

**HUMAN RIGHTS IN AFRICA:  
WILL THE AFRICAN RENAISSANCE STRENGTHEN  
THE INTERNATIONAL NORMATIVE ORDER?**

**“The only ailment that has no cure is the spawn of a curse.”**

- Thabo Mbeki, speaking at the launch of the African Renaissance Institute in Pretoria on 11 October 1999

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## **DECLARATION**

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

## **ABSTRACT**

The South African Presidency has played a significant part in championing the African Renaissance vision. Elements of the vision attracting most attention are its supposed recognition of the importance to continental revival of peace, stability and 'good governance' (including respect for the rule of law and fundamental human rights).

The question is whether the vision is able to live up to the hope that it signals new respect by the governors for the human rights of the governed. The fear has been expressed that the continent's Renaissance is being crippled in its infancy by an excessively cautious South African interpretation of the vision, particularly in regard to human rights issues.

Ex-President Nelson Mandela has urged that, while governments should be mindful of the high ideals of human rights, they should be conscious also of a democratic realism that surrounds the issue. Neglect of human rights is the certain recipe for internal and international disaster. Mandela has called for a "more comprehensive international policy of 'democratic realism' to replace the traditional concept of 'realism'". The policy suggests the protection of diversity both within and between states.

Consequently, consideration is given to options for the promotion, deepening and defence of 'democracy' as a reliable bulwark against the abuse of human rights. Foremost among the options considered is armed humanitarian intervention, including its possible purposes and effects and, particularly, the reliability and durability of its outcomes.

John Stuart Mill's arguments are examined concerning the vital necessity of domestic readiness to best utilise any assistance arising from external intervention. If Mill's thesis is correct, then President Thabo Mbeki's approach may be the most appropriate in the circumstances.

Devising agreed policies on intervention in African countries where human rights abuses are intensifying continues to face significant political resistance based on the prioritisation of the principle of non-interference in the internal affairs of a sovereign state. Mbeki clearly understands African leaders' caution regarding human rights promotion and protection. National sovereignty is difficult to surrender in a world of weak allies and strong competitors, which ensure continued state resistance to foreign guidance on democracy and human rights.

South African foreign policy suggests a sober reckoning of the complexity and duration of the task of turning around the continental ship. South African foreign policy, initially idealistically seen as occupying the 'moral high ground' following the 'democratic miracle' of 1994, is now more firmly rooted in a 'realist' understanding of the primary

need for committed and dependable allies, and sensitive to allegations of hegemonic aspirations. Mbeki, consequently, follows a non-confrontational consensus-building process, ensuring that as many African leaders as possible 'buy in' to the vision and its programme of implementation. He focuses instead on 'educating' and 'encouraging' domestic populations to object to current experiences of forms of rights deprivation. While time-consuming, it may at least produce a solidly grounded policy approach to the amelioration of the continent's ills.

## OPSOMMING

Die Suid Afrikaanse Presidensie het 'n noemenswaardige rol gespeel in die verkondiging van die Afrika Renaissance denkbeeld. Elemente daarvan wat die meeste belangstelling geskep het is sy vermeende besef van die gewigtigheid vir vastelandse herlewing van vrede, stabiliteit en goeie staatsbestuur (insluitend respek vir regsoewereniteit en basiese menseregte).

Die vraag is of die denkbeeld die hoop kan naleef dat dit beteken nuwe respek van die leiers vir die menseregte van hul inwoners. Die vrees is uitgespreek dat die vastelandse Renaissance word in sy kindsheid vermink deur 'n buitensporige versigtige Suid Afrikaanse vertolking van die denkbeeld, besonder in verband met menseregte.

Oud-president Nelson Mandela het aangespoor dat, terwyl regerings moet oplet vir menseregte ideale, moet hulle ook bewus bly van 'n 'demokratiese realisme' dat omsingel die kwessie. Verontagsaming van menseregte is die seker resep vir interne en internasionale rampspoed. Mandela het om 'n meer omvattende internasionale beleid geroep om die tradisionele konsep van 'realisme' te vervang. Dié beleid voorstel die beskerming van ongelykheid beide binne en tussen state.

Gevolgtrek, opsies word oorweeg vir die promosie, versterking en beskerming van 'demokrasie' as 'n betroubare bolwerk teen die misbruik van menseregte. Voorste van die opsies oorweeg is bewapende medemenslike ingryping, insluitend die moontlike oogmerke en gevolge, veral die betroubaarheid en duursaamheid van sy uitwerkings. John Stuart Mill se argumente is ondersoek rakende sy mening oor die deurslaggewende noodsaaklikheid van binnelandse gereedheid om gebruik te maak van buitelandse ingryping. As Mill korrek is, dan is President Thabo Mbeki se uitgangspunt dalk korrek.

Die ontwerp van ooreengekome beleide oor ingryping in Afrikalande waar menseregte misbruik verskerp moet steeds erken sterk politiese weerstand gebaseer op die beginsel van nie-ingryp in die interne sake van onafhanklike state. Mbeki verstaan goed Afrika-leier se versigtigheid oor menseregte-promosie en -beskerming. Nasionale soewereniteit is moeilik om oor te gee in 'n wêreld van swak bondgenote en sterk vyande, wat besorg voortgaande staatsweerstand teenoor buitelandse 'leiding' oor demokrasie en menseregte.

Suid Afrika se buitelandse beleid dui op 'n verstandige berekening van die ingewikkeldheid en duur van die taak om die skip om te draai. Suid Afrikaanse buitelandse beleid, aanvanklik idealisties gesien as okkupeerder van die morele hoë grond na 1994 se 'demokratiese wonderwerk', word nou beskou as meer stewig geworteld in 'n 'realistiese' verstand van die primêre behoefte aan getruoe bondgenote, en is uiters sensitief aan bewerings van heerskappige ambisies.

Gevolgtlik, volg Mbeki 'n nie-konfrontasie/konsensueel proses. Daarmee probeer hy om seker te maak dat soveel as moontlik van sy medeleiers inkoop in tot die denkbeeld en implementasie program. Hy fokus dus liewer op 'opvoeding' en aanmoedig interne bevolkings om opstand in te neem teen hul eie ervarings van menseregte-misbruik. Terwyl dit tyd eis, dalk mag dit 'n soliede beleid besorg.

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## ***CHAPTER ONE: THE RESEARCH PROBLEM***

### **1.1 Introduction**

The South African Presidency has played a significant part in developing and championing the African Renaissance vision, and in rallying commitment for its practical implementation. However, as with any new concept, the vision continues to undergo change and refinement even as it attracts more attention – as well as supporters and detractors. One consequence of the continuing change has been that the content of the vision, initially the source of confusion by reason of its unfamiliarity, has now become a subject of confusion because of its inspirational attraction to an inordinately wide spectrum of interests.

As a mobilising tool, this vision seems to be stirring great interest among élites, if not yet proving to be an inspiration to the ordinary inhabitants of the continent. But it is precisely because its greatest potential value lies in the communication of hope to ordinary folk and, hence, to their mobilisation (to whatever end), that the vision has become the property mainly of those who claim to understand and represent ‘the masses’. Having become the private domain of so many different interests, the vision may sometimes be discounted as a vehicle carrying irreconcilable passengers.

It might be justifiably claimed that, inherently biased as human beings are, we are poorly equipped to produce an objective analysis of any vehicle of hope. But it is precisely because the African continent is so widely perceived to be in a desperate need of tangible hope that the African Renaissance vision can be and should be carefully examined.

Some of the elements of the African Renaissance vision that have attracted most attention are the recognition given by its proponents to the importance of peace, stability and ‘good governance’ to continental revival. The latter phrase is generally understood to cover a broad spectrum of values and standards in public affairs, ranging

from 'sound' economic management, through a commitment to eradicate corruption from public administration, to institutional and daily respect for the rule of law and fundamental human rights.

The question is whether the vision is able to live up to the widely expressed belief and hope that it signals a new respect by the governors for the human rights of the governed. The fear has been expressed that the African Renaissance is being crippled in its infancy by an excessively cautious South African interpretation of the continental vision, particularly in regard to human rights issues. The focus, then, of this study is to explore various foreign policy options available to South Africa for the promotion and protection of universal and fundamental human rights. This will include consideration of certain forms of bilateral and multilateral diplomacy and, in particular, the desirability and feasibility of armed humanitarian intervention in the affairs of sovereign states in order to promote and the observance and protection of universal fundamental human rights on the African continent. The central value of the human person and human life will constitute the fundamental assumption underlying this purpose.

An attempt will therefore be made to answer the following main questions:

1. What is the definition and content of the African Renaissance vision as understood by, primarily, the Office of the President of the Republic of South Africa?
2. What goals and, hence, values, are implied by the concept and vision of the African Renaissance as set out in relevant policy documents, public statements by policymakers and the strategies contained in the Millennium Africa Plan ('MAP'); the Omega-New Africa Initiative ('NAI'); and the New Partnership for African Development ('NEPAD')?

3. Does the South African Presidency's espousal and practice of the vision of the African Renaissance reflect a prioritisation of human rights norms and standards?
4. Is greater respect for international human rights norms necessary for the achievement of the African Renaissance vision, as it is currently advocated?
5. In appropriate circumstances, is intervention and, particularly, armed humanitarian intervention in the affairs of a sovereign state a foreign policy instrument that offers the prospect of enhancing the promotion and protection of human rights on the African continent, and/or advancing the cause of the African Renaissance?

The answers to these questions will form the basis of an appraisal of the vision of the African Renaissance and its policy complement. The objective of this analysis will be to establish whether the policies proposed by the vision are compatible with its core values and, therefore, whether they are likely to promote the attainment of those values.

The study will require a close examination of South African foreign policymakers' writings, speeches, statements and media releases, as well as media reports of these events. Additional available background documentation consulted includes policy papers and analyses of elements of the policy context and of policy implementation by professional research institutes and other commentators.

## **1.2 Basic concepts and definitions**

The predicament presenting itself for consideration and underlying the problem statement is the poor quality of life of most of Africa's inhabitants. This poor quality of life is characterised by personal insecurity, economic hardship, social disruption, and declining standards of health and education. These problems are frequently said to arise from ethnic, political, intellectual and religious intolerance, which often degenerate into situations of chronic social, political and, in turn, military instability.

The concept 'quality of life' has many elements, for human beings require many basic needs to be met in order, first, to sustain life, and then to move beyond mere existence to the enhancement of its quality. However, even the concept of 'basic needs' does not enjoy a completely consensual content. The assertion that some agreed core set of needs exists is confronted with the challenge of the diversity of human culture and, within the framework of that concept, the additional variable of the uneven acceptance of the notion and content of individuality. By definition, moreover, individuality is only with some difficulty capable of an irreducible core meaning – as is evidenced by the myriad varieties of personal preference.

Inextricably linked to the debate around the meaning and content of 'individuality' is the discussion concerning the appropriate place and role of the individual within the context of various social groups. The present context is the study of human rights in contemporary international relations. One is faced here with several possible broad definitions of a social group, including clan, ethnic group, nation / state, region, continent, and humanity in general, quite apart from the plethora of the sometimes intersecting subsets of these categories.

Nevertheless, on the basis of the assumption that some agreement is possible concerning the content of basic human needs, the possibility exists of exploring the requirements for the satisfaction of that agreed core list of human needs. Proponents and supporters of sometimes competing conceptions of human rights clearly have not entirely resolved the matter of precisely which 'needs' form the basis of 'rights'. Thus, we are faced with several coloured lists, or 'generations' of rights, viz. 'blue', 'red', 'green' and 'brown', all of which jostle for universal recognition as fundamental human rights warranting equal attention and priority.

Some commentators have asserted that the satisfaction of all or some of these basic human needs by the observance of these fundamental human rights will herald the achievement of the goal of 'true civilisation'. By this is meant a generalised and more

or less equitable enhancement of the quality of life of all of humankind, or 'global justice'<sup>1</sup>. However, a vigorous debate has surrounded the relative priority that should or should not be given to recognising, promoting and implementing the rights contained in the several lists.

The aim here is not to engage in a detailed debate over whether or not 'universal fundamental human rights' can exist, or over their content if indeed they do. Rather, it will be argued that there is evidence of growing agreement on the core content of these fundamental human rights, if not a steady and sustained process of recognition in practice. While, therefore, it is accepted that the core content of 'universal fundamental human rights' continues to rest on somewhat insecure foundations, the contribution made by – even constitutive value of – their recognition to a healthy society is increasingly accepted, at least by way of public statement and conduct within multilateral fora.

Previously, the Cold War era was characterised by the almost unopposed acceptance of a minimalist/reductionist realist perspective of the need, in a deadly dangerous and potentially anarchic world, to focus, first and foremost, on the 'hard' security interests of the state. These security interests of the state in the conditions of the Cold War required strong alliances: a bipolar rigid bloc formation.

Some argue that the opportunities - and challenges and threats - of globalisation are obliging states to retain a realist perspective. The struggle to avoid being irrevocably 'left behind' in the race towards economic growth implies a security dimension. Both domestic stability and international security are dependant upon economic strength.

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<sup>1</sup> See, for example, Charles R Beitz 'Justice and international relations' in Charles R Beitz, Marshall Cohen, Thomas Scanlon and A John Simmons (eds.) *International Ethics* Princeton University Press: Princeton, N J, 1985, 282-311

The traditional realist theory of international relations emphasises the short-term needs of the sovereign state as the primary bulwark against the constant, even imminent, threat of anarchy. In so doing, it will be submitted, it fails to take account of or, at least, de-prioritises the vital contribution of more long-term or 'soft' policy initiatives, such as the legal protection of human rights, to the security of both the individual state and of international society. Nevertheless, like the liberals and idealists, the neo-realist approach does recognise that, for the 'nation-state' to survive, it must incorporate certain elements of the liberal emphasis on multilateralism. Thus, for example, temporary alliances are formalised in institutions, frequently on a regional or sub-regional level. These institutions usually focus on economic interests and imperatives that depend for their success on varying degrees of 'shared sovereignty' – a comforting euphemism that has, thus far, proven ineffective in allaying fears of the reality of surrendered sovereignty and power.

It is argued that Africa's current economic and developmental difficulties are caused, in significant part, by the widespread, continued adherence by its leadership to the narrower, state-centric aspects of classical realism and their consequent failure to respect and observe the core content of universal fundamental human rights. This argument is not advanced in order to deny thereby that significant shifts will have to be made in the direction of 'justice', however defined, in the international arena outside Africa, if the protection and observance within Africa of human rights is to have any prospect of success. The argument is based, rather, on the view that institutionalised domestic respect for human rights, i.e. in some form of democratic system, provides at least one essential element of an environment conducive to stability, predictability and, hence, individual and group diligence and prosperity.

If Africa wishes to stave off marginalisation, and to retain and renew the already waning interest and commitment of sympathetic funders and commercial partners, it is widely held that it must play its part by urgently paying attention to the long-term attractiveness of its domestic markets to foreign investors. In the context of

globalisation, these foreign sources of investment and development capital enjoy an expanding range of competing choices for the location of their investment risk. Similarly, therefore, the globalisation of human interaction has rendered domestic respect for human rights a legitimate subject of international concern.

This study assumes that respect for human rights is an end in itself, if not on the grounds of any agreed sacred origin and nature of the human creation, then at least on the basis of universal human dignity. The study tries to show that it is, also, a necessary prerequisite for development and its concomitant, the alleviation of poverty. It is argued that it is in both South Africa's and the West's interest to encourage the practical recognition of this among other 'truths' as the best and only way to ensure their own social and economic stability and security.

It is increasingly understood that John Donne's observation that "No man is an Island, entire of itself"<sup>2</sup> is equally applicable to the states composing international society, particularly in a scenario of rapid globalisation. It is, consequently, in their own self-interest for relatively developed and prosperous states to ensure that they are not, in the near future, surrounded by a sea of desperation seeking to flood into their relatively stable and prosperous societies.

On the other hand, the slow, uneven, sporadic and, sometimes, shallow and unconvincing growth of democracy on the African continent has been considered to be a prime indicator of the poor prospects for the observance and protection of human rights in the short term. Similarly, the continued widespread absence of a generalised climate of transparency, accountability and predictability is frequently advanced as an explanation for erratic and circumscribed – even negative – economic growth in African societies.

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<sup>2</sup> *Devotions Meditation XVII*, quoted in *The Concise Oxford Dictionary of Quotations*, Oxford University Press: Oxford 1981 at 89



And yet some have argued that reports of Africa's marginalisation are both inaccurate and premature. On the contrary, it is being said, Africa's time has come. Indeed, President Thabo Mbeki frequently describes the twenty-first century as 'The African Century'. However, for Africa to 'succeed', it has been acknowledged that it must face up to its challenges and take responsibility for setting about finding solutions. It cannot continue to rely solely on outsiders as either targets for blame or sources of pity and assistance. Hence, the relevance of prospects of, particularly, regional economic, political and military co-operation and intervention initiatives.

Consequently, consideration will be given to possible options for the promotion, deepening, and defence of 'democracy', broadly defined, as a reliable bulwark against the abuse of human rights. Foremost among the options to be considered will be that of armed humanitarian intervention, including its possible purposes and effects and, particularly, the reliability and durability of its outcomes. For, as John Milton has observed in *Paradise Lost*<sup>3</sup>:

'Who overcomes  
By force, hath overcome but half his foe.'

Armed humanitarian intervention will be given this focus for a number of reasons. Firstly, the very possibility of the use of various forms of intervention and the lowering of sovereignty barriers/thresholds has enjoyed renewed academic and political interest as a result of the passing of the bipolar Cold War and the acceleration of globalisation. Second is the varying degree of military disengagement from Africa of Western powers<sup>4</sup> such as France, the United States and Britain. France has played a particularly significant and direct role in many conflicts in post-colonial Africa, primarily in defence of client regimes in its ex-colonies. The United States, on the other hand, provided mainly financial and military resources, rather than engage its own forces

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<sup>3</sup> Book i, 1.1 (1668 ed.) *ibid.* at 168

<sup>4</sup> See, generally, Jakkie Cilliers and Peggy Mason (eds.) *Peace, Profit or Plunder: the privatisation of security in war-torn African societies* Institute for Security Studies: Pretoria 1999, especially at 1-80

directly. The embarrassment of the Somalian experience was the exception that reinforced the American reluctance to become directly involved in armed humanitarian ventures.

Third is the failure by Africa to follow the international trend of any supposed post-Cold War peace dividend, maintaining its unhappy record of widespread conflicts. Fourth, the seemingly intractable fractiousness of populations within colonial boundaries and under unrepresentative regimes has both contributed to and arisen from human rights abuses and the persistence of underdevelopment, creating the scenario of 'failed states' requiring radical forms of assistance lest acute situations assume chronic dimensions. In these circumstances, armed humanitarian intervention is increasingly discussed as a possible tool of international political management, particularly where it is deployed with apparent success outside the continent.

Intervention in the affairs of a 'sovereign' African country may or may not support the view that, despite Africa's many problems, the continent is unfairly being written off as 'hopeless'. Thus, intervention may, variously, reveal an analysis of the state as irredeemably weak, or as worthy of a degree of assistance in order to bolster its continued survival. Intervention may, after all, be undertaken as a result of a variety of considerations, ranging from restoring hope, to temporarily delaying the inevitable tide of anarchy, to securing a selfish advantage.

### **1.3 The inspiration of contextual urgency**

The 1999 United Nations Human Development Report expressed grave concern at growing inequalities, with economic factors dominating social and political outcomes<sup>5</sup>. This representation of the global wealth structure was echoed by the Fancourt Declaration on Globalisation and People-Centred Development, which emerged prior to

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<sup>5</sup> cited by Sikose Mji 'Preface' to P Mathoma, G Mills and J Stremlau (eds.) *Putting People First: African Priorities for the UN Millennium Assembly* South African Institute of International Affairs: Johannesburg 2000 at vii

the Commonwealth Heads of Government Meeting in Durban in November 1999, and which states<sup>6</sup>, among other things:

‘In today’s world, no country is untouched by the forces of globalisation. Our destinies are linked together as never before. The challenge is to seize the opportunities opened up by globalisation while minimising its risks.

‘...The persistence of poverty and human deprivation diminishes us all. It also makes global peace and security fragile....

‘If the poor and the vulnerable are to be at the centre of development, the process must be participatory, in which they have a voice. We believe that the spread of democratic freedom and good governance ...are key to the expansion of human capabilities, and to the banishment of ignorance and prejudice. Recognising that good governance and economic progress are directly linked, we affirm our commitment to the pursuit of greater transparency, accountability, the rule of law and the elimination of corruption in all spheres of public life and in the private sector.

‘...Recognising that the full exploitation of the opportunities for development created by globalisation is not possible without security, political stability and peace[, w]e commit ourselves, in partnership with civil society, to promote processes that help to prevent or resolve conflicts in [a] peaceful manner, support measures that help to stabilise post-conflict situations and combat terrorism of all kinds.

‘Good governance requires inclusive and participatory processes at both national and international levels...’.

It is submitted that if there is to be any change in the quality of life for the people of Africa and elsewhere in the world, then people-centred development must be the primary focus of world leaders. One may observe this change in practice, for example,

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<sup>6</sup> [www.polity.org.za/govdocs/misc/fancourtdec.html](http://www.polity.org.za/govdocs/misc/fancourtdec.html) (Date accessed: 07 June 2000)

in the recent willingness to consider debt-relief, even if hedged about by (not entirely unnecessary or unrealistic) conditionalities. One may also mention the new focus on development, as opposed to simple, gross economic growth, and the awakening to environmental dangers and their causes. A further instance is the emerging trend towards the adoption of a transnational approach to what were, traditionally, primarily matters for internal policing, such as the drug trade and small arms control.

The UN Report, echoed by the Fancourt Declaration, accordingly identifies certain core principles or values that should be understood as integral to a people-centred development strategy:

Ethics – greater respect for and observance of human rights standards;

Inclusion – greater incorporation of people and countries into the mainstream of global priorities and activities;

Human security – greater societal stability and greater certainty, stability and refuge of people; and

Development – greater equity in the relative distribution of wealth; less poverty and deprivation.

This focus has arisen because of the extreme social, emotional and physical distress that the inhabitants of the African continent have endured for so long and which many continue to face on a daily basis. It is widely acknowledged that this dire situation has developed at least in part because the African continent has not generally proven to be an hospitable environment for the consistent observance of and respect for human rights norms and standards, as reflected in the primary international instruments on the subject. Nor has the continent generally provided a welcoming home for democratic political systems, wherein these norms and standards are, historically, most effectively established and protected.

Several reasons have been advanced for the unfortunate and disturbingly widespread and ready tendency to disregard the human rights of Africa's residents. These

explanations have included arguments variously based on the supposed undemocratic nature of Africa's conservative, subservient (or, at least, quiescent) and irrational superstitious cultures. Another explanation has been the uncritical and unelaborated application to national governance of the persuasive but parochial values of group or factional leadership<sup>7</sup>. Another makes reference to a lack of financial and developed human (as opposed to material) resources required to effectively manage a modern democracy. This, in turn, raises issues of international economic justice; questions concerning the serial impact, of slavery, colonialism and, later, of realist theories of national strategic interest that held sway during the Cold War; as well as the lingering debate over the universality or otherwise of human rights norms and standards.

Whatever the explanation, the widespread practice arose whereby African (and Third World) states championed 'solidarity rights' – to the virtual exclusion of civil and political rights. Thus, certain rights that had been identified as fundamental – if not always practised – by the international community, while occasionally accorded some recognition in international discourse by African states, were not respected internally within their physical borders. During the post-independence decades, many African governments, while professing to endorse human rights issues in multilateral fora, ignored their civil and political manifestations in their internal and bilateral relations. Robertson refers<sup>8</sup>, for example, to "vehement Third World objections, not so much to the very idea of human rights as to its elucidation in the UN Declaration and the twin Covenants. These were said to embody 'Western' preconceptions of freedom at odds with those in Asia and Africa...".

African governments argued that, by so doing, they protected pre-colonial human rights regimes that were, supposedly, all-encompassing. This argument was fallacious. For, while professing to be inspired by 'African practices' on human rights, they put in

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<sup>7</sup> John Stremlau 'Putting People First: Priorities for Africa and the UN Millenium Assembly' in Mathoma *et al. op. cit.* 1-27 at 4-5

<sup>8</sup> Geoffrey Robertson Q.C. *Crimes Against Humanity: The Struggle for Global Justice* Penguin: London 2000 at xvi

place instead regimes whose human rights practices did not incline them to external scrutiny. Having agitated for independence on a broad human rights platform, post-independence governments in Africa proceeded to put in place human rights policies that were as bad, if not worse, than those of their colonial predecessors. This logically led to many African governments adopting foreign policies devoid of any 'first generation' human rights content.

Oji Umzurike offers the following description<sup>9</sup> of Africa, one decade after the new independence movement heralded a new dawn:

'... [A] negation of democracy. ... [O]pposition parties, being prone to oppose on every issue, became clogs in the wheels of progress. ... [G]overning parties became more intolerant, denied government resources and facilities to their opponents and veered to the single party system. The line between public, party and private property became blurred, as evidenced in the massive wealth of most long-reigning political leaders – even as their countries wallowed in penury. As corruption became rife, the misused resources were insufficient to support the expected rate of development'.

He then offers the explanation that the “political leaders were too familiar with, and had suffered under, the dictatorship of the colonial powers, whereas they were constitutionally expected to practice the democracy of the metropolitan states of which they had a fleeting acquaintance as students, visitors or workers. They visited the opposition parties with the repression they themselves had experienced.”

Umzurike excuses the dictatorial viciousness that has characterised much of African governance as a “malady” that “befell” an otherwise benign class of leaders. On the other hand, his observation that the situation was “[at least] compounded by inexperience, ineptitude and foreign manipulations to reintroduce colonialism in other forms” seems intuitively more accurate. “Falling commodity prices, the increased cost

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<sup>9</sup> U Oji Umzurike *The African Charter on Human and Peoples' Rights* The Raoul Wallenberg Institute/Martinus Nijhoff Publishers: The Hague 1997 at 22

of imported goods and technological backwardness were obstacles to the high expectations of independence". Stremlau endorses<sup>10</sup> the deficiency in resources allocated by the West to 'political development' as one of the reasons for the failure of independent African states to deal effectively with the broader challenge of development.

Umozurike continues to describe how the military, "controlling the bulk of coercive instruments", either took over or attempted to overthrow "virtually all" African governments, "purportedly to cleanse the" perceived, alleged or actual corruption within the "Augean stables". He asserts that they were initially enthusiastically received as saviours by the populace but, in time, "fell" into the selfsame "errors" as their civilian progenitors. "Used to issuing or receiving orders, the military oligarchies were often more intolerant of opposition or of differing views" or "administrative styles" and were "prepared to defend their 'shortcomings' with the arms entrusted to them for the purpose of national defence against external threats. They became threats that had to be placated, assuaged" or simply "bribed by the governments. The swords of the military hung over the heads of the tax-payer, who paid the bills. The rule of law changed to the rule of force and in some states some ethnic groups were marked out for systematic decimation and marginalisation".

In the 1970s, at the height of the Cold War, respect for human rights on the African continent reached its lowest ebb. Except in the case of Liberia, "the OAU<sup>11</sup> maintained an indifferent attitude to these breaches, relying on just one of its interdependent and mutually-limiting principles – 'non-interference in the internal affairs of states'" – to absolve it of any obligation to in any way oppose the infringement of human rights standards.

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<sup>10</sup> John Stremlau *op. cit.* at 4

<sup>11</sup> i.e. the Organisation of African Unity, in many instances controlled by client regimes of the superpowers

However, as Umozurike observes, “the domain of domestic jurisdiction does not cover matters of treaty-law or customary [international] law”. Already as of the immediate post-colonial era, the domestic duty to observe and uphold the broad spectrum of human rights had been firmly established under international law. Thus, Shyley Kondowe has decried the misuse of ‘state sovereignty’ by African leaders and governments as a deliberate tool “to sustain the oppression of their citizens”<sup>12</sup>. Particularly in view of the passing of the Cold War, the advent of globalisation and the development of international governance, “it is futile”, he argues, for states to continue to insist on sovereignty as “a sole condition of statehood”. He quotes South African President Thabo Mbeki<sup>13</sup> as stating that:

‘the process of globalisation necessarily redefines the concept and practice of national sovereignty. The frontiers of sovereignty are being pushed back, especially as regards the smaller countries of the world, such as our own’.

One is inclined, then, to endorse Umozurike’s conclusion that it is “unconvincing that preoccupation with development and national stability resulted in the neglect of human rights. There could be no genuine development at the expense of human rights”<sup>14</sup>. Indeed, Mary Robinson, United Nations High Commissioner for Human Rights, emphasised the indivisibility of human rights when she called<sup>15</sup> for equal concern for, on the one hand, civil and political rights, and social, economic and cultural rights, on the other. The economic and social citizenship of the African people needs to be promoted simultaneously with the move towards the strengthening of democratic practices.

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<sup>12</sup> ‘Sovereignty, Intervention and Democratisation in Small African States’ in Mathoma *et al.*, *op. cit.* 85-93 at 85

<sup>13</sup> South African President Thabo Mbeki’s address to the 54<sup>th</sup> Session of the United Nations, quoted in Kondowe *ibid.* at 86

<sup>14</sup> K. Vasak and P. Alston (eds.) *The International Dimensions of Human Rights* 1982, Vol. 2, quoted in Umozurike *op.cit.* at 23

<sup>15</sup> M. Robinson ‘Bread and ballots: Human rights aren’t divisible’ *International Herald Tribune* 9 December 1998, quoted in Shadrack B O Gutto ‘The African State, Human Rights and Refugees’ in Mathoma *et al.*, *op. cit.* 73-84 at 84



If human rights are indeed indivisible, it is argued that, if Africa is to enhance its profile internationally and if it is to succeed in having its development agenda considered, it must re-evaluate its domestic policies and diplomacy with a view to giving a central place to human rights issues. Despite repeated horrors, and despite Africa's belated experiments with human rights, democracy and the rule of law, there are hopeful signs that human rights observance is increasing rather than diminishing in Africa.

Similarly, democratic systems are the subject of increasing experimentation on the African continent. This is so even though democracy is an imprecise and contentious business wherever divisions of whatever nature run deep<sup>16</sup> – an undeniable and significant factor in the arbitrarily-drawn map that characterises multi-cultural and multi-ethnic Africa<sup>17</sup>.

Consequently, Abdoul Aziz M'Baye, writing on human rights and democratisation in Africa<sup>18</sup>, has noted that human rights, initially differently perceived by different human groupings, have progressively evolved towards a common global understanding as communication has increased and improved between previously isolated groups. He defines human rights as referring to "the social equilibrium between groups, and particularly to the balance between the collective requirement to secure the survival of the group and the need of the individual to achieve its goals".

The purpose and priority of the state, within this context, is first to rationalise intra-group interactions and, second, to ensure the preservation of the group itself. The

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<sup>16</sup> Roland Paris 'Peacebuilding and the Limits of Liberal Internationalism' *International Security* Vol. 22 No. 2 (Fall 1997) 54-89 at 75-76, discusses how democratic elections, by encouraging political activity, can be exploited by ambitious and unscrupulous politicians in deeply divided societies to foster 'parochial exclusiveness ... at the expense of ... the broader public good'. This has led to instability and consequent gross abuses of human rights in countries such as Angola, Sudan, Rwanda, Bosnia, Sri Lanka and Ethiopia

<sup>17</sup> I William Zartman 'Africa as a subordinate state system in international relations' *International Organisation* Vol.21 No.3 1967, 545-564, made the observation that Africa was a continent of 'state-nations', not nation-states. Cited in Mathoma *et al*, *op cit*. at 5

<sup>18</sup> Abdoul Aziz M'Baye 'Nations, States or Nation-states: Human Rights and Democratisation in Africa' in Mathoma *et al*, *op cit*. at 51-71

purpose of the state is, accordingly, to balance these two imperatives. The concepts of human rights and democracy provide the theoretical and practical framework for policy formulation and implementation in meeting the challenge of ensuring this balance. In this regard, it is worth recalling UN secretary-general Kofi Annan's description of democracy as the best available conflict resolution mechanism, not necessarily because of what it can do but because of what it can prevent<sup>19</sup>.

#### 1.4 The current status of human rights

The concept of respect for others – the notion that there are certain things that we should not do to one another, and that there are particular duties we owe to each other – is common to all civilisations, although these core values have been defined differently by different cultures throughout history. As Ken Booth has argued in his advocacy of cosmopolitanism, or “sensitive universalism”, that there needs to be a “dialogue between universal values and local definitions”, or interpretations<sup>20</sup>.

This commonality of values is accurately reflected in Harold Courlander's extensive collection of oral literature, traditions, myths, legends, wisdom and sayings in *A Treasury of African Folklore*<sup>21</sup>. His ‘Introduction’ observes that:

‘The oral literature and traditions of African peoples communicate to us the scope and nature of our common identity. We discover there, if we have not already surmised it, how much we share – our views about good and evil; about what is pompous or vain and what is moderate or immodest; and our standards defining the mutual responsibilities of the group and the individual. ... the similarities of outwardly contrasting societies are more impressive than the differences<sup>22</sup>.’

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<sup>19</sup> Greg Mills ‘Global Realities and African Priorities: A View from South Africa’ in Mathoma *et al.*, *ibid.* 29-38 at 35, citing ‘Freedom’s journey: A survey of the 20<sup>th</sup> Century’ *The Economist* 11 September 1999 at 7

<sup>20</sup> Ken Booth ‘Human wrongs and international relations’ *International Affairs* Vol. 71 No. 1 (1995) 103-126 at 119

<sup>21</sup> Marlowe and Co.: New York, NY 1996

<sup>22</sup> Courlander *ibid.* 1-2

The changes that have taken place internationally since the fall of the Berlin Wall have highlighted the acceptance by the international community that questions of human rights, and the inherent dignity of the individual, must play a more important role in the relations between states. Hitherto, such perspectives were relegated to the backwaters of international discourse, with the result that some (including African) states professed respect for such values publicly, but failed to respect them in practice. In a globalising environment, however, it is becoming increasingly necessary to attempt a common understanding of the content of these core values in order to avoid conflict and to facilitate human interaction across particular borders.

The concept of 'human rights' has been identified as the shorthand expression of an emerging global consensus on the identity of the core interests to be protected in order to preserve peace and promote development. Adherence to accepted human rights norms is gradually assuming what is submitted to be its rightful place as a virtual precondition for admission into the global game.

Additionally, while respect for human rights is no automatic panacea, the correlation between peace, development and human rights is increasingly accepted. Consequently, the precise content of the notion of human rights and who is to define that content have become issues of utmost significance.

Understanding of the content of the concept is dynamic and undergoes continual evolutionary, although not necessarily 'linear'<sup>23</sup>, development. Ancient societies had no equivalent to the modern concept of a right that applies to all human beings equally, inasmuch as, for example, slavery, male dominance and the reservation of rights for citizens alone, were all recognised by the law at various times and in various places.

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<sup>23</sup> Robertson *op. cit.* xvi

Ancient legal systems were frequently founded upon an understanding of what the deity had ordained. Thus, for example, the Koran (Surah 4:34) recognised the right of men to chastise women, and even the Old Testament, in Genesis 3:16, records God's pronouncement that man shall 'rule over' woman. However, the New Testament Christian message of the common ancestry of God, the equality of all humankind and the ideal of love for all and service to all humanity, is essentially favourable for the idea of human rights. There is no agreement on the sacred origin of the human creation. Nevertheless, at least on the basis of universal human dignity, human rights norm observance is a necessary prerequisite for global contact in areas of human interaction as diverse as social, cultural, religious and economic.

### 1.5 The nature of human rights

Despite the growing appeal and status of the human rights idea, its content remains the subject of extensive debate. The concept of human rights, like that of democracy, is espoused by all the world's ideologies. However, as with the democratic idea, the precise meaning of the expression 'human rights' continues to be elusive: there is no commonly agreed definition of that concept in political, philosophical, and legal discourse<sup>24</sup>. Intuitively, suggest Kibwana, Acheampong and Mwangi, the word 'human' implies that the rights deemed human are those that pertain essentially to human beings. This appears to be the import of definitions of human rights that hold that "human rights are rights which all persons equally have simply because they are human"<sup>25</sup>. Although this assumption has the merit of simplicity, it does not settle the controversy over the precise definition and content of human rights. This is because,

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<sup>24</sup> This is true of 'rights' generally: see J Waldron (ed.) 'Theories of Rights' Oxford University Press: Oxford 1992, cited in Kivutha Kibwana, Kenneth A Acheampong and Makumi Mwangi *Human Rights and Diplomacy in Africa: A Critical Perspective* [www.ukc.ac.uk/politics/publications/journals/kentpapers/kibwana.html](http://www.ukc.ac.uk/politics/publications/journals/kentpapers/kibwana.html) (Date accessed November 2000)

<sup>25</sup> A Gerwith 'The Epistemology of Human Rights' in P Frankel, J Paul and F D Miller (eds.) *Human Rights* Basil Blackwell: Oxford 1984 p.1; see also Gerwith *Human Rights: Essays on Justification and Applications* Chicago University Press: Chicago 1982, cited in Kibwana *et al.*, *ibid*

rather than forming the root of all particular rights which human beings have, human rights have generally always been deemed to be one species of these rights<sup>26</sup>.

To further compound matters, the word 'rights' itself has not enjoyed undisputed definition. Indeed, if there is any agreement at all in rights discourse, it is that rights norms exhibit profound ambiguity. According to Hohfeld's analysis, the word 'right' is an ambiguous term used to describe a variety of legal relationships<sup>27</sup>. There is,

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<sup>26</sup> R Wasserstrom 'Rights, Human Rights and Racial Discrimination' in D Lyons (ed.) *Rights* Wadsworth Publishing Co.: Belmont, Ca. 1979 at 48, cited in Kibwana *et al.*, *ibid.*

<sup>27</sup> N W Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* Yale University Press: New Haven 1923, cited in Kibwana *et al.*, *ibid.* See also J W Harris *Legal Philosophies* Butterworths: London 1980 at 76-86.

Sometimes it is used in the strict, positive sense of a right holder being entitled to claim something, with a correlative duty in another. At other times it is used to indicate a privilege or liberty to do something. On other occasions, the word 'right' stands for a passive immunity from having one's legal status altered by another person's act, while it also refers to a power to alter legal rights and duties.

In spite of all these terms having been identified as rights, each concept invokes different protections, and produces different results. The problem is illustrated by the philosophical analysis of legal rights, which has engendered various theories of rights, the most popular being the contract and the power (or will) theories of rights. For a detailed discussion of these theories and others, see D D Raphael *Problems of Political Philosophy* Macmillan: London, 1975, especially at 54-114; and J W Harris *ibid.* especially at 24-35 and 209-218.

The contract theory of rights sees rights as arising from a legally binding promise made by one person to another, often for a reciprocal promise or commitment (i.e. consideration). The parties to such a contract are said to owe obligations to each other by virtue of their mutual promises to do or to refrain from doing specified acts. Their contractual undertakings can be legally enforced by either of them. Hence, they are bound to perform their obligations.

The inadequacy of the contract theory of rights in determining which rights constitute 'human' rights lies in the fact that rights universally acknowledged as human rights do not imply any contractual relations in which parties (e.g. a state and its citizens) exchange mutual promises of action or forbearance. It has been accurately observed that:

'The rights of the hungry to be fed, the rights of children to be educated, the right of a citizen to a fair trial...all make no essential reference to a prior promise...on the part of those with correlative obligations[.] [T]hey may be claimed, asserted, upheld and in general understood without involving the notion of contract in any way, yet they are just as much rights as the right of any promisee'. See T Campbell *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* Routledge and Kegan Paul: London 1983 at 115, cited in Kibwana *et al.*, *ibid.*

In contrast to the contract theory of rights, the power (or will) theory of rights deems one to have a right when one is able to require another to act or to refrain from acting in a certain way, thereby limiting that person's freedom of choice. This theory has a positivist outlook in that, in establishing the existence of any right, all that needs to be done is to verify the relevant rules or laws by which one

consequently, still nagging controversy over virtually every facet of the concept of human rights. Thus, there is no agreement on such basic issues as the origin and justification of human rights, their irrevocability or otherwise, their content and priority, and whether only individuals, groups, or both, are the proper bearers of human rights.

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can impose an obligation on another, while that obligation can also be waived by the right holder. The limitation facing the power/will theory is that human rights do not find expression only in rules. The reason is that there exists also the possibility that such rules of law may be empty of moral content, thereby failing to provide any effective protection for human dignity that is widely accepted as the more appropriate basis of human rights.

The interest theory of rights has been proposed as an alternative to both the contract and the power theories of rights. According to this theory, “[T]o have a right is to have an interest protected or furthered by the existence or non-existence of a rule, law or understanding requiring action or inaction in ways which are designed to have a bearing on the right-holder; obligations, under these rules, are owed to the right holder because they are obligations to further or protect A’s interests, this being the essence of the right in question, rather than a secondary consequence of the fulfilment of the obligation”. See Campbell *ibid.* at 92. Locating rights in interests is not entirely Campbell’s idea. For another defence of the interest theory of rights, see D N MacCormick ‘Rights in Legislation’ in P M S Hacker and J Raz (eds.) *Law, Morality, and Society* Clarendon Press: Oxford 1977 at 189-209, cited in Kibwana *et al.*, *ibid.*

In Campbell’s view, any objection to the view that all rights relate positively to what right-bearers are interested in, on the ground that social and legal rights do not always have a direct impact on what individuals are concerned about, is superficial. This is because such interests are ‘dispositional’ and their protection gives individuals the right to have them when they choose to exercise them. He further notes that the ‘interested in’ theory of rights could also be criticised for embodying the notion that one’s rights need not relate to one’s welfare. Such an argument, he validly contends, is likely to be made by those in societies in which self-directed individualistic interests are those most prized and protected.

While these various theories may illustrate certain elements of the concept of human rights, they do not themselves yield a substantive definition of human rights. For this reason, an attempt has been made to determine what are human rights by ascertaining the demands or proposals made in the name of human rights. The reason is that “theory construction is not the only way of providing understanding, for we achieve some, perhaps sufficient, understanding of the notion of rights by learning how to respond to the necessities it expresses”. See B Gower ‘Understanding Rights: An Analysis of a Problem’ in F E Dowrick (ed.) *Human Rights: Problems, Perspectives and Texts* Saxon House: Westmead 1979 at 53, cited in Kibwana *et al.*, *ibid.*

## ***CHAPTER TWO: THE NATURE OF HUMAN RIGHTS PROTECTION***

### **2.1 A history and classification of human rights**

This persistent controversy notwithstanding, international conventions provide examples of certain widely accepted approaches to human rights. One such approach deems human rights to refer to individuals as well as groups. Group rights, as attested to by the meaning of 'genocide' in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948), are of as legitimate concern as individual rights and, in certain circumstances, individual rights can be secured through group rights<sup>28</sup>.

Secondly, although human rights must be possessed by all human beings, this is not the same thing as endorsing the proposition that all human rights should be realised contemporaneously in all societies. The general acceptance of the notion of the progressive realisation of certain human rights, especially economic, social and cultural rights, rules out such a proposition.

Thirdly, the concept of human rights encompasses various groups, or 'generations', of rights. These are civil and political rights; economic, social and cultural rights; and solidarity rights, that is, the right to development, the right to peace and security, and the right to benefit from the common heritage of mankind, i.e. the right to a clean and healthy environment. This approach takes cognisance of the fact that specific historical circumstances form the basis of all demands that are made in the name of human rights.

Civil and political rights take their roots from the eighteenth century struggles in Europe and America to emancipate the individual from state oppression and secure for him liberty from the arbitrariness of state action. The revolutions occasioned by these

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<sup>28</sup> See Article 11

struggles engendered the classic eighteenth century declarations: the Virginia Declaration of Rights (1776), the Declaration of Independence of the United States (1776), and the Declaration of the Rights of Man and of the Citizen (1789) in France.

A number of these instruments constituted significant landmarks in Western political development, and these, in turn, influenced the universal perspective of human rights. For example, the English Magna Carta, which King John signed in 1215 at the insistence of his barons, subordinated the King, as well as his subjects, to the law: The former was obliged to engage with the latter within the four corners of the law. The ambit of the Magna Carta was restricted to the clergy, the nobility and the bourgeoisie, and held no benefits for the ordinary people. The charter was upheld by subsequent kings and was extended and strengthened by the Petition of Rights of 1628 and the Bill of Rights of 1689<sup>29</sup>.

The language of the preamble to the American Declaration of Independence from English colonialism employed a generous ecumenicism and was favourably disposed to the idea of human rights – despite the subsequent hypocrisy that characterised the continued acceptance of the practice of slavery. Thus, the founding fathers expressed the belief, founded on an article of faith, that:

‘We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just powers from the Consent of the Governed. That wherever any form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it and to institute new Governments, laying its foundation on such Principles and organising its Powers in such Form, as to them seem most likely to effect their Safety and Happiness’<sup>30</sup>.

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<sup>29</sup> J Williamson *The Evolution of England* Oxford 1961 at 103, quoted in Umozurike *op. cit.* at 9

<sup>30</sup> Umozurike *ibid.* at 10



The French Declaration of the Rights of Man and the Citizen of 1789 again proclaimed universal principles applicable to all peoples. It declared the equality of all, the primacy of the rights to liberty, property, security and resistance to oppression and the equality of citizens, freedom of thought and of opinion, as well as their admission to honours, public posts and employment on the basis of merit. Sovereignty was recognised as properly residing in the nation and all authority to exercise it must be derived from the people<sup>31</sup>.

The foundation of Western, now increasingly universal, human rights, observes Umozurike<sup>32</sup>, was 'at first ethical and moral' and was later strengthened by the introduction of political and then legal dimensions by philosophers such as Grotius, Locke and Montesquieu.

Initially, human rights fell within the domestic jurisdiction of states<sup>33</sup>. The few exceptions to this general rule included the treatment of foreigners and the controversial right of humanitarian intervention in cases of gross violations of human rights, or atrocities<sup>34</sup>. The progressive internationalisation of the protection of human rights began with several landmark documents. These included the World War I peace settlement; the peace treaties for the protection of the religions and languages of minorities in Central and Eastern Europe; minimum labour standards under the supervision of the International Labour Organisation; and the mandate system for the

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<sup>31</sup> Lord Acton *Lectures on the French Revolution* 1916, quoted in Umozurike *ibid.* at 11

<sup>32</sup> *ibid.* at 9-10

<sup>33</sup> *ibid.* at 11

<sup>34</sup> See, generally, John Stuart Mill 'A Few Words on Non-Intervention' in John M Robson (ed.) *The Collected Works of John Stuart Mill* Vols. 1-33 University of Toronto Press: Toronto and London 1963-1991, cited in Georgios Varouxakis 'John Stuart Mill on Intervention and Non-Intervention' *Millennium: Journal of International Studies* Vol. 26 No. 1, 57-76. See, also Robertson *Crimes Against Humanity op. cit.* 403-411, and Richard N Haass *Intervention: The use of American military force in the post-Cold War world* Brookings Institution: Washington D.C. 1999 at 9-18

colonies of the defeated powers that endeavoured to ensure accountability to, and the public welfare of, the governed, as a trust to civilisation<sup>35</sup>.

Economic, social and cultural rights became part of human rights discourse after the 1917 socialist revolution in Russia, and were later adopted by the newly independent states. That revolution proclaimed the Rights of the Oppressed and Toiling Workers and Peasants. The socialist approach to human rights proceeds from the premise that “social opportunities and rights are not inherent in the nature of man, and do not constitute some sort of natural attributes”. The reason is that “rights and freedoms of individuals in any state are materially stipulated and depend on socio-economic, political and other conditions of the development of society, its achievement and progress”<sup>36</sup>.

Nazi atrocities during World War II shocked the conscience of humankind and forced the peoples of the world to seriously reconsider the legitimacy and adequacy of the concept of domestic jurisdiction as it bore upon human rights. Human rights were, consequently, enshrined in the UN Charter, albeit in general terms. They were, however, soon elaborated in the Universal Declaration of Human Rights of 1948. The Declaration was initially not intended to be legally binding. Rather, it was to be “a guiding light to all those who endeavoured to raise man’s material standard of living and spiritual condition ... a moral obligation on the different countries to find ways and means of giving effect to the rights proclaimed therein”<sup>37</sup>.

However, with its constant repetition, reaffirmation and elaboration in subsequent instruments, both universal and regional, as well as in national constitutions, the

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<sup>35</sup> See, for example, Stephen D Krasner ‘Sovereignty, regimes and human rights’ in Volker Rittberger (ed.) *Regime Theory and International Relations* Clarendon Press: Oxford 1993, 139-167 at 159

<sup>36</sup> V Katarshkin ‘The Socialist Countries and Human Rights’ in K Vasak (ed.) *The International Dimension of Human Rights* Greenwood Press/UNESCO: Westport, Connecticut and Paris 1982 at 631, cited in Kibwana *et al.*

<sup>37</sup> UN Plenary Meeting, Official Records of third session, part I (1948), p 873, Netherlands delegate, quoted in Umozurike *op. cit.* at 11

essential principles have acquired the status of customary international law binding on all states without their express consent<sup>38</sup>.

Near universal acceptance exists that the concept of human rights includes the two categories of rights contained in the Universal Declaration of Rights of 1948, viz. 'first generation' rights or civil and political rights, and 'second generation' rights such as social, economic and cultural rights. Increasing recognition attaches to 'third generation' rights, such as environmental, group and developmental rights. These 'solidarity rights' emanate from the growing realisation that, particularly in a 'globalising' society, international co-operation is called for if states are to fulfil certain human rights obligations. Hence, rights such as the right to peace and security and the right to the equal enjoyment of the environment cannot be secured by states acting individually. Africa has played an important role in including this latter set of group-focused rights in the international agenda, particularly by reason of their incorporation in the African Charter on Human and Peoples' Rights.

Thirdly, it is generally accepted that certain categories of human rights are not absolute, and may be restricted in order to secure the comparable rights of others, and the interests of the community at large<sup>39</sup>. Such limitations do not deny the worth or existence of such rights, but underscore the fact that while these rights are not extinguished, they may, in certain circumstances, be properly overridden or, at least, temporarily constrained. It is in this light that the assertion is made that human rights are *prima facie* rights and not absolute rights<sup>40</sup>.

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<sup>38</sup> See, generally, M Akehurst *A Modern Introduction to International Law* (5 ed.) George Allen and Unwin: London 1984 23-42, especially 25-34; Christopher M Ryan 'Sovereignty, intervention and the law: a tenuous relationship of competing principles' *Millennium: Journal of International Studies* 1997 Vol. 26 No. 1, 77-100 at 89 and the authorities quoted there; and Robertson *op. cit.* 85-87, for useful discussions of the concepts of *opinio juris* and *jus cogens*

<sup>39</sup> See Joseph Raz 'Rights-Based Moralities' in J Waldron (ed.) *Theories of Rights op.cit.* at 182-200, cited in Kibwana *et al*

<sup>40</sup> An argument for a limited notion of absoluteness in the strongest sense, can be made without falling foul of the view that human rights should be limited to enable all to enjoy such rights and in the interest of the whole community. For example, the right that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment can be held to be such an absolute right. This is

Finally, the concept of human rights contains the demands that are made on the basis of societal values, and focuses on the morally appropriate way of treating human beings either in their individual capacities or as members of social groups. In this conception, human rights are accorded to individuals or groups in order that they can realise their self worth and dignity, and to organise society in such a way that these goals are effectuated and respected.

## 2.2 Three generations of human rights

The development and elaboration of international human rights norms fits into a conceptual framework that recognises their development in three simultaneously interpenetrating and interconnected stages. International human rights law<sup>41</sup> consequently recognises the emergence, in turn, of three generations of human rights<sup>42</sup>. First generation human rights ('blue') are based on the eighteenth century conceptions of libertarian rights, and reflect natural law ideas. These are negative rights, to the extent that they provide protection against the encroachment by government on individual rights. First generation human rights provide for civil and political liberties. Not only did they inspire seminal international human rights instruments such as the Universal Declaration of Human Rights (1948), but also the International Covenant of Civil and Political Rights (1966), and are expressed in many national constitutions. Municipal institutions and courts have a primary role to play in the promotion of first generation human rights, since they may clarify their content, or create evidence of

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because there is no morality, public welfare or general good that any limitation of this right could be held to protect in any society. It is for this reason that Article 2(2) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) provides that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture'.

<sup>41</sup> In political terms, this approach is loosely characterised as the 'three worlds' of human rights. The western (First World) approach emphasises civil and political rights; the socialist (Second World) approach emphasises economic and social rights, while the Third World approach emphasises self-determination and development rights. See Jack Donnelly *International Human Rights* Westview Press: Boulder Co. 1993 at 35, cited in Kibwana *et al.*; see also the cautionary words of Robertson *op. cit.* at 80-82

<sup>42</sup> See for example, D H Ott *Public International Law in the Modern World* Pitman Publishing: London 1987 at 238-238, cited in Kibwana *et al.*

state practice, thus aiding in the development of these rights into customary international law.

Second generation human rights ('red') evolved in an effort to temper and balance the highly individualistic character of first generation rights. For this reason, second generation human rights display a highly social orientation. They usually require affirmative action: state intervention is considered necessary for their fulfilment.

In Africa (and generally in countries that were formally colonised), the development of second generation rights was seen as being prompted by, amongst other reasons, reaction against colonial exploitation. Indeed, developing countries introduced an argument for the primacy of second generation human rights over first generation ones: they argued that the achievement of social and economic rights is a precondition for the enjoyment of other, particularly first generation rights, such as civil and political rights. In this regard, Third World countries made significant contributions to the development of some second generation human rights, such as the international legal regime against racial discrimination<sup>43</sup>.

On the other hand, the argument has been advanced that second generation human rights<sup>44</sup> are 'inferior' or secondary to first generation human rights; that whereas first generation rights can be realised by governmental pursuit of certain policies, the realisation of second generation rights depends on the availability of resources. Being purely aspirational, therefore, governments merely undertake to fulfil them, but cannot be held responsible for their non-fulfilment (or abuse). However, this perspective ignores the fact that international instruments embodying aspirational rights do still oblige governments not to adopt policies that are contrary to their letter and spirit.

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<sup>43</sup> Y K Tyagi 'Third World Responses to Human Rights' 21 *Indian Journal of International Law* (1981) 119-140, cited in Kibwana *et al.*

<sup>44</sup> As reflected for example in the International Covenant on Economic, Social and Cultural Rights (1966)

Increasingly, therefore, legislative instruments require the 'progressive realisation' of rights in this category<sup>45</sup>.

Third generation human rights ('brown' or 'green'), unlike the first two, transcend national borders, and are in essence rights against the international community of states as a whole. Third generation rights, also known as 'solidarity' or 'brotherhood' rights, have as their philosophical foundation the global interdependence of both individuals and nations. Their roots are found in the Universal Declaration of Human Rights, which asserts that everyone is entitled to an international order in which their rights can be fully realised<sup>46</sup>. However, their juridical basis was most clearly set out in the *Barcelona Traction Light and Power Case*<sup>47</sup>, where the court suggested that states may have obligations *ergo omnes*. There is, then, a sound basis on which to argue for the international protection of third generation human rights, such as the right to self-determination, to a healthy environment, to peace, and to 'development'.

African states have been justly accused of not respecting human rights generally. Nevertheless, as with second generation rights, they have made a notable contribution to the development of third generation rights when they were included in a regional human rights instrument for the first time in the African Charter on Human and Peoples Rights<sup>48</sup>.

### 2.3 The problem of quality control

The Third World's emphasis on second generation rights and on third generation (i.e. 'solidarity') rights was historically used to ignore their record on the observance of

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<sup>45</sup> See, for example, section 27 (2) of the Constitution of the Republic of South Africa Act, No. 108 of 1996, which obliges the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the rights to health care, food and water, and social security.

<sup>46</sup> Article 28

<sup>47</sup> *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain, ICJ Reports (1970), in D J Harris *op. cit.* 453-464 at 454, and Robertson *op. cit.* 86

<sup>48</sup> U Oji Umzurike 'The African Charter on Human and Peoples' Rights' 77 *American Journal of International Law* (1983) 902-912, cited in Kibwana *et al*

especially first generation rights. Further, third generation rights tended to expand the scope of human rights, and promoted quantity at the expense of quality. For this reason, the idea of the quality control of human rights has been mooted<sup>49</sup>. The basis of this idea is that the inclusion of all types of endeavour as 'human rights' may serve to dilute the very concept of human rights and, moreover, especially render their enforcement difficult.

This is a pertinent concern: there is still a need to identify a core of human rights whose respect by all states should be mandatory, giving rise not only to international concern, but to direct action<sup>50</sup>. Otherwise, fears that African states - and developing countries generally - would use their development concerns to include every facet of human endeavour in an ever-expanding portmanteau of decreasingly enforceable 'human rights', while continuing to withhold or ignore the most fundamental - and easily implementable - rights from their citizens<sup>51</sup>, would be well founded.

It has been argued that, if this quality control approach were accepted, it could lead logically to the identification of a core set of human rights which all states would be required by international law and practice to observe. This core of rights would be uniform for all states, and would in some way (either through constitutions or other laws) be reflected in municipal laws. This would mean that states would have a similar and enforceable human rights regime. This aspiration towards a uniform and internationalised core human rights regime would eventually make their enforcement easier, and would also put to rest the jurisprudential debate as to the status of international human rights law in the municipal domain.

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<sup>49</sup> See for example, P Alston 'Conjuring up new human rights: a proposal for quality control' 78 *American Journal of International Law* (1984) 607-621, cited in Kibwana *et al.*

<sup>50</sup> The argument in favour of humanitarian intervention in conflicts such as those in Somalia and Rwanda is a good example. (On the concept of humanitarian intervention see C A Arend and R J Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* Routledge: London and New York 1993, ch.8)

<sup>51</sup> See E G Bello 'Human Rights: The Rule of Law in Africa' 30 *International and Comparative Law Quarterly* (1981) 628-637 at 631, cited in Kibwana *et al.*

The debate on the status of international law in municipal law centres on the question of whether a state adopts a dualist or a monist view<sup>52</sup>. Where a monist view is adopted, international law is automatically incorporated into municipal law (i.e. domestic law); whereas a dualist view specifies that international law must be formally adopted and transformed into municipal law for it to be enforceable in that domain<sup>53</sup>.

The question of whether the international law of human rights is binding on states should not, say the authors, be based on a choice between the positivist view that it is dependent on consent only, or on natural law-based arguments. The argument should be rather that the content is agreed on by states generally, and on that basis is reflected in municipal law, i. e. contractually, and hence directly enforceable. The uniformity of content thus acquired would put to rest sovereignty-based arguments for the non-enforcement of a general human rights regime since it would also be reflected in the municipal laws of all states.

While the apparent simplicity and neatness of the proposal has its attractions, the authors fail to explicitly recognise that the proposed solution is itself positivist in that it relies entirely upon the consent of and implementation by individual states. For this reason, it is submitted, their recommended solution is likely to indefinitely remain an aspiration as the member states of the United Nations, where they do not continue the debate over the precise core content of human rights norms, then fail to implement existing legal standards.

On the other hand, the difficult truth is that, the realm of operation of human rights does encompass almost the entire range of human interaction. They are, consequently, best protected when they are observed voluntarily, based on internalised values, and

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<sup>52</sup> See G Schwarzenberger and E D Brown *A Manual of International Law* Professional Books: Oxford 1976 ch.5, cited in Kibwana *et al.* See also Akehurst *op. cit.* 43-48; and Harris *op. cit.* 55-57

<sup>53</sup> See M Dixon and R McCorquodale *Cases and Materials on International Law* Blackstone Press: London 1991 ch.4, cited in Kibwana *et al*



integrated into the cultural practices and daily lifestyle of a nation<sup>54</sup>. No legal system can promise to police all situations where human rights may come under threat. The Preamble to the African Charter explicitly asserts that ‘the virtues of ... historical tradition and the values of African civilization ... should inspire and characterize ... the concept of human and peoples’ rights’. This makes it a significant contribution to the international effort to meet the challenges set out in the Preamble to the Charter of the United Nations. So, too, the former’s instruction in Article 29 (7) to ‘preserve and strengthen positive African cultural values’.

Nevertheless, the very existence of global and regional legal systems for the protection of human rights arises from the regrettable reality that these virtues and values – and their concomitants elsewhere in the world - are frequently observed more in their breach. Such is the case in the instance of Africa, too.

#### **2.4 A brief history of human rights in Africa: pre-colonial times to independence**

Oji Umzurike<sup>55</sup> has responded to the general cynicism and dismissive attitude to arguments supporting the recognition of human rights in pre-colonial Africa. While declining to romanticise or generalise about daily life in the diversity that was African society, he accurately observes that “[a] group of people bent on denying or ignoring one another’s rights cannot exist as a society. The [mere] existence of society thus presupposes the recognition of the rights of the members. This truism applies as much to human society as to the society of nations”. Nevertheless, he recognises that this statement should be understood within the context of the rather different conception of the range of rights recognised and accepted by the various cultures and religions prevalent at the time.

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<sup>54</sup> Francis Fukuyama *Trust: the social virtues and the creation of prosperity* Hamish Hamilton: London 1995, cited in Nicholas Rennger ‘The ethics of trust in world politics’ *International Affairs* Vol. 73 No. 3 (1997) 469-487 at 482

<sup>55</sup> Umzurike *op. cit.* at 12-19

R.J. Vincent echoes<sup>56</sup> Umozurike:

‘...morality is a notion that presupposes society. Nobody, as Marx said, seen in his isolation produces values, and nobody, as Hannah Arendt adds, in his isolation cares about them – things, or ideas, or moral ideals, ‘become values only in their social relationship’.

Umozurike has referred to Africa’s somewhat different cultural conceptions of human rights. Nevertheless, the existence and expanding recognition of universal basic rights has been emphasised by Vincent and others, like Ken Booth, who advocate that we look beyond our doubts, engage with the real needs of real people by “having the courage of our confusions”, and think and act “without certainty”<sup>57</sup>. Accordingly, he argues, not every idea originating in the West can be simplistically labelled as “imperialist” and discarded. There are some ethnocentric ideas – and individual human rights is one of them – for which it should not be necessary that one apologise. What matters from his cosmopolitan perspective is not the origin of an idea, but the meaning and significance it currently bears: nowadays, cultures and their values are “promiscuous”, “made in the world”<sup>58</sup>.

In any event, it is not entirely clear that the idea of human rights in fact originated in the West. Ken Booth refers to a 1947 UNESCO survey on the origins and possible universal nature of human rights, where a Chinese scholar argued that they had originated in the Middle Kingdom, while an Islamic philosopher had asserted their origin in Islam.

These considerations do not necessarily mean, however, that Africa has no need of a separate paradigm of analysis when one examines the prospects for democracy and the

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<sup>56</sup> R J Vincent ‘Western Conceptions of a Universal Moral Order’ in Ralph Pettman (ed.) *Moral Claims in World Affairs* Croom Helm: London 1979 at 77

<sup>57</sup> R J Vincent *Human rights and international relations* Cambridge University Press/Royal Institute of International Affairs: Cambridge 1986 esp. 127-8, cited in Ken Booth ‘Human wrongs and international relations’ *International Affairs* Vol. 71 No. 1 (1995) 103-126, at 112

<sup>58</sup> Ken Booth *ibid.* at 113-4

promotion and protection of human rights. Moreover, the solutions are not necessarily identical simply because the continent's cultural history may be understood to bear some similarities with European experiences. Nevertheless, UN Secretary-General Kofi Annan has insightfully observed that "It was never the [African] people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so"<sup>59</sup>.

Generally, the well-being of the members of traditional African society was anchored on the health and stability of the society as a whole. Thus, the 'rights-claimer' had to be prepared to carry out the obligations that accompanied them, for rights were - and still are - understood to be intertwined with duties. Claude Ake<sup>60</sup>, explaining the interface between individual and societal rights, concludes as follows:

'We put less emphasis on [the] individual and more on the collectivity, we do not allow that the individual has any claims which may override that of the society. We assume harmony, not divergence of interests, competition and conflict; we are more inclined to think of our obligations to other members of our society rather than our claims against them'.

Similarly, Umozurike<sup>61</sup> embraces Uchendu's description of pre-Christian and pre-Islamic Nigeria as characteristic of all of black Africa. The latter found that the social order was ontologically-aligned and resolved problems with a handful of kinship principles, reciprocity and redistribution:

'The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging, security and social justice. In such [a] social order[,] duties preceded rights. The principle was clear: [in order] to enjoy your rights[,] you must do your duty; and duty and right have a reciprocal relationship[.]

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<sup>59</sup> Address to the Communications Conference at the Aspen Institute, Colorado, 18 October 1997  
[www.unhcr.ch/hurricane/hurricane.nsf/\[symbol\]/sg.sm.6366.En.opendocument](http://www.unhcr.ch/hurricane/hurricane.nsf/[symbol]/sg.sm.6366.En.opendocument)  
(Date accessed: 18 April 2000)

<sup>60</sup> Claude Ake 'The African Context of Human Rights' *Africa Today*, 1<sup>st</sup>/2<sup>nd</sup> Quarter 1987, 5 -12, quoted in Umozurike *op. cit.* at 18

[S]tructurally[,] both were [in] balance[.] ... The lineage incorporates the living, the dead and the unborn. By the principal of reciprocity, the living respect the ancestors and the traditions they left; the ancestors reciprocate by maintaining the prosperity of the living community and[,] through reincarnation, strengthen the living lineage. When the living die, they join their ancestors’.

Equally, testifying before the West African Land Commission (1908, p. 103), Chief Elesi of Odogbolu in the western part of Nigeria said<sup>62</sup>, “... the land belongs to a vast family of which many are dead, few are living and countless members still unborn.”

African societies thus had ‘stabilising’ factors that included a sense of obligation to one’s kith and kin, a respect for (and sometimes fear of) the deity that was omnipotent and omniscient, and to which all humans were accountable for their actions on earth. This belief structure had a restraining effect on human activities, since the good expected to be appropriately rewarded and the wicked or their successors to be condemned.

Morality (in the sense of ethics, or applied morality), concludes Umozurike, was therefore of the greatest importance in African private and public relations – a situation that, he asserts, was decimated by the advent of slavery and colonialism.

A popular school of thought on the pre-colonial human rights situation in Africa argues that human rights were recognised to the extent that the communal-based economic systems emphasised the provision of economic, social and cultural rights. The existing political organisations ensured that political and civil rights were either not violated, or that violations were minor<sup>63</sup>. Indeed, some have argued that human rights, particularly

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<sup>61</sup> V C Uchendu ‘Tradition and Social Order’ excerpt from inaugural lecture, University of Calabar, Nigeria, 11 January 1990, in Umozurike, *ibid.* at 19

<sup>62</sup> Quoted with approval by the Privy Council in *Amodu Tijani v Secretary to the Government of Southern Nigeria* (1921) 2 AC 399, cited in Umozurike *ibid.* at 18

<sup>63</sup> For a discussion of human rights in pre-colonial Africa see O C Eze *Human Rights in Africa: Some Selected Problems* Nigeria Publishers Ltd. and Macmillan: Lagos 1984 9- 14, cited in Kibwana *et al.*

economic rights, were well developed and respected in pre-colonial Africa. This argument has therefore been used to support the primacy of second generation rights in post-colonial Africa, and the view that Africa has its own special conception of human rights.

Kibwana and his co-authors accept that a high degree of freedom existed in pre-colonial societies, especially those of an acephalus, or devolved, character. Often, an individual who disagreed with his or her family or clan was free to leave the immediate community. Sections of a community could remove themselves from the jurisdiction of a tyrannical leader by migrating to another jurisdiction. However, they argue, this freedom was more apparent than real as it was curtailed by the fact that individualism and separatism were not viable where community life was necessary to conquer a harsh natural environment to ensure survival.

They submit, moreover, that the exponents of the view that pre-colonial Africa displayed a well-developed and encompassing human rights regime paint too rosy a picture. In the early civilisations and kingdoms such as in Ancient Egypt, Ethiopia, Nubia and the West African kingdoms, human rights, especially those of slaves and other low class populations, were virtually non-existent: indeed, only the ruling groups enjoyed an abundance of such rights<sup>64</sup>. Further, they submit, the development of custom and customary laws in many ways served to qualify the basic human rights. For instance, with the advent of patriarchy, women's rights were gradually but significantly curtailed, or compromised.

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<sup>64</sup> For a consideration of the pre-colonial human rights situation in the great African civilisations, especially the political and constitutional structure of those civilisations, see G Mokhtar (ed.) *A General History of Africa: Vol. 11* UNESCO and Heinemann: Paris and London 1981. See also C A Diop *The African Origin of Civilization: Myth or Reality?* Lawrence Hill and Co.: Westport Connecticut. 1974; H J Salemson and M de Jager (eds.) *Civilisation or Barbarism: An Authentic Anthropology* Lawrence Hill and Co.: Westport Connecticut 1981, cited in Kibwana *et al.*

Similarly, Umozurike divides pre-colonial Africa into two broad types of societies<sup>65</sup>. There were those with advanced systems of government, with kings ruling over extensive areas. Executive, legislative and judicial powers were usually concentrated in the rulers, who designated their officials and subordinates. The greater part of Africa was, however, “atomistic”, consisting of small communities with recognised heads in the nature of kings, elders, title-holders or other functionaries.

In both types of society, though, members and citizens, as opposed to aliens, were accorded full rights that both the community and the leadership sought to protect. The rights to life and property, for instance, are as old as human society and infractions brought upon the perpetrator delictual or criminal consequences. Importantly, Umozurike states that, with some notable exceptions, the kings were not authoritarian and every society had its democratic processes. The Ashanti kings in Ghana, for example, were ritually warned against dictatorship and abuse of office before they assumed office.

On the negative side, Umozurike admits that “[v]irtually all” African societies “recognised” the institution of domestic slavery, and some societies were blighted by a ‘caste’ system whereby some people were treated as inferior to other human beings, as well as by the ritual of human sacrifice.

The content of the rights recognised and guaranteed during this early period was minimal. For example, although the economies burgeoned, they still could not support a high level of economic rights. Indeed, the political and civil rights guaranteed then are dwarfed by the array of equivalent rights recognised in contemporary complex societies. Despite these qualifications, however, Kibwana *et al.* accept that there existed an emerging African customary law of human rights, which could have acted as a base for developing a code of human rights practices during the colonial era.

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<sup>65</sup> Umozurike *op. cit.* at 14

However, such base as did exist was “significantly destroyed” by colonial administrations, and did not serve as a foundation for constructing an independent regime of human rights in Africa that was based on experiences different from western European ones.

The authors note that it has been suggested that “[d]uring colonialism, it was European colonisers who violated human rights in their efforts to enforce the political and legal authority of the colonial government and ensure smooth colonial administration”<sup>66</sup>. Whatever the justification(s) advanced for colonialist rule by the colonising powers<sup>67</sup>, colonialism meant the wholesale denial of peoples’ human rights: indeed, this provided one reason for the resistance to colonial rule<sup>68</sup>. Without the use of force, colonialism could not have been sustained.

Therefore, they argue, during most of the colonial period, the growing human rights regime that had been nurtured during the pre-colonial era became subverted. However, it must be noted that the negation of human rights in the colonial period was not wholesale, since the human rights of the colonisers, and of white and other migrant communities, were guaranteed. Thus, “within the womb of colonialism lay the seeds of its later destruction”, since the colonised peoples were able to appreciate what an acceptable level of human rights was by simply observing the human rights position of the foreigners.

Later, the development and articulation of an international human rights regime, especially the promulgation of the Universal Declaration of Human Rights (1948), gave

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<sup>66</sup> E O Esimokhai ‘Towards an Adequate Defence of Human Rights in Africa’ (1981) 21 *Indian Journal of International Law* 141-148 at 142, cited in Kibwana *et al.*

<sup>67</sup> For example, Lord Lugard gave the rationale for colonialism as based on a ‘dual mandate’: to exploit the wealth of the colonies, and to promote the moral and educational progress of the colonised peoples. See F J D Lugard *The Dual Mandate in British Tropical Africa* William Blackwood and Sons: London 1929 18, cited in Kibwana *et al.*

<sup>68</sup> For a discussion of human rights during the colonial era in Africa, see O C Eze *Human Rights in Africa op.cit.* at 14-22, cited in Kibwana *et al.*

the colonised peoples an idea of the human rights that could and should be aspired to and enjoyed by all human beings, including themselves.

During colonialism, the negation of human rights was effected not only through force, but also by legal instrumentalism, that is, the justification of such negation through legislation. As a result of this, many draconian laws were promulgated, for instance emergency regulations, detention without trial, provisions on compulsory labour, and the proscription of public meetings, whose aim was to control native populations<sup>69</sup>.

Although these laws were detested by the African populations, “future African leaders were socialised and culturalised within that colonial system and subsequently adopted the colonial *modus operandi* as well-suited for post-independence governance. Unsurprisingly then, for many African countries, the brief interlude of *uhuru* (freedom) after independence quickly gave way to authoritarianism akin to that which existed under colonial rule”.

Human rights ideology was advantageously used as a basis for the struggle for independence from colonialism. Thus, Africans demanded, and were able to secure, certain rights, such as the right to self-determination, and the freedom of association and expression. To the extent that the adverse human rights situation was used to indict colonial rule, human rights gained a legitimacy that rendered it difficult to justify the denial of those rights to the populace after independence.

As was to be expected, the colonised were most vocal in criticising the absence of guaranteed human rights under colonialism. But, when it came to fashioning constitutions and their human rights contents during pre-independence negotiations, it was the colonial powers that most vocally advocated the inclusion of standard forms of

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<sup>69</sup> See, for example, R M van Zwanenberg *Colonial Capitalism and Labour in Kenya, 1919- 1939* East African Literature Bureau: Nairobi 1975, cited in Kibwana *et al.*, on how these laws and policies were effected.



human rights in these constitutions<sup>70</sup>. To the colonial authorities, western-type human rights were pivotal to guaranteeing the property interests of settlers and colonial civil servants, argue the authors.

Although these fundamental rights, as enshrined in the independence constitutions, expanded freedom and the individual rights of indigenous populations generally, nationalist leaders frequently characterised them as an imposition by foreigners, geared towards protecting their vested interests. Indeed, the later emasculation of Bills of Rights contained in African constitutions was justified on those grounds as well as on their over-concentration on western type, individualised civil and political rights to the exclusion of economic and social rights<sup>71</sup>.

Some countries such as Ghana and Tanganyika initially opted not to have a Bill of Rights in their constitutions. Their central argument was that a Bill of Rights would, in the process of its enforcement, invite conflict between the executive and an activist judiciary. Supporting this argument, Tanganyika Government Paper No.1 of 1962 stated that:

‘The government believes that the Rule of Law is best preserved not by formal guarantees in a Bill of Rights, which invites conflict between the Executive and the Judiciary, but by independent judges administering justice free from political pressure’<sup>72</sup>.

Despite such absences of a constitutional Bill of Rights, human rights practice was not significantly different between those countries that adopted, and those that did not adopt, a Bill of Rights. However, in those countries that did not, the enjoyment of human rights by the citizenry rested on the goodwill of the political leadership. It is

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<sup>70</sup> For a discussion of how human rights got into African independence constitutions, see L Zimba *Zambian Bill of Rights: An Historical and Comparative Study of Human Rights in Commonwealth Africa* East African Publishing House: Nairobi 1984 19-37, cited in Kibwana *et al.*

<sup>71</sup> Even supposedly more ‘liberal’ leaders such as Julius Nyerere, used this argument, see Kibwana *et al.*

<sup>72</sup> Tanganyika Government Paper No.1 of 1962, Dar-es-Salaam, Government Printers, 1962, at 6, cited in Kibwana *et al.*

unsurprising, then, that even in countries such as Ghana and Tanzania, the citizens subsequently agitated for constitutionally guaranteed and justiciable rights<sup>73</sup>.

Although most African countries incorporated in their constitutions a justiciable Bill of Rights modelled on the Universal Declaration of Human Rights, official recognition and the practice of human rights left a lot to be desired. As one commentator has observed:

‘One would have thought that when African states gained their independence the unpleasant experiences of the repressive colonial regimes would have made their leaders abhor violations of human rights. Instead, some African leaders showed traits of intolerance, high-handedness and callousness in dealing with political opponents and non-conformists’<sup>74</sup>.

Political leadership in Africa chose to reduce the human rights content of their countries’ constitutions largely in order to preserve their political positions<sup>75</sup>, although whether this was for reasons of avarice and ego, or based also upon the example of historical and traditional model of long-lived leadership, remains obscure. In either event, the one party system, for example, with all its potential for negating human rights, was meant to ensure the political longevity of incumbent regimes. Thus, soon after independence, the human rights situation in many independent African countries bore an unhappy resemblance with that obtaining under colonial rule.

Political leaders presided over systems that diluted human rights values that had been thought during the struggle for independence to be absolutely central to democratic government. However, this state of affairs did not mean that human rights provisions served no useful purpose, the authors submit. African regimes were not willing to go so far as to actually remove Bills of Rights from their national constitutions, for fear of

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<sup>73</sup> In Tanzania, this was eventually achieved through the Law of Fifth Amendment, 1984, see Kibwana *et al.*

<sup>74</sup> Esimokhai ‘Towards an Adequate Defence of Human Rights in Africa’ *op.cit.* at 142

<sup>75</sup> B O Nwabueze *Constitutionalism in the Emergent States* C Hurst and Co.: London 1973, cited in

confirming that their rule was authoritarian and undemocratic. Consequently, during periods of repression and misrule, affected citizens relied on the human rights provisions enshrined as Bills of Rights to challenge unconstitutional and undemocratic rule, and to vindicate their rights. With time, the Bills of Rights, like the sphinx, resurrected and have formed one of the more useful weapons for challenging the legitimacy of politically unresponsive regimes during the struggle for greater democracy in Africa.

### 2.5 Sovereignty and human rights in post-colonial Africa

Christof Heyns and Frans Viljoen thus note<sup>76</sup> that there is, generally speaking, “a high level of norm recognition in the various African countries”. Their conclusion is based on the fact that “human rights standards are recognised as valid norms”, and are included in many national constitutions, or are contained in international treaties signed by African countries. Thus, for example, all 53 members states of the OAU have ratified the African Charter, and norm recognition or norm acceptance “could consequently be regarded as universal”<sup>77</sup>.

Their analysis of associated provisions and implementation mechanisms, however, as well as of the actual practices in many countries on the continent, “generally reveals weak norm enforcement”<sup>78</sup>. This is either because no constitutional provision is made for recourse to judicial or other enforcement or, where such recourse is provided, it has not been utilised to any significant effect.

This problem is evident in the African Commission on Human Rights, established in terms of the African Charter on Human and Peoples’ Rights. The Commission has only the ‘power’ of secret recommendation passed through a political filter (the Assembly of

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Kibwana *et al.*, *op. cit.*

<sup>76</sup> 1999 (15) *South African Journal on Human Rights* 421-438 at 424

<sup>77</sup> *ibid.* at 428

<sup>78</sup> *ibid.* at 424

Heads of State and Government of the OAU) still largely fixated on the preservation of pristine sovereignty.

Consequently, without a certain basic level of practical respect for human rights norms within the participating domestic systems, wider regional systems based on voluntary compliance by its constituent parts are unable to function. Indeed, this is unsurprising if one accepts that it is inherently unrealistic to expect any state to voluntarily adhere to the human rights pronouncements of any supra-national institution when it refuses to do so in respect of its own courts or other domestic human rights institutions.

Where, however, a basic commitment to the observance of human rights norms exists in public life, even though complete consensus is elusive, or where spontaneous adherence is fragmentary, law can play a pivotal role in promoting consensus and encouraging and enforcing compliance.

A basic commitment to human rights norm observance requires an acknowledgement or acceptance that sovereignty is not an absolute or immutable principle. Indeed, the very notion of human rights constitutes a limitation on state sovereignty<sup>79</sup>. It is submitted, therefore, that:

‘There are things that states may do only as an affront to higher principles. To enforce human rights is to impose restraints on state discretion and to oblige states to ensure that individuals and institutions respect those restraints. Respect for human rights is a fundamental principle of modern international law and international relations, indicating thereby that they are too precious to be left in the realm of exclusive state discretion. Consequently, a matter is correctly understood to have been removed from the realm of domestic jurisdiction as soon as it is the subject of customary international law or treaty law’<sup>80</sup>.

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<sup>79</sup> Umozurike *op. cit.* at 83

<sup>80</sup> *Nationality Decrees of Tunis and Morocco Case* PCIJ Ser. B No. 4 (1923), D J Harris *Cases and Materials on International Law* (3 ed) Sweet & Maxwell: London 1983 at 695-6; *Case Concerning German Interests in Polish Upper Silesia* PCIJ Ser. A No. 7 (1926) p 19, quoted in Umozurike, *op.*

As will be discussed in the following chapter, regional and global arrangements for the protection of human rights constitute the international or supra-national legal system in this field. The ‘teeth’ of international law are significantly weaker and its enforcement more indirect than is true of human rights enforcement in the domestic context. Co-operation among sovereign states in the international system is based upon the principle of the consent of equals. Nonetheless, non-conformity with human rights norms may and does on occasion lead to one state being ostracised by others states or institutions which may use the ‘naming and shaming’ strategy to oblige the offending state to redirect its actions. In an increasingly interdependent world, the shame associated with marginalisation can be expressed in diplomatic or economic isolation, both of which are potentially powerful tools to influence state behaviour.

In view of the limited practical utility of the African Commission on Human Rights, Heyns and Viljoen<sup>81</sup> have concluded that it may be argued that the international enforcement of human rights depends for its success on the existence of a web of diplomatic, cultural and trade relations between states. One might add that the political will to deploy these tactical weapons is a further critical prerequisite for the effective enforcement of human rights norms. Only where these ties exist, and where the exercise of political will does not constitute an unrealistic eventuality, can their potential suspension or severance constitute a credible threat or sanction.

Heyns and Viljoen argue<sup>82</sup> that, while international systems for the protection of human rights generally lack the benefit of direct enforcement characteristic of domestic systems, regional systems arguably enjoy certain advantages over the global or United

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*cit.* at p 83; see also Markovic ‘Implementation of Human Rights and the Domestic Jurisdiction of States’ in A Eide and Shou (eds.) *International Protection of Human Rights* 47; Okungwu ‘The OAU Charter and the Principle of Domestic Jurisdiction in Intra-African Affairs’ 13 *Indian JIL* (1973) 589; Umozurike ‘The Domestic Jurisdiction Clause in the OAU Charter’ *African Affairs* (London April 1979) 179; Akinyemi ‘The Organisation of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States’ (1972-73) 46 *British YBIL* 393, quoted in Umozurike *ibid.* at 83. See also Robertson *op. cit.* 14-15 and 403-411

<sup>81</sup> *op. cit.* at 433

<sup>82</sup> *ibid.* at 423

Nations system. Regional systems, they submit, are able to give “more authentic expression to the values and historical peculiarities of the people of a particular region, resulting in more spontaneous compliance”. Further, due to the geographical proximity of the states involved, regional systems, under the right conditions, have the potential to exert stronger pressure against transgressing neighbours. “Peer pressure is easier to exert in a smaller circle of friends”, they aver. An effective regional system can, consequently, supplement the global system in significant ways.

However, it is also argued the critical outstanding link in the chain of international human rights norm enforcement is constituted by a reliable, independent and objective system for defining, identifying and publicising such violations. There exists then, one would suggest, a clear need for either an independent multilateral ‘early warning system’ to perform this information-gathering and -dissemination function. The beginnings of an appreciation of this fact appear in the ‘emergency’ procedures envisaged in Article 58 of the African Charter. The machinery established in the African Charter is, however, poorly developed and an opportunity was lost to establish a credible institution to perform this vital role.

## **2.6 Human rights expressed as *ubuntu***

Ex-President Leopold Senghor of Senegal has attempted to reassure those who fear the consequences for individual liberty of the ‘African philosophy of law’. The African tradition does not consist in alienating or subordinating the individual to the community, but in co-existence, in giving everyone a certain number of rights and duties<sup>83</sup>. The emphasis on peoples’ rights **together with** individual rights seeks to create harmony between the individual and society. The African notion of ‘man in society’, or *ubuntu*, is one of harmony, for only in and through society can a person find the fulfilment of their aspirations. Far from being a relationship of subordination –

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<sup>83</sup> OAU Doc. CAB/LEG/67/5, p. 6, quoted in Umozurike *op. cit.* at 90-91

an impression fostered by its abusers – it is one of “complementarity, participation and dialogue”<sup>84</sup>.

This **communitarian** approach differs from the orthodox Western perspective, with its emphasis on the individual **as against** society. Importantly, it also contrasts with the collectivist orientation that **subordinates** individual rights to those of the state and the fundamental development of communism. This latter orientation permits the state to determine, delineate and protect individual rights. The state is, by implication, consequently entitled to curtail them according to the dictates of its own ‘higher’ interests. The drawback here is that ‘the state’ is a fiction created and operated by and, all too often, for the benefit of, a select group of fallible individual bureaucrats and members of the executive.

Various attempts have been made in recent years to employ the concept or philosophy of *ubuntu* as shorthand for the communitarian African approach to the protection of human rights. The concept of *ubuntu* was referred to in Constitutional Principle XIII in South Africa’s interim Constitution, Act No. 200 of 1993. It has been defined by Mr Justice Pius Langa, Deputy-President of South Africa’s Constitutional Court, as signifying that “the life of another person is at least as valuable as one’s own”<sup>85</sup>. He asserts that the concept entails the reciprocity of individual rights and duties owed to the community. This carries with it the consequence that individual rights in the African Charter can be explained and justified only by reference to the rights of the community<sup>86</sup>. His fellow judges on the Court variously settled on definitions emphasising various aspects of the philosophy, such as humaneness, social justice and fairness, as well as entailing constructive or corrective or restorative punishments in law as opposed to vengeance. This latter approach was founded on the understanding

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<sup>84</sup> W Benedek ‘Peoples’ Rights and Individuals’ Duties as Special features of the African Charter on Human and Peoples’ Rights’ in Kunig, Benedek and Mahalu (eds.) *Regional Protection of Human Rights by International Law: The Emerging African System* 1985, 59-94 at 63, quoted in Umozurike *ibid.* at 90

<sup>85</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 752C-D para [225]

<sup>86</sup> Rosalind English ‘Ubuntu: the Quest for an Indigenous Jurisprudence’ 1996 (12) *SA Journal on*

that the offence had been committed against the community, rather than against the individual victim.

Archbishop Desmond Tutu, on the eve of his Chairmanship of the first hearings of the Truth and Reconciliation Commission, outlined his understanding of the concept as follows:

‘Our people must show the world that God has given us a great gift, *ubuntu* .... However, the world should also know that forgiveness and reconciliation are not cheap .... *Ubuntu* says I am human only because you are human. If I undermine your humanity, I dehumanise myself. You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That’s why African jurisprudence is **restorative rather than retributive**’<sup>87</sup> (emphasis added).

Rosalind English<sup>88</sup>, trying to explore the meaning of the concept, expresses frustration at the fact that it is both “underexplained and overexplained”, requiring one to choose between conflicting explanations. English quotes Acting Judge Sydney Kentridge as defining *ubuntu* (extra-judicially) as a “feeling of common humanity”, but cautions that this does not assist us in solving the conflict between the state’s notion of the public interest and the freedoms and liberties of the individual<sup>89</sup>.

She asks whether the concept is capable of playing the role of a useful jurisprudential tool, or whether it is, simply, all things to all people. She criticises appeals by judges of the South African Constitutional Court to look for the substantive values informing the content of the concept in ‘the will of the people’ who, she notes, are notoriously capable of prejudice, caprice, selfishness and “short-termism”. She cites Langa J’s own

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*Human Rights* 641-648 at 643

<sup>87</sup> ‘Profile’ in *Mail and Guardian* March 1996, quoted in English *ibid.* at 645

<sup>88</sup> English, *ibid*

<sup>89</sup> Alec Russell, similarly, notes that, unfortunately, in *ubuntu*’s strength lies its weakness: ‘It is a beguiling ideal but its culture of tolerance is easily abused. Too often in Africa it has become an



concern<sup>90</sup> that “the relationship between ‘contemporary standards of decency’ and public opinion is uncertain”.

John Hart Ely has pointed out<sup>91</sup> that there is no way of avoiding this contradictory position once one appeals to community morality in a judicial context. The argument that there is some sort of people’s morality out there to support the decision of a court on an issue of rights is “pernicious nonsense”. This is because it allows judges to strike down majority legislation in the interests of protecting minorities, whilst justifying their powers to do so with appeals to majority opinion:

‘Now think again about consensus as a possible source, and the message will come clear; it makes no sense to employ the value judgments of the majority for protecting minorities from the value judgments of the majority.’

The concept of respect for others – the notion that there are certain things that we should not do to one another, and that there are particular duties we owe to each other – is common to all civilisations. This is despite the fact that these core values have been defined differently by different cultures throughout history.

It is the practical, compassionate expression of this ethic of mutual respect that has been lacking in far too many African experiences of government. And its absence has been replicated to devastating effect in the self-serving club that is constituted by the Assembly of Heads of State and Government of the OAU. Shyley Kondowe has decried<sup>92</sup> the misuse of sovereignty by African leaders and a collusively-woven blanket of silence has been drawn by the Assembly over the abuses perpetrated by its members upon the hapless populations of African countries. And it is this long-standing practice, based on the supposedly overriding principles of sovereignty and non-interference that

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excuse for subservience or tyranny or both.’ See *Big men, little people: encounters in Africa* Macmillan: London 1999 at 256

<sup>90</sup> *S v Williams* 1995 (3) SA 632 (CC) at 643G-H para [36], quoted in English *ibid.* at 648

<sup>91</sup> in ‘Consensus’ *Democracy and Distrust* (1980) 69, quoted in English, *ibid.*

<sup>92</sup> Shyley Kondowe ‘Sovereignty, intervention and democratisation in small African states’ in Mathoma *et al., op. cit.* 85-93 at 85

has attracted the perception of an institutionalised immorality within the halls of power on the African continent.

Consequently, then-President Nelson Mandela, addressing the OAU Summit meeting of Heads of State and Government in Ouagadougou, Burkina Faso, on June 8 1998, forcefully propounded the view that<sup>93</sup>:

‘None of us is a superstar and none can succeed without the success of the other. ... That common destiny requires that we should treat the question of peace and stability on or Continent as a common challenge. Accordingly, I believe that we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the Continent the right and duty to intervene when, behind those sovereign boundaries, people are being slaughtered to protect tyranny. In all instances, this takes place with no regard whatsoever to the fact that the legitimacy of our governments derives from our commitment to serve the interests of the people on the basis of mandates given by the people themselves.

‘In this context, we must frankly assess whether our ‘Central Organ for the Prevention, Management and Resolution of Conflicts’ is succeeding to meet the hopes of our Organisation and peoples.’

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<sup>93</sup> [www.anc.org.za/ancdocs/history/mandela](http://www.anc.org.za/ancdocs/history/mandela) (Date accessed 11 October 2000)

## ***CHAPTER THREE: THE LEGAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN AFRICA***

### **3.1 The United Nations system**

Human rights have been on the agenda since the beginning of the state system<sup>94</sup>. They have, however, achieved their historical apotheosis in the United Nations system. United Nations' concern with the promotion and protection of human rights and fundamental freedoms stems directly from the acceptance by the international community that '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'. It arises also from the consequent pledge by States Members of the United Nations 'to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms'<sup>95</sup>.

Thus, Article 1 of the Charter of the United Nations includes the achievement of international co-operation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' as one of the purposes of the United Nations. This inclusion represents a clear expression of the profound commitment of its founders to human rights. Moreover, the experience of the two world wars convinced them that effective international protection of human rights is one of the essential conditions of international peace and progress<sup>96</sup>.

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<sup>94</sup> Ryan 'Sovereignty, intervention and the law: a tenuous relationship of competing principles' *Millennium: Journal of International Studies* 1997 Vol. 26 No. 1, 77-100 *op.cit.* at 88; and Stephen D Krasner, 'Sovereignty, regimes and human rights' in Volker Rittberger (ed.) *Regime Theory and International Relations* Clarendon Press: Oxford 1993 at 139ff.

<sup>95</sup> Human Rights Fact Sheet No. 1 *Human Rights Machinery* United Nations Centre for Human Rights: Geneva, 1992, at 3. See also the 'Appendix: Charter of the United Nations' to H G Nicholas *The United Nations as a political institution* (5 ed.) Oxford University Press: London 1977

<sup>96</sup> Fact Sheet No. 1 *ibid.*

The Charter of the United Nations is replete with references, albeit somewhat generalised, to human rights and fundamental freedoms. In the Preamble, the peoples of the United Nations express their determination “to reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’. They continue to vow to ‘establish conditions under which justice and respect for the obligations arising from ... international law can be maintained, and to promote social progress and better standards of life ...”.

Further, the words ‘promoting and encouraging respect for human rights and fundamental freedoms’ are repeated, with slight variations, in Article 1, on the purposes and principles of the United Nations. They appear also in Article 13, on the functions and powers of the General Assembly; in Article 62, on the functions of the Economic and Social Council; and in Article 76, on the basic objectives of the International Trusteeship System.

In Article 56, all Members of the United Nations pledge to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set out in Article 55. These ends include the promotion of ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’. Article 55, furthermore, explicitly recognises that the creation of conditions of stability and well-being are necessary for peaceful and friendly relations among nations founded on, among other factors, respect for the principle of equal rights. Article 68 empowers the Economic and Social Council to set up commissions ‘in economic and social fields and for the promotion of human rights’.

In terms of Article 13, one of the functions of the United Nations General Assembly is to initiate studies and make recommendations for the purpose of (a) ‘promoting international co-operation in the political field and encouraging the progressive development of international law and its codification’; and (b) ‘promoting international

co-operation in the economic, social, cultural educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all ...'.

For the most part, human rights items on the agenda of the General Assembly originate in sections of the report of the Economic and Social Council which relate to human rights, or in decisions taken by the Assembly at earlier sessions to consider particular matters. Issues with a bearing on human rights have also been proposed for inclusion in the Assembly's agenda by the other principal organs of the United Nations System, by Member States, and by the Secretary General. Since its adoption of the Universal Declaration of Human Rights in 1948, the Assembly has adopted numerous declarations and conventions focusing on human rights.

Under Article 62 of the Charter, the Economic and Social Council ('ECOSOC') may 'make recommendations for the purpose of promoting respect for and observance of, human rights and fundamental freedoms for all'. It may also prepare draft conventions for consideration by the General Assembly and convene international conferences on human rights issues. Article 68 provides that the Council shall, where necessary for the performance of its functions, establish one or more commissions for the promotion of human rights.

These 'specialised agencies' report regularly to the Council. The Council may, in terms of Article 64, make arrangements with these agencies and with Member States to be furnished with reports on steps taken to implement its own recommendations and those by the General Assembly that relate to the Council's mandate. The latter may then make its observations known to the General Assembly.

To assist it with issues relating to human rights, the Council has established the Commission on Human Rights which has, in turn, established the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Commission on Human

Rights was established in 1946 and is the principal body dealing with human rights issues, as it may engage on any matter relating to human rights.

The Commission undertakes studies, prepares recommendations and drafts international instruments relating to human rights. It also executes particular tasks assigned to it by the General Assembly or ECOSOC, including the investigation of allegations concerning the violation of human rights and the handling of communications relating to such violations. The Commission has also established organs to investigate human rights problems in specific countries and territories, as well as on thematic or systemic situations.

As of 1992, no country- or region-specific agency had been set up to deal with an African problem, apart from those dealing with apartheid and its spillover<sup>97</sup>. In more recent years, however, under the current Secretary General, Mr Kofi Annan, a number of special rapporteurs have been appointed in connection with African problems.

A major weakness of the Commission is the fact that its membership consists of the states whose human rights actions are intended to be the subject of scrutiny and criticism by the other States Parties to the Convention. The crucial legal principle of procedural fairness, *audi alteram partem*, may be served by such inclusion, but the accompanying weakness is that decisions are taken by a vote of the elected members, rather than necessarily upon the basis of principle. It has, in consequence, closely examined the activities of only pariah states such as South Africa under apartheid, Israel, and Chile under Pinochet<sup>98</sup>. Individual states report on their own practices and the reports are, consequently, frequently either propagandistic or irrelevant, simply listing constitutional provisions. The more powerful states in international society have

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<sup>97</sup> *ibid.* at 7-8

<sup>98</sup> Krasner *op. cit.* at 164. Robertson *op. cit.* at 45-47 notes that the Commission has signally failed to consider even Pol Pot's Cambodian genocide; the Central African Republic's Emperor Jean Bédel Bokassa's "primitive savagery"; Idi Amin's mass murders in Uganda; the "grotesquely unfair treason" trials in 1995 of dissidents like Ken Saro-Wiwa by the Nigerian dictator, Sani Abacha; or China's 1990 Tiananmen Square shootings.

not been subjected to much pressure because other states fear the potential retaliatory threats to their own sovereignty. As will appear below, the persistence of these weaknesses may hardly be said to have set an appropriately rigorous standard for the African Commission.

Furthermore, despite the fact that six treaties provide that disagreements concerning human rights issues can be referred to the International Court of Justice, the Court has not been very active – because states are required to consent before a matter may go to the Hague<sup>99</sup>. Even those states that have lodged blanket consents have been hesitant to sue other states – for fear of the tables being turned in the future. Independent oversight is, therefore, still limited.

Africa constitutes one of the five UN regions. The 53 African countries that are members of the UN by and large form an integral part of the United Nations human rights system, as assessed by, for example, the number of African states that have ratified the principal UN human rights treaties. These treaties are the Convention on the Elimination of All Forms of Racial Discrimination ('CERD')<sup>100</sup>, the International Covenant on Economic, Social and Cultural Rights ('ICESCR')<sup>101</sup>, the International Covenant on Civil and Political Rights ('ICCPR')<sup>102</sup>, the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')<sup>103</sup>, the Convention Against Torture ('CAT')<sup>104</sup> and the Convention on the Rights of the Child ('CRC')<sup>105</sup>. 'Norm acceptance' at this level is relatively high<sup>106</sup>.

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<sup>99</sup> *ibid.* at 164

<sup>100</sup> 660 UNTS 195, adopted on 21 December 1965, entered into force on 4 January 1969

<sup>101</sup> 993 UNTS 3, adopted on 16 December 1966, entered into force on 3 January 1976

<sup>102</sup> 999 UNTS 171, adopted on 16 December 1966, entered into force on 23 March 1976

<sup>103</sup> UN GA Res 34/180, UN doc A/34/46, adopted on 18 December 1979, entered into force on 3 September 1981

<sup>104</sup> UN GA Res 39/46, UN doc A/39/51, adopted on 10 December 1984, entered into force on 26 June 1987

<sup>105</sup> UN GA Res 44/52, adopted on 20 November 1989, entered into force on 2 September 1990

<sup>106</sup> Heyns and Viljoen *op cit.* at 425

'Norm enforcement' in respect of these treaties takes place primarily by means of reporting to the treaty monitoring bodies (in the case of all six treaties) and individual complaints (in the case of three of the six). Heyns and Viljoen, unsurprisingly, report a relatively high number of African states as having failed to comply with their voluntarily-assumed reporting obligations. Moreover, where states parties have subjected themselves to the individual complaints procedure, "a tradition of using these mechanisms has not yet been developed".

The challenge is for states to comply with existing obligations and to subject themselves to the full range of preventive mechanisms contained in the conventions. NGOs should also enhance their monitoring operations and, where necessary, challenge state reports and do more to encourage individuals to lodge complaints, where applicable.

### **3.2 Regional arrangements**

As discussed earlier, nothing in Chapter VIII of the UN Charter 'precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that [they] and their activities are consistent with the Purposes and Principles of the United Nations'.

While the Charter goes so far as to encourage such regional efforts at the pacific settlement of disputes, regional organisations may not, with certain exceptions, take independent enforcement action.

### **3.3 The Organisation of African Unity**

One such regional dispute resolution agency is the Organisation of African Unity. The Preamble to the Charter of the OAU, among other things, expresses the conviction that it is 'the inalienable right of all people to control their own destiny'. It also evidences a consciousness that 'freedom, equality, justice and dignity are essential objectives for



the achievement of the legitimate aspirations of the African peoples' and recognises that 'conditions for peace and security must be established and maintained'. Moreover, it reaffirms adherence to 'the Principles of ... the Charter of the United Nations and the Universal Declaration of Human Rights' on the grounds that they 'provide a solid foundation for peaceful and positive co-operation among States'.

Article II of the OAU Charter provides that the Organisation shall include the following objectives:

- '(a) to promote the unity and solidarity of the African States;
- (b) to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;
- (c) to defend their sovereignty, their territorial integrity and independence; and
- ...
- (e) to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.

Article III solemnly affirms and declares Member States' adherence to the following principles, including the sovereign equality of all Member States; non-interference in the internal affairs of States; respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.

The relative importance of these and other principles in Article III clearly demonstrates the continuity of overriding concerns prevalent at the time of agreement on the OAU Charter. So, too, the particular structure of the substitute for the Specialised Commission on political and human rights issues envisaged in Article XX, viz. the African Commission on Human and Peoples' Rights established under the African Charter of Human and Peoples' Rights. Those concerns related to the perceived fragility of the independent viability of many Member States. Nevertheless, the importance of human rights, within the context of the relative unimportance of ethnic

and national rights<sup>107</sup>, are clearly recognised as providing a ‘solid foundation’ for the ‘peaceful and positive co-operation’ that are recorded as a primary purpose of the Organisation. This recognition has since been codified in the African Charter on Human and Peoples’ Rights.

Despite the paucity of references to human rights in the OAU Charter, the distinctively anti-colonialist and anti-apartheid practice of the Organisation, as well as its efforts in other areas such as refugee affairs, has exhibited its clear, if occasional, official recognition of the value of human rights. These seeds of sensitivity, together with the considerable influence of external forces, paved the way for a ‘great leap forward’ in the enshrinement of less equivocal human rights standards<sup>108</sup>.

### **3.4 The African Charter on Human and Peoples’ Rights**

The OAU adopted the African Charter on Human and Peoples’ Rights at the Nairobi Summit of Heads of State in 1981. The African Charter, also known as the Banjul Charter, after the city in which it was first considered, came into force on 21 October 1986, having secured ratification by an absolute majority of member States.

The African Charter is the central instrument in the African system of human rights protection. The two others are the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), which entered into force in 1974, and the African Charter on the Rights and Welfare of the Child (1990), which was not yet in force as of late 1999. The African Charter was drafted largely as a response by African jurists to human rights violations during the 1970s<sup>109</sup>.

The African Charter, as its name suggests, includes both human and peoples’ rights, as well as both rights and duties, an approach which, although new to international instruments, accords with the African conception of rights as inseparable from

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<sup>107</sup> Preamble to the OAU Charter

<sup>108</sup> Umozurike *op.cit.* at 25-28

duties<sup>110</sup>. These rights and duties apply to individuals and groups alike. The emphasis on a community and collectivist approach is reflected in the focus on the family, society, the nation, and the State.

Two bodies are responsible for the promotion and protection of human and peoples' rights: the African Commission on Human and Peoples' Rights and the Assembly of Heads of State and Government of the OAU. However, an additional protocol, the Protocol on the Establishment of the African Court on Human and Peoples' Rights (1998), has been adopted. When the Protocol enters into force it will supplement the non-binding mandate of the Commission with the binding powers of an African Human Rights Court. As of late 1999, thirty-three countries have signed the Protocol, but only two have ratified it<sup>111</sup>. Fifteen ratifications are required before the Court may be established. Perhaps significantly, Senegal is one of the two countries to have ratified the Protocol (the other is Burkina Faso). It was Senegal that in March 2000 arrested the erstwhile President of Hissene Habré of Sudan on charges of domestic human rights abuses<sup>112</sup>.

The African Commission comprises 11 members elected by the Assembly, with the Chairman and Vice-Chairman being elected by the members from among their number. The Secretary is, however, appointed by the Secretary General of the OAU, thereby further increasing the potential for political management and control of the Commission's activities, despite their nominal integrity and independence. The fact that the Secretary General of the OAU is also entitled to draw up the Commission's agenda further inhibits the potential for principled action by the Commission, despite the obligation that the Chairman of the Commission be consulted<sup>113</sup>.

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<sup>109</sup> Heyns and Viljoen *op. cit.* at 428

<sup>110</sup> Isaac Nguema, first Chairman of the African Commission on Human and Peoples' Rights in Human Rights Series *The African Charter of Human and Peoples' Rights* United Nations Centre for Human Rights: Geneva 1990 at 1

<sup>111</sup> Heyns and Viljoen *op. cit.* at 428

<sup>112</sup> Cape Times March 2000 Independent Newspapers Cape Town

The principal responsibilities of the Commission are to ensure the promotion and protection of human and peoples' rights. The task of promotion involves functions relating to studies, research, information, sensitisation, consciousness-raising education, dissemination, training and general guidance by way of advice and recommendation. It also includes quasi-legislative functions in terms of which the Commission is required to prepare, and propose to States, draft laws and regulations on human rights and to define the principles applicable in the field. Promotion also includes co-operation with non-governmental organisations having similar or complementary objectives.

The Commission's protection mandate consists of examining complaints of human rights violations by States parties. Complaints may be referred to the Commission by either other States parties or by private persons, whether natural or juristic. The investigation of complaints results in a report, detailing the facts and findings of the enquiry, together with an opinion, transmitted to the Assembly for decision. The Assembly alone has the power of decision – "a matter for regret", according to Isaac Nguema, first Chairman of the Commission<sup>114</sup>.

Although Article 60 provides explicitly that the Commission 'shall draw inspiration from' the usual international sources of international on human rights, the work of the Commission is limited by a number of procedural limitations in addition to those discussed above. Firstly, the Commission may investigate a complaint only upon receipt of a complaint: it has no *mero motu* powers. This is a particularly important defect within the context of the provisions of Articles 52, 53 and 58. The former sections confine the Commission to (a) reporting obligations and powers of recommendation to (b) the Assembly of Heads of State and Government – precisely the *locus* of potential political stalemate.

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<sup>113</sup> Rule 6 of the Rules of Procedure of the African Commission on Human and Peoples' Rights

<sup>114</sup> *ibid.* at 3

Secondly, the provisions of Article 58 seriously constrain the ability of the Commission to effectively intervene in situations of ‘emergency’, or ‘a series of serious or massive violations of human and peoples’ rights’. The obligation on the Commission to first report to the Assembly and then await further instructions from the Chairman of the Assembly bears with it the seeds of an institutional inability to prevent such swift holocausts as a Rwanda or even the slow collapse of a Zaire.

Thirdly, the effective veto on publicity in the hands of the Assembly contained in Article 59 and Rule 32, and in the hands of the Secretary General in Rule 33, further limits the tactical and strategic efficacy of the Commission’s interventions by making them subservient to political considerations.

The extraordinary wording of Rule 81 ‘Contents of Reports’ further compounds the Commission’s powerlessness. The rule concerns the obligation by States parties to submit, every two years, a report on the ‘legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed’ by the African Charter. Rule 81 provides as follows:

‘1. States parties to the Charter shall submit reports on measures they **would have** taken to give effect to the rights recognised by the Charter ... . The reports should indicate, **where possible**, the factors and **difficulties impeding** the implementation of the provisions of the Charter.

...

3. The Commission may, **through the Secretary General**, inform States parties to the Charter of its **wishes** regarding the form and the **contents** of the reports... ’ (emphasis added).

It seems difficult to avoid the inference that the wording of the Charter and its regulations has been adopted with the clear intention that member States will be expected to fail to meet their human rights obligations. The implicit message,

moreover, seems to be that no negative consequences will ensue for the defaulting State.

In addition, the Secretary General is, in sub-rule 3, once again granted a discretion to interfere in the Commission's requests for information that it may deem necessary for the proper performance of its functions. This discretion is repeated in the following Rule, where the Secretary General 'may, after consultation with the Commission, communicate to the specialised institutions concerned', copies of those parts of the country reports that relate to their competencies. This provision, together with the repeated requirement that the proceedings of the Commission must be held in secret closed session, add to the restrictions on the free flow of information and the opportunities for untoward interference in situations requiring the Commission's and the Assembly's attention.

Nevertheless, despite these apparent limitations, its 1989-1991 Chairman, Oji Umzurike, considers the intentionally confidential design of the dispute resolution mechanisms to be its strength<sup>115</sup>. He admits that the Commission's power to criticise human rights violations is hamstrung by the requirement of confidentiality and delayed by the procedure of having to report first to the Assembly<sup>116</sup>, but locates responsibility for the success or failure of the Commission on the calibre of the Commissioners themselves. The difficulty here seems to be that several Commissioners have close relationships with their national executive<sup>117</sup>, thereby creating perceptions of a possible lack of appropriate independence.

In view of these constraints, it is perhaps unsurprising that the Commission has been described as having been "slow in implementing its protective mandate"<sup>118</sup>. By the end

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<sup>115</sup> U Oji Umzurike *The African Charter on Human and Peoples' Rights* op. cit. at 83

<sup>116</sup> *ibid.* at 83

<sup>117</sup> Heyns and Viljoen *op cit.* at 432

<sup>118</sup> Heyns and Viljoen *ibid.* at 429; and U Oji Umzurike 'Five Years of the African Commission on Human and Peoples' Rights' (1993) 4 *Calabar Law Journal* 1, cited in Heyns and Viljoen *op cit.* at 431

of 1996, the Commission had finalised only 72 cases, of which 50 were declared inadmissible, 5 were withdrawn and 5 settled amicably. Of the 12 cases actually to have received substantive attention, violations were found in all instances. It is unclear whether the recommendations flowing from these findings have been complied with.

In *Constitutional Rights Project v Nigeria, No. 139/94* (in respect of Ken Saro-Wiwa and seventeen others) and in *Constitutional Rights Project v Nigeria, No. 140/94* (in respect of M K O Abiola, A Enahoro and others), the Commission was requested to ensure that the state safeguard the activists' health in detention pending the final disposition of their cases. The limited nature of the Commission's recommendations<sup>119</sup>, with respect, exemplifies the weakness arising from the Commission's confidential manner of operation. Indeed, Umozurike later seems to recant his initial endorsement of the cosy confidentiality of the Commission's operations. He signals agreement with the Commission's first Chairman, Isaac Nguema, when he concedes<sup>120</sup> that it is "doubtful whether traditional reconciliatory methods can be a substitute for modern judicial settlement". Thus, he endorses proposals for the institution of an African Court of Justice along the lines of the European Court. These proposals have, since, to some extent, been included in the Protocol on the Establishment of the African Court on Human and Peoples' Rights.

Nguema makes the significant point, however, that respect for human rights has been internationalised and their protection is not restricted to present, limited African remedies: any shortcomings in the enforcement procedures of the African Charter can be taken up "elsewhere". Where possible (i.e. where the offending state is a signatory), therefore, a matter may, in the interim, be referred to a body such as the Human Rights Committee established by Article 28 of the International Covenant on Civil and Political Rights.

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<sup>119</sup> *ibid.* at 82

Although empowered to conduct itself as an ordinary court of law once it is finally able to entertain a matter, the envisaged African Court will, however, have limitations of its own<sup>121</sup>. Although the Court will be able to deliver advisory opinions and decide contentious cases, it may consider and decide upon a contentious matter only after it has been filtered through the African Commission, or by the member states, individually or collectively. Furthermore, individuals or NGOs may not approach the Court directly, except for an advisory opinion, without the consent of the state concerned. Enforcement of the Court's orders is also supervised (or 'managed', one is tempted to suggest) by the Council of [Foreign] Ministers, as opposed to the Assembly in regard to the Commission's recommendations. The caution with which one approaches this supervisory role by the Council of Ministers arises from the provisions of Article XIII of the OAU Charter which establish this body. Article XIII (1) states explicitly that the Council of Ministers 'shall be responsible to the Assembly'.

It seems clear, therefore, that the interests of the rulers will continue to be prioritised over those of the ruled. Within this particular context, 'rights of power', such as sovereignty, will continue to trump 'democratic rights', such as liberty.

### **3.5 Morality, ethics and human rights under the African Charter on Human and Peoples' Rights**

Despite these shortcomings, however, the African Charter contains numerous indications of underlying values, such as the express inclusion of certain human duties towards family, community and state, that conform to widely accepted norms of acceptable conduct. Virtually all societies will be able to identify with this expression of a commonality of values. It bears with it further substantiation, if such were needed, of the confident assertion that there is no reason why African heads of state should be permitted to continue to claim a peculiarly African morality that entitles them to act in disregard of, particularly, their citizens' individual rights.

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<sup>120</sup> *ibid.* at 92. See also E Ankumah *The African Commission on Human and Peoples' Rights* Martinus Nijhoff: The Hague 1996, reviewed by Rachel Murray in 1997 (13) *SAJHR*, 695-699



Thus, the African Charter incorporates and repeats virtually all the rights recognised by the principal international human rights instruments such as the Universal Declaration of Human Rights and the Conventions on Civil and Political Rights, and on Economic, Social and Cultural Rights. In addition, the African Charter espouses what is arguably a more balanced approach to the issue that, if adequately understood and appropriately applied, holds the promise of correcting what some see as a Western drift from liberty to licence.

For example, Article 17 of the African Charter obliges States parties to promote and protect 'morals and traditional values recognised by the community'. While such values inevitably vary to some extent between communities, they will be interpreted by the Commission 'in conformity with the modern trend in the State as a whole'<sup>122</sup>. Although uncommon in international instruments, these values reflect historically widespread, if not necessarily contemporary, African social mores.

The African Charter may be said to recognise that pre-colonial Africa was no Nirvana and enunciates a need to move away from the less acceptable aspects of traditional African society. Accordingly, the individual is obliged, in Article 29(7) 'to preserve and strengthen **positive** African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the moral well-being of society' (emphasis added). Further, Article 27(2) requires that the 'rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

The inclusion of these references and appeals to moral values exemplifies the important and undeniable link between international law and international morality. Thus, for example, the Treaty of Paris 1914 referred to 'the sin of the slave trade'. The Final Act of the Congress of Vienna 1815 had viewed the slave trade as 'repugnant to the

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<sup>121</sup> See Heyns and Viljoen *op cit.* at 431

<sup>122</sup> *ibid.* at 97

principles of humanity and universal morality'. In *The Antelope*, the United States Chief Justice Marshall held that although the slave trade did not violate international law (at the time), it was contrary to natural law<sup>123</sup>. Britain, nevertheless, subsequently concluded many bilateral treaties banning the slave trade, which led to the first multilateral treaty recognising its illegality: the Berlin Treaty of 1885. As a result, then, of a (proclaimed) **moral** aversion, the slave trade was progressively outlawed.

Umozurike reiterates<sup>124</sup> the view that the “existence of any group of people, including national and international communities, requires a substructure of law and morality; the one supports the other. The ‘law habit’ [or, ‘the rule of law’] encourages respect for moral rules that are not legally binding, while morality strengthens the attitude of respect for the law.” One might add that morality supplements and leads changes in the law by drawing attention to its deficiencies. Hence, as Oppenheim has pertinently observed, “[t]he higher the standard of public morality rises, the more will International Law progress”<sup>125</sup>.

There is a “congenital” relationship between morality and legality, asserts Umozurike<sup>126</sup>. Personal morality plays a significant role in public morality. It is almost tautologous to assert that a leadership that observes and respects a personal moral code is less likely to challenge municipal or international law. For example, the determinants of President Jimmy Carter’s foreign policy prioritisation of human rights are said to have been “his religious beliefs, his fundamentalist origins, the moralist streak of his nature, and the success of the civil rights movement in the [American] South”<sup>127</sup>.

Umozurike summarises the essence of this perspective when he observes that the simple universal moral precept of the Golden Rule, i.e. doing unto others as we would

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<sup>123</sup> 23 US (10 Wheaton) 1825, 66, quoted in Umozurike *The African Charter op. cit.* at 98

<sup>124</sup> Umozurike *ibid.* at 99

<sup>125</sup> Sir Hersch Lauterpacht (ed.) *International Law: A Treatise by L. Oppenheim* (7 ed.) 1948, at 84, quoted in Umozurike *ibid.* at 99

<sup>126</sup> Umozurike *ibid.* at 101

<sup>127</sup> Kenneth W Thompson *Morality and Foreign Policy* (1980) 72, quoted by Umozurike *ibid.* at 101

have them do unto us, “resolves seeming principled arguments into a straightforward choice between right and wrong”. Thus, for example, the prospective victim of a denial of a right is quite unlikely to argue that his national state has an absolute right to deal with him as it pleases, to the exclusion of intervention of any kind. One should adopt, along with Umozurike, a perspective that focuses on the weak and vulnerable in any situation, the attitude that prioritises the ‘right’ to an inviolable sovereignty is revealed for what it is: a morally bankrupt ‘threadbare’ new robe for the emperor.

## ***CHAPTER FOUR: INTERNATIONAL LAW, HUMAN RIGHTS AND ARMED HUMANITARIAN INTERVENTION***

### **4.1 Armed humanitarian intervention in international law and practice: history and theory**

It was mentioned earlier that the policy instrument of armed humanitarian intervention re-emerged strongly onto the international agenda following the end of the bipolar stalemate of the Cold War. Variants of the tool have been used with some degree of success, and after some reluctance, by the Western powers in the Balkans during the disintegration of Yugoslavia and, more recently, in Afghanistan. On the other hand, the failure to deploy it in Rwanda and elsewhere in Africa has been roundly condemned. A more modest armed humanitarian intervention by the British in Sierra Leone has produced a less dramatic and slower, but nevertheless effective cessation of the brutal Liberian-supported civil conflict. Richard N. Haass has predicted<sup>128</sup> that both opportunities and calls for armed humanitarian intervention are likely to increase in the future.

Historically, the treatment of citizens by their own state was traditionally a matter of domestic jurisdiction and the observance of human rights was merely a moral or political obligation. The historical exceptions have been the treatment of foreigners and gross human rights abuses, specifically in regard to religious and ethnic minorities. Consequently, Stephen D. Krasner has observed<sup>129</sup> that the content of the human rights agenda during various historical periods reflected the concerns of those states that possessed superior economic and military power. Systems of human rights protection have, historically, depended heavily, if not exclusively, on the power and interests of

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<sup>128</sup> Richard N Haass 'Intervention: the use of American military force in the post -Cold War world' Brookings Institution: Washington DC 1999 at 132. See also Shyley Kondowe *op. cit.* at 90 ff; and Geoffrey Robertson QC *Crimes against humanity* 403-424

<sup>129</sup> Krasner 'Sovereignty, Regimes and Human Rights' in Volker Rittberger (ed.) *Regime Theory and International Relations* Clarendon Press: Oxford 1993, 139-167 at 166

these states. This is because the essential functions of monitoring and enforcement have depended on the policies adopted by the 'great powers'. In these circumstances, the principle of self-help superseded the principle of non-intervention.

However, the gross abuses associated with the conduct of the warring countries during the Second World War caused such revulsion that the UN Charter sought to reverse this ordering of principles and, at least partly because of Hitler's abuse of the principle<sup>130</sup>, partially reasserted the principle of non-intervention<sup>131</sup>. The Universal Declaration of Human Rights that followed it mitigated this reordering by providing for a 'common standard of achievement for all peoples of all nations'<sup>132</sup>, rather than a legal obligation, to respect and promote human rights at an international level. However, the two 1966 International Covenants on human rights spelled out these same rights in legally binding documents that evidenced a resumption of the efforts of earlier centuries to mediate the relationship between the ruler and the ruled.

Since 1945 there has been an explicit effort to construct an international human rights system – albeit not the first such endeavour. Thus, the Peace of Westphalia had contained detailed provisions concerning religion in parts of Germany. Similarly, a series of treaties, concluded in the first half of the nineteenth at the behest of Great Britain, had created an international system to abolish the slave trade. Detailed agreements were also concluded in the late nineteenth and early twentieth centuries to protect minorities in East and Central Europe. These early efforts, from the time of Hugo Grotius in the 1400s until immediately prior to World War I, did not absolutely prohibit war but sought to impose moral constraints on it<sup>133</sup>. Modern international society has, however, sought to replace these moral constraints with overtly legal proscriptions.

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<sup>130</sup> See Robertson *op. cit.* 31

<sup>131</sup> Article 2(7), which must, however, be read with and qualified by Chapter VII, particularly Articles 39 and 51, and Article 55 in Chapter VIII

<sup>132</sup> Eleanor Roosevelt, Chairperson of the United Nations Human Rights Committee, quoted in Umozurike *ibid.* at 99

These persistent attempts to create human rights systems that enshrined principles and norms governing the relationship between leader and citizen, and the controversy they have generated, are indicative of the inherent contradiction in the notion of state sovereignty, asserts Krasner<sup>134</sup>. Thus, a political order based upon sovereign states implies both the right of self-help and the norm of non-interference. But if states actually have the right to pursue whatever policies they choose, there is nothing to prevent them from interfering in the internal affairs of other states.

Such intervention has frequently been implemented directly, largely in the forms of military and humanitarian intervention, and by way of cultural and economic 'imperialism'. But it has also been manifest in various human rights systems that have reflected the values of the most powerful states in the system at a particular historical juncture. The contemporary system of universal declarations and conventions largely espouses the values of the western liberal democracies, he concludes.

However, he continues, the articulation of principles and norms is one thing; their enforcement is quite another. He cites the example of the success of the anti-slavery movement which, he finds, was largely a consequence of Britain's willingness to unilaterally employ its naval power to police shipments on slave routes<sup>135</sup>, despite the acknowledged existence of a widespread revulsion for the trade in the western world. Thus, the religious tolerance and the later religious freedom that spread in the West was not the result of an international regime, but of individual national states' reassessment of their own priorities. Similarly, attempts to protect the minorities of Eastern and Central Europe were a complete failure because the more powerful states were unwilling to enforce the norms they had imposed. Even the coherence of the contemporary human rights regime is attacked on the basis of the intermittent readiness to commit meaningful resources to monitoring and enforcement.

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<sup>133</sup> Lassa Oppenheim *International Law* (7 ed.) Longman: London 1953, at 177-78, cited in Ryan *op. cit.* at 81

<sup>134</sup> Krasner *ibid.* at 165

<sup>135</sup> Robertson *op. cit.* 14

These experiences, he concludes, tend to suggest the continuing relevance of the realist paradigm, rather than the liberal co-operative model of international society and the prospects of success for international human rights regimes. Krasner does concede, nevertheless, that realism is unable to provide a full account of the creation and implementation of human rights regimes. He quotes John Ruggie<sup>136</sup> as saying that “social purpose”, which cannot be explained by a bare description of the distribution of power in the international system has, in fact, determined the content of various regimes. The reality of internal domestic divisions, and the presence and growth of an active civil society have led to the creation of transnational alliances that contribute substantially to the efficacy of human rights regimes in the modern era that increasingly bypasses the power of the state.

Christopher M. Ryan<sup>137</sup> elaborates on changes in strategic realities since the end of the Cold War that demand a different response to the state power-focus of the realist approach. During the Cold War, international society sought to resolve conflict by emphasising and prioritising the “maintenance of state power and the inviolability of territorial sovereignty”. Political ideology and military might were arguably used to maintain the *status quo* in an international system that often winked at state use of force against other states and against internal populations<sup>138</sup>.

Crucially, he notes the greater convergence of international political and legal ideologies, at least in principle, as well as some change in the priorities of international society. Accordingly, the primary concern of international society continues to be the prevention and resolution of interstate conflict. However, the increasing attention given to intrastate conflicts and their origins – previously considered to lie within the bounds of the domestic jurisdiction of states – has prioritised humanitarian and human rights

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<sup>136</sup> Krasner, *ibid.* at 167

<sup>137</sup> ‘Sovereignty, Intervention and the Law’ *op. cit.*

<sup>138</sup> Ryan cites Louis Henkin *How Nations Behave* Columbia University Press: New York, NY 1979 at 137-38

law in contemporary conflict resolution processes<sup>139</sup>. One example of this change is the greater debate around and willingness to undertake controlled humanitarian intervention in circumstances that would previously have been regarded as being of solely domestic concern.

It is important to be aware of the dynamic nature of international law – as of any legal system that aspires to continued relevance. Changing circumstances generally lead to a change in the law, sooner or later<sup>140</sup>. Thus, the failed efforts early this century to control armed conflict, for example with the Kellogg-Briand Pact of 1928, have been followed by later efforts, such as the League of Nations and the United Nations. Consequently, the Preamble to the UN Charter states that the guiding purpose of the organisation is to ‘save succeeding generations from the scourge of war’ and ‘to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest’. At the time of the creation of the UN, the common interest of states was the renunciation of all forms of international aggression. Nevertheless, the Allied powers agreed even then that the regulation of warfare and the basic protection of human rights could not be left entirely within the jurisdiction of individual states<sup>141</sup>. As international society has changed, however, so has our understanding of the ‘common interest’, argues Ryan. With the advent of human rights law as a significant incarnation of international law, it is possible to argue that the legality of humanitarian intervention should be judged against the international norms that have developed since then.

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<sup>139</sup> United Nations Fact Sheet No. 13 *International Humanitarian Law and Human Rights* United Nations Centre for Human Rights: Geneva, 1991. See, too, Michael Veuthey ‘The Contribution of International and Humanitarian Law to the Restoration of Peace’ in Kevin Kahil (ed.) *A Framework for Survival: Health, Human Rights and Humanitarian Assistance in Conflicts and Disasters* Council on Foreign Relations: New York, NY 1993, cited in Ryan *ibid.* 77

<sup>140</sup> See, for example, Akehurst *op. cit.* at 23 ff and 176 ff; and Harris *op. cit.* at 11 ff

<sup>141</sup> Thus, in 1948, US Secretary of State George Marshall observed that “Governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force.” Cited in Stephen Marks ‘The Roots of the Universal Declaration of Human Rights in the French Revolution’ *Human Rights Quarterly* 20 (1998) 483-4, quoted in Robertson *op. cit.* 31



The concept of sovereignty is not absolute under international law. Indeed, throughout history, international society has placed varying degrees of constraint upon states' domestic autonomy. While Ryan concedes Krasner's point that historical human rights regimes were "motivated more out of political necessity than humanitarian concern", this does not negate the fact that, for several centuries, international society has endorsed the principle that governments cannot act with unrestrained licence within their borders. The "weight of [further] positive law was added to these beliefs" when the League of Nations enacted the first ('international'/multilateral) formal commitments to the domestic protection of human rights.

These early 'exceptions' showed not only that states are capable of voluntarily agreeing to curb both their international and internal conduct, but also that a willingness existed to submit to the binding authority of an external authority, Carl von Clausewitz's 'competent body'<sup>142</sup>. Although the League, "an international organisation based on the rule of law for the purpose of regulating not only international aggression, but also internal state actions", ultimately failed, it set a precedent that cannot be ignored, says Ryan. Indeed, the destructiveness of warfare has forced states to realise that it is in their long-term interest to surrender certain aspects of their sovereignty and to accept the regulation of conflict by an independent entity.

Accordingly, the world no longer faces the same threat of nuclear confrontation. However, it continues to be confronted by a variety of lesser but no less significant threats, such as the proliferation of weapons in developing countries, the rise of conventional armies in the developing world, civil war, ethnic conflict, the drug and slave trades, international terrorism, and 'warlordism' in Africa. The potential for violence is increased by the uncertainty surrounding the 'rules of behaviour' in the post-bipolar international system where no obvious hegemon has stepped in to fill the void and decisively impose order.

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<sup>142</sup> See Ryan *op.cit* at 79-80

The result is that each decision and each action by the United Nations assumes greater relevance and significance as the *de facto* and *de jure* rules of conduct are being developed. This vacuum represents an opportunity – and, indeed, a responsibility – for international society, through international law, to provide a clearer and more detailed ‘code of international conduct’. Hedley Bull also recognises that, given the absence in international society of any legislative authority competent to change the law, it is essential “to take account of changing values” when interpreting the law<sup>143</sup>. The continued credibility of the international system depends, to no insignificant degree, on its ability to generate these new rules.

The United Nations has a legally acknowledged role as the primary international forum for international society to deliberate on global security and human rights issues. It is, therefore, a strong contender for the role of Clausewitz’s ‘competent body’ to lead the development of international law in these fields, and particularly on the issue of control of domestic human rights abuses that have the potential to lead to breaches of international peace and security. Indeed, Article 13 of the UN Charter provides that:

‘[t]he General Assembly shall initiate studies and make recommendations for the purpose of:

- promoting international co-operation in the political field and **encouraging the progressive development of international law** and its codification;
- promoting international co-operation in the economic, social, cultural, educational and health fields, and **assisting in the realisation of human rights and fundamental freedoms for all** without distinction as to race, sex, language or religion’ (emphasis added).

Further, Article 14 of the Charter allows the General Assembly, subject to a Security Council request in terms of Article 12, to ‘recommend measures for the peaceful adjustment of **any situation, regardless of its origin**, which it deems likely to impair the general welfare or friendly relations among nations’. These **include ‘situations**

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<sup>143</sup> Bull *op. cit.* at 150

**resulting from the violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations'** (emphasis added).

Article 1, setting out the Purposes and Principles of the United Nations, includes the following provisions in paragraph 1.:

'To maintain international peace and security, and to that end: to take effective collective measures for **the prevention and removal of threats to the peace**, and for the suppression of acts of aggression **or other breaches of the peace**, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes **or situations which might lead to a breach of the peace...**' (emphasis added).

It is clear from these provisions that the United Nations is endowed with the competence to assist in the promotion of the peaceful resolution of disputes that have their origin in domestic situations of gross human rights abuses. The UN's collective mandate to ensure the peaceful settlement of disputes also provides it with the tools of sanctions, concessions and the use of force, thereby facilitating the role of international law in offering viable response options to the majority of conflicts<sup>144</sup>.

However, Ryan then quotes J L Brierly as saying that "[l]aw will never play a really effective part in international relations until it can annex to its own sphere some of the matters which at present lie within the 'domestic jurisdiction' of ... states"<sup>145</sup>. Ryan thus acknowledges that the ability of international law, as developed by the United Nations and generally, to perform this task and fulfil the role advocated by him, is challenged by those who fundamentally question the relevance of international law.

Thus, classical realists, such as E H Carr and Hans Morgenthau, have expressed the view that political/military power is the ultimate determinant in an anarchical state

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<sup>144</sup> Louis Henkin, Richard C Pugh, Oscar Schachter and Hans Smit *International Law: Cases and Materials* West: St. Paul, Minn. 1993, 945, cited in Ryan *op. cit.* at 82

system<sup>146</sup>. Neorealists such as Kenneth Waltz, and structuralists such as Susan Strange have argued, more recently, that economic and other power relationships determine the structure of international relations<sup>147</sup>. The realist tradition<sup>148</sup> has argued that international law is essentially an ‘epiphenomenon’. As such, it has only a marginal effect on state behaviour independent from the power relationships characterising international society: States generally consider reliance on international law to be a practical option only when it coincides with their overriding objective of power maximisation.

On the other hand, institutionalists and legalists understand international law as one among several important constraints on state behaviour. International law is capable of promoting international co-operation by motivating states to recognise that their own long-term self-interest requires them to observe and enforce international law<sup>149</sup>. Thus, “[a]ll countries say that they are great defenders of and believers in human rights. ... No country really admits it is a human rights violator”<sup>150</sup>. One would therefore argue that such is the persuasive moral and legal force of the principles of both international law and of human rights that no-one readily admits to brazenly flouting them. Rather, a country that has, in fact, breached an internationally accepted standard will usually aver that it has, instead, faithfully observed the relevant prescripts.

Article 2 (1) of the UN Charter provides that ‘the organisation [i.e. the UN] is based on the principle of the sovereign equality of all its members’ and codifies the customary

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<sup>145</sup> Ryan *ibid.* at 82

<sup>146</sup> E H Carr *Nationalism and After* Macmillan: London 1967; and Hans Morgenthau *Politics Among Nations: The Struggle for Power and Peace* A A Knopf: New York, NY 1967, cited in Ryan *ibid.* at 83

<sup>147</sup> Susan Strange ‘Cave! hic dragones: a critique of regime analysis’ in Stephen Krasner (ed.) *International Regimes* Columbia University Press: Ithaca, NY 1977 at 333-54

<sup>148</sup> Hedley Bull *The Anarchical Society: A Study of Order in World Politics* Macmillan: London 1977 at 127-161

<sup>149</sup> See Ryan *op. cit.* at 84 and the authorities cited there

<sup>150</sup> Patricia Derian, ex-President Jimmy Carter’s Assistant Secretary of State for Human Rights, quoted in Stanley Hoffman ‘Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal’ in *Daedalus* Vol. 112 No. 4 (Fall 1983) 19-49 at 26

international legal norms of sovereignty and non-intervention inherited from the Peace of Westphalia in 1648. It also embodies the foundation upon which much of the current international legal system is built.

Even if one accepts this, however, it is possible to assert that sovereignty has been compromised both in law and in principle (*de jure*), as well as in practice (*de facto*). Thus, for example, in principle, the laws of war have prohibited states from waging war in any manner that they choose: the concepts of 'proportionality' and 'necessity' are accepted as principles overriding the sovereign authority of states. Moreover, in practice, technological advances and the expanding realm of economic and social interdependence of international society continue to decrease the ability of the state to assert complete autonomy of domestic decision-making<sup>151</sup>. These practical matters of daily life are progressively eroding the traditional understanding of sovereignty and are blurring the distinction between the internal and international spheres of the conduct of a state's affairs.

Moreover, international law also recognises the existence and legitimacy of cardinal principles that supersede the freedom of a state to act with impunity within its own borders. Thus, *ius cogens* (or, the peremptory norms of international law, usually considered to be derived originally from natural law, but now to be discerned primarily from custom and treaties) is considered by leading authorities to bind states to the extent that they may not contract out of them<sup>152</sup>.

Thus, the Genocide Convention<sup>153</sup>, the Convention Against Torture<sup>154</sup>, and the Convention Against Apartheid<sup>155</sup> are human rights treaties that have codified and

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<sup>151</sup> See Ryan *op. cit.* at 85 and the authorities cited there

<sup>152</sup> See Akehurst *op. cit.* at 40-41

<sup>153</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, UN Treaty Series Vol. 78, 1951, 277

<sup>154</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, *International Legal Materials* Vol. 23, 1984, 1027

<sup>155</sup> Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, cited in Ryan *op. cit.* at 86

criminalised three of the primary principles of *ius cogens*. Additional limits to sovereignty are recognised in international law: states may voluntarily conclude agreements that limit their autonomy or which transfer aspects of their autarky to international organisations, such as the UN, the European Union and the OAU.

While the principle of state sovereignty contained in Article 2 (7) of the UN Charter expressly forbids international intervention in the ‘domestic’ affairs of a state, “the emerging legal view of sovereignty attempts to correct this fundamental flaw of the Westphalian system”<sup>156</sup>. Simply put, if absolute sovereignty prevailed in all matters of international law, it would be entirely impossible to devise any norm or law that bound all states, even if they were to purport to agree to a treaty. This fact, together with the havoc a state can visit upon its domestic population, renders the principle potentially catastrophic.

Consequently, ‘absolutist’ notions of sovereignty have begun to wane and, while the state remains the legal agent of international action with the relevant elements of independent decision-making, it is arguable that the legitimacy of state action is increasingly understood as derived from ‘the people’<sup>157</sup>. This liberal definition of state legitimacy has been endorsed by the United Nation Security Council<sup>158</sup>. However, a state’s ‘right’ to govern its people (through its reiterated Westphalian claims of territorial sovereignty) is tied to its ‘responsibility’ to those people by means of a contract of consensual transfer of some of its citizens’ rights<sup>159</sup>.

The crucial implication arising from this resolution is that a state that fails to meet its obligations in this regard is legally subject to international sanction and to intervention to enforce these responsibilities. Ex-President Bill Clinton of the United States was,

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<sup>156</sup> Ryan *ibid.* at 87

<sup>157</sup> Ryan *ibid.* at 87 and the authorities cited there

<sup>158</sup> Provisional Records of the Security Council, Document S/PV.3406.9, New York, NY: United Nations, 1992

<sup>159</sup> Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* Transnational Publishers: Dobbs Ferry, NY 1988, 15, cited in Ryan *ibid.* at 87

thus, able to justify a bombing attack on a sovereign state that had done nothing to damage narrow American interests on the grounds that “We could not stand aside and let history forget the Kosovo Albanians”<sup>160</sup>. He later elaborated: “In Kosovo, we did the right thing, we did it the right way and we will finish the job. Because of our resolve, the twentieth century is ending not with helpless indignation, but with hopeful affirmation of human dignity and human rights for the twenty-first century”<sup>161</sup>.

International human rights law, including the UN Charter<sup>162</sup>, aims at the protection of basic human values as expressed in individual and group rights. The Charter recognises the connection between the respect for and observance of human rights, on the one hand, and the maintenance of international peace and security on the other. Its purpose is to provide a minimal standard of individual rights protection and to alleviate human suffering. Customary international law, the laws of war and the ‘general principles of law’ form the basis of many of the norms of international human rights law. The phrase ‘general principles of law’ is a reference to the Statute of the Permanent Court of International Justice, the forerunner of the International Court of Justice<sup>163</sup>. There is no reason, says Michael Akehurst, why it should not mean the general principles of both international and national law. It includes the collection of laws found in the majority of national and successive international legal systems that regulate the same concepts, for example, the prohibitions on murder, slavery, torture and genocide.

The fundamental origins of human rights law, however, are to be found in the relationships between states as contained in the international agreements concluded since the Second World War<sup>164</sup>. Foremost among these are the UN Charter and the Universal Declaration of Human Rights. The Charter, while speaking of human rights protection in broad and arguably vague terms, nevertheless remains the ultimate source

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<sup>160</sup> Bill Clinton ‘Why the Allies must fight on’ *Sunday Times* (London) 18 April 1999, cited in Robertson *op. cit.* 444

<sup>161</sup> *The Times* (London) 15 July 1999 p. 46, cited in Robertson *ibid.* at 444

<sup>162</sup> Article 55 of the UN Charter

<sup>163</sup> Akehurst *op. cit.* at 34

<sup>164</sup> Ryan *op. cit.* at 88

of authority for enforcement<sup>165</sup>. The Declaration, in Article 28, boldly asserts the international framework for national human rights protection in the following words: 'Everyone is entitled to a social **and international order** in which the rights and freedoms set forth in this declaration can be fully realised' (emphasis added).

The ability of international society to ascertain when a gross violation of human rights law has occurred is relatively easy; the proliferation of civil society organisations and ease of access to advanced telecommunications has assisted official agencies in their monitoring roles. It is considerably more difficult, however, for international society to authoritatively enforce the law on offending states. Probably the most effective means of imposing enforcement measures are the domestic courts of the violating state. But it is unlikely that the courts in a state that perpetrates gross violations of human rights will be either competent or prepared to challenge the actions of its political leaders. International tribunals are potentially less partial – because they are less beholden – but they have faced difficulties of authority.

The jurisdiction of an 'international' court is usually dependent upon the consent of the states involved, as is demonstrated by the example of the Lockerbie aeroplane bombing trial of Libyan nationals under Scottish law in the Netherlands. However, the recent experience of the International Tribunals for Yugoslavia and Rwanda has shown that it is possible to set up credible institutions, whether with or without the consent of the violating state. On the other hand, this option focuses on *ex post facto* activity whereas, as the saying goes, 'an ounce of prevention is worth a pound of cure'.

#### **4.2 Practical experiences of armed humanitarian intervention**

The question then arises concerning the existence and nature of preventative measures that might be available to the international community. One is armed humanitarian intervention, but this mechanism is still controversial and, consequently, has been

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<sup>165</sup> Henkin and Pugh in Ryan *ibid.* at 89



rarely used and then usually once the situation has reached crisis proportions, such as the British intervention in Sierra Leone. Even here, though, the situation could not be termed intervention proper, as the British troops and supplies were dispatched to Freetown only after an invitation from the beleaguered government. The Western intervention in the Yugoslavian province of Kosovo and also in the Federation's capital of Belgrade at the end of 1998 are, perhaps the prime examples of humanitarian intervention properly so-called in recent times.

Much has been said of late concerning the need for the UN, for example, to move away from the impartiality of its peacekeeping mandate and corresponding avoidance of military action<sup>166</sup>. The 1992 United Nations intervention in Somalia has been widely understood as the equivalent of 'the lesson of Vietnam' (that is, 'stay out, period'). Nevertheless, the criticism arising from the subsequent decision to ignore the Rwandan genocide has resuscitated the idea that some form of rapid intervention force should be created to intervene in humanitarian disasters with a political origin or character.

As the twentieth century drew to a close, Geoffrey Robertson identified in the Lockerbie trial, the Rwandan and Yugoslavian war crimes tribunals in Arusha and The Hague, and in the arrest of General Pinochet, a veritable "quest – almost the thirst – for justice". He asserts that this search replaced "even the objective of regional security as the first principle of international action"<sup>167</sup>.

This focus on 'justice' and on intervention in the internal affairs of the state emerges from the growing understanding that most present and future conflicts will take place within states, rather than between them. Hence the necessity of emphasising hitherto subordinate themes. The reality of the changes wrought by the passing of the Cold War era is beginning to be identified. With that recognition has come a readiness to begin

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<sup>166</sup> Robertson *op.cit.* 446

<sup>167</sup> Robertson *ibid.* 448

discussing alternate strategies for the protection of human rights and the prevention of large-scale human rights abuses and atrocities, not least in Africa.

One example has been the Nigerian-led ECOWAS/ECOMOG intervention in Liberia and Sierra Leone. Another has been the United States'-inspired exploration of a homegrown African 'peace-keeping' force. In the realm of human rights, as in the arenas of culture and economics, the message is being sent that, given the imperatives of globalisation, the days of almost unlimited state sovereignty are numbered. Consequently, responsibility can no longer be denied and pressure is mounting for some form of direct military action that cannot be indefinitely avoided. It is appropriate, therefore, to consider the prospects for armed humanitarian intervention, particularly given the recent history of failing African states where internal conflict is characterised by widespread human rights abuses.

#### **4.3 Armed humanitarian intervention: philosophical and theoretical dimensions**

Ralph Pettman<sup>168</sup> has stated succinctly that “[m]oral discourse is an integral aspect of any political conversation”. Ralph G Carter has, similarly, bluntly observed<sup>169</sup> that “[f]or those entrusted with political power and held accountable for their actions, moral considerations cannot be avoided”. However, he continues, “policy decisions usually involve trade-offs between multiple values, and one option rarely emerges as clearly superior to others. ... The difficulties of making moral choices in government are magnified in the foreign policy realm. ... Unlike their domestic counterparts, foreign policymakers are faced with the need to promote policies that are acceptable in both domestic and external arenas”.

American President Woodrow Wilson's 'idealism' of the 1930s offered the following foreign policy prescription: if nations would adopt democratic forms of government

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<sup>168</sup> Pettman *op. cit.* at 17

<sup>169</sup> 'Morality in the Making of Foreign Policy' in *Ethics, Government and Public Policy: A Reference Guide* J S Bowman and F A Elliston (eds.) Greenwood Press: Conn. 1988, 287-305 at 287

and consistently implement the 'golden rule' in their interactions, global harmony would be advanced. The rise of fascism and the failure to preserve international peace seemed, however, to prove the naïve and simplistic inadequacy of Wilson's notions for the chaotic world of international politics characterised by the global crisis of the Second World War.

Consequently, the aftermath of World War II witnessed the rising influence of realism in American and Western foreign policy in general. The consequence was the close identification between the USA and reactionary, repressive and authoritarian, yet anti-Communist, regimes. The unsavoury nature of these regimes and the changes that relationships with them wrought in US foreign policy contributed, in turn, to a growing rejection of realism as a guide to policy. For idealists, moral considerations could not be ignored and had to be reintroduced into the foreign policy-making process.

Reinhold Niebuhr led the criticism of Wilsonian idealism in the 1930s in his classic *Moral Man and Immoral Society: A Study in Ethics and Politics*. He laid the foundation for the realists who followed by dismissing the idea that moral considerations applicable to individuals hold true also for society<sup>170</sup>. He argued that groups were far less likely than individuals to act morally since the former were ruled by emotion and force, instead of reason. Moreover, the self-criticism required for moral analysis could easily be interpreted as disloyalty to the group. Being emotionally- rather than rationally-driven, groups find it difficult, if not impossible, to honestly give equal consideration to the needs of both outsiders and its own.

Furthermore, the patriotism promoted by group loyalty has a perversely contrary and immoral outcome. Individually, patriotism is a moral act following a voluntary decision taken to sacrifice one's own needs to those of the group. But, as Niebuhr noted, "the sentiment of patriotism achieves a potency in the ... soul, so unqualified, that the nation is given carte blanche to use the power, compounded by the devotion of individuals, for

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<sup>170</sup> Scribner's: New York, NY 1932, discussed in Carter *op. cit.* at 288 ff.

any purpose it desires". Thus, the individual act of patriotism might produce support for immoral national practices, such as the killing of civilian non-combatants in wartime.

The most common conceptual paradigms of 'the group' in international relations are 'the state' and 'the nation-state'. And it is these structures that provided the focus for the distinction between political and personal ethics, between the moral burdens of the *statesmen* and their less strategically significant *countrymen*. It is not, says Pettman<sup>171</sup>, a quantum leap from a focus on the 'state', to "doctrines that positively exalt" its status, to *realpolitik* and the logic that the most moral claims are those that preserve the national interest, "however and by whomever this is defined". He concedes, however, that this does not deny the fact that enlightened self-interest is usually sufficient to persuade against the resort to crude power politics alone.

By alleging that, in terms of group morality, the end justifies the means, Niebuhr prepared the way for the realists who followed, including Hans Morgenthau who set out<sup>172</sup> the fundamental principles of the theory. Realists considered that the laws of human nature governed politics. Within the context of human frailties and shortcomings, foreign policymakers sought to gain, maintain, or extend their national power. Morality was shifting, dynamic and situational and so avoided the fundamental 'error' of equating one's own cultural moral views with some broader set of moral laws governing the universe.

Morgenthau further argued that the ethics of nationalism had overcome the Christian ethics of cosmopolitanism in the past 150 years. Consequently, leaders who followed their 'true' national interests simultaneously engaged in 'moral national' behaviour,

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<sup>171</sup> Pettman *op. cit.* at 22

<sup>172</sup> Hans J Morgenthau 'A Realist Theory of International Politics' in David L Larson (ed.) *The Puritan Ethic in United States Foreign Policy* Van Nostrand: Princeton, N. J. 1966, 62-72. Also *Politics Among Nations* A A Knopf: New York 1951; and 'The Mainsprings of American Foreign Policy' in James M McCormick (ed.) *A Reader in American Foreign Policy* Peacock: Itasca, Ill. 1986, 48-50, all cited in Carter *op. cit.*

whereas those whose actions were based on their personal moral principles engaged in 'moralistic' behaviour, which would certainly fail to achieve its goals.

The realist approach offered two advantages. Firstly, it appeared to more closely reflect international politics than did Wilsonian idealism. Secondly, realism seemed to legitimise the use of immoral means to achieve moral ends. Realists, thus, favoured teleological arguments that defined actions as moral based on the goodness of the goals those actions were intended to achieve, rather than on the attributes of the behaviour itself. One might add that, with intention as the defining precondition, realists also disregarded the issue of whether or not the envisaged goal was, in fact, achieved. Idealists, on the other hand, tended to accept deontological arguments that prioritised just action, even if unjust outcomes perhaps resulted.

The most notorious exponent of the view that immoral means may be employed in the pursuit of some greater good is probably Niccolo Machiavelli, who is regularly wheeled out to illustrate the cynics' position. "A prince", he argued, "cannot observe all those things which are considered good in men; being often obliged, in order to maintain the state, to act against faith, against charity, against humanity, and against religion ... he must ... not deviate from what is good, if possible, but be able to do evil if constrained ..."<sup>173</sup>. Similarly, "[a] man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good. Therefore it is necessary for a prince [and a people], who wishes to maintain himself, to learn how not to be good, and to use and not use it according to the necessities of the case"<sup>174</sup>.

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<sup>173</sup> *The Prince and the Discourses* Random House: New York, NY 1950, at 64-6, cited in Pettman *op. cit.* at 23

<sup>174</sup> *ibid.* Ch. XV and Ch. XVIII quoted in J D B Miller 'Morality, Interests and Rationalisation' in Pettman *op. cit.* 36-51 at 40

Pettman correctly identifies<sup>175</sup> something “more important” in Machiavelli’s position: “Implicit in it is a direct attack on one enduring assumption of Western political thought, that of the existence of ‘natural law’”. He states that Machiavelli “malignantly” ignored the tradition because he viewed Christian morality as simply incompatible for a head of state with the sort of secular morality he considered necessary to build a secure state. As Isaiah Berlin has argued<sup>176</sup>, “... For Machiavelli there is no conflict [between public and private morality]. Public life has its own rules: to which Christian ethics is a gratuitous obstacle”.

There is more to this than the argument that love and goodness cannot be realised in the public arena, and that generous motives may be foolish and dangerous when pursued in an environment of hostility and interstate competition. It goes further than the separation of politics and ethics; “it is the uncovering of the possibility of more than one ethical system, with no criterion common to the systems whereby a rational choice can be made between them”. The implication of denying the existence of an objective and generalised set of human ideals entails the collapse of a cornerstone of the Western philosophical tradition, Berlin asserts. The existence of an objective, generalised set of ideal standards for human behaviour is usually understood to have its origin in Grotius’ natural law, which he successfully severed from the limitations of divisive and intolerant human religious denominations.

Unsurprisingly, the realist idea that policymakers could be absolved of the moral consequences of their actions was strenuously challenged. Critics noted that, in the real world, policies were devised and implemented by people who were rarely able to maintain a separation between their value systems and their decisions. The focus of idealist criticism was their rejection of the realist use of immoral means to attain moral ends. Indeed, idealists noted approvingly that realists such as Morgenthau accepted that

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<sup>175</sup> Pettman *ibid.* at 23

<sup>176</sup> Isaiah Berlin *The Originality of Machiavelli* a paper delivered to the Political Studies Conference, Oxford, 27 March 1963, 1, quoted by Pettman *ibid.* at 23

the definition of national interests should be narrowly defined and should take into account the needs of other nations<sup>177</sup>.

Similarly, other realists like Alexander Hamilton, Theodore Roosevelt and George Kennan endorsed the idealist principle that the pursuit of national interests should be constrained by moral considerations. Kennan proposed that [American] foreign policy should be consistent with [American] moral standards, but should not seek to impose those standards on others. Hence, Americans [and others] should not object when other states offend US [their own] sensibilities but do not hurt essential national interests.

The extensive historical span represented by these individuals indicates the “continuing impact of moral considerations on American foreign policy”<sup>178</sup>. Indeed, Carter asserts<sup>179</sup> that the “only major exception to the close linkage between the means of American foreign policy and claims to higher moral values came during the height of the Cold War”. The deep divisions around involvement in Vietnam facilitated renewed interest in idealist approaches to international relations.

Nevertheless, asserts Carter<sup>180</sup>, there may be broader international consensus on moral issues than many realise. He quotes Niebuhr as claiming that “enlightened men of all nations have some sense of obligation to their fellow-men, beyond the limits of their nation-state”. Carter goes on to cite Paul A Freund<sup>181</sup> as saying that this sense of obligation may be virtually universal, since most cultures value justice and the equitable treatment of individuals.

Unfortunately, says Carter, universal values are often too general to provide policy guidance in specific real-world cases. Significantly, however, Carter fails entirely to

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<sup>177</sup> Carter *op. cit.* at 289

<sup>178</sup> *ibid.* at 290

<sup>179</sup> *ibid.* at 291

<sup>180</sup> *ibid.* at 302 and the authorities cited there

consider the implications of the expanding role that the notion of human rights is playing in providing an ever more detailed set of values against which to assess political action. Miller understands this point when he states<sup>182</sup>, from within a state-centric paradigm, that the only hope of relative international harmony and a wider common morality being applied lies in “sufficient mutual accommodation”. This balancing of interests will continue to be essential if peace and development are to take root, and this will require both African states and Western-dominated institutions to demonstrate a simultaneous recognition of each other’s legitimate concerns about the other.

Miller relies on Figgis<sup>183</sup> when he emphasises the fundamental necessity of a general acceptance of the existence of some universal imperative if the rights of ‘others’ are to be given any consideration. “Some form of the ‘reason and nature doctrine’ must prevail”, he argues. Otherwise nationalist expedience will continually threaten to atomise domestic and international society.

R J Vincent<sup>184</sup> goes further than Miller in his interpretation of natural law and propounds the position that “universality is ... implied by the very idea of morality”. ‘Right reason’ as the means of accessing the moral principles inherent in (human) nature is available – and applicable – to all humankind. Both essential elements of justice are, accordingly, universally present in and binding on the individual, including Machiavelli’s prince. Thus, he says, “[I]f the protection of the interests of individuals or groups is something which in general the state does better than any more inclusive entity [such as a smaller, more congruent, group], then the interests of the state ...

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<sup>181</sup> ‘Philosophy, Moral Reasoning and Law’ in Kenneth W. Thompson (ed.) *Ethics and International Relations* Transaction/Council on Religion and International Affairs: New Brunswick, N.J. 1985, cited in Carter *ibid.* at 291

<sup>182</sup> Miller *op. cit.* at 50

<sup>183</sup> J N Figgis *From Gerson to Grotius* Cambridge 1923, 74-7

<sup>184</sup> R J Vincent ‘Western Conceptions of a Universal Moral Order’ in Pettman (ed.) *op. cit.* at 52-78



acquire thereby a moral dignity”<sup>185</sup>. State morality is, thus, derivative rather than something to be found *a priori*.

The realist position stands to be criticised for accepting, but then fixing, this domestic position and generalising it to the international arena by its doctrine of the immutability of a morally plural world. In an increasingly interdependent and globalising world, it is, simply, increasingly inaccurate. The consequence of the realist position is a norm of non-intervention that suffices only in a world of self-contained states, whereas it is argued that it constitutes moral abdication in contemporary circumstances.

Vincent identifies several dimensions of the debate between realism and idealism. There is, first, disagreement about the principles that are to direct action in international relations. Secondly, there is debate around the criteria by which we judge actions once taken. Thirdly, the origin of these rules, and the basis of obligation to them, are the subjects of dispute. ‘Naturalists’, or supporters of the natural law orientation, assert that rules of right reason are discoverable by the use of the intellect and apply to humankind and their institutions by virtue of their very humanity. Positivists, or realists, on the other hand, derive rules from command, custom or treaty, and “from practice rather than precept”. The latter appealed to “good sense” in not setting rules too far ahead of behaviour, and observed that different societies did, in fact, have different moral regimes.

Nevertheless, the attention paid to human rights in such instruments as the UN Charter, the Charter of the Nuremburg International Military Tribunal and the Universal Declaration of Human Rights, arose not from the evidence of state practice, but from a conviction about right conduct regardless of state practice.

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<sup>185</sup> *ibid.* at 58

There are four grounds upon which 'naturalism', to which these developments represented a return, may be defended as a source of morality. In the first place, the positivist doctrine that what is considered to be right in any society is, in fact, right, might have the effect of legitimising practices that the ordinary person would find morally offensive. Natural law, here, is the ordinary person's 'informant' or conscience. Secondly, the "unscientific" quality of the naturalist description of a universal morality, viz. "principles of conduct discouraged by the use of right reason", can be avoided by rephrasing it into either a logical question regarding the necessities for social life, or into an empirical question. For example, "Are there, as a matter of observation, certain principles of human conduct that are universal in the sense that no society exists that does not, to some extent, observe them?" A variant on this latter question would ask whether it is accurate to assert that a capacity for ethical conduct may be observed in people everywhere so that, even if the particular rules are different, an "ethical competence" is universal.

A third defence of natural law relies not on its form but on its function: Whatever might be thought of the particular pronouncements of natural law at particular times, it is a body of doctrine that has fulfilled three "majestic" functions in Western political experience. It has established a universal basis for law (the Stoics; Rome); it has provided a rational foundation for ethics (Aquinas); and it has produced a theory of natural rights that infused the American and French revolutions.

Rationalism, observes Vincent, is a thread that runs through each of these functions and constitutes a fourth defence of natural law. A significant part of morality is included if one required 'good' reasons for any action. He recognises that this is a weak defence because it separates 'right' and 'reason', thereby letting in positivism by default. But, he exhorts, it does, at least, "provide a protest against arbitrariness". If this were the only function of naturalism, its 'otherworldliness' would be a central weakness. On the other hand, its 'worldliness' is the central weakness of positivism.

Human rights are the modern incarnation of natural rights. They claim a universal applicability and an authority that both precedes and supersedes human enactment. However, the free exercise of human rights is still extensively held in thrall to the strictures of positivism and the limitations of its cognate, realism. Sir Hirsch Lauterpacht's assertion that, by virtue of the fundamental rights of the individual in the Charter of the United Nations and in other international instruments, he has now been constituted a subject of international law whose rights and freedoms states have a duty to observe. But this statement is to be balanced against the positivist limitation that hinders much of international law – the poor prospects of enforceability.

There is a greater likelihood of even the smallest state enforcing its rights than there is of the individual doing so, at least in regard to rights not also recognised in regional instruments – as in Europe – that establish a court accessible to the individual. This is all the more true if Article 2(7) of the UN Charter – the clause reserving domestic jurisdiction against any intrusion by the international organisation except in the case of the enforcement of peace and security – is taken seriously and is not regarded as an outmoded dogma. Indeed, UN practice, as noted elsewhere, has, until relatively recently<sup>186</sup>, been to reinforce domestic jurisdiction rather than to accord enhanced status and recognition to the individual. Accordingly, the 1966 UN General Assembly covenants on human rights retreated from the individual-focus of the Universal Declaration of Human Rights and provided only that states may petition the human rights committees established by them on behalf of an individual in another state.

If states are to remain the guardians of human rights within each other's territories, any expectations about their performance must be measured against their unpromising record thus far in this regard. This is especially so given their collective failure regarding the issue of primary concern in the UN Charter – the maintenance of peace and security in international relations.

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<sup>186</sup> See *Provisional Records of the Security Council*, Document S/PV.3406.9, New York, NY, United Nations, 1992, cited in Vincent *ibid.* at 70

Nevertheless, it is the idea that states do have duties concerning human rights that has, according to Vincent, informed the traditional doctrine of humanitarian intervention, so that if a state's behaviour seriously offends the conscience of international society it is disentitled from invoking the principle of non-intervention. The problem with this doctrine is, in his view, however, not in its identification of the evil to be discontinued, but in the trust we are required to place in those who are to act on behalf of the international community. The moral argument for non-intervention even in the face of gross and outrageous conduct within a state arises partly because of the absence of such trust in those who have not proven themselves worthy of it, and partly because of the uncertain practical consequences of intervention.

The moral basis for the principle of non-intervention in international society is founded on an analogy with the right of individuals to be left alone to pursue their legitimate ends, as long as they do not, in so doing, interfere unduly with the similar activity of others. States, however, enjoy an additional moral claim to the application to them of the principle. It is not based upon any intrinsic moral superiority of this particular form of group association, but on its practical potential to provide a "framework of order within which justice might be achieved. It is to be defended then, on moral grounds, for what it makes possible, rather than for what it is", it being difficult to conceptualise justice facilitated except by the provision of order.

It may be true that this order might "play host to injustice" in a particular instance. He argues<sup>187</sup>, however, that for the moral defence of the state to be rendered indefensible, and with it the principle of non-intervention, "it would have to be shown that its affront to justice was systematic, and not merely possible". Ultimately, therefore, the moral case for non-intervention relies not on the perfection of the state, but on the absence of a serious and viable competitor for its role as a community within which morals might be enforced.

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<sup>187</sup> *What are Human Rights?* at 81, quoted in Vincent *ibid.* at 78

Where, however, offences against human rights are extensive or extreme, and the particular state has clearly lost the moral argument, it is grotesque to pander to form when substance demands action. Insistence on the pretence of an invitation to intervene is hypocritical and reliance on the moral purity of the intervening state too unreliable. Multilateral approval and co-operation is the remaining option, whether at the regional or global level. Even Hedley Bull finds a consensual multilateral approach to intervention acceptable<sup>188</sup>, although he predicates this upon the object of intervention failing to conform to the defining characteristics of a state, either completely or, ideally, at all.

Bull challenges the claim that developments in the field of human rights are evidence of the “majestic progress of the prevailing norms of world politics ‘from international law to world law’, the birth-pangs of a world society or community that is replacing the society of states”.

He then asserts that “the legal standing of many of the declarations and resolutions in which standards of human rights are proclaimed, is in dispute. With the important exception of the European Convention, the instruments that have been developed are without effective procedures for implementation and enforcement. There is [furthermore] a great gap between the standards proclaimed and actual ‘human rights conditions’ in various parts of the world”. He thereby implicitly calls into question the legality of virtually the entire body of international law, despite the widespread agreement on its status as law, as reflected by respected writers such as D J Harris<sup>189</sup> and Michael Akehurst<sup>190</sup>. Bull finds support from John Stuart Mill, for whom “... the law of nations is simply the custom of nations”<sup>191</sup>. Michael Akehurst, however, cautions that “it is significant that those who regard international law as a form of [non-

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<sup>188</sup> ‘Human Rights and World Politics’ in Pettman (ed.) *op. cit.* 79-91 at 83

<sup>189</sup> *Cases and Materials on International Law* (3 ed.) 1983 *op. cit.*

<sup>190</sup> ‘A Modern Introduction to International Law’ (3 ed.) 1977; and (5 ed.) 1984 *op. cit.*

<sup>191</sup> quoted by Varouxakis ‘John Stuart Mill on intervention and non-intervention’ in *Millennium op. cit.* at 71

binding] morality usually speak of it as ‘*mere morality*’<sup>192</sup>. It is suggested that this recitation by Akehurst speaks volumes about the fundamental assumptions of the adherents to the view that international law is not law.

Bull goes on to argue that it is clear, despite the convergence of values around human rights that one may infer from the proliferation of treaties and declarations, that “there are divergences of the most fundamental kind as to what these values are”. One may observe that arguments based upon the general similarity of the central principles of human legal systems might be similarly inadequate.

However, it would not, it is believed, be inappropriate to observe that circumstances have changed since Bull wrote in 1979. He is, consequently, no longer entirely accurate in his assertion that “claims that they express not the consent of states, but ‘the general will of the world community’, are an aspiration rather than a description of actual trends”. Indeed, even then, Bull accepted ex-President Jimmy Carter’s insistence that there is nothing parochial or tendentious about the contention that, for example, the denial of such ‘basic’ human rights, as are represented by torture and the refusal of a fair trial, is wrong, however widespread these practices may be.

There can be no denying that there continues to be an element of aspiration in human rights documents, but there is also a progressively generalising recognition that states are obligated to comply with rules enshrining human rights. The fact that some states frequently do not comply usually leads them to deny or excuse such failure rather than to deny their obligation. Indeed, a trend does seem to be emerging in favour of compliance. Significantly, it is suggested, Bull concedes that “[i]t is possible that the area of shared moral attitudes and preferences in world society as a whole will grow”.

Michael Walzer elaborates on the long-recognised place of human rights in international society and the ‘distinction’ between the rights of the state and those of

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<sup>192</sup> Akehurst *op. cit.* at 1

the individuals who inhabit it. He consequently describes<sup>193</sup> the rights of political communities (i.e. 'states'), viz. territorial integrity and political sovereignty, as deriving ultimately from the rights of individuals. It is from individuals that states acquire their authority. He quotes John Westlake<sup>194</sup> as holding that "[t]he rights and duties of states are nothing more than the duties and rights of the men who compose them".

Thus, when state are attacked, it is their members who are challenged, not only as to their lives, but also as to the aggregation of the things they value most, including the political association they have developed that enables and facilitates all those other things. The challenge to the state is recognised and explained in terms of their members' rights. If they were not morally entitled to choose their form of government and influence the policies that shape their lives, external coercion would not constitute the crime of aggression. Indeed, individual rights (to life and liberty) underpin the most important judgments we make about war. States' rights are simply their collective form.

The rights of states, says Walzer, rest on the consent of their members, on the basis of contract theory. 'Contract' is a metaphor for the process of association and mutuality, the continuing nature of which the state claims to protect against external threats of encroachment. The moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and considered justified.

The consequence of this contract is that political allegiance presages legal title to land, which follows the people who live on it. Consequently, territorial integrity is a function of national existence: it is the coming together of a people that establishes the integrity of the territory. Walzer bolsters this explanation by reference to the primary form of the 'legalist paradigm' of the definition of aggression, which has been endorsed by the

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<sup>193</sup> Michael Walzer 'The Rights of Political Communities' in *International Ethics* Princeton University Press: Princeton, N. J. 1985, 165-194 at 167

<sup>194</sup> John Westlake *Collected Papers* L. Oppenheim (ed.) Cambridge, England, 1914, at 78, cited in Walzer *ibid.* at 167

United Nations General Assembly<sup>195</sup>. He presages his discussion of this paradigm with the caveat that the complex realities of international society have required the devising of a 'revisionist paradigm' in order to more accurately provide for judgments on the justice and injustice of particular wars.

The legalist paradigm of the theory of aggression is summed up in six propositions:

1. There exists an international society of independent states

States are the members of this society, not individual men and women. In the absence of a universal state, men and women are protected and their interests represented only by their own governments. Although states are founded for the sake of life and liberty, they cannot be challenged in the name of these rights by any other states: Hence the principle of non-intervention. The rights of private persons can be recognised in an international society, as in the UN Charter and Universal Declaration of Human Rights, but they cannot be enforced without challenging the dominant values of that society: the survival and independence of separate political communities.

2. This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political sovereignty

These two rights rest, ultimately, on the right of men and women to build a common life and to risk their individual lives only when they freely elect to do so. Nevertheless, the relevant law refers only to states, and its details are determined by the conflictual and consensual interactions between states. These processes are continuous, and international society therefore has no final structure, although territory and sovereignty can be described at any point in time.

3. Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act

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<sup>195</sup> See the 'Report of the Special Committee on the Question of Defining Aggression (1974), General Assembly Official Records, 29<sup>th</sup> Session, Supplement No. 19(A/9619), 10-13, discussed in Walzer *op. cit.* at 175 ff.



As is the case with domestic crime, the focus is on actual or imminent action: a state cannot be said to be forced to resist unless the necessity is both obvious and urgent.

4. Aggression justifies two kinds of violent response: a war of self-defence by the victim and a war of law enforcement by the victim and any other member of international society

Anyone may come to the aid of the target state, use necessary force against the aggressor, and make the equivalent of a 'citizen's arrest'. As in domestic society, the duties of bystanders are not entirely clear, but the theory tends to negate the right of neutrality and to require general participation in law enforcement.

5. Nothing but aggression can justify war

The central purpose of the theory is to limit the incidence of war. There must have been a wrong and it must have been received (or is imminent). Nothing else justifies the use of force, not even domestic injustice. Hence, again, the principle of non-intervention.

6. Once the aggressor state has been militarily repelled, it may also be punished

The concept of the just war is ancient, but neither the procedures nor the forms of punishment have been firmly established in customary or positive international law. Nor are its ends clear: retribution, deterrence; restraint or reform? The domestic adage is 'punish crime to prevent violence'; its international equivalent is 'punish aggression to prevent war'.

The implication of the paradigm is clear: if states are members of international society, the subject of rights, they must also be the object of punishment.

The principle that states should never intervene in the domestic affairs of other states "follows readily from the legalist paradigm and, less readily and more ambiguously, from those conceptions of life and liberty that underlie the paradigm and make it plausible", Walzer observes. These same conceptions "seem also to require" that we

disregard the principle on occasions. Consequently, 'intervention' is not defined as a criminal activity and, although intervention in its various forms may entail threats to the territorial integrity and political sovereignty of target states, including invasion, it can be justified. And, as an exception to a fundamental organising principle of an international society that some see as perpetually on the brink of anarchy, it must be justified.

Walzer expands upon his thesis by referring to the ideas of John Stuart Mill<sup>196</sup>, discussed elsewhere, who retains the individual/community analogy. The citizens of target states are the members, it is presumed, of a political community entitled, *a priori*, to collectively determine their own affairs, says Mill. States are to be treated as self-determining regardless of whether or not their internal political arrangements can be described as free, for 'self-determination' and 'political freedom' are not equivalent terms. Thus, a state is 'self-determining' even if its citizens struggle unsuccessfully to establish free institutions, and it has been deprived of self-determination even if such institutions have been established – but by an intrusive neighbour.

The members of a political community, Mill holds, must seek their own freedom, just as the individual must cultivate his own virtue. They cannot be liberated, and he cannot be rendered virtuous, by any external force. Indeed, political freedom depends upon the existence of individual virtue – which the armies of another state is most unlikely to elicit unless, perhaps, they inspire an active resistance and set in motion a process of political self-determination. But, Mill implies, the raw material must be there in the first instance. Self-determination, accordingly, is the school in which virtue is learned (or not) and liberty is won (or not).

Mill allows that a people who have endured the "misfortune" to be ruled by a tyrannical government are peculiarly disadvantaged: they may never have enjoyed the opportunity

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<sup>196</sup> J S Mill 'A Few Words on Non-Intervention' in J S Mill *Dissertations and Discussions* New York, 1873, Vol. III, 238-63, discussed in Walzer *ibid.* at 178 ff.

to develop the virtues required for establishing and maintaining freedom. But he stands firm, nevertheless, on the stern doctrine of self-help. "It is during an arduous struggle to become free by their own efforts that these virtues have the best chance of springing up". Walzer here draws an instructive comparison with the Marxist aphorism that '[t]he liberation of the working class can come only through the workers themselves'<sup>197</sup>.

Mill appears to believe that citizens get the government they deserve or, at least, the government for which they are "fit". And the only test of whether a people have become 'fit' for democratic institutions is that they, or a sufficient number of them to prevail in a contest, "are willing to brave labour and danger for their liberation. ... No people ever was and remained free, but because it was determined to be so; because neither its rulers nor any other party in the nation could compel it to be otherwise"<sup>198</sup>.

Paraphrasing Mill, one may conclude that there exists no right to be protected from the consequences of domestic political, i.e. individual moral, failure.

However, Walzer notes an important rider to Mill's apparently rigid position: force directed by a state at its own people will never prevail over a people ready to "brave labour and danger", except if it is reinforced from outside. Correspondingly, only if the external intervention force is prepared to undertake action that is continuous and sustained over time can it shift the domestic balance of power decisively toward the forces of freedom. Contrarily, however, it is precisely any prolonged or intermittent intervention that carries with it the greatest threat to the triumph of the domestic forces of freedom; the former, one surmises, because it portends either to overwhelm or to atrophy the internal liberation forces, the latter simply because of its unreliability.

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<sup>197</sup> Irving Howe (ed.) 'The Basic Writings of Trotsky' New York, 1963, 397, cited in Walzer *ibid.* at 179

<sup>198</sup> John M. Robson (ed.) 'The Collected Works of John Stuart Mill' Vols. 1-33, University of Toronto Press: Toronto and London 1963-1991 Vol. 21, 123-4, quoted in Varouxakis *op. cit.* at 60

These are, says Walzer, the “truths expressed by the legal doctrine of sovereignty”, which defines the “liberty of states as their independence from foreign control and coercion”. While, of course, not every internationally ‘independent’ state is domestically ‘free’, he suggests that the recognition of sovereignty is “the only way we have” of establishing a ring within which battle for liberty can be conducted and sometimes won. As with individuals, so with sovereign states: there are some things that we cannot do, even when it is ostensibly for their own good.

The dangers of and barriers to intervention remain. Nevertheless, the language of human rights is creating a transnational justice constituency that continues to pressurise states to improve their domestic conduct. It is this constituency that promises to ensure the creation of a means more dependable than either unilateral state-to-state, or multilateral, intervention has proven to be. As Maurice Cranston has said<sup>199</sup>: “There is indeed something deeply absurd in an arrangement by which something so personal and individual as the rights of man should be settled in committees to which only governments have access; it is a situation worthy of Lewis Carroll”.

Consequently, concedes Walzer, “the ban on boundary crossings is not absolute”, partly because of the frequently “arbitrary and accidental nature” of such borders, and partly because of the ambivalent relationship between the political community or communities within those borders and the government that holds that ring. Both of these grounds are of immense significance for post-colonial Africa, one would suggest, especially in view of the debate around ‘state failure’ in Africa<sup>200</sup> and Hedley Bull’s concession<sup>201</sup> vis-à-vis entities whose status as states is open to doubt, for whatever reason. Echoing Bull, Walzer – correctly, it is submitted – identifies a significant *lacuna* in the non-intervention principle: it is often unclear when a community is, in fact self-determining; when it qualifies, in effect, for non-intervention. In fact, Mill

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<sup>199</sup> source unknown

<sup>200</sup> see, for example, Jeffrey Herbst ‘Responding to State Failure in Africa’ *International Security* Vol. 21 No. 3 (Winter 1996/7) 120-144; and Shadrack Gutto ‘The African state, human rights and refugees’ in *Putting People First* by Mathoma *et al.*, *op. cit.* 73-84, especially 76-7

later modified his position to hold that 'liberal' powers have a right to "assist struggling liberalism", without the condition precedent of ongoing interference by a foreign power<sup>202</sup>.

The prohibition on intervention is, accordingly, subject to unilateral suspension in three categories of case where it apparently fails to serve the purposes for which it was devised:

1. When a set of borders contains two or more political communities, one of which is already engaged in a large-scale military struggle for independence. In other words, when the international community is faced with a war of **national liberation or secession**. Examples are numerous: North and South Korea; North and South Vietnam; East Timor and Indonesia; Eastern Europe during the Cold War; the Kurds and Iraq and Turkey; Afghanistan; Sudan; Ethiopia and Eritrea; Katanga and Zaire; and the range of anti-colonial struggles in Central America and Africa.
2. When the borders have already been crossed by the armed forces of a foreign power, even if invited by one of the parties to a civil war. This constitutes the instance of **counter-intervention**. The wars in the former Yugoslavia, Angola and Namibia and, more recently, the conflict in Zaire/Democratic Republic of Congo, spring to mind.
3. When the **violation of human rights** within domestic borders is so abhorrent that it makes talk of community or self-determination or 'arduous struggle' seem cynical and superfluous, such as in cases of enslavement or genocide.

#### **ad 1. National liberation or secession**

A difficulty arises in trying to ascertain whether a liberation or secessionist movement in fact represents a distinct community, or that the community has voluntarily

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<sup>201</sup> Bull 'Human rights and world politics' in Pettman *op. cit.* 79-91 at 83

<sup>202</sup> Varouxakis *op. cit.* at 70

coalesced as opposed to succumbed to the threatened or actual terror of a superior force. Consequently, the mere appeal to the principle of self-determination is insufficient: evidence must be furnished that a community exists whose members are committed to independence and are ready and able to determine the conditions of their own existence. Thus the requirement of a political or military struggle sustained over time.

Domestic despots are, according to this scenario, protected, but perpetrators of imperial or colonial oppression are not. The reason underlying the distinction may be found in the supposed task of international society, viz. to establish independent communities, and not necessarily liberal or democratic ones. While, however, counter-intervention for the sake of independence is 'honourable and virtuous', it is not always necessarily prudent – or even morally required – because of the dangers involved.

#### *ad 2. Civil War*

It is rare that a national liberation movement unambiguously embodies the claims of a single, unified political community, is capable of sustained military action, and is challenged by a clearly alien force whose intervention can be avoided or halted without risking a wider war. The prospective third party intervenor is more frequently faced with a confused web characterised by claim and counterclaim. It is, consequently, extremely difficult to establish the point at which a direct and open intervention, military or otherwise, may be fairly described as a counter-intervention. It is similarly difficult to predict the effects of such intervention.

In these circumstances a qualified form of self-help is applied. Assistance to the established government is permitted on the grounds that it is 'the official representative of communal autonomy in international society'. Assistance may, however, be given for only as long as the government faces only internal dissension, rebellion or insurgency. As soon as the insurgents acquire sustained control over some significant portion of the territory and population of the state, they are to be regarded as

belligerents with rights, including an equality of status with the government. In such circumstances, neutrality is enjoined and even obligatory. For once a community is effectively divided, foreign intervention (as discussed earlier) rarely serves the cause of self-determination.

Regrettably, it is suggested, this position can amount to a bare endorsement of *de facto* positivist realism, as it succumbs to the exercise of sheer force. Mill and Walzer argue that “foreign states cannot establish or disestablish the legitimacy of a government”. It cannot be gainsaid: there can be no doubting the central importance of the standing of the government with its own people. But, one would continue, the stated position is insufficiently nuanced to take account of whether the population is divided as a result of the exercise of force or of choice. Granted that it may be extremely difficult to ascertain the truth of the matter, but it is suggested that an effort should at least be made to determine whether sheer overwhelming brute force has quenched the fires of liberty, and whether it has been supplemented from outside a territory.

But what is the test of legitimacy of and popular support for a government where ‘true’ democracy is unknown? Walzer and Mills would say that it is the test of self-help. The legitimacy of a new regime is assumed during a period of grace, giving it time to build support. But a government that receives economic and technical aid, military supplies and strategic and tactical advice, and is still unable to instil obedience, let alone allegiance, in its population, is plainly illegitimate, whether defined according to sociological or moral standards. Ultimately, therefore, counter-intervention is morally permissible only on behalf of a government that has already passed the self-help test.

### **ad 3. Humanitarian intervention**

A legitimate government, then, for Mill, is one that can fight its own internal wars. And external assistance in such wars is, says Walzer, correctly termed counter-intervention only when it balances, and does no more than balance, the prior intervention of another power, making it possible once again for the domestic forces to win or lose on their

own. The result of civil wars should not be indicative of the strength of the intervening states, but of the domestic balance of power.

There are, however, other instances where the external players do not wish the internal balance to prevail – precisely because it is an artificial balance maintained by force. If the dominant forces within a state are engaged in massive violations of human rights, insistence upon self-determination and self-help is neither appealing nor persuasive, despite the limitations and potential complications that have been recognised<sup>203</sup>.

Walzer distinguishes the reference to self-determination and self-help as applying to the freedom of the political community as a whole; it is inapplicable when the basic survival or essential liberty of a substantial numbers of its members is threatened. In such cases there may well be no help except from outside. Crucially, we are then obliged to query the very existence of a self-determining political community when a government viciously attacks its own people. In these circumstances, the government and its forces are easily classified as criminal and guilty of crimes against humanity. Humanitarian intervention, then, is the form of intervention that is most closely analogous to what, domestically, may be characterised as law enforcement or the maintenance of law and order.

Nevertheless, intervention even in these circumstances requires that an international frontier be crossed, which is forbidden by the legalist paradigm – unless it is authorised, in present circumstances, probably by the international society of nations through the United Nations. The fact of the matter is that unilateralism is the norm in the international arena, but it is of greater concern when it involves a response to domestic violence because it can so easily be used as a cover for aggression aimed at dominating and coercing a susceptible neighbour.

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<sup>203</sup> Booth *op. cit.* at 120



Hence, many lawyers prefer to abide by the legalist paradigm, merely denying legal recognition to the need for intervention and asserting that humanitarian intervention “belongs not in the realm of law but of moral choice, which nations, like individuals, must sometimes make...”<sup>204</sup>. This is acceptable, says Walzer, only if one recognises that moral choices are not simply *made*; they are the products of judgment, for which one requires criteria. If the law does not provide the necessary criteria, they are nevertheless present in our ‘common morality’.

Thus, intervention is justified when it is a calculated, proportionate response (with reasonable prospects of success) to actions that shock the conscience of ordinary men and women. There is, therefore, concludes Walzer, no moral reason “to adopt that posture of passivity that might be called ‘waiting for the UN’ (‘waiting for the universal state, waiting for the messiah ...’)”. Any state capable of stopping the slaughter has a right, at least, to try to do so. The fact that the legalist paradigm excludes such efforts indicates only the inadequacy of the paradigm to account for moral realities.

The revisionist paradigm may, therefore, be summarised as follows: States may be invaded and wars justly begun to assist secessionist movements (once they have demonstrated their representativeness), to balance the earlier interventions of others states, and to rescue peoples threatened with massacre. In each of these instances we permit or, afterwards, either praise or decline to condemn, these ‘violations’ of the formal rules of sovereignty. We do so on the grounds that they uphold the values of individual life and communal liberty – of which sovereignty is merely an expression and from which it is, ultimately, derived.

The limitations and provisos are central to the revisions. While it is sometimes argued, says Walzer, that it would safer to insist on an absolute rule of non-intervention

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<sup>204</sup> Thomas M Franck and Nigel S Rodley ‘After Bangladesh: The Law of Humanitarian Intervention by Military Force’ 67 (1973) *American Journal of International Law* 304, quoted in Walzer *op. cit.* at 193

because of their frequent disregard, the strict rule may also be ignored, and we are then left with no criteria to judge what will happen next. In any event, we do possess 'valuable', in the sense of value-laden, standards in the form of internationally binding legal commitments to human rights. Rather be guided by these, one would suggest, than by a cold neutrality. Neutrality, or a stance in favour of strict non-intervention, amounts to the same thing as intervention, observed Talleyrand, this time in favour of the *status quo*<sup>205</sup>.

#### 4.4 Armed humanitarian intervention and the law

Intervention with the aim of restoring an internationally acceptable level of human rights observance is probably the most controversial enforcement option available in human rights law. It is frequently seen as "simply a cloak of legality for the use of brute force by a powerful state against a weaker one". "[E]xperience has shown how readily more powerful states have used the pretext of a higher good to impose their will and values on weaker states"<sup>206</sup>.

Humanitarian intervention has never been accepted as a warrant for the unilateral use of force by a state. Chapter VII of the UN Charter thus provides that only the Security Council shall have the authority to determine the existence of a threat to or breach of the peace, or an act of aggression, or to decide on measures to maintain or restore peace.

Furthermore, Article 2 (4) of the UN Charter, the definitive international statutory provision on the use of force, states that: '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

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<sup>205</sup> Charles-Maurice Talleyrand, quoted in Oscar Schachter 'International Law in Theory and Practice' Martinus Nijhoff: The Hague 1991 at 1640-41, cited in Christopher M. Ryan 'Sovereignty, Intervention and the Law' *op. cit.* at 79

<sup>206</sup> Farooq Hassan 'Realpolitik in International Law: After the Tanzanian-Ugandan Conflict' in *Willamette Law Review* Vol. 17 No. 4 (1981) 850-60, quoted in Ryan *ibid.* at 90

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’

Literalists argue that that the only permissible exception is the narrow provision in Article 51 for the right of self-defence. However, this position fails to take account of the changing political and social context in which international law must operate, and would amount to “a tyrant’s charter”<sup>207</sup>. Even in the past, scholars like the naturalist Hugo Grotius asserted the right of humanitarian intervention as a component of the just war theory<sup>208</sup>. Thus, he said, if a tyrannical leader “should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded”. It is possible to argue, on the basis of an interpretation of the Purposes and Principles of the UN as set out earlier, that the UN Charter permits humanitarian intervention, if authorised by the Security Council. This argument is further supported on the basis of Articles 55 and 56’s requirement that states take joint and separate co-operative action for the promotion of universal respect for, and observance of, human rights and fundamental freedoms

Despite this mandate, however, no action taken by the United Nations to alleviate human rights violations has been overtly taken in terms of Articles 55 and 56<sup>209</sup>. Instead, the UN has, not unreasonably, determined that a threat to or breach of international peace or security had occurred and authorised action in terms of Chapter VII.

The UN Charter is not the only international legal instrument providing possible sources of authority for intervention in cases of human rights violations in Africa. Article 8 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) states that any contracting party may call upon the ‘competent organs

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<sup>207</sup> Ken Booth *op. cit.* at 116

<sup>208</sup> Hogo Grotius *De Jure Belli ac Pacis* trans F W Kelsey, M W Dunne: Washington D.C. 1925, 584, cited in Ryan *op. cit.* at 91

<sup>209</sup> *ibid.* at 92

of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide'<sup>210</sup>.

The International Covenant on Civil and Political Rights (1966) provides states with recourse to dispute settlement procedures established by general or particular international agreements in force between them; these can range from non-forcible diplomatic pressure to forcible military action<sup>211</sup>. However, any UN-authorized response must be taken in accordance with the principles of proportionality and necessity.

Importantly, interventions under the auspices of the United Nations are less susceptible to suspicions of ulterior motives because they will be subject to closer scrutiny than would be the case in the event of unilateral action. One may, thus, superficially contrast the UN enforcement action in Kuwait and Somalia, for example, with the NATO action in Yugoslavia/Kosovo on the narrow basis of authorisation. While there can be no doubt that the former were the subject of heightened official political scrutiny in terms of adherence to closely defined mandates, the latter was equally the subject of intense media scrutiny (as were the other two operations) that arguably served much the same purpose.

Thus, while the technical illegality of the NATO operation cannot be doubted, one cannot deny the initial moral warrant for some degree of pre-emptive intervention in a chronically pathological situation and in the face of UN Security Council paralysis. It is submitted that these considerations were only marginally dulled by the sometimes over-zealous and reckless action during bombing operations over Belgrade. Indeed, the recent electoral overthrow of Slobodan Milosevic as the federal Yugoslavian leader, followed by the establishment of diplomatic relations with the primary actors in the

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<sup>210</sup> adopted 9 December 1948, UN Treaty Series (Vol. 78, 1951) at 277, cited in Ryan *op. cit.* at 93

<sup>211</sup> adopted 16 December 1966, Article 44, cited in Ryan *op. cit.* at 93

NATO action, speaks louder, one would venture, than the alleged ‘immorality’ of illegality.

The most important issue in a situation of human rights violation is to ascertain when such internal violations pose a threat to international peace and security. Some scholars have argued that human rights contraventions arising directly from internal conflicts that are sufficiently large to justify the attention of international society are *a priori* large enough to represent a threat to international peace and security<sup>212</sup>.

UN Secretary General Javier Perez de Cuellar addressed the issue in his 1991 annual report<sup>213</sup>:

‘It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be systematically violated with impunity. ... [T]he case for not impinging on the sovereignty, territorial integrity, and political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty ... includes the right of mass slaughter or of launching systematic campaigns of decimation or of forced exodus of civilian populations in the name of controlling civil strife or insurrection.’

However, the question of which standard should be applied by international society to determine whether a violation is sufficiently large to warrant international intervention remains unanswered<sup>214</sup>. In the instances of Iraq, Somalia and Haiti, the Security Council decided that abuses were sufficiently severe to pose a threat to international peace and security. But the standard utilised is unclear. The challenge posed to international society by the absence of this standard is to move beyond the political

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<sup>212</sup> David Scheffer ‘Toward a Modern Doctrine of Humanitarian Intervention’ *University of Toledo Law Review* Vol. 23 No. 1 (1992), 263, quoted in Ryan *op.cit.* at 95

<sup>213</sup> *Report of the Secretary General of the United Nations* Press Office of the United Nations: New York, NY 1991, 5, cited in Ryan *ibid.* at 96

<sup>214</sup> Ryan *ibid.* at 96

considerations that hamper international co-operation and accept a set of criteria that contradicts the traditional view of sovereignty.

One way to meet the challenge is to accept the liberal and natural law interpretation of sovereignty as derived from 'the people'. It is possible to argue that, when a state makes itself guilty of massive cruelty and persecution of its people in a manner that deprives them of internationally recognised human rights, it is no longer behaving as a state properly so-called. It has transgressed the bounds of domestic jurisdiction, and has violated a fundamental precept of humanity. The mechanism contained in Articles 55 and 56 of the UN Charter (discussed above) would then be available to authorise action on the basis that domestic violations of human rights constitute a threat to international peace and security.

A second argument endorsing the legality of intervention is based upon the traditional *ius cogens* view that, if a consensus exists in the domestic legal systems of a number of states guaranteeing the basic human rights of their inhabitants, these guarantees are regarded as norms of international customary law. Breach of these laws through state-sanctioned force could, therefore, constitute a breach of international peace and security requiring a Security Council response in terms of Chapter VII, Article 39.

#### **4.5 Armed humanitarian intervention in historical practice**

If the legal foundation for humanitarian intervention can thus be said to exist, how are we to address the ever-present threat of Security Council inaction arising from use of the veto? It is argued that a precedent and an admittedly imperfect mechanism already exist in the 'Uniting for Peace' Resolution of the General Assembly when dealing with the Korean situation<sup>215</sup>. The Resolution permits the General Assembly to take action if the Security Council is unable or unwilling to address a threat to or breach of international peace and security<sup>216</sup>. It was based on the view that Article 24 gives the

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<sup>215</sup> of 3 November 1950, see Akehurst *op. cit.* at 186-7; and Harris *op. cit.* at 682-7

<sup>216</sup> Ryan *op. cit.* at 83

Security Council only **primary** (i.e. not 'sole') responsibility for the maintenance of international peace and security<sup>217</sup>.

The mechanism is, however, imperfect because it depends on rare political agreement, although the voting threshold is lower in the sense that no veto power exists and a two-thirds majority is required by Article 18 on 'important questions'. On the other hand, the emergence on the African continent of a growing democratic consensus would suggest that a convergence of fundamental values is taking place. The 'difficulty' here with the argument for intervention is that this democratic consensus is emerging without the need for or the implementation of a settled right of humanitarian intervention.

On the other hand, the existence of a right and the consequential creation of an organised system of operationalisation could, arguably, hasten the advance of democracy or, at least, an end to the destructive intrastate conflicts that do not give democracy a chance. Conversely, the Nigerian experience of persistent religious and ethnic conflict, even after the advent of democracy, alerts us to the possible accuracy of Mill's stern caution against the futility of external intervention to impose democratic and human rights norms on a people who have not, as a whole, yet begun to appreciate their true value.

Stanley Hoffmann<sup>218</sup> has echoed Mill by endorsing Emmanuel Kant's emphasis on the primary importance of the receptivity of the domestic *milieu*. While Kant was right to recognise the interdependence of the twin solutions to the two problems of human rights and peace, he was also correct to stress the decisiveness of the internal arrangements within a country. Thus, whether or not a particular country upholds human rights standards depends, ultimately, not only on whether external peace permits domestic 'civility', or on favourable internal circumstances (often subject to the whims

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<sup>217</sup> The argument was approved in the *Certain Expenses of the United Nations Case*, ICJ Reports 1962, 151, quoted in Harris *op. cit.* at 698-704; and Akehurst *op. cit.* at 186

of passing rulers). It depends also on the social, economic and political structures arising from underlying values: the state of human rights is the **mirror** of the polity, not *vice versa*. Consequently, one may conclude that the enforcement of the international normative order requires the **prior** achievement of some form of **domestic** liberal democratic consensus.

Alexander Cockburn<sup>219</sup> has observed that the US has frequently intervened (usually via CIA-funded coups, insurrections and assassinations) to effect a change of government in developing countries. The outcome has, almost without exception, been contrary to America's long-term interests and values. Cockburn cites mainly examples in the Middle East: Iran, Iraq, Afghanistan and Pakistan. But, given the history of American interventions in central America and the Far East, the principle discussed above appears to hold: where there is no democratic domestic consensus in the targeted state, each of these indirect interventions has succeeded merely in muddying the waters for the United States. Intervention in support of factions or individuals on the grounds of their perceived power and influence has led to less stability, diversion from the democratic path and lower standards of human rights observance.

Would a world at peace, even because of respect for the normative order, be capable of transforming its members? asks Hoffmann. The dilemma he sees is that the effectiveness of the international normative order of human rights requires both a genuine (not merely a rhetorical) consensus on the values that inspire the order, and a global [i.e. supranational and independent] enforcement system that would constitute a revolution in international relations. He considers neither of these to be readily attainable.

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<sup>218</sup> Hoffmann Daedalus op. cit. at 32

<sup>219</sup> South African Broadcasting Corporation: AMLive 26 September 2001 [www.sabc.co.za](http://www.sabc.co.za) (Date accessed: 31 October 2001)



Nevertheless, he calls on liberal democracies to take the international dimension of human rights more seriously and, accordingly, a major foreign policy goal<sup>220</sup>, for reasons of morality and long-term self-interest. Elaborating upon the latter category of interests, he notes that development, social progress, a reduction in the levels of violence and a concomitant enhancement of psychological, economic and physical security, as well as environmental sustainability, require a “reorientation of politics and a redefinition of the national interest ... [to] ... incorporate ... more of the international interest...”. This reorientation produces “a pooling of sovereignties, and the spread and strengthening of international regimes”<sup>221</sup>. Such a strategy, he argues, would narrow the gap between the normative order and international practice.

Hoffmann rejects the realist response of ‘It can’t be done and you should not try’ as unrealistic: it is essential that we try, however difficult. It to be essential, however, that not only governments but also the voluntary, informal and private sectors be brought on board, by restrictive legislation, if necessary, so that public policy is not undercut by, for example, bankers and corporations investing in a target country. Central to his plan is the requirement that it be multinational, to guard against the temptations of selfish national interest.

This brief description of a multi-faceted approach to the challenges of human rights protection finds an echo in a description of actual, but failed, ‘alternative’ intervention in Rwanda before the 1994 genocide<sup>222</sup>. Adopting a ‘conflict resolution’ conception of intervention, as opposed to an ‘international society’ approach, Bruce Jones argues that

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<sup>220</sup> Hoffmann *op. cit.* at 35

<sup>221</sup> *ibid.* at 37. C B Macpherson *The real world of democracy* Oxford University Press: New York and Oxford 1966, has also discussed future domestic and foreign policy imperatives for liberal democracies. He argues at 66-7 that “...national power from now on is going to depend on moral advantage, on moral stature, then the claims of morality and power will coincide. The way to national power will be the recognition and promotion of equal human rights”. Internationally, “... if the liberal capitalist economies merely retain their present moral advantage and disadvantage, the net balance of advantage will tip against them, and they will decline in relative power”.

<sup>222</sup> Bruce D Jones ‘Intervention without borders: humanitarian intervention in Rwanda, 1990-94’ *Millennium: Journal of International Studies* (1995) Vol. 24 No. 2 225-249 at 225-6

the latter accords humanitarian status to interventions undertaken with humanitarian motives, whereas the former are measured in terms of their outcomes. They argue that a robust theory of intervention should incorporate both motives and results in assessing the humanitarian character of actions.

## ***CHAPTER FIVE: AFRICAN PRIORITIES***

### **5.1 Human rights and security**

John Stremlau, writing on African priorities before the Millennium Assembly of the United Nations in September 2000, argued<sup>223</sup> that sub-Saharan Africa's two biggest countries, Nigeria and South Africa, should be heading a diplomatic initiative advocating a people-centred approach to regional security and development. "Consistent with their pro-democracy policies would be a call for regional and international organisations to hold member governments more accountable for the denial of human rights and other domestic abuses of power that can lead to deadly conflict and bedevil development". He predicated this forecast on the contention that "recent political disasters in Africa rank among the world's worst complex emergencies of the 1990s. They have destroyed progress and prospects of economic development, and diverted scarce foreign assistance to urgently needed but less productive humanitarian purposes".

The priorities of Western donor governments are moving away from country-focused development programmes that have proven to be the mainstay of corrupt and abusive governments. The priority in new funding programmes is to prevent deadly conflict and accelerating poverty reduction, and to address a new generation of transnational environmental, public health, crime and other public safety problems. African countries, in order to access greater proportions of the available donor funds, will need to re-orient their own conduct and relationships toward a greater regional focus.

This, Stremlau suggests, could lead to a new North-South compact in which developing countries generally will also have to agree to accept donor conditionality in the form of stricter internationally-imposed conditions and accountability for the management of

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<sup>223</sup> 'Putting People First: Priorities for Africa and the UN Millennium Assembly' in *Putting People First: Priorities for Africa and the UN Millennium Assembly* Mathoma et al., op. cit. 1-27, at 1

their domestic political and economic affairs. In exchange, the North would agree to more generous funding and permit the South a greater role in the governing of the global institutions whose task it will be to “define and enforce stricter standards of local accountability”.

Although much ground needs to be covered before any such bargain may be struck, at least two factors are seen as motivating its future acceptance by representatives of both developing and developed countries:

- A growing realisation in Africa and internationally that existing approaches to conflict prevention, human rights protection and development have proven to be inadequate in stemming the tide of disintegration of many African states.
- A Western desire to avoid being drawn into further costly humanitarian crises, coupled with an even stronger aversion to mounting effective peace enforcement or peacekeeping operations. African proposals concerning preventive partnerships are, therefore, likely to be sympathetically received.

By promoting the rights and empowerment of the people rather than defending the exclusive sovereignty of states as the basis of world order, African leaders “can begin to make a moral case for a more equitable North-South relationship”. Stremlau adds the caveat that, crucially, the realisation of this prospect depends on African leaders demonstrating their readiness to hold each other accountable for implementing democratic values and practices. He cites the anti-colonial and anti-apartheid struggles as a positive and hopeful precedent for achieving local success when Africans have advanced moral arguments globally. He recognises, however, that for African governments to judge each other’s domestic behaviour contradicts a central tenet of the continent’s post-independence international relations. ‘Interference’ of any kind in the internal affairs of another state, “although not uncommon, until very recently has been routinely rejected by the ... OAU except in cases of colonial territories or apartheid South Africa”.

The decision at the 1999 Algiers OAU Summit to oppose any government that assumes power by military means reflects this change. However, the resolution received the support of several delegates whose accession to power had been by precisely such means, and military threats to civilian rule are by no means a thing of the past.

It is difficult to disagree with Stremlau when he observes<sup>224</sup> that contemporary global political struggles are no longer ideological, but are more about equity than liberation. Matters of freedom and justice draw their moral strength from the principle of the inherent equality of people, which, he states, is the “cornerstone of political order in any democratic nation” and, echoing Umozurike, “the first article of faith among all of the world’s major religions”.

The world’s older democracies are discovering that, if the principle is to retain its relevance as the foundation for social and political order, it must be applied also in the economic sphere of life. All inhabitants must be allowed increased equalities of economic opportunity. The global demographic and economic trends noted earlier signal escalating levels of conflict unless novel means of adaptation and integration can be devised to reflect increased equity and fairness.

The European Westphalian international system, applied to post-colonial Africa, has clearly not prevented a disastrously dysfunctional scenario across much of the continent, in which warlords have vandalised extensive areas of west, central and east Africa. The OAU’s strict adherence to the principles of sovereignty and non-interference has proven effective in avoiding more than a few interstate wars. However, even those states that have benefited from more enlightened and beneficent leadership are faced with the growing reality that the prevailing norms of sovereignty are more often a hindrance than a help in meeting the challenge of economic and cultural globalisation.

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<sup>224</sup> *ibid.* at 2

Not only does political self-determination frequently belie economic dependence, but unless people's security within states is soon enhanced, the danger exists that domestic human insecurity will spill over and undermine international security among and between states. Three current examples of the accuracy of the fear of this threat already exist. They are the multi-state meltdown around the Democratic Republic of Congo, the effect on Namibia and Zambia of the (almost entirely value-free) civil war in Angola, and the contagion of instability among the small states of West Africa.

The inability or unwillingness to deal democratically with the destructiveness of factionalism has made Africa the world's most conflict-ridden region, as well as host to 23 of the world's poorest countries<sup>225</sup>. Consequently, Africa's leaders are beginning to examine their more distant history in an endeavour to discover possible models to surmount current failures. Traditional notions of community (discussed earlier) are included in this consideration and may encourage the trend to greater receptivity to norms and institutions beyond sovereignty and "more responsive to the needs and aspirations of communities within and across"<sup>226</sup> existing state boundaries. Increased interest in the potential benefits of regional co-operation and even integration in the economic, financial and security fields provides some evidence of the perceived decline in significance of what is, essentially, only ever either nominal or partial sovereignty.

These harsh realities have stirred renewed interest in the value of human rights observance as a key indicator of a country's political health and stability. A deterioration in the status of human rights observance in respect of individuals or minorities is increasingly seen as an early warning sign of potential conflict. Boutros Boutros-Ghali, in his 1992 Secretary General's report to the UN Security Council, entitled 'An Agenda for Peace', initiated consideration of a more people-centred approach to security and development by noting that a failure to protect human rights

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<sup>225</sup> K Annan *The Causes of Conflict and Promotion of Durable Peace and Sustainable development in Africa* Report of United Nations Secretary General Kofi Annan to the UN Security Council, May 1998, cited in Stremlau *op cit.* at 5

<sup>226</sup> *ibid.*

risked the failure and fragmentation of more and more states<sup>227</sup>. Should this happen, he warned, the relative peace and stability of the current international order would be subverted.

President Mandela elaborated on this theme in a 1994 essay<sup>228</sup>:

‘While governments should be mindful of the high ideals of human rights, they should be conscious of a democratic realism that surrounds the issue, too. The neglect of human rights is the certain recipe for internal and international disaster.’

A few years later, at the June 1997 OAU Summit in Harare, the new UN secretary-general, Kofi Annan, made the “strongest endorsement of human rights ever heard at such a gathering”<sup>229</sup>:

‘The conflicts that have disfigured our continent have, all too often, been accompanied by massive human rights violations. I am aware of the fact that some view this concern as a luxury of the rich countries for which Africa is not ready ... I find these thoughts truly demeaning of the yearning for human dignity that resides in every African heart ... Human rights are African rights, and I call upon you to ensure that all Africans are able to fully enjoy them.’

Annan followed this statement with a forceful report a few months later to the Security Council that analysed conflicts in Africa, noting that<sup>230</sup>:

‘Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intrastate in origin. ... The consequences of those conflicts have seriously undermined Africa’s efforts to ensure long-term stability, prosperity and peace for its peoples ...

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<sup>227</sup> B Boutros-Ghali *An Agenda for Peace* Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277-S/24111, 17 June 1992, cited in Stremlau *ibid.* at 6

<sup>228</sup> N R Mandela ‘The waning nation-state’ in N P Gardels (ed.) *At Century’s End: Great Minds Reflect On Our Time* ALTI: La Jolla, Calif. 1996 at 291, quoted in Stremlau *ibid.*

<sup>229</sup> UN Press Release, ‘Secretary General calls for efforts to unleash African “Third Wave” based on democracy, human rights, sustainable development’, SG/SM/6245/Rev.1, 2 June 1997, quoted in Stremlau *ibid.*

<sup>230</sup> Annan *The Causes of Conflict op cit.* at 1, quoted in Stremlau *ibid.* at 7

Preventing such wars is no longer a matter of defending states or protecting allies. It is a matter of defending humanity itself.’

The situation has not improved since then: Africa in 1998 ranked first among the world’s regions for the number of deadly conflicts<sup>231</sup>. Africa, consequently, continues to produce the highest number of internally-displaced people and refugees spilling over borders, draining resources and destabilising neighbouring states. Sadako Ogata, the erstwhile United Nations High Commissioner for Refugees, has reminded governments that “[t]oday’s human rights abuses are tomorrow’s refugee movements”<sup>232</sup>.

A more intrusive, people-centred approach to regional security is indicated here, too, but devising agreed policies on intervention in African countries where human rights abuses are intensifying continues to face significant political resistance. Even non-binding statements criticising a government’s domestic policies continue to be viewed by members as violating the UN Charter’s principle of non-interference in the internal affairs of a state. This wariness may well stem from reluctance to subject themselves to the prospect of similar treatment by a divided and politicised organisation at some point in the future. This already occurs within the confines of the UN’s Human Rights Commission, where the United States was recently voted off that body. That argument, however, may be met with the response that it is simply another argument in favour of some form of open judicial or quasi-judicial process. This function might, perhaps, be broadly akin to the incipient International Criminal Court or, alternatively, a type of international human rights ombudsman, with the power of independent recommendation, as opposed to the overtly political and narrow nationalistic process that currently persists.

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<sup>231</sup> The University of Hamburg’s Research Group on the Causes of War, December 1999, *The Star* Johannesburg 21 December 1999, cited in Stremlau *ibid.* at 7

<sup>232</sup> UN High Commissioner for Refugees, *The World’s Refugees: In Search of Solutions*, Oxford University Press: Oxford 1995 at 57 *ibid.*



Only once in about forty years has the UN intervened in the internal affairs of a state in an attempt to contain or reverse severe human rights abuse. The only exception was the 1979 Security Council decision in terms of Chapter VII of the UN Charter that apartheid posed a sufficient threat to international peace. It is now widely agreed that the sanctions imposed in terms of the Security Council's resolution contributed significantly to the peaceful end to oppression in South Africa. Bearing in mind this precedent, it may have been theoretically possible that many of the more recent conflicts in Africa and elsewhere may have been avoided had earlier action been taken by either the UN or the appropriate regional body or, even, an independent, professional, early-warning body.

It is, says John Stremlau, "in this spirit" that ex-President Nelson Mandela has called for a "more comprehensive [and value-laden] international policy of 'democratic realism' to replace the traditional concept of 'realism'". The latter approach presumes that "all states seek maximum advantage in their international relations and that, at best, peace will be a function of a balance of power capable of deterring the most powerful from seeking domination"<sup>233</sup>.

This vision of 'democratic realism' suggests a world in which diversity (in terms of which virtually everyone is a member of a minority) is protected, not just between states, but within them. The practical advantages of the consequent peace and stability will be enhanced prospects for the combating of poverty as greater predictability encourages and attracts the foreign direct investment needed to provide the stimulus for growth in the absence of domestic savings.

Considerations of sovereignty ensure continued resistance by states generally to foreign guidance on democracy and human rights. Nevertheless, scholars have endorsed the perception of increased responsiveness and accountability, and an egalitarian approach to governance among an emerging politico-military bloc of market-oriented but

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<sup>233</sup> Stremlau *ibid.* at 8

pragmatic African states that aim to end the continent's decline<sup>234</sup>. To the extent that this bloc may be evidence of a 'democratic realism', it may hold out the hope of a growing trend in favour of a greater sensitivity to the needs and aspirations of Africa's citizenry.

## **5.2 The African Renaissance and human rights: the development of South African foreign policy**

It is into this context that South African Presidents Nelson Mandela and Thabo Mbeki have spoken, with their shared vision of a continental reawakening. How are we to assess South African foreign policy since the 1994 elections? Has South African foreign policy promoted African observance and protection of human rights, either directly or indirectly? Has South Africa adopted a stance that could be said to have assimilated the opportunities in the evolving global and continental situation?

The years immediately following South Africa's first democratic elections in 1994 were sprinkled with hope, unedifying confusion and disappointment over the place of human rights in South Africa's foreign relations.

### **5.2.1 Human rights at the forefront of South African foreign policy**

Barely a month after his inauguration as President of the newly democratic South Africa in June 1994, Nelson Mandela addressed a summit of OAU heads of state<sup>235</sup>. He was infused with hope that Africa was, at last, on the threshold of a new era. He began his address with a reference to Rome's defeat of Carthage, and proceeded to catalogue "a litany of African suffering and subjugation", culminating in the twentieth century when Africans were "the outstanding examples of the beneficiaries of charity" and "the permanent victims of famine, destructive conflicts and the pestilences". He acknowledged that many in his audience had failed their people: "We must face the

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<sup>234</sup> Dan Connell and Frank Smyth 'Africa's New Bloc' *Foreign Affairs* March/April 1998 Vol. 77 No. 2, 80-94

<sup>235</sup> Alec Russell *op. cit.* at 290

matter squarely that where there is something wrong in how we govern ourselves, it must be said that the fault is not in our stars but in ourselves that we are ill-governed”.

Mandela nevertheless asserted that Africa’s time had come: “We have it in ourselves”, he said, “as Africans, to change all this. We must assert our will to do so. We must say that there is no obstacle big enough to stop us from bringing about an African Renaissance.”

However, recalls Alec Russell<sup>236</sup>, Pierre Sané, Secretary General of Amnesty International, “ridiculed” the idea of a new dawn during his visit to South Africa in 1998 ahead of the fiftieth anniversary of the UN Declaration of Human Rights. He cautioned against “unfounded optimism” as being “as dangerous for Africa as knee-jerk pessimism”. “Renaissances have been promised by African leaders since independence”, he said. “In the sixties we heard of Renaissance. In the eighties we heard of it.” Echoing what then-Deputy President Thabo Mbeki was saying at the time, Sané said “The reality of Renaissance to the ordinary people will come [only] when human rights are a reality ... and when the right to food and access to health care is a reality. As long as those are not the case it will remain what it is, just talk.”

The disappointment and cynicism had first set in following South Africa’s about-face on Nigeria that brought it more into line with the hesitant approach adopted by other African countries. In contrast to Nelson Mandela’s trailblazing call in 1995 for sanctions against the Nigerian dictatorship, South Africa subsequently tried to ‘pull the teeth’ from a United Nations Human Rights Commission resolution which criticised the West African country’s human rights record<sup>237</sup>.

The Department of Foreign Affairs acknowledged that it had withheld support for the resolution until it was watered down, but argued that this was the best strategy to get

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<sup>236</sup> *ibid.* 292

<sup>237</sup> Stefaans Brummer *Weekly Mail & Guardian* 19 April 1996 [www.mg.co.za](http://www.mg.co.za)

consensus among African, Asian and Latin-American countries. Such a consensus was sought apparently in order to increase the chances of the European Union-sponsored resolution being adopted by the United Nations Human Rights Commission in Geneva.

Jackie Selebi, South Africa's ambassador to the UN High Commission in Geneva, said that South Africa had taken the view that it "should make a contribution to a position where African countries can for the first time get consensus on an issue that involves [Nigeria]". Selebi was later appointed Director-General of the Department of Foreign Affairs.

This was quite different from Mandela's courageous and outspoken call for oil sanctions against Nigeria immediately after the hanging in November 1995 of minority rights activist Ken Saro-Wiwa. Mandela's stance had been praised, but not heeded, by many in the West, but African countries made it clear they were not amused by what they saw as Mandela's disregard for African solidarity. South Africa's position before the UN Human Rights Commission was seen as final confirmation that it had prioritised African solidarity, and would no longer act alone.

Indeed, South Africa's regional partners in the Southern African Development Community had made it clear at the body's pre-Christmas 1995 summit that South Africa "had to do things on a regional basis". This criticism was, clearly, taken to heart and, thereafter, became a strong theme in South Africa's foreign policy. This became evident from the fact that South Africa, and Mandela, fell silent on Nigeria during 1996 to the extent that South Africa tried to discourage a meeting of Nigerian opposition groups in the country by, for example, not issuing visas timeously. In other matters concerning individual countries, such as the crisis in Swaziland, where pro-democracy and labour groups asked for South African help, the Department of Foreign Affairs said repeatedly it would act only in conjunction with its regional partners<sup>238</sup>.

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<sup>238</sup> Speaking at the launch of the African Renaissance Institute in Pretoria on 11 October 1999, Mbeki re-emphasised the essential priority of consensual action in advancing the African Renaissance, albeit

Negotiations to water down the resolution coincided with a visit by Foreign Minister Alfred Nzo to London for a meeting of the Commonwealth 'Committee of Eight'. The Committee, of which Nzo was a member, was established by the Commonwealth at its annual heads of state meeting in New Zealand in November 1995 to examine human rights abuses in Nigeria, Sierra Leone and the Gambia. Part of the Committee's mandate was to visit Nigeria on a fact-finding mission, but the Nigerian dictator, General Sani Abacha, refused them entry on the grounds that it interfered with the country's sovereignty.

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with a democratic twist. South Africa's sensitivity to charges that it secretly harboured hegemonic aspirations were evident:

'...[T]hroughout the entirety of our political lives we have been exposed to the inspiring perspective of African unity and solidarity and the renewal of our Continent. ... I am convinced that all of us present here share a common vision in favour of African unity and solidarity, African development and renewal and an end to the marginalisation of our Continent in world affairs and development processes. It would seem to us vitally necessary that whereas, for some time, the achievement of these objectives has been left to our governments, it is necessary that we return this vision to the people.

'We are therefore of the firm view that there is a critically important and urgent need to develop a Popular Movement for the African Renaissance. Accordingly, we believe that political organisations and governments in all African countries should be mobilised to act in furtherance of the objectives of the African Renaissance.

'...we must move from the fundamental proposition that the peoples of Africa share a common destiny. Each one of our countries is constrained in its ability to achieve peace, stability, sustained development and a better life for the people, except in the context of the accomplishment of these objectives in other sister African countries as well. Accordingly, it is objectively in the interest of all Africans to encourage the realisation of these goals throughout our Continent, at the same time as we pursue their attainment in each of our countries.

'These goals can only be achieved through a genuinely popular and protracted struggle involving not only governments and political parties, but also the people themselves in all their formations. Such a popular movement for the fundamental renewal of Africa would also have to take into account the ... reality that:

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- the continental offensive can only be sustained if the active populations of all countries are confident that none of the countries of the continent, regardless of the extent of its contribution to the Renaissance, seeks to impose itself on the rest as a new imperialist power; and
- the forces for change have to be built up and consolidated within each country, without ignoring or underestimating the imperative and the potential for an increasing co-ordinated trans-national offensive for the mutually beneficial renewal of the continent.'

[www.anc.org.za/ancdocs/history/mbeki/1999/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index/html) (Date accessed: 13 October 2001)

As with the Commonwealth Committee of Eight mandate (from which South Africa later withdrew), the part of the EU resolution at the Human Rights Commission that South Africa wanted removed also sought an international probe into Nigeria's human rights situation. A draft version of the EU resolution said, among other things, that it was "deeply concerned about the human rights situation in Nigeria". It called for a range of human rights to be guaranteed and for Nigeria to take "immediate and concrete steps to restore democratic government". It also called for the appointment of a UN special rapporteur to "examine the human rights situation in Nigeria" and to report to the UN General Assembly and the Human Rights Commission. But, said Selebi, "African countries don't like a special rapporteur; in fact not any country likes a special rapporteur"<sup>239</sup>.

### 5.2.2 South Africa's foreign policy 'failures'

South Africa was, however, not alone in flinching from firm action on human rights. The subsequent Commonwealth heads of government meeting in Edinburgh had also held back from imposing tougher sanctions against the military regime in Nigeria<sup>240</sup>. The attempted military coup in Zambia, following so closely behind the decision of Commonwealth leaders not to impose tougher sanctions against the military dictatorship in Nigeria because of opposition from African countries, held "a searing lesson" for the international community, but especially for Africa and the Commonwealth, asserted *The Argus* in an editorial.

The lesson was that, "so long as the pervasive curses of modern Africa military coups are allowed to succeed and prosper through the easygoing response to them of the world's democracies, so long will Africa remain a politically unstable continent with huge impediments to trade and investment. The combative editorial in *The Argus* argued that the Commonwealth's failure to embrace President Mandela's call for far tougher sanctions against Nigeria "could only have encouraged those who at that very

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<sup>239</sup> Selebi indicated that a special rapporteur is seen as having very wide powers and as being "difficult to remove from the agenda".

time must have been conspiring to overthrow the elected government in Zambia". The "hand-wringing response of a majority of African Commonwealth leaders to the despotism in Lagos" had only aggravated a perception of invulnerability.

"The exciting vision of an African renaissance, a vision which had its genesis in South Africa's hard struggle for freedom and democracy, depends crucially on the advancement of democracy and human rights on the continent", it argued. However, what prospect was there of advancing this "great cause of renewal" if the Commonwealth failed to vigorously take action against those rulers who had subverted democracy and who exhibited contempt for human rights?

"The Commonwealth's African members failed democracy when they had shied away from President Mandela's proposals on Nigeria. Sadly for all who live in Africa", concluded the editorial, "the consequences [were] unlikely to be limited" to this instance.

"Renaissance", lamented *The Independent* of London<sup>241</sup> a short time later, echoing the caution concerning the continent, "is not a word we have come to associate with the African continent in recent years. Bloodshed and catastrophe, more often. Three decades after the end of the colonial era, the legacy has seemed bitter and poisoned. After the great wave of independence, one-party socialist regimes promised a utopia which never arrived in much of the continent, while capitalist-friendly dictators ruled and plundered the rest. The Cold War was fought by proxy between the allies of Washington and Moscow - sometimes just with money, sometimes with guns. The continent has been marked by famine, corruption and chaos."

Even in the 1990s there had been bloodshed on an unimaginable scale, where the world looked on in apparent helplessness. Nigeria, Sudan, Angola, Rwanda, Burundi, Sierra

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<sup>240</sup> Editorial 'The Commonwealth and democracy' *The Argus*, Cape Town, 1997 [www.iol.co.za](http://www.iol.co.za)

<sup>241</sup> Editorial 'Bloodshed and catastrophe' *The Independent* (London) 22 May 1997 [www.iol.co.za](http://www.iol.co.za)

Leone, Liberia, Mozambique had all been scarred by civil war, and the misery of millions that it caused. Not, then, a time for much optimism about the continent. And yet, the newspaper supported President Nelson Mandela's call for an African renaissance. Mandela had said that he was "convinced that our region and our continent have set out along the new road of lasting peace, democracy, social and economic development".

Despite the temptation of a cynical response, said *The Independent*, "it would be dangerous to dismiss this as the mere wishful thinking of an old man. Mandela, perhaps more than anybody else, has the moral right to be at odds with conventional wisdom about his continent." The editorialist saw an apparent boost for Mandela's optimism in the collapse of the Mobutu regime in Zaire, although Kabila himself had not yet shown whether he possessed democratic credentials. So Mandela's optimism had to be "hedged round, again and again". As Mandela himself acknowledged: "It is given that complex problems spanning decades will not lend themselves to easy solutions." But he also insisted that "[t]he time has come for Africa to take full responsibility for her woes, use the immense collective wisdom it possesses to make a reality of the ideal of the African renaissance whose time has come."

In politics, *The Independent* accepted, bringing people to believe that something could be achieved was one of the first stages in finding a path over apparently insurmountable barriers. If there was, urged the editorialist, "even the smallest possibility Mandela may prod his fellow leaders around Africa into raising their aspirations, and cleaning up their acts, he should be heard, and applauded".

Then-President Nelson Mandela was involved in a further instance of the clash of views over the appropriate place of human rights in South Africa's foreign policy. He accepted a controversial award from President Muammar Ghaddafi of Libya and paid an official visit to the country. Exiled Libyan opponents of the Ghaddafi regime wrote open letters to President Nelson Mandela urging him not to visit Libya and give his



tacit support to a “brutal, tyrannical regime”<sup>242</sup>. They argued that Mandela’s visit represented “a tragic setback to human rights and to the cause of freedom and democracy in all of Africa.”

One correspondent, clearly of the opinion that moral and ethical considerations should be central to the conduct of foreign policy, wrote:

‘I do not think that this letter will make much difference to you now that you have joined the ranks of ‘the political elite’ as these kind of letters had little impact in - the beginning - on those who presided on the system of apartheid. But this letter will make a difference to me, for I happen to believe that resisting evil, even in the simplest of ways, is its own reward and that **great results come from small but moral steps**. As the great Mahatma Gandhi said “They say means are after all just means. I would say means are after all everything” (emphasis added).

‘Your planned trip to Libya, may be justified in your mind and the minds of your ‘advisers’ in so many different ‘political and economic’ ways. One thing is for sure however, it cannot be justified MORALLY and ETHICALLY in any way....’

Another correspondent<sup>243</sup> wrote:

‘... [Y]our president’s intention to visit Libya ... is unfortunate. Nelson Mandela should know that he is a respected elderstateman but ... I am not happy with the way he handles humanitarian issues.

‘[Given] the wave of unrest that blew across Africa during his incarceration under the gulag of apartheid South Africa, one should expect that he should be in the forefront fighting for the freedom of Africa. The way he is going he will lose his credibility and ... respect.’ The correspondent praised Mandela’s 1995 condemnation of Ken Saro-

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<sup>242</sup> *Daily Mail & Guardian* 20 October 1998 [www.mg.co.za](http://www.mg.co.za)

<sup>243</sup> Per Ottest, Bergen, Norway, *Daily Mail & Guardian* 27 August 1998 [www.mg.co.za](http://www.mg.co.za)

Wiwa's murder by the Nigerian, but regretted his later prevention of members of the opposition from holding a conference in South Africa.

Thus, despite the hopeful signs discerned by some observers in the language used by Mandela and Mbeki to promote the concept of an African Renaissance, the human rights practice of the South African government was firmly aligned with the requirements of African elite solidarity<sup>244</sup>.

It was, consequently, of little surprise when Amnesty International<sup>245</sup> later strongly criticised South Africa's failure to respect its international human rights obligations. Amnesty charged that South Africa had rendered itself guilty of failing in its obligations "under both its national constitution and international law". Amnesty located such failure in South Africa's 'protection' of Mengistu Haile-Mariam, former Ethiopian head of state, and its failure to ensure that he remained in South Africa pending the outcome of an investigation into his alleged human rights crimes.

The government, at the very least, should have ensured that Mengistu Haile-Mariam remained in the country until the National Director of Public Prosecutions had

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<sup>244</sup> This move to adopt a solidarist position was not without its own faultlines, however. Mbeki addressed the Non-Aligned Movement Ministerial Meeting at the United Nations in New York on 23 September 1999 as Chairperson. He proposed that NAM had to review and question its methods of work and its structures. It had to do so in order to ascertain whether they were appropriate and able to serve the needs of its members' people for a democratic system of global governance that would ensure that all countries had an equal stake in promoting peace and security. These questions were important if NAM were to be able to respond adequately to the new challenges posed by globalisation, he argued.

Thus, for example, he asked whether the consensus principle "did ... not all too often prevent [NAM] from taking meaningful action when a few members states, or even one, refused to compromise and thus prevented the majority from acting in unison". He wondered aloud whether NAM could really be affective if its procedures and methods of work allowed it to move only at the pace of the slowest or the most obstinate and difficult member.

[www.anc.org.za/ancdocs/history/mbeki/1999/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index/html) (Date accessed: 13 October 2001)

<sup>245</sup> Amnesty International News Release 8 December 1999. News Service 231/99 AI INDEX: AFR 53/99.

undertaken an investigation into his possible prosecution in South Africa or extradition to another state, said Amnesty International<sup>246</sup>.

South Africa's Constitution incorporates customary international law, and it had a resulting obligation to investigate the alleged crimes of Mengistu Haile-Mariam, said Amnesty. "This obligation" had again been "assumed by South Africa when it ratified the Convention against Torture and the Genocide Convention on 10 December [1998]".

The Mengistu incident appeared to be no more than a further step in a journey down from the moral high ground. Griffiths Ayiteyfi, writing in the *Weekly Mail & Guardian* of August 26 1998<sup>247</sup> argued that the 1994 election victory of the ANC had raised hopes that a new moral authority would shape the political agenda of the whole continent. But, he said, "the ANC had not taken a single progressive stance on an African issue". The inability of the Government of South Africa to promote a progressive agenda in Africa "baffled" him. He reported the widespread hope that the moral authority that South African President Nelson Mandela carried in Western Europe and the United States "would have been used to shape a viable African agenda for the late twentieth century and beyond". However, if recent events in Africa were any measure of the ANC's foreign policy (or lack thereof), he argued, "then the sacrifice of millions of Africans to spur change in South Africa during the dark days of Apartheid would have been in vain".

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<sup>246</sup> The South African government sought to excuse its failure on the technical basis that Mengistu Haile-Mariam had left the country apparently prior to the receipt by the government of a formal request for his extradition to Ethiopia. (Mengistu had returned to Zimbabwe where he has lived under President Mugabe's protection since fleeing Ethiopia in 1991.)

<sup>247</sup> 'The ANC squanders its moral leadership over Africa' [www.mg.co.za](http://www.mg.co.za)

See also 'South Africa's foreign policy: human rights and national interests' in *Focus Letter* No. 3 June 1996 Helen Suzman Foundation: Johannesburg. The writer deplored the "shameful betrayal" of Nigeria's democrats and the Libyan people and the "embarrassing" reversal of a "principled" policy. The "prodigious promise" and "international prestige" of Mandela and his reconciling nation had been "comprehensively squandered" within a few months.

Ayiteyfiio recalled how, in *A Long Walk To Freedom*, South Africa's first president described in detail the campaign to raise funds from various poor countries in Africa – from which they were not sent away empty-handed. He was willing to excuse the ANC government for not being able to help Rwanda during the genocide of 1994, because the government was still very new. However, there had since been occasions where a “resolute policy of engagement could have given hope to millions of Africans that we were on the threshold of an Age of Reason. But, while those to whom a lot has been given dither and drag their feet, the forces of evil are passionately committed<sup>248</sup>. Since the inception of the ANC administration in 1994, South Africa has not taken a single position that a reasonable person who is informed about African affairs could interpret as progressive: on Angola, Sierra Leone, Nigeria, Congo-Kinshasa (the invasion by Rwanda and Uganda), or Sudan. When millions of lives are at stake, there is nothing but busy consultations to do precisely nothing!”, he charged<sup>249</sup>.

He contrasted South Africa's essentially diplomacy-based foreign policy in the Democratic Republic of Congo, with the starkly military form adopted by other Southern African countries, such as Zimbabwe and Namibia. In the face of their “genocide”, instead of “offering a helping hand, ... South Africa [was] once again shirking.” There was “a dire need”, he submitted in conclusion, “for a single success

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<sup>248</sup> It is argued that neutrality is a chimera, and that it is, instead, necessarily itself a form of ‘intervention’ – in favour or, even, in defence of the most the most ruthless. Edmund Burke is recalled as famously saying that the only thing necessary for the triumph of evil is for good men to do nothing. Similarly, Mohandas K. Gandhi observed that “Non-co-operation with evil is as much a duty as is co-operation with good”. See Dr Laurence Peter *5 000 Gems of Wit and Wisdom* Treasure Press: London, 1991 at 225

<sup>249</sup> Mbeki did consider it necessary to express South African's gratitude for the enormous sacrifices made by the peoples of the continent towards the liberation from apartheid when he spoke at the launch of the African Renaissance Institute in Pretoria on 11 October 1999:

‘The sacrifices the peoples of our Continent made to end the apartheid crime against humanity, which denied the very humanity of everybody who was African, were many and varied. Among other things, the countries of Southern Africa also paid a very high price in human lives lost, as well as property and infrastructure destroyed, as they withstood the campaign of aggression and destabilisation conducted by the apartheid regime. Undoubtedly, Angola and Mozambique paid the highest price in this regard. I would like to take this opportunity, once more, to reiterate our profound appreciation to their governments and peoples for their extraordinary solidarity, which our people will never forget.’

[www.anc.org.za/ancdocs/history/mbeki/1999/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index/html) (Date accessed: 13 October 2001)

story, where progressive African forces triumph over evil in a clear and decisive manner<sup>250</sup>. If the ANC government could not use a carrot **and** stick approach to African issues now, then when, he asked. “If not in the heart of Africa, then where, and on what occasion?” (emphasis added).

Reuel Khoza was similarly critical of the apparent absence of clear and principled adherence to core values and principles by black business<sup>251</sup>, who were supposed to participate in the drive to revitalise the African economy. He charged that a failure to pursue “values” would stultify dreams of a continental rebirth. Black business leaders, particularly, had a “historic responsibility to help create and shape economic processes, systems and institutions that support and nourish the vision of an African renaissance”.

The task for black business was simple and easy, yet profoundly difficult, he warned. In the economic sphere, their contribution was to “begin doing those things that most reflect African values and interests; those things that help define Africa and its people as competent, successful and with a profound sense of dignity and self-worth. It is easy and simple because it is straightforward and is a natural desire of any people. It is difficult because we have not developed the vision, the courage, the honesty, the consistency and the discipline to constantly make those decisions, in the course of black economic empowerment deals, that could be seen to be contributing to an African renaissance”.

He bewailed the fact that “[m]any of our decisions and activities are characterised by short-sightedness, expediency, greed and vanity. In many instances where our hearts are in the right place and we are trying to do the right things, we seem to lack the

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<sup>250</sup> In other words, decisive action was needed to ‘encourage courage’ among ordinary people resisting disempowerment and deprivation.

<sup>251</sup> Reuel Khoza ‘Are we making new clothes without an emperor?’ *Independent Newspapers*, 1997. (Reuel Khoza was the then chairman of the Eskom Council and of Co-ordinated Network Investments, a black empowerment group. The article was an edited version of his keynote address to the 33rd annual conference of the National African Federated Chambers of Commerce and Industry. [www.iol.co.za](http://www.iol.co.za) )

intellectual framework or the self-belief to stay the course and prevail when challenges arise". He concluded, eloquently summarising his analysis of the values that must necessarily inform an African renaissance:

'We have choices to make. ... We could choose to be like parasitic weeds, or we could choose to be like oak trees. ... We could choose to perpetuate the stereotype of the African as a dependent, servile, parasitic citizen of the world, or we could choose to create a new prototype of the African as a proud, productive and independent citizen of the world...'

### 5.2.3 Human rights caution

Presaging Blade Nzimande's later brief reference to the need for greater democratisation in Africa, Jan van Eck noted<sup>252</sup> that a new generation of African leaders was saying that, for democracy to be durable, it had to flow from a 'bottom-up' process. In the light of this emerging recognition, then-Deputy President Thabo Mbeki's call for an African renaissance would be questioned by many, argued van Eck. It was necessary to understand why so many African countries experienced the kind of chaos and disorder that most recently had scarred Sierra Leone and the Great Lakes region. These experiences included the unspeakable atrocities committed by Uganda's Idi Amin<sup>253</sup>; the mass migrations and terrible suffering of millions of pitiful refugees; as well as the revolution in the former Zaire and the ousting of Mobutu. These upheavals had, and would continue to, reinforce the negative image that so many non-Africans in the so-called developed world have of the continent and its people.

However, van Eck cautioned, it was too often forgotten that nearly all these African upheavals and catastrophies were caused by small, sectarian and selfish groups of leaders. The practice in international quarters to label some African countries as 'failed

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<sup>252</sup> Jan van Eck 'Restore the lifeline from Africans to leaders' *Independent Newspapers*, 10 June 1997. [www.iol.co.za](http://www.iol.co.za). Van Eck was an ANC MP and was, at the time of the article, a senior consultant in conflict analysis and resolution at the Centre for Conflict Resolution at the University of Cape Town.

<sup>253</sup> Geoffrey Robertson *op. cit.* at 62 notes that Tanzania was the only member state of the OAU that had "the decency" to criticise Amin's "barbaric" rule.

states' or 'basket cases' was not very helpful, he asserted. It did a grave injustice to the millions of ordinary people who had no say over the political élites and their misguided policies. It incorrectly implied that not only had the rulers failed, but so had the people. If this were true, then only a foolish man (which Mbeki was not, said van Eck) would predict an African 'renaissance'.

To be able to evolve sustainable solutions to the problems of Africa, van Eck argued, we needed to understand the way in which the traditional link between the government or those in authority and the governed had been destroyed over many centuries. It had started, he said, during the slave trade when "so-called leaders" sold their own subjects to slave traders from foreign countries. It had continued during colonialism when leaders "sold their souls to their colonial masters and governed their subjects according to the wishes of the colonialists", and during the post-colonial, independence era when so many new (black) political elites merely continued the unaccountable policies and practices of their former colonial rulers. It had also continued during the "Cold War (which was cold everywhere except in Africa and the Third World), when many African leaders sold their countries and its people to the highest bidder - be they from the West or East". Since then, also, during a "new era of international economic ['neo-] colonialism'", leaders had allowed "foreign capital to dictate their domestic policies."

The common thread identified by van Eck that ran through all these periods in Africa's history was that those in authority, had been "forced, coerced, bought or encouraged to co-operate with selfish, exploitative non-Africans" to implement policies that benefited foreign powers and interest groups. These policies had, at the same time, had disastrous consequences for the ordinary citizens of African countries.

For example, asked van Eck, would the chaos which had characterised the former Zaire for almost 40 years have ensued had certain Western powers not planned and implemented various forms of destabilisation against – and the execution of – Zaire's

first extremely popular and charismatic prime minister, Patrice Lumumba on the grounds that he was regarded as a communist?<sup>254</sup>

Africa's post-independence era, he speculated, might have been more stable had Africans been allowed to select their leaders and help develop policies without the active and on-going interference of certain powers, especially foreign ones. It had not been the Africans who had decided on their leaders and their policies, but London, Paris, Berlin and Washington. Was it any wonder, therefore, asked van Eck, that the whole concept of accountable leadership had virtually ceased to exist in so many African countries? This was one of the most important reasons why so many African countries had so frequently been plagued by military coups, he argued. Had the governments that were overthrown truly been people's governments, it was unlikely that military coups would have become virtually second nature in Africa.

The lesson which had been learnt by the new generation of African leaders such as Yoweri Museveni of Uganda "was that society had to be rebuilt from the bottom up to ensure that the masses, the ordinary people, were the ones who decided who would govern them, and how".

In view of the "incredibly violent" history of many African countries, "the resultant severe lack of tolerance, trust, transparency, accountability and the history of misuse of state institutions for sectarian interests, it was highly unlikely that any of them would move rapidly towards fully representative multiparty democracy", however. For

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<sup>254</sup> Mbeki recognised that it was important to demonstrate that Africa had learned from its experiences but, also, that it was not alone in deserving blame. Consequently, he argued, the "exit from the African stage of a personality such as General Mobutu Sese Seko of the former Zaire" represented "the death of neo-colonialism" on the continent.

Excerpted from the speech by Deputy President Thabo Mbeki at the United Nations University 'The African renaissance, South Africa and the world', 9 April 1998. [www.anc.org.za/ancdocs/history/mbeki/1998/index.html](http://www.anc.org.za/ancdocs/history/mbeki/1998/index.html) (Date accessed: 13 October 2001)



democracy to be sustainable and truly bottom-up, the process of democratisation would “of necessity” have to be a lengthy one.

#### 5.2.4 Conception and birth of the vision

In June 1997, Vusi Mavimbela, then political adviser in Deputy President Thabo Mbeki’s office, initiated the public debate concerning the future of the continent. He wrote that “Africa needed to reinvent itself in a way that would send a clear message to the world that it is no longer prepared to be marginalised”<sup>255</sup>.

Mavimbela was writing during the post-Cold War surge of more open political and economic interaction on a world scale. In this state of flux, he discerned a new vision of political and economic renewal in Africa, a vision surpassed only by the optimism that had greeted the first years of decolonisation in the 1960s. Campaigns for democratisation in the nineties, and the liberation of South Africa in particular, had energised African peoples nearly as profoundly as the nationalist movements of more than two generations previously, he asserted. These two “moments of African rebirth” had served as dress rehearsals and held important lessons for the third ‘moment’: the African renaissance<sup>256</sup>.

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<sup>255</sup> *Independent Newspapers*, 15 June 1997 [www.iol.co.za](http://www.iol.co.za). Mavimbela’s detailed statement of the Deputy Presidency’s vision is a valuable record for identifying the source and tracing the development of many current themes and policy initiatives by the South African Government.

<sup>256</sup> Mbeki later traced a different set of three stages when he addressed the launch of the African Renaissance Institute in Pretoria on 11 October 1999:

‘We speak of a continent which, while it led in the very evolution of human life and was a leading centre of learning, technology and the arts in ancient times, has experienced various traumatic epochs; each one of which has pushed her peoples deeper into poverty and backwardness. We refer here to the three periods of:

- slavery, which robbed the continent of millions of her healthiest and most productive inhabitants and reinforced the racist and criminal notion that, as Africans, we are sub-human;
- imperialism and colonialism, which resulted in the rape of raw materials, the destruction of traditional agriculture and domestic food security, and the integration of Africa into the world economy as a subservient participant; and
- neo-colonialism, which perpetuated this economic system, while creating the possibility for the emergence of new national elites in independent states, themselves destined to join the dominant global forces in oppressing and exploiting the masses of the people.

‘During this latter period, our continent has experienced:

The first 'moment' covered roughly the period from Ghana's independence in 1957 to the collapse of the socialist grouping of states in 1989. There were many debates about why developing countries, in Africa especially, had been unable to use this moment of political liberation to usher in social and economic emancipation. Mavimbela identified himself with the long-standing view espoused by the Non-Aligned Movement that relations between African nation states and world powers continued to be determined less by free policy choices than by what was prescribed by the major donor countries. It was an unequal relationship, politically and economically, he said.

The ideological, economic and strategic imperatives of the Cold War had played a huge part in the nature of the relations between Africa and the world powers. Even the political and economic organisational instruments of the developing countries, such as

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- unstable political systems in which one-party states and military rule have occupied pride of place, leading to conflict, civil wars, genocide and the emergence of millions of displaced and refugee populations;
  - the formation of predatory elites that have thrived on the basis of the looting of national wealth and the entrenchment of corruption;
  - the growth of the international debt burden to the extent that, in some countries, combined with unfavourable terms of trade, it makes negative growth in national per capita income inevitable; and
  - actual declines in the standard of living and the quality of life for hundreds of millions of Africans.'
- [www.anc.org.za/ancdocs/history/mbeki/1999/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index/html) (Date accessed: 13 October 2001)

Paul-Henri Bischoff has echoed *The Argus*' (see footnote 236 above) understanding of the Renaissance idea as having a South African origin. He has argued that, what began in South Africa as "a national renaissance", including the nation-building project centred on a redefined African self and the transformation of [South African] society to achieve a more equitable redistribution of power and wealth, is part of a continuum which **wants to be** part of the change occurring in Greater Africa. Out of this transformation for which the rest of Africa hoped, struggled and suffered, has therefore come South Africa's advocacy in Africa and the rest of the world for an African Renaissance" (emphasis added).

Bischoff argued that:

'[t]he need to achieve stability holds the key to a new African vision, as does the recognition that there have to be many ways of achieving stability. Uniting different efforts to bring peace to the continent is the all-embracing vision of an African Re-awakening. The idea of renewal is first and foremost an attempt to bring about an African view on the containment and prevention of conflict, second, the eschewal of authoritarianism and third, the attempt at functional co-operation to make autonomous communication and co-operation possible in the face of global encroachments [on sovereignty].'

See 'A foreign policy for all? South Africa and the call for an African Renaissance' *Conflict Trends* Issue 3 at 33-6

the Non-Aligned Movement, the Organisation of African Unity and regional economic groupings such as the Southern African Development Community ('SADC'), were rendered less effective by the ideological alignment of forces within them. For this reason, they ended up as divided and disjointed, 'loose' formations incapable of empowering developing countries to secure their independence from the dynamics of the Cold War.

The second 'moment' identified by Mavimbela covered the period from the end of the Cold War, at the end of the 1980s, and the decade of the 1990s. Regrettably, he noted, "the Cold War era has not yet been replaced by a New World Order characterised by the restructuring of international relations, the guaranteeing of mutual respect and the redressing of the legacy of colonialism and neo-colonialism". Instead, he lamented, the bipolar world of the Cold War had been replaced by "the tripolar economic and social world made up by North America, Europe and East Asia". Advances in technology that had revolutionised production, distribution and the communication of knowledge constituted the material basis of this world. This tripolar competition was threatening to marginalise Africa.

With African countries no longer considered by world powers to be of the same strategic importance as they were during the Cold War, an exacerbation of this marginalisation threatened. African countries found themselves in direct competition for global economic integration and vital capital flows with more regionally integrated economies in eastern Europe and east Asia. Nevertheless, he submitted, this miracle offered hope to the people of Africa that economic development could be rapid and achievable without the annexation of foreign markets through imperial physical force<sup>257</sup>.

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<sup>257</sup> It may be worth recalling, at this point, that contrary to Mavimbela's thesis, the 'Asian miracle' has, since, lost some of its lustre. It became apparent that it had been excessively founded on economic and financial practices, such as nepotism and cronyism, which contradicted the broad trend of globalisation towards open competition. It is these and more benign cognate practices arguably inherent to African culture and society that may prove to pose significant obstacles to African integration into globalising markets. One is mindful here, for

Mavimbela's thesis<sup>258</sup> was that "[t]he *raison d'être* for a renaissance in the African continent [was] the need to empower African peoples to deliver themselves from [among other things] the legacy of colonialism and neo-colonialism, and to situate themselves on the global stage as equal and respected contributors to, as well as beneficiaries of, the achievements of human civilisation". Thus, just as the continent was once the cradle of humanity and an important contributor to civilisation, he argued,

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example, of the relative loyalty displayed toward tribe and clan, as opposed to the inchoate chimera of the 'nation' composed of citizens of equal status and worth.

<sup>258</sup> Mbeki subsequently set out his understanding of the vision in a speech at the launch of the African Renaissance Institute in Pretoria on 11 October 1999. The necessary conditions existed, he said, for the realisation of the African Renaissance vision. They are:

- the completion of the continental process of the liquidation of the colonial system in Africa, attained as a result of the liberation of South Africa;
- the recognition of the bankruptcy of neo-colonialism by the masses of the people throughout the continent, including the majority of the middle strata;
- the weakening of the struggle among the major powers for spheres of influence on our continent, as a consequence of the end of the Cold War; and
- the acceleration of the process of globalisation.'

The tasks of the African Renaissance derived from the continent's experience, covering the entire period from slavery to date. They included, said Mbeki:

- the establishment of democratic political systems to ensure the accomplishment of the goal that 'the people shall govern', ensuring that these systems take into account African specifics so that, while being truly democratic and protecting human rights, they are nevertheless designed in ways which really ensure that political and, therefore, peaceful means can be used to address the competing interests of different social groups in each country;
- establishing the institutions and procedures which would enable the continent collectively to deal with questions of democracy, peace and stability;
- achieving sustainable economic development that results in the continuous improvement of the standards of living and the quality of life of the masses of the people;
- qualitatively changing Africa's place in the world economy so that it is free of the yoke of the international debt burden and no longer a supplier of raw materials and an importer of manufactured goods;
- ensuring the emancipation of the women of Africa;
- successfully confronting the scourge of HIV/AIDS;
- the rediscovery of Africa's creative past to recapture the peoples' cultures, encourage artistic creativity and restore popular involvement in both accessing and advancing science and technology;
- strengthening the genuine independence of African countries and continent in their relations with the major powers and enhancing their role in the determination of the global system of governance in all fields, including politics, the economy, security, information and intellectual property, the environment and science and technology.'

[www.anc.org.za/ancdocs/history/mbeki/1999/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index/html) (Date accessed: 13 October 2001)

The recognition of the central importance of human rights to both the theoretical design and practical realisation of the vision is clear.

this renaissance should empower it to help the world rediscover the oneness of the human race; the equality of humankind.

One of the most fundamental elements constituting this renewal, Mavimbela submitted, was the creation of a growing and sustainable economy; one which could assimilate, contribute to and take advantage of world economics. This economic condition was an essential element for the “survival and consolidation of this African dream”.

Mavimbela employed notably idealistic language when he discussed the political dimension of the vision. It would include a “new wave for the democratisation of Africa [that] should be broadened, deepened and sustained as part of the quest for its rebirth. Africa must lead the world by example and show that it is a continent based on the will of its people, a continent singularly dedicated to their total emancipation”. Africa also needed capable political leadership and stable societies, Mavimbela accepted. The continent needed the leadership that could win progressive political debates within their own countries and provide effective national, continental and global leadership<sup>259</sup>.

Talk of the ‘New World Order’ should also include the restructuring and repositioning of many of the regional, continental and international institutions in line with the objective of empowering developing countries, Mavimbela continued. Not only should global institutions such as the United Nations, International Monetary Fund and the World Bank change to accommodate this goal, he submitted, “but organisations of developing countries such as NAM and the OAU should redefine their roles. These organisations”, he proposed, “should begin to gear themselves for the task of socio-economic empowerment”.

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<sup>259</sup> One might observe that this might prove to be a slow process as the continent’s leadership finds it difficult to move too far ahead of still extensively conservative societies. On the other hand, times of overwhelming, unavoidable change have frequently proven to be opportune moments for precipitating a ‘paradigm shift’ in both thought and actions.

Also linked to the issues of development and global competitiveness was the importance of institutions for regional co-operation and integration. Capital tended to flow towards big and integrated markets, he observed, but shunned fragmented and multiple markets where there was multiple membership, duplication, waste of resources and a lack of co-ordination.

Mavimbela also argued that social scientists needed “to identify aspects of our social culture which need to be enhanced and protected to serve the [cause] of the African renaissance”. He referred to the claim that the Renaissance of the 16<sup>th</sup> century had benefited from the Protestant ethic. He noted, also, that the emergence of the Asian renaissance had led to the increased popularity of classical writings on Confucianism in Western bookshops, although, in the 1920s, Max Weber blamed Confucianism for Asia’s economic stagnation.

Mavimbela concluded that there were many elements necessary for the realisation of the renewal of the African continent which were still missing. Others, however, had begun to emerge, albeit in a rudimentary form. “The task”, he argued, was “not to lament those that are missing, but to work on those that exist and to encourage and bring about those elements that are missing”.

To realise this dream, he identified the pressing need to “work tirelessly to build **continental unity and consensus** on the necessary programme of action”. Certainly, he cautioned, the continent would have to surmount obstacles set by those who did not wish to see, or those who feared, a **united** and renewed continent. Nevertheless, Africa could not be left “wandering between two worlds, one dead, the other unable to be born”. This was a generation, he encouraged, caught in a historical conjuncture which privileged it with the possibility of seizing the moment and become the midwives of the African renaissance (emphasis added).

### 5.2.5 The challenge is posed

In 1997, then-Deputy President Mbeki's concept of an 'African Renaissance' was an idea in its infancy. Like all newly named trends, "it was a mix of emerging fact, insight and a modicum of wishful thinking". Whether the term become a reality or withered in the face of economic stagnation and strife depended, at least in part, on how the continent responded to the trend of superpower withdrawal, argued Ross Herbert<sup>260</sup>.

The trend was illustrated by France's decision to reshape its policy toward its former African colonies and gradually withdraw some of its 8 300 troops in six countries. France's policy change reflected also the growing refusal to intervene militarily, and to promote, instead, African peacekeeping forces. French diplomats argued that 'it was time for Africa to stand on its own feet'. France would continue to offer moral, developmental and industrial aid. But it would no longer unilaterally intervene in the internal affairs of former colonies.

This was a significant policy shift, observed Herbert. Unlike Britain, France had never fully disengaged from its African colonies. With a mix of advice, foreign aid and military intervention, France had frequently played kingmaker. France had used its influence to press for good governance on occasion. But maintenance of influence and profitable economic relationships had been far more important goals, which had driven France into cosy relationships with some of Africa's most corrupt and anti-democratic regimes, he noted.

For decades, Africa policy had been set by "a small clutch of diplomats, without regard for French public opinion", which had grown increasingly critical of French military intervention to defend the indefensible. Herbert reported diplomatic sources as saying the policy shift was a direct reaction to that criticism and in a sense represented the "democratisation of French foreign policy".

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<sup>260</sup> Ross Herbert *The Star*, 1997 [www.iol.co.za](http://www.iol.co.za)

The change was positive for Africa, but there was great potential for this policy shift to embarrass those singing the praises of African Renaissance, argued Herbert. France was effectively leaving a power vacuum that the “spectacularly ineffective” OAU was in no position to fill. Within that vacuum were a “spate of [continuing] crises and several of Africa’s longest-reigning rulers who face[-d] approaching elections after spending years resisting the spread of democracy”.

Herbert’s assessment of the prospects for an African Renaissance began with the recognition that southern Africa had clearly made real progress on issues of peace and economic growth. But for every success story, he mourned, there was a rebellion somewhere or an illegitimate leader clinging to power that detracted from sporadic and patchy efforts at peace-building and democratic stability. With France, the United States and Britain all unwilling to deploy troops in Africa, the burden of African crisis prevention was squarely on African shoulders. Several African nations, including South Africa, had expressed “routine” willingness to deploy their soldiers on peacekeeping missions, but an African leader was needed, he argued, “who possesses moral authority, economic strength and an effective, disciplined military”.

Nigeria had attempted to play the role in Liberia and Sierra Leone, but had been largely ineffective. That left South Africa as the natural leader and mediator, said Herbert. While South Africa had accepted participation in African peacekeeping operations, taking the lead in crisis prevention was no easy task. He recognised that intervention was expensive, risked lives and distracted leaders from pressing domestic issues. But Herbert and others have concluded<sup>261</sup> that the issue would not go away. This meant that

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<sup>261</sup> See, for example, Hussein Solomon and Maxi van Aardt (eds.) *‘Caring’ security in Africa: theoretical and practical considerations of new security thinking* ISS Monograph Series No. 20 Feb 1998, ISS: Halfway House; Mark Malan *SADC and sub-regional security: unde venis et quo vadis?* ISS Monograph Series No. 19 Feb 1998, ISS: Halfway House; Jakkie Cilliers *Building security in Southern Africa: an update on the evolving architecture* ISS Monograph Series No. 43 Nov 1999, ISS: Pretoria; Jakkie Cilliers and Annika Hilding-Norberg (eds.) *‘Building stability in Africa: challenges for the new millennium’* ISS Monograph Series No. 46 Feb 2000, ISS: Pretoria; Mark Malan *‘Keeping the peace in the neighbourhood and abroad: lessons for South Africa from the Russian experience?’* *African Security Review* Vol. 7 No. 3 1998, 27-41; *‘Peace enforcement’: the real peace support challenge in Africa* *African Security Review* Vol. 7 No. 5 1998, 11-25; and



“South Africa will have to decide exactly how badly it wants to see the African Renaissance become a reality”.

It is on the basis of this assessment of South Africa’s lead role in the promotion and implementation of the African Renaissance vision that the principal focus of the remainder of this section will be on South African policy and practice. This examination is intended to assist in answering the question whether it offers a realistic prospect an enhancement in levels of African adherence to fundamental human rights standards.

Writing a few months before the release of the ANC’s landmark foreign policy discussion document in December 1997, Blade Nzimande<sup>262</sup> subsequently observed that South Africa’s transition to democracy was taking place at a time of momentous changes in the international order. The collapse of the Soviet Union had ushered in a world that was “uni-systemic”. At the same time, powerful forces of globalisation and liberalisation had emerged. These forces had not only profoundly changed international economic relations, but also threatened the national sovereignty of many countries, particularly in the Third World, he said.

South Africa’s own interests demanded that it be active in promoting greater understanding internationally for the developmental needs of peoples and countries in the Third World, and in promoting self-determination and democratic norms worldwide. It was against this background, he submitted, that South Africa’s foreign policy should be devised and judged.

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Richard N. Haass *Intervention: the use of American military force in the post-Cold War world* Brookings Institution Press, Washington DC, 1999.

<sup>262</sup> Blade Nzimande ‘SA’s challenges in Africa and world’ *Independent Newspapers*, 7 May 1997 [www.iol.co.za](http://www.iol.co.za) . Blade Nzimande MP was chairman of the ANC National Executive Committee’s international affairs committee.

For Nzimande, one of South Africa's major achievements on the African continent was the prominent role the country was playing in the peaceful resolution of conflicts. South Africa's initiatives, within the context of the OAU, were setting an example of how Africans themselves were capable of resolving their problems. This was being achieved "despite major problems whereby some of the leading world powers would like to see African problems resolved in a manner that is favourable only to themselves".

The ANC, he stated, believed that such solutions were no solutions at all. South Africa's role in Africa and the ANC's emphasis on Africans taking a leading role in resolving their own problems was firmly located within a vision of an African renaissance. This was an attempt, he continued, to "build confidence among ourselves as Africans that Africa as a continent has what it takes to overcome underdevelopment, poverty and instability and set itself on a route to accelerated development, democracy and prosperity".

South Africa was still faced with many challenges in the international arena, but a few stood out as the most important, said Nzimande, echoing Mavimbela and presaging the ANC's subsequent discussion document. The first was to lobby and struggle for the democratisation of world multilateral forums, including the UN, the IMF and World Bank. The second challenge was to play an effective role, within the context of the OAU, in achieving an African renaissance. The third task was to contribute to strengthening Third World solidarity and united action towards a just world order<sup>263</sup>.

#### **5.2.6 The African National Congress' approach**

This narrower understanding of the responsibilities arising from Africa's sacrificial contribution to South Africa's liberation seemed to be echoed by the African National

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<sup>263</sup> South Africa's fourth challenge, said Nzimande, was to contribute towards the liberation and self-determination of, particularly, the Palestinian and the Saharawi peoples.

Congress' ('ANC') landmark foreign policy discussion document<sup>264</sup>, released before its end-of-year conference in 1997. The document recognised that a “distinguishing feature” of South Africa was the “sustained interest of the rest of the world” in its future. This would not necessarily last indefinitely, however. Nevertheless, despite its “limitations and problems”, South Africa aimed to “make a significant contribution to ensuring peace, democracy, respect for human rights and sustained development”. These “principles” were “fundamental” to its foreign policy<sup>265</sup>, as was an eschewal of a short-term focus on narrow self-interest or on hegemonic ambitions<sup>266</sup>.

The document was described by Clive Sawyer as a “thought-provoking mixture of pragmatism and quixoticism” and viewed the African Renaissance vision as a “counter to continuing globalisation”<sup>267</sup>. The ANC’s vision of an African renaissance “formed the main pillar of its proposals for South Africa’s foreign policy”, said Sawyer, but that policy “pitted the renaissance against globalisation in what many may regard as a quixotic and controversial quest”. There was, however, he concluded, no other option for the movement than to propose this quest, given the reservations it [and many others] had about globalisation.

The document blamed globalisation for subjecting international political and economic institutions, as well as national political institutions, to the overarching global market. It argued that globalisation entailed a “real danger” that the political and economic policy of governments throughout the world could be dictated by the monopoly companies of developed countries. Naturally, this was anathema to the ANC that, in the years since the first democratic elections, had increasingly signalled its intention to pursue an

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<sup>264</sup> The ‘working document’ proposed that “South Africa’s policy initiatives should be modest and not overly ambitious”. It should devise a “proactive policy in keeping with South Africa’s resources and commensurate with its international position” – paragraph A2. ‘Introduction’.

<sup>265</sup> Paragraphs 3.4 ‘South Africa’s re-entry into the community of nations’, 4.7 ‘Focus on good governance, human rights and democratisation’ and 5.7 ‘South Africa’s limitations and strengths’.

<sup>266</sup> Paragraph 3.1 ‘South Africa’s democratisation process’.

<sup>267</sup> Clive Sawyer ‘ANC sets sights on new world order’ *Independent Newspapers* 1997 [www.iol.co.za](http://www.iol.co.za). The African National Congress reviewed its foreign policy vision ahead of its December 1997 national conference.

independent course on foreign policy. It had, on occasion, refused to bend to the will of any particular bloc and, in particular, that of the world's sole superpower, the United States, said Sawyer.

The discussion document was "frank about the realities facing the country and the party". It "soberly" noted that the economic objectives of the Western powers had not come to an end with the Cold War and that the division of the world into economic blocs left little opportunity for challenging the world order.

The document indicated a strong sensitivity concerning the drive towards neo-liberalism that accompanied the process of globalisation, thereby undermining the sovereignty of, especially, countries in the developing world. This dilution of state sovereignty was illustrated by some developing countries having to seek World Bank or International Monetary Fund approval for their national budgets before they present these budgets to their parliaments.

The ANC document, however, rejected the two extreme reactions to globalisation: the first being acquiescent assimilation into the global village and the second being an ultra-leftist resistance to the leviathans of the world economy. The shortcoming of the first approach – passive assimilation – was its failure to recognise that the emerging international context was not necessarily structured to the advantage of a developing country like South Africa. The drawback of the second was that it failed to recognise that South Africa, as a small country, was already inextricably tied to the international economy. Another weakness was that it reduced foreign policy opportunities.

The document proposed using the international situation to work for a just and equitable world order and envisaged that the African Renaissance vision should form the basis for this. It was for this very reason, the document argued, that the renaissance posed a threat to the strategy of globalising capitalism. Indeed, "[t]he success of the

Renaissance depends on the extent to which it challenges globalisation [in its present form].”

It was, therefore, clear that there existed for the drafters an inextricable link between the economic and political future of the continent. Neither democracy and human rights, on the one hand, nor issues of national and international good economic governance, on the other, could be considered to be independent of each other. Neither could be pursued to the exclusion of the other. There was no trade-off in either direction. Adequate protection of human rights depended upon the production of sufficient economic resources to fund the necessary mechanisms. Similarly, the generation of a sustainable economic surplus was reliant upon respect for fundamental norms of human dignity.

It was also clear that it adopted a broad perspective on the wide range of elements necessary for a holistic continental recovery. All of these elements should be borne in mind simultaneously when assessing appropriate responses to various situations. Consequently, to emphasise any particular element would be inappropriate and may lead to a misinterpretation and misunderstanding of the overall policy thrust. Thus, for example, it would be inaccurate to hold on the basis of the document that South Africa's foreign policy would prioritise human rights. This would be especially so if one were to argue that this focus would be pursued to the virtual exclusion of other pivotal aspects, such as economic recovery and the fight against poverty. It is important, therefore, to examine this milestone document in its entirety for an accurate understanding of the true relative priority of human rights issues in South African foreign policy and practice.

The document consequently argued that key elements of the renaissance vision should include:

- The economic recovery of the African continent as a whole.
- The establishment of political democracy on the continent.

- The need to break neo-colonial relations between Africa and the world's economic powers.
- The mobilisation of the people of Africa to take their destiny in their own hands, preventing the continent from being [merely] a place for the attainment of the geo-political and strategic interests of the world's most powerful countries.
- Fast development of a people-driven and people-centred economic growth.

Significantly, the document noted that a renaissance would not be possible in an environment of conflict and instability. It went on to examine how the goals of the renaissance could be achieved, notably drawing on the lessons of the Great Lakes conflicts. The events leading up to the establishment of the Democratic Republic of the Congo were “a learning example of the potential for Africa to resolve its own problems without interference from the imperialist countries”. ... “At the same time, one major lesson was the extent to which powerful countries like ... the US still want to see their interests being of central importance on the African continent.”

The document went on to signal a reluctance to grasp the nettle of human rights norm promotion and protection, calling for clarity on how to put human rights, justice and democracy at the forefront of foreign policy<sup>268</sup>. The policy it suggested was the avoidance of a harsh sanctions-style or interventionist approach, a further reiteration of the importance of both continental solidarity and economic matters. More direct and ‘invasive’ forms of intervention, particularly of a military kind, were clearly beyond serious consideration. Consequently, it said, adopting a carefully non-prescriptive and ‘neutral’ stance, placing human rights at the forefront of foreign policy “certainly should not mean that we should refuse to conduct any diplomatic and trade relations with countries whose record in human rights or democracy we regard as unsatisfactory. But it should also not mean that, when we engage with the governments of such

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<sup>268</sup> Although it was not stated within the document, Sawyer felt that this may have stemmed partly from the discomfort felt by the Government over criticism that it had failed to do enough to campaign for human rights elsewhere. But the policy it suggested, the avoidance of a harsh sanctions-style approach, was unlikely to close the door to such criticism, he concluded.

countries, we ignore, marginalise or subordinate these principles and only concentrate on trade and diplomacy". Thus was the policy of "quiet diplomacy" explicitly endorsed as the only form of diplomacy<sup>269</sup>, since deployed with so little evident effect in the instance of human rights abuses and the undermining of the rule of law in Zimbabwe, particularly since 1999.

The discussion document also proposed a revamp of the Non-Aligned Movement to help in these efforts. Turning to the Organisation of African Unity, the document 'accepted' that South Africa's interests were inextricably linked to those of the broader continent and called for South Africa to lead a campaign to transform the OAU. Importantly, the document defined the principal challenge as enabling the OAU to effectively 'intervene' in the promotion of democracy, justice and human rights, while at the same time not undermining the OAU Charter, which protected the national sovereignty of African countries. Nevertheless, urged the authors, ever seeking to emphasise the equivalence of the several goals it proposed, the Charter "should not be used as a shield for states that violate human rights."

Mbeki has repeatedly stated that he discerns a "new urgency to build and strengthen our institutions of democracy, develop a culture of respect for human rights and [to] ensure accountable and transparent governance". He has cited as evidence of this the decision by the Organisation of African Unity, at its 1998 Summit in Algiers, that those leaders who **seized power through force** should not be permitted into the next Summit of the OAU. The African continent was "awakening and assuming its responsibilities" he has declared<sup>270</sup> (emphasis added).

It remains to be seen, however, whether Mbeki and the OAU take a stand against those who, like President Robert Mugabe of Zimbabwe, seem intent upon **retaining** power

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<sup>269</sup> Paragraph 5.2 'Principles and cornerstones'

<sup>270</sup> Address by the Chairperson of the Non-Aligned Movement, President Thabo Mbeki of South Africa, to the NAM Ministerial Meeting, United Nations, New York, 23 September 1999. [www.anc.org.za/ancdocs/history/mbeki/1999/index.html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index.html) (Date accessed: 13 October 2001)

by legal subterfuge and force. It is suggested that President Mugabe's refusal to date to agree to permit foreign scrutiny of the presidential electoral campaign should, at least, give rise to a warning of the prospect of exclusion.

The policy document dealt also with human rights, "conflict prevention and **peacemaking**" as "substantial" concerns to "South Africa in the African context". It also viewed "preventive diplomacy" as "an essential and fundamental consideration", particularly as, "once conflict occurs, **diplomacy** ... is more difficult, traumatic and costly – both materially and in terms of human life – namely, devising appropriate **peacemaking** and peacekeeping operations"<sup>271</sup> (emphasis added).

Multilateral military action is apparently not excluded by the document. However,, unless it purports to adopt the Clausewitzian definition of war as merely an extension of politics (i.e. 'diplomacy'), the form of words adopted by the document suggests that South Africa is wary of committing itself to anything but the diplomatic exercise of "devising" **peacemaking** interventions, as opposed to participating in them. In particular, armed humanitarian intervention is not discussed in so many words, despite the possibility of arguing for an implied connection from the contextual juxtaposition of the issues of human rights and peacemaking.

Outlining strategies to put the concerns of Africa and the developing world on the international agenda, the document called for the development of alliances with progressive states and parties in the Western world. The emphasis in these alliances would vary from trade to political considerations. However, the document cautioned that the development of such alliances was unlikely to work unless countries in the developing world devised a common agenda<sup>272</sup>.

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<sup>271</sup> Paragraph 6.1 'The challenge of multilateralism'

<sup>272</sup> In concrete terms, this common agenda should include the following priorities:

- Making a priority of democratising and expanding the membership of the United Nations Security Council.
- A common programme on poverty alleviation and debt relief for developing countries.
- Democratisation of institutions like the World Bank and the IMF.



The document's emphasis on economic issues as they related to the urgent need to combat poverty was again evident in the call for the strengthening of the OAU to effectively co-ordinate economic relations on a continental basis.

Having outlined these ambitious goals, the document reiterated the warning against overestimating South Africa's capacity as a small country although, it said, the country's international image would enable it to 'punch above its weight'.

It was inevitable that an African renaissance and attempts towards the transformation of international relations would mean responses from major powers that "might not be positive", the document warned. It was, consequently, "**important to strike a balance** between pursuit of an African renewal and gathering enough strength in order to defend whatever advances we make and, most importantly, not to act in a childish manner" (emphasis added).

### 5.2.7 The new policy in action

Peter Fabricius subsequently assessed the practical effects and implications of this redefined policy, including the stated intention not to conduct itself immaturely, following South Africa's response to the American Africa Growth and Opportunity Act, which promised improved access to the US market for important African products<sup>273</sup>.

Fabricius noted that Deputy Foreign Minister Aziz Pahad had remarked in 1996 that, where United States and South African interests intersected, "we can co-operate". That statement, commented Fabricius, may have created the impression that relations between the two countries were entering a "more mature phase of co-operation in pursuing common interests". South Africa had, previously, bent over backwards to avoid creating the impression among African states that it was the unwitting tool of the United States' Africa policy. Pahad's words and some concurrent developments

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<sup>273</sup> Peter Fabricius 'SA must not side with dictators' *Independent Newspapers* 1998 [www.iol.co.za](http://www.iol.co.za)

suggested, however, that South Africa was now more ready to assert itself on the continent and show less sensitivity to what other African countries felt about its relationship with the US (or anything else).

However, noted Fabricius, Pahad's statement was made not long before the birth of the concept of the 'African Renaissance' was articulated by then-Deputy President Thabo Mbeki's Office. Fabricius recalled that the concept was initially widely hailed in the West and elsewhere as a promising sign that South Africa was at last about to fulfil its historic destiny by leading Africa into a new age of good governance, sound economic policies and prosperity. But since then, he argued, an implicit strain of the renaissance had become more explicit, one that was not so pleasing to Western ears. That was the idea that if Africans took responsibility for their own destiny, others should completely keep out.

While this may be a good thing in principle, Fabricius accepted, one contradictory consequence had seemed to be that South Africa had increasingly taken sides with Africa in disputes with the Western powers, even where, by doing so, it sided also with undemocratic practices, human rights abuse and bad economics. "Instead of blowing a new breath of fresh air into Africa, the renaissance [was] to this extent starting to reinforce the weary old destructive tendency to resist criticism from the outside, or even from other African states, as interference, and so to let bad rulers be".

Fabricius cited the example<sup>274</sup> of Ex-President Nelson Mandela's "powerful" 1995 stand against the Nigerian military regime, when he led "a crusade" to have Nigeria expelled from the Commonwealth. But South Africa had, thereafter, "backed right off". It had even withdrawn from the Commonwealth ministerial group monitoring sanctions. This had followed a statement by a senior Mbeki adviser that South Africa wished to present a lower profile on the issue because its leading role was creating a

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<sup>274</sup> discussed above

degree of resentment in Nigeria which might threaten South Africa's African renaissance ambitions<sup>275</sup>.

Another unfortunate example discussed by Fabricius was South Africa's attitude towards Western initiatives to help Africa create a peacekeeping capability<sup>276</sup>. Some of the least democratic African countries – the ones which had, therefore, come under greatest Western pressure, such as Nigeria (at that time), Sudan, and Libya – unsurprisingly opposed the initiatives most strongly. Other countries with better records, such as Uganda, were in favour. Even the foreign minister of Zimbabwe, “no great lackey of the West”, Fabricius commented, had apparently advocated that the OAU accept the aid with the pragmatic observation that, whatever Western interests might be in Africa, African countries should take the aid and use it to their own ends. South Africa's foreign minister, Alfred Nzo, had, however, reportedly kept out of the argument, apparently for fear of appearing pro-West.

But perhaps the most glaring example cited by Fabricius was South Africa's initial attitude towards the United States' Africa Growth and Opportunity Act<sup>277</sup>. The bill had struggled through Congress against heavy opposition because it would, among other things, boost African exports into the US by lifting or easing tariffs on certain important African products, especially textiles and clothing. The rest of SADC and most other African countries supported the bill, for obvious reasons. Textile producers in South Africa said it would create 100 000 jobs in the country. But South Africa for a long time withheld support for the bill, jeopardising its chances of being enacted. South Africa's ambassador to the US, Franklin Sonn was reported as saying he was troubled

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<sup>275</sup> The Nigerian government subsequently participated closely with South Africa and Algeria in the joint New Africa Initiative. NAI included the essence of the African Renaissance vision and the Millennium Africa/Omega Plan devised by Mbeki and Algeria's President Bouteflika. This development may corroborate the efficacy of South Africa's withdrawal from President Mandela's principled, but unpopular stand.

<sup>276</sup> Discussed at the OAU.

<sup>277</sup> Later renamed the Africa Growth and Opportunity Act.

by the bill's 'conditionalities' which stipulated that its benefits would accrue only to countries judged by the US to be committed to the free market and democracy.

Here, says Fabricius, South Africa had placed itself in the "absurd position of jeopardising its own workers' interests [in order] to demonstrate a solidarity with its African fellows which most of them did not want". South Africa easily qualified for the benefits of the bill. So too would most, if not all, SADC countries. For whose sake then were we being so sensitive to Western pressure?, he asked. For the Libyas, Nigerias<sup>278</sup> and Sudans of the continent?

While it was fitting that SA should refuse to be a tool of Western interests in Africa, it was "perverse to oppose worthy objectives just because the West supports them. Such worthy interests must include the pursuit of democracy and sound economic policies in Africa, without which we will always suffer by association. It is much more in South Africa's own long-term interests to pursue these goals, even in tandem if necessary with the dreaded Western powers, than to oppose those values and jeopardise our material interests for the sake of solidarity with African dictators", argued Fabricius<sup>279</sup>. It certainly seemed as if South Africa was not drawing the line in the most appropriate location.

### **5.2.8 Mbeki's interpretation of the vision**

It is important, for a number of reasons, to closely consider Thabo Mbeki's exposition of the renaissance vision. Firstly, Mbeki has gathered into his office the reins of much of South Africa's foreign policymaking and practice. His is an active presidency in this respect, as is evidenced by his many foreign engagements. Not least among his

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<sup>278</sup> Nigeria has, of course, since embraced democracy once again.

<sup>279</sup> Since these incidents, and particularly in the African Union's endorsement of the joint New Africa Initiative, it seems that the continent and South Africa have publicly committed themselves to principles acceptable to the Western powers who hold the purse strings so vital to the economic and political revival of Africa. It may be doubted whether this presages a real change in policy to substantive action against human rights abuse on the continent, rather than constituting merely a continuation of the cautious language of the ANC's 1996/1997 foreign policy document, which effectively endorsed 'quiet diplomacy'.

decisions that have served to increase his direct management of South Africa's foreign policy was the appointment of the trusted Dr Nkosazana Zuma as his Foreign Affairs Minister.

Secondly, South Africa's second president has energetically pursued the project of building a broad-based crosscutting coalition in support of the continent's rebirth. Seminal steps have included the absorption of other signal African contributions, such the Omega Plan, as well as the subsequent European and North American endorsement of the newly co-authored strategy, discussed further below. The President is clearly the lead player in the development of the dream. His efforts at ensuring implementation are certainly worthy of continued attention.

Meanwhile, Deputy President Mbeki continued his campaign of raising the profile of the renaissance idea while addressing the United Nations University<sup>280</sup>. He asked how the continent could "hope to emulate the great human achievements of the earlier Renaissance of the Europe of the 15th and 16th centuries". One of the answers to this question was to recall the fact that, "as the European Renaissance burst into history in the 15th and 16th centuries, there was a royal court in the African city of Timbuktu which, in the same centuries, was as learned as its European counterparts." What this told him was that "my people are not a peculiar species of humanity!"

He spoke of this "long-held dogma" of Africans' difference because it continued to "weigh down the African mind and spirit, like the ton of lead that the African slave carrie[-d] on her ... shoulders, producing in her and the rest" an attitude which contested "any assertion that she [was] capable of initiative, creativity, individuality, and entrepreneurship". The weight of this dogma and consequent attitude dictated that she would "never straighten her back and thus discover" her equality. "An essential and

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<sup>280</sup> Speech by Deputy President Thabo Mbeki at the United Nations University 'The African renaissance, South Africa and the world', 9 April 1998. [www.anc.org.za/ancdocs/history/mbeki/1998/index.html](http://www.anc.org.za/ancdocs/history/mbeki/1998/index.html) (Date accessed: 13 October 2001)

necessary element of the African Renaissance” was, consequently, to “assert the principality of her humanity – the fact that she, in the first instance, is not a beast of burden, but a human and African being<sup>281</sup>.”

Defining ‘genuine liberation’, Mbeki recognised the necessity to demonstrate the capability of establishing and maintaining systems of good governance. Africa’s own practical experiences, he explained, emphasised that military governments did not represent the system of good governance that it sought. Accordingly, the continent had made the point clear that it was opposed to military coups and had taken practical steps, as exemplified by the restoration to power of the elected government of Sierra Leone, to demonstrate its intent to meet this challenge. Similarly, said Mbeki, many African governments, as well as the OAU, had sought to “encourage the Nigerian government and people to return as speedily as possible to a democratic system of government<sup>282</sup>.”

The cautious, diffident and non-invasive tone of this statement has proven to be a significant herald of his policy content. Consequently, although at least 25 multi-party democracies had been established in Africa in the nineties, he cautioned that “each country has its particular characteristics to which it must respond as it establishes its democratic system of government. Accordingly, none of us seek to impose any supposedly standard models of democracy on any country, but want to see systems of government in which the people are empowered to determine their destiny and to resolve any disputes among themselves by peaceful political means.”

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<sup>281</sup> Marcus Ramogale agrees that a nation’s “psycho-cultural wealth” determines its success. It is, consequently, vital that Africa takes responsibility to rebuild its value systems in the wake of their colonial destruction. The reconstruction process is necessarily a moral one, based on notions of ‘decency and excellence’. – ‘Quest for excellence’ in *Frontiers of Freedom* 1<sup>st</sup> quarter, 1998, South African Institute of Race Relations: Johannesburg.

<sup>282</sup> Mbeki again referred to “...the important decision recently taken at the Algiers Summit of the OAU to exclude from its ranks, with effect from the next Summit, all military regimes that may still exist on the African Continent. A further decision was taken to **assist** such countries **resolutely** to move towards a democratic system of government” (emphasis added).

Address to the 54th Session of the United Nations General Assembly in New York, 20 September 1999 [www.anc.org.za/ancdocs/history/mbeki/1999/index.html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index.html) (Date accessed: 13 October 2001)

In this context, and adopting an essentially long-term and catholic perspective of the continent's historical progress, he mentioned two 'initiatives' taken by the continent as a whole through the agency of the OAU. The first was the establishment of the inter-state Central Organ for the Prevention and Resolution of Conflicts. The Organ would be increasingly empowered, he promised, perhaps unaware of the inherent contradiction, to **intervene to resolve** conflicts on the continent by means of **peacekeeping**, which would increase the "collective capacity to intervene quickly, to ensure that we have no more Rwandas, Liberias or Somalias"<sup>283</sup>.

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<sup>283</sup> For Mbeki, there seems to exist a close parallel between the role of the OAU/AU and the role of the UN in the need to democratise its structures, and the concomitant need re-focus their respective activities on the objective promotion and defence of democratisation. It is suggested that it is not unreasonable to read into his implicit analogy a call for the UN to undertake to do that which the OAU/AU may not be able to do itself for the foreseeable future in defence of human rights norms.

During his address to the 54th Session of the United Nations General Assembly *ibid.*, Mbeki noted that changed circumstances created the opportunity for a more democratic system of international governance, as would be reflected by a "correct" restructuring of the UN. The process of globalisation necessarily redefined the concept and practice of national sovereignty, he argued, and the frontiers of that sovereignty were being pushed back, especially as regards the smaller countries of the world. Inevitably, then, it became necessary that a "compensatory movement took place, towards the reinforcement of the impact of these countries on the system of global governance, through the democratisation of the system of international relations".

He argued that the mere spread of democracy throughout the world spoke of a greater commitment among the nations to the resolution of national and international conflicts by peaceful means. The UN, therefore, had a responsibility to focus especially on the objective contained in Article 1 of its Charter, viz. 'to take effective collective measures for the prevention and removal of threats to the peace ... and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...?'

This, said Mbeki, imposed a solemn and supreme responsibility on the United Nations to work for the prevention of conflicts, and to endeavour to resolve them so that a durable peace can be established. Sometimes, the international response to conflicts had been to wait for them to develop into violence, and even wars and, only then to intervene through costly **peacekeeping** operations. These served, at times, merely to "freeze those conflicts, perpetuate polarisation, and make their timely resolution more difficult". On the other hand, the requirement that the United Nations undertake such interventions to "**prevent**" the outbreak of hostilities, imposed an obligation on the UN to ensure that it was viewed by governments and peoples as a truly even-handed interlocutor and "**peacemaker**". **Peacemaking**, then, is not an exercise in military enforcement, according to Mbeki's view.

In view of this criticism, it is unclear whether Mbeki's reference to an enhanced '**peacekeeping**' role for the OAU's Central Organ for the Prevention and Resolution of Conflicts, would actually increase the "collective capacity to intervene quickly, to ensure that we have no more Rwandas, Liberias or Somalias". The OAU's Central Organ is to be increasingly empowered to intervene to resolve

The second initiative was the adoption of the African Charter of Human and Peoples' Rights. The Charter set norms according to which African countries could judge both themselves and their sister countries as to whether they were conducting themselves "in a manner consistent with the defence and promotion of human and peoples' rights." Implicitly recognising the historical failure to give real substantive content to these norms, and that a change in the way these admirable values are actually dealt with was possibly a long way off, he conceded that "[I-]like others throughout the world, we too are engaged in the struggle to give real meaning to such concepts as transparency and accountability in governance, as part of the offensive directed against corruption and the abuse of power".

Perhaps cognisant, too, of the type of scepticism voiced by Pierre Sané, Mbeki identified his vision with a long-established 'movement'. He argued from these initiatives that, in the political sphere, the African Renaissance had already begun:

'Our history demands that we do everything in our power to defend the gains that have already been achieved, to encourage all other countries on our continent to move in the same direction, according to which the people shall govern, and to enhance the capacity

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conflicts on the continent by means of **peacekeeping** (as well as to prevent aggravated levels of conflict).

Continuing to address the UN's credibility crisis, he argued that it could attain the objective of acting as an even-handed '**peacemaker**' only if it worked genuinely 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' as stated in its Charter. If the nations were indeed seriously committed to these critical objectives of peace and democracy in the world, then there was no excuse to further postpone meaningful restructuring of the United Nations, he declared.

During the Cold War era, with the prevalence of dictatorship in many countries, the politics of power might have been seen as the only path to survival, he conceded. However, the management of the world today through the exercise of such power, however modified, would itself "subvert the objectives of democracy and peace, spawning pretenders to the throne at global, continental and regional levels", Mbeki argued.

Continuing to appeal to the more hard-headed and self-interested among his audience, Mbeki added that "it could be argued quite rationally that international peace, democracy and prosperity" were the "necessary condition for the further rapid growth of the world economy. This latter held, in turn, the key to the further expansion of corporations both small and big, which seek global markets.



of the OAU to act as an effective instrument for peace and the promotion of human and people's rights, to which it is committed'.

The "political imperatives of the African Renaissance" were inspired "both by our painful history of recent decades and the recognition of the fact that none of our countries is an island which can isolate itself from the rest, and that none of us can truly succeed if the rest fail".

Turning to economic matters, he addressed the need to deal urgently and effectively with the reality of both hunger and disease. Furthermore, the "restoration of the dignity of the peoples of Africa" demanded that Africa's leaders "deal as decisively and as quickly as possible with the perception" of the continent as "condemned forever to depend on merciful charity". Accordingly, many countries had introduced new economic policies which sought to create conditions that were attractive for domestic and foreign investors, encourage the growth of the private sector, reduce the participation of the state in the ownership of the economy and, in other ways, to build modern economies. The creation of regional markets was also a priority, he said.

He then reiterated the interconnectedness of economic and political progress. As part of the "determined offensive to achieve integrated and mutually beneficial regional development", Southern African leaders, especially, had taken other initiatives to deal with common regional problems. These included regional security, peace and stability, including the building of regional **peacemaking** and peacekeeping capacity, as well as a regional system of co-operation to combat crime.

Mbeki underlined Africa's supposed recognition of the reciprocal linkage between the political and economic categories of human rights. He noted that a significant number of countries had "shown relatively high rates of growth as a direct consequence of changes in economic policy and, of course, the achievement of stability within our countries, as a result of the establishment of democratic systems of government". These

economic objectives, “which must result in the elimination of poverty, the establishment of modern multi-sector economies, and the growth of Africa’s share of world economic activity”, were an essential part of the African Renaissance.

Mbeki again accepted that South Africans owe their “emancipation from apartheid in no small measure to the support and solidarity extended to us by all the peoples of Africa”. In that sense the country’s victory over the system of white minority domination was an African victory. This, he believed, imposed an obligation on South Africans lead, “to use this gift of freedom, which is itself an important contribution to Africa’s Renaissance, to advance the cause of the peoples of our continent.” South Africa, therefore, had to succeed, especially in strengthening and further entrenching democracy internally and inculcating a culture of human rights among all its people. This was indeed happening, he said.

Lest he give credence to whispered unease over his country’s suspected ‘imperial’ designs, Mbeki clearly bound himself to a solidarist position in the achievement of these ends. He declared that the peoples of Africa entertained the “legitimate expectation that the new South Africa, which they helped to bring into being”, would not only be “an expression of the African Renaissance by the manner in which it conduct[-ed] its affairs, but [would] also be an active participant **with** other Africans in the struggle for the victory of that Renaissance throughout our continent” (emphasis added).

Similarly, arguing that a recognition of interdependence implied the necessity of global action, Mbeki invited his audience to “join us in the noble struggle” to achieve these objectives. The process of globalisation emphasised the fact that no person is an island, sufficient to himself or herself, he observed. Rather, all humanity was an interdependent whole in which none could go hungry ‘elsewhere’ in the world. It was, accordingly, impossible for the African renaissance to succeed unless the international

community agreed that Africa constituted the principal development challenge in the world.

In a subsequent statement at Gallagher Estate, Midrand, on 13 August 1998<sup>284</sup>, Thabo Mbeki addressed the struggle for political power that was, at that time, dragging down particularly the Kingdom of Lesotho, the Democratic Republic of Congo, Eritrea and Ethiopia, Guinea Bissau, and Algeria. He said that it was “because of these pitiful souls, who are the casualties of destructive force for whose birth they are not to blame, that Africa needs her renaissance”.

Africa, he proclaimed, had no need for the criminals who would acquire political power by “slaughtering ... innocents...”. Nor had she any need for such as those who, because they did not accept that power was legitimate only because it served the interests of the people, had laid Somalia to waste.

“Neither”, he continued, “has Africa need for the petty gangsters who would be our governors by theft of elective positions, as a result of holding fraudulent elections, or by purchasing positions of authority through bribery and corruption. ... together [they] demean our Continent and ourselves. The time has come that we say enough and no more, and by **acting** to banish the shame, remake ourselves as the midwives of the African Renaissance...” (emphasis added). President Mbeki has no-one but himself to blame if his actions concerning Zimbabwe’s 2002 presidential elections are closely scrutinised.

He levelled severe criticism at those who corrupted the political order for personal gain at all costs. In this equation, he argued, the poverty of the masses of the people became a necessary condition for the enrichment of the few. It was out of this “pungent mixture

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<sup>284</sup> [www.anc.org.za/ancdocs/history/mbeki/1998/index.html](http://www.anc.org.za/ancdocs/history/mbeki/1998/index.html) (Date accessed: 13 October 2001) The speech became known as “The African Renaissance Statement”, although this was more because of its principled moral content and powerful phraseology, rather than because it heralded anything more than a ringing exhortation.

of greed, dehumanising poverty, obscene wealth and endemic public and private corrupt practice”, that many of Africa’s *coups d’etat*, civil wars and situations of instability were born and entrenched.

He declared in ringing tones that the time had come to “call a halt to the seemingly socially approved deification of the acquisition of material wealth and the abuse of state power to impoverish the people and deny our Continent the possibility to achieve sustainable economic development.” The African Renaissance, he asserted dramatically, demanded that “we **purge** ourselves of the parasites and maintain a permanent vigilance against the danger of the entrenchment in African society of this rapacious stratum with its social morality according to which everything in society must be organised materially to benefit the few” (emphasis added).

“...The call for Africa’s renewal, for an African Renaissance”, he continued, implicitly endorsing Mill’s assertion of domestic national responsibility, “is a call to rebellion. **We must rebel against the tyrants and the dictators**, those who seek to corrupt our societies and steal the wealth that belongs to the people. **We must rebel** against the ordinary criminals who murder, rape and rob, **and conduct war** against poverty, ignorance and the backwardness of the children of Africa” (emphasis added).

Again, however, Mbeki left unsaid what action, if any, might be employed by external agencies such as the OAU in support of such ‘democratic rebels’ if, indeed, he meant these powerful words to be understood in their literal sense. This vagueness characterises most of Mbeki’s public pronouncements on the practical dimension of the ‘commitment’ of the African Renaissance vision and programme to the protection and promotion of human rights. It is, consequently, not entirely clear whether Mbeki means by such statements that the time has come to ‘forcefully’ fully implement and/or defend the provisions of the Covenant on Civil and Political Rights, **while simultaneously** moving on to fulfil the terms of the Covenant on Economic, Social and Cultural Rights.

An alternative interpretation might be that he intends to merely endorse the African Charter of Human and Peoples' Rights as it currently stands, with all its limitations and reservations. Thus, while the Charter apparently recognises rights, it does so 'within the law' as any undemocratic leader may determine from time to time. So, for example, Article 6 provides that "... No one may be deprived of his freedom **except for reasons and conditions previously laid down by law**". Similarly, Article 8 declares that "No one may, **subject to law and order**, be submitted to measures restricting the exercise of" freedom of conscience and the profession and practice (emphasis added).

Emphasising perspectives of balance and moderation, Mbeki placed all his eggs in the basket of democracy: "...[W]e want to see an African Continent in which the people participate in systems of governance in which they are truly able to determine their destiny and put behind us the notions of democracy and human rights as peculiarly 'Western' concepts. Thus would we assume a stance of opposition to dictatorship, whatever form it may assume." Reinforcing this assessment, he limited his call for 'opposition to dictatorship' to the role of an election monitor: "Thus ... we must ensure that ... elections are ... truly democratic, resulting in governments...genuinely representative of the will of the people". By this means [alone], he asserted, would the continent create the mechanisms for the **peaceful resolution** of conflicts within African society, to ensure that the competition for scarce resources does not result in a mutual slaughter of civil war and violent conflict.

He again seemed careful to avoid bold leadership: "By saying all this, I am **not** suggesting that there is **any one model of democracy** which we must copy. Necessarily, we have to take into account the specific conditions in our countries to find the organisational forms which, while addressing those specific conditions, nevertheless still live up to the perspective that the people shall govern" (emphasis added).

While, then, on balance, Mbeki appears to accept a broad definition of the political evils to be confronted, they are, essentially, to be confronted peacefully, by the international community, at least. Armed humanitarian intervention is not an option to be considered readily or, even, at all it seems.

The essential reliance on the single strategy of 'pure' or elemental diplomacy, as opposed to the inclusion of any broader tools of persuasion, was re-emphasised when Mbeki spoke at the opening of the Zimbabwe Trade Fair in May 2000<sup>285</sup>. On this occasion, he again focused on mutual interests and solidarity, to the almost entire exclusion of words indicating disagreement, let alone disapproval. Again repeating central concepts as if they were a mantra or magic spell that would, by themselves, achieve the desired end, he stated: "In as much as we know from our own history that

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<sup>285</sup> 5 May 2000. Mbeki said:

'I am convinced that Zimbabwe and South Africa share a common obligation to ensure that their economies help to drive the process of growth and development throughout the SADC region. Inevitably, therefore, both of us have responsibilities that extend beyond our borders and have to respond to these, basing ourselves on the regional solidarity and unity in action we achieved during the difficult years of the struggle for liberation.

'It is obvious that the regional programme I have spoken of requires that we also address the issue of peace and stability throughout our region. Our region needs no education about the fact that without such peace and stability, we cannot achieve sustained development, the fundamental condition for the realisation of the objective of providing a better life for all our people.

....

'As peoples who share a common destiny, defined by more than the mere fact that we are neighbours, we have to be concerned about what happens in each of our countries. In this context, Mr President, I might take advantage of this occasion to mention the concern you had, a few years ago, that we, the black people of South Africa, should not make the grievous mistake of allowing the outbreak of a civil war among themselves. I am convinced that the interventions you made in this regard contributed to turn us away from a path that would have been truly disastrous.

...

'[A]s a people, we are convinced that it would be best that this important matter is dealt with in a co-operative and non-confrontational manner among all the people of this sister country, both black and white, reflecting the achievement of a national consensus on this issue, encompassing all Zimbabweans. Accordingly, we trust that ways and means will be found to end the conflict that has erupted in some areas of Zimbabwe, occasioned by the still unresolved land question in this country.

'Peace, stability, democracy and social progress in Zimbabwe are as important for yourselves as they are for the rest of the region. Peace, stability, democracy and social progress in South Africa and each one of the countries in our region are important both within each of our national boundaries and in the context of the successful evolution of all the other SADC countries.'

[www.anc.org.za/ancdocs/history/mbeki/2000/index/html](http://www.anc.org.za/ancdocs/history/mbeki/2000/index/html) (Date accessed: 13 October 2001)

you are ready to assist us to achieve peace, stability, democracy and social progress in our own country, so are we, in the common interest, willing and ready to work with you for peace, stability, democracy and social progress in Zimbabwe, in our region and the rest of our Continent ...”.

It has become clearer with the passage of time that Mbeki’s words are more artistry and artifice than to be interpreted literally as ‘action-oriented’. Indeed, the practice of his foreign policy to date has been conducted largely within the verbal dimension, and indirectly so at that. In this sense, the South African Presidency, where it leads, does so with great caution.

Those seeking an endorsement of a more direct and literal interpretation of the confrontation with or intervention against undemocratic abuses of human rights, may discern some degree of irony in the following words, uttered by Mbeki at the UN Millennium Summit in New York on 7 September 2000. Speaking in an economic context, Mbeki regretted the global ‘refusal’ to use its “enormous capacity to end the contemporary, deliberate and **savage violence** of poverty and underdevelopment. **Our collective rhetoric conveys promise**”, he asserted. **“The offence is that our actions communicate the message that, in reality, we do not care. We are indifferent.** Our actions say the poor must bury the poor. The fundamental challenge that faces this Millennium Summit is that, credibly, we must demonstrate the will to end poverty and underdevelopment” (emphasis added).

A further instructive example was the response of the current Deputy President, Jacob Zuma, to a question in the National Assembly concerning the policy status of his reported statement made at the close of the Heads of South African Foreign Missions Conference on 15 February 2001. The statement had indicated that the OAU principle of non-interference in the domestic affairs of member states should be challenged as outmoded<sup>286</sup>.

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<sup>286</sup> 7 March 2001. [www.anc.org.za/ancdocs/history/mbeki/2001/index.html](http://www.anc.org.za/ancdocs/history/mbeki/2001/index.html)

The Deputy President's reply to the question referred to the Constitutive Act of the African Union, which will replace the OAU in 2002, and which the South African Parliament ratified on 28 February 2001. While the reported statement did not constitute official government policy, Mr Zuma said, he added tentatively that "current developments on the Continent show that many leaders share these views. Examples of this are the stance of the OAU to isolate military dictatorships, the move towards democratisation and the pending establishment of an African Court of Human and People's Rights... . There may now exist sufficient grounds for Africa to review its original position, with the intention of either confirming it or changing it, based on the will of the African people...".

This response provided little clarity on the possible place in South Africa's foreign policy of any form of armed intervention in defence of human rights norms and standards. Indeed, its vagueness closely mimicked the controversy and confusion surrounding the 'SADC' (effectively, South African and Botswanan) intervention in Lesotho some three years previously<sup>287</sup>.

Then-Deputy President Mbeki had sought to deploy the concept of 'neo-colonialism' when defending that intervention against critics of its legality. Ignoring the allegations of vote-rigging, Mbeki said, bitinglly:

'Because of their hatred for the forces of genuine change on our Continent, and their determination to defeat us, ...these judges virtually approve of a coup d'état in Lesotho against an elected government, proclaim criminal arson and looting in Lesotho as an heroic act of resistance, denounce a humane approach by the region's armed forces which minimised the loss of life, and prostitute the truth in the process ... .

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(Date accessed: 13 October 2001)

<sup>287</sup> See Cedric de Coning 'Conditions for Intervention: DRC and Lesotho' in *Conflict Trends* Issue 1, October 1998 at 20ff, ACCORD: Umhlanga Rocks, South Africa; and Prof. George Barrie 'South Africa's forcible intervention in Lesotho: what does international law say?' *de Rebus* January 1999 at 46-7.



'Our strength, however, derives from the fact that in as much as we did not owe our liberation as a Continent from colonialism and apartheid to these superior judges, so we will not owe our emancipation from the deadly clutches of neo-colonialism and the other ills which afflict our Continent to these eminent persons. Accordingly, it is not their view which should determine our direction and pace of march, but our own **sovereign** perspective of what is good and necessary for us to achieve the new birth of Africa' (emphasis added).

Because of the President's much-criticised occasional resort to the 'race card' domestically, it is unclear whether Mbeki's disparaging response to 'neo-colonial judges' constituted merely a calculating deflection of warranted criticism and a justification of the legally indefensible. Consequently, it is difficult to draw any conclusions concerning whether or not 'humanitarian intervention' may indeed constitute part of the armoury to advance the African renaissance.

A similar example is presented by the Constitutive Act of the African Union. It stipulates 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'. However, the possibility of a decision by the Assembly in favour of intervention in defence of human rights remains an imponderable. This is particularly so in view of the almost obligatory obeisance he paid to the concept of sovereignty, although on this occasion the reference was to a solidarist, continental, independence<sup>288</sup>.

When then-Deputy President Mbeki addressed the ministerial meeting of the Non-Aligned Movement in Durban<sup>289</sup>, he again expressed his grave doubts whether a stable world of divided fates was possible and, more importantly, whether such a world, even if it were possible, was desirable. It was not possible, in his view, for "some to

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<sup>288</sup> For further discussion of this issue, see footnote 278 above

<sup>289</sup> Durban, 31 August 1998. [www.anc.org.za/ancdocs/history/mbeki/1998/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1998/index/html)

ceaselessly maintain and expand their prosperity while billions of others were victim to dire misfortunes"<sup>290</sup>. Patently, something had to be done. The necessary "action", urged Mbeki, required of global political leaders was that they should face up to the question of "whether universal human values have any place at all in the ordering of human affairs"<sup>291</sup>.

Mbeki then elaborated on the necessary connection between the completion of political liberation and progression to the next phase, of economic liberation, contrasting conduct within Africa's 'new bloc'<sup>292</sup> with that of the unreconstructed rump. "Clearly, he declared, "any among us who is preoccupied with denying his or her people their democratic and human rights, who is fixated on waging wars against others, who is too busy looting the public coffers or who thinks that he or she must bow in supplication for charity to those whose wealth sets them aside as the mighty, will not have the time to participate in meeting this historic challenge".

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(Date accessed: 13 October 2001)

<sup>290</sup> Mbeki referred with approval to the writer in the London *Financial Times* in June 1998, who had commented on the emerging markets crisis as follows:

'At present the west, in general, and the US, in particular, seem blessed even by the dire misfortunes of others. But the stability of this world of divided fates is doubtful - economically and ultimately politically. Either sustained prosperity in the west will help bring stability and renewed growth to Asia and elsewhere, or the spreading crisis is all too likely to export instability to the west. Today's western complacency could tomorrow look mere vainglory.' (FT: June 13/14, 1998)

<sup>291</sup> Mbeki, addressing the 54th Session of the United Nations General Assembly in New York a few days later on 20 September 1999, reiterated his earlier calls for a truly international undertaking to extend the application the full range of human rights standards. In doing so, he utilised the opportunity to echo the catholic (i.e. political and economic) focus of his African renaissance vision:

'The Charter of this Organisation and the Universal Declaration of Human Rights provided all of us with the vision towards which we should strive', he said. 'The time had come to take determined measures to ensure that the values expressed by these words informed what actually happened in the common world we all share. There was a need to work together to reconstruct human society in a manner consistent with the perspective of which they spoke. The central message they contained was', he said, 'expressed in the words of the Declaration of Human Rights:

'...the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.'

<sup>292</sup> Dan Connell and Frank Smyth 'Africa's new bloc' *Foreign Affairs* March/April (1998) Vol. 77 No. 2, 80-94

Subsequently, during his Chairperson's address to the Non-Aligned Movement's Ministerial Meeting at the United Nations in New York on 23 September 1999<sup>293</sup>, Mbeki noted that the largest number of intra- and inter-state violent conflicts and wars were within NAM. This had resulted in millions of refugees and displaced persons. He questioned whether the time was not now appropriate to prevent and manage these conflicts so as to spare their people the horrendous consequences of instability and war. Were NAM members ready, he asked, to "assist each other, learn from one another and act together to end tension and resolve conflicts?" Or did they "deliberately deny [themselves] the possibility of sharing these problems with one another by asserting [their] state [i.e. political] sovereignty?"

Everyone who viewed the Non-Aligned Movement as "the repository of democracy, human rights, good governance and the sovereign voice of the poor of the world" must also see the Movement as "a serious instrument for the transformation of a world driven by the process of globalisation". It was, he asserted, therefore necessary for NAM to examine itself to see whether the way it was organised and worked as a Movement, and the way its members co-operated, were such that it was able to meet these challenges and opportunities. Mbeki, again, was playing the role of the prophet in the wilderness, rather than the leader of a triumphant army emerging from the trenches; a teacher and encourager, rather than a sergeant major.

Addressing the Nigerian Institute of International Affairs<sup>294</sup>, President Thabo Mbeki restated the central position of democratic forms of governance to the Renaissance vision. The new wave of African leaders viewed democracy as "a vital element of the humanisation process" he declared. Re-emphasising the relevance of human rights to daily life, Mbeki criticised the loss of democratic power in many African countries that

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<sup>293</sup> [www.anc.org.za/ancdocs/history/mbeki/1999/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1999/index/html) (Date accessed: 13 October 2001)

<sup>294</sup> Address to the Nigerian Institute of International Affairs, Abuja, 3 October 2000: 'Democracy and Renaissance in Africa: In search of an enduring *Pax Africana*' - [www.anc.org.za/ancdocs/history/mbeki/2000/index/html](http://www.anc.org.za/ancdocs/history/mbeki/2000/index/html) (Date accessed: 13 October 2001)

had led to the people “being pre-occupied with a hand-to-mouth existence, the difficult struggle to survive”.

The argument of cause and effect could be reversed, however, urged Mbeki<sup>295</sup>. “It is important that all of us”, he continued, “...build an Africa that shares a common vision for a more human, caring society freed of dictatorship, warfare and military upheavals, where there is a desire among all that the conflicts that will [i.e. ‘inevitably, unfortunately’?] exist will be resolved peacefully. At the same time, for our people to have the space to participate in the processes of the renaissance, they must live in conditions of peace and stability throughout the continent”<sup>296</sup>.

Mbeki quoted with approval John Stremmler, an American scholar at the University of the Witwatersrand who, in his essay *African Renaissance and International Relations*, had this to say:

‘None of the political disasters afflicting African in recent years were inevitable, nor do any more have to be. Surmounting the legacies of colonialism remains a complex challenge for many communities, but at least no future imperial threats loom. Resolving current crises and preventing new ones will require much broader and deeper forms of intra-African co-operation.

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<sup>295</sup> The principle of the indivisibility and interdependence of all human rights accords with the modern trend in international human rights law. See Sandra Liebenberg ‘The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa’ (1995) 11 *SA Journal on Human Rights* 359-378 at 374.

<sup>296</sup> Mbeki has returned repeatedly to this form of words or exhortation, for example, in a statement at the African Renaissance Conference in Johannesburg on 28 September 1998. He expressed support for the people of Nigeria in the similar challenges they faced, having taken their first important democratic step away from military rule, corruption and the abuse of power. He indicated his approval of “a system of governance that successfully addresses the challenges of a multi-cultural and multi-ethnic society and an equitable system of sharing resources, for a path of economic growth and development which benefits the people and reinforces the independence of Nigeria. Any progress made on all these issues would be of great benefit not only to Nigeria.”

Similarly, just as that “enemy to progressive change represented by ethnic divisions and antagonisms” could not be avoided, so the people of the Democratic Republic of Congo could not do without that process of fundamental transformation in the interests of the people, which constituted “the core of the vision of an African Renaissance”.

[www.anc.org.za/ancdocs/history/mbeki/1998/index/html](http://www.anc.org.za/ancdocs/history/mbeki/1998/index/html) (Date accessed: 13 October 2001)

'If successful, an African renaissance will finally bring an enduring *pax africana* and the promise of evolving political frameworks that will allow the continent's rich cultural diversity to flourish. Only then can inescapable forces of economic and technological globalisation be managed and eventually turned to advantage at all levels of African society.'

Mbeki expressed his concurrence that "one of the most important challenges facing Africa today is to achieve a comprehensive and sustained peace and to ensure an enduring *pax africana*, "for [both] democracy and sustained development [are] possible only in conditions of peace and stability."

### **5.2.9 Mbeki's leadership team**

This conviction, shared by other African leaders, has led to the progressive development and frequent adaptation of a proposed 'Marshall Plan' for the African continent. Foremost among the continent's leadership involved in transforming the vision into an implementable plan have been Mbeki, Nigeria's democratically-elected, reformed military dictator, President Olusegun Obasanjo, Algeria's electoral 'thief', President Abdelaziz Bouteflika, and President Abdoulaye Wade of Senegal.

Termed, variously, the MAP/Omega Plan, NAI and, most recently, NEPAD<sup>297</sup>, the plan pledges implementation of, or requires, the following pre-conditions for sustainable growth and development:

- peace and security
- democracy and good political governance
- sound economic and corporate governance
- infrastructure development
- improved access to developed-country markets

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<sup>297</sup> *Business Report* 26 October 2001 'Africa called to clean house', Quentin Wray. See also 'Plan for African renaissance launched today', *Cape Times* 23 October 2001, Reuters, and 'European leaders welcome African initiative', *The Star* 11 October 2001, Sapa-AFP

The plan was adopted in July 2001 by a summit of the 53-member Organisation of African Unity, which is to be transformed over the period of a year into a broader entity, the African Union.

Addressing the World Economic Forum meeting in Davos, Switzerland, on 28 January 2001<sup>298</sup>, Mbeki described the then-MAP programme as a declaration of “a firm commitment by African leaders to take ownership and responsibility for the sustainable economic development of the continent”. Their starting point was a critical examination of Africa’s post-independence experience and an acceptance that things had to be done differently in order to achieve meaningful socio-economic progress, without which it would not be easy to achieve their historic task of improving the lives of their people.

Their programme contained, said Mbeki, “a vision, perspective and the outlines of a plan for the redevelopment of Africa”. It clarified the objectives [of the African renaissance vision] and the approach to development projects that were going to be appraised, further developed and negotiated with their partners in Africa and the rest of the world during the succeeding few months. They had developed the outlines of a concrete programme of action that was multi-faceted and the priority areas it would cover included creating peace, security and stability, and democratic governance, without which it would be impossible to engage in meaningful economic activity<sup>299</sup>.

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<sup>298</sup> ‘Millennium Africa Renaissance Programme - Implementation Issues’  
[www.anc.org.za/ancdocs/history/mbeki/2001/index/html](http://www.anc.org.za/ancdocs/history/mbeki/2001/index/html) (Date accessed: 13 October 2001)

<sup>299</sup> Other priorities are:

- Investing in Africa’s people through a comprehensive human resource strategy;
- Harnessing and developing Africa’s strategic and comparative advantages in the resource-based sectors to lead the development of an industrial strategy;
- Increasing investments in the information and communication technology sector, without which Africa would not be able to bridge the digital divide;
- Development of infrastructure, including transport and energy; and
- Developing financing mechanisms.

For a range of complex reasons, MAP’s leadership conceded, African countries (with a few notable exceptions) had “weak states”. An essential step in the implementation of the programme would, therefore, be to strengthen the capacity of these states. There was a need to create a ‘continent-wide’ programme to develop this capacity with the support of developed countries, the private sector and multilateral institutions. The focus of the programme was not increased aid, but increased

The overarching objective was the “acceleration of efforts to eradicate poverty on the continent” and to significantly increase new investments by mobilising both domestic and especially foreign savings. Participation would be limited to African leaders committing themselves to a Compact, while a Forum of Leaders would make decisions about sub-programmes and initiatives and review progress on its implementation.

Regarding issues of democracy and human rights, African governments were already working together on conflict prevention and resolution, he said. He again referred to the “firm resolution” taken by the Organisation of African Unity to “discourage” usurpation of power and military coups and to “concrete action” taken to resolve conflicts in many parts of the continent<sup>300</sup>.

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investments in viable infrastructure and business opportunities. Targeted aid and technical support to address capacity constraints and urgent human development priorities would, however, also be required.

MAP proposed a ‘Global Partnership’ for Africa’s development and inclusion in the world. This posed “a challenge and an opportunity to all countries of the world. The continued marginalisation of Africa from the globalisation process, and the social exclusion of the vast majority of [its] people constitute[-d] a serious threat to global social stability”.

<sup>300</sup> Again, ‘concrete action to discourage’ seems to mean little more than a euphemism for quiet diplomacy.

## ***CHAPTER SIX: THE NEED FOR A REASSESSMENT OF THE DEMANDS OF THE RENAISSANCE VISION***

This paper has attempted to argue that the essential raw material exists for an improvement in the human rights climate on the African continent. The international legal framework is in place and there exist myriad examples of workable domestic or national interpretations and applications of the ingredients of that edifice. African states have acquired their independence from colonial oppression and exploitation and the number of African democracies is growing. A consensus is slowly emerging among the continental leadership that democracy is what their peoples need for contentment, stability and economic growth. It is not merely a concept that the 'West' uses as a tool with which to discriminate against African countries for the sake of colonial-era resentments. The trend to African adoption of international norms and standards in the field of governance has accelerated despite lingering appeals to the exclusive nature of indigenous African traditions. Increasingly, common ground is being recognised between the two historical traditions. Differences in emphasis need not become differences of principle. Through the pain and mistrust of the imperial era, an understanding is growing of an essential mutuality of interests and values.

The realisation of Africa's feared marginalisation will only perpetuate the ability of its undemocratic leaders to successfully appeal to 'indigenous' values to the exclusion of alien 'Western' norms. These indigenous values, while not necessarily in themselves all immoral or unethical, are impractical and incompatible with any attempt at a successful modern state. Any supposed distinction between these values and those increasingly part of broader international understanding is far easier to assert and deploy in the continued absence of the plethora of cross-cutting interpersonal ties that typify modern international society. In a world where knowledge is power, individual knowledge must be extended beyond self-serving élites in order for it to serve democratic ends. The



reasoning behind Mbeki's emphasis on connecting Africa to the digital revolution becomes clear given this core element of the irresistible forces of globalisation.

This convergence of understanding regarding values has taken place at the same time as (and, possibly, because) the demise of the Cold War revived hopes for greater consensus on matters of human rights. In reaction to the brutal consequences of the selfish exploitation of 'realism', a resurgence of idealist natural law theories of international relations and democratic governance has been evident. The subsequent announcement of a vision of an Africa reborn seemed to give added impetus to these idealistic hopes of a New World Order. The Renaissance vision as expounded by President Thabo Mbeki was enthusiastically greeted as offering some hope that these values may assume centre-stage importance in the 'African century'.

Consequently, the vision of an African Renaissance, and MAP/Omega/NAI/NEPAD, clearly requiring Africa to take responsibility for its failures and for implementing solutions, inspired significant optimism concerning developments on the continent. Ex-President Nelson Mandela's stance concerning Nigeria only served to increase that optimism. South Africa's second President, Thabo Mbeki, has called upon Africans to identify and define their problems and to recognise their existence, in order to seek partnerships to eradicate or, at least, overcome them.

In doing so, however, a 'brown' or developmental rights agenda seems to have received most attention from his office. While this focus is recognised as necessary and, indeed, vital to the future of Africa, in practice it frequently seems to be emphasised at the expense of a vital simultaneous – and practical – emphasis on the other rights in the spectrum, especially the 'blue' rights that underpin democratic governance. When the two agendas are not pursued exclusively of each other, the value of continental and, more especially, sub-Saharan solidarity is interposed in order to temper any criticism that may be voiced against undemocratic practices. This tendency has evoked sighs of frustration, disappointment and even exasperation at times.

On the other hand, the contribution and benefit of the value of brotherhood or *ubuntu* may be too readily ignored. It does, at least, have the positive effect of not closing down channels of communication. One is reminded also of John Stuart Mill's conclusions concerning the vital necessity of domestic readiness to best appropriate any assistance arising from external intervention. If one accepts Mill's thesis, then the possibility exists that Mbeki's approach may, in fact, be the most appropriate in the circumstances. He may indeed be deliberately avoiding overt and direct confrontation and challenge with leadership perceived to be 'out of line' with democratic trends, choosing to focus instead on a policy of 'educating' and 'encouraging' domestic populations to object to current experiences of some form of rights deprivation. This may be the longer, but more sustainable, route to follow. It may be worth recalling that Aesop's tortoise did, ultimately, defeat the hare.

Indeed, time has bred caution and a realisation that, if Africa is to offer something new, it may well be some while in gestation. In fact, the attainment of the vision of the African Renaissance is explicitly stated by its exponents to be partly dependent upon the realisation of greater levels of global, continental and domestic 'justice'. It appears, then, that Africa's renaissance may well be an essentially long-term journey with a broad vision.

While exegesis and assessment of the vision remain immature, it is reasonable to conclude that President Mbeki has been well advised concerning the caution with which African leaders continue to approach the matter of human rights promotion and protection. National sovereignty is difficult to surrender in a world of weak allies and strong competitors (or, in the eyes of some, 'exploiters'). The announcement of the rebirth of the continent does not, at least in this respect, herald any significant or immediate departure from the hesitantly-breached confidential style of the OAU.

Indeed, there has been no 'Damascus road' conversion for African leadership as a group. As President Mbeki has been at pains to explain, the Renaissance is no new

phenomenon: it has been under way at least since Ghana became the continent's first celebrant of freedom from the colonial yoke. The inclusion in the African Charter of legal and political rights and moral obligations presented Africa with a unique opportunity to make a signal contribution to the resurgence of natural law theories in public international law and international relations. However, the opportunity has yet to bear much of the promised fruit.

Thus, the mediation of the Renaissance vision through South African foreign policy suggests that a sober reckoning has been undertaken concerning the complexity and duration of the task of turning the ship around. Mbeki has, consequently, adopted a non-confrontational consensus-building process, thereby ensuring that as many African leaders as possible 'buy in' to the vision and its programme of implementation. While time-consuming, it may at least produce a solidly grounded policy approach to the amelioration of the continent's ills.

While, therefore, South African foreign policy initially prompted idealistic projections arising from the supposed occupation of the 'moral high ground' following the 'democratic miracle' of 1994, it may now be described as more firmly rooted in a 'realist' understanding of the primary need for committed and dependable allies. The South African government has shown itself sensitive to allegations of hegemonic aspirations. It has, for this reason, developed a strong 'Afro-centric' or 'South-centric' plank in its Renaissance platform that has, on occasion, led to the adoption of certain questionable positions.

Consequently, South Africa's relative economic strength on the African continent led to an initial perception of its power not always matched by its subsequent willingness to deploy that power in either a military form or, even, in a unilateral political mode. Its potentially influential political and diplomatic role since the advent of the process of democratic transformation has been tempered by its more cautious emphasis on solidarity among sovereign states.

It has been argued that “Africa’s future success lies in a combination of the need for expertise, good, democratic and transparent governance, and capital”<sup>301</sup>. One avenue leading to this goal is through the establishment of strategic alliances and patterns of practical co-operation between African states themselves, ideally within existing regional economic and security structures<sup>302</sup>. This appears to be the prescription currently proposed by NEPAD. But it is submitted that another equally immediate need is to actively ‘encourage’ informed and sensitive domestic governments, an imperative that requires, among other things, a shift in policy focus and lending practice by multilateral institutions such as the United Nations-system bodies, and the national and international financial agencies.

Also required, it is suggested, is a more realistic – and courageous – assessment of the full range of practical implications of the call to ‘encourage courage’ by the ‘democratic rebels’ lauded by Mbeki, as well as appropriate support methodologies. Such ‘rebellions’, or resistance, even if peaceably begun, notoriously do not necessarily elicit a non-violent response by an undemocratic state apparatus. Consequently, something more than a uni-dimensional foreign policy or multilateral strategy is required. The poverty of a one-track foreign policy is starkly illustrated in the failure of SADC to ‘encourage’ Mugabe to reconsider his chosen path to re-election. Even Mbeki has acknowledged that political violence will not simply be wished away.

What remains absent, therefore, and not only in Africa it must be emphasised, is an urgent appreciation of the fundamental primacy of the value of human life. Arising from this deficiency is the widespread policy failure to recognise the cardinal value of the protection of human rights or, more directly and personally phrased, the protection of human beings. The consequence of this intellectual and moral omission is policy

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<sup>301</sup> P T Mathoma ‘Foreword’ in Mathoma *et al.* *Putting People First op. cit.* at p xii

<sup>302</sup> For discussion of these issues, see Hussein Solomon and Maxi van Aardt (eds.) ‘Caring’ security in Africa *op. cit.*; Mark Malan SADC and sub-regional security: unde venis et quo vadis? *op. cit.*; Jakkie Cilliers Building security in Southern Africa: an update on the evolving architecture *op. cit.*; Jakkie Cilliers and Annika Hilding-Norberg (eds.) Building stability in Africa: challenges for the new millennium *op. cit.*

confusion over the appropriate policy tools to utilise when undemocratic regimes seriously infringe acceptable norms and standards of humanitarian decency. And the fruit of this confusion is the continuation of mistrust and accusations of double standards. Hence, the 'brave new world' of the principled use of armed humanitarian intervention to halt large-scale human rights abuses has remained only sporadically evident.

Analysts like Mark Malan of the Institute for Security Studies and Richard N. Haass have written extensively and authoritatively on the complex philosophical and practical problems facing attempts to keep and make peace, in Africa and elsewhere<sup>303</sup>. They have shown that traditional diplomatic and military approaches to the prevention of intrastate conflicts (the type of conflict that constitutes both the main threat to human rights-norm observance, and the frequent consequence of failure to do so), have proven inadequate.

However, even Boutros Boutros-Ghali, the United Nations Secretary General who consequently introduced the concept of 'peace enforcement' has been unable to define it. The UN itself, moreover, has proven signally incapable of effective response to the imperative of intervention in 'failed states in the throes of civil war'<sup>304</sup> in order to contain or halt the gross human rights abuses that frequently characterise failing states. As the authorities gradually lose whatever respect and control they once enjoyed, a creeping anarchy emerges that defies simple, clear characterisation as a 'crisis' warranting and justifying some form of direct, forceful intervention.

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<sup>303</sup> See, for example, Mark Malan: (a) 'The principle of non-interference and the future of multinational intervention in Africa' *op. cit.*; (b) 'Keeping the peace in the neighbourhood and abroad' *op. cit.*; and (c) 'Peace enforcement': the real peace support challenge in Africa' *op. cit.* See also Emmanuel Kwesi Aning 'War and peace: Dilemmas of multilateral intervention in civil wars' *African Security Review* Vol. 9 No. 3 2000, 19-33; Richard N. Haass *Intervention op. cit.*; and Pierre du Toit 'Peacebuilding in Africa: prospects for security and democracy beyond the state' *African Security Review* Vol. 8 No. 1 1999, 11-19

<sup>304</sup> 'Peace enforcement' *ibid.* at 11

Malan has argued that this inability stems partly from the fact that “multinational interventions continue to be based on the peacekeeping principles of impartiality, consent, and the non-use of force except in self-defence – principles which are tenuous in the midst of the turmoil of intrastate conflicts”. The “politically correct” school “continues with its fixation on Chapter VI [of the UN Charter which provides for the peaceful settlement of disputes] and its reluctance to seriously consider how to make peace enforcement work”<sup>305</sup>. Consequently, most national doctrines on forceful interventions in the cause of peace or human rights “continue to amount to a counsel of inaction bordering on paralysis”<sup>306</sup>, says Malan. The anti-intervention argument is founded upon pragmatism, emphasising what is perceived to be possible and effective in usually complex emergencies, rather than what is right.

There exists, however, “a minority viewpoint which is less concerned with the risks involved and more concerned with humanity” and “based on ethics. In an humanitarian emergency, it is morally reprehensible”, says Malan, “to stand by and do nothing, even if the only way to intervene effectively requires lethal force”<sup>307</sup>. The answer, argues Malan, is clearly to unify these perspectives by “focusing on what is both right and effective”<sup>308</sup>.

Consequently, it is submitted, it ought now finally to be recognised that it has been placed beyond debate that the internal violation of human rights is legitimately a matter of international concern. This is affirmed by the UN Charter, the Universal Declaration of Human Rights and even the African Charter on Human and Peoples’ Rights. Moreover, the principle of ‘humanity’ as codified in, particularly, international humanitarian law and practice, demands that people are treated humanely in all

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<sup>305</sup> *ibid.* at 13

<sup>306</sup> *ibid.* at 15

<sup>307</sup> This viewpoint is represented by such as Sir Brian Urquhart, who has made a great contribution to ‘classical’ UN peacekeeping.

<sup>308</sup> However, for Malan, the strongest practical argument for attempting to develop a viable peace enforcement doctrine is the fact that such operations ‘have been and will continue to be conducted’ in

circumstances, and that everything possible is done to alleviate human suffering and to ensure respect for the individual. These considerations should, therefore, form the departure point for the development of international and regional capacity for peace enforcement<sup>309</sup>.

Malan refers to the obvious but fundamental general principle of conflict resolution identified by the Joint Evaluation of Emergency Assistance to Rwanda report, i.e. that “respect for international law and norms will tend to diminish conflict, whereas violations will tend to stoke it”<sup>310</sup>. The simple and fundamental point he makes is that respect for the law tends to encourage more of the same, and vice versa. The ‘Rwanda Report’ continues to indict the violation of “international law and associated principles” and the failure to act upon the “legal right and moral obligation to intervene in order to stop the genocide”.

It is, therefore, submitted that the reluctance of governments to act in circumstances where they do not perceive their direct national interests to be affected, where appropriate national laws either do not exist, or where the rule of law has disintegrated, must be counterbalanced by Security Council action. In Africa, where developed countries are signalling their growing reluctance to become involved in areas and issues of which they have limited understanding<sup>311</sup>, the African Union must, of necessity, also

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a wide range of circumstances by many different parties and agents. The issue is not going to go away. See also Christopher M Ryan ‘Sovereignty, Intervention and the Law *op. cit.* 77ff.

<sup>309</sup> J O C Jonah ‘Developing a United Nations capacity for humanitarian support operations’ in L Gordenker and T G Weiss (eds.) *Soldiers, peacekeepers and disasters* Macmillan/International Peace Academy, London, 1991, cited in Malan *ibid.*

<sup>310</sup> H Adelman and A Suhrke ‘The international response to conflict and genocide: lessons from the Rwanda experience’ in *Early Warning and Conflict Management (Study 2)*, Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, March 1996, at 71, cited in Malan *ibid.* 16

<sup>311</sup> Stephan Maninger ‘Heart of darkness: Western policy of non-interventionism in Africa’ *African Security Review* Vol. 8 No. 6 1999, 25-36, provides a particularly harsh and bleak explanation of the supposed historically immutable marginalisation of the continent. Indeed, he characterises decolonisation as ‘less a successful freedom struggle on the part of Africans than a voluntary albeit gradual withdrawal by colonisers’ who had grown disillusioned with the prospects of the ‘three Cs’ of ‘Commerce, Christianity and Civilisation’ taking root and flourishing. He describes a superstitious, pathologically fragmented and tribalised continent founded upon familial loyalties and widely dependent upon slavery for economic advancement inherently unsuitable to Western enlightenment concepts such as the separation of powers, the rule of law and individual rights. He, thereby, savagely

take up this challenge. Malan has pointed out, however, that recent Western efforts to assist African countries to build capacity to participate in peace support operations have focused on outmoded, traditional, standard UN peacekeeping doctrine – with all its limitations in the circumstances facing the continent<sup>312</sup>.

Malan and others have, consequently, endorsed peace enforcement as an appropriate doctrine for dealing with current realities. In this scenario, and in accordance with the legal principles contained in the sources of international law referred to above, intervention is justified when it is a calculated, proportionate response (with reasonable prospects of success) to actions that shock the conscience of ordinary men and women. These limitations and provisos are central to the validity of the revisionist argument. There is, therefore, no moral reason “to adopt that posture of passivity”. Any state or, preferably, any group of states, capable of stopping the slaughter has a right, at least, to try to do so. The fact that the legalist paradigm excludes such efforts indicates only the inadequacy of the paradigm to account for moral realities.

Its antithesis, the revisionist paradigm, may be summarised as follows: States may be invaded and wars justly begun to assist secessionist movements (once they have demonstrated their representivity), to balance the earlier interventions of other states, and to rescue peoples threatened with massacre. In each of these instances, the society of states should permit or, *ex post facto*, either praise or decline to condemn, these ‘violations’ of the formal rules of sovereignty, on the grounds that they uphold the

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undermines optimistic forecasts of democratisation and sustainable economic growth based on a newly-discovered work ethic.

Perspectives such as Maninger’s of the African continent as the so-called ‘heart of darkness’, may give rise to a query concerning the significance of President Thabo Mbeki’s comment at the launch of the African Renaissance Institute in Pretoria on 11 October 1999. On that occasion, Mbeki apparently endorsed a ‘superstitious’ worldview when he said that “[t]he only ailment that has no cure is the spawn of a curse”.

<sup>312</sup> One may find some connection, if not an entire explanation, between this deficiency and the general lack of enthusiasm exhibited by African countries for the idea of the creation of a joint armed humanitarian intervention force.



values of individual life and communal liberty. Sovereignty is merely an expression of these fundamental values and, ultimately, derived from them.

It is sometimes argued that it would be safer to insist on an absolute rule of non-intervention because of the frequent disregard of these rules. Similarly, however, the strict rule may also be ignored, and we are then left with no criteria to judge what will happen next. In any event, we do possess 'valuable', in the sense of value-laden, standards in the form of internationally binding legal commitments to human rights. Rather than be guided by these, one would suggest, than by a cold neutrality. After all, neutrality, or a stance in favour of strict non-intervention, amounts to the same thing as intervention, this time in favour of the *status quo*, as Talleyrand has averred.

It is important to understand, nevertheless, that the African renaissance vision as articulated and implemented thus far is, as yet, in its early incarnations. The vision may not yet be firmly established among its initial adherents. Nor may there yet be a full appreciation of its consequent demands. Although this may be disappointing for the idealists, it is perhaps therefore too soon to expect the necessary broad acceptance of the centrality of the need to overtly establish a multilateral organ/mechanism for humanitarian intervention. One suspects that the political will to establish and utilise it may emerge only if and when demanded by the democratised, educated and 'activist' electorate both envisaged and required by the African Renaissance vision. In that sense, at least, the proponents of the vision are correct when they assert that the future of Africa is in its own hands.

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