

SECTION I

The paradigm of human rights and its relevance for Africa

Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world¹

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The *universal* in the Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) of 1948² and its fundamental law, the Charter of the United Nations (UN),³ laid the foundation of a human rights movement that changed the face of the world.⁴ Indeed, the manifestations of human rights after World War II were as revolutionary as the human rights declarations of the American and French Revolutions in the last years of the 18th century.

¹ This paper pursues further what I started with my contribution to the XIth International Congress of the Commission on Folk Law and Legal Pluralism in 1997 (Hinz 1999), followed by Hinz (1998) and taken up again with “Jurisprudence and anthropology” (Hinz 2006e). In the latter, I quoted Freeman’s (1994:509) *Introduction to jurisprudence*, where he called the development of sociological jurisprudence “one of the most characteristic features of the twentieth-century jurisprudence”. Referring to this, I added that, in view of increasing globalisation, *anthropological jurisprudence* would be the most characteristic feature of the jurisprudence of the new century. The Association of Southern African Anthropologists and the *Deutsche Gesellschaft für Völkerkunde* (DGV, the German Anthropological Association) had human rights and anthropology on the agenda of their respective 2005 congresses. An earlier version of this paper was presented at the 2005 ASnA Conference.

The quoted earlier papers and the current paper are theoretical reactions to projects in which the Centre for Applied Social Sciences (CASS) in the Faculty of Law of the University of Namibia (UNAM), the Faculty’s Human Rights and Documentation Centre, and the writer, in his capacity as UNAM’s United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair for Human Rights and Democracy, were involved since the Faculty’s institution in 1993, namely human rights education and good governance workshops with local stakeholders, traditional leaders, but also government officials from English-speaking African countries who attended World Trade Organisation (WTO) training programmes at UNAM.

² Resolution 217 (III) of the UN General Assembly on 10 December 1948.

³ The latter came into force on 24 October 1945.

⁴ Cf. Steiner & Alston (2000:137ff).

How *universal* was what was set in motion after WWII? How *universal* was the UDHR? The majority of the members of the UN as we see them today did not participate in the drafting, debate and adoption of the declaration because their respective countries were still under colonial rule.⁵ Some of the members of the UN at the time expressed their unease with the UDHR, amongst them Saudi Arabia, South Africa and the Soviet Union, albeit for different reasons.⁶

The 1948 plea and vote for human rights did not result in questioning the legitimacy of colonialism. The adoption of the UDHR also did not prevent the continuation of fascist rule in Greece, Portugal and Spain after the end of fascism in Germany and Italy; nor did it prevent colonial powers from pursuing their interests with oppression and wars. Furthermore, the UDHR did not save the world from traumatic wars such as that in Vietnam, and it did not prevent countries emerging from colonial rule from falling into the trap of domestic conflicts that caused the death of millions. Does all this not prove the American Anthropological Association's objections to the intended project of a UDHR right are valid?⁷

Looking back at what happened in the field of human rights after WWII, one has to acknowledge that tabling the UDHR to the world agenda was only the starting point of a movement that has grown steadily since then. The adoption of the UDHR was the adoption of a world vision which, although it did not terminate violations of human rights with the stroke of a pen, it did set a powerful movement in motion. The movement gradually reached out to areas that required protection by legal instruments; it became the platform for the production of many conventions and treaties and, with them, mechanisms to control their observance and, to some extent, to sanction violations.

The post-war human rights movement started as a direct reaction to what happened before and during WWII. The agreement between the allied powers to prosecute those responsible for war crimes before international tribunals (in Nuremberg and Tokyo) preceded the UN Charter. It set important precedents

⁵ The UN had 56 members when the UDHR was adopted.

⁶ A total of 48 members voted in favour, while 8 abstained; cf. Steiner & Alston (2000:138ff).

⁷ Cf. American Anthropological Association (1947; cited in Steiner & Alston (2000:372–374).

for an international understanding of crimes against humanity,⁸ and was the foundation of a new concept of international law that eventually resulted in the establishment of the International Criminal Court in 1998!⁹

The UDHR was meant to be what its title indicates: a *declaration*, not an internationally binding agreement. Today, however, dominant opinion in public international law regards it as having become part of international customary law.¹⁰ From a socio-political point of view, the UDHR expressed a *vision of cosmopolitanism*:¹¹ a vision with a plea for a world with more dignity and respect for human beings. Indeed, the UDHR became a powerful platform to argue cases of concern and build an ethical code from which to launch the development of human rights instruments. Some exemplary achievements include the Covenant on Economic and Cultural Rights; the Covenant on Civil and Political Rights;¹² the Convention on the Prevention and Punishment of the Crime of Genocide;¹³ the Convention on the Elimination of all Forms of Discrimination against Women;¹⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment;¹⁵ and the Convention on the Right of the Child.¹⁶ It is important to understand that all these concretisations of human rights, including the many regional instruments developed in Africa, the Americas, and Asia, were inspired by the 1948 *cosmopolitan vision*. They needed the inspiration; they also needed

⁸ On 8 August 1945, France, the Soviet Union, the United Kingdom and the United States of America agreed in London on the creation of international military tribunals. Annexed to the agreement was the Charter of the International Military Tribunal at Nuremberg. Before the end of the Nuremberg trial, 19 additional countries had acceded to the Charter. The Tokyo Tribunal was created in January 1946 at the directive of the Commander-in-Chief of the Allied Forces by the Charter of the International Military Tribunal for the Far East. For this and further developments in the field of international criminal law, cf. Werle (2005: 1ff).

⁹ Cf. the Rome Statute of the International Criminal Court of 1998.

¹⁰ Cf. here Sieghart (1983: 53ff).

¹¹ I use *cosmopolitanism* as the human-faced alternative/complement to *globalisation*.

¹² It took 12 years to get the two Covenants adopted by UN General Assembly in 1966. The Convention on Civil and Political Rights came into force in the same year, but the Convention on Economic Social and Cultural Rights only entered into being in 1976.

¹³ In force since 1951.

¹⁴ In force since 1981.

¹⁵ In force since 1987.

¹⁶ In force since 1990.

time to reach a level of debatability; and they needed their environments and climates, without which they would not have gained the status of law.¹⁷

The amount of legally binding human rights provisions proves that the ethical intention of the UDHR was successful insofar as it at least consolidated the international discourse on human rights. By doing so, it contributed to the creation of an internationally agreed foundation in which this discourse is grounded. In other words, the international consensus sets limits to deviations from what is considered to be *universal*, and obliges alleged deviators to enter into further discourses in line with procedures, again agreed upon at international level. However, the successful promotion of internationally accepted human rights did not silence the voices who were reluctant to give unrestricted applause to the unconditional statement of the universality of human rights, as has accompanied the promotion of human rights at international level. An important indication of support for the cautioning voices against the euphoria of universality is the reservations registered by signatories of human rights instruments when acceding to them. *Reservations* are domestic back doors that allow domestic deviations to remain legal. Another – and even more significant – indication flows from growing attempts to reappropriate one’s own cultural values against alleged universal principles and norms.¹⁸ The pressure towards globalisation and corresponding attempts to counter economically motivated interests in globalisation through policies of levelling everything according to the rules prevailing in dominant features of culture has created space for what I call the *anthropology of diversity cum cosmopolitanism*.¹⁹ Interestingly, by these means the space has also been created for arguments against the notion of the *universality* of human rights. Cultural and social diversities and particularities are referred to in order to show that they do not provide for the necessary societal ground for the alleged universality of human rights.²⁰ This revival of cultural

¹⁷ Believers in the foundation of human rights in nature tend to forget this. There are many *limits to law*, as Allott (1980) has shown.

¹⁸ The right to culture has, by now, found entry into many constitutions; cf. e.g. Article 19 of the Constitution of the Republic of Namibia.

¹⁹ Cf. here Appiah (2006), but also Hinz (2006a) and (2006b); I will return to this concept later herein.

²⁰ Cf. here Murray & Kaganas (1991:125f), Hinz (1995:98ff) and, in particular, the recent article by Brown (2008:363ff), which is a very helpful summary of the resumed anthropological debate on cultural relativism and human rights. See also the well-documented overview of universalism and cultural relativism in Steiner & Alston (2000:366ff), particularly the contributions reprinted therein by An’Naim (1990), Howard (1991), Kuper (1999), and

relativism – or, more precisely, the more enlightened approach to determine the position of the relative in the universal – is high on the agenda of political and academic endeavours. The result of revisiting the debate about the universalism or relativism of human rights is a new concept of universality, which, in accordance with recent contributions to this topic, can be called *soft* or *weak universalism* (or *soft* or *weak relativism*, for that matter).²¹

The following observations are intended to elaborate on this concept of soft universalism (or relativism) from a jurisprudential perspective, as informed by anthropology. Practical examples will be used to show the interface between universality-inspired expectations and a situation-derived insistence on home-grown particularity. The application of the anthropological jurisprudential perspective will provide the foundation for the application of the suggested concept *soft relativism*. This will be done with a *normative interest*, i.e. an interest in considering avenues for responses to positions of relativism from a *soft* universalist point of view.

Human rights in legal anthropological perspective and the need for anthropological jurisprudence

What makes the perspective on human rights legal-anthropological? What is special about a legal-anthropological perspective on human rights? The legal-anthropological perspective applied in the following observations allows at least two things which are not usually employed in legal human rights discourses. The first is that the anthropological approach is not restricted to what is normally understood to be *law*, i.e. the rules under the authority of the State. The legal anthropologist reflects on all sorts of rules and norms, irrespective of their sources. The second matter is that legal anthropology is not bound to a

Pannikar (1982). Cf. also Kühnhardt (1987); Hoffmann (1991), with reports by scholars from Africa, Asia, Europe, the Islamic world, and Latin America; Höffe (1992); Dembour (1996); Wiredu (1996); Bielefeld (1998); Jerónimo (2001); Cowan et al. (2001); Kreff (2003); Maoz (2004); Heuser (2004); Baer (2004); the contributions to the symposium entitled “Critical Perspectives on Human Rights and Multiculturalism in Neoliberal Latin America” in *PoLAR (Political and Legal Anthropology Review)*, 28(1):2005; Bennett (1995, 1996, and 2004:76ff); Goodale (2006); Li (2006); and Wilson (2006). What Werner Menski achieves by going *beyond tradition and modernity* in analysing Hindu law (2003) or African and Asian legal systems (2007) illustrates the methodologically promising field *beyond universalism and cultural relativism*.

²¹ Cf. Brown (2008:263ff, 371ff).

given set of rules, i.e. the code which describes what ought to be. Instead, legal anthropology takes note of what *is*, or, in other words, what has an empirical dimension. The empirical dimension allows judgements beyond the borders of a State-law-centred interpretation; it permits questions about the functioning of the law, and about the way the law is applied by the people.

Three examples have, therefore, been selected to illustrate the interface – or, rather, the inherent tensions – between general law and the claims for the prevailing weight of the particular. The examples are taken from the three main levels of governance: local, national and international. With the exception of international governance, all the examples have emerged in constitutional systems bound to human rights, democracy and the rule of law.

The examples from the local and national level reveal that, although human rights have generally been accepted to apply, the respective practice has failed to develop the appropriate language for their translation. In the section on local governance later in this paper, it will be shown that social entities deriving their legitimacy from non-statal, i.e. traditional²² structures, in practice enjoy more acceptance than so-called democratically elected structures. With respect to *national governance*, the focus will be on problems arising from the fact that constitutional orders in countries such as Namibia or South Africa were more or less one-dimensionally modelled after constitutions of the Western world. For *international governance*, a critical example related to the World Trade Organisation (WTO) will be chosen. The WTO was opted for as it is probably the most efficient international body in terms of implementing its law. In its 13 years of existence, the WTO has produced far-reaching case law and, by doing so, shaped *world jurisprudence*. Although statutorily limited to trade matters, the WTO is acknowledged as a semi-hidden world government, representing more power than any other international organisation.²³

²² Understood in the sense of the law enacted by many African countries, such as the Traditional Authorities Act, 2000 (No. 25 of 2000) in Namibia.

²³ Usually, the literature on globalisation discusses the role and function of the WTO. Less commonly, but probably of greater theoretical significance, the WTO, its law, policies and decided cases have become the subject of legal philosophy. Cf. here Roederer & Moellendorf (2004:598ff), and the course programme for Jurisprudence (Legal Philosophy) at the Faculty of Law, University of Namibia (Hinz 2005c).

Local governance

In respect of local governance, the concept of *political* and/or *legal pluralism* has been promoted by many legal and anthropological scholars as the most adequate to reflect the fact that many (if not all) African countries have a plurality of legal systems.²⁴ The more conventional approach to the fact of plural legal systems was to speak of *legal dualism* and, in so doing, refer to the fact that most African countries have two principal legal systems: one that is called the *general law* system, and one that is the system in which *customary (indigenous) law(s)* prevail(s). To speak of *legal dualism* is obviously less provocative than the notion of *political and legal pluralism*, but why?

The provocation in the concept of *political and legal pluralism* lies in the theoretical context from which the concept of *pluralism* emerged. While speaking of *legal dualism* was basically nothing more than stating that there were two sets of legal rules that applied to a social situation which claimed to be under one political order, *legal pluralism* entailed more. Speaking of *legal pluralism* is speaking of a theory. *Legal pluralism* has become a far-reaching theoretical construct that has received recognition in jurisprudence.²⁵ Legal pluralism is not only a helpful tool in empirical legal research, but also encompasses a normative component which renders alternative thinking to be an empirically falsified, State-centred assumption.²⁶ While the employment of a community's own law as a result of pressure from the State to follow its law may, from an analytical perspective, be interpreted as resistance, the normative orientation of legal pluralism informs us that the factual resistance to employing the law of the State is an indication of a successfully claimed right to give effect to one's own culture.

Namibia (and, subsequently, South Africa) restored African customary law and gave it its recognised place in the country's constitutionally guaranteed legal orders. After years of marginalisation and exposure to abolition according to the whims of colonial and apartheid politics, African customary law received a constitutionally safeguarded place at the same level as the imported general common law in the form of Roman–Dutch law and its amendments.²⁷ In view

²⁴ Cf. here Hinz (2006d), with reference to further relevant literature.

²⁵ Cf. the Seventh Edition of *Jurisprudence* by Freeman (2001:919ff).

²⁶ See Hinz (2006d:29ff).

²⁷ Article 66 of the Constitution of the Republic of Namibia, and Section 211 of the Constitution of the Republic of South Africa.

of this important development towards the re-dignification of African customary law, one has to note that the implementation of the politically required decision to re-dignify customary law has, at the same time, created many problems that have taken years to find solutions – if found at all. The following cases will demonstrate the dimension of these problems.

Politicians in Namibia and South Africa are still not convinced of the need to give appropriate recognition to the quality of governance offered by traditional structures at local level. For example, the constitutionally required so-called *wall-to-wall* system in South Africa has not provided the necessary space for traditional authorities.²⁸ The Namibian decentralisation policy and law²⁹ has not achieved more than to relegate some authority from central to local government, and in so doing recognise the de facto decentralised (or, more precisely, the de jure, i.e. traditionally and locally already existing) competencies.³⁰

The problem of ownership of land under customary law is one that has occupied the debate between traditional authorities and the Namibian Government for several years.³¹ A promising compromise was reached with the enactment of the Communal Land Reform Act.³² Section 17 of the Act states that communal land vests in the State, but that it is held in trust for the respective traditional community. The Act even acknowledges that customary land rights have to be regarded as being at the same level as common law land rights, meaning that compensation is due to the holders of customary land rights in the case of expropriation to the same degree as that for holders of common law property rights.³³ The practice, however, is different. Arguments relating to inter-community land conflicts

²⁸ Cf Hinz (2002).

²⁹ Cf. the Decentralisation Enabling Act, 2000 (No. 33 of 2000).

³⁰ Cf. Hinz (2005a). Although the Namibian Traditional Authorities Act, 2000 (No. 25 of 2000) confirms, inter alia, certain administrative functions for traditional authorities, the decentralisation policy as such is silent about this as well as the fact that there are quasi-governmental administrative agents working at the level to which decentralisation is envisaged.

³¹ Cf. Malan & Hinz (1997).

³² No. 5 of 2002.

³³ See section 16(2) of the Act, which stipulates that holders of customary law land rights have to be compensated when land is withdrawn from a communal land area. The author's interpretation of this section is that customary land rights are like any other rights which are subject to the guarantee of Article 16 of the Namibian Constitution, but also subject to the right to compensation as required under the right to property.

illustrate that customary land rights are seen by many to be some kind of second-class right – if rights at all.³⁴ Conflicts between holders of customary land rights and expanding municipalities demonstrate how the latter ignore the legal position of the holders of customary land rights.³⁵

The famous *Bhe* case of the South African Constitutional Court,³⁶ in which crucial questions in the customary law of inheritance had to be answered,³⁷ in its main opinion failed to understand the social reasons behind the rule of male primogeniture. As demonstrated by the dissenting judge, the reinterpretation of the rule of male primogeniture could have led to a gender-neutral shape of primogeniture. But the dissenting opinion also failed to give African customary law its place in the pluralistic set-up of the South African legal system. What the author of the dissenting opinion did not consider was that African customary law is owned by the communities that have created and maintained it; on top of that, the authority to amend such customary law has not only been the inherent power of traditional authorities themselves, but also been confirmed by recent legislation.³⁸

The national level

The new African constitutionalism has been correctly associated with constitutional developments in countries such as Namibia and South Africa.³⁹ The constitutions of Namibia and South Africa contain a Bill of Rights that is binding on all State powers. Violations of constitutionally guaranteed human rights and freedoms can be investigated by courts of law and remedied by court orders. Although

³⁴ See the conflict between Owambo cattle farmers and the *Ukwangali* Traditional Authority (Mushimba 2008), as well as the recent report on comparable problems between traditional communities in the Kunene Region and settlers from the *Uukwaluudhi* and *Ongandjera* Traditional Authorities (*The Namibian*, 27 November 2008).

³⁵ Cf. the conflict between holders of customary land rights and the Helao Nafidi (Oshikango) Town Council (*The Namibian*, 12 May 2006).

³⁶ *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another*, 2005 (1) BCLR 1 (CC); see also Hinz (2006f) on the case.

³⁷ Cf. Hinz (2008:99ff), which looks at some of the issues in the customary law of inheritance, which need urgent attention in respect of law reform.

³⁸ Cf. section 3(3)(c) of Namibia's Traditional Authorities Act, 2000 (No. 25 of 2000), and section 4(3) of South Africa's Traditional Leadership and Governance Framework Act, 2003 (No. 41 of 2003).

³⁹ Cf. Hinz (2006a, 2006b).

both countries' constitutions can be interpreted as liberating responses to social and political oppression, the legitimacy of both is still an issue of debate. The extraordinary consultation process that preceded the adoption of the Interim Constitution of South Africa as well as the adoption of the final Constitution did not end questions about the legitimacy of that country's supreme law.⁴⁰ In Namibia, the debate is less articulate, but has similar undertones.⁴¹

Questioning the legitimacy of the constitution as such may be an extreme position; but the fact that Judge Albie Sachs – a judge of South Africa's Constitutional Court – calls for references to *traditional African jurisprudence* in one of that Court's leading cases can also be interpreted as questioning legitimacy: it points in the direction where the lack of legitimacy can be identified.⁴² The call for references to traditional African jurisprudence appears in Judge Sachs's arguments against the death penalty after he concludes his arguments about international human rights instruments and the jurisprudence related to these. In other words, traditional African jurisprudence was additionally employed in order to give his judgement weight with respect to those whose mindsets were closer to this jurisprudence than to the conventional jurisprudence of Western provenance.⁴³

The international level

One of the burning questions with respect to the WTO – being one of the most elaborated structures of international governance – is not only about the employment of human rights in the interpretation and application of WTO law as it stands, but also about how human rights could assist in developing new trade-related policies. The debate about human rights in executing the mandate given to the WTO is certainly promising, but it is still far from being accepted as an integral part of WTO jurisprudence and policies.⁴⁴

⁴⁰ A prominent voice in this context is Ramose (2002).

⁴¹ Personal observation.

⁴² *S v Makwanyane & Another*, 1995 (6) BCLR 665 (CC), at 787.

⁴³ Cf. Hinz (2006e:465ff).

⁴⁴ Cf. Committee on International Trade Law (2004:543ff), but also Petersmann (2004); Cottier et al. (2005); and Cottier & Oesch (2005:520ff). A very comprehensive collection of articles on the WTO, its governance, dispute settlement, and developing countries by Janow et al. (2008) does not even have one entry on human rights. The final chapter, entitled "Future challenges", of the leading textbook on WTO law by Matsushita et al. (2003:589ff) holds on the one hand that "the WTO has a role to play in promoting human

This article is certainly not the place to evaluate human rights and the WTO in a comprehensive manner. The following will, instead, concentrate on two documents only, with the aim of showing a tendency in the consideration of human rights and their political and philosophical foundation. The first document is a semi-official publication written by the first Chairperson of the Appellate Body of the WTO,⁴⁵ James Bacchus, a lawyer from the USA. The second document is a case decided relatively recently by the WTO Appellate Body. The case has given rise to questions closely related to the issue of human rights in the context of the WTO.

In *Trade and freedom*, Bacchus⁴⁶ journeys back to his time at the WTO, and looks at all those who served with him in the Appellate Body.⁴⁷ He reflects on the ideological climate that inspired not only him but his colleagues as well in their approaches to the cases they had to hear. The first “faceless judge”⁴⁸ Bacchus portrayed was his Egyptian colleague, Said El-Naggar. El-Naggar studied in the London School of Economics under Karl Popper, and was obviously able to convince Bacchus to follow Popper and his powerful philosophy and plea for an “open society”.⁴⁹ Indeed, Bacchus states –⁵⁰

[t]hus, like Popper, I choose to believe that, in an open society, we can choose to be free.

As convincing as Bacchus’s reflections of the post-1995 period – when the WTO started operating – may be as a personal record, the ongoing debates (periodically

rights” (ibid.:605). On the other, the authors warn that “if the WTO ever were to try to become a human rights enforcement agency, there is little chance its dispute mechanism would survive; it soon would be engulfed in compliance problems, and the WTO itself would be under threat” (ibid.) In particular, Petersmann (2004), Cottier et al. (2005) and Cottier & Oesch (2005) have taken a different stand: Petersmann expresses the clear view that “[t]he universal recognition of ‘inalienable’ and ‘indivisible’ civil, political, economic, and social human rights, and of the general obligation of all governments to protect and promote human rights, requires interpreting international treaties in conformity with relevant human rights obligations” (in Cottier & Oesch 2005:522).

⁴⁵ Their task is to hear international trade law cases referred to them by the WTO Dispute Settlement Panel.

⁴⁶ Bacchus (2004).

⁴⁷ The portraits of the members of the Appellate Body are presented by Bacchus (2004:51ff); Said El-Naggar’s portrait is first (ibid.:53ff).

⁴⁸ (ibid.:18ff).

⁴⁹ Popper (1957, cited in Bacchus 2004:133ff).

⁵⁰ Bacchus (2004:137).

erupting in violence) about the legitimacy of the WTO, however, should lead one to ask whether Popper's powerful "open society" was powerful enough to convince participants in the international trade system who have not undergone training in the London School of Economics, i.e. who are rooted in systems of thought to which Popper's world view did not reach out!⁵¹

The second text referred to here is the case of *Pakistan v The European Communities*, and concerns the conditions for the granting of preferential tariffs to developing countries.⁵² The manner in which the Appellate Body of the WTO assessed the conditions in granting preferential treatment to developing countries is proof of the need to consider (or reconsider) the principles and assumptions underlying WTO judgements, and has an immediate bearing on the problem of the role and functions of human rights in matters related to international trade law. The legal question that the Appellate Body had to grapple with involved what the relationship was between the most-favoured-nation clause⁵³ (an achievement of trade liberalisation and prominent in the various agreements under the WTO) and the so-called "enabling clause"⁵⁴ (which allows special and preferential treatment of developing countries). The enabling clause can be interpreted as an acknowledgement of the *right to development* and, thus one of the issues that form part of the package that has become known as the *Doha Development Agenda*.

Do the two clauses stand side by side at the same level, or is the enabling clause an exception to the most-favoured-nation clause? The answer to this question has important legal consequences, particularly with respect to who will have the burden of proof, and for what. While the Appellate Body held that

⁵¹ Buchanan & Golove (2002) show how difficult it is to argue for a jurisprudential (legal philosophical approach) to international law.

⁵² European Communities. *Conditions for the granting of tariff preferences to developing countries. Report of the Panel WT/DS246/R and Report of the Appellate Body WT/DS246/AB/R.*

⁵³ The most-favoured-nation clause requires that "any advantage, favour, privilege or immunity granted" in one case "shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties" to the WTO (Article 1(1) of the General Agreement on Tariffs and Trade (GATT) of 1947, which is part of the treaty body governing the WTO.

⁵⁴ The members of GATT adopted the enabling clause as Decision I/4903 of 28 November 1979: Differential and more favourable treatment reciprocity and fuller participation of developing countries (The Enabling Clause).

the enabling clause was an exception to the most-favoured-nation clause, one member of the Dispute Settlement Panel held a dissenting opinion in regard to the rest of the adjudicating body. The most significant feature of the decision (including the dissenting opinion) is that the results were achieved on the basis of conventional interpretation, i.e. without reference to the principles that stand behind the application of the formal tools of interpretation and, thus, guide such interpretation. Noting what has been discussed in many international fora to give the right to development an applicable format, and noting further that the philosophy behind the Doha Development Agenda is, indeed, the very right to development, the Appellate Body would have come to a different interpretation of the relationship between the two rules of WTO law. While the most-favoured-nation clause is a procedural rule to achieve equality, the enabling clause accepts factual inequality as a reason to respect such a situation by providing special treatment – which, if provided effectively, would eventually lead the recipient of the treatment to be at a level that would prompt treating such recipient at the same level of formal equality as the provider of the special treatment. In other words, what we see as informing the enabling clause is the principle of *social justice*, which is no less important than justice through formal equality. In fact, had the Appellate Body only touched on arguments of this nature, it would have found plenty of support in constitutional jurisprudence, which would have been helpful in contributing to the development of the WTO jurisprudence.⁵⁵

The author's own experience in the Regional Trade Policy Programme, a major WTO training programme at the University of Namibia, complements what has been said so far.⁵⁶ The Programme's objective is to train African government officials in all WTO-related matters. When the author suggested that a module on WTO law and human rights be added to the programme, officials in the WTO reacted with reluctance. It was decided, therefore, to offer the module outside the official programme. While participating in the event, the officials' attitude changed: sitting at the back of the audience listening to the module, the WTO colleagues saw that the initiated discourse was guided by the need to argue

⁵⁵ The German discussion about the so-called *Sozialstaatsklausel* ("social State clause") – Article 20 of the German Constitution, which determines the State to be a social one – is but one example that could have been explored. For more on the social State clause in the German Constitution, see Gerstenmaier (1975).

⁵⁶ From 2005 to 2007, the author was the Academic Co-ordinator of the WTO UNAM Regional Trade Policy Programme for government officials from all English-speaking African countries.

human rights issues rather than solicit applause by emotionalised reference to human rights generalities!

In fact, analysing what happened around the suggestion to have the said module on WTO and human rights reminded me strongly of an experience with a human rights workshop for Namibian traditional leaders. To the workshop participants' surprise and shock, a distinguished traditional leader called human rights "monsters".⁵⁷ It took us some time to interpret this qualification of human rights. Only later did we begin to understand that, for the traditional leader concerned, human rights were incomprehensible entities: no appropriate translation for the concept *human rights* existed in the traditional leader's culture. Despite the years that had passed since the adoption of the Namibian Constitution, the human rights which were to have brought independence from the rule of apartheid had remained alien concepts. However, they did exist, so it was unnecessary to call them *monsters*.

The WTO officials' resistance to come closer to human rights and, in so doing, to consider whether the law of human rights would not even be an asset in interpreting WTO law, appears similar to the resistance of the quoted traditional leader (who, by the way, does not stand alone with his reluctance to accept human rights as a tool for administering his community). While the traditional leader's 'monster' is covered in the cloth of importation, the WTO-imagined 'monster' is covered in the cloth of the ghosts of Seattle: the very place where ministerial consultations were prevented by anti-globalisation and pro-human rights activists!⁵⁸

Where to look for answers

Where could we search for responses to the unsolved questions presented? Where could we find a *better* jurisprudence than the one usually offered, and which obviously did not guide us towards arguments that could produce reactions to

⁵⁷ Previously referred to in Hinz (2006e:461ff).

⁵⁸ How the traditional 'monster' can be humanised will be dealt with in the next part of this paper; the 'monster' in the WTO officials' perception will certainly be demystified by scholarly work, as quoted above, and which actually starts at a very technical level as Mavroidis (2008), for example, submits in his analysis of WTO-decided cases focusing on the interpretation of WTO law and the Vienna Convention on the Law of Treaties of 1969.

resolve difficulties of the nature described above? Answers to these questions will be investigated within the framework of what I call *anthropological jurisprudence*.⁵⁹ But what is *anthropological jurisprudence*, and what answers are hoped to be found in this jurisprudential approach?

Following the move of jurisprudence to a *sociological* sphere (by Max Weber, Eugen Ehrlich and the American and Scandinavian realists), new value was added by reaching out into the world of legal reality (and the perceptions with respect to law held by the people, i.e. the *social* functioning of law). In this same way, *anthropological* jurisprudence will add value to jurisprudence by breaking the wall of Western fixations and reaching out into other worlds: worlds with different legal and political realities and perceptions of justice.

This adding of value will be explained further by exploring some aspects of the debate about the universal nature of human rights as it has evolved in recent years, particularly in view of positions submitted by scholars from Indian and Muslim, but also African, backgrounds.⁶⁰ Views against the universality of human rights have taken different shapes and directions. However, there is some common ground as to their point of departure: scholars of different orientations highlight the specific and unique, socio-historically Western background of human rights. Human rights, as they have developed before and after the UDHR, are bound to this background and will, therefore, lead to social friction if forced on societal situations that differ from the socio-historic background of the West.

Important differences should be noted when it comes to the socio-political consequences that are to be drawn from this basic starting point. Two extreme positions are conceivable: one would be to give human rights uncompromised priority, and expect one-dimensional change to comply with them; the other extreme would be to leave the different worlds as they are, and accept that certain societies would not be part of human-rights-inspired civilisation. Conventional philosophical and sociological jurisprudence provides many offers to motivate as well as criticise these extreme positions.⁶¹ I will not explore the extremes here, but will focus instead on the *mediating positions* between the extremes, which

⁵⁹ See Footnote 1.

⁶⁰ See the references cited in Footnote 20, particularly An’Naim (1990); Brown (2008); Howard (1991); Kuper (1999); Pannikar (1982); and Wiredu (1996).

⁶¹ As can be seen in the literature quoted in Footnote 20.

appear to be more relevant to the envisaged anthropological jurisprudential orientation.

The reason for focusing on the mediating positions is simply that they are the only ones that are able to provide jurisprudential answers to anthropologists, which, as mentioned earlier in this article, have been described as *soft relativism*, *weak universalism*, or as Michael Brown puts it, relativism within reason.⁶² Brown⁶³ summarises the foundation of relativism within reason in six points, as follows:

- Firstly, ethnocentrism with respect to the values employed by a given community is a fact, but not one that is impossible to overcome. The globalised world in which we live has led to a situation where communities are unavoidably confronted with more than one value system.
- Secondly, cultural systems, although never closed, show considerable coherence. This requires that norms and practices first have to be understood within their own contexts. Put differently, norms and practices cannot be understood except within their own contexts. Any judgement about norms and practices presupposes understanding in this sense. This applies to all norms and practices – even those that are far from someone’s own societal and normative conceptualisation!⁶⁴

⁶² Brown (2008:371).

⁶³ (ibid.).

⁶⁴ As Brown (2008:366) says, “On the one hand, anthropologists are well represented among those calling attention to the suffering experienced by women as a result of patriarchal customs as well as the destructive impact of neo-colonialist policies. On the other, anthropologists stand ready to question simplistic moralizing that invokes the rhetoric of universal human rights. The latter kind of intervention is exemplified by Lila Abu-Lughod’s cautionary essay on Muslim women (2002), which challenges ill-considered assumptions about the oppressed status of women in the Muslim world. Abu-Lughod asks her readers to be “respectful of other paths towards social change that might give women better lives” (ibid:788), paths that may have Islamic variations difficult for non-Muslims to envision. With respect to the genital mutilation of women, the female anthropologist Gruenbaum (2001:203) holds the following in the concluding chapter of her study on female circumcision: “Agitation for change to deeply held beliefs and for modification or elimination of practices that define or reinforce important elements of identity is sure to encounter obstacles, not only from those who defend the practices, but also from those who have a different analysis of when and what the priorities would be”. Brown (2008:366) reaches out to the same cultural problem and holds that, even if one would not be convinced by arguments such as those quoted here, one would have to “acknowledge that ... [the] call for open dialogue and scrupulous attention to evidence should be taken seriously, especially when seen against a backdrop of the West’s previous efforts to impose its moral vision – too often coloured by economic and political vision – in Africa and elsewhere”. In

- Thirdly, Brown holds that the “vast majority” of societies have been able to provide rewarding lives for their members, lives that permit the expression of all human emotions, allow for some level of personal freedom and self-expression, and offer individuals satisfying social roles”.⁶⁵ This general feature should not distract our attention from the fact that particular practices prompt reservations, which, however, are to be expressed with caution.
- Fourthly, societies are never homogeneous. It is part of the internal dynamics of societies to challenge norms and practices which, at face value, may appear to be uncontested because of their being long-established.
- Fifthly, the interactions between different cultural systems call for special attention. The effects of these interactions have complex and far-reaching effects. They may offer a challenge to the receiving culture or distort its internal dynamics, and
- Sixthly, referring to results by scholars who follow a comparative approach according to which universals are of limited use in accounting for cultural differences, Brown pleads to keep universals in mind when analysing the norms and practices of different communities.⁶⁶

Observations of this nature generalise the results of empirical analyses. On the one hand, they acknowledge the existence of human rights as such and take note of the general legal claim of universality. On the other, on the basis of empirical data they warn against the one-dimensional claim of universality. They show that societal reality is much more complex than any one-dimensional language of universality could be. However, this is where anthropology – being basically concerned with the *is* – ends, and anthropological jurisprudence with its normative dimension begins; this is also where the mediating positions unfold their importance by enriching the conventional jurisprudential discourse on human rights. They open the discourse for the gravities of cultural diversity and, by doing so, contribute an additional dimension to the tools of legal interpretation.

Within the mediating approaches, one can distinguish between four positions. The first concedes that certain societies have not yet reached the *(social, cultural or economic) stage* required as the social basis for the societal implementation

his reaction to the comments solicited from fellow anthropologists by the editors of *Current Anthropology*, Brown (ibid.:380) concludes by calling on one “to pause before judging, to listen before speaking, and to widen one’s views before narrowing them” (ibid.:380).

⁶⁵ Brown (ibid.:372).

⁶⁶ (ibid.).

of human rights. The second position considers the *complexity of human rights*, thus allowing space for the specific societal orientation towards those parts of human rights that best correspond to the needs of the given society. The *third* accepts human rights as they have emerged in the mentioned socio-historic context as a code of principles, rules, or normative offers to be *translated* into the societies concerned in terms of *jurisprudential foundations* prevailing in those various societies. The *fourth* position is similar to the first, but much more difficult to accommodate in a legal order whose interest is eventually to deliver judgements on whether or not a given societal behaviour complies with the law, including human rights. This last position looks at situations which, at face value, are inconsistent with the letter of internationally drafted human rights but are nevertheless deeply rooted in the socio-cultural environment from which they have emerged. What is at stake here are cases of possible “paths’ variations” as put forward by Lila Abu-Lughod⁶⁷ and which need consideration before any conviction in terms of human rights violations is handed down. These four mediation positions are presented in more detail as follows:

The first mediating position

Like the others do, this position refers to the observation that human rights are a product of special, i.e. Western, developments. It accepts them as desirable standards, but pleads – at least temporarily – for lenience, so that societies have time to work themselves closer to what would be expected from them from the point of view of human rights. This mediating position could be based on the evolutionist understanding according to which human societies are to undergo historically predetermined processes of change from more or less primitive conditions to stages of modernity, for which human rights are increasingly important. However, the evolutionist understanding is not a necessary condition for the first mediating position. It is also conceivable to interpret a given societal situation as one for which a learning process is required before a new normative dispensation will be accepted. In Namibian human rights and good governance training exercises, it has often been requested that communities and individuals be given *time* before changes are implemented. In particular, this request for time was made with respect to equality-promoting changes in family law.⁶⁸

⁶⁷ See Footnote 64.

⁶⁸ The argument of needing time was raised in workshops on the Married Persons Equality Act, 1996 (No. 1 of 1996), which abolished the inherited marital power of the husband over his wife.

As problematic as this plea may be in view of a given situation violating human rights, one cannot really argue against the request for time to allow the process of reform to take its course, i.e. from the point of view of achieving progress in having the necessary human-rights-driven changes accepted. This is particularly true when procedural mechanisms are not yet available for remedying a given situation! In other cases, lenience in respect of time will certainly also depend on what is at stake, i.e. how serious the human rights violation is. At any rate, it would also then be up to the existing (governmental and non-governmental) human rights institutions to monitor the expected reform process so that the plea for time would not merely be buying time without producing results. At any rate, the time argument would most probably not stand the test of constitutionality if a case of violation is taken to court. In view of this, it may be worthwhile for the legislator to consider building a rule into an act of human rights implementation that would allow for its gradual implementation.

The second mediating position

The second position is of particular importance when legal systems meet which maintain distinct approaches to the balance of the various individual rights in the overall human rights system. Proponents of this second position, rather than emphasising the rights of the societally isolated individual, hold the alternative concept of the communitarian quality of the individual who achieves his/her humanity through the community in which s/he lives. Living in social relationships does not only mean having rights: it also mean having duties understood to be *constituent* components of the essence of being human – as *constituent* as the capacity to rights have been interpreted to be. The oft-quoted expression *umuntu ngumuntu nga bantu*⁶⁹ of the philosophical alternative to the Cartesian credo of enlightenment, *cogito ergo sum*. *Umuntu ngumuntu nga bantu* means “I am because others are” – namely, the very opposite to what Descartes claimed. “I am because others are” is also an alternative to Rousseau’s dictum, according to which fencing off a piece of land and declaring it as one’s own was the starting point of (bourgeois) society. For *umuntu ngumuntu nga bantu* society (community) starts with the proactive inclusion of persons (and nature, for that matter) and not with their exclusion.

It is interesting to explore the extent to which the call for traditional African jurisprudence has made headway in the application of law: *ubuntu*⁷⁰ appears to

⁶⁹ A saying which exists in many African languages.

⁷⁰ Ramose (2002:41) explains *ubuntu* to mean “the fundamental ontological and

be the very portal to traditional African jurisprudence. *Ubuntu* can be interpreted as the abstracting notion of *umuntu ngumuntu nga bantu*. *Ubuntu* appears in the postamble of the South African Interim Constitution of 1994 to denote the African concept of reconciliation as opposed to vengeance. *Ubuntu* was recalled to serve as a point of reference in the death penalty case of the South African Constitutional Court to demonstrate the value of life in African culture. *Ubuntu* was the theoretical and normative point of departure for the Court to make use of ethnographic data collected in South African traditional communities, with the purpose of illustrating the traditional African right to life as equal to the demonstration of the right to life derived from the dignity provision in the South African Constitution and international human rights instruments. *Ubuntu* appeared again in the *Bhe* case brought before the South African Constitutional Court,⁷¹ where it served as a reference for the interpretation of constitutional requirements in view of the ascertainment and development of customary law in line with societal needs. *Ubuntu* has generated theoretical reflections, of which Mogobe Ramose's *African philosophy through ubuntu* is but one prominent example.⁷²

The reorientation of constitutionally guaranteed human rights towards greater prominence of economic and social rights has become a challenge in the Namibian as well as the South African adjudication of cases. The Namibian Constitution contains only one so-called second-generation human right as a fully guaranteed human right, namely the right to education.⁷³ Other second- and third-generation rights are found in a special chapter titled *Principles of State Policy*.⁷⁴ State policy principles cannot be claimed as rights can,⁷⁵ at least as far as the text of the Constitution is concerned, and excluding possible obligations Namibia has accepted under international agreements. The South African Constitution has gone a different route by integrating rights beyond the first generation into the body of its entrenched fundamental rights and freedoms. Nevertheless, the Constitutional Court of South Africa has, in its interpretation of these rights (exemplified with respect to the right to housing), opted for an approach that

epistemological category in the African thought of the Bantu-speaking people. It is the indivisible one-ness and whole-ness of ontology and epistemology.”

⁷¹ See Footnote 42.

⁷² Ramose (2002).

⁷³ Article 20.

⁷⁴ Chapter 11, Namibian Constitution (Articles 95ff).

⁷⁵ See Article 101.

focuses on the limits to these rights, thus giving them a status not too different from that of principles in the Namibian Constitution.⁷⁶ However, it is obvious that claims for second- and third-generation rights will increasingly occupy national and international agendas, given the increasing inroads being made into national and sub-national social structures, prompted by ongoing globalisation.⁷⁷

The third mediating position

As mentioned previously, the third position confirms human rights as they emerged in the said socio-historic context as a code of principles and rules accepted as normative offers, but reserves the need to establish the jurisprudential foundations of such principles and rules prevailing in the societies concerned.

While the first mediating position attempted to achieve some type of coexistence between or even integration of the internationally suggested standard in human rights and the relativising view on human rights, the intention of the second mediating position is to employ a “soft human rights approach”,⁷⁸ through which the principal objectives of human rights would be secured by searching for and researching the *indigenous* foundations which – confirmed by or developed according to the secondary rules (Hart) applicable in the given community – would inspire and guide the community and its law-making or law-applying institutions to secure a legal order in which men, women and children would receive the necessary degree of respect and dignity.

This soft approach is based on three normative assumptions:

- That all societies have an inherent understanding that human beings deserve equal respect and dignity
- That this understanding is related to an at least orally maintained indigenous political philosophy, of which sages are the custodians,⁷⁹ and

⁷⁶ See section 26(1) and (2) and *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC).

⁷⁷ Cf. here Nakuta (2008), for example. The growing focus on second- and third-generation human rights is another challenge to the aforementioned interpretation of the enabling clause in the WTO law.

⁷⁸ This approach arose in view of strategies developed in human rights and good governance programmes within the UNAM Faculty of Law. See Footnote 1 and, in particular, Hinz (2006e).

⁷⁹ For example, they preserve and transmit the knowledge and wisdom contained in oral literature, particularly in proverbs; cf. Kavari (2006); Möhlig (2002).

- That both the understanding about respect and dignity as well as the indigenous philosophy will be flexible enough to respond to new needs and demands with applicable answers.

Flexibility, in particular, means having a structured openness in accordance with given rules of interpretation. For example, a legal system that is closed to such a structured interpretation will not meet the criterion of this third assumption.⁸⁰ Otherwise, the (albeit refutable) thesis is that any system of order would qualify as a potential candidate in terms of the second mediating position. Put differently, there is no society that does not have an inherent potential of a human rights system, although such system may be based on concepts, rules and procedures that are not identical to those that emerged socio-historically during the period of European enlightenment, as explained earlier.

It is by no means a novelty that Indian, Islamic and Chinese scholars have explored the various cultural codes prevailing in their respective regions in order to establish whether or not such cultures and codes offer arguments that would lead to protected standards of respect and dignity of human beings.⁸¹ The less-explored domain in these attempts is the domain of African cultures, although there are authors in the field of African philosophy/anthropology who have successfully contributed to the debate. They have focused on indigenous African systems of thought to determine the role of human beings vis-à-vis their communities.⁸² Indeed, some scholars of African philosophy who have analysed the structure of African customary law found that it did not follow the methodology applied in modern legal (hard or soft) positivism.⁸³

The fourth mediating position

While the ‘time’ argument in the first mediating position may even lead to an legally accepted delay in the application of human rights, the argument in the fourth mediating position goes beyond this. There is no claim for time; instead, here the claim is that, in certain sensitive cases, (international or national)

⁸⁰ The closure of interpretation was an issue in Roman law as well, and is high on the agenda in Islamic law; see Mayer (1990); Weiss (1978).

⁸¹ See literature cited in Footnote 20.

⁸² See e.g. Wiredu (1996); Ramose (2002: 81ff); and, in general, many contributions in Coetzee & Roux (2002).

⁸³ Among whom are Austin, Kelsen, and Hart. See Ramose (2002:81ff).

verdicts will miss the purpose of adjudicating cases if the verdicts do not accept that convictions would not meet the expectation of justice in a given social and cultural context. What is needed in cases of this nature, therefore, are delays: not in the implementation of an existing rule, but in the application of possibly existing rules to such cases. To illustrate, consider the way the Protocol to the African Charter on Human and Peoples' Rights of 2003 handles the issue of polygamous marriages. While many human rights activists will hold that polygamy is not in line with gender equality and other human rights,⁸⁴ the Protocol has obviously taken a lenient position by obliging the parties to the Protocol to "encourage monogamy as the preferred form of marriage".⁸⁵ In other words, instead of a clear verdict against polygamy, the Protocol expressed concerns with respect to polygamy, but nevertheless leaves it to the parties to the Protocol to decide on what would fit best into their respective socio-cultural environments. Notably, the parties were not given free discretion: they are obliged to encourage monogamy. Recalling the anthropological reservations quoted above from Brown's⁸⁶ revision of the Universalism v Relativism debate, one would certainly applaud the drafters of the Protocol for their wisdom in focusing on a open provision which takes note of the socio-cultural environment prevailing in many – if not most – African countries. We could call what we find in the Protocol a compromise; we could also interpret it to be a non-decision in a matter still under debate. Non-decisions are, indeed, very appropriate answers to questions that arrive at the "limits of law".⁸⁷ Instead of promoting law into fields of uncertainty, it is wise to accept it has limits. However, these curtailments should not prevent all sorts of societal stakeholders from exploring the space 'beyond the limits',⁸⁸ and even consider *paralegal* measures such as educational programmes, which would prepare the ground for future legal measures proper.

⁸⁴ Cf. Anyolo (2008:83ff).

⁸⁵ Cf. Article 6(c) of the Protocol.

⁸⁶ See Footnote 54.

⁸⁷ Cf. Allott (1980).

⁸⁸ For example, in discourses informed by ethics! An interesting example to refer to here is the current discussion about compensation for the genocide committed by the German colonial power in its former colony of German South West Africa against the *Ovaherero/Ovambanderu* and others. So far, the generally accepted law will not be helpful in finding solutions to this case. However, the ethical dimension remains and requires a response. Cf. Hinz (2005b); Patemann & Hinz (2006); to the concept of *beyond the limits of law* in more general terms, see Hinz (2006g).

Whether or not a case will end in a non-decision will certainly require careful exploration as to the justification of a *non-liquet*⁸⁹ decision. Comprehensive investigations will have to take place before a case can be accepted to qualify for such an exceptional treatment. “Relativism within reason” requires that failing to provide reason will result in failing to accept that the proposed case is a *non-liquet* case.

Conclusion

The task of this paper, as mentioned earlier, was not to offer a retrospective reflection of how cultural relativist anthropology reacted to the post-WWII project of the UDHR. Arguing whether or not the UDHR would have received a different format if anthropology had contributed to it in a more positive way would be mere speculation. Leaving aside reservations which argue against the epistemological possibility of cultural relativism, cultural relativism from Boas to Herskovits has certainly contributed to the acceptance of cultures as creations in their own rights – to the extent that even the best-informed applied anthropology would not “regard the culture that is applying anthropology as the equal of the culture to which anthropology is to be applied”.⁹⁰

The fact that cultural relativism as it was framed by leading anthropologists lost appeal does not mean that it also lost all its potential for fruitful provocation. However, relativist provocations cannot deny that times have changed. Practical philosophy, applied social science (sociology and, more so, anthropology) have taken over space left empty by ‘pure’ science. Indeed, there are good reasons to refer to the *return of justice*, as was done in the subtitle of a legal philosophy text published some years ago.⁹¹

How and where is justice returned, and what does it mean to speak of *the returned justice*? The quest for justice as expressed by the quoted textbook has returned: with the increasing public relevance of practical philosophy and its search for the ethical foundation of societies – a search which, today, can only be understood

⁸⁹ *Non-liquet* is conventionally referred to situations where a decision-relevant fact cannot be established, with the result that a decision has to be made as to which party will bear the burden resulting from the non-established fact.

⁹⁰ Wolf (1964:24); cf. also Gardner & Lewis (1996:28f, 156f); and more recently, Brown (2008).

⁹¹ Braun (2001).

as an inter- or multicultural project, i.e. an anthropological one: globalisation is unavoidable; and anthropological jurisprudence is applied anthropology – the aim of which is to contribute to the *cosmopolitan face of globalisation*.

The universalist vision to create a generally applicable code to ensure human dignity in all parts of the globe has the opportunity of coming closer to what it wishes to achieve. The quest for the *cosmopolitan face of globalisation* has given the post-WWII human rights movement a new drive – one that is even more challenging than the challenges faced after WWII itself!

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Transitional justice and human rights in Africa¹

Charles Villa-Vicencio

Introduction

Africa stands at the cutting edge of the international debate on transitional justice. The Juba talks between the Government of Uganda (GOU) and the Lord's Resistance Army (LRA) juxtapose local initiatives for justice and reconciliation with international demands for prosecutorial justice.² Joseph Kony's failure to show good faith in these talks by extending LRA terror into Democratic Republic of Congo (DRC) villages further evidences the need for Africa to address the demands of the International Criminal Court (ICC). On the other hand, the decision by the Pre-trial Chamber of the ICC to issue a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of Sudan, for war crimes and crimes against humanity raises significant questions concerning the appropriateness of the court's intervention in a growing African crisis.

The situation in the DRC raises similar questions. The trial of rebel leader Thomas Lubanga in The Hague for war crimes relating to the forced recruitment of child soldiers sends a strong message that warlords are not above the law. His trial could at the same time inflame an already fragile ethnic situation in the eastern part of the country, where he is seen as a protector of Hema rights in the ethnic rivalry for control of the region's vast mineral resources. Will the threatened trial of Laurent Nkunda, head of the *Congres National pour la Defense du Peuple*³ (CNDP), whether in The Hague or in Kinshasa, contribute to peace-building or further alienate his Tutsi ethnic followers, recognising that the United Nations (UN) has accused Nkunda's troops as well as government troops of mass killings and rape?⁴

¹ An expanded version of this paper is to be found in Villa-Vicencio [Forthcoming].

² *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army*, Juba, Sudan, 29 June 2007. See also Baines (2007).

³ National Congress for the Defence of the Congolese People.

⁴ Having arrested Nkunda in Rwanda following a joint Rwandan–DRC military initiative, the DRC has asked for his extradition. The question is whether Rwanda will comply; whether the DRC prosecutes him in Kinshasa as a renegade Congolese soldier – which would signal a growing domestic capacity not to rely on the ICC for prosecutions; or

As an increasing number of African states move towards democracy, attempts to impose the ICC's demands for the prosecution of those alleged to be responsible for genocide, crimes against humanity and war crimes are likely to provoke increasing concern among some peace-builders on the continent. The fragile peace agreement between Robert Mugabe's Zimbabwean African National Union (ZANU-PF) and the Movement for Democratic Change (MDC) in Zimbabwe is a case in point.⁵

Confronted by decades of impunity that have spiralled into civil wars, regional conflict, genocide and oppressive rule, the international community insists that perpetrators of such deeds have their day in court. The fact that 30 African states – for whatever reasons – have ratified the Rome Statute, thereby accepting the jurisdiction of the ICC, suggests general acceptance of this proposition.

However, the level of political instability that characterises many African peace initiatives is such that even the most fervent proponents of prosecutions recognise the need to ensure that legal action against perpetrators does not throw the country back into war. Article 16 of the Rome Statute allows the UN Security Council to suspend ICC investigations for renewable one-year increments if those investigations relate to situations with which the Security Council is engaged under its Chapter VII powers relating to matters of peace and stability.⁶ Article 53 of the Statute, in turn, allows for a stay of prosecutions triggered by a State Party or Security Council referral if, taking into account the seriousness of the crime and the interests of the victims, this is judged to be “in the interest of justice” – which presumably includes situations where prosecutions might impede peace initiatives.⁷

Luc Huyse warns that the notion of *the interests of justice* is an “extremely technical and diffuse concept”.⁸ If this means that the criteria by which these technicalities are to be unravelled are solely those of international law, to the

whether he will ultimately face trial in The Hague on charges of genocide, crimes against humanity, or war crimes.

⁵ The fact that Zimbabwe, like Sudan, has not signed the Rome Statute will involve the direct intervention of the UN Security Council for this to happen.

⁶ Rome Statute of the International Criminal Court; available at <http://www.un.org/law/icc/statute/romeofra.htm>; last accessed 15 December 2008.

⁷ (ibid.); see also Lovat (2006).

⁸ Huyse & Salter (2008); see also Lovat (2006).

exclusion of the judgement of governments and others directly involved in peace-building, then the ICC effectively has the final word – reducing local and regional initiatives to be, at best, poor cousins in the peace process.

A choice between the ICC and national structures of justice, including African traditional mechanisms for justice and reconciliation, is not the most pressing issue facing African countries. Rather, it is to ensure that perpetrators of gross violations of human rights are held accountable for their deeds, and that there is sufficient political and socio-economic transformation to ensure that victims regain a sense of human dignity. For these developments to take place it is imperative that local and other peace-building initiatives be supported to ensure that the peace process does not slide back into conflict. Peace cannot be restored in conflict situations by persecutions alone. Nor can the international demand for an end to impunity be ignored or played down by less than decisive action being taken against those principally responsible for acts of genocide, crimes against humanity or war crimes.

This requires local initiatives for peace-building to respond to and, where necessary, be adapted to the demands of international law. The ICC, on the other hand, needs to ensure that its activities do not jeopardise local initiatives aimed at ensuring sustainable peace and social development in countries seeking to overcome conflict.

My intent in what follows is to –

- identify the limitations of prosecutorial justice as witnessed in the dominant transitional justice debate
- consider the challenge of traditional African mechanisms to Western notions of conflict resolution and peace-building, and
- ponder the origins and parameters of the transitional justice debate in Africa.

Transitional justice

The 2004 UN Report to the Secretary-General on *The rule of law and transitional justice in conflict and post-conflict societies* defines *transitional justice* as –⁹

⁹ United Nations (2004); see also United Nations (1992)

... processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

A 2006 UN document entitled *Rule of law for post-conflict states: Truth commissions*, on the other hand, provides a much narrower focus for transitional justice and truth commissions, and fails to adequately affirm the necessary link between justice and reconciliation.¹⁰ In brief, the implication of the *Truth commissions* document is that justice is more important than reconciliation, accountability is more important than truth, and reparation is more important than reconstruction.

It is this emphasis in the transitional justice debate that is challenged in what follows. If justice is delivered through ad-hoc tribunals, the ICC or any other body that is perceived to bear the characteristics of 'imposed' or 'outsiders' justice', such body's ability to transform a nation is limited. The former UN Secretary-General acknowledges this as well:¹¹

Peace programmes that emerge from national consultations are ... more likely than those imposed from outside to secure sustainable justice for the future in accordance with international standards, domestic legal traditions and national aspirations.

Given the mandate of the ICC to intervene in national situations only where a State is "unwilling or unable"¹² to carry out investigations and prosecutions of its own, more energy could well be put into empowering and, where necessary, sensitising national courts and/or alternative structures authorised by States to deal with gross violations of human rights in a given situation, rather than taking the decision-making process out of their hands.

Victim demands invariably extend beyond what any formal international or national court of law can provide. This is why transitional justice mechanisms cannot be reduced to prosecutions. They need to include additional formal structures in order to meet victim demands. Differently stated, transitional justice proponents need to acknowledge the inherent limitations of trial justice in order to maximise the contribution of their discipline to peace-building. These limitations include the following:

¹⁰ UNHCHR (2006).

¹¹ Orentlicher (2004).

¹² Rome Statute.

- **Prosecution restrictions:** No legal system can prosecute more than a limited number of alleged perpetrators. The question is this: How does one hold those perpetrators who do not have their day in court accountable for their deeds?
- **Prosecutorial criteria:** The ICC's mandate is to prosecute the major proponents and architects of the most serious crimes under international law: genocide, crimes against humanity, war crimes and (the as yet undefined) crimes of aggression. Given the decisions on ICC persecutions to date, the question is by what criteria some perpetrators are judged to be major proponents and architects of serious crimes and others not.

When Dr Irae Baptista Lundin, a Maputo-based political analyst, was recently asked whether she thought Mozambique ought to have instituted criminal trials against those alleged to be responsible for gross violations in the post-independence conflict between the *Frente de Libertação de Moçambique*¹³ (FRELIMO) and the *Resistência Nacional Moçambicana*¹⁴ (RENAMO), she responded with a counter question: “Who ought we to have prosecuted? If not the Rhodesians, South Africans and other international players who funded the war, why RENAMO and FRELIMO?”¹⁵

- **Fixed charges:** Courts are required to prosecute against a fixed charge sheet. This means that, while trials are able to deliver justice on specific gross violations of human rights, they are unable to address broader aspects and patterns of injustice that have destroyed the lives of individual victims and communities. Included among the latter are invariably those who have neither the economic capacity nor the emotional will to resort to the courts.

To cite but one example, Saddam Hussein was convicted of crimes against humanity for the killing and torture of 148 Shi'ite villagers in Dujail following a failed attempt in 1982 to assassinate him. Hussein was sentenced to death and subsequently hanged. The courts did not address the more extensive record of his reign of terror. Questions about the United States (US) and the West encouraging Hussein to invade Iran in 1980 – an invasion that

¹³ Front for the Liberation of Mozambique.

¹⁴ Mozambique National Resistance Movement.

¹⁵ Maputo, May 2008.

led to the deaths of 1.5 million people – were not posed. Also not part of the court record is the supply of components of the chemical weapons with which Saddam drenched Iran and the Kurds. The chaos that resulted from the 2003 invasion of Iraq by US and allied forces and the subsequent use of Saddam's Abu Ghraib torture chambers by US soldiers are similarly not part of any court record.

- **Truth-telling:** Trials contribute to the demand for truth. Frequently, however, there is a need to go beyond the confines of the court in order for victims to engage perpetrators in face-to-face encounters, confrontation and dialogue in their quest for truth regarding their ordeal. Only through this process can they begin to understand the causes, motives and perspectives of those responsible for their suffering, which opens the possibility for victims to begin to bring closure to their trauma. This level of truth-telling takes time and levels of encounter between enemies and adversaries for which courts are ill-equipped.
- **Perpetrator responsibility:** Judgements handed down by courts can prescribe community service as a form of restorative justice, but the broader community is largely excluded from this process. Traditional community structures, on the other hand, provide a framework within which the responsibilities of perpetrators can be implemented and a context within which victim reparations and restoration can be delivered.
- **Reparations:** Deep and lasting community reparations and restitution can only happen as a result of dialogue and negotiation between an aggrieved and violated community and the State. The physical, psychological and material cost of suffering can be partially compensated by a court of law. This can open space within which victims can better more successfully aspire towards the restoration of their human dignity. Ultimately, however, the restoration victims' human dignity in a more complete sense is something that can only be achieved through their direct involvement in political struggle, social dialogue and self-determination.
- **Confrontation:** Courts are places of confrontation between prosecutor and accused. Prosecutorial justice can contribute towards the attainment of a holistic form of justice involving acknowledgement, truth recovery, political

reconciliation, comprehensive forms of reparation, and restoration of human dignity. However, far more is required to bring this process to completion, including the institution of appropriate forms of political, economic and social (re)construction – which are beyond the scope of formal courts.

Addressing the needs of victims, their communities and society as a whole, scholars and practitioners of peace-building are increasingly exploring the extent to which African traditional structures for justice and reconciliation can contribute to meeting these needs. In summary, there are immense moral, legal, political and practical concerns at the level of victim and community needs to which courts can contribute, but are invariably unable to bring closure.

African traditional justice systems

The political potency and appeal of African traditional systems is perhaps not essentially at the level of specific practices, recognising that practices are often culture-specific – differing not only from one country to another, but also between ethnic groups and clans within countries. Rather, this potency and appeal lie at the level of social legitimacy, grounded as these differing practices are in community involvement and established traditions. It is frequently pointed out that African traditional practices fall short of Western notions of due process and procedure. These traditional practices have also not demonstrated an obvious capacity to meet the sheer magnitude and complexities of contemporary political conflicts on the continent. Traditional courts and structures are often criticised for being gender-insensitive, although in some situations women preside over courts and ceremonies. While this is the case in the *gacaca*¹⁶ courts in Rwanda, where 30% of the *inyangamugayo*¹⁷ are women, many women continue to find the process intimidating in cases that involve issues of rape and sexual violence.¹⁸ In recent years, women have become *Bashingantahe*¹⁹ in Burundi, and women exercise significant power among traditional matriarchal groups in parts of Ghana, Mali, Mozambique and elsewhere on the continent. This said, Africa is largely a male-

¹⁶ A current adaptation of traditional courts.

¹⁷ Judges.

¹⁸ This resulted in cases of sexual violence being excluded from *gacaca* jurisdiction in 2004, although they were reinstated to their jurisdiction in 2008. It is not clear what changes have been introduced to address the earlier problems. For a discussion on the *gacaca* courts, see Clarke (2008a).

¹⁹ Community leaders and counsellors.

dominated society, which is reflected in most traditional judicial and governance structures. There are also situations where the competency and legitimacy of the presiding elders and other officials are questioned by local communities.

It is both wrong and unhelpful to overvalue the role of traditional African structures in dealing with crime and conflict. It is generally recognised that African traditional mechanisms need to undergo revision. The *gacaca* courts in Rwanda, for example, constitute an adaptation of original practices; and the July 2007 communiqué on the Juba talks between the GOU and the LRA refer to the need for “necessary modifications” to traditional Acholi, Iteso, Langi and Madi practices.²⁰ At the same time, it is important to acknowledge that political elites in Africa and elsewhere often seek to manipulate both international institutions and local practices to their own advantage or that of their cronies.

African traditional practices of justice and reconciliation clearly do not offer a panacea for Africa’s conflict. Assessing traditional African practices of justice and reconciliation in the Horn of Africa and, more particularly, Ethiopia, Tarekegn Adebo suggests that –²¹

African traditional structures have in many instances over the years been discredited and marginalised by colonial authorities and missionaries as well as by post-independent governments. This has often resulted in the emergence of incompetent elders and leaders who are open to manipulation and corruption.

Adebo suggests, however, that this does not detract from the fact that these institutions – though often compromised – are the carriers of traditional values and principles that people continue to place in high regard:²²

It is these ideas and values, rather than the existing structures or the presiding elders within these structures that should be incorporated into current peace-building structures.

Acknowledging the tension between tradition and modernity, he argues that the historic value and integrity of traditional institutions can be identified and adjusted to meet the demands of international law.

²⁰ *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army*. Juba, Sudan, 29 June 2007.

²¹ Uppsala, October 2007.

²² (ibid.).

In the past, traditional reconciliation structures were rarely authorised or equipped to deal with blood feuds or murder. This, suggests Adebo, provides the required space within which traditional and modern judicial demands can meet. In parts of present-day Ethiopia, for example, traditional structures continue to be used to settle less serious crimes, while high-level crimes are referred to national courts. Similarly, in Rwanda, the *gacaca* courts deal with crimes up to a certain level, while so-called Category 1 crimes – involving those alleged to be involved in planning, organising, inciting, supervising or instigating the 1994 genocide or other crimes against humanity – being referred to the formal courts or the International Criminal Tribunal for Rwanda in Arusha.²³

Clearly, traditional justice and reconciliation practices continue to prevail across the continent. The question is whether and how these practices can be incorporated into the dominant transitional justice debate – with increasing evidence of African governments as well as scholars of transitional justice on the African continent and elsewhere addressing this concern.²⁴

Without addressing specific practices of African traditional mechanisms for justice and reconciliation, which in any event differ from context to context, the following tensions reflect a common – albeit apparently contradictory at first – dialectic that holds together the goals of these practices:

- **Individual and community accountability:** The strength of traditional reconciliation mechanisms is located in their participatory, community focus. The individual offender is encouraged to make peace with the victim, whether living or dead, as well as with the family, clan, community and their ancestors. What is important is the communal responsibility to restore the damage done to the victim and his or her community, through the affirmation of social values that have traditionally sustained the community. The latter requires the participation of the ancestors.

The dialectic between individual culpability and community responsibility stresses the negotiated nature of justice, which requires the democratic participation of citizens in the creation of structures of authority, and agreement on the rules by which people are governed. Disregard of the

²³ Since 2008, however, some Category 1 cases are being dealt with by *gacaca* courts, where those accused of ‘lesser’ crimes – including complicity in genocide – are tried.

²⁴ See Huyse & Salter (2008).

values, perceptions and demands of communities by international bodies, not least in volatile political situations, can have significant consequences for peace and social justice in a given situation. Demands by international bodies for individual culpability need to adjust to the implications of a broader African sense of responsibility as a basis for ensuring both acceptance and sustainable peace.

- **Retributive and restorative justice:** If the focus of formal justice systems is retributive, the focus of African traditional courts is essentially restorative. However, it would be quite wrong to castigate international justice as entirely punitive and romanticise African justice as entirely restorative. Both forms of justice are important, especially in societies seeking to extricate themselves from lawlessness and disregard for the rights of victims in an abusive society. This requires the transitional justice debate to draw on the essential principles of both retributive and restorative justice.

African traditional mechanisms offer a space within which not only the political elite may talk, but also the rank and file members of aggrieved and warring groups can encounter one another. It provides a platform for citizens to engage State-appointed custodians of justice, who often isolate themselves from the challenges of broader society.

- **Individual and social truth-telling:** From the perspective of Western-trained lawyers, African traditional ways of evidence-giving, which frequently reach beyond the confines of a specific charge sheet required in conventional court systems, are seen to fall short of the rigour and specificity required by Western jurisprudence. African traditional ways of giving evidence and of story-telling, on the other hand, can offer the possibility of a level of truth-telling overlooked by formal courts.

The quest for this broader understanding of truth-telling is captured in the discussion on four different levels of truth identified in the South African Truth and Reconciliation Commission (TRC) Report which includes factual or forensic truth, personal or narrative truth, social truth or dialogical truth, and healing and restorative truth.²⁵ This complexity of truth-seeking by victims and survivors in a post-conflict situation as well as by the broader

²⁵ Truth and Reconciliation Commission of South Africa (1998:110–114).

society involved in the conflict is largely beyond the capacity of courts to deliver. Recognising that while different victims and survivors demand different kinds of truth, in principle, trials only satisfy the demand for what is seen to be objective or factual truth.

Albie Sachs, an important participant in the debates preceding the establishment of the Commission and presently a Constitutional Court judge, suggests that “dialogue truth is social truth, the truth of experience that is established through interaction, discussion and debate”.²⁶ It is this level of ‘engaged truth’ that is required to enable societies of deep conflict to explore the possibility of transcending their own often narrow perceptions of the truth as a basis for overcoming the polarisation in them that bedevils fuller truth recovery. Courts of law can contribute to this process by helping to get disclosure on *who did what to whom*. However, more is required to uncover the cause, motives and perspectives of those involved in the conflict. It is this level of personal and narrative truth, social or dialogical truth, and healing and restorative truth that formal court processes rarely deliver. African traditional mechanisms offer the possibility of addressing these needs.

- **Victims and perpetrators:** Pertinent to transitional justice is the question of how to address individual culpability within a context of collective victimisation. The difficulty involved is graphically presented in a Justice and Reconciliation Project (JPR) field note on Dominic Ongwen, a high-ranking LRA soldier whose military career began when he was abducted at the age of 10 on his way to school in the Gulu District in Uganda in 1980.²⁷ He is reported to have been “too little [sic] to walk” and having been denied adequate social and moral development, he is seen to be unable to make responsible decisions in later life.²⁸ However, Ongwen cannot simply be viewed as a child who was forced to kill: he embraced his assigned task in a manner that resulted in his promotion into the high command of the LRA, and is allegedly responsible for an array of gruesome deeds.

Most advocates of formal trials would argue that perpetrators such as Ongwen need to have their day in court, contending that this kind of

²⁶ (ibid.:113).

²⁷ Justice and Reconciliation Project (2008).

²⁸ (ibid.).

decisive intervention by the courts will contribute to sustainable peace, help establish the rule of law in the wake of lawless rule, and counter the desire for revenge by victims. Above all, prosecution is seen to be a deterrent to future gross violations of human rights – although there is no evidence to date that the ICC indictments have deterred either government or rebel forces in Uganda, the DRC or elsewhere to stop committing atrocities. The question is whether the threat of prosecution in polarised communities – where killers are often driven by deep beliefs based on clan, ethnicity and other ideologies – is ever enough to deter killing. When prosecutions are seen as a form of victor’s justice imposed by outside agencies, which is often the case in international tribunals and the ICC, prosecutions may indeed do little more than intensify the spiral of violence.

While the moral status of Ongwen and others in similar situations can never be conclusively resolved, an African traditional approach to the complexities of his position offers a space within which the aftermath of armed conflict and war can be grappled with by those most affected by it. Most importantly, such traditional structures offer opportunities for the community to decide on the nature and extent of penalties that offenders like Ongwen ought to face, and on what terms they can be reincorporated into communities that include families, bush wives²⁹ and children. In brief, formal courts impose judgements, whereas African traditional structures reach for negotiated settlements. In post-conflict situations, the latter can contribute to preserving the peace. The question is whether such settlements are also forms of impunity that fail to re-establish the rule of law so desperately needed in emerging democracies.

- **Reparations and development:** A litmus test of any judgement is its implementation. This is especially true in situations where retributive justice is replaced by restorative measures. Bluntly stated, if reparations and restoration do not happen in restorative justice situations, victims are often left without any positive outcome in their quest for justice.

The gap between proposed reparations and the actual monetary compensation paid out in places like Malawi and Rwanda in the wake of the rule of Hastings Banda and the 1994 genocide, respectively, is sometimes identified

²⁹ Women with whom soldiers have had conjugal relations during the war.

as evidence of the failure of restorative as opposed to retributive responses to the rights of victims and survivors. In South Africa, the five-year delay in the government's response to the TRC's recommendations on reparations has, together with the drastically reduced amount ultimately paid to victims, in turn raised further questions about the integrity of restorative justice.³⁰

The value of community participation in decision-making with regard to reparations through African traditional mechanisms potentially results in a level of pressure from local chiefs and elders as well as clan-based forms of social pressure to deliver on agreed forms of compensation and reparation. In some situations, this level of community participation also results in a measure of benefit for parties on both sides of a conflict through the sharing of land and cattle, and the development of cooperative community projects.

- **Ritual and procedural accountability:** Rituals, ceremonies and symbols are high on the priority list of exploring options for justice and reconciliation in the wake of conflict and war in African traditional justice and reconciliation mechanisms. Such social practices and structures constitute an important space within which discussion on guilt, responsibility and restoration can happen.

These ceremonies can be one-off events, which is often the case in the Acholi practice of *Mato Oput*, which is augmented by related ceremonies. Magama spirit ceremonies in post-war Mozambique similarly comprise a single event, despite involving several components, and are seen to be a culmination of healing initiatives. In other situations the ceremonies are repetitive and cumulative, akin in some ways to successive counselling sessions. This is evident in traditional *palaver* ceremonies in Liberia and in other Mano River countries. It is also the case in serial encounters with the spirits of the dead in Sierra Leone; in the *abashingantahe* practices of dispute resolution in Burundi and in *Barza Intercommunautaire* in the DRC's North Kivu Province,³¹ and in southern African countries, where one's ancestors need to be consulted and appeased as part of ongoing negotiations between former enemies and adversaries.

³⁰ De Greiff (2006); see also Doxtader & Villa-Vicencio (2004).

³¹ The *Barza Intercommunautaire* is rejected in South Kivu as an attempt to ensconce government stooges at the local level; see Clarke (2008b).

The *gacaca* courts in Rwanda, among others, bring people together in an attempt to deal with genocide and related crimes, on the assumption that talking and social encounter creates the opportunity for social re-engagement between victims and offenders. The former head of the Rwandan National Unity and Reconciliation Commission, Aloisea Inyumba, put it as follows:³²

The very act of meeting under a tree or in a local council hall, with local judges in formal attire and the authority to rule on disputes, takes on a ritualistic form of its own. The process is as important as the content and detail of testimony and evidence offered in the hearings. The medium becomes a significant part of the message. It helps create a milieu conducive to reconciliation.

Ritual and ceremony provide an important space for both *preverbal* and *non-verbal* reflection, conversation and decision-making in African traditional justice and reconciliation mechanisms. The process seeks to break the silence on issues of suffering and aggression that often prevails, thus enabling perpetrators and victims to make a behavioural shift from a prelinguistic state to the point where they can begin to talk about their experiences. The aim is to enable perpetrators to acknowledge their violation of human rights, and victims to begin to deal with their suffering and resentment.

The link between ritual and behavioural response is a contested field. Some scholars working on the relationship between ritual and peace-building draw on neurobiological research to suggest ritual can impact on the physical structure of the brain, decision-making and behavioural change. Briefly stated, it is suggested that rituals, symbols and ceremonies impact on different levels of human consciousness, resulting in different ways of thinking – allowing a person to respond more thoughtfully and with less spontaneous aggression to the situation they face.³³

Transitional justice in Africa

At the heart of the transitional justice debate is the question: *Transition to what?* A narrow focus on legal impunity too frequently neglects major issues of social and economic impunity, which underpins every oppressive society on earth.

³² Kigali, September 2006.

³³ Schirch (1990); Schechner (1993).

It further neglects the need to create restorative cultures, inclusive histories, appropriate memorials, and the development of a restorative society. In brief, criminal prosecution alone is too weak a premise on which to build social stability and redress deep-seated historical conflicts.

The strength of African justice and reconciliation mechanisms is that they are grounded in the social fabric of the communities they represent. They seek to overcome social polarisation and, where appropriate, they explore ways of reintegrating perpetrators into society. They have community reconciliation as an ultimate goal, against which censure, retribution and restoration need to be measured.

To the extent that the ultimate goal of transitional justice is to hold perpetrators accountable for their deeds, restore the human dignity of victims, overcome political polarisation, (re)build societal structures, and promote civic trust, the exploration of complementary partnerships between the ICC and African traditional mechanisms for justice and reconciliation are both desirable and realistically possible.

Few scholars and practitioners have a principled objection to promoting a viable relationship between the ICC and domestic governments or traditional courts to ensure that these objectives are met. Difficulties emerge when it is assumed that international justice is the measure of all justice. This is particularly problematic on the African continent, which is burdened with the memory of colonialism and internationally imposed 'solutions' to domestic problems that have resulted in the endless suffering of African people. The question is how to accomplish a realistic level of complementarity between international and domestic institutions.

For this complementarity to emerge, it is necessary to address a range of concerns, which include the following:

- **The need for a higher level of transparency and debate concerning the priorities of the ICC:** When the ICC opened its investigations in northern Uganda, the Prosecutor indicated that the court's intervention would help end the war, stating that the role of the court was to contribute directly to peace. However, when Joseph Kony indicated a willingness to enter into peace negotiations provided charges against him were dropped, this

provoked the Prosecutor to say it was his job to prosecute and not to make peace. What, then, is the role of the Prosecutor, and how does this impact on Articles 16 and 53 of the Rome Statute?

- **The impact of international justice in particular situations:** To what extent, for example, does the arrest of former Liberian dictator Charles Taylor through the agency of the Sierra Leonean Special Court entrench other dictators in their positions in terms of refusing to accept political asylum or amnesty as a ‘reward’ for surrendering power – fearing that they may face the same fate as Taylor? To what extent ought local and regional leaders to be consulted in deciding whether justice or peace should be prioritised in situations of entrenched armed conflict and mass atrocities?

The extent of the legitimacy of international law in local or domestic situations, especially in isolated communities that are struggling to bring an end to armed conflict, war and mass atrocities: Jurgen Habermas reminds us that neither moral nor legal values emerge from some normative metaphysical or universal source: law, whether international or customary, is a social construction attainable through debate, persuasion and inclusive legal discourse involving the participation of everyone concerned.³⁴ Writing at the time of the first wave of African independence, Lon Fuller argued that, at its best, law was based on societal consensus concerning the “best route to a better future”, giving expression to “who we want to be” and the “kind of community we aim to have.”³⁵ While the moral legitimacy of international law is broadly accepted and established, the contextual efficacy of international law needs to be repeatedly questioned and renegotiated. In the words of Michael Ignatieff, “For the truth to be believed it has to be allowed by those who suffer its consequences”.³⁶

- **The fact that only Africans have been indicted by the ICC since its inception in 2002:** This elicits sentiments within the transitional justice debate that often detract from the thoughtfulness needed to promote justice and sustain peace. Questions are raised as to why certain African rebel leaders have been indicted to the exclusion of others, and why some heads of state are seen to be exempted from prosecutions while others are not. The

³⁴ Habermas (1998:222).

³⁵ Fuller (1958:630).

³⁶ Ignatieff (2004:214).

situations in the Central African Republic, the DRC, Sudan, and Uganda are clearly demanding of international attention in this regard. The resultant level of suspicion towards the ICC by many Africans could be resolved by greater candour and transparency on the part of the ICC.

- **The continuing underlying dichotomy between African communitarianism and colonial forms of liberal individualism:** Western notions of law and individual responsibility were an inherent part of colonialism. In the process, traditional law mechanisms were suppressed. With few exceptions, resistant traditional leaders were replaced by hand-picked collaborators. Post-colonial leaders rarely saw the need to deviate from such practices.

It is too late and it would also be quite wrong to attempt to undo centuries of history. Times and needs have changed. The challenge is to find ways to identify and introduce such communal values and practices into international law that can contribute to the creation of the kind of social cohesion and stability that so many African countries need.

The often-quoted observation by Kofi Annan, the former UN Secretary-General, on the mandate of the ICC and the South African experiment in transitional justice through a TRC to deal with its apartheid past, is pertinent here:³⁷

The purpose of the clause in the Statute [which allows the ICC to intervene where the State is 'unwilling or unable' to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

Although the Rome Statute did not exist at the time of the South African TRC, the words of the former Secretary-General raise the question whether present and future African settlements can be considered in a similar, albeit modified, manner.

³⁷ Annan (1998).

Peace-building invariably involves political concessions, deal-making and moral compromises. The African contribution to this process is to turn a necessity into a potential for virtue by favouring maximum inclusivity and the pursuit of reconciliation in dealing with issues of conflict and national security. It offers the opportunity to rise above violent conflict and abuse through the repair of relationships and the rediscovery of the humanity of even those who seem to have sacrificed their right to be regarded as human. Africa, at the same time, needs to face the reality that where perpetrators are not willing to make peace, they need to face the strong arm of retribution and exclusion from society.

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Human rights education in Africa

Nico Horn

Introduction: Human rights education in the context of the United Nations

Human rights and education have gone hand in hand ever since the Charter of the United Nations (UN) was accepted. By signing the UN Charter, states committed themselves to cooperating with the UN to promote and achieve –¹

... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The emphasis on education gained further momentum when the Universal Declaration of Human Rights (UDHR) was adopted in 1948. Long before the UN declared 1995–2004² the Decade for Human Rights Education, the UDHR and the Covenants placed education at the centre of human rights activities.

The UDHR emphasises the importance of human rights education in the Preamble as an element that is fundamental to developing a human rights culture:

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, ...³

Now, therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms ...⁴

¹ Article 56, read with Article 55(c).

² From a suggestion made at the World Conference on Human Rights in Vienna in December 2004, the UN General Assembly proclaimed the Decade for Human Rights Education as being from 1 January 1995 until 31 December 2004 (Resolution 49/184).

³ Preamble, para. 6.

⁴ (ibid.:para. 8).

The argument seems clear: the success of a post-World-War-II human rights dispensation is only partly dependent upon the signing of the UN Charter and political acceptance of the UDHR (and later ratification of the covenants and treaties). The General Assembly understood this, and at the adoption of the UDHR called on all nations –⁵

... to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.

Andreopoulos and Claude note that, in the UDHR, education is more than a tool to promote human rights:⁶

It is an end in itself. In positing a human right to education, the framers of the Declaration axiomatically relied on the notion that education is not value-neutral. In this spirit, Article 30⁷ [sic] states that one of the goals of education should be “the strengthening of respect for human rights and fundamental freedoms”.

While Article 26(1) deals with education as a general human right, Article 26(2) makes the development of the human personality and the strengthening of respect for human rights and fundamental freedoms part of the content of human rights education. Education as a basic human right cannot be any education. Its content, says the UDHR, ought to be built on a substantive understanding of the dignity of all human beings and an appreciation of the rights and freedoms to which human beings are entitled.

The phrase *human rights education* can refer both to the human right to education – which is a right protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and, which is more often the case, to the content of education to develop a substantive knowledge and understanding of human rights.

The right to education and the teaching of human rights (*human rights education*) are intertwined. Children have a right to education, but the education that they ought to receive is not ideologically neutral: it is compelled to include education on human rights.

⁵ Session of the UN General Assembly, 10 December 1948, Palais de Chaillot, Paris.

⁶ Andreopolous & Claude (1997:3).

⁷ The authors (ibid.) in fact cite Article 26, not Article 30.

Article 26(2) placed human rights education in the centre of human development:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Since the UDHR's adoption, the substantial moral authority unfolded in it pressed the international community continuously not only to agree to implement basic education programmes, but also to adopt all the other existing international human rights treaties.

Human rights law as a new development in international law after WWII could only grow into a generally accepted international benchmark if both the government and the people of each member state knew the UDHR, accepted its content and applied it: hence the strong emphasis on education.

The ICESCR and the International Covenant on Civil and Political Rights (ICCPR) were developed in the 1950s, completed in 1966, and adopted in 1976, with the intention of giving substance and form to human rights law, as well as attention to the importance of education as a foundation to implementing a human rights dispensation. Article 13 of the ICESCR not only mandates education as an economic right, but also, in a further elaboration of Article 26 of the UDHR, links it to the importance of developing the whole person and the ability to participate effectively in a free society:⁸

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Elaborating on the broad understanding of education in Article 26 of the UDHR, the ICESCR sees education as a process of developing the person to become a moral agent who accepts his/her own dignity, respects the rights of others,

⁸ Article 13(1).

and has the ability to participate in a free society and contributes to peace. This somewhat utopian understanding of the value of education underlines the fact that the ICESCR, with its emphasis on social justice, will be an exercise in futility if the poor and marginalised do not have the social skills and knowledge to exercise their rights.

While the ICCPR only refers to the right of parents to religious and moral education for their children, human rights education is implied in all the Articles that presuppose some intellectual sophistication. Andreopoulos and Claude refer to Article 19(1), namely the “right to hold opinions without interference”, and Article 19(2), the right –

... to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

They point out that education is a process involving the sharing and dissemination of ideas.⁹ In other words, education is the gate to exercising all the rights and freedoms of the Covenant.

Several of the treaties created to elaborate on the protection of specific human rights include a section on the obligation of states to educate their citizens. The Convention on the Eradication of All Forms of Racial Discrimination, for example, makes education a central obligation of each state party:¹⁰

States Parties undertake to adopt immediate and effective measures, particularly in the fields of **teaching, education**, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention. [Emphasis added]

In the UN Convention on the Right of the Child, member states commit themselves to education directed to –

⁹ Andreopolous & Claude (ibid.:4).

¹⁰ Article 7.

- the development of the child's personality, talents and mental and physical abilities to their fullest potential¹¹
- the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the UN Charter¹²
- the development of respect for the child's parents, his or her own cultural identity, language and values, and roots¹³
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups, and persons of indigenous origin,¹⁴ and
- the development of respect for the natural environment.¹⁵

Bösl and Jastrzembski ask whether Article 29 creates a human right to human rights education.¹⁶ They note that this opinion has for a long time been proposed by activists and non-governmental organisations (NGOs). Opponents of the view point out that no such right is specifically mentioned in the other human rights instruments. However, it cannot be disputed that states have an obligation to teach and allow others to teach human rights. It is also generally agreed that human rights education is fundamental to the implementation of human rights.¹⁷

Africa and the UN system

From the outset, Africa was at a disadvantage in human rights education. Only Egypt and two sub-Saharan countries, Ethiopia and Liberia, voted in favour of the adoption of the UDHR in 1948,¹⁸ while South Africa abstained together with the Soviet bloc.¹⁹ All the other countries were still under colonial rule and represented de jure by the colonial powers.

¹¹ Article 29(1)(a).

¹² (ibid.:29(1)(b)).

¹³ (ibid.:29(1)(c)).

¹⁴ (ibid.:29(1)(d)).

¹⁵ (ibid.:29(1)(e)).

¹⁶ Bösl & Jastrzembski (2005:5).

¹⁷ (All ibid.).

¹⁸ Session of the UN General Assembly, 10 December 1948, Palais de Chaillot, Paris.

¹⁹ By 1948, the Nationalist Party, a racist political grouping in South Africa that excluded the black majority from political power, took over the helm of government. After that, South Africa was in constant conflict with the UN, of which it is a founding member, over its race policies and its occupation of the then South West Africa (now Namibia).

However, as the countries on the continent gained their independence one by one, they joined the UN and enthusiastically became part of most of the major human rights treaties. Viljoen points out that, as far as ratification or signing of the human rights instruments is concerned, by 2006, African participation had exceeded the total international average in most of these instruments.²⁰ Consider the following:²¹

- Some 94% of all African countries have ratified the ICCPR compared with 82% globally
- For the ICESCR, the figures are 91% (Africa) to 80% (global)
- For the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it is 96% to 90%
- For the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), it is 79% to 74%
- For the Convention on the Right of the Child, it is 98% to 99%, and
- For the Convention on the Elimination of All Forms of Racial Discrimination (CERD), 92% of all African countries have ratified the treaty compared with 89% globally.

However, the enthusiastic ratification does not tell the full story. In many instances, ratification is not complemented by complying with the demands of the instrument itself. Viljoen comments that African states often submit their state reports late,²² and they lack detail.²³ CEDAW is the only exception. By 31 December 2006, only 11 African countries had not submitted any reports at all to the treaty body.²⁴

If state reporting is the most important review and evaluation instrument, the success of the UN system needs to be questioned. Viljoen observes that the impact of the monitoring mechanism of the prominent treaties on Africa is

²⁰ Viljoen (2007:149).

²¹ (ibid.).

²² By 31 December 2006, a total of 13 African countries were a minimum of ten years late in submitting at least one ICCPR state report (ibid.:104). Only 14 African countries have submitted a state report under the ICESCR (ibid.:123).

²³ (ibid.:104).

²⁴ (ibid.:129).

questionable.²⁵ While the UN sees the treaty system as one of the organisation's success stories,²⁶ there is little evidence of that system's success in Africa.²⁷

The African Charter on Human and Peoples' Rights

Following the tendency in the rest of the world, the Organisation of African Unity (OAU) adopted the African Charter on Human and People's Rights (ACHPR) on 27 June 1981. The Charter was met with little enthusiasm, however. It took five years for a majority of the member states to ratify the Charter, and 13 years for the African Commission to publish its first decision.²⁸ Only in 1999, when Eritrea ratified the Charter, did it finally attain the full ratification of all 53 OAU member states.

The ACHPR was the first of several African treaties. African countries were slow to ratify these African instruments. These countries appeared to dedicate their attention to the UN system rather than their own. While they were leading the world in ratifying UN instruments, it took a total of 18 years for all the African member states to ratify ACHPR. By December 2006, only 27 countries had ratified the Convention for the Elimination of Mercenarism in Africa; only 20 had ratified the Protocol to the African Charter on the Rights of Women in Africa;²⁹ and only 39 had ratified the African Charter on the Rights and Welfare of the Child.³⁰

The state reporting did not fare much better. By 2006, 15 of the member states of the OAU's successor, the African Union (AU), did not present any reports at all, while seven countries' reports were more than ten years overdue and only 14 states had actually complied with all their reporting responsibilities.³¹ Viljoen comments that, in contrast, the countries with the poorest records in this scenario performed much better when it came to reporting to the UN treaty bodies.³²

²⁵ (ibid.:129).

²⁶ See UNHCHR Report No. UN A/59/20045/Add.3, dated 25 May 2005, quoted in (ibid.:146).

²⁷ Viljoen (2007:146).

²⁸ Murray (1997).

²⁹ The resistance to the Protocol is partly related to the opposition to Article 6, subpar (c), requesting states parties to encourage monogamy as "... the preferred form of marriage".

³⁰ See Viljoen (2007:308).

³¹ (ibid.:377).

³² (ibid.).

State reporting does not tell the whole story, however. In an article on positive human rights developments in Africa, Odinkalu refers to three important human rights documents coming from the AU in 2002:³³

- A declaration formulating new Principles Governing Democratic Elections in Africa
- A declaration on Democracy, [and] Political, Economic and Corporate Governance in Africa, and
- The Ministerial Council of the AU agreed to the text of an African Union Convent on Preventing and Combating Corruption.

The existence of these documents at least points to a developing concern in Africa for the protection of human rights.

However, Africa is far from being a beacon of human rights conduct. A lack of knowledge and information is still a barrier preventing African people from claiming and exercising their human rights. By 1987, the ACHPR was generally unknown in Liberia.³⁴ Some 16 years later, in December 2003, Sierra Leone shared the Liberian experience.³⁵ Research in Zimbabwe in 1994³⁶ and in Kenya in 1997 came to the same conclusions.³⁷

It seems as if the African system is still reasonably unknown in Africa. Okafor points out that while doing well in taking cases to treaty bodies on behalf of aggrieved persons and being sympathetic towards the fate of the marginalised, civil society is predominantly elitist: its members come from the top echelons of urban life, and they often do not speak the vernaculars of the people they offer to represent.³⁸

Moreover, African judges seldom refer to the African system. Instead, they prefer to use the non-domestic jurisprudence of southern Africa, the US Supreme Court, the Supreme Court of Canada, and the European Court of human Rights.

Despite the initial emphasis in the international community, the UDHR and the covenants on human rights training in international human rights law, it seems

³³ Odinkalu (2003:105).

³⁴ Ellen Sirleaf (2007; in Okafor 2007:261).

³⁵ Kargbo (2007, pers. comm.; in Okafor (ibid.).

³⁶ Tigere (1994:64).

³⁷ Okafor (2007:261).

³⁸ (ibid.:268ff).

as if Africa has never really bought into it. While it caught up on the ratification of human rights treaties, it failed in teaching the weak, the marginalised, and society at large, but also the powerful judiciary. An African human rights culture and a general knowledge of the rights of all people are still not fully developed, therefore.

The road to the Decade for Human Rights Education³⁹

In the 1970s, the right to human rights education became a popular theme within the UN. While the UDHR and the ICESCR emphasised the need for education, role players wanted to move to the methods and content of human rights education.

Eventually the United Nations Educational, Scientific and Cultural Organisation (UNESCO) took the initiative and placed human rights education on the agenda of a General Conference in 1974, which led to UNESCO member states unanimously adopting the so-called Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms, which contained the following recommendations, among others:⁴⁰

The General Conference recommends that member states should apply the following provisions by taking whatever legislative or other steps may be required in conformity with the constitutional practice of each state to give effect within their respective territories to the principles set forth in its recommendation.

The General Conference recommends that Member States bring this recommendation to the attention of the authorities, departments or bodies responsible for school education, higher education and out-of-school education, of the various organisations carrying out educational work among young people and adults such as student and youth movements, associations of pupils' [sic], parents, teachers' unions and other interested parties.

Twenty years later, after the end of the Cold War, UNESCO held an International Congress on the education of human rights and democracy, in cooperation with

³⁹ I am appreciative to one of the editors, Dr A Bösl, for referring me to an article he had co-authored on this topic (Bösl & Jastrzembki 2005).

⁴⁰ Adopted by the General Conference at its 18th Session, Paris, 19 November 1974; available at http://www.unesco.org/education/nfsunesco/pdf/Peace_e.pdf; last accessed 9 April 2009.

the UN Centre for Human Rights in 1993 in Montreal, Canada, on the theme “World Plan of Action for Education in Human Rights and Democracy”. It made provision for the creation of extensive programmes for human rights education to further the ideals of tolerance, peace and friendly relations among states, peoples and marginalised groups.⁴¹ The Congress adopted, among other things, a plan to obtain its educational goals:⁴²

This Plan calls for methods which will reach the widest number of individuals most effectively, such as the use of the mass media, the training of trainers, the mobilisation of popular movements and the possibility of establishing a world-wide television and radio network under the auspices of the United Nations.

The next landmark in human rights education was the World Conference on Human Rights in Vienna in 1993. In the concluding document of the Conference, representatives of 171 countries affirmed the state’s obligation to training:⁴³

The World Conference on Human Rights reaffirms that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasises the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups and encourage the development of United Nations activities in pursuance of these objectives. Therefore, education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion, and this should be integrated in the education policies at the national as well as international levels.

The UN Decade for Human Rights Education

Reacting to the undertakings by the World Conference, the UN General Assembly proclaimed the Decade for Human Rights Education on 23 December 1994, to begin on 1 January 1995.⁴⁴

⁴¹ World Plan of Action text available at http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/342-353.HTM; last accessed 10 April 2009.

⁴² (ibid.).

⁴³ UNHCHR (1993:Article 33).

⁴⁴ Resolution 49/184 of the UN General Assembly, 94th Plenary Meeting, 23 December 1994.

The associated UN Resolution points to Article 26 of the UDHR and Article 13 of the ICESCR in emphasising the importance and ongoing need for human rights education. It makes an important statement regarding the expected outcome of such education:

... that human rights education constitutes an important vehicle for the elimination of gender-based discrimination and ensuring equal opportunities through the promotion and protection of the human rights of women ...

Human rights knowledge is an indispensable component of the struggle for gender equality and equal opportunity for women. Without knowledge there can be no proper understanding of the possibilities and remedies available to women to reach their full potential. The fact that African states are reluctant to ratify the Protocol to the African Charter on the Rights of Women in Africa indicates a special need for gender education to enable women to be the persons they ought to be – and, indeed, the objectives of human rights education go beyond the transference of knowledge. The final outcome should be broader adherence to human rights principles, a stronger activist approach to violations (since people will know their rights) and, eventually, more peace.

The Plan of Action defines *education* as –⁴⁵

... training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes and directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free society;
- (e) The furtherance of the activities of the United Nations for the maintenance of peace.

The following general principles were set out in the Plan of Action to guide the programme:⁴⁶

⁴⁵ Article 2, “Plan of Action for the United Nations Decade for Human Rights Education, 1995–2004: Human rights education – Lessons for life”; Appendix to The United Nations High Commissioner for Human Rights on the Implementation of the Plan of Action for the United Nations Decade for Human Rights Education (1995–2004), UN Document A/51/506/Add.1, 12 December 1996.

⁴⁶ (ibid.:Articles 3–9).

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- The programme should create the broadest possible awareness and understanding of all of the norms, concepts and values enshrined in the Universal Declaration of Human Rights, and the international human rights instruments;
- A comprehensive approach to education for human rights, including civil, cultural, economic, political and social rights and recognising the indivisibility and interdependence of all rights, shall be adopted;
- Education shall include the equal participation of women and men of all age groups and all sectors of society both in formal learning through schools and vocational and professional training, as well as in non-formal learning through institutions of civil society, the family and the mass media;
- Human rights education shall be relevant to the daily lives of learners, and shall seek to engage learners in a dialogue;
- Human rights education shall seek to further effective democratic participation in the political, economic, social and cultural spheres, and shall be utilised as a means of promoting economic and social progress and people-centred sustainable development;
- Human rights education shall combat and be free of gender bias, racial and other stereotypes; and
- Human rights education shall seek both to impart skills and knowledge to learners and to affect positively their attitudes and behaviour.

The Plan for Action identified five objectives:⁴⁷

- (a) The assessment of needs and the formulation of effective strategies for the furtherance of human rights education at all school levels, in vocational training and formal as well as non-formal learning;
- (b) The building and strengthening of programmes and capacities for human rights education at the international, regional, national and local levels;
- (c) The coordinated development of human rights education materials;
- (d) The strengthening of the role and capacity of the mass media in the furtherance of human rights education; and
- (e) The global dissemination of the Universal Declaration of Human Rights in the maximum possible number of languages and in other forms appropriate for various levels of literacy and for the disabled.

The associated UN Resolution includes a number of role players to participate in such education:⁴⁸

- Governments, who are encouraged to eradicate illiteracy, to develop the human personality and to strengthen the respect for fundamental rights and freedoms;

⁴⁷ (ibid.:Article 10(a)–(e)).

⁴⁸ (ibid.:Articles 11–19).

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- The High Commissioner for Human Rights for Human Rights, who is requested to coordinate the implementation of the Plan of Action;
- The Centre for Human Rights of the Human Rights Secretariat, the member states, non-governmental organisations and specialised agencies of the UN, who are requested to support the endeavour; and
- International, regional and national non-governmental organisations.

Governments are the main role players, therefore. They are expected to develop national plans of action for human rights education and introduce or strengthen national human rights curricula, conduct national information campaigns, and open public access to human rights resources.⁴⁹

The success of the Decade for Human Rights Education

Human rights education by governments

Cardenas comments that governmental human rights education in Africa predominantly dealt with the development of school curricula, while the training of officials was left to NGOs.⁵⁰ An additional result of the human rights education initiative in Africa was the formation of human rights commissions: these grew from six in 1996 to 38 by 1999. Human rights commissions thereby became the main role players in human rights education in Africa.⁵¹

Human rights commissions are an excellent vehicle for human rights education. Since government is responsible for such education, it may well be that they will use it for their own purposes. Human rights education carries a high risk for governments, comments Cardenas.⁵² The more successful such education is, the greater the risk that government action will be challenged and that the public will make serious demands for compensation and the punishment of human rights abusers. If government controls such education, therefore, it can set the pace and manage its content.

However, although human rights commissions are funded predominantly by the State, they are independent – or are at least perceived to be so. With the strong network of human rights commissions and other defenders of human rights such

⁴⁹ (ibid.:Article 11).

⁵⁰ Cardenas (2005:368).

⁵¹ (ibid.:368, 371).

⁵² (ibid.:365).

as public defenders and ombudspersons across Africa and globally, human rights commissions are exposed to developments in human rights education in other jurisdictions and regions. This exposure has the potential to create a common approach that will strengthen the universality of human rights.

Cardenas looked at the South African Human Rights Commission (SAHRC), whom she perceives to be the most active and best-funded commission in Africa – and, possibly, the world.⁵³ Human rights curricular development is a major function of this Commission.⁵⁴ But it is also involved in training officials such as the police and the army, and in regional training of other human rights commissions.

However, not even the SAHRC did not escape the criticism of overcompensating for the needs and aspirations of government. Cardenas, without accusing the SAHRC of subjectivity or bias, mentions that more than 90% of its budget comes from government.⁵⁵ This potential shortcoming applies to all human rights protectors and commissions. While institutional independence is officially guaranteed by the state, a lack of funds can cripple such bodies or force them to a subordinate position.⁵⁶

Evaluators of human rights education have emphasised the importance of a broad definition of *human rights in education*.⁵⁷ A broad understanding of human rights will prevent the concept from being understood as the right to education, rather than a substantive understanding as human rights as both the object and substance of human rights education. The SAHRC clearly operates with a broad definition and their work includes several projects on social and economic rights.

The SAHRC was also a pioneer in setting up a Centre for Human Rights Education Training.⁵⁸ While there were several human rights centres at universities at the time, no one coordinated the educational programmes of the different role players from government, civil society and educational institutions. The Centre

⁵³ (ibid.:371).

⁵⁴ See Keet & Carrim (2006); see also Candau (2004).

⁵⁵ Cardenas (2005:373).

⁵⁶ In 2002, the number of Commissioners of the SAHRC was drastically cut – despite the growing case load; see SAPA (2002; in Cardenas 2005:374).

⁵⁷ Rukanda (2002:285–286).

⁵⁸ Cardenas (2005:372).

still serves as an example of how educators from civil society and government can be brought together to coordinate focused human rights education without too much duplication.

The overall picture of African participation in the UN Decade for Human Rights Education is bleak. Only 7 of the 53 member states returned an evaluation questionnaire to the High Commissioner. Of the reports received, many were vague, contained little information, and certainly had no specifics on training programmes.

Other responses came from 13 NGOs, 3 national human rights institutions and 4 human rights and university institutes.⁵⁹ Very little was done by governments to take human rights education to professional groups such as the police, the defence force and immigration officers, and even less to vulnerable groups such as minorities, migrant workers, prisoners and people living in extreme poverty.⁶⁰ Moreover, African governments expected intergovernmental organisations to fund human rights education projects.⁶¹

The obstacles listed by the seven African governments that responded to the questionnaire in respect of implementing human rights education programmes are an indication of a lack of political will rather than the obstacles themselves being insurmountable. This lack of will is evidenced by there being no technical assistance for developing and executing national human rights education plan, and no provision of long-term State funding.⁶² NGOs, on the other hand, attribute many of the obstacles to a lack of political will.⁶³

Given the high expectation that the High Commissioner for Human Rights had and the important role that the UN Plan of Action gave to governments, a mere 14% response by governments can hardly be seen as successful after the first five years of the Plan's existence. Moreover, even those who responded did not necessarily indicate major successes.

The performance of governments in the second five years did not improve significantly. In a High Commissioner for Human Rights report in October 2003,

⁵⁹ UN (2000).

⁶⁰ (ibid.:points 33 and 34).

⁶¹ (ibid.:point 37).

⁶² (ibid.:points 39–41).

⁶³ (ibid.:point 42).

only 17 out of a potential total of 50 sub-Saharan-African countries were listed amongst UN member states who had in fact reported to the High Commissioner on initiatives taken in their countries as part of the Decade for Human Rights Education. Many of these sub-Saharan-African reports were outdated.⁶⁴ Also evidencing a lack of political will among African governments is the fact that Burundi has not reported to the High Commissioner since June 2000, Cameroon since May 1999, Cape Verde since February 1999, and the list goes on.

However, there were also countries who submitted elaborate reports. These included Mozambique, Namibia and Zimbabwe.⁶⁵ Unfortunately, the UN does not have any instruments by means of which to measure the success of human rights education efforts. For example, is a programme successful if human rights are the content of a well-structured and managed school subject? Zimbabwe is a case in point, where the country spent time, money and effort in setting up and implementing human rights education programmes, but the state of the country shows little real impact of these programmes. Indeed, on the contrary: the decline of human rights started at a time when one would have expected the education programmes to produce some results.

Civil society and human rights education

Civil society has played an important role in both education and advocacy in Africa. For example, Okafor attributes Nigeria's relatively successful interaction with the implementation of the African instruments to that country's strong civil society and numerous local civil society organisations.⁶⁶ Sceptical observers of human rights education see the contribution of NGOs as the only possible way of overcoming government apathy and lack of commitment.⁶⁷

While civil society seems to be able to conduct human rights education programmes with important role players such as the police, military and other government agents,⁶⁸ they are not very successful in delivering such education to marginalised groups. Okafor ascribes this shortcoming to the fact that human rights activists come from a small elite who understand the human rights environment,

⁶⁴ OHCHR (2003).

⁶⁵ Rukanda (2004).

⁶⁶ Okafor (2007:269).

⁶⁷ Rosemann (2003:6).

⁶⁸ Cardenas (2005:368).

but not necessarily what Okafor calls the language of the marginalised.⁶⁹ In other words, they share the life experiences of the governing elite rather than that of marginalised people. Consequently, they are unable to bridge the gap between the elite and the have-nots. While they may understand the needs of the people in terms of human rights, they are not the best people to communicate teach these rights to the marginalised groups.

However, despite the shortcomings, NGOs are the main role players in specialised grass-roots education. The work of the Metlhaetsile Centre in Botswana is a case in point.⁷⁰ While the country is proclaimed as the most stable democracy in Africa, women are still treated as second-class citizens, despite the landmark decision of *Attorney General v Unity Dow*.⁷¹ The Centre's education programmes include a wide range of activities in rural areas, including interaction with traditional authorities.

In Namibia, Women's Action for Development has been involved in empowering and educational programmes for rural women since 1994.⁷² In Nigeria, an activist group working from 1993–1996 for women's rights under Islamic law was launched as BAOBAB for Women's Human Rights in 1996. Its programmes include basic education at grass-roots level as well as paralegal training.⁷³

Similar organisations working specifically with women and children's rights mushroomed during the Decade for Human Rights Education. While it is still too early to determine the long-term impact and sustainability of all these organisations, NGOs were at the forefront of human rights education in fields not covered by African government programmes.

For the first half of the decade, civil society in Africa seemed to have performed somewhat better than their government counterparts, by reaching most target groups with their human rights education programmes.⁷⁴ However, education was seldom identified as the main focus of NGOs. They concentrated on the

⁶⁹ Okafor (2007:269).

⁷⁰ Dow et al. (1997; in Andreopoulos & Claude 1997:455–468).

⁷¹ Unreported case of the Court of Appeal, No. 4/91. The case declared certain discriminatory provisions of the Citizenship Act unconstitutional.

⁷² See <http://www.wad.org.na/>; last accessed 10 March 2009.

⁷³ See <http://www.baobabwomen.org> for further information; last accessed 10 March 2009.

⁷⁴ UN (2000:point 35).

human rights related to their mandate, “... and carry out generic work on human rights awareness to increase support for their particular concerns”.⁷⁵

The High Commissioner noted that the NGO programmes seldom included interaction with the government.⁷⁶ However, the long-term success of formal educational programmes in schools can hardly be sustainable without government participation.

Thus, while civil society has complied with some aspects of their mandate under the programmes and objectives of the Decade for Human Rights Education, the key objective – a global culture of human rights – has a long way to go in Africa.

Human rights education as part of formal education

While African governments have spent most of their resources on curricular development as far as human rights education is concerned, educators have questioned the effectiveness of incorporating such education into formal education. Meintjes, for example, asserts that while the rhetoric of empowerment suggests changes in education itself, “the ends and means will remain those of conventional education”.⁷⁷ In the same vein, Henry refers to the historical role of education to socialise students into the existing social structure. Students are taught to respect authority and to revere politicians – not to question them.⁷⁸

The criticisms by Meintjes and Henry have merit. However, critical thinking and analysis are no longer taboos in pedagogic literature. Hecht, a proponent of democratic education, points out that formal schooling is a very small part of the learner’s learning experience.⁷⁹ If freedom and uniqueness are integral aspects of their daily life, why should formal education be different?

One can apply the insights of democratic education to human rights education. Why should respect for the humanity of others or an understanding of one’s own rights contradict the socialising skills needed by young learners to integrate

⁷⁵ (ibid.:point 124).

⁷⁶ (ibid.).

⁷⁷ Meintjes (1997:70).

⁷⁸ Henry (1991:420).

⁷⁹ Hecht [n.d.].

into the group? If human rights are part of the common values of the society in which the young learner finds him-/herself, understanding human rights will be part of their socialising process. If, however, human rights education is an add-on to impress the international community, the tension between an autocratic political system and education philosophy on the one hand and freedom and respect of the dignity of others on the other will confuse the learner rather than contributing to his/her full development as a human being. In such a scenario, Meintjes's argument has relevance: the outcome will be formal education as it is known today.

Human rights after the UN Decade for Human Rights Education

Sceptics have suggested that the UN Decade for Human Rights Education has been a failure. Rosemann, a critic of the UN human rights system, sees the role of member states being the main educators as a recipe for failure.⁸⁰ The failure of the work of the Human Rights Commission⁸¹ over 50 years is a clear indication to Rosemann that states cannot exercise self-regulation. And human rights education can only work in "... an overall atmosphere where a rights-based approach to human dignity is accepted and a free society where individuals can claim their human rights without endangering their own lives".⁸²

This envisaged "free society" has not yet been created by 50 years of the human rights dispensation. In the mid-term global evaluation of the Decade programme, the UN pointed out that only a few national human rights strategies had been developed in the ten-year period. To solve the problem of non-commitment by governments, the High Commissioner for Human Rights suggested three strategies:⁸³

- Another decade dedicated to human rights education
- A special fund for human rights education, and
- A joint NGO–government committee to take human rights education forward.

⁸⁰ Rosemann (2003:1).

⁸¹ The Human Rights Commission has in the meantime been replaced by the Human Rights Council. Rosemann is possibly as opposed to the Council as he was to the Commission, since the core of the Council is still elected by member states.

⁸² Rosemann (2003:1).

⁸³ UNHCHR (2003).

Rosemann⁸⁴ sees only one possible way forward: less government participation, and more NGO participation. In this process, civil society should accept the role of a parliamentary opposition when it comes to human rights issues. In other words, if the UN is serious in developing communities where human rights are respected and individuals are free to claim their freedoms and rights, they will have to empower NGOs to become more aggressive in opposing human rights abuses – even if it means eliciting active antagonism from government.

Viljoen, while seeing the ratification of treaties as an important anchor that may help to stabilise the gains of democratisation, remains critical of the impact of the UN System on African countries.⁸⁵ A good record in ratification will not result in more rights and a more democratic society: it can merely prepare the ground.

Hathaway, like Viljoen, questions the positive conclusions that one can draw about Africa's excellent record of ratifying treaties.⁸⁶ Treaty ratification, she asserts, is often an indication of bad performance rather than an indication of an awakening human rights culture.⁸⁷ Her findings are carried by the signing and ratification history of at least one recent convention, namely the Merida Convention. This UN anti-corruption convention was adopted on 9 December 2003. Kenya signed and ratified the Convention on the same day. Only 12 countries ratified it in 2004, 9 of whom were from Africa (Algeria, Benin, Madagascar, Namibia, Nigeria, Sierra Leone, South Africa and Uganda).⁸⁸ This is not to say that all the countries that ratified early (i.e. in 2004) are corrupt; but neither does ratification say anything about the human rights performance of a state.

However, one should not lose sight of the gains of the Decade for Human Rights Education. While one cannot necessarily link the growth of human rights commissions in Africa with the initiatives of the Decade for Human Rights Education, the commissions became major role players as human rights educators during the Decade. And the initiatives of the High Commissioner for Human Rights during those ten years at least played a role in the emphasis on human rights education.

⁸⁴ Rosemann (2003:6).

⁸⁵ Viljoen (2007:146).

⁸⁶ Hathaway (2002).

⁸⁷ (ibid.).

⁸⁸ UN Office on Drugs and Crime (2009).

But the small victories do not compensate for the unfulfilled objectives and expectations of the programme. There are no indications that Africans in general have an awareness and understanding of the UN human rights instruments; neither can one speak of a general trend to see first- and second-generation human rights as indivisible and interdependent. Moreover, the programme hardly made any impact on the number of human rights educators in Africa.

The High Commissioner was positive in his evaluation of the Decade, as were the representatives of the member states at the adoption of a second Decade, this time called “The World Programme for Human Rights Education”.⁸⁹ The initial term for the Programme was 2005–2014, but this closing period has been extended indefinitely. As President of the General Assembly Mr Jean Ping of Gabon added, the first Decade was the catalyst for several human rights education programmes.⁹⁰ He did, however, also mention that the World Programme could only succeed if national and local actors used it as a mobilisation tool. He appealed to all states to combine their efforts to make human rights education a reality at home and a focus of discussions in the future. Effective human rights education – which enhances respect, equality, cooperation and understanding, therefore preventing human rights abuses and conflicts – remained one of the best prerequisites towards the achievement of a peaceful world, in his view.⁹¹

Although some programmes did develop as a result of the Decade for Human Rights Education, governments did not develop national strategies; they did not cooperate with NGO efforts; very few networks were created; and the idea that a more human-rights-friendly consciousness is developing in Africa remains a dream.

Bösl and Jastrzembski⁹² are correct in pointing out that the programme was not as positive as asserted by the High Commissioner. If the major role players – the governments themselves – performed so badly, and if the NGOs, who are praised for their contribution, participated in education only as a secondary interest to boost their main mandates, how can we speak of success at all?

It is also true, however, that governments cannot bear the responsibility for human rights education alone. It was unrealistic from the outset to expect governments

⁸⁹ UN (2004).

⁹⁰ (ibid.).

⁹¹ (ibid.).

⁹² Bösl & Jastrzembski (2005:5).

to coordinate the programme and to take responsibility for the national strategies and plans of action. Cardenas rightly points out that human rights education will place governments under pressure.⁹³ The more successful the education, the more citizens will insist on their rights and the more government will be forced to act against human rights violators.

And the vast majority of governments in Africa (and worldwide) prefer not to be pressurised by human rights bodies or human rights issues. They are usually forced by constitutional provisions, an independent judiciary and other regulatory bodies such as human rights commissions and Ombudsmen and the threat of action before a treaty body to comply with the expectations of the UN and regional human rights instruments.

A better strategy would have been a more vigorous drive to institute human rights commissions or other human rights protectors in all countries and use them as the central role player to develop national strategies, and to initiate cooperation between governments and other players.

Most of the African member states of the UN did not inform it about the status of their national human rights education efforts; nor did they draw up national action plans for education in human rights. Consequently, they made it practically impossible to evaluate the development of human rights education in Africa.

World Programme for Human Rights Education

Despite opposition from some European countries and the United States of America, the UN General Assembly adopted a second decade for human rights education, this time called World Programme for Human Rights Education.⁹⁴

The programme started on 1 January 2005 and will be ongoing. The first phase will run until the end of 2009, and focuses on primary and secondary education. The Human Rights Council, however, has remained silent on the focus areas of the second phase. National strategies and minimum standards were this time given to governments. The minimum standards expect governments to evaluate the human rights programmes in their education systems. Unfortunately, the programme assigns a politician – the minister of education – rather than a human rights

⁹³ Cardenas (2005:364f).

⁹⁴ UN (2004).

commission or Ombudsman to take responsibility for the implementation. Informal education and other role players will be dealt with in later phases. However, by repeating the mistakes of the first Decade, the prospects of a more successful second decade must be questioned.

Final comments

In his proposals at the end of the first Decade, the High Commissioner proposed cooperation between civil society and government as a vehicle to take the educational ideals forward. The idea of an intergovernmental or joint civil society–government endeavour makes sense. However, given the mediocre performance of governments during the first Decade, another suggestion by the High Commissioner may have more potential in terms of producing results:⁹⁵

The potential of the treaty monitoring system in advancing human rights education, in particular through the treaty bodies' review of country reports, could be maximised. Nongovernmental organisations and national human rights institutions, when they exist, should be more involved in this process, and could coordinate their efforts in publishing reports on human rights education as a tool of cooperation with their Governments and with the existing regional and international mechanisms. Treaty bodies could also consider adopting additional general comments concerning various aspects of human rights education, as appropriate.

The South African example has set a standard that can be copied by the growing number of human rights protectors in Africa. Human rights protectors can play an important role as a preventative force rather than a mere investigation body after a violation has taken place. Together with civil society, they were the driving forces of the Decade for Human Rights Education. Neither the human rights commissions nor the treaty bodies play any significant role in the first phase of the World Programme for Human Rights Education.

The treaty bodies have also not yet indicated in their endeavours that they are willing to make human rights education a general point in evaluating state reports. However, human rights education cannot be left to the Committee on Economic, Social and Cultural Rights. While the right to education is primarily the mandate of the said Committee, educating the masses, state officials and vulnerable societies are the responsibility of all the treaty bodies. Indeed, no

⁹⁵ UNHCHR (2003).

treaty report can be said to be completed if it does not include a section on human rights education in the country. It is unlikely that governments in Africa will take up their mandate on human rights education in the near future; so human rights institutions, treaty bodies and civil society will have to take the initiative if ever we are to see change.

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