Commission found that the expression ‘humanitarian intervention’ did not help to carry the debate forward, so too do we believe that the language of past debates arguing for or against a ‘right to intervene’ by one state on the territory of another state is outdated and unhelpful. We prefer to talk not of a ‘right to intervene’ but of a ‘responsibility to protect’.

In spite of these international standards and principles, the application of humanitarian intervention has been inconsistent with Africa carrying a majority of the ‘forgotten tragedies’. In the words of Louis, the respectability of humanitarian intervention is being called in question by the current approaches that mainly serve the interests of the major powers.

LOUIS, PA ‘INCONSISTENCY AND THE TRAGEDY OF AFRICA’S NEGLECT’ (2001)

The concept of humanitarian intervention is based on the alleviation of human rights violations. Recent actions in Sierra Leone and Kosovo, however, suggest that the practice of humanitarian intervention has less to do with stopping abuses than with furthering the interests of the intervening powers and their advocates. As a member of both the United Nations observer mission in Sierra Leone and the interim administration in Kosovo, I was able to witness the contrasting approaches to humanitarian intervention in those two arenas of conflict.

Nigeria, the West African powerhouse, spent considerable human and financial resources to help neutralise a murderous rebellion in Sierra Leone
that has caused untold violations of human rights and international humanitarian law. The Nigerian model of humanitarian intervention was marked by a robust use of force to compel the rebels to accept the legitimacy of the elected government. As a regional power with its own human rights problems and a lethargic economy, however, Nigeria needed the assistance of the international community. Since the United States, Britain, and the other permanent members of the UN Security Council had no interests worth pursuing in a poor African country, the international community paid little attention to the plight of the people of Sierra Leone. The largely ill-equipped — if determined — Nigerians and a few hundred Ghanaians, Guineans, and Malians were left to their own meager resources to stanch a humanitarian crisis of unimaginable proportions.

The eventual establishment of a UN peacekeeping force in Sierra Leone following the Lomé Agreement of July 1999 has not changed matters much. Sierra Leoneans have yet to reap the fruits of that intervention; certainly it lacked the robustness of the purported humanitarian intervention in Kosovo. There, from March through June 1999, scarcely two million residents benefited from a horrifying bombing campaign of Yugoslavia, which involved million-dollar missiles and other high-tech weaponry. In the aftermath of the bombing, 40 000 NATO troops deployed in Kosovo have provided protection and other assistance. At the peak of the crisis, NGOs and UN agencies showered the Kosovar refugees with cellular telephones, bottled water, cigarettes, and other amenities. Humanitarian workers and other Western experts crowded the television screens to register their incredulity and outrage that this could happen in Europe on the eve of the twenty-first century.

Meanwhile, the plight of African refugees, who often fled the same kind of ethnic violence as the Kosovar Albanians, faded from the world’s consciousness as these refugees tried to survive on the crumbs left over from the Kosovo operation. The United Nations had to scramble to find 13 500 troops and the funds to support the operation in Sierra Leone, a country with nearly six million inhabitants. The US Committee for Refugees estimated that international agencies and NGOs spent 11 cents per Sierra Leonean refugee versus $1.50 per Kosovar refugee. Though I did see destroyed villages in Kosovo, I saw nothing like the wide expanses of burned towns (including Freetown, the capital), amputee camps, droves of sex slaves, and child soldiers that continue to flourish in Sierra Leone. Thus, the concentration of resources devoted to Kosovo and the multiplicity of the actors involved seems excessive when contrasted to the Band-Aid applied to Sierra Leone. This point is not lost on those Sierra Leoneans who are aware of the situation in Kosovo. Even Mary Robinson, the UN High Commissioner for Human Rights, implied at the start of her three-day visit to Sierra Leone in June 1999 that there were disparities in treatment. She acknowledged that there had been more suffering, more loss of life, and more human rights violations in Sierra Leone than in Kosovo.

At the NGO level as well, the attention given to the two populations was shockingly disparate. While working in Sierra Leone as a human rights officer for the UN observer mission, I met a representative of a major international human rights organisation, a US citizen who said that formerly she had been
a journalist. Her chief task consisted of monitoring the human rights situation and writing reports. My conversations with her revealed that she possessed little credible experience in Africa and virtually no human rights experience. In Kosovo, by contrast, I met seasoned workers who came to alleviate the plight of the suffering Kosovars. I believe this reinforces the appearance that international NGOs send people to Africa who are seeking only to find themselves and to establish a reputation.

Judging by the disparity between operations in Sierra Leone and Kosovo, not to mention the criminal failure of the international community, under US leadership, to act in Rwanda, humanitarian intervention remains tinged with racialism and the assertion of power to further imperialist aims. Sierra Leone represents a shameful example of disregarding the plight of long-suffering black Africans; Kosovo, on the other hand, appears as a shining and dangerous example of a power foreign to a region, NATO, seeking to find a *raison d’être* in the post-Cold War era. NATO demonstrated its might, lest its imagined adversaries fail to appreciate the ‘new world order’.

Reasonable people can disagree about the proper criteria for humanitarian intervention. But if genocide in Rwanda and the horrors of Sierra Leone do not qualify for attention from those countries with the capacity to provide the necessary assistance, then the notion of humanitarian intervention has no validity. Those who doubt the truth of my assertions should re-examine just what is so special about the nature of suffering in Kosovo versus that of African countries in even deeper turmoil. What justifies continuing the huge expenditure of resources on the province of a sovereign nation? One need not be an apologist for Serbia’s erstwhile leaders to be puzzled by the difference in treatment — nor need one be naïve about the vagaries of international politics.

The international human rights movement must overcome its biases and argue for even a semblance of consistency. By their current practice of treating different regions of the world unequally, international NGOs and Western governments are effectively subverting the principles of human rights and humanitarianism, which have gained a measure of respectability in the aftermath of the European wars of the last century. That respectability is being called into question by the current approaches to humanitarian intervention, which serve mainly the interests of major powers. Unfortunately, humanitarian intervention has very little to do, in practice, with respect for human rights.
The reluctance of the international community to act in a robust manner was illustrated earlier in the case of the Rwandan genocide as it is set out here by the Commander of the UN Peacekeeping Mission in Rwanda, General Dallaire.

FOREWORD BY LIEUTENANT-GENERAL ROMEO DALLAIRE IN FEIL, S PREVENTING GENOCIDE: HOW THE EARLY USE OF FORCE MIGHT HAVE SUCCEEDED IN RWANDA (1998)

A Report to the Carnegie Commission On Preventing Deadly Conflict

The experience in Rwanda was a watershed for the international community, the United Nations, the contributors to the United Nations Assistance Mission for Rwanda, and, least of all, myself. However, no one noticed that it was a watershed at the time. It was seen as too difficult and not of sufficient interest and value to prevent the outbreak of violence, and once violence had broken out, it still was not of sufficient interest to warrant the expense of resources and risk of more casualties to stop the violence from spreading. While others remained focused on the world’s other crises, the people of Rwanda were forgotten. It was not really until the international community noticed tens of thousands of refugees in eastern Zaire, with thousands dying daily of cholera, that they felt truly compelled to act. This three-month delay cost the lives of hundreds of thousands of innocent Rwandans, and countless scars and disfigurements for those who lived through the horrors. Like the crisis at the time, the need for a response mechanism and the consequences of not looking for solutions are guaranteeing the recurrence of other humanitarian catastrophes now and into the future.

Is this a lesson that we need to have taught to us a second time? Do we, the members of the international community, really require that more innocent women and children be slaughtered by the thousands to cause a change in our priorities and level of concern? When the sanctity of human rights can be so blatantly violated and remain tolerated by the international community, there is a problem of such seriousness that words alone cannot explain. I remain mystified that human life, the security of non-combatants, and the prevention of such horrors as the genocide in Rwanda are, sadly, not sufficient to act as a catalyst for a swift and determined response from the international community.

I often ponder the possible solutions to the many problems that the international community and the UN faced in the spring and summer of 1994, and am convinced that it is imperative that these solutions be found quickly. It would be immoral if not outright criminal to allow another tragedy to occur by failing in our collective responsibility to humanity at large. The ingredients and recipes for solutions currently exist but remain in want of a sponsor, a leader with moral determination to bring together the political, the humanitarian, and the security structures and disciplines in synergistic applications of innovative thought to this requirement to respond to human dignity rather than national self-interest.
It behooves us to take the horrible lessons of the Rwandan debacle and prevent future genocide by formalising a pragmatic and cohesive multidisciplinary prevention capability. The killings could have been prevented if there had been the international will to accept the costs of doing so even after the politically difficult losses of peacekeeping in Somalia and the *ad hoc* confusion of April 1994. We need to use our processes to achieve the aim of assisting humanity, as opposed to preserving our processes at the expense of humanity. The coalition of like-minded free nations, with well-developed doctrines respecting human rights, should form the nucleus of a rapid reaction capability for the United Nations to bolster its ability to keep the peace. The looming threat of overwhelming international retribution is still required to keep in check some of the impulses of hate-filled elements. We, as the international community, must be prepared to come to the aid of humanity in a swift yet effective manner. What remains lacking, what is absent, is the will to implement such solutions. We must all strive toward this goal or continue to repress the collective guilt and wash our hands that have been stained with the blood of so many innocent victims of power-hungry and ruthless extremists.

...
C. WOMEN AND PEACE

Women often play a critical role in resolving conflicts and sustaining peace. Previously unacknowledged, today policymakers and practitioners are seeking ways and approaches to enhance the participation of women in the attainment of peace and security.

The following is an extract from the Beijing Platform for Action, an agenda for the advancement of women's rights resulting from the Fourth World Conference on Women held in Beijing in 1995, where women and armed conflict was one of the critical areas of concern.

BEIJING PLATFORM FOR ACTION (1995)


...Women and armed conflict

131. An environment that maintains world peace and promotes and protects human rights, democracy and the peaceful settlement of disputes, in accordance with the principles of non-threat or use of force against territorial integrity or political independence and of respect for sovereignty as set forth in the Charter of the United Nations, is an important factor for the advancement of women. Peace is inextricably linked with equality between women and men and development. Armed and other types of conflicts and terrorism and hostage-taking still persist in many parts of the world. Aggression, foreign occupation, ethnic and other types of conflicts are an ongoing reality affecting women and men in nearly every region. Gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism and racial discrimination, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law. International humanitarian law, prohibiting attacks on civilian populations, as such, is at times systematically ignored and human rights are often violated in connection with situations of armed conflict, affecting the civilian population, especially women, children, the elderly and the disabled. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. Massive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape, including systematic rape of women in war situations, creating a mass exodus of refugees and displaced persons, are abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished. Some of these situations of armed conflict have their origin in the conquest or colonialisation of a country by another...
State and the perpetuation of that colonisation through state and military repression.

132. The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949, and the Additional Protocols of 1977 provide that women shall especially be protected against any attack on their honour, in particular against humiliating and degrading treatment, rape, enforced prostitution or any form of indecent assault. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, states that ‘violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law’. All violations of this kind, including in particular murder, rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response. Gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or summary and arbitrary detention, all forms of racism, racial discrimination, xenophobia, denial of economic, social and cultural rights and religious intolerance.

133. Violations of human rights in situations of armed conflict and military occupation are violations of the fundamental principles of international human rights and humanitarian law as embodied in international human rights instruments and in the Geneva Conventions of 1949 and the Additional Protocols thereto. Gross human rights violations and policies of ethnic cleansing in war-torn and occupied areas continue to be carried out. These practices have created, inter alia, a mass flow of refugees and other displaced persons in need of international protection and internally displaced persons, the majority of whom are women, adolescent girls and children. Civilian victims, mostly women and children, often outnumber casualties among combatants. In addition, women often become caregivers for injured combatants and find themselves, as a result of conflict, unexpectedly cast as sole manager of household, sole parent, and caretaker of elderly relatives.

134. In a world of continuing instability and violence, the implementation of cooperative approaches to peace and security is urgently needed. The equal access and full participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security. Although women have begun to play an important role in conflict resolution, peacekeeping and defence and foreign affairs mechanisms, they are still underrepresented in decision-making positions. If women are to play an equal part in securing and maintaining peace, they must be empowered politically and economically and represented adequately at all levels of decision-making.

135. While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance,
sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination.

136. Women and children constitute some 80 per cent of the world's millions of refugees and other displaced persons, including internally displaced persons. They are threatened by deprivation of property, goods and services and deprivation of their right to return to their homes of origin as well as by violence and insecurity. Particular attention should be paid to sexual violence against uprooted women and girls employed as a method of persecution in systematic campaigns of terror and intimidation and forcing members of a particular ethnic, cultural or religious group to flee their homes. Women may also be forced to flee as a result of a well-founded fear of persecution for reasons enumerated in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution, and they continue to be vulnerable to violence and exploitation while in flight, in countries of asylum and resettlement and during and after repatriation. Women often experience difficulty in some countries of asylum in being recognised as refugees when the claim is based on such persecution.

137. Refugee, displaced and migrant women in most cases display strength, endurance and resourcefulness and can contribute positively to countries of resettlement or to their country of origin on their return. They need to be appropriately involved in decisions that affect them.

138. Many women's non-governmental organisations have called for reductions in military expenditures worldwide, as well as in international trade and trafficking in and the proliferation of weapons. Those affected most negatively by conflict and excessive military spending are people living in poverty, who are deprived because of the lack of investment in basic services. Women living in poverty, particularly rural women, also suffer because of the use of arms that are particularly injurious or have indiscriminate effects. There are more than 100 million anti-personnel land-mines scattered in 64 countries globally. The negative impact on development of excessive military expenditures, the arms trade, and investment for arms production and acquisition must be addressed. At the same time, maintenance of national security and peace is an important factor for economic growth and development and the empowerment of women.

139. During times of armed conflict and the collapse of communities, the role of women is crucial. They often work to preserve social order in the midst of armed and other conflicts. Women make an important but often unrecognised contribution as peace educators both in their families and in their societies.

140. Education to foster a culture of peace that upholds justice and tolerance for all nations and peoples is essential to attaining lasting peace and should be begun at an early age. It should include elements of conflict resolution, mediation, reduction of prejudice and respect for diversity.

141. In addressing armed or other conflicts, an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively.

...
United Nations Security Council Resolution 1325 is a landmark resolution, not only in terms of addressing the impact of war on women, but also in charting the benchmarks and standards for the involvement of women in all activities relating to conflict prevention, management and resolution, and in the consolidation of peace.

UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325 ON WOMEN, PEACE AND SECURITY (2000)


Security Council Resolution 1325 was passed unanimously on 31 October 2000. Resolution (S/RES/1325) is the first Resolution ever passed by the Security Council that specifically addresses the impact of war on women, and women’s contributions to conflict resolution and sustainable peace.

The Security Council,

...  
Expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements, and recognising the consequent impact this has on durable peace and reconciliation,

Reaffirming the important role of women in the prevention and resolution of conflicts and in peacebuilding, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

Reaffirming also the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts,

Emphasising the need for all parties to ensure that mine clearance and mine awareness programmes take into account the special needs of women and girls,

Recognising the urgent need to mainstream a gender perspective into peacekeeping operations, and in this regard noting the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations (S/2000/693),

Recognising also the importance of the recommendation contained in the statement of its President to the press of 8 March 2000 for specialised training for all peacekeeping personnel on the protection, special needs and human rights of women and children in conflict situations,

Recognising that an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection
and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security,

Noting the need to consolidate data on the impact of armed conflict on women and girls,

1. **Urges** member states to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;

2. **Encourages** the Secretary-General to implement his strategic plan of action (A/49/587) calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes;

3. **Urges** the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard calls on member states to provide candidates to the Secretary-General, for inclusion in a regularly updated centralised roster;

4. **Further** urges the Secretary-General to seek to expand the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;

5. **Expresses** its willingness to incorporate a gender perspective into peacekeeping operations and urges the Secretary-General to ensure that, where appropriate, field operations include a gender component;

6. **Requests** the Secretary-General to provide to member states training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peacebuilding measures, invites member states to incorporate these elements as well as HIV/AIDS awareness training into their national training programmes for military and civilian police personnel in preparation for deployment and further requests the Secretary-General to ensure that civilian personnel of peacekeeping operations receive similar training;

7. **Urges** member states to increase their voluntary financial, technical and logistical support for gender-sensitive training efforts, including those undertaken by relevant funds and programmes, *inter alia*, the United Nations Fund for Women and United Nations Children's Fund, and by the United Nations High Commissioner for Refugees and other relevant bodies;

8. **Calls** on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as
they relate to the constitution, the electoral system, the police and the judiciary;


10. **Calls** on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;

11. **Emphasises** the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls, and in this regard, stresses the need to exclude these crimes, where feasible from amnesty provisions;

12. **Calls** upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design, and recalls its Resolution 1208 (1998) of 19 November 1998;

13. **Encourages** all those involved in the planning for disarmament, demobilisation and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants;

14. **Reaffirms** its readiness, whenever measures are adopted under article 41 of the Charter of the United Nations, to give consideration to their potential impact on the civilian population, bearing in mind the special needs of women and girls, in order to consider appropriate humanitarian exemptions;

15. **Expresses** its willingness to ensure that Security Council missions take into account gender considerations and the rights of women, including through consultation with local and international women’s groups;

16. **Invites** the Secretary-General to carry out a study on the impact of armed conflict on women and girls, the role of women in peacebuilding and the gender dimensions of peace processes and conflict resolution, and further invites him to submit a report to the Security Council on the results of this study and to make this available to all member states of the United Nations;
17. Requests the Secretary-General, where appropriate, to include in his reporting to the Security Council, progress on gender mainstreaming throughout peacekeeping missions and all other aspects relating to women and girls;

18. Decides to remain actively seized of the matter.

While the international standards for the participation of women in resolving conflict and peacebuilding are only beginning to be codified, women have been mobilising for peace in many conflict situations. Because women often bear the brunt of war, Heyzer, Executive Director of the United Nations Development Fund for Women, argues that their vision and voice should form the dominant, rather than an alternative perspective, in the search for long-term peace and stability.

The Dag Hammarskjold Lecture
Full text available at http://www.responsibilitytoprotect.org/index.php/civil_society_statements/

... The intertwining forces of internal and external conflict and social and gender injustice undermine the capacity of countries to move towards sustainable peace and development and threaten global peace and security. If we are to find just and equitable responses to the great challenges of this era and increase all forms of human security — economic, political, and social — then those who are most affected by insecurities and injustices must be involved in finding solutions. Decision makers must take into account current problems of injustice at every level, as well as people’s own solutions to them. Because some of the most entrenched social, economic, political, and cultural injustices are endured by women, half of the world’s population, it is necessary to make their voices heard, their perspectives visible, and their solutions legitimate; they must become leaders of communities and institutions, with the power to shape policies and agendas. In an increasingly insecure world, the vision of women who advocate for peace and justice must finally come to the fore as the dominant, rather than the alternative, perspective. Unless we take seriously the theme of the United Nations Women’s World Conferences, ‘Equality, Development and Peace’, we are going to lose out on the possibility of long-term peace and stability.

... Women in conflict zones throughout the world have mobilised within their communities and across borders to demand that the international community put an end to violence, to urgently address the impact of war on women and their communities, and protect the future of their societies, as well as women’s role in shaping that future. Based on their realities in conflict, women demanded the creation of an internationally agreed upon mechanism that could highlight the impact of war on women’s lives, ensure the protection
of their fundamental human rights, and guarantee their participation in processes of peace building and post-conflict reconstruction. It was this mobilisation, with the support of UNIFEM, that helped result in the formulation and adoption of Security Council Resolution 1325 on Women, Peace and Security. With this landmark resolution, women have shown it is possible to redefine international frameworks and policies using their own diverse experiences in conflict areas around the world.

It is important for those who represent the international system to identify, support, and respond seriously to people's efforts to mobilise in ways compatible with international values, to make viable non-violent forms of mobilisation. It is not simply a question of recognising people's aspiration to find alternatives to violence; it is a matter of making legitimate people's realities, grievances, and struggles, giving people reason to trust in an international system that protects and defends their rights, empowering local constituencies for reform, and promising people a stake in a common future. This means, among other things, assisting local constituencies in their efforts to address the injustices of the present and the past. The challenge to the international system is an urgent one. Failure to respond in a timely and effective manner could result in an irreversible loss of faith in international norms, as well as in aspirations for an inclusive future that defends the dignity and rights of all people.

Such a loss of faith will only deepen people's sense of betrayal and distrust, and generate the conditions for more hostility and revenge. In short, the challenge to respond effectively is a matter of life and death and demands a rethinking of how we mobilise to create a more secure and just world.

Wars are a major source of devastation, human suffering and poverty, affecting all aspects of economic, social and political life. The nature of warfare has changed: It is no longer soldiers who comprise the largest number of casualties, but civilians. In World War I, 14 per cent of the deaths were civilians; today it is estimated that this number has risen to over 75 per cent. The nature of the battlefield has changed: Warfare is no longer fought in remote battlefields between armies but is fought in our homes, our schools, our communities and increasingly on women's bodies.

In this context, it is important to understand the conditions and difficulties of women's lives in times of war and conflict, and to understand how women seek to connect these experiences at the local level to global policy making and action. I would like to refer to SC Resolution 1325 and focus here on the three interrelated dimensions that affect women's lives during violent conflict and in the transition to peace: first, the specific impact that war has on women's lives, including various forms of violence and the erosion of the economic and social fabric of community; second, the importance of women's participation in peace processes; and third, women's role in shaping post-conflict reconstruction processes to ensure their societies are founded on justice, inclusion, and a commitment to the dignity and development of all its members.

In conflicts throughout the world, violence against women has been used as a weapon of war, not just to violate the women but to humiliate the men of the
other side, and to erode the social and moral fabric of entire communities across generations. Women know the cost of violence, extremism and exclusion, the cost of destroyed states and economies, and the cost of accumulated conflicts. They know what it means to have sons, brothers, husbands, and even daughters who have fought and died in conflicts. Many women and girls are forced to hide or flee, lest they be coerced into slavery by militia groups. Others actively join armed movements to seek protection from other armed groups, or seek retribution for the loss of loved ones.

Women know what it means to be displaced, to bear high rates of maternal and child mortality and low rates of access to education and health care. They know what it means to be excluded from public life, and not to be recognised as full citizens. In situations of conflict, women are the first to be affected by infrastructure breakdown, and carry the ever increasing burden of caring and providing for their families, the injured and the wounded, while being forced to adopt survival strategies at the margins of war economies.

Women who have survived wars must find ways to live with the gross injustices that have filled their past and are haunting their present acts of discrimination and violence committed before, during and even after conflict. In the recovery process, there must be peace with justice and equality. The consolidation of peace cannot be achieved unless there is justice based on the rule of law. This refers to a principle of governance in which all persons, institutions and entities, including the state, are accountable to laws that are consistent with international norms and standards. The charter of the UN itself, together with the four pillars of the international legal system international human rights law, international humanitarian law, international criminal law, and international refugee law make up the normative foundation necessary to advancing the rule of law.

As stated by Secretary-General Kofi Annan in his report on rule of law and transitional justice in conflict and post-conflict societies, helping war-torn societies re-establish the rule of law and come to terms with large-scale abuses is a core mission of the United Nations. In contexts marked by devastated institutions, exhausted resources, and a traumatised and divided population, this is an overwhelming but urgent task. While the UN has been tailored to respond to the immediate security needs of populations affected by conflict, and to address the grave injustices generated by war, the root causes of conflict have too often been overlooked and insufficiently dealt with. Yet, it is precisely in addressing the causes of conflict and seeking to build societies based on inclusiveness, equality, and rule of law, that the international community can help prevent a return to conflict in the future. Prevention is the first imperative of justice and sustainable peace.

The United Nations plays an important role in upholding the rule of law by helping countries to strengthen national systems for the administration of justice in accordance with international standards. Increasingly, the UN realises the importance of adopting a comprehensive approach, by engaging all relevant institutions in the development of national justice systems, and paying attention to various dimensions of this process, including establishing standards of justice, formulating laws that codify them, strengthening
institutions that implement them, developing mechanisms to monitor them, and protecting the people who must have access to them.

While women are often the first victims of armed conflict, they must also be recognised as part of its resolution. Within the framework of Security Council Resolution 1325, attempts are being made in the UN to develop a more systematic approach to consulting with and involving women in conflict and post-conflict societies, in all stages and at all levels of the peace and reconstruction process. The participation of women in peace-making, peacekeeping, and peacebuilding ensures that their experiences, priorities, and solutions contribute towards stability and inclusive governance. The rebuilding process must address all forms of injustice embedded in conflict and must restore all dimensions of justice — legal, restorative and distributive — from a gender perspective. Impunity for crimes committed against women weakens the foundations of societies emerging from conflict by legitimising violence and inequality, and exposes women and the larger community to the threat of renewed conflict. During the transition to peace, a unique window of opportunity exists to put in place a gender responsive framework for a country's reconstruction. The involvement of women in peacebuilding and reconstruction is in fact a key part of the process of inclusion and democracy that can contribute to a lasting peace.

It was women from conflict areas who, in engaging the international community to address their situation, identified women, peace and security as common priorities, requiring an urgent response by various local and international actors, from members of their own communities to member states on the United Nations Security Council. It was women who pried open the closed doors of the Security Council, availing themselves of a mechanism, known as the Arria Formula, by which those who had actually experienced war and conflict and others outside the formal decision-making process could make their voices and perspectives heard. Since the adoption of Resolution 1325, there have been some notable achievements. A Security Council Resolution with a strong constituency and broad implications for more than half the world's population, its implementation is being carefully monitored by women around the world.

Peace operations are now starting to develop ways of responding to some of the specific concerns of women in conflict zones. In line with our own mandate to improve women's lives, UNIFEM has responded to this appeal by catalysing the United Nations system and supporting the participation of women in various dimensions of peacekeeping, peacebuilding, and reconstruction. While a handful of good practices are, of course, insufficient in addressing the overall problem, these initiatives have been important in setting precedent and showing some possible ways forward in efforts to protect and support women in conflict. I will elaborate briefly on the three priority areas of women's protection during conflict, their participation in peacebuilding, and their role in post-conflict reconstruction, and then share with you some of the concrete work UNIFEM has supported in each of these areas.
Protection in armed conflict

War has become a highly gendered phenomenon. While the vast majority of fighters in armed groups are men, it is increasingly common for women civilians to be targeted through sexual violence, which is increasingly used as a weapon of war against the enemy side. In many places, women and girls are also highly vulnerable to kidnapping, forced labour, and trafficking. In places such as Uganda and the DRC, it is still common for girls to be abducted into armed groups and forced into sexual slavery, with the vast majority becoming infected with sexually transmitted diseases and, increasingly, HIV/AIDS. In addition, women and girls have been forced to trade sex for safe passage, food, and protection, including by members of security forces. Women and girls are seldom protected from these threats; their aggressors are seldom punished.

We also need to better understand women's realities not just as victims but also as actors in political conflict. Many women choose to join political movements, including armed groups, in times of conflict. Their roles include civil activists, community workers, combatants, intelligence, nurses, porters, and cooks. Women may join, or even form, these groups because of political conviction or affiliation or to seek protection from enemy forces. In Aceh, for example, many widows and their daughters have joined the guerrilla movement for protection from the Indonesian military and military-backed militia. In such cases, women may be targeted three-fold: as women, as civilians of the opposite side, and as political enemies in armed conflict. Female dependents of combatants are also at high risk of violence and, in many places, have been subjected to gross abuses, including arbitrary detention, kidnapping, torture, and rape.

Given the nature of contemporary conflicts, it is a political and social necessity to address issues of justice in a multidimensional manner, engaging all institutions of the justice system. Neglect of one inevitably leads to the weakening of the others. If injustices experienced by people during war are not sufficiently attended to, it is unlikely that trust will be established in the rebuilding of peace. Focusing on the way conflict affects women and girls is crucial to re-stitching the social fabric of families and communities after conflict and violence have ripped them apart. Until justice is seriously addressed a sadly ambiguous message is sent to perpetrators of human rights abuse that they are above the law. There must be urgent and severe action against this chilling destruction of women and communities.

Women and girls face a massive justice deficit in war-torn societies. By and large, international protection and assistance operations still effectively neglect the specific needs of women and girls. In my visits to countries in or emerging from conflict, I have seen these gaps with painful clarity. I have heard about women's futile quest to learn the fate of the raped and impregnated women or the countless children they were forced to bear. In conflict area after conflict area, I have met the mothers of the disappeared, and walked through valleys of widows, huge communities of women left alone to fend for themselves and their families. These women live each day bearing painful memories of humiliation and torture that they and their loved ones were subjected to. And as if this were not enough, they are also struggling to
claim their property, their inheritance, their land and, in some cases, even to retain their children.

Protection and humanitarian assistance for women is glaring in its inadequacy. As the nature of security has changed, blurring the lines between militias and civilians, making it difficult to provide the security needed, we have totally failed to protect women and girls against the multiple forms of violence they are subjected to during conflict. The massacres in Darfur and the mass rapes in Haiti are the most recent examples. This is why women stress again and again the need for protection in armed conflict and an end to impunity for crimes against women. They want accountability for past abuses, the punishment of human wrongs and the protection of human rights. Beyond that, they are no longer willing to be seen only as victims; they want to be recognised as part of the solution in the rebuilding process. They know that no matter which side wins, women will lose unless they are recognised as stakeholders of the future of their societies.

Establishing timely and effective justice is an integral part of any peacebuilding and reconstruction effort, if there is to be a solid foundation for lasting peace and respect for human rights. Failure to address inequalities in the justice system and its discrimination of women jeopardises the chance of securing sustainable peace and increase the risk of violent conflict, as men and communities that have been humiliated through the violence against their women maintain anger, a sense of injustice, and a desire to seek revenge.

Participation in peace processes

But protection for women during conflict is not enough. Gender justice and women’s rights must be integrated in peace agreements and in the legal and institutional structures supporting post conflict reconstruction. Without women’s equal participation and full involvement in peacebuilding, neither justice nor development will be possible in a war-torn society’s transition to peace. In many war-torn countries, many women assume activist roles while holding together their families and communities. In some cases, they have managed to bring their experiences into formal peacebuilding processes, relating their realities and concerns to official negotiating parties. When women’s voices are heard and heeded, critical priorities that would otherwise be left out of peace processes are often reflected. Such issues include the importance of increasing the presence of women in the civilian, military and police components of peacekeeping operations. Where this has happened, it has led to improved relations with local communities, which is essential to the success of peace interventions. Emphasis is also given to designing disarmament, demobilisation and reintegration (or DDR) processes to meet the special needs of girls and women who have been abducted into armed groups, women combatants, dependents of combatants, and former soldiers who are trying to return to civilian life. Too frequently, these women are totally excluded from rehabilitation programmes that are designed to foster reconciliation through support for education, health, access to land, credit, etc. The needs of women with children or rape babies, or girls in fighting forces, are seldom incorporated into demobilisation and reintegration
initiatives. In addition, women’s peace initiatives, sometimes undertaken across warring sides, involve taking high risk in extreme conflict situations.

However, these efforts are insufficiently recognised and supported, both politically and financially. Sustainable peace is, in many ways, contingent on community-based involvement and ownership of the peace process. From the grassroots level to the negotiating table, support for women’s participation in peacebuilding contributes to a society’s efforts to recover from violent conflict. In war, women are activists, caretakers, providers and survivors. Strengthening women’s groups on the ground in conflict areas strengthens the chance that they can provide communities of hope, reaching out across barriers of identity, including clan, ethnicity, religion, and political affiliation and helping people to transcend these. They break the lines along which groups organise and mobilise for war against each other. As we saw clearly in Rwanda, Sierra Leone and elsewhere, when these communities of hope break down, children are much more easily recruited into becoming soldiers, as everyday security and opportunities for social development are eroded.

**Gender justice in post-conflict reconstruction**

The term ‘post-conflict’ is a simplification to describe societies where there has been a termination of hostilities either through negotiations or war, and there has not been a relapse into violence. Their transitional status provides an opportunity to shift agendas towards peace. The term ‘gender justice’, as used here, refers to the integration of gender perspectives within every dimension of justice, and the role of women in shaping justice frameworks and rule of law institutions in ways that promote their human rights, legal equality and inclusion.

Women have a crucial role to play in the rebuilding of stable societies. International and regional initiatives to link peace with justice not only benefit women, but are also strengthened by them. During the transition to peace, a unique opportunity exists to put in place a gender responsive framework for a country’s reconstruction based on the three dimensions of justice: Legal justice to address discriminatory laws against women at institutional and policy levels, such as inheritance laws which prevent women from owning property; restorative justice to address violation of human rights and war crimes so that people can move beyond their trauma and begin to construct new lives for themselves; and distributive justice to address structural and systematic injustices such as the political, economic and social inequalities that are frequently the underlying causes of conflict. Although the urgency of each of these three dimensions varies among conflicts and although they are interdependent and mutually reinforcing, the tendency is to focus primarily on restorative justice, addressing past wrongs through tribunals and the criminal justice system. Overlooking any of these dimensions of justice can lead to a recurrence of conflict and weaken the foundations of peace. Using a gender sensitive approach to all three dimensions can help remove barriers and facilitate the movement of post conflict countries towards stability, development and inclusive governance. Indeed, gender justice is a critical and integral dimension of any approach to establishing the rule of law and consolidating peace.
There are some essential actions required for sustainable peace which the three dimensions of justice can accelerate. These include the rebuilding of state institutions for inclusive governance; the adoption of a constitution and establishment of legal justice, or rule of law that addresses equality and fairness; the reconstruction of the economic and social infrastructure and destroyed facilities based on distributive justice to address the root causes of the conflict; the healing of the psychosocial trauma of war through truth and reconciliation in order to bring about restorative justice. In the aftermath of conflicts, resources are depleted, infrastructure is destroyed, and social, economic and political relationships are strained. Successful reconstruction depends upon the use of every available resource. Women represent the most precious and underutilised of these resources. Unless a country's constitutional, legal, judicial and electoral frameworks deal with gender equality, then no matter what happens after conflict, or how peaceful a transition, the country will never have a fair chance at development.

The work on truth and reconciliation has to rest on restorative justice, and there has to be an end to impunity for the violence that is used against women. The women I met in Rwanda have testified against war criminals that still wield power and influence. They have endured the pain of telling, retelling and reliving their stories often without privacy and security. Women seeking justice need protection and look to the standards set by the ICC. They ask for witness protection, legal support, counselling, as well as separate chambers and female judges to hear cases of women survivors of sexual violence. They ask for sanctions against tribunal staff that do not respect the rights of witnesses. Accountability means being answerable to women for crimes committed against them; it means punishing those responsible and ensuring redress for victims. But lasting peace requires not only accountability for past actions, but also responsibility for present and future ones. Civilian police and post-conflict judicial institutions, for example, must learn to understand and address the issues such as the trafficking in women and girls, and sexual violence, both of which increase dramatically during conflict and spill over into post-conflict societies. Gender equality and inclusion and freedom from sexual violence are fundamental values on which peacebuilding must be based.

In Rwanda, UNIFEM's support for women leaders has helped to promote women's perspectives in government policies and within parliament, the judiciary and the police. Rwanda today has the world's highest percentage of women judges (50%) and the highest percentage of women in Parliament (49%). Our support contributed to the passage of the inheritance bill, which guarantees women and girls the right to inherit property, an important ingredient of peacebuilding. This reform will go a long way in revitalising the agricultural sector. It will also enable people and communities to invest in economic security as part of human security as rural economies once again are able to produce food and can integrate the internally displaced and the ex-combatants back into the community. Similarly, support for women's organising in Angola, Timor Leste, and Mozambique has promoted gender-sensitive reviews of legal frameworks and has increased women's participation in the political arena.
Advances in political and legal rights are not matched, however, by significant progress in the achievement of distributive justice. Eight of the ten countries ranked lowest on the Human Development Index and half of the countries designated as least developed countries, or LDCs, have had major wars in the recent past. Already poor, these countries are further impoverished by violence with the destruction of their infrastructure, livelihoods and productive capacity. The vast majority of countries emerging from conflicts are LDCs and thus deeply dependent on the international financial institutions (IFIs) such as the World Bank and the International Monetary Fund for reconstruction. These IFIs have acted as catalysts and guarantees for bilateral donors, and the Bank in particular has sponsored quick impact employment schemes and community development. Together with the United Nations, these multilateral institutions have put in place a results-focused transitional framework (RFTF) for post-conflict countries to be followed by a poverty reduction strategy (PRS). Despite their considerable efforts to reconstruct war-torn societies and destroyed states, the Bank and the IMF have tended to underestimate the underlying causes of conflict and the need to give conflict prevention a central place in the PRS and in the country's overall economic strategy. Their approach has been to engage in the costly tasks of reconstructing the economy to catch up with years of lost economic growth focusing on macroeconomic stability. They have treated devastated economies and destroyed states in the same way as peaceful countries in their economic policy prescriptions, regarding armed conflicts as temporary disruptions to an established economic path. The issues of distributive justice among warring parties and along gender lines are not sufficiently addressed, including inequalities in income, assets, employment and access to land. As lead institutions for economic recovery in post-crisis countries, it is essential that they do more to incorporate these issues into their policy frameworks, not only for quick impact projects or recovery packages but, more importantly, in the development strategies proposed or prescribed to governments.

For women who have long organised for peace on the ground, Security Council Resolution 1325 on Women, Peace and Security represented a long overdue recognition of their accomplishments and challenges. It gave much needed political legitimacy to their struggle. Women were instrumental in the adoption of Resolution 1325 and are breathing life into its implementation. This resolution is not simply a UN document; it is a window to greater protection and promotion of the rights of those who are often the most vulnerable, the most invisible, and who have the greatest stake in peace. It set a new threshold of action by the UN system, and by all member states. However women’s contribution to the peace building and reconstruction process will bear fruit only if conflict prevention and the reduction of political violence become a central part of development strategies to reduce poverty, exclusion and inequalities among groups.

The opportunity now exists to make women and gender perspectives central to peace and reconstruction processes. The UN system as a whole can leverage the political, financial and technical support needed for these efforts to have an impact on peace efforts nationally, regionally and internationally. Ensuring women’s representation in peace-making,
peacekeeping, and peacebuilding, would be a first step in recognising the unique and critical contributions that women can make to sustainable peace.

Making Resolution 1325 work means ensuring that the challenges facing women in conflict become a regular item on the political agenda, in thematic debates, and every time a country situation is addressed. There must be efforts at every level, from local societies to the international community, to ensure its implementation.

As long as the current institutional deficit in responding to women exists, women’s lives are not being taken seriously enough by governments or the international community. The security of people must be regarded as a goal as important as the security of states. Security Council Resolution 1325 is a good example of how women, as non-state actors, have been able to bring situations that have endangered the security of women within particular states to the attention of the Security Council. What is needed now is serious and comprehensive implementation, through coordinated partnerships that address current challenges and promote strategies that have worked.

Using Sudan as an example, Awad illustrates how women have mobilised in support of peacebuilding, even when they were locked out of the formal negotiations under the auspice of the Intergovernmental Authority on Development (IGAD).

\textbf{AWAD, OM} \textit{TRANSITION FROM WAR TO PEACE IN SUDAN} \hfill (2004)
Geneva: University for Peace
Full text available at http://www.upeace.org

\textbf{Engendering peaceful transformation}

Progress in Sudanese women’s peacebuilding efforts has been twofold. First, women have created seventy-one organisations and increased their presence in public and private institutions. Second, they have embarked on two novel areas of activity: adopting a protective role in support of women and children affected by war and famine, and embracing a proactive role in peacemaking and reconstruction activities. The Sudanese Women’s Voice for Peace, founded in 1984 as Sudan’s first women’s NGO focusing on peace, conducts work in the areas of resettlement, reconciliation, and peace education. Indigenous patriarchal cultures may exert biases against women, but they generally allow them an active role in society. The situation of women who work the land in some parts of Sudan while men stay at home is extreme, but it is regardless a symbol of women’s active participation and sharing of responsibilities. The number of women in most civil service institutions, the private sector, and institutions of learning either exceeds or approaches that
of males. For example, the percentage of female students at the University of Khartoum has recently surpassed the percentage of male students. Most institutions have begun to train their secretaries in a range of computer programmes to enhance the efficiency and competency of these organisations. The majority of civil servants in secretarial posts (and the same posts in the private sector) are female, thus allowing a significant number of women access to ICT. Sayeda Ahmed has been a secretary at the National Corporation of Electricity (NCE) in Khartoum for twenty-five years. Ten years ago she received training in word processing, and in 2004 she is being trained in Excel, PowerPoint, and Web-based programmes. She contends that such courses have empowered the secretaries of the NCE as well as made it possible for them to cope with the growing needs of their jobs.

This environment has generally paved the way for women to organise efforts and activities with the purpose of strengthening the role of women in society, launching initiatives and programmes for the enhancement of women’s capacity and skills, and raising public awareness of gender issues. NGOs concerned with women’s issues perform significant humanitarian, social, and political activities. Most of the projects are directed at internally displaced persons in refugee camps. Some four million IDPs live in Sudan, most of them women and children, and many of them are psycho-socially traumatised and lacking basic means.

NGOs such as the Southern Women’s Corporation for Peace and Development, the Sudan Peace Group for Relief and Development, and the Support Organization have launched projects in education, water sanitation, health care, and family reunification. Some organisations have designed innovative programmes for youth involving sports, drama, and the arts, such as drawing, which can be utilised as a means of healing and peace education.

Women are playing leading roles in the dissemination of a peace culture through innumerable activities. In this area the Salam Alizza organisation introduced a ground-breaking project that seeks to transform the culture of violence spread by Hakamat — influential individual women, mainly in Western Sudan, who recite poems that encourage violence — to a culture of peace. Through poetry these women have traditionally inspired men to fight against their enemies and resolve tribal differences with armed force and bloodshed. Salam Alizza’s programme aims to dispense with the lyrical violence of Hakamat women’s poetry while redirecting their poetic abilities toward the promotion of peaceful coexistence among different clans.

Despite the vital role of women in the transition from war to peace, and notwithstanding their emphatic support for ongoing rounds of the peace process, women are usually excluded from the negotiations. In July 2002 in Kenya, the Machakos Protocol was signed, marking tangible progress in the peace talks. It provides for the preservation of unity as a common national goal, but it also guarantees the right of self-determination for the people of the south. During talks, women from the north and the south united in their support for the protocol and asked that immediate steps be taken to ensure the participation of women in the negotiations. On August 7, 2002, the Sudanese Women’s Civil Society Network for Peace (SWCSNP) and the Secretariat of Women Solidarity Group issued a position paper.
The Southern Women’s Group for Peace convened on August 8, 2002, and issued a position paper on the protocol noting that the negotiation process should include professionals, technicians, and women. A comprehensive statement by another Sudanese women’s group has unequivocally proclaimed women’s entitlement to active participation in subsequent rounds of all peace negotiations:

(1) We would like to express our special concerns, as women are not well represented in the delegations negotiating the peace process although since 1996 women from the south, north and Western Sudan have been networking for peace issues and culture and for strengthening the conflict resolution mechanisms. Furthermore, in relation to the impact of war, in some cases, women have been marginalised in the peace negotiations as if war and peace are not of women’s concern and as if Sudanese society is only a male society.

(2) We are worried that women’s exclusion from the negotiations would be a momentum to the end results as well as to the after peace or transitional periods. Evidently our rights, needs and interests would be neglected or stereotyped.

The history of the peace talks had not, however, been entirely free of women’s involvement. Agnis Lukodo, the first woman governor in modern Sudan, participated in the 1993 peace talks coordinated by the Inter-Governmental Authority on Development (IGAD), marking a bright experience in the peace process. Similar participation should be broadened in the interest of securing a lasting peace.
### QUESTIONS

1. To what extent do historical legacies, such as the arbitrary division of states by colonial powers, the character of colonial commercial relations, the Cold War, and the continental perception of international indifference towards African conflicts still account for the existence and nature of modern African conflicts?

2. Are the root causes of conflict in Africa unique to the continent? Illustrate your response by drawing upon a conflict in another region.

3. According to the World Bank, the expected duration of conflict is currently double that of conflicts that started prior to 1980. What are possible explanations for this?

4. Does a struggle for human rights lie at the root of all conflicts? Illustrate your response with examples and possible exceptions.

5. To what extent is it feasible and practical to rely on traditional methods of solving conflict in modern-day Africa?

6. Could the oversight of traditional conflict resolution methods partly explain the limited success of various internationally brokered peace agreements?

7. How can the incorporation of relevant African values and ethics contribute to the amelioration of on-going African conflicts?

8. What lessons could be learnt from recent conflict prevention, management and resolution experiences in Africa?

9. The sub-regional organisations are the ‘building blocks of the African Union’. What does this mean with specific reference to peace and security?

10. What strategies can ensure that the views of traditionally disadvantaged groups such as women, the youth, rural dwellers and ethnic and religious minorities are adequately reflected in peacemaking efforts in Africa?

11. How do key elements of a comprehensive post conflict strategy – cessation of hostilities, demobilisation, reintegration, resettlement, economic revitalisation, good governance, etc, complement each other?

12. Kofi Annan says: ‘The fact that we cannot protect people everywhere is no reason for doing nothing when we can’. Based on the international response to conflicts in Africa (Rwanda and Darfur, for example), does it seem that the words ‘we cannot protect people everywhere’ refer to Africa, and ‘when we can’ refer to the rest of the world?

13. What means of UN reform would you suggest in order for UN peacekeeping to be more effective in Africa?
(15) Article 10 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides for the ‘right to peace’. What does this entail?

(16) Women’s peacekeeping efforts in Africa generally occur at the grassroots level. While such is necessary and has made important contributions to peace, what steps must be taken by the African Union to ensure women play a more meaningful role in peacebuilding at the regional and international level?
FURTHER READING


Further Reading


USEFUL WEBSITES

African Centre for the Constructive Resolution of Disputes (ACCORD) www.accord.org.za
African Union www.africa-union.org
Centre for Conflict Resolution www.ccrweb.uct.ac.za
Institute for Security Studies www.iss.co.za
International Crisis Group www.icg.org
Safer Africa www.saferafrica.org
UPEACE www.upeace.org
Women’s International League for Peace and Freedom www.peacewomen.org
SECTION 3:
POST-CONFLICT JUSTICE

Post-conflict justice, as discussed in the essays that follow, is a form of justice located between an ‘old order’, often characterised by gross violations of human rights, oppression and violence, and a ‘new order’ that promises democracy, human rights, the rule of law and good governance. It prioritises the principles of the new dispensation, including the rule of law and the need for social transformation, while affirming the importance of protecting society against the danger of collapsing back into the old order. This involves a level of statecraft that the Deputy President of the South African Constitutional Court, Ismael Mahomed, at the time of his country’s transition, defined as a ‘historic bridge’ from the past to the future for both victims and perpetrators ‘to become active, full and creative members of the new order’. It seeks to stabilise and protect the transition as a basis for the promotion of realistic and viable change.

Post-conflict justice is necessarily a broad and inclusive justice. Usually it requires a focus on restorative justice measures that address issues such as the punishment for past crimes as well as the need for political stability and socio-economic transformation. It often includes amnesty as a means of drawing past perpetrators into the new order and reparations for victims and survivors of gross violations of human rights, not only in monetary terms but in other ways that promote the restoration of their human dignity through public protection, redress, acknowledgment and recognition as a basis for facilitating their full participation in the new order.
Post-conflict justice, in the inclusive sense of restorative justice, prioritises the needs of victims. It reaches beyond the right of victims to see those responsible for their suffering identified and censored in some way. It further seeks the creation of a society within which issues of identity, culture, gender rights and economic stability are actively promoted. Above all, it recognises the need for the rule of law to be entrenched in the emerging society. As such, legal impunity for those guilty of past crimes needs to be addressed, while recognising that prosecution, not least at the time when the new order is still being entrenched, could have the most severe implications for peace. This is where amnesty for some or all offenders is judged to be a political necessity. Without this concession perpetrators may well refuse to surrender their guns.

The question that needs to be asked repeatedly in all post-conflict societies is who the primary benefactor is of the legal concessions that often characterise an emerging new society. The nature and duration of a post-conflict society need at the same time to be assessed carefully. When does this phase of political existence give way to ‘normality’, allowing established forms of justice to be introduced? It is one thing to deal with prosecutions and the payment of reparations; it is another to ensure societal stability, economic growth, cultural adjustment and related forms of transformation. These take time. The need is to ensure the maximum participation of as many sectors of society as possible in this process. Post-conflict justice is an interim justice. It involves realpolitik. It functions as a midwife to an emerging new order. The birth process is usually a long one. It takes time. It is complicated. It requires careful monitoring, adjustments and constant care.
A. WHAT IS TRANSITIONAL JUSTICE?

In the following article, the Deputy Chairperson of the South African Truth and Reconciliation Commission provides an overview of issues of justice, human rights and nation-building in countries undergoing change from oppressive rule to democracy and the rule of law.

in Villa-Vicencio, C and Doxtader, E Pieces of the puzzleCape Town: Institute for Justice and Reconciliation

Transitional justice seeks to address challenges that confront societies as they move from an authoritarian state to a form of democracy. Frequently, these societies are emerging from serious conflict and violence that often includes widespread human rights violations and in some instances genocide and crimes against humanity. Such situations are often characterised by a breakdown in legal services; stark divisions and apportioning of blame; institutional collapse; and economic downturn. In this light transitional justice is not a contradiction of criminal justice but rather a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and start a process of reconciliation and transformation toward a more just and humane society.

The Nuremberg Trials, the International Tribunal for Former Yugoslavia and the International Tribunal for Rwanda as well as the establishment of the Permanent International Criminal Court (ICC), are themselves major steps forward in the effort to confront impunity. They are also a stern reminder to those prepared to commit serious criminal acts that they will face grave sanctions if and when they are brought to book. However, realistically it is impossible to prosecute all offenders during times of transition. Who then should be prosecuted? This vexed question of selective prosecution is one that seems to undermine the very idea of individual criminal responsibility so fundamental to our understanding of the rule of law. Other problems also abound. In the wake of conflict national legal systems are often in disarray and trials are often both very lengthy and costly. Moreover, the almost exclusive focus by tribunals on the perpetrator(s) is often to the detriment of the victims. In short, the aim of transitional justice is wider than prosecuting perpetrators. Punishment cannot be the last word. Due to these shortcomings, it is impossible to deal with the true intent of justice by court procedures alone. A holistic approach to transitional justice seeks to complement retributive justice with restorative justice. There are at least five components of this holistic approach:

Accountability

The rule of law and the fair administration of justice deserve our greatest respect. No society can claim to be free or democratic without strict adherence to the rule of law. Dictators and authoritarian regimes abandon
the rule of law at the first opportunity and resort to brazen power politics leading to all manner of excess. It is of central importance, therefore, that those who violate the law are punished. But there are limits to the law and we need to embrace a multi-faceted notion of justice that is wider, deeper and richer than retributive justice. It is not only impossible to prosecute all offenders, but an overzealous focus on punishment can make securing sustainable peace and stability more difficult. To achieve a just society, more than punishment is required. Documenting the truth about the past, restoring dignity to victims and embarking on the process of reconciliation are all vital elements of a just society. Equally important is the need to transform society so that it does not impede the consolidation of democracy and the creation of a human rights culture. It follows that approaches to societies in transition will be multi-faceted and will incorporate the need for consultation to realise the goal of a just society.

Truth recovery

One of the non-judicial mechanisms that has gained great prominence over the last ten years is the Truth and Reconciliation Commission (TRC). A TRC, as indicated by its title is concerned first and foremost with the recovery of truth. Through truth-telling, these commissions attempt to document and analyse the structures and methods used in carrying out illegal repression while taking into account the political, economic and social contexts in which violations have occurred. In some ways, it is unfortunate that the word ‘truth’ is used. Beyond its Orwellian overtones, many critics rightly point out that it is impossible for the truth ever to be fully known.

Reconciliation

A number of commissions have talked not only about truth but also about reconciliation. If the word truth conjures up problems for many people, so does the word reconciliation. It has religious connotations, especially in the Christian faith, and there are many who would prefer that the word and the concept of reconciliation not be used in TRCs that are seeking to recover the truth and promote the interests of victims.

At best, reconciliation involves commitment and sacrifice; at its worst, it is an excuse for passivity, for siding with the powerful against the weak and dispossessed. Religion, in many instances, has given a bad name to reconciliation, representatives often having joined forces with those who exploited and impoverished entire populations instead of being in solidarity with the oppressed. Reconciliation is unrealistic when it calls for mere forgetting or concealing. In Argentina, the concept of reconciliation is regarded with deep scepticism. In that country, the Roman Catholic Church, in large measure, supported the military junta, and the perpetrators of human rights violations were always the first to call for reconciliation. The same is true of Rwanda, where religious groups and officials participated in the massacre of the Tutsis. In this context, talk about reconciliation is highly suspect and can be viewed as a call for amnesia. Unless calls for reconciliation are accompanied by acknowledgment of the past and the acceptance of responsibility, they will be dismissed as cheap rhetoric. Perhaps one of the ways in which to achieve at least a measure of reconciliation in a deeply
divided society is to create a common memory that can be acknowledged by those who created and implemented the unjust system, those who fought against it and the many more who, while in the middle, claimed not to know what was happening in their country.

Reconciliation, as a process for seeking an often elusive peace, must be understood through the lens of transitional justice. It is better understood if victims believe that their grievances are being heard and addressed, that the silence is being broken. Reconciliation can begin when perpetrators are held accountable, when truth is sought openly and fearlessly, when institutional reform commences and when the need for reparation is acknowledged and acted upon. The response by former victims to these initiatives can increase the potential for stability and increase the chances of a sustainable peace.

The process of reconciliation has often been hindered by the silence or denial of political leaders concerning their own responsibilities and the failures of the state. On the other hand, when leaders are prepared to speak honestly and generously about their own involvement or, at least, the involvement of their government or the previous government, then the door is open for the possibility of some reconciliation amongst the citizens.

Institutional reform

For truth and reconciliation to flourish, serious and focused attention must be given to both individuals and institutions. Institutional reform should be at the very heart of transformation. The TRC is an ideal model for holding together both retrospective truth and prospective needs. Unfortunately, most TRCs have chosen to focus almost entirely on individual hearings. This is important and critical, but if commissions were to hold institutional hearings, it would enable them to call to account those institutions directly responsible for the breakdown of the state and the repression of citizens.

In at least one commission, an opportunity was created for spokespersons from the military, the police and the security forces while also inviting politicians, faith communities, legal representatives, the media and labour officials to give an account of their role in the past and how they saw their role in the future. In other words, it is simply not enough to be merely concerned about the past. We must deal with it, but we must not dwell in it. We should deal with the past for the sake of the future.

On a recent visit to Serbia, it was obvious that one of the major problems preventing the country from moving on from its dark and ominous past was that its institutions had remained almost exactly the same: the same policemen were controlling the police forces; the same generals were controlling the army. This can be said to be true of most of Serbia’s major institutions. As I moved from one group of leaders to another, it became clear that unless these institutions are radically restructured, there will be little opportunity for growth, development or peace in Serbia. This is not only true of Serbia but applies to the former Yugoslavia as a whole and to all states in transition.
In deeply divided societies where mistrust and fear still reign, there must be bridge-building and a commitment to both criminal and economic justice. For that to be a reality, institutions as well as individuals have to change.

Reparations

Reparations have a long history, but until now have not received sufficient systematic attention. The individual reparations issued by the Federal Republic of Germany were a watershed moment in the history of reparations. Until 1952, reparations were solely an inter-state affair, involving payments by the losing state to the victorious one, as in the Versailles Treaty. Reparations to the victims of the Holocaust were the first instance of a massive nationally sponsored reparations programme to individuals who had suffered gross human rights violations.

It is worth emphasising that from the standpoint of the victims, reparations programmes occupy a special place in a transition to democracy. Reparations are, for them, the most tangible manifestation of the efforts of the state to remedy the harms they have suffered. Criminal justice, even if it were completely successful, both in terms of the number of perpetrators brought to book (far from being the case in any transition) and of the results (which are always affected by the availability of evidence and by the persistent weaknesses of judicial systems), is in the end a struggle against perpetrators rather than an effort on behalf of victims.

From truth-telling, victims can obtain significant benefits that may include a sense of closure derived from knowing the fate of loved ones, and a sense of satisfaction from the official acknowledgment of that fate. But in the absence of other positive and tangible manifestations, truth by itself can easily be considered an empty gesture — as cheap and inconsequential talk. Finally, institutional reforms will always be a long-term project, which only indirectly affect the lives of the victims.

In many ways the dilemmas and challenges in reparations are a microcosm of the overall challenges of transitional justice. How does one balance competing legitimate interests in redressing the harms of victims and ensuring the democratic stability of the state? Similar to other areas of transitional justice, such as truth-telling or institutional reform, simple judicial decisions cannot provide the comprehensive solutions demanded by such interests. Rather, solutions must be found in the exercise of judgment and a creative combination of legal, political, social and economic approaches.

Conclusion

There are enormous difficulties in pursuing justice in a normal situation, but when one attempts to do this in countries undergoing transitions, the problems are intensified. There is a need to balance two imperatives: On the one hand, there is the need to return to the rule of law and the prosecution of offenders; on the other, there is a need for rebuilding societies and embarking on the process of reconciliation. In helping to make states work, it is important, therefore, to balance accountability with the shoring up of fragile emerging democracies. The overall aim should be to ensure a
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sustainable peace, which will encourage and make possible socio-economic development.


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... The link between peace and justice

Much has been written about the decision of the Security Council to establish an international criminal tribunal to investigate and prosecute war crimes in the former Yugoslavia [Yugoslav Tribunal], but what is not often stressed is that this decision was necessarily founded upon the recognition of a direct link between peace and justice. In establishing the Yugoslav Tribunal, the Security Council was acting under powers conferred upon it by Chapter VII of the UU Charter. In terms thereof, the Security Council is only authorised to pass resolutions binding on all states parties if it decides that enforcement measures are necessary to bring to an end a situation which constitutes a threat to international peace and security.

In September, 1991, the Security Council determined that the situation in the former Yugoslavia constituted such a threat that, acting under Chapter VII, it imposed a complete arms embargo on Yugoslavia. It was, however, Resolution 827, passed twenty months later, which explicitly acknowledged that the widespread violations of humanitarian law and human rights occurring in the region constituted a threat to international peace. This is made clear in the following paragraphs of the resolution:

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organised and systematic detention and rape of women, and the continuance of the practice of ‘ethnic cleansing’, including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and
the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.

As we see, the Security Council resolved that the establishment of the Yugoslav Tribunal was the most appropriate way of dealing with such a threat.

In November, 1994, a similar decision was taken by the Security Council in respect of Rwanda, where an internal armed conflict had resulted in the commission of a genocide claiming the lives of up to one million people. It was thus anticipated by the Security Council that justice would help restore peace in both the former Yugoslavia and Rwanda and hasten the return of refugees to their former homes.

Particularly at the time of the negotiations at Dayton, Ohio, in September, 1995, there were many astute politicians and political commentators who suggested that, in fact, peace and justice were in opposition, and that the work of the Yugoslav Tribunal was retarding the peace process in the Balkans. Even at that late juncture in the history of the conflict, and in the context of that debate, people failed to see the link between peace and justice which had so deliberately (and in my view correctly) been made by a unanimous Security Council in May, 1993.

I have no doubt that in countries or regions where there have been egregious human rights violations, it is less likely that there will be an enduring peace without some attempt to bring justice to the victims. In particular, there are the following five positive contributions which justice can achieve.

First, exposure of the truth can help to individualise guilt and thus avoid the imposition of collective guilt on an ethnic, religious, or other group. During my visits to the former Yugoslavia, and particularly Belgrade, I was astounded at the manner in which Serbs I met were consumed by their historical hatred of Croats. Most meetings I attended began with a history lesson — if I was lucky the history began during the Second World War, but on less happy occasions it began with the Battle of Kosovo in the fourteenth century. It was no different in Zagreb or Sarajevo where collective guilt was ascribed to Serbs or Muslims, as the case may be. In the Balkans, violence has been erupting periodically over a span of six hundred years. Very seldom have the perpetrators of that violence been brought to account. Victims were denied justice.

The result is that blame has been ascribed not to the leaders who sponsored the violence, but to the communities or people represented by those leaders. In one respect, perhaps, the most important beneficiaries of the Nuremberg Trials were the German people. Credible evidence presented at those trials established the guilt of the Nazi leaders beyond a doubt. Through the criminal trial process, focus was placed upon the accused as individual criminals or leaders and not as Germans. So the group of men standing in the dock at Nuremberg were seen as the criminals they were, and not as representatives
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of the German people. I have no doubt that Germany would have had far more
difficulty in coming to grips with its sordid World War II history but for the fact
that those leaders were brought to trial.

Second, justice brings public and official acknowledgment to the victims. This
usually is the first step in their healing process.

Third, public exposure of the truth is the only effective way of ensuring that
history is recorded more accurately and more faithfully than otherwise would
have been the case. The Nuremberg Trials have made the work of Holocaust
deniers far more difficult. Without the exhumation of mass graves in Bosnia,
the fabrications of some Bosnian Serb spokespersons would have had some
credibility. The first Yugoslav war criminal to be sentenced, Drazan Erden–
movic, confessed to having murdered over seventy innocent Muslim men
outside Srebrenica in July, 1995. His evidence helped to verify the occurrence
of mass murders at Srebrenica. This evidence was confirmed later by
photographic material taken by the US government which showed bodies lying
in the vicinity of a grave on the day of the shooting. Further photographs
taken the following day showed the grave freshly covered with earth.
According to a Bosnian Serb Army spokesperson, the grave contained the
bodies of soldiers killed during battle.

The exhumations conducted by the Office of the Prosecutor in the summer of
1996, however, exposed the lie in such claims. The persons buried in the
grave had been killed with a single bullet shot in the back of the head, most
of them while their arms were bound behind their backs — certainly not the
way in which people die in the course of battle. Through the establishment
of the Yugoslav Tribunal, the massacre of thousands of innocent Muslims who
sought safety in the UN ‘safe haven’ of Srebrenica has been established with
a degree of certainty that otherwise would have been absent.

Fourth, in my experience, there is only one way to curb criminal conduct and
that is through good policing and the implementation of efficient criminal
justice. In any country there is a direct relationship between the
effectiveness of policing and the crime rate. If would-be criminals believe
that there is a good prospect of their being apprehended and punished, they
will think twice before embarking upon criminal conduct. It is no different in
the case of international crimes. If political and military leaders believe they
are likely to be brought to account by the international community for
committing war crimes, that belief in most cases will have a deterrent effect.
Between the Nuremberg and Tokyo war crimes trials and the establishment of
the Yugoslav Tribunal, there was not a single international attempt to enforce
humanitarian law. Leaders of countries bent on fighting wars in blatant
disregard of the laws of war could be confident that the international
community would make no attempt to bring them to account. If they were
safe in their own countries, they had nothing to fear from any external
agency. An international deterrent can come only from the enforcement of
international law.

Fifth, exposure of the nature and extent of human rights violations frequently
will reveal a systematic and institutional pattern of gross human rights
violations. It will assist in the identification and dismantling of institutions
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responsible therefore and deter future recurrences. That already has been the experience of the Yugoslav Tribunal in relation to the conduct of the Bosnian-Serb administration, and patterns may well emerge in the case of other parties to the Balkans conflict. It already is the experience of the South African Truth and Reconciliation Commission [TRC].

Mamdani deals here with the complex problem of the relationship between justice and reconciliation. He enquires as to the meaning of justice in countries coming out of colonial rule, while analysing (and problematising) notions of race and tribe in state institutions.

MAMDANI, M ‘WHEN DOES RECONCILIATION TURN INTO A DENIAL OF JUSTICE?’ (1998)
Sam Molutshungu Memorial Lectures
Pretoria: HSRC Publishers

I want to discuss the collapse of a paradigm, that of justice, which animated the post-war struggle for independence in equatorial Africa, and the ascendancy of another, that of rights, which goes by the name of ‘reconciliation’ in contemporary South Africa. I will argue that the pendulum has shifted from one to another, and that this swing is best illustrated by two paradigmatic cases: The ‘social revolution’ of 1959 in Rwanda and post-apartheid ‘reconciliation’ in South Africa. If post-1959 Rwanda represents a case of justice without reconciliation, then post-apartheid South Africa illustrates one of reconciliation without justice. Our dilemma, it seems to me, is how to transcend the polarity between justice and reconciliation: Are we condemned to choose between the two? Or, is a measure of justice, as I will argue, a necessary ingredient for a durable reconciliation? To manage the tension between reconciliation and justice creatively, do we not need to think of reconciliation as not just political but also social, and justice as not just criminal and individual, but also social and systemic?

The paradigm of justice and its pitfalls

The promise of state independence in equatorial Africa was summed up in a single demand: Justice. What did justice mean? What was the injustice of the colonial system? The answer lay both in the nature of power and that of production.

The nationalist political project was first and foremost a response to the nature of colonial power. The colonial state was a bifurcated power. It claimed a dual legitimacy, both modern and traditional. Modern power was urban-based and spoke the language of rights. In contrast, traditional power, rural-based, spoke the language of culture. These languages, of rights and of
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culture, signified two contrasting institutional set-ups, both of organising power and reproducing political identities.

Modern power claimed to be civilised. This claim should be understood in 18th century Hegelian terms, which identified the advent of civilisation with the modern state and its centralised monopoly over all legitimate means of violence — a development that was said to have rendered societal conflict free of violence. Thus, the modern state claimed to be the underpinning of a civil society, short hand for civilised society. Civil power and civil society were two sides of the same Hegelian coin. Civil power was the source of civil laws, which guaranteed civil rights to citizens. In the colonies, however, the power, the law and the bearers of rights were racialised. Racism was the original sin of civil society in colonial Africa.

The other face of colonial power was the Native Authority, the enforcer of ‘customary’ law. Before we accept its claim to being ‘traditional’, we need to recall that nowhere in pre-colonial Africa were there traditional chiefs with unchallenged powers over every domain of social life. Everywhere, traditional authorities were in the plural: There were clan-heads alongside chiefs, age-sets alongside gender groups, each with a legitimate say in a clearly defined and limited domain. The idea of an unchallenged and absolute executive authority holding sway over all domains of social life — as traditional — is foreign to pre-colonial Africa. Secondly, the existence of multiple sources of tradition also meant that tradition was never in the singular, always in the plural. Sources of tradition were not only several; they were often conflicting. This should not be surprising since tradition was always a lived reality, about which people had different memories, sources, convictions and hopes for the future. Lived and reproduced in tension, tradition was always changing. What was new and untraditional was the idea of a single tradition, officially sanctioned and officially enforced, as ‘customary law’.

My interest is not really in challenging the universality of modernity and the authenticity of tradition. It is, rather, in underpinning the political significance of both. What should we make politically of the fact that while civil power was defined in racial terms, both the Native Authority and the custom it enforced as law were defined in ethnic terms? That while civil power and civil law were racialised, the Native Authority and ‘customary’ law were ethnicised?

My argument — made fully in a book I called Citizen and Subject — is that colonial power sought to reproduce two distinct identities through this legal and institutional apparatus: a racial identity amongst beneficiaries, and an ethnic particularism amongst victims. Race was the identity through which power united its beneficiaries as citizens, and ethnicity the identity through which the same power fragmented its victims as subjects. This attempt to build a Chinese Wall between racially united citizens and ethnically fragmented subjects was pioneered by the British who called it ‘indirect rule’.

The French emulated it in the 1920s and called it ‘association’. The Belgians followed in the 1930s, and the Portuguese in the 1950s. In spite of differences between them, it is significant that every colonial power in equatorial Africa
reorganised its administration into one or another version of indirect rule. From this point of view, it is relevant to note that the re-organisation of the South African State by the National Party, called apartheid, removed the Native Affairs Department from rural to urban areas. The effect was to reorganise administration in rural areas in line with principles of indirect rule, by mediating racialised power through the ethnically defined authority of chiefs. In this sense, apartheid, I argued, should be understood as the generic form of the colonial state in Africa, not as an exception to it.

And yet, there was a crack in the proverbial Chinese Wall. In spite of political ideology and political practice, the civic and the ethnic could not be kept apart as two worlds: The imperative of colonial political economy was at cross-purposes with that of colonial power. While power was preoccupied with keeping everyone in their place, the logic of political economy compelled many to change places. This constant changing of places, this dynamic human flow, was a consequence of the system of migrant labour. Migrant labour created urbanised subjects. Race was no longer simply an identity of the beneficiaries of powers; it also turned into an insurgent urban identity, have urbanised subjects. Brought to town as migrants, urbanised ‘natives’ were beyond the lash of customary law but were still excluded from the regime of civilised rights. It is the urban subject nursing a racial grievance that formed the social base of nationalism. One need only think of Nkrumah’s ‘verandah boys’ and Cabral’s ‘boatmen’ or, closer to home, of the post-World War II ANC in South Africa.

Similarly, ethnicity too became a contradictory construct. It did not remain simply an identity of power, of chiefs organised as the Native Authority, but also turned into an insurgent peasant identity. In spite of the claim that tradition was singular and unchanging, there was never an unquestioned acceptance of the official version of custom. From the onset of colonial rule, peasants had their own version of custom against that of chiefs, as did women against that of men, and youth against that of the older generation. One need only think of the string of rural revolts that called for a ‘genuine’ custom to replace that, which had been officially crafted and enforced as customary law.

In the history of every nationalist movement, the key question was always how to link the revolt of the urban strata against racial exclusion with the revolt of rural subjects against an oppression justified as ‘customary’ in ethnic terms. In this context, justice meant, first and foremost, deracialisation, of urban society, civil society and the central state. For militant nationalism, which linked the revolt of the urban strata with that of insurgent peasants, justice also meant de-ethnicisation, the denial of that reified difference, that stigma which went by the name ‘tribe’. The theorist who best captured the tenor and substance of nationalist resistance on this score was Frantz Fanon.

The demand for justice had also another side, particularly in colonies ruled from a metropolitan-based power. Here, the difference between settler and non-settler colonies was telling. For the non-settler economy, the absence of state independence translated into unfavourable conditions for local capital accumulation. By and large confined to primary production under
technologically backward conditions, the backwardness of this mainly agrarian economy was theorised by militant nationalism as a modern dependency.

Underdevelopment wrote dependency theorists, was a modern condition, reproduced through an international division of labour that was created through imperial domination and reproduced through a combination of the market and force. The leading dependency theorist on the African continent was Samir Amin, the author of Accumulation on a World Scale.

The core demand for justice was thus double: Deracialisation and de-ethnicisation within and breaking the chains of dependency without. Justice would require a reorganisation of both power and production. My argument is that it is the failure to reorganise power that was the key to the collapse of the nationalist project. Out of that collapse was born the paradigm of rights, so narrowly articulated that it has little room for a meaningful notion of justice. It is this revisionist, truncated, post-Cold War notion of rights that today goes by the name of reconciliation.

The failure to reorganise power was a double failure. Epistemologically, it was a failure to historicise and problematise notions of race and tribe as identities reproduced by a form of power, and embedded in a set of institutions. Militant nationalism either accepted these identities and definitions as the hallmarks of a positive science — as with race — or it dismissed them as ideological constructs, as with tribe. Politically, it was a failure to produce a practice that would change the paradigm. When revolutionaries succeeded, they managed to turn the world upside down; but they failed to change that world. More than anything else, that failure was political.

Rwanda: The pursuit of justice as revenge

The most spectacular instance of this double failure was Rwanda. To draw a few general lessons from the Rwandan experience, I will focus on one event, the ‘social revolution’ of 1959. This is the event that ushered in the volcanic landscape that we call postcolonial Rwanda. I will begin with the question of identity — who is a Muhutu and who a Mututsi — and the need to distinguish between cultural and political identities. If you go to contemporary Kigali and ask someone in the Rwandan Patriotic Front (RPF) as to the difference between a Muhutu and Mututsi, you will most likely be told: ‘We live on the same hills, speak the same language and practice the same religion. We are the same people’. And so it is: Culturally, the difference between Bahutu and Batutsi is like a difference along a continuum. But not so politically. Bahutu and Batutsi have been produced as bipolar, often antagonistic, political identities: One as power, the other as subject. The cultural continuity, and the political discontinuity, is very much like that between Afrikaners and Coloureds in this country. As is well known, the Native Authority in colonial Rwanda, particularly after the late 1920s, were wholly Batutsi and the peasant masses predominantly Bahutu. Not surprisingly, peasant jacqueries against the Native Authority took on an anti-Tutsi character. Abetted by the Catholic Church and encouraged by Belgian colonial power, peasant
resistance turned into an insurgent revolt against Tutsi power in the Native Authority.

The new power, the custodian of the ‘social revolution’ of 1959, was self-consciously a ‘Hutu Power’. Institutions previously Tutsified were now Hutu-ised. A programme of redress, permanent and without limits, followed. Access to education, from primary to university, and to state employment was defined in terms of whether you were recognised by the state as a Muhutu or a Mututsi. ‘Hutu’ and ‘Tutsi’ became permanent identities, politically enforced, the former with a preferential access to power, the latter subject to that same power. The quest for justice had turned into revenge.

Post-1959 Rwanda raises a question: How did the pursuit of justice turn into revenge? Several lessons can be drawn from the historical tragedy that unfolded in the aftermath of the ‘social revolution’ of 1959.

First was a failure to historicise the nature of power and the identities it generated, one that turned into a failure to reform power and to transform the identities imposed by power. For the fact was that Tutsi was not simply the identity of chiefs in the Native Authority, it was also the identity of the native strata most directly affected by racial exclusion in the civic sphere. In other words, Tutsi was the identity both of power in the Native Authority and of an insurgent nationalism in the civic sphere. The irony is that both Bahutu and Batutsi had a victim consciousness, but in different realms of power: Bahutu resisted an ethnic dictatorship in the Native Authority, and Batutsi resisted a racial dictatorship in the civic authority. Whereas Bahutu resistance against a ‘customary’ Native Authority was called tribalism, Batutsi resistance against a racialised and modern civic power was called nationalism. Both tribalism and nationalism were insurgent ideologies, and yet both were limited in perspective and problematic in nature. Forged as movements of resistance in the womb of power, each was marked from birth by the contours of that power. So a racialised Tutsi identity came to be the birthmark of urban resistance and an ethnicised Hutu identity the birthmark of rural resistance.

If the insurgency was to transcend the identities imposed by power as divisions inside the people — racial and ethnic — then it would have to reform the nature of that power. It would have to deracialise civic authority and detribalise Native Authority, as so many jumpstarts in an overall democratic process.

This, then, was a failure to differentiate political from cultural identity. It was not surprising in an age when politics was often considered to be a residual activity. If you were a rightist, you assumed that the contours of political identity were culturally given, and if you were a leftist you assumed they were economically determined. It was a failure to realise that political identity was not and did not have to be a simple and unproblematic translation of cultural or economic difference into the political sphere. Rather, political identity was reproduced through a set of historically defined institutions that underpinned a form of power. Only a reform of that power would reproduce a common political identity. In Rwanda, this was a failure to recognise that one could forge a common Rwandese political identity, without denying Bahutu and Batutsi as cultural identities along a cultural continuum,
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but at the same time without translating these into bipolar political oppositions.

Second, even if it led to a radical changing of places between Bahutu and Batutsi, the ‘revolution’ reinforced Hutu and Tutsi as political identities, rather than eroding them. The same process which turned the consciousness of being a Muhutu, previously a stamp of servitude, into a badge of pride and an identity of power, demonised the Batutsi. To make the revolutionary process ‘permanent’, it institutionalised the political opposition between Hutu and Tutsi. Rwanda raises the question of how identities consolidated in the course of a struggle can persist in a changed context, thereby subverting the very possibilities opened up by that struggle. It calls attention to the process by which past grievances is sanctified into a shield protecting a new power against future critiques. More specifically, it invites us to understand the process by which memories of a past tragedy — the Holocaust, the Genocide — become key ingredients in the forging of a new state ideology. Put in the language of revolutionaries, it underlines some of the ways in which demands for ‘permanent revolution’ as in Trotsky or ‘uninterrupted revolution’ as in Mao can turn into so many gravediggers of that same revolutionary process.

Third, as the programme of redress, heralded as revolutionary justice, became permanent — even turned into a prerogative of ‘revolutionaries’ — the failure to reorganise power turned into a failure to reorganise and create a political community inclusive of both Bahutu and Batutsi. Revolutionaries who vowed never to forget the past accented the past over the future, giving a longer leash to the identities which animated that past, and a shorter shift to a process that might forge a common identity and a reorganised political community of survivors out of that past tragedy. It is the failure to frame justice within notions of an inclusive political community that turned justice into a permanent preoccupation, a vendetta that increasingly spelt revenge.

South Africa: The search for an alternative paradigm

The South African search for an alternative paradigm has been a conscious move. Beginning by distancing itself from the legacy of post-independence Africa, it has turned into a search for new and more appropriate analogies. The search for clothes that fit has also been a mixed experience, involving both discarding clothes that don’t fit and appropriating those that do, even if they may not fit quite fully. I will argue that it is worth understanding the rationale behind this process of sifting, for it illuminates the logic behind the politics of reconciliation in contemporary South Africa.

The analogy that was discarded was that of Nuremberg. This conversion has recently been recounted by Kadar Asmal, a leading ANC activist, in a book he co-authored with two others. Asmal tells us that he ‘campaigned for a South African equivalent of the Nuremberg trials’, until faced with the reality of ‘a negotiated revolution’ which ruled out ‘imposing victors’ justice’. Any such attempt to identify and punish politically responsible individuals, he tells us, ‘would result in what has been called “justice with ashes”’. In South Africa, he concludes, there should thus be ‘no Nuremberg trials’, ‘no vindictive “lustration laws” on the recent Czech model disqualifying certain persons
from the old order from holding office in the new’, and ‘no black-listing of collaborators as in post-war France and Belgium’. All these were rejected, says Kadar with a straight face, ‘in favor of ideals of nation-building and reconciliation between the oppressors and the previously oppressed’.

I find Asmal’s argument interesting on two counts. To begin with, he makes no distinction between justice and victor’s justice. He presumes that all justice is victor’s justice. From this point of view, all justice is the same as revenge. Is it then surprising that justice should appear as the price for reconciliation? Secondly, and perhaps for this very reason, Kadar’s conversion is not really a change of political heart. It is more of a pragmatic political concession. The result is a breach in what the book considers politically possible and what it continues to uphold as politically desirable: While the demand for Nuremberg is dropped, the Holocaust continues to be the metaphor through which Asmal and associates seek to illuminate the injustice of apartheid. The Holocaust is, however, an inappropriate metaphor, for a variety of reasons. Key to these is that it abstracts from the real problem: Whites and blacks in South Africa are not akin to Germans and Jews, for Germans and Jews did not have to build a common society in the aftermath of the Holocaust. There was Israel. South African whites and blacks, however, do have to live together in the aftermath of apartheid. Here, as in Rwanda, yesterday’s perpetrators and victims — today’s survivors — do have to confront the problem of how to live together. Faced with identities inherited from the past, they must forge new and common identities. To paraphrase a friend, if the survivors of the Holocaust marched to the tune, ‘Let My People Go’ the survivors of apartheid would have to march to a different tune: ‘Let My People Stay’.

It is this point of difference — that victims and perpetrators do have to continue to live together, and at that in a context in which past perpetrators would continue to wield considerable if not enormous power — that has become the basis for the South African leadership to embrace a different analogy. This is the analogy with the Latin American dictatorships, particularly those in Chile and Argentina. To this political insight, which I neither wish to dispute nor to diminish, can be added other points of resemblance between the South African and the Latin American contexts. Were there not in both instances gross human rights abuses in the confrontation between power and resistance? Did not both confrontations, in the absence of an outright victory on either side, lead to a mutual exhaustion and, born of it, a mutual recognition — political wisdom — that this waste of life and resources need not continue? Finally, did not the global situation, as the internal one, also underline the need for compromise and facilitate it?

While not wishing to detract from the insight that underlines the above observations, I do wish to point out its limited nature by raising a different question: How does one go beyond the compromise of 1994? 1994 has a double significance. While it shows that reconciliation is possible, it also raises a further question: How can reconciliation be made durable? I will argue that just as the possibility of reconciliation required putting aside the analogy of the Holocaust and Nuremberg, its durability requires acknowledging the extent to which the analogy with the Latin transition is inadequate.
Truth telling in South Africa has led to two unanticipated outcomes. Each raises doubts about the ease with which the process of reconciliation may be consolidated within its present framework. I will frame these outcomes as two sets of questions. First, is reconciliation an inevitable outcome of truth telling? Is it also not possible that the more truth comes to light — and the less justice is seen to be done — the more truth may breed outrage amongst the majority and fear in the minority? Could such a situation not lead a growing number in the majority to call for justice as criminal justice — a demand for a Nuremberg — and many in the minority to turn to flight, autonomy, and even separation as possible solutions to an increasingly fearful circumstance? The dilemma is this: While the argument to opt for truth-telling as opposed to criminal justice was underscored as a political necessity, the more truth is told the more it may fuel the very demand it is supposed to have displaced, that for justice!

Second, the analogy with Latin dictatorships has obscured the difference between perpetrator and beneficiary. As such, the more it unfolds, the more the process is subject to a critique: Whose truth? Which truth? The truth of the minority or the majority? Of the political activist or the population? Where the focus is on perpetrators, victims are necessarily defined as the minority of political activists; for the victimhood of the majority to be recognised, the focus has to shift from perpetrators to beneficiaries. The difference is this: Whereas the focus on perpetrators fuels the demand for justice as criminal justice, that on beneficiaries would shift focus to a notion of justice as social justice.

This shift, in turn, is likely to illuminate further the difference with the Latin transition. As a form of power, apartheid undergirded a particular system of privilege. A focus on power that obscures the relationship to privilege leads to accenting the relationship between perpetrator and victim as the minority. But a focus that links power to privilege links perpetrator to beneficiary, racialised power to racialised privilege, and puts at centre-stage the relationship between beneficiary and victim as the majority. To recognise this difference is, I think, key to thinking through how to make the reconciliation durable.

The distinction between perpetrator and beneficiary, and between victims as the minority and victims as the majority, allows us to distinguish between two forms of reconciliation: One narrow and political, the other broad and social. The reach of political reconciliation is limited to the political elite, to political activists on this side and to state agents on the other side; its embrace is limited to a minority, in a word, to perpetrators and their victims. Social reconciliation has a wider embrace. It reaches out to ordinary members of society, those who benefited or got victimised as part of the logic of an ongoing system, regardless of agency. The embrace of social reconciliation includes the vast majority, in a word, beneficiaries and victims.

I do not wish to oppose political to social reconciliation as alternatives, but to distinguish them so as to underline the relationship between them. My point is both to acknowledge the importance of political reconciliation as a pre-requisite to a social reconciliation and to argue that the political reconciliation may not prove durable without a social reconciliation. It is,
thus, to raise questions like: What does it mean to reconcile beneficiary and victim as the majority? To deepen reconciliation from the political to the social? To broaden it from the political elite to society?

I suggest that, as a first step, we recognise that there are degrees of reconciliation that bear a relationship to forms of justice, even if the relationship is tension-ridden. Limiting justice to criminal justice, to punishment, is not necessarily to benefit victims. I have been arguing that the latter requires a shift of focus from the world of agents and activists to that of winners and losers, from those who were victimised individually and personally to those whose victimhood was more anonymous and circumstantial, from gross human rights abuses — murder, torture, rape — to gross systemic outcomes like those of pass laws and forced removals, abuses which racialised both poverty and affluence. It is a shift of focus that relocates agency in a historicised structure. But this shift in focus is also a shift in logic: Perpetrators are personally and individually guilty, beneficiaries may not be. They may be unconscious beneficiaries of systemic outcomes, where benefits cannot necessarily be linked to individual agency. Thus, many a white South African can have benefited from the system and yet be honestly surprised at the injustices perpetrated in the name of that same system. Isn't one objective of the TRC's televised hearings in fact to invite beneficiaries to be so outraged at the evil that was perpetrated in their name as to denounce perpetrators, and thereby isolate them? For beneficiaries to join victims in a common outrage at evil is a positive development, but for beneficiaries to shirk responsibility for the ongoing consequences of that evil is, I suggest, hardly positive.

Agency theory, whether in its rights or subaltern version, has a tendency to be blind to structural constraints. This is why I think it is not enough that we leave the responsibility for righting wrongs between beneficiaries and victims as the majority as a moral burden on the shoulders of beneficiaries. Rather, this needs to be understood as a legislative and executive burden of that agency which claims to be the upholder of the public good, the state. It is also why I would say that to make reconciliation durable requires moving from a narrow recognition of rights that individualises and dehistoricises it, accenting the rights of property holders above those of the rest, to a broad recognition that underlines the need to right historical wrongs, and thus to provide a measure of justice to previously excluded groups. To create the basis for a stable regime of rights, it may be necessary to address the tension between justice and rights as a tension between different kinds of rights, rather than to polarise it. The lesson we should draw from Rwanda is not that there should be no redress, because any justice would be victor's justice, but that redress should be limited in duration and be socially meaningful to the widest majority of victims. Without a measure of social justice, reconciliation cannot be durable.

Addressing the tension between social justice and individual rights may require moving away from an absolute emphasis on either, so as to contextualise and relativise the emphasis on both. If the first step in reconciliation was to guarantee security for the minority by temporarily breaching the rights of the majority — no Nuremberg, no regime of equal political rights in the short run so as to allow for minority vetoes in the
interim, ‘sunset’ clauses that allow for a presence of the minority in the state apparatus, a presence out of all proportion to its numerical weight in society — then does not the second step call for a breach, also limited and temporary, but this time in the rights of the privileged minority, in order to ensure a measure of dignity for the majority, through a form of group redress that is equally dramatic if temporary, that gives the hitherto deprived majority a stake in reformed social institutions?

One may ask: What if there is no social justice, no durable reconciliation, but instead a sort of a pragmatic, day-to-day accommodation? What if racial privilege is entrenched as a constitutional right and comes to be defended in the language of rights in civil society and in the language of standards within institutions? Indeed, if we are to go by the experience of other privileged minorities on this continent — minorities like the Asians of Uganda or the Tutsi of Rwanda, those who were popularly seen, on the morrow of independence, as illegitimate beneficiaries of a colonial relationship — this alternative does give us pause to think. Does not their example illuminate what can happen when a privileged minority enters into a Hobbesian pact, trading political rights for security of privilege? Is the price not one of being branded permanently — and racially — as a minority, one whose wealth is considered an ill-gotten privilege, a fixed target against which any and every demagogue may organise in the name of social justice, while unleashing a tide of revenge? We need to consider whether a reconciliation that masks the continuation of privilege may not invite revenge as surely as does a demand for justice that knows no bounds.

Conclusion

One needs to resist the temptation to overlook the redeeming features of the new paradigm. Its contribution flows from the critique of the paradigm of justice, that it is not enough to change positions. Such a merry-go-round only triggers a cycle of revenge. Identities have to be transcended, not just displaced. To forge a common future for past perpetrators and beneficiaries, and their victims, it is necessary also to address them all as survivors.

If the paradigm of reconciliation has the virtue of pointing to a common future, its pitfall is that it does this on the basis of diminishing the nature of evil so grossly that accepting it requires nothing short of suppressing the agency of the majority. Telescoping the definition of victims to political activists may be justified as political necessity, as trimming the political agenda to fit the capacity of the moment; in short, as making the transition manageable. And yet, should we not resist the temptation to celebrate necessity as virtue, in the process turning that momentary necessity into a permanent condition? It is in this context that, I suggest we need to take a second look at the work of the Truth and Reconciliation Commission.

I suggest that while we accept the political imperative behind the compromise of 1994 that created the TRC as an amnesty commission, we nonetheless question its ideological claim to be a truth commission. I suggest we go beyond asking whether truth necessarily leads to reconciliation and recognise that the nature of truth is not an unproblematic given. Could there not be versions of the truth? If the relationship between perpetrators and
victims highlights one truth, does not the relationship between beneficiaries and victims as the majority express a related but different truth? In as much as the commission highlights the former and obscures the latter, should we not ask: How much room does the truth, as tailored by this commission, have for the experience of the vast majority of South Africans? In tailoring the truth to fit the experience of agents and activists, and in obscuring the experience of the vast majority, is not the commission asking us to embrace the consequences of apartheid as ordinary people experienced it, to accept these as the price of reconciliation, even as part of normal life? Is reconciliation then turning into an embrace of evil? If so, how long can it hold?

I do not presume that the TRC should have been the agency to deliver a measure of justice to victims as the majority. But I do presume that the TRC could and should have prepared the ideological groundwork for practical initiatives to do so. In making a distinction between the two functions of the TRC, one political (granting amnesty) and the other ideological (defining the truth), my point is to focus attention on the ideological work of the commission. It is to make the argument that in highlighting the identity of perpetrators while obscuring that of beneficiaries, the TRC has given us a version of truth which obscures the link between perpetrators and beneficiaries, and thus between racialised power and racialised privilege.

If reconciliation is not to turn into an embrace of injustice, of evil — even if it is called truth — then the pursuit of social justice needs to be recognised as a political imperative. I recognise that what is politically desirable may not always be politically possible. And yet, that is reasoning enough to explore ways of making it possible politically. It is reason enough to explore how to resolve the tension between managing the reconciliation politically in the short run and making it durable socially in the long run, and to consider whether it is possible to manage the tension between reconciliation and justice by approaching reconciliation in degrees, as a step-by-step process that moves from the political leadership to the population, from perpetrators and victims as a minority to beneficiaries and victims as the majority. Just as the distinction between political and social reconciliation does not have to highlight the agency of the political leadership at the expense of denying popular agency, it does not have to overload the agenda of the moment at the risk of eroding a limited capacity. By recognising that degrees of reconciliation are linked to forms of justice, it can also allow us to explore ways of linking the two to make reconciliation durable.

Either we try and shape events by putting the question of social justice on the political agenda, or we let events compel us into that recognition, sooner or later. The difference, of course, is that whereas foresight will keep the initiative in the hands of political leaders, the lack of it will just as surely pass the initiative to demagogues.
B. APPROACHES TO TRANSITIONAL JUSTICE

In the following extract, the Gacaca (or traditional court) process adopted by the Rwandan government to deal with those alleged to have been involved in the 2004 genocide in that country is assessed. Attention is given to local participation as a means of conflict management.


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... Gacaca as a democracy-promoting mechanism

Although the Rwandese government has progressively tightened its grip over the Rwandese people, at the same time it has, almost paradoxically, created a forum that mandates popular expression: The Gacaca courts. Established to unburden the national court system while simultaneously promoting truth and reconciliation, Gacaca remains a bold transitional justice experiment. It has provoked deep apprehension from the international community, with prognoses of failure and inadequacy buzzing.

However, neither the international community nor the Rwandese government fully or accurately grasps the democracy-engendering potential of Gacaca. Gacaca may serve as a crucial steam valve for the expression of opposing views because it: (1) functions as the only forum where citizens are required to communicate both with each other and with the State, (2) has the discussion of taboo topics in its very mandate, and (3) has emerged from a community-based, restorative past. Thus, it has the potential to: (1) engender a culture of discourse in a society whose political culture is primarily characterised by its silence and compliance, (2) develop a practice of peaceful dispute resolution, and (3) ultimately provide fertile ground for the development of democracy in Rwanda.

The Gacaca courts experiment

When the RPF took power in Rwanda in July 1994, thereby ending the genocide, it faced the daunting task of dealing with the past. Rather than opting for a TRC-like mechanism to cope with the society-wide crimes committed in 1994, the new government ambitiously embarked on a mission to bring every genocidaire to justice. As President Paul Kagame has explained, ‘There can be no durable reconciliation as long as those who are responsible for the massacres are not properly tried’. Rwanda initiated this plan through the use of a judicial system composed of the mere five judges and fifty lawyers that remained in the country. Nevertheless, the government incarcerated 125 000 genocide suspects — about ten percent of the adult male Hutu population — and placed them in jails meant to hold only 15 000 people.
To manage the overwhelming nature of its task, the government passed a genocide law in which it divided the crimes committed during the genocide into four categories: Category I for leaders of genocide or crimes against humanity, Category II for homicides and accomplices, Category III for serious assaults, and Category IV for offenses against property. Although the government managed to try 5,000 individuals by mid-2001, the number of detainees languishing in prisons, along with international abhorrence of the conditions of confinement and concerns over possible due process violations, forced Rwanda to reconsider its strategy.

In 2001, the government passed the Gacaca Law, which transferred crimes in Categories II-IV to an institution the government had co-opted from Rwandan customary law — Gacaca. Before the genocide, Gacaca was a traditional, community-based mechanism for resolving local civil disputes. In their traditional form, Gacaca proceedings were conducted by community members, with respected community figures serving as judges. The principles applied in Gacaca emerged from local customary values. The proceedings aimed to emphasise to the wrongdoer the gravity of the wrong committed so that he or she could reconcile with the community and thus be reintegrated into society.

When the Rwandese government adopted the Gacaca system, it retained certain traditional characteristics of the original model. These characteristics include requiring members of society to provide testimony and evidence against suspects, as well as to participate in hearings. However, it departed from the restorative nature of traditional Gacaca by granting the elders who serve as judges the power to sentence defendants to punishments ranging up to lifetime imprisonment, thus substituting retributive characteristics for some of Gacaca's rehabilitative ones.

The Gacaca courts established by the government were put in place to serve two official purposes: Justice and reconciliation. Most pressingly, the Gacaca courts supplement the national courts in their mission to try genocide crimes retributively. Second, the community involvement element the existence of a forum for community members to voice their concerns and make known their suffering — endeavours to imbue this retributive mechanism with the spirit of social rehabilitation and reconciliation.

Therefore, the single institution of Gacaca aims to do the work for which two distinct transitional justice mechanisms — criminal tribunals and TRCs — are typically utilised. In light of Gacaca's goals, the international community has raised concerns about its efficacy. Whether Gacaca will prove to be a success in light of these official goals remains to be seen. Gacaca has only recently begun its operations. As of 2003, only ten percent of Gacaca courts had held pretrial hearings, and none had actually begun to try suspects. Thus, any discussion of Gacaca's success or failure remains speculative.

Gacaca courts — The birthplace of civic culture

Even if Gacaca fails to attain its stated goals of justice and reconciliation that does not necessarily discredit Gacaca as an effective transitional justice mechanism. Because it can contribute to the consolidation of democracy, in
order to truly pass judgment on Gacaca it is important to re-examine it in light of the link between transitional justice and democracy. Assessing Gacaca through the lens of Dahl's democracy criteria of participation and contestation — critical processes for Rwanda — it becomes apparent that Gacaca can serve as the birthplace of civic culture in Rwanda. This can happen in two ways. First, Gacaca’s structural characteristics can promote civic culture, thus facilitating their replication in future transitional justice mechanisms. Second, civic culture can be promoted incidentally, as a by-product of the power struggles between the government and the people currently taking place through Gacaca.

**Gacaca’s structural characteristics and the multiple dimensions of developing civic culture**

In its contemporary form, Gacaca draws its unique strength from its combination of indigenousness and state involvement. Although Gacaca has been co-opted and altered by the government, it nevertheless retains its traditional origin and communal style. As such, it allows the Rwandese people to retain a sense of ownership and comfort within the forum. This innate familiarity may encourage the people to approach Gacaca with a participatory attitude. Furthermore, the very fact that this community-based mechanism is now utilised by the government creates a critical communication bridge between the people and the State that did not exist before. Consequently, any effects that Gacaca’s structure may have will impact not just local communities, but also the relationship between the people and the government. Such linkage plants civic culture directly where it should reside: in the space between society and the State.

Gacaca’s procedural dependence on public participation has made it a forum in which speech is relatively free and protected. Thus, the democracy-engendering consequences of free speech can begin to emerge within this forum. To start, freedom of speech in Gacaca can serve as a crucial safety valve for the ethnic opposition and discontent that is currently building up in Rwanda. As Thomas Emerson writes:

> [F]reedom of expression is a method of achieving ... a more stable community ... [T]he process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process ... Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society.

Freedom of speech allows the Rwandese people and government to confront their conflicts openly. Furthermore, open discussion of differences is apt to promote public autonomy and public inquisitiveness. These characteristics fall squarely within civic culture.

Notwithstanding the retributive characteristics the government has added to Gacaca, it remains a restorative instrument. Because of its restorative nature, it serves as a precedent for peaceful dispute resolution while engendering the civic engagement and empowerment that are necessary for civic culture to develop.
Restorative justice mechanisms are defined in terms of both procedure and values. Procedurally, rather than isolating the criminal and the State from the victim and the community, restorative mechanisms bring all stakeholders in an offense together for the purpose of reintegrating the accused into society. In Gacaca, the stakeholders include the accused, his or her family, the village, and the victims, as well as the government.

Rather than operating on the basis of retributive, eye-for-an-eye tactics, restorative values introduce to the justice process ‘healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends’. In Gacaca, great value is placed on the accused’s admissions of guilt and on expressions of shame and regret. Punishments are significantly reduced to reward such restorative behavior. Similarly, Gacaca incorporates restorative punishment mechanisms, such as community service, for many lower-level crimes.

Restorative justice and democracy are conceptually linked. Anthony Alfieri, in arguing for community prosecution for politically isolated ethnic minorities in the United States, explains that ‘[t]he theory of restorative justice offers a model of democratic citizenship’. Restorative justice creates community networks of interdependence and develops a demand for accountability, thus engaging and empowering individuals in society and building a civic culture that promotes democracy.

Restorative justice is based on ‘communitarianism, a belief that the rights of individuals cannot be preserved without citizens taking responsibility, both individually and collectively, for the good of the community as a whole’. However, the concept of community does not simply signify homogeneity of views. Rather, a closer assessment of community reveals that it actually connects groups of individuals with similar interests to groups of individuals with opposing interests.

At one level, when individuals meet in a restorative forum, they have the opportunity to find that their interests place them within a distinct stakeholder group. Finding safety and support in numbers, such ‘common-interest’ groups can begin to voice their concerns and interests more courageously and openly, even in the presence of other groups that may possess opposing interests. This phenomenon can occur in Gacaca, where Hutu villagers find that their sense of oppression by the government is shared by other villagers. Thus, restorative forums place individuals within common-interest groups that may oppose one another.

However, the restorative process also counterbalances stakeholders’ common-interest positions by placing them in an interdependent relationship with opposing groups. This interdependence emerges from the fact that, to resolve a problem, opposing communities must come together and cooperate. Thus, in Gacaca, Hutu villagers, Tutsi victims, and Tutsi government officials must work together if they are to achieve justice. In order to achieve justice, groups that hold opposing views first must develop an egalitarian, deliberative, cooperative modus operandi. By fostering teamwork, restorative mechanisms allow stakeholders to learn that the concept of
‘community’ can, and indeed must, include the opposition. In this way, the concept of community in Rwanda can be transformed effectively from an ethnic, us-versus-them paradigm into a paradigm that includes all citizens.

Fundamentally, the experience of peaceful management of opposing interests should generate a public preference against violent resolution of schisms. It is this new preference for peace, coupled with practices of both contestation and participation that may emerge as a unifying force within Rwanda, thus creating a national community. The interdependence among contesting common-interest groups may effectively achieve the minimal national unity necessary for Rwandese society to coalesce into a democracy. Similar to the mission of nationally focused TRCs, the mission of the community-focused restorative justice experience is to redefine the relationship between opposing communities from violence that leads to disintegration to constructive engagement that leads to a polity and thus to a functioning democracy. Whereas the TRC achieves this linearly, prior to or distinct from the political process, a community-level restorative mechanism such as Gacaca develops commitment to the processes of democratic participation and contestation by engaging in them directly. As parties engage in these processes, the commitment to them emerges and feeds back into the processes themselves. In effect, Gacaca's democracy-engendering function may fulfil Gacaca's official goal of reconciliation, albeit in a circular way.

Experiencing interdependence with the opposition within a restorative context facilitates the development of a practice of peaceful dispute management that must exist for democracy to operate fully. Opposing common-interest groups balance power through the processes of participation and contestation. However, opposition is counterbalanced by the recognition that society is interdependent, thus preventing the disintegration of the common-interest communities' commitment to living together with their opposition in a cooperative and tolerant democratic state. Restorative mechanisms therefore highlight the interrelationship between these two seemingly opposing notions of community and demonstrate how opposition and co-operation function in tandem to drive the democratic process.

Beyond creating a network of communities, restorative mechanisms tie stakeholders, both citizen and state, into a system of mutual accountability. By seeking justice through participation and deliberation with state officials, the society creates ‘an important restraint on state actions in this area’. In this way, accountability begins to flow in two directions: top-down from the State to the communities that remain closest to the criminals, and bottom-up from society to the State that may be dispensing punishment unjustly.

Finally, through encouraging and protecting participation, Gacaca ought to create a sense of empowerment among the people of Rwanda. Restorative justice mechanisms have been found to empower communities that are typically isolated from the democratic process. Alfieri reports that ‘the enlargement of citizen participation, institutional decentralisation, and accountability of [government] prosecution offices to local communities stimulates citizen-state collaboration and grassroots equality initiatives broadly within the criminal-justice system, thereby ameliorating the
conditions of poverty, disempowerment, segregation, and crime pervading communities of color’.

Similarly, beginning with community engagement on the subject of criminal justice, Rwanda’s people can begin to develop a sense of empowerment that will allow further pursuit of ‘citizen-state collaboration and grassroots … initiatives aimed at alleviating … powerlessness … and … violence’, Rwanda’s most pressing problems.

... 

**Gacaca in the transitional justice menu**

Over the past fifty years, the international community has been developing a menu of transitional justice mechanisms and a body of international criminal law to fulfill its commitment to putting an end to crimes against humanity and systemic abuse of human rights. The Gacaca experiment serves to remind those involved in this continuing international effort that the primary recipient of transitional justice is not the international community, but the postconflict society — composed of both victims and perpetrators — that suffered during mass atrocities. As Neil Kritz, a leading authority in transitional justice, argues, ‘it is essential that the needs of those people not be given short shrift for the sake of a feel-good international exercise in justice’. Kritz calls for bringing transitional justice mechanisms ever closer to the society that experienced conflict: ‘From a pragmatic, political perspective, insofar as post-conflict justice is a necessary ingredient to successful peacebuilding and long-term stability in the country, … ensuring a form of post-conflict justice that is maximally effective vis-à-vis the local population needs to be a higher priority …’.

This issue has particular resonance in Rwanda’s case. The measure of success of the ICTR as a transitional justice institution will not depend on whether it has provided international criminal law with a body of precedent, but on whether Rwanda will revert to mass murder. Should interethnic violence return to Rwanda, it will discredit not only the ICTR, but the entire transitional justice effort.

To be sure, the existing transitional justice mechanisms all play useful roles in promoting peace and democracy. However, no one mechanism suffices to address the complex undertaking of healing and transforming a post-conflict society. The recent coupling of a tribunal and TRC in Sierra Leone reflects an understanding within the transitional justice field that such mechanisms can complement each other and thus answer a post-conflict society’s needs more thoroughly. In this context, a mechanism modelled on Rwanda’s Gacaca — an indigenous, community-owned, restorative bridge between the people and the new State that fosters local participation and open management of conflict — emerges as an addition to the existing transitional justice menu. With this addition, transitional justice not only will be more effective, but will be recalibrated more closely to its preventative mission.

In addressing mass atrocities such as genocide, transitional justice scholars must remember that they are tackling society-wide calamities. Miriam Auckerman conveys this by arguing that mass atrocities are more akin to natural or humanitarian disasters than to crime. Such a conceptualisation of
social conflict directs our responses away from punishment and toward ‘rebuilding societies by developing shared histories, establishing democratic institutions, or ensuring greater economic and political equality’. With this understanding, transitional justice is seen less as a means of managing calamities and more as a means of altering their preconditions and thus preventing them from occurring again. This reasoning shifts the transitional justice field from the justice paradigm towards one of democratisation.

If democratisation requires a change in the political culture of a people, then, as Erin Daly submits, transitional justice is more appropriately called ‘transformative’ justice. ‘Transition’ refers to top-down processes, and ‘it does not reach deep into the soil of the new society where the commitment to democratic values actually takes root’. Transformation, on the other hand, calls upon a society to ‘reinvent itself’. As the field develops in light of experiments such as Gacaca, it may well seek to change even its very name to better reflect the scope of its mandate.

It remains to be seen whether Gacaca will bring about justice or truth in relation to the genocide of 1994. Nonetheless, Gacaca will serve the mission of transitional justice if it creates a forum through which democracy can take root in Rwanda. By engendering civic culture, Gacaca addresses the preconditions that have made violence part of Rwanda’s history. Consequently, Gacaca can fulfill transitional justice’s fundamental goal of preventing the events of 1994 from recurring.

...
Still, public opinion of the Tribunal is overwhelmingly negative. The most recurrent criticism is linked to its perceived incompetence. People wonder how up until now the Tribunal has only managed to convict seven people and detain 39 in the Arusha facilities, given all the money it reportedly absorbs. It took over three years to arrive at a recent guilty verdict for Georges Rutaganda, the former leader of the infamous Interahamwe militia, which implemented the genocide.

Some Rwandan political activists and survivors’ organisations adopt a hard line against the Tribunal, even rejecting its right to prosecute. They cynically declare that ‘foreigners’ have created the Tribunal ‘to make business out of the genocide … out of the blood of ours who passed away’. After the November 1999 decision to release the heinous génocidaire Jean Bosco Barayagwiza on a technicality, IBUKA, the most prominent of such organisations, accused the UN of denying the magnitude of the genocide. IBUKA also called the Tribunal a ‘trompe l’oeil’ for survivors, which translates in our local language as a ‘don’t-cry-child toy’.

The Tribunal can make a difference for the future of human rights in Rwanda by exposing the truth of the genocide: It was not a result of ancient, tribal hatred, but rather a carefully planned exploitation of ethnic differences by rulers seeking to hold onto their power. With this truth, we may lay the groundwork for reconciliation, and through reconciliation, we can build understanding of each other’s human rights.

Yet today, bitter perceptions among the public are severe enough to threaten the continued existence of the Tribunal. What saves it is Rwandan indifference. Victims of the genocide are much more concerned about what is happening in Rwandan courts, where over 125,000 detainees are held, the vast majority of those suspected of participation in the killings. These cases are more personal since the accused are those whom the victims saw breaking into their homes with machetes and clubs, not the masterminds who schemed to ‘leave none to tell the story’ in the distant state offices. Furthermore, unlike the Tribunal, the national courts compensate survivors for material losses.

To gain legitimacy in Rwanda the Tribunal needs to improve its work and efficiency while ameliorating its image. This is not to say that it should cave in to government and survivor-group criticism; it should do nothing that would threaten its independence and pursuit of justice. But it does need to improve its communication strategies with the Rwandan people to counter misperceptions of its role, procedures, and philosophy and to let the importance of its work be known. The longer the Tribunal keeps a distance from the people, the less it will appear to be serving the interests of Rwandans.

This will not be an easy task. Post-genocide Rwandan society is deeply divided. The war left behind not only chronic poverty, family dislocation, ethnic hatred, and trauma, but also a widespread legacy of negativism from which the Tribunal likely suffers. Even local human rights activists are confronted by the accusing fingers of their compatriots asking, “What did you do during the genocide when innocent people were being butchered?”
Disillusionment mingled with trauma can constitute a great obstacle to any initiative, no matter how well intentioned. No institution can be expected to gain support from all strata of the population. Still, efforts must be made. If the Tribunal were to overcome these challenges, it would show that international justice can be more than just rhetoric.


... Yet another example of a post–conflict country is Mozambique, whose choice of ‘amnesia’ as a way of closing the book on the past has been less analysed. Mozambique was involved in a war of liberation against Portugal from 1964 to 1974. Following independence in 1975, it was embroiled in a civil war with Renamo forces pitted against the Frelimo government until 1992 when the General Peace Accord was signed, followed by multiparty elections in 1994.

Despite the fact that one million civilians were killed, thousands tortured, and some of the most horrendous acts of barbarism were committed, there were no calls for justice, punishment or accountability. There was never any serious thought given to establishing a South African styled truth commission, or holding international and local prosecutions as Rwanda did. Ten days after the peace accord was signed, the Frelimo government declared a general amnesty that would cover acts committed by both sides in the civil war. According to Harry West, powerful figures in each party feared opening up to public inquiry abuses of political opponents for fear opponents would charge them with similar crimes. West states that in Mozambique there was ‘a broad constituency for public silence’. Prime Minister Pascoal Mocumbia told him, ‘We thought it better to let time heal these wounds’.

African medicine and reintegration

There have been no truth commissions, or investigations into the past, to attribute blame. Neither have there been any trials arising out of the past civil war to hold any individuals accountable for human rights violations. Rather, Mozambicans have decided to deal with the past through traditional African ceremonies of healing at the local level. Part of the reason has to do with the Peace Accord, which never authorised commissions or tribunals. Another explanation is cultural. The notion of ‘speaking out’ is foreign to Mozambicans.
Edward Green and Alcinda Honwana explain: ‘To talk and recall the past is not necessarily seen as a prelude to healing or diminishing pain. Indeed, it is often believed to open the space for the malevolent forces to intervene’. Absent as well is the notion of revenge. Mozambicans point out the folly of holding on to vengeful attitudes. If someone talks of wanting to avenge a violence done to him, listeners will remind him how revenge leads to counter-revenge and so forth. Whether this is absent from their culture, or the result of pragmatism — a lesson learned from years of conflict (ie that revenge leads to counter-revenge and more conflict) — is not clear. Whatever the reason, Mozambicans have chosen to move forward, to reintegrate perpetrators and victims into their communities, without dwelling on the past.

In Mozambique, violence was viewed as a pathology that needed to be cured like any other illness. Traditional healers, called *curandeiros*, were responsible for ‘defusing the cultures of violence the war had wrought’. Traditional practitioners have played a role in purification ceremonies addressing both perpetrators and victims of violence. Examples abound of civilians kidnapping soldiers and taking them back to their villages for ceremonies to ‘remove the war’ from them. If someone finds a soldier wandering alone, we take him and bring him to a *curandeiro*. Most people do not really want to fight, these soldiers have done terrible things, but many of them were kidnapped and forced to fight ... The *curandeiros* take the war out of them, they uneducate their war education. They remind the person how to be a part of their family, to work their *machamba*, to get along, to be a part of the community.

Vengeance was forsworn; if they were to banish soldiers from the community, soldiers would continue to use violence to sustain themselves. Another reason for the interest in former soldiers is that they are vehicles through which the spirits of the war dead might enter and afflict the entire community. Ceremonies for returning soldiers are based on placating ancestors for bad deeds they may have committed. Reconciliation, then, is viewed primarily between the living and the dead — those who have been contaminated by war and bloodshed, and the spirits of the dead. The treatments involve a series of symbolic procedures aimed at cutting one’s links with the past. Military clothes may be burned, and the soldier may be treated with water mixed with the leaves of the mululua tree splashed on his body. ‘When he gets out of the river the young man cannot look back. Looking back is believed to open the door to the war spirits, inviting them to come and haunt him. The past, the war, has to flow away with the river’. Having placated the spirit of the person killed, the former warrior has removed the victim’s spirit from sitting on his shoulder, and bringing him and the community bad luck. The ceremony re-humanises the former soldier, allowing him back into the community, where he is accepted, according to Priscilla Hayner, ‘almost without question, even by the relatives of their victims’.

Community-based reintegration processes have also been conducted for victims. Carolyn Nordstrom describes a purification ceremony she witnessed involving a woman who had been sexually assaulted by soldiers. Members of the community helped her piece together decent clothing to wear on the special day. They told her stories of other atrocities as a reminder that she
was not alone, nor responsible for her plight. On the day of the ceremony, food was prepared and musicians brought in. Highlights of the ceremony, which lasted through the night, included a ceremonial bath, accompanied by songs and stories about healing, dressing her in her new clothing, and feasting. The women then carried her into the hut, surrounding her and stroking her, and speaking encouraging words of healing and rebirth. They then picked her up, and returned to the crowd, who welcomed her back into the community. ‘Throughout the ceremony, the woman was continually reassured with stories of ongoing support; of her need to place responsibility for her plight with war and not her own actions; and of her own responsibility to heal the war’s wounds so she does not inflict the violence that she was subjected to on others’.

What is noteworthy is that the patient is not expected to speak, to articulate her trauma, which was so central to the work of the TRC’s HRV hearings. Honwana argues that recent studies of war-affected populations in Mozambique ... show that talking about traumatic experiences does not necessarily help patients to come to terms with their distress. For Honwana, ‘Recounting and remembering the traumatic past would be like opening the door for the harmful spirits to penetrate the communities’.

There is the danger, however, that these ceremonies, which are founded on the importance of an abrupt breach with the past, may lead to denial about the past. Based on his field work among women in Manica in 1992, an area with the longest exposure to violence in the country, Mark Chingono found: ‘The most surprising thing to emerge from most of the life history narratives by women, especially young women, was that virtually none made a direct reference to the impact of war on their lives. They only mentioned the war in passing or when specifically asked’. Furthermore, not acknowledging the past, and not holding individuals accountable (blaming for instance not individuals, but ‘the war’), may lead to a culture of impunity.

This method of dealing with the past — amnesia — seems to have worked for Mozambicans, at least in the short run. The civil war has not resumed. When Renamo leader Afonso Dhlakama did not win the presidency in the 1994 elections, Renamo did not return to the battlefield. The late United Nations Deputy High Commissioner for Refugees Sergio Viera de Mello praised ‘the culture of reconciliation, the culture of peace’ in Mozambique, stating there was ‘no form of recrimination or hatred’ there. Harrison’s study of Mecufi (in northern Mozambique) also suggests that post-election conflict has subsided with time and that, despite political conflicts between Frelimo and Renamo, ‘there was a basic mutual acceptance of the other party’s presence’. The enduring peace is attributed by Nordstrom to the community-based conflict resolution strategies practised throughout the country that emphasised the reintegration of perpetrators and victims.

The peace, however, may not endure. The close 1999 election, with Frelimo barely wining, and the bitterness among Renamo supporters who felt the election had been stolen, led to demonstrations by Renamo supporters in 2000 in which 54 persons were killed. Ten years after the first post-peace accord elections, Renamo retains an armed group of former guerrillas in Sofala province, threatening a coup if the December 2004 elections do not go its
way. If Frelimo wins, Dhlakama has threatened to seize power since ‘any victory [of Frelimo] is the fruit of theft’. And if Renamo wins in 2004, it could mean ‘payback’ time. The constitution — lacking federalism, checks and balances, and separation of powers — ‘is tailor made to become a charter of revenge, the sore winners lusting to punish their defeated rivals’.

There is peace — the absence of warfare — but the peace is precarious. And, if the civil war era generation has chosen to forego violence, there is no guarantee that their children will feel the same. Vamik Volkan argues that painful memories that are not adequately dealt with by one generation will infect future generations in cycles of violence and counter-violence. A ‘chosen trauma’ may lie dormant for years, ready to be rekindled by leaders to consolidate the group emotionally and ideologically, erupting finally in violence. This remains a real possibility in the absence of identifying individual perpetrators (rather than blaming ‘the war’), or uncovering the truth about the past. The US State Department’s annual Human Rights reports note that the fate of thousands of Mozambicans who disappeared during the civil war remains unresolved. The pact to ‘let time heal all wounds’ may overestimate people’s capacity to let bygones be bygones. Recent events in Argentina and Chile, where the courts are overturning 30-year-old general amnesties, reflect the difficulty of ‘sealing the book’ on the past too quickly.

Truth commissions are being promoted increasingly in post-conflict situations around the world. The following two extracts elaborate on the nature of truth commissions and identify the contributions and limitations of truth commissions in the peace process.

**FREEMAN, M AND HAYNER, PB ‘TRUTH-TELLING’ (2003)**

in International Institute for Democracy and Electoral Assistance
*Reconciliation after violent conflict: A handbook* Stockholm: International Institute for Democracy and Electoral Assistance

What is a truth commission?

Generally, the term ‘truth commission’ refers to bodies that share the following characteristics:

1. are temporary bodies, usually in operation from one to two years;
2. are officially sanctioned, authorised or empowered by the state and, in some cases, by the armed opposition as well as in a peace accord;
3. are non-judicial bodies that enjoy a measure of *de jure* independence;
4. are usually created at a point of political transition, either from war to peace or from authoritarian rule to democracy;
5. focus on the past;
6. investigate patterns of abuses and specific violations committed over a period of time, not just a single specific event;
(7) complete their work with the submission of a final report that contains conclusions and recommendations; and
(8) focus on violations of human rights and sometimes of humanitarian norms as well.

At least 25 official truth commissions have been established around the world since 1974, though they have gone by many different names. There have been ‘commissions on the disappeared’ in Argentina, Uganda and Sri Lanka; ‘truth and justice commissions’ in Haiti and Ecuador; ‘truth and reconciliation commissions’ in Chile, South Africa, Sierra Leone and now the Federal Republic of Yugoslavia; and most recently a ‘commission for reception, truth and reconciliation’ in East Timor. Although these commissions all fit within the definition above, it should be noted that some of them did not at the time of their operation consider themselves to be truth commissions, nor were they understood to be such by the wider public.

Potential benefits and risks

Potential benefits

Although truth commissions may not be appropriate in every context, they have the potential to generate many benefits for societies in transition. The following list of potential benefits may assist in initial reflections on the role and focus of a truth commission while a new commission is in development:

*Commissions can help establish the truth about the past.* They can establish a record of the past that is accurate, detailed, impartial and official. This record can serve to counter the fictitious or exaggerated accounts of the past that were propagated by the previous regime (or other parties to a past conflict) and bring the true scale and impact of a violent past to the public consciousness. In addition, commissions can locate the whereabouts of missing victims who may have been forcibly ‘disappeared’ or buried clandestinely.

*Truth commissions can promote the accountability of perpetrators of human rights violations.* They can complement the work of criminal prosecutors by gathering, organising and preserving evidence that can be used in prosecutions. They can also build a case for and recommend forms of accountability short of criminal sanction, such as civil liability, removal from office, restitution or community service schemes.

*Commissions can provide a public platform for victims.* They can put victims — long ignored and forgotten by the public — at the forefront and centre of the transition process. This can help to make victims whole again, both individually and as a group, and give them a sense of personal vindication. In addition, by providing a public platform for victims to speak in their own voices, commissions can help to educate the public about the individual human impact of past crimes and thereby build support for further victim-centred transitional justice initiatives such as reparation programmes.

*Commissions can inform and catalyse public debate.* They can help stimulate public deliberation on the complex array of moral, political and legal issues
that must be addressed during a transition process. This can be achieved by engaging with the public through commission activities and encouraging broad media coverage. In addition, truth commissions can themselves serve as a model for the public, as the public begins to take up again the critical practice of discussing controversial political subjects without fear of recrimination or resort to violence. Commissions can also serve as independent, impartial and public arbiters if and when members of the previous regime grossly misrepresent or distort events of the past.

*Commissions can recommend victim reparation.* They can build a case for reparation as a necessary form of compensation for past abuses and for ongoing psychological, physical and economic injuries experienced by victims. They can also establish fair and effective definitions and categories of ‘victim’ for the purpose of financial reparation or benefits to follow. In addition, commissions can help to repair the moral dignity of victims by carrying out their work in a manner that is both sensitive to and acknowledges the harm suffered by them. Commissions can also make creative and appropriate suggestions regarding symbolic forms of reparation for victims, such as memorials, reburials and commemorative ceremonies.

*Commissions can recommend necessary legal and institutional reforms.* Through their investigations they can provide clear evidence of how particular institutions individually and collectively failed to uphold human rights protection in the past. In addition, commissions can identify and recommend specific legal and institutional reforms that will enable the country to achieve the long-term social, economic and political objectives that are essential to ensuring a better future. Such reforms may include, for example, strengthened civilian oversight of intelligence agencies and the military; new appointment, tenure and disciplinary rules for the judiciary; the establishment of an independent and well-financed prosecutor’s office; redesign of the electoral and political system; land reform; and new human rights training programmes for the police and armed forces.

*Commissions can promote reconciliation.* They can promote tolerance and understanding by allowing conflicting parties to hear each other’s grievances and suffering. This may help build empathy, thereby deterring acts of vengeance and countering the rivalries and hatreds arising from past events. Commissions can also provide a safe and impartial forum for direct restorative justice processes in which the victim, the offender and/or other individual or community members can actively participate in the mediation and resolution of past grievances of a less serious nature. In addition, commissions can recommend practical and fair measures for the necessary reintegration of certain categories of offenders back into society.

*Commissions can help to consolidate a democratic transition.* By all the above means, they can signal a formal break with a dark and violent past, and the transition to a more open, peaceful and democratic future. If they are successful, truth commissions can have the effect of weakening anti-democratic actors who might otherwise continue to pursue their goals outside the democratic process.

...
Principal activities of a truth commission during its lifetime

**Outreach**

Public outreach by a truth commission is critically important. The nature and the extent of a commission’s outreach efforts will profoundly affect its access to information, its effectiveness in addressing the needs of victims, its ability to manage public expectations and its general reputation in the eyes of the public. Some of these efforts can be carried out directly by the commission through holding public information meetings and through the preparation, publication and dissemination of pamphlets, videos and publications in popular form about the role and mandate of the commission. The commission can also achieve its outreach goals by engagement with and effective use of NGOs, local grass-roots organisations and the media. Relations with civil society and the media can, however, be complicated by the fact that they will often play a dual role vis-à-vis the commission, working simultaneously as partner to it and as critical watchdog of its procedures and actions.

**Statement-taking**

Most truth commissions collect most of their information through private, closed-door meetings, usually by commission staff taking testimony from individual victims in one-to-one encounters. This process is referred to as ‘statement-taking’ and typically involves both a meeting and the filling out of a statement form by the deponent. Statement-taking is important in at least two ways: It furthers the goal of establishing the truth about the past; and it provides an opportunity for victims to come forward and recount their traumatic experiences in a sympathetic and generally safe environment. Because of the sensitive nature of the process and the often horrific character of the information involved, statement-taking requires staff to exhibit concentration, respect and emotional control, and should generally involve intensive training before it is undertaken. Statement-takers need to know when and how to listen and how to respect the often unexpected rhythm and logic of a person’s memory. Although there can be a tension between the desire to focus only on the specific type of information being sought by the commission and the need to allow the deponent to tell the story in his or her own way, a statement-taker must find a way to strike the right balance. For most victims and witnesses, a statement-taker will be the only personal contact they have with the commission, and as a result the impressions they leave on deponents and communities are especially significant and enduring.

**Research and investigation**

Research units and police-like investigation units are increasingly becoming a part of the structure of truth commissions. Such units, however, tend to form only part of commissions with large budgets and robust mandates, such as the TRC in South Africa. Research units tend to be relatively small but staffed by persons with strong research skills and familiarity with national think tanks, NGOs, local archives and other key sources of information. In contrast, investigative units may include people with legal backgrounds or even experience in law enforcement. Many truth commissions combine research and investigation into one department, which has many advantages.
Data processing

Truth commissions have to deal with enormous volumes of information which must be organised and systematised. This requires, among other things, an effective database for the storage, organisation and retrieval of records and data. Generally speaking, commissions which do rigorous data collection and analysis will be better able to defend their findings on scientific grounds. A strong data management system will help arrive at a ‘big picture’ analysis of historical patterns that can show, for example, the exact ratio of violations committed by one side to those committed by the other. In terms of staffing, commissions should hire a programmer to write and maintain the basic software and to extract the data in formats appropriate for the analysts. They will also need professional statisticians (or social scientists fluent in statistical methods) to review the data before it is published, and a team of data processors to input all the information received by the commission.

Public hearings

Most past truth commissions have not held public hearings. There is, however, an increasing trend to give commissions a mandate to do this. This is the case for the new commissions in Peru, East Timor and Sierra Leone, to name only a few. There are persuasive reasons for a commission to hold public hearings. By giving victims and survivors a chance to tell their story before a public audience — particularly where the hearings are aired on television or the radio — a commission can formally acknowledge past wrongs, encourage public understanding and sympathy for victims, reduce the likelihood of certain sectors of society continuing to deny the truth, and enhance the transparency of its work. Public hearings can also help to shift a truth commission’s focus from product (ie, its final report) to process, by engaging the public as audience, encouraging press coverage of its issues over a longer period of time and generally stimulating an authentic national discourse about the past. The truth commissions in Uganda, Sri Lanka and Nigeria have all held public hearings, but it was the public hearings of the South African TRC that had the greatest international impact. Not only were there hundreds of days of public hearings; there was also a unique diversity in the types of hearing held, including victim hearings, amnesty hearings, special thematic hearings (eg, on women and children), special event hearings (eg, on the 1976 Soweto student uprising), institutional hearings (eg, with the legal and health sectors) and political party hearings. Lured by the powerful example of South Africa, a number of analysts have recommended that all truth commissions should hold proceedings in public. There may, however, be legitimate reasons not to do so, including security risks for commissioners and victims, time and resource constraints, and concerns about ‘judicialising’ commission proceedings. At the same time, public ‘truth’ proceedings are potentially powerful enough to at least warrant consideration by all commissions.

Emotional support

Truth commissions seem to satisfy a clear need on the part of some victims to tell their stories, be listened to and ultimately be healed in some way. For others, however, the process can lead to re-traumatisation, which may in some cases have severe after-effects. Past truth commissions have not
generally given this issue enough attention, but this is starting to change. For example, in South Africa, the TRC hired four mental health professionals, provided training in trauma counselling for staff and hired ‘briefers’ who had the job of providing constant support to those giving testimony at public hearings. It is worth noting that commission staff can themselves be traumatised by the process and require emotional support. In many societies, however, standard psychological counselling may not be the appropriate model for helping victims, for cultural reasons or because of resource constraints. The ideal source of support in some places, therefore, may be collaboration with community organisations, traditional healers, religious institutions or self-help support groups.

**Final reports**

Often the defining moment for a truth commission is the completion and publication of its final report. Final reports have often constituted the enduring legacy of commissions and have also been used as a resource for human rights education or for subsequent prosecutions. If they are well documented and methodologically sound, final reports can serve as a critical guard against revisionism. In many ways, however, the impact of a final report may depend less on its content than on a variety of surrounding factors, including when and how the report is publicised, how widely it is distributed, how much coverage it receives in the media and whether there are both traditional and alternative presentations of the findings.

Although the content and format of reports will vary, final reports usually contain a section on findings and a section on recommendations. The findings section will typically identify the causes and patterns of past violations, as well as the victims of those violations. In some cases, individual and/or institutional responsibility for violations may also be reported — a practice which is examined in greater detail in the subsection on **naming names and due process** below. There may sometimes be a tension within a commission between a preference for a legal or empirical approach and an emphasis on a narrative, historical account.

In addition to reporting findings, truth commissions usually make recommendations, aimed variously at providing assistance or redress to victims, making necessary constitutional, legal and institutional reforms in order to prevent future relapse into war or authoritarian rule, and facilitating the consolidation of democracy and the rule of law. In many cases, commissions have also made recommendations for follow-up measures to ensure their timely and effective implementation. Unfortunately, the record on implementation of commission recommendations is not encouraging.
Naming names and due process

A number of truth commissions have had the power to publicly name those individuals found to be responsible for human rights crimes. These include the commissions in El Salvador, Chad and South Africa. Others have not been expressly granted this power but have been creative in finding indirect ways of naming individuals. For example, some commissions have effectively identified individual perpetrators by printing (unchallenged) direct quotations of witnesses or victims that mention the perpetrators’ names, or by identifying those who headed particular units or regions where particular violations took place, thereby making perpetrator identities easily discoverable. In other cases, attribution of individual responsibility has been effected through deliberate or unintentional press leaks by the commission.

Few of the issues surrounding truth commissions have attracted as much controversy as this question of ‘naming names’, and the issue remains a point of tension for those crafting new bodies. The disagreement is between two contradictory principles, both of which can be strongly argued by rights advocates. The first is that due process requires that individuals accused of crimes be allowed to defend themselves before being pronounced guilty. Due process is violated if a commission, which is different from a court of law and does not have the same strict procedures, names individuals responsible for certain crimes. The second principle is that telling the full truth requires naming persons responsible for human rights crimes when there is clear evidence of their culpability.

The question therefore becomes: What standards and procedures of due process should apply to individuals who may be named in a report? Should they be informed of the allegations against them and told that the commission intends to name them in a public report? Should they be given the opportunity to respond to the evidence against them and offer a defence? Should the commission be obligated to state clearly that its own conclusions about individual responsibility do not amount to criminal guilt? These are the sorts of issue that commissions must grapple with. Past experience seems to suggest that the best practice is to allow commissions to name names but ultimately to leave it at their discretion whether or not to do so. This is because there may be a range of legitimate reasons for not naming names. For example, there may be real security risks for commissioners, victims or witnesses, or there may be due process problems such as a lack of sufficient evidence to publicly condemn an individual, or an inability to afford proper notice or procedural safeguards for those accused of violations.

If a commission decides not to name perpetrators, it should at least be required to set out its reasons for not doing so, and these reasons must be politically, morally and legally defensible. Where a commission does decide to name names, it must clearly state that its findings do not amount to a finding of legal or criminal guilt. As to the due process entitlements that should apply, it seems that at a minimum persons who might be named should be (a) informed without undue delay of the allegations against them and of the intention to name them in a public report, and (b) given the opportunity to respond to the evidence against them and offer a defence, but not necessarily through an oral hearing. Additional due process entitlements,
such as the right to counsel or the right to cross-examine witnesses, should be offered only in very exceptional circumstances.

As a general rule, it is both unnecessary and undesirable to burden truth commissions with due process requirements equivalent to those of a court. Burdening a commission in this way would seriously undermine its ability to carry out its most essential duties by considerably slowing down the investigation and hearing process, stifling its capacity to gather facts and evidence, and generally over-judicialising commission procedures. This is not to say that commissions ought to sacrifice the rights of perpetrators in the name of the victims. It is simply to emphasise that a rational balance must always be found between the dual interests of fairness and efficiency.

The challenge of engaging perpetrators in the process

One of the greatest shortcomings of past truth commissions has been their inability to secure meaningful co-operation from perpetrators, whether in the police, the military, the intelligence agencies or elsewhere. The one significant (and controversial) exception is the TRC in South Africa, which had the power to grant individual amnesty to perpetrators of politically motivated crimes. Amnesty was granted to those who fully confessed to their involvement in past crimes and showed them to be politically motivated. For particularly serious crimes, the applicant was required to appear in a public hearing to answer questions. Several thousand perpetrators came forward to the commission to disclose their involvement in and knowledge of past human rights violations under this process.

Of course, the use of a ‘truth-for-amnesty’ formula as a means to secure perpetrator co-operation raises difficult moral, legal and political issues. Amnesties generally violate the right of victims to redress and will generally be inconsistent with a state’s obligation under international law to punish perpetrators of serious human rights crimes. They can also subvert the rule of law by allowing only certain groups of perpetrators to escape liability. They can undermine both specific and general deterrence, and promote cynicism and disillusionment among victims of human rights abuses, which in turn could cause them to take the law into their own hands and embark on acts of private vengeance.

On the other hand, a ‘truth-for-amnesty’ arrangement can be more defensible where: (a) the commission’s power has been given reasonably democratically; (b) amnesty is given on an individual, not class, basis; (c) a form of public procedure is imposed on its recipients; (d) victims are given an opportunity to question and challenge an individual’s claim to amnesty; and (e) reparation payments are made to victims. An amnesty’s scope can also be narrowed by making the grant of amnesty reversible following the commission of a new and similarly grave offence. To date, only South Africa has used the ‘truth-for-amnesty’ formula. The example should be copied only with the greatest caution, and only where there are similarly compelling circumstances. First, in the absence of a credible threat of prosecution (a factor which is rarely present in transitional contexts), it is unlikely that perpetrators will feel compelled to apply for an amnesty. They are more likely to prefer to remain silent, thereby avoiding any risk of public shame or
social ostracism. Second, a range of mechanisms to encourage perpetrators to come forward may be available that are more principled and practical than the granting of amnesty and could better serve the causes of truth and reconciliation. For example, commissions might offer mechanisms for testimony to be provided on an anonymous or confidential basis; they might use a subpoena power; or they might be able to offer a witness protection/relocation service. Another possibility is that truth commission sponsors could create a new punishable offence of failure by witnesses (other than victims) to come forward to the commission with information about past crimes. None of these alternative approaches will necessarily lead to extensive cooperation from perpetrators and reluctant witnesses. Without them, however, cooperation may be virtually non-existent.

Follow-up efforts

Once a truth commission submits its final report, archives its files and is formally dissolved, the task of carrying out its recommendations will naturally fall to others. Unfortunately, the implementation of recommendations has frequently been a major shortcoming for truth commissions, even where there has been a legal obligation on the part of government to implement them (as there was in El Salvador, for example). One of the main causes of non-implementation appears to be lack of political will; but even when sufficient political will is present, there may not be sufficient institutional capacity or funds. Whichever the case, it is critically important for truth commissions to suggest mechanisms that can ensure proper monitoring and follow-up. Sometimes truth commissions are fortunate in that a plan of follow-up is built into the mandate, as is the case in Sierra Leone. For most, however, a system of follow-up must be recommended. In Chile, the commission recommended the creation of a public commission to continue some of its own work and to facilitate compliance with reparation measures. In Guatemala, the commission recommended the creation of a follow-up institution (the Foundation for Peace and Harmony, Fundación por la Paz y la Concordia, to be made up of government and civil society representatives) to implement some recommendations directly and monitor the implementation of others.

MINOW, M ‘TRUTH COMMISSIONS’ (1998)
in Minow, M Between vengeance and forgiveness: Facing history after genocide and mass violence Boston: Beacon Press

Imprisoned for twenty-seven years for his political work, the freed Nelson Mandela then helped to negotiate the peaceful end of South Africa’s apartheid. A crucial item in the negotiation was how the new government should deal with the events and consequences of the apartheid period. The outgoing leaders made some form of amnesty for those responsible for the regime a condition for the peaceful transfer to a fully democratic society. The
interim constitution, a remarkable document of negotiated political transformation, called for a process for freeing participants in apartheid from prosecution. It gave explicit reference to the African concept, ubuntu, meaning humaneness, or an inclusive sense of community valuing everyone. Yet precisely the commitment to ubuntu made it urgent to establish human rights during the transition, and to help the entire nation confront its past.

The African National Congress (ANC), led by Mandela, wanted a truth commission, an official investigation into the facts of atrocities, tortures, and human rights abuses. The ANC had already launched two independent inquiries into human rights abuses committed by its own members, especially in ANC training camps in Angola. This process unearthed facts about tortures and deaths committed within ANC activities, embraced and elevated human rights standards, and set a tone concerning values that departed from those that prevailed under apartheid. Some ANC leaders thought a similar but more extensive truth commission to inquire into the massive atrocities committed by apartheid officials would help to honour victims and also offer some answers to burning questions about what really had happened under apartheid. The National Party, led by the old regime, advocated a reconciliation commission. The chief concern here was amnesty for participants in the activities approved and ordered by the apartheid government.

After a negotiated settlement between the major parties in the early 1990s, the world awoke on 27 April 1994, to globally transmitted pictures of the dramatic day of South Africa’s first democratic elections. People of all colours and races waited patiently in massive lines to vote, and then hung around to celebrate the experience. The multiparty negotiating forum and the last apartheid Parliament adopted the Interim Constitution in 1993. It included in its final paragraphs an unusual self-reflection: A description of the document itself as a bridge from the past of a deeply divided society to a future committed to human rights, democracy, and peaceful coexistence. Toward those ends, the document directed the Parliament to adopt a law providing for the mechanisms and criteria for granting amnesty for conduct ‘associated with political objectives and committed in the course of the conflicts of the past’.

On 19 July 1995, the Parliament fulfilled this charge in creating a Truth and Reconciliation Commission (TRC), with a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation. The Parliament’s decision to create the TRC reflected a lengthy process of consultation with many different groups. This process built upon but also distinguished the South African effort from previous truth commissions undertaken elsewhere. Like a few other commissions, the TRC was launched by a democratic legislative act. Yet only the TRC grew from extensive public debate and involvement in its design.

... After the transition to power in South Africa, national leaders and scholars joined with people drawn from the international community to study these and other previous truth commissions and conducted discussions in public hearings and other settings. Some people worried about this process. University of Cape Town professor Andre Du Toit, a long-time human rights
activist in South Africa, has commented, ‘as religious leaders and churches became increasingly involved in the commission’s work, the influence of religious style and symbolism supplanted political and human rights concerns’. The language of forgiveness invoking religious community grew as the commission took shape.

Yet, when South Africa’s justice minister Dullah Omar reflected on the goals embedded in the Act, he stressed the value of the process of public deliberation in creating legitimacy for the undertaking. He also emphasised how the drafters remained mindful of the larger context of negotiation and compromise between former adversaries, as well as theoretical analysis of principles of justice and international law. The religious and ethical commitments and standing of leaders in South Africa, such as Nelson Mandela and Archbishop Desmond Tutu, set the tone of reconciliation and forgiveness. The practical sense of security once the black majority obtained voting rights over economic resources to support a process for forging national unity.

Based on the experiences in other countries, South Africans concluded that ‘to achieve unity and morally acceptable reconciliation, it is necessary that the truth about gross violations of human rights must be: Established by an official investigation unit using fair procedures; fully and unreservedly acknowledged by the perpetrators; made known to the public, together with the identity of the planners, perpetrators, and victims’. Crucially, Omar and others decided that the commitment to afford amnesty was the price for allowing a relatively peaceful transition to full democracy. Amnesty would be available but only conditionally to individuals who personally applied for it and who disclosed fully the facts of misdeeds that could be fairly characterised as having a political objective. Trading truth for amnesty, and amnesty for truth, the commission was intended to promote the gathering of facts and the basis for the society to move on toward a strong democratic future.

Members of Griffith Mxenge’s family, Steve Biko’s family, and other survivors of murdered activists joined to file a lawsuit challenging the TRC’s very existence. They claimed that the amnesty provisions violated the rights of families to seek judicial redress for the murders of their loved ones. The newly created Constitutional Court heard the case, and rejected the claim. The court reasoned that neither the South African Constitution nor the Geneva Convention prevented granting amnesty in exchange for truth.

Stinging in the minds of many is the widespread practice of granting amnesty following collective atrocities. In Brazil, the armed forces granted themselves amnesty before permitting the civilian government to be restored; in Uruguay, the civilian government granted amnesty apparently after a private agreement with military leaders to do so. Against those images, amnesty seems closer to impunity than to justice or accountability.

Yet the amnesty process employed by the TRC, however contested and complex, is different. It is not a blanket grant. Prosecutions and civil suits remain potential options against any perpetrators who do not apply for amnesty, and against those whose applications are denied. There is an
important difference between the TRC’s individual grants of clemency or pardon that follow a finding of guilt, and other amnesties granted prior to prosecution, and often accorded to a group to wipe out the offenses entirely. The conditional amnesty process does not foreclose truth-seeking, but instead promotes it. The commission could secure statements and explanations of specific acts of torture and murder otherwise unavailable, especially because outgoing authorities destroyed records and closed ranks. Thus, as its name signals, the Truth and Reconciliation Commission combines a notion of restorative justice with the search for truth.

The commission is charged not only with obtaining the facts, but also with working to overcome ignorance or denial among the general community and among government officials. It turns the promise of amnesty, wrested from political necessity, into a mechanism for advancing the truth-finding process. The commission also aims to restore and devise recommendations for reparation. Its goal is to express government acknowledgment of the past, to enhance the legitimacy of the current regime, and to promote a climate conducive to human rights and democratic processes. Only if the recommendations for reparations are followed with concrete actions, though, will these aims promise to bear fruit.

Do the aspirations of the South Africa Truth and Reconciliation Commission represent ‘second best’ goals in the face of practical political constraints? Or do the TRC’s objectives identify an admirable alternative to prosecutions needed to implement national and international norms in response to collective violence and state-sponsored atrocities? Does the TRC chart an exemplary path between vengeance and forgiveness? Or does this truth commission illustrate an inevitable residue — of feeling, moral outrage, and justice’s demands — that exceeds the reach of legal institutions?

I suggest that even in light of some of the basic goals of prosecution, truth commissions can afford benefits to a society. If the goal of healing individuals and society after the trauma of mass atrocity is elevated, truth commissions could well be a better option than prosecutions, although limitations in the therapeutic value of commissions for individuals and limitations in our knowledge of societal healing make this a line of future inquiry rather than a current conclusion.

... Healing a nation

Can a therapeutic process work for collectivities? Are truth commission mechanisms, which already fall short of the elements necessary for full therapeutic relationships and treatment for individuals, able to promote reconstruction of whole societies? National healing and reconciliation takes precedence over individual healing in the design of the TRC, but it would be wrong to suggest that a commission by itself could accomplish the reconstruction of a society devastated by violent and hostile divisions. Yet there are promising roles that a commission can play.

Father Bryan Hehir observes that truth commissions function at three levels: (1) personal catharsis through talking about terrible personal trauma; (2) moral reconstruction, by producing a social judgment and moral account of
the historical record; and (3) political consequences, to take action such as prosecutions or instead to desist after assessing the risks of further violence and instability. In this view, the social reconstruction occurs as the commission provides an accounting of the atrocities and articulates the moral stance needed to name the horrors, and also to move on.

It remains an open question whether through taking testimony and publishing reports, a truth commission can also help to reconcile groups that have been warring or otherwise engaged in deep animosities. Even a minimal form of reconciliation would require capacities for constructive co-operation between those most victimised and those who committed, ordered, or countenanced their victimisation. Crucial here would be demonstrable evenhandedness and honest acknowledgment of injuries and wrongs committed by the competing sides without losing hold of the distinction between those who abused government power and those who resisted the abuses. The TRC is committed to exposing abuses by the liberation forces as well as by apartheid officials and supporters, and perhaps this commitment to the injuries on both sides can support reconciliation over time. Yet the very effort to articulate the moral baseline must treat the crimes of apartheid as worse than the crimes of the ANC or other antiapartheid activists in terms of scale and motive. Some observers object that the entire TRC operates as a political witch hunt designed to discredit the former National Party government even more than it has been already.

In addition, a truth commission focused on the experiences of victims may tilt the writing of history in terms of victimhood rather than rights in a democratic, political order. Andre Du Toit, an academic activist involved in the formation of the TRC, worries that the focus on victims, caregiving, and the Christian notion of forgiveness may lead some people to refuse to participate. The survivors [who do not identify as victims] do not relate to this situation. They respond by saying, ‘we have had these experiences, but we do not want to present ourselves as victims in need of healing. We do not necessarily agree with the message of forgiveness. What political purpose does the story serve when it is framed in this way?’

Treating truth commissions as focused on therapy seems to ignore politics, short-change justice issues, and treat survivors and their recovery as a means toward a better society rather than as persons with dignity and entitlements to justice. Yael Tamir, an Israeli philosopher, listened to an exchange of views about the relative importance of victim testimony and common civic rights in truth commissions, and commented: ‘I am uneasy about this psychological perspective because the catharsis of one person is the suffering of another. How does this work in cases where everybody has done something wrong to somebody else?’

Even where everyone has done something wrong to someone else, the wager of the TRC is that reconciliation can be better reached if the emphasis is on securing in public form the fullest possible truth. Then there is a chance to acknowledge human rights violations committed by each side rather than to blame and punish only those who devised and implemented apartheid.
Yet many long-time antiapartheid activists cannot accept the archbishop’s call for reconciliation and forgiveness across South Africa. To Churchill Mxenge, the brother of Griffith Mxenge, and antiapartheid lawyer murdered under apartheid orders, the archbishop’s stance seems a betrayal of his own promises made at Griffith’s funeral to ensure that justice would be done. The surviving brother recounted to Tina Rosenberg, ‘I try to put myself in Tutu’s position ... Tutu is a man of the cloth, a man who believes in miracles. But I cannot see him being able overnight to cause people who are hurt and bleeding simply to forget about their wounds and forget about justice ... Unless justice is done it’s difficult for any person to think of forgiving’.

Churchill Mxenge had the chance to convey his views to Archbishop Tutu directly on a television show with several family members of apartheid victims. Tutu offered the explanation of political necessity: Amnesty was extended to avoid military upheaval. When Tina Rosenberg later asked the archbishop whether he was honouring his commitment to justice, he replied by identifying different kinds of justice: ‘Retributive justice is largely Western. The African understanding is far more restorative — not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people’.

Archbishop Tutu does not speak for all black South Africans, and certainly not for all South Africans, in this aspiration. This very dissension, ideally, could be part of the story narrated by a truth commission. Honesty about the complexity of the past and transparency about the commission’s own deliberations can help prevent the production of a victors’ report. A fact-finding commission can expose the multiple causes and conditions contributing to genocide and to regimes of torture and terror, and it can distribute blame and responsibility across sectors of society.

Many in South Africa proudly embrace the TRC's search for nonviolent responses to violence. From their vantage point, it is an act of restraint not to pursue criminal sanctions, and an act of hope not to strip perpetrators of their political and economic positions. Yet it is also an act of judgment that prosecutions would impose too great a cost to stability, reconciliation, or nation building. Acknowledging the dimension of political necessity should not obscure the dimension of courage. When a democratic process selects a truth commission, a people summon the strength and vision to say to one another: Focus on victims and try to restore their dignity; focus on truth and try to tell it whole. Pursue a vision of restorative justice, itself perhaps a major casualty in the colonial suppression of African traditions. Redefine the victims as the entire society, and redefine justice as accountability. Seek repair, not revenge; reconciliation, not recrimination. Honour and attend in public to the process of remembering. Cynthia Ngewu, mother of one of the individuals known as the Guguletu Seven, expressed the vision beautifully:

This thing called reconciliation ... if I am understanding it correctly ... if it means this perpetrator, this man who has killed Christopher Piet, if it means he becomes human again, this man, so that I, so that all of us, get our humanity back ... then I agree, then I support it all.

These bold ambitions may be doomed. To create such high expectations is to invite disappointment. Yet the wager is that setting these goals at least to some degree redirects people’s understandable desires for vengeance and
recrimination. The democratic origins of the TRC help to consecrate that redirection through a process of broad participation. A truth commission imposed by the nation’s executive or an international body may have even more difficulty conveying the messages of reconciliation. It might instead seem merely an insincere or ineffective sop to those who demand some response to the atrocities. Articulating goals more modestly than the TRC’s — such as gathering names and accounts of victims and documenting the scope of killings, torture, and other atrocities — could save truth commissions from generating cycles of high hopes and bitter disappointments.

The TRC’s pursuit of restorative justice is also in jeopardy if it presages no changes in the material circumstances of those most victimised. Characterised as only one step in the process of reconciliation, the TRC is designed to propose specific economic reparations and also to assist the development of a society stable enough to pursue land reform, redesign of medical and educational systems, and other reforms to redress the massive economic imbalances in the country. The TRC committee on reparations will recommend to the president specific acts requested by the victimised, such as funds for gravestones, as well as collective reparations in the form of monuments, parks, and schools named for victims and survivors, and individual stipends to support medical and therapeutic treatment. Its Authorising Act also creates a special fund to meet the immediate needs of those who testify. The longer term vision of social transformation holds out the idea of redemption for suffering, and yet if progress toward this vision is not made, scepticism about the goals of healing and reconciliation will surely mount.

Justice requires at least particular truths. Truth-seeking may occur without the trials that can produce just punishments. Truth and justice are not the only objectives, or at least they do not transparently indicate the range of concerns they may come to comprise. Instead, I have identified twelve overlapping aspirations:

1. overcome communal and official denial of the atrocity and gain public acknowledgment;
2. obtain the facts in an account as full as possible in order to meet victims’ need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators;
3. end and prevent violence; transform human activity from violence — and violent responses to violence — into words and institutional practices of equal respect and dignity;
4. forge the basis for a domestic democratic order that respects and enforces human rights;
5. support the legitimacy and stability of the new regime proceeding after the atrocity;
6. promote reconciliation across social divisions; reconstruct the moral and social systems devastated by violence;
7. promote psychological healing for individuals, groups, victims, bystanders, and offenders;
8. restore dignity to victims;
9. punish, exclude, shame, and diminish offenders for their offenses;
10. express and seek to achieve the aspiration that ‘never again’ shall such collective violence occur;
11. build an international order to try to prevent and also to respond to aggression, torture, and atrocities;
12. accomplish each of these goals in ways that are compatible with the other goals.

In light of this list, truth commissions are not a second-best alternative to prosecutions, but instead a form better suited to meet many of the goals. Indeed, to serve the goals of healing for individuals and reconciliation across social divisions even better, truth commissions would need to diverge even more than they usually do from prosecutions, and to offer more extensive therapeutic assistance and relief from threats of prosecution.

When the societal goals include restoring dignity to victims, offering a basis for individual healing, and also promoting reconciliation across a divided nation, a truth commission again may be as or more powerful than prosecutions. The commission can help set a tone and create public rituals to build a bridge from a terror-filled past to a collective, constructive future. Individuals do and must have their own responses to atrocity, but the institutional framework created by a society can either encourage desires for retribution or instead strengthen capacities for generosity and peace.

This suggests that the most difficult aspiration is the last one: It is far from clear that a truth commission can achieve therapeutic and reconciliatory goals at the same time that prosecutions proceed. Although South Africa currently permits prosecutions of those individuals who do not obtain amnesty from the TRC, all of the practical dimensions of prosecutions could work against the goals of healing, reconciliation, and full truth-telling. Nonetheless, a rich understanding of healing from atrocity gives an important place to the operations of a justice system, including prosecution and punishment of perpetrators, if the process is not to unleash new violence and thirst for revenge. Prosecutions and truth commissions share, fundamentally, the effort to cabin and channel through public, legal institutions the understandable and even justifiable desires for revenge by those who have been victimised.

The repertoire of societal responses to collective violence must include prosecutions, but it must not be limited to them. Investigatory commissions, most fully developed in the South African Truth and Reconciliation Commission, challenge the assumption that prosecutions are the best form of response. Consider the story of General Magnus Malan, army chief and later defense minister. Charged with authorising an assassination squad that mistakenly killed thirteen women and children in 1987, General Malan was the subject of one of the few prosecutions before the completion of the work of the TRC in South Africa. The prosecution of Malan grew from nine months of investigation and trial took nine more, costing twelve million rand. In 1996, General Malan was found not guilty, despite numerous allegations that continued to be made after the trial ended. Then, in 1997, General Malan volunteered to speak before the TRC. He expressly did not seek amnesty but instead wanted the chance to tell his own story. He acknowledged cross-border raids; he described how he set up a convert unit to disrupt Soviet-
backed liberation movements. He denied approval of assassinations or atrocities. He also made clear his opposition to the operation of the TRC itself, as a witch-hunt, but said that he came forward to take moral responsibility for the orders he had given.

Fact-finding commissions open inquiry into the varieties of possible responses and the multiple responses and the multiple purposes they may achieve. Truth commissions emphasise the experiences of those victimised; the development of a detailed historical record; and the priority of healing for victims and entire societies after the devastation to bodies, memories, families, friendships, and politics caused by collective violence. A truth commission could generate the evidence to support prosecutions. Or, when the fullest accounts and anticipation are sought in a nation marked by deep and historic divisions, a truth commission represents a potential alternative to prosecutions. Whether these implement or complement justice, they are worthy of human effort in the continuing struggles against mass atrocities.


The International Criminal Court (ICC) was created by a treaty negotiated in Rome in 1998 (the Rome Treaty). The Rome Treaty required 60 ratifications before the Court could come into existence. These ratifications came far sooner than many had anticipated and on 1 July 2002, the ICC came into being. As of May 2004 94 countries had ratified the Rome Treaty. These include 8 states from Europe, including France, Germany and the United Kingdom; 24 states from Africa, including the Democratic Republic of the Congo, Namibia, Nigeria, South Africa and Sierra Leone; and other significant states from all regions of the globe, including Argentina, Australia, Brazil, Canada, Jordan and New Zealand. Significant states that have not ratified the treaty include China, Russia and the United States.

The Court’s subject matter jurisdiction is limited to four of the most serious international crimes: genocide, crimes against humanity, war crimes and aggression. At the present moment, the Court has subject matter jurisdiction only over the first three of these crimes. The Court will have jurisdiction over the fourth crime, aggression, only after the states party to the Rome Treaty agree on a definition of aggression ... Under the terms of the Rome Treaty, the earliest period by which such a definition can be agreed is July 2009.
Personal jurisdiction

Only individuals may be prosecuted before the Court, although those who are under 18 years of age at the time they commit one of the enumerated crimes are explicitly excluded from the jurisdiction of the Court. Organisations, corporations and states are not subject to the jurisdiction of the ICC. This is in contrast to the International Court of Justice, which can only hear cases brought by one state against another, and in rare circumstances can hear a case brought by an agency of the United Nations. While other courts have suggested that certain high-ranking government officials may not be prosecuted while they are in office, the Rome Treaty is quite clear that such immunities do not hold with respect to the work undertaken by the ICC. Thus, any individual, regardless of his or her official status either at the time of the commission of the offence or at the time of the prosecution, may be brought before the ICC.

Military commanders and other superiors may be held responsible for the acts of their subordinates if they either ordered such acts or knew, or should have known, that their subordinates were committing such acts. Thus, a superior officer may not avoid criminal responsibility just because he or she did not engage in the torture, killing or other act that constitutes an international criminal offence. He or she may avoid responsibility if it can be shown that all necessary and reasonable measures within his or her power were taken to prevent the criminal activity, or that the matter was referred to the relevant authorities for investigation and possible prosecution.

In addition to being limited to crimes committed by natural persons, the ICC is subject to a number of other jurisdictional limitations. It is charged to hear only those cases that involve the most serious international crimes and only in circumstances where there is no other viable forum before which individual responsibility for such crimes can be adjudicated.

The Court does not automatically have jurisdiction over an individual suspected of committing one of the four enumerated crimes. To be subject to the Court’s jurisdiction, an individual must either be a national of a state party to the Rome Treaty, or the act for which they are being prosecuted must have been committed on the territory of a state party. In other words, there must be a link between the individual suspected of committing the international crime and a state that has ratified the Rome Treaty. If there is such a link, then the Court has personal jurisdiction over the individual. Thus, if an individual who is either from a state that is not a party to the Court or who commits one of the enumerated crimes in the territory of a state that is not party to the Rome Treaty, then they fall outside of the personal jurisdiction of the Court. As of this writing, a US soldier who commits a war crime in Iraq would not be subject to the jurisdiction of the ICC, as neither the United States nor Iraq has ratified the Rome Treaty.

There is one significant exception to these requirements: The Court can assert jurisdiction over crimes committed by an individual who is not a national of a state party and when the offences are not committed on the territory of a non-state party if the United Nations (UN) Security Council refers the matter to the Court. Thus, the ICC has potential jurisdiction over
every individual and territory in the world subject to the approval of the Security Council and the veto powers of the five permanent members (China, France, Russia, the United Kingdom and the United States of America).

Admissibility

The ICC's jurisdiction complements, rather than replaces, the jurisdiction of national courts. Even if an individual suspected of committing one of the covered crimes satisfies the linkage requirement of personal jurisdiction, the Court may still not have the power to hear the case. If the Court has personal jurisdiction over the individual for a crime that falls within its subject matter jurisdiction, the case may not be heard if it fails to meet certain admissibility requirements. A case is admissible and can proceed to trial only if all other states that also have jurisdiction over the individual for the same criminal activity choose not to prosecute. Thus, if an individual subject to the personal jurisdiction of the Court commits a war crime in the context of an armed conflict, the ICC will only be able to prosecute that individual if neither the state in which the crime was committed nor the state of which the individual is a national decides to prosecute.

The Rome Treaty mentions neither amnesty nor truth commissions. To the extent that they are used to protect an individual from accountability for an international crime, amnesty and truth commissions may raise questions about the admissibility of a case. If a state undertakes an investigation or prosecution of an individual suspected of a violation within the jurisdiction of the Court, the case may still be admissible if it can be shown that the investigation or prosecution were in fact designed to protect the individual from any liability for his or her crimes. Therefore, the question facing the Court will be whether a truth commission like the South African Truth and Reconciliation Commission (TRC) provides sufficient accountability for violations of international criminal law. If it does not, then the Court may hear a case even though it was the subject of such a commission.

Investigations

The Court has certain built-in checks and balances to ensure that only the most serious crimes that would otherwise not be addressed are investigated and prosecuted. There are three ways that the jurisdiction of the Court may be triggered (or an investigation for the purpose possible prosecution may be initiated): by a state party to the Rome Treaty, by the United Nations Security Council or by the prosecutor of the ICC. A state party may refer to the prosecutor for further investigation of a 'situation' in which crimes subject to the Court's jurisdiction are alleged to have occurred. Similarly, the Security Council may also refer a matter to the prosecutor for further investigation.

In addition to initiating investigations based on a referral by a state party or the Security Council, the prosecutor may under his own initiative investigate situations where one of the enumerated crimes is alleged to have occurred. The prosecutor's authority to initiate an investigation and eventual indictment is subject to the approval of a Pre-Trial Chamber of the Court. The prosecutor must have a 'reasonable basis' for initiating the investigation. Even if the prosecutor believes that they have a reasonable basis for
Proceeding with an investigation, they may not proceed unless the Pre-Trial Chamber agrees with their determination and assertion that the case does indeed fall within the jurisdiction of the Court. The decision at this initial stage by a Pre-Trial Chamber with respect to jurisdiction and admissibility is not binding on the Court.

In June 2004, the Prosecutor, Luis Moreno Ocampo, announced that he was initiating his first investigation of alleged violations under the Rome Treaty in the Democratic Republic of the Congo.

...
A big step forward was taken in the past decade, with the establishment of the international criminal tribunals for the former Yugoslavia and for Rwanda. These have already shown that it is feasible to bring to impartial justice, before a judiciary representing the world’s great legal systems, persons both high and low who are accused of crimes against humanity.

Yet it has taken 50 years to agree on the form this court should take, and the extent of its powers. There were many considerations that had to be carefully evaluated — in particular, the implications such a court might have for the delicate process of dismantling tyrannies and replacing them with more democratic regimes, committed to uphold human rights.

There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: Without justice, there can be no lasting peace.

Certainly there is a place in every court for mercy and compassion. But mercy can be shown only when guilt and responsibility have been clearly established and acknowledged.

And individual responsibility is of crucial importance, for two reasons.

First, persons who are tempted or pressured to commit unspeakable crimes must be deterred, by the knowledge that one day they will be individually called to account. That deterrence was missing in the past. It is needed today as much as ever, and it will be needed in the future.

And second, only by clearly identifying the individuals responsible for these crimes can we save whole communities from being held collectively guilty. It is that notion of collective guilt which is the true enemy of peace, since it encourages communities to nurture hatred against each other from one generation to the next.

As for compassion, those most entitled to it are, of course, the victims of crime.

For those who have been slaughtered, all we can do is seek to accord them in death the dignity and respect they were so cruelly denied in life.

To the survivors, who are also the witnesses, and to the bereaved, we owe a justice that also brings healing. And that means that you, the judges, will have to show great patience and compassion, as well as an unfailing resolve to arrive at the truth. There must be justice, not only in the end result, but also in the process.

Above all, however, this court is for those who might be victims in the future. If the court lives up to our expectations, they will not be victims, because would-be violators will be deterred.
That is why it is so important that you, the judges, and all the officials of the Court, demonstrate in all your actions and decisions an unimpeachable integrity and impartiality.

In all your functions — judicial, administrative and representational — you must act without fear or favour, guided and inspired by the provisions of the Rome Statute. The wisdom of your judgements must be such as to command universal respect for international justice and the force of law. The honesty and efficiency of the Court’s administration must be beyond reproach.

All your work must shine with moral and legal clarity, bringing life to the provisions of the Rome Statute and helping the States parties to discharge their share of responsibility. That assistance will be an important part of your task.

Of crucial importance is one responsibility that States parties must discharge in the very near future: The choice of a prosecutor. The importance of that function can hardly be exaggerated. As we know from the experience of the international tribunals for the former Yugoslavia and Rwanda, the decisions and public statements of the prosecutor will do more than anything else to establish the reputation of the Court, especially in the first phases of its work.

It is, therefore, vital that a person of the highest calibre be found to undertake that grave responsibility. This surely is a time to set aside national interests, and focus exclusively on the qualifications of the individual candidates. Once that choice is made, States will also have a responsibility to co-operate with the Court — in effecting arrests of those indicted, in providing evidence, and in enforcing sentences once imposed. That cooperation is essential, if the Court is to succeed.

The commitment shown thus far augurs well for the future. The United Nations looks forward to working with the International Criminal Court in this cause, which is the cause of all humanity.

In this newspaper article, consideration is given to the complex situation prevailing in northern Uganda. The question is posed whether the arrest and prosecution of child killers will potentially facilitate peace or undermine initiatives aimed at bringing an end to the crisis.

‘HUNTING UGANDA’S CHILD-KILLERS: JUSTICE VERSUS RECONCILIATION’ (2005)

No one doubts that terrible crimes have been committed in northern Uganda. The Lord’s Resistance Army (LRA), a rebel group led by Joseph Kony, a man who thinks himself semi-divine, has spent the past 18 years slaughtering
peasants, enslaving children and slicing off the lips and noses of conscripts it suspects of disloyalty. But does this mean that the newly established International Criminal Court (ICC) should be going after Mr Kony and his lieutenants? Several community leaders in northern Uganda think not.

As the ICC prepares to issue its first arrest warrants against the LRA’s leaders, Rwot Acana II, the paramount chief of the northern Acholi people, who have borne the brunt of the rebels’ atrocities, predicts that it will be ‘the last nail in the coffin’ of a fragile peace process. The threat of prosecution, he argues, will deter the rebels from accepting a government-offered amnesty, and therefore prolong the war. He and other Acholi leaders have been furiously lobbying the ICC to back off. They argue that it would be better to apply traditional Acholi justice. If the rebels confess their guilt and undergo cleansing rituals, they will be accepted back into their communities, say the ICC’s critics.

The ICC was first invited to consider the northern Ugandan conflict in January 2004, by the Ugandan government. Earlier this year, the government appeared to be having second thoughts. President Yoweri Museveni spoke of ‘convincing the ICC to drop their indictment if the LRA rebels surrender’. But Luis Moreno-Ocampo, the court’s chief prosecutor, turned a deaf ear, and the government has now relented. Mr Moreno-Ocampo is expected to apply to the court’s pre-trial chamber for arrest warrants against half a dozen rebel chiefs by the end of this month.

Mr Kony’s gang has reportedly abducted more than 20,000 children. Some are forced to fight, some to carry bags, others to have sex with the fighters. By way of initiation, many are obliged to club, stamp or bite to death their friends and relatives, and then to lick their brains, drink their blood and even eat their boiled flesh.

Nearly 2 million people, representing some 90 per cent of the population of the three main Acholi provinces of Gulu, Kitgum and Pader, have fled their homes and now live in crowded and unhealthy camps. Even here, they are at risk. Every night, streams of bare-footed children trudge miles to sleep in the relative safety of the main towns, before returning home at dawn.

The force that terrorises them remains shadowy. Mr Kony, who was raised, like most Acholis, as a Catholic, claims to have been sent by God to save his people from evil, a heading under which he includes President Museveni and all forms of witchcraft. He says he wants to rule Uganda in accordance with the Ten Commandments, though he has at times made more prosaic demands, including education for all, an independent judiciary and policies to encourage foreign investment.

No one knows how many troops Mr Kony commands. Some say he once had as many as 10,000; others that he now has only a few hundred. Betty Bigombe, the chief mediator between the government and the LRA, reckons there are about 3,000 ‘rebels’ left, of whom 800 are fighters. Since Mr Museveni’s forces number 100,000 or so, including militias, many northerners wonder how hard the government is really trying to crush the rebellion.
That said, peace looks more likely now than for a decade. Pressure on the rebels has increased since the government of neighbouring Sudan agreed in 2002 to stop backing them. It has also allowed Ugandan forces to attack Mr Kony’s bases in southern Sudan, and last month, the two countries mounted their first joint military operation against the LRA.

This, combined with the amnesty, has flushed thousands of rebels out of the bush. Despite the vaunted Acholi tradition of reconciliation, many have found it hard to rejoin their own communities. Hundreds have joined the army instead, and are now hunting their former comrades. Others have hidden to escape the wrath of their families. But Mr Kony and his top commanders have not been lured out — and many suspect they never will be.

The ICC’s supporters argue that it can help end impunity, which was why it was first set up in 1998. If Mr Kony is brought to justice, it may deter others currently contemplating mass murder. And despite the fears of Acholi leaders — which not all Acholis share — it does not seem to have impeded the peace process in northern Uganda. Some argue that, on the contrary, it has increased the pressure on rank-and-file rebels to turn themselves in.

But the ICC has no police force. How, ask the sceptics, will it catch Mr Kony when he has evaded the Ugandan army for 18 years? The court’s supporters retort that similar misgivings were voiced when the international tribunal for the former Yugoslavia was set up, yet Slobodan Milosevic, the former Serbian president, and most of his generals are now in the dock.

Since this is its first test case, the ICC is determined to succeed in northern Uganda. Its credibility is at stake. Catching Mr Kony may take years or even decades. But unlike other international tribunals, the ICC is permanent. There is no time limit for its work. Its indictments, once issued, remain in force until the indictee is either tried or dead. It can wait for Mr Kony, who may incidentally be running out of hiding places.

His fellow Acholis hate him. His friends in Sudan are turning their backs on him. Donors are pressuring Mr Museveni to pacify the north (and to abide by constitutional term limits, but that is another story). Mr Kony might hope to hide in a state that is not a party to the ICC. But who would want him?
The provisions for the Sierra Leonean Special Court to prosecute those primarily responsible for the atrocities committed in that country after 30 November 1996 are a major step forward in the advancement of international law. The question, however, remains how to deal with those guilty of crimes prior to that date. The need for reparations is discussed and the limitations of the amnesty clause in the 1999 Lome Peace Agreement are identified.

AMNESTY INTERNATIONAL ‘SIERRA LEONE: ENDING IMPUNITY AND ACHIEVING JUSTICE’ (2005)

Amnesty International's message to the National Victims Commemoration Conference
Also available at www.amnesty.org

... The Statute of the Special Court provides a mandate to prosecute those ‘who bear the greatest responsibility’ for crimes against humanity, war crimes and other serious violations of international law committed during Sierra Leone's armed conflict after 30 November 1996. Its jurisdiction therefore does not include all those who committed crimes under international law throughout the 10-year conflict. Only 11 of the very large number of people suspected of committing these crimes have been indicted. Two of them, including former Liberian President Charles Taylor, have yet to be arrested and surrendered to the Special Court.

Since August 2003 Charles Taylor has been harboured by the Nigerian government in violation of its legally binding obligations under international law. Its decision to grant refugee status to Charles Taylor violates Nigeria's obligations to surrender a person indicted for crimes under international law or to submit the case to its prosecuting authorities. The Nigerian government must arrest Charles Taylor and surrender him to the Special Court.

While prosecuting a few of those responsible for these crimes is a major contribution towards ending impunity in Sierra Leone, it is only a partial response. More needs to be done. While Sierra Leone's Truth and Reconciliation Commission (TRC) has been important in providing a forum for victims and perpetrators to recount their experiences, creating an impartial historical record of human rights abuses committed during the conflict, identifying the reasons for those abuses, and facilitating reconciliation, it cannot be a substitute for a court of law to try alleged perpetrators of serious violations of international law.

An essential element of providing justice to the victims of human rights abuses is the provision of reparations. Amnesty International was disappointed that the Statute of the Special Court did not follow the example of the Rome Statute of the International Criminal Court by authorising the Special Court to award reparations for victims of crimes within its jurisdiction, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Such reparations are integral to achieving justice for the victims and also assisting them to rebuild their lives.
The national justice system needs to be able to work to ensure that all those who committed horrific crimes during the conflict, but who are not among the small number indicted by the Special Court, are brought to justice and that their victims have access to reparations. In this, the ‘legacy’ bequeathed by the Special Court to the national justice system — which continues to face serious challenges in providing effective and efficient administration of justice — is crucial. Although the Special Court cannot by itself turn around the struggling national justice system, its presence, example and resources should be an important catalyst for and reinforce a committed, long-term strategy to end impunity and build an effective system of justice for the future.

A major stumbling block, however, is the general amnesty included in the 1999 Lomé peace agreement and subsequently enacted into national law. This amnesty, however, cannot apply to crimes against humanity, war crimes and other serious violations of international law. In a historic decision in March 2004 the Special Court refused to recognise the applicability of the amnesty provided by the Lomé peace agreement and concluded that it did not prevent international courts, such as the Special Court, or foreign courts from prosecuting crimes against humanity and war crimes. For impunity to be successfully challenged in Sierra Leone, the amnesty provision must be removed from the statute books.

A landmark and lasting legacy of the Special Court would be if its example were to be followed and the death penalty removed from Sierra Leone’s statute books. The discrepancy between the Special Court, where the maximum penalty which can be imposed is a period of imprisonment, and the national courts, which continue to pass death sentences, needs to be removed. The Sierra Leone government should follow the example of the Special Court, as well as implement one of the key recommendations of the TRC, and abolish the death penalty.

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**Women suffer specific crimes, such as rape, in a conflict situation. These crimes are often not adequately addressed through the justice process and need specific attention. The African Union mandate and role in the promotion of gender justice are considered.**

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**JUMA, M ‘THE ROLE OF THE AFRICAN UNION MACHINERY IN PROMOTING GENDER JUSTICE IN POST-CONFLICT SOCIETIES’ (2005)**

*African Women for Peace Advocacy Magazine* Special Edition

**Gender in post-conflict societies**

Post-conflict situations pose a number of challenges to the reconstitution of justice — broadly taken to encompass the set of norms and principles that
assign rights and duties, and guarantee appropriate distribution of benefits and burden among societal members. Effective justice ensures due process, engenders a sense of fairness and forms a basis for public law and order, whose breakdown is a major source of conflict in the first place. In other words, attainment of justice and reconciliation guarantees the rule of law and the protection of private and collective property. Challenges relating to retribution, restoration and/or healing in post-conflict situations are compounded when viewed through a gender lens. This paper flags out, in a summarised form, some of these challenges and suggests ways in which the African Union (AU) can utilise its mandate to promote gender justice in post-war countries.

Usually, justice systems and structures are among the first to collapse at the onset of conflict. This reality accentuates the level of injustice that women confront during active conflicts. Disruption and break-up of familial, social and community structures of protection as well as the involvement men in prosecuting war, expose women to numerous levels of insecurity and injustices. Furthermore, efforts to deal with injustices committed during, or after, war are complicated by the heinous character and nature of violence perpetrated against women. In all major African conflicts from Liberia, Sierra Leone, Democratic Republic of Congo, Rwanda, Burundi, Northern Uganda, Southern Sudan to Somalia, women have been subjected to war crimes including rape, physical violence, assault, destitution and prolonged physical and psychological insecurity emanating from the loss of social networks and protection. In extreme situations, women have been targets of war, part of the war game and/or booty. No wonder statistics the world over indicate women to be the main victims of war. Attainment of justice in post-conflict situations therefore cannot escape dealing with gender specific crimes and injustices as a basis for consolidation of peace. Failure to do so meaningfully not only increases the vulnerability of women in ‘peace’ times, but also means violations against women could continue unabated.

Attention in addressing gender justice needs to focus at two levels: First are the issues in the normative realm that sets forth the norms, principles, standards and benchmarks that guarantee justice. In other words, what choice does a country emerging from conflict adopt in terms of the justice system? It is imperative that women effectively participate in determining the national choice; otherwise reconstruction runs the risk of excluding a large section of the population. A second set of issues relates to the transformation of institutions and ethos in ways that enable women to take full advantage of opportunities that the reconstruction agenda presents. The AU has the potential to reinforce both these levels of engagement in all aspects and activities of post conflict reconstruction.

**AU mandate and role in promoting gender justice**

The AU has a central role in the promotion of justice, including gender justice, in post-conflict societies. Broadly, this mandate is derived from article 5(2) of the Constitutive Act, which provides for the establishments of a Peace and Security Council (PSC). This Council is a standing decision-making organ for the prevention, management and resolution of conflicts, including post-conflict reconstruction. More specifically, the Protocol Relating to the
Establishment of the Peace and Security Council states the rationale for the creation of the PSC as, among other things:

To promote and implement peacebuilding and post-conflict reconstruction activities and to consolidate peace and prevent resurgence of violence, as well as to promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of the efforts for preventing conflicts.

This involves restoration of the rule of law, establishment and development of democratic institutions, consolidation of peace agreements, reconstruction of the society and government institutions, implementation of disarmament, demobilisation and reintegration of refugees and internally displaced persons, humanitarian action and disaster management. The manner in which these activities are conceived and implemented has implications for the extent to which women can claim and access justice in the post-war situations.

While the AU has a well-articulated mandate for post-conflict reconstruction, the Protocol makes flirting references to gender specific issues in post-war situations. Women are conceived as objectives of intervention and lumped with other categories of ‘vulnerable’ groups, namely children, the elderly and other traumatised groups (article 14 (3)). Although positive interpretation of this provision could address issues specific to gender injustice and needs, this is not provided for explicitly and remains as a matter of speculation.

The on-going work of crafting an AU framework for post-conflict reconstruction provides a great opportunity for the AU to promote gender justice. It should be recognised that war impacts differently on women and men. The reconstitution of a society, including its justice systems and practices, may require new and innovative frameworks and structures that differ from those in place before the outbreak of conflict. In other words, pre-war institutions may be incapable of addressing crimes committed during or after the war, as well as the consequences of such crimes. Experiences across the continent indicate a great desire to address gender (in)justice and inequality especially in areas that have traditionally been of concern such as participation in decision-making, economic empowerment, especially issues of property, access to credit, etc. While these are important and need to be pursued, it is critical to note that war experiences transform societies, and that communities seldom return to their exact pre-war order. Reconstruction should thus be conceived as an opportunity for innovative reconstitution or creation of structures that open up new horizons for women empowerment including enhancing gender justice.

Challenges for enhancing gender justice

There are three major obstacles to the enhancement of gender justice in post-conflict situations. Perhaps the greatest is the manner in which recovery is conceived and executed. Any post-war situation is characterised by immense pressure to turn a country around. However, the vision of this recovery is still dominated by development and securocrat perspectives, with the main actors being international (World Bank, Development donors etc) and the national political and security elite. This mind set obscures other
critical aspects of recovery, including justice, which remain addendums to the ‘main’ programmes, namely economic development and security. Issues of fairness, due process, distribution or governance are seen as ‘soft’ areas. This poses a paradigmatic challenge especially because it diminishes the value of a more integrative human security approach to reconstruction.

Secondly, the lack of a normative framework for reconstruction leaves countries to muddle through reconstruction without a template to guide national processes that determine their priorities and design strategies for recovery. This void is often filled by international intervention in the form of expatriates or imposition of foreign models that may be irrelevant to the situation on the ground. More often than not these interventions fail to consolidate peace.

Thirdly, although women are increasingly playing critical roles in conflict resolution, peace building and post conflict reconstruction, they remain under-represented at decision and policy-making levels at both the national and multilateral levels. Women remain marginalised from the onset of peace processes. From Burundi, Sierra Leone, Liberia, DR-Congo and most recently in the Sudan, male securicrat types have dominated peace processes — this composition has undoubtedly shaped both the nature of negotiations as well as implementation practices. The need for adequate and effective women representation in thinking about, designing and implementing policies and programmes cannot be emphasised enough. If the experiences from the few peacekeeping missions where women have been deployed are anything to go by, then the involvement of women in post-conflict reconstruction, and especially in the area of justice which is a linchpin for co-existence and democratic practice, is an imperative.

Opportunities for the AU to promote gender justice

First, the AU has made some progress that should be consolidated as evidenced by its adoption of the Protocol on the Rights of Women. It has embraced the values of gender equality, democracy, human rights and good governance and made policy decisions to increase the participation of women at the continental, regional and national levels. The expansion of these values will be tested by the ability and commitment of the African Union to involve key constituencies, in this case women, in activities relating to the peace and security agenda in general and post-conflicts reconstruction specifically. Commitments need to be translated into frameworks and guidelines that ensure women contribute positively. In line with this, the AU can use its leverage to cascade these commitments to the regional and national levels. It could encourage member states to adopt parity with AU commitment on gender equality. This would greatly increase the opportunity for women to access and improve the justice in post-conflict situations.

Secondly, the AU could enhance gender issue within its mechanisms. Women should as a matter of right, rather than privilege, serve in key AU organs such as the Panel of the Wise, be appointed as special envoys or mediators and be offered an opportunity to engage in various processes of unpacking the different aspects of the peace and security agenda, including post-conflict reconstruction.
Thirdly, the AU can encourage women to take advantage of the provisions of the Protocol on Peace and Security to increase their influence in the Peace and Security Council. Using article 8 of the Protocol, the AU could establish a unit that monitors genders issues in post conflict situations. It is imperative that such a committee or unit is linked to the PSC and other AU structures. One way of attaining this immediately, would be to revive the defunct African Women Committee on Peace and Development and locate it within the AU structures rather than consulting it in an advisory capacity. The AU could also urge the Peace and Security Council to invite women groups, experts and organisations to address the Council on a regular basis, as provided for in article 20 of the Protocol on Peace and Security. In addition to providing women with an opportunity to influence the decisions of the PSC, such an arrangement would keep the Council well-informed on the issues relating to gender in any recovery situation.
QUESTIONS

(1) Do traditional justice systems, such as gacaca, provide distinct advantages or disadvantages when compared to international criminal law, such as the International Criminal Tribunal for Rwanda or the International Criminal Court?

(2) Is it justifiable to suspend prosecutorial justice, as was done to some extent in the case of the South African Truth and Reconciliation Commission, for the sake of peace?

(3) Can there be peace without justice? Choose an African country to illustrate your argument.

(4) When does a transitional period end, requiring a country to terminate transitional justice initiatives?

(5) What steps might a nation in transition be required to take to ensure economic growth?

(6) What form can reparations realistically take in a poor country such as Rwanda or Burundi?
FURTHER READING


Orentlicher, DF ‘Settling accounts: The duty to prosecute human rights violations of a prior regime’ (1991) 100 Yale Law Journal 2537

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Profiles

University for Peace

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For more information, see www.upeace.org

Centre for Human Rights

The Centre for Human Rights of the University of Pretoria was established in 1986. The Centre is an academic department of the Faculty of Law and focuses on human rights law in Africa. In addition to the wide range of publications on human rights law in Africa is published on a regular basis by the Centre - Human Rights Law in Africa, African Human Rights Law Reports, African Human Rights Law Journal and Constitutional Law of South Africa - the Centre also offers masters’ programmes on human rights and short courses on good governance issues. These are attended by students, academics, government officials, practitioners, civil society leaders and others from across the African continent. The Centre also organises the annual African Human Rights Moot Court Competition.

For more information, see www.chr.up.ac.za.
Editor and Assistant Editor

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This Reader contains some of the essential readings on human rights, peace and justice relevant to Africa. The material within consists of extracts from academic writings, reports from the United Nations and non-governmental organisations, speeches, official documents, national constitutions, and human rights cases. Where possible, the extracts have been selected from African writers.

The Reader is part of an evolving Series on Peace and Conflict in Africa published by the United Nations-affiliated University for Peace (UPEACE). The main objective of the Series is to make material which can be used by African universities in courses dealing with issues of peace readily accessible to lecturers, students and researchers.

This Reader is a joint publication of the Africa Programme of the United Nations-affiliated University for Peace and the Centre for Human Rights of the University of Pretoria. It can be used in conjunction with other publications in the Series, particularly the Compendium of Key Human Rights Documents of the African Union and the Compendium of Key Documents relating to Peace and Security in Africa.

The Reader has been edited by Christof Heyns and Karen Stefiszyn. The editor of the Series on Peace and Conflict in Africa is Christof Heyns.