
CONTEMPORARY AFRICAN
POLITICAL ECONOMY
HUMAN RIGHTS
IN AFRICA
CONTEMPORARY DEBATES
AND STRUGGLES
EDITED BY
EUNICE N. SAHLE

Contemporary African Political Economy

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Editor

Human Rights in Africa

Contemporary Debates and Struggles

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CHAPTER 1

Introduction

Eunice N. Sahle

In the post-World War II period, human rights discourse has increasingly become a salient feature of national, regional, and global political and other dynamics. At the global level, since the emergence of the Universal Declaration of Human Rights (UDHR) on December 10, 1948, the United Nations (UN) has generated numerous normative instruments geared to enabling the realization of human rights. As scholars such as Micheline Ishay have demonstrated, these developments, including the emergence of the UDHR itself, have been influenced by numerous historical and conjunctural factors including constitutive tenets of the world's dominant religions, intellectual debates, political and economic projects of institutions of global governance, regional human rights developments, trends in the world economy, and democratic and human rights struggles by citizens in specific geographies.[1] In terms of the African continent, its regional interstate body, the Africa Union (AU),[2] and its predecessor, the Organization of African Unity, have adopted various human rights instruments.[3] For example, in 2005, the AU's protocol on women's rights entered into force following its adoption in 2003.[4] At the national level, countries such as South Africa and Kenya

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have in recent decades adopted constitutional frameworks underpinned by strong Bills of Rights.

While the preceding developments are notable, human rights discourse has a long and diverse history (James 2007). Further, like other discourses, the emergence and evolution of human rights has not been a unilinear and unproblematized process. Historically and in the contemporary era, the other side of these developments has been contestation about the meaning, relevance, and assumptions about human rights. In debates about human rights in the eighteenth century—particularly in response to the French democratic revolution—Jeremy Bentham declared them as "rhetorical nonsense,—nonsense upon stilts" (1998, 62).[5] His utilitarian based critique of human rights was not the only one articulated during that period. Women's human rights scholars and activists challenged the gendered conceptualization of human rights in the constitutional frameworks that emerged in parts of Europe in the wake of eighteenth-century democratic revolutions.

A critique of human rights during that period is evident in the work of French women's human rights activist Olympe de Gouges. In response to what she considered as male-centric underpinnings of the 1789 French Declaration of the Rights of Man and Citizen, she generated her own Declaration titled, "Declaration of the Rights of Woman and Citizen [1791]."[6] While the latter was characterized by tensions,[7] it nonetheless made an important feminist intervention in debates, as she stated: "man alone has raised his exceptional circumstances to a principle. Bizarre, blind, bloated with science and degenerated—in a century of enlightenment and wisdom—into the crassest ignorance, he wants to command as a despot a sex which is in full possession of its intellectual faculties; he pretends to enjoy the Revolution and to claim his rights to equality in order to say nothing more about it.[8] For her gendered critique of the prevailing human rights norms embedded in the 1789 Declaration, the French government labeled her as a "counter-revolutionary" and "unnatural woman" and killed her in 1793.[9]

Historically, human rights discourse has not only neglected its gendered foundation, but also the racist practices of dominant power structures. Demonstrating the intersecting forms of dispossession and acts of human indignity that African American women faced in the United States in 1851, the human rights activist Sojourner Truth stated: "That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps

me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman?"[10] Moreover, even in the context of democratic and human rights revolutions and the emergence of liberal ideals in Europe in the seventieth and eighteenth centuries, leading intellectuals and other dominant actors supported European colonial projects. These developments for example resulted in the colonization of most parts of Africa in the nineteenth century. In the main, the meaning of "human" underpinning international human rights norms has had a checkered history, as Ishay demonstrates when she poses the question "Human Rights for Whom?" in her seminal study of the emergence and evolution of human rights debates and practices in different historical moments (Ishay 2004).

For some scholars, the universalistic assumptions underpinning international human rights instruments, such as the UDHR, have been an area of intense contestation. From a relativist school of thought, N. Berney Pityana, for example, argues that such assumptions are problematic for they ignore the cultural and philosophical diversity that mark human societies and inform their ideas "about the human condition" (2004, 42). Thus, for Pityana, while underpinned by universalistic assumptions, "international human rights" are provincial in nature for they are rooted in "European or Western norms" (ibid.). Other scholars focusing on universalism–relativist debates, such as Rhonda Howard, call into question the static representation of and uncritical approach to local cultural traditions and philosophies, and simplistic representations of what is constructed as the West and "others" by some relativist scholars.[11]

While acknowledging limitations of the international human rights regime, particularly as it pertains to the question of international "cultural legitimacy," Adullahi Ahmed An-Na'im cautions against dismantling the legacies it has established (1990, 355). To address some of these limitations, An-Na'im calls for the interpretation of contemporary "provisions" of the international human rights regime and the development of "appropriate literature sensitive to the need for cultural legitimacy" (ibid.). In his view, such a project of cross-cultural analytical dialogue can systematically address some of the issues that have hindered the cultural legitimation of the international human rights regime (ibid.).

An-Na'im is not alone in calling for cross-cultural dialogue on human rights. Such concerns characterize Charles Taylor's work that explores the "conditions" for generating "a genuine, unforced international

consensus on human rights" (1999, 101). Such efforts would entail the diverse "groups, countries, religious communities, [and] civilizations" that mark our world agreeing on "certain norms that ought to govern human behavior," while drawing on their own conceptual foundations to justify them (ibid.). Reaching such a consensus about norms is of course difficult, as Taylor's work indicates. Nonetheless, his work and that of An-Na'im offers philosophical and insightful analytical openings on ways to address some of the tensions underlying the universalistic–relativist debates. Further, it is important to note that, while there is a tendency to equate cultural relativist approaches to human rights with the global South, this phenomenon manifests itself globally in the ideologies and practices of social actors committed to protecting and reproducing their political, economic, and socio-cultural privilege (Oloka-Onyango and Tamale 1995).[12] Such relativism can function to protect and normalize present political, socio-cultural, and economic inequalities in a given country, both in the global South and North (ibid.).

For some scholars, the question of realization and implementation of human rights is crucial to debates pertaining to human rights. Arguing along these lines, Susan James posits that the granting of rights to "people" who are not in a position to realize them represents "merely rhetorical gestures" and that "such empty beneficence" is a form of insult "to disadvantaged individuals and communities" (2005, 79). The question of implementing human rights is also central to Makau Mutua's 2016 book. While acknowledging the importance of human rights norms and the power dynamics marking their emergence in a given historical moment, Mutua calls attention to the importance of their enforcement (ibid.). From his perspective, the establishment of enforcement strategies and targets is crucial if a given human rights mechanism is to achieve legitimacy. According to him, important as the establishment of human rights norms are, their "observance" and "implementation" are what indicates whether they "were worth formulating in the first place" (2016, 11). While not neglecting the question of implementation, Amartya Sen contends that the "unrealizability of any accepted human right, which can be promoted through institutional or political change, does not, by itself, convert that claim into a *non*-right" (2004, 320). Overall, the origins, evolution, scope, and underlying ideas of human rights remain highly contested, even as human rights norms at the national, regional, and global levels continue to be generated in the twenty-first century. Such contestation is crucial in the field of human

rights and should not be a source of "embarrassment" (ibid., 323). Further, such contestation is part of "public reasoning" (ibid., 322), an important bedrock for human rights theorizing and practice (see generally, Sen 2004).

Human Rights in Contemporary Africa: A Brief Introduction

This volume's point of departure is that contestation is a vital feature of scholarly, civil society, and public policy debates pertaining to human rights. From its perspective, contestations about human rights norms and their developments, some of which are discussed in various chapters in this volume, are crucial because "open critical scrutiny is essential for dismissal as well as for defence" of any human rights instrument and its underlying philosophical assumptions (Sen 2005, 161). Such contestations illuminate the contributions and limitations of a given human rights mechanism. Nonetheless, the aim of this volume is not to explore all questions concerning human rights in contemporary Africa. Rather, it has two primary aims, which we hope will generate insights in ongoing debates relating to human rights in contemporary Africa and elsewhere. First, it explores key developments in Africa such as the emergence of new democratic constitutions' orders, the rise of China, struggles for sexual minority rights, transitional justice mechanisms, and acts of terrorism and their implications for human rights concerns. Its second objective is to interrogate human rights norms with a focus on a range of questions, including, but not limited to, Africa's contributions to the emergence of international human rights norms.

To systematically meet its aims, the book is organized into two major parts. Its first part, which is composed of five chapters, focuses on diverse developments in recent decades on the African continent and their implications for human rights. The volume's second part explores various human rights norms such as freedom of expression and the right to water, among others. In addition, it discusses Africa's contributions to the evolution of norms in human rights law and international humanitarian law. In light of its aims, the volume generates important insights that should be of interest to scholars, civil society groups, and public policymakers.

Following this introductory chapter, the volume's second chapter by Willy Mutunga, a leading scholar of human rights and law, and Kenya's

former Chief Justice and President of the Supreme Court, begins its analysis with a brief discussion of the rise of the country's human rights movement. Mutunga highlights this movement's engagement in a range of human rights struggles: "struggle for the rights of the youth, women, persons with disabilities, children, the aged, minorities, pastoralists, hawkers, peasants, workers, artisans, artists, writers, students, intellectuals, refugees, internally displaced persons, and many other groups" (p. 21, this volume).

The role of African intellectuals in human rights debates and struggles is part of Mutunga's chapter's concerns. According to him, these intellectuals have, for example, interrogated the conceptualization of human rights. For example, his work with Alamin Mazrui has highlighted what they term as "Euro-centeredness" in dimensions of the international human rights regime (Mutunga and Mazrui 2002, 128–32). Demonstrating the dialectical dynamic of human rights work in Africa, their work has contended "that some conceptions" of the international human rights regime "such as the right to self-determination" cannot just be dismissed as tools of imperialism for they "have had a revolutionary and transformative character when invoked and implemented in struggles for independence" (ibid.). The chapter's focus on the contributions of local civil society and African intellectuals to human rights issues demonstrates the agency of Africans in the evolution of human rights, even under significant structural and other constraints. Thus, his work calls into question studies that ignore local agency in other historical and contemporary political, economic, and socio-cultural processes in Kenya and elsewhere in Africa.

Mutunga's chapter also focuses on Kenya's 2010 Constitution and generates important insights from a human rights perspective. For example, his discussion of the concept of "the human rights state" and ways in which elements of the current Kenyan Constitution and transformation in the judiciary form a foundation for the emergence of a human rights state provides innovative ways of conceptualizing contemporary state forms with a strong Bill of Rights in Africa and other parts of the world. Nonetheless, his chapter demonstrates the theoretical and other challenges of envisioning such state forms. In addition, Mutunga's chapter signals the emergence of decolonial constitutional processes not only in Kenya, but in other parts of the global South such as Colombia.

David Hallowes' chapter continues this volume's exploration of democratic constitutional frameworks that have emerged in Africa since the

1990s. Hallowes examines the constitutive features of South Africa's constitution with a focus on social economic rights outlined in its Bill of Rights, and how they have been interpreted by the courts. In addition, he examines the framing of the right to property, its justification, and its implications for struggles for land rights and equality in the post-apartheid era. Hallowes further discusses the framing of the environmental right in the constitution and suggests that it provides an important opening in the ongoing struggles for environmental and economic justice in post-apartheid South Africa. However, he contends that whether such a potential is realized in the context of contemporary economic and other priorities of the South African state and social forces linked to it remains to be seen.

In the main, Hallowes' chapter shows dimensions of the progressive underpinnings of the South African post-1994 constitutional order and its tensions. His discussion of land rights, for instance, demonstrates the dual character of the Constitution. In terms of reforms in the land sector, he argues that they are aimed at addressing "the results of past racial discrimination" (Constitutional 1996, Sec. 25 (4) (a), quoted on p. 71, this volume). However, "because expropriation must be compensated—though not necessarily at market value—comprehensive land reform would be very expensive….[and] it is also not a priority of the state" (ibid.). Thus, over two decades "after the first democratic election" and several others after "the passing of the Native Land Act" in 1913, "less than 6 percent of land has in fact been redistributed" (ibid.).

Chapter 4's main aim is to contribute to debates concerned with gender-based violence in the context of war and post-conflict reconstruction efforts in the field of human rights. The chapter begins with a focus on what it considers as key foundations of gender-based violence in the context of conflict, with a focus on wartime sexual violence. An underlying argument of its analysis is that such violence doesn't emerge in a vacuum. For example, the emergence and evolution of gendered political economic structures, legitimacy crises of the state, militarization of societies, and other developments contribute to acts of sexual violence in the context of conflict. As such, the chapter calls attention to the need for contextual and gendered analysis in studies pertaining to wartime sexual violence.

Further, the chapter highlights the long silence on wartime sexual violence in the evolution of international human rights instruments and

transitional justice mechanisms in the post-World War II period. In the last few years, however, developments in international human rights instruments in addition to other dynamics, such as the transitional justice mechanisms that emerged in Rwanda and Sierra Leone in the last two decades, indicate that silence about such violence is slowly being broken. While acknowledging that progress has been made in struggles against gender-based violence in the context of conflict, as demonstrated in recent transitional justice mechanisms and the reframing of international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, the authors contend that more work still remains. Building on insights from feminist scholarship, they conclude that more attention needs to be paid to the roots of gender-based violence in the context of war, and in envisioning transitional justice mechanisms in a manner that enables the emergence of strategies that address the multi-layered nature of the harms that survivors of such violence experience and have to deal with in the post-conflict period.

Marc Epprecht's Chapter 5 focuses on timely issues pertaining to sexual minority rights in contemporary Africa. While highlighting the progress that has been made in such struggles, his nuanced analysis reminds us of the challenges that "lgbti"[13] (lesbian, gay, bisexual, trans, and intersex individuals) and "msm"[14] (males who have sex with males) and civil society groups face in framing their struggles in the context of a variety of "homophobias." According to Epprecht, in matters of sexuality in contemporary Africa, the idea that seems to be widely accepted is that "non-normative sexuality is not named as such, but takes place under the umbrella of heteropatriarchal constructions of family, faith, and African identity" (p. 147, this volume). Comfortable as such an approach to sexuality might be to its proponents, the chapter argues that it is deeply problematic in the context of the multiple challenges that it highlights.

While overt human rights discourses and discussions of sexual identities face significant structural, political, and socio-cultural constraints in various countries in Africa, Epprecht highlights the innovative ways in which sexual minorities negotiate belonging and their struggles for sexual rights. Along these lines, he contends that, in light of the silences surrounding same-sex relations, "men and women" in various parts of Africa "have always invented words and argots to disguise activities and liaisons disapproved of by popular culture" (p. 154, this volume). Such coinages include, but are not limited to, "*Kuchu* (East Africa)"

and "*saso* (Ghana)" (ibid.). Similarly, while there are some exceptions, the majority of lgbti and msm organizations in contemporary Africa use covert language, such as "The Triangle Project," "Sister Namibia," "Alliance Rights Nigeria," "the Centre for the Development of People (Malawi)," "Andiligueey" in Senegal, and others, in describing themselves and their objectives (p. 155, this volume). Even with such elusive framing, these organizations continue to face challenges. Yet, while it is still too early to draw firm conclusions, Epprecht's analysis suggests that recent efforts that strategically combine public health concerns and incorporate the language of rights in ways that pay attention to local context seem to be a productive pathway in the struggles for the rights of sexual minorities in contemporary Africa.

China's involvement in various parts of Africa continues to animate debates in scholarly, civil society and public policy domains. In Chapter 6, Ian Taylor embarks on this task with a focus on human rights. Taylor offers an insightful discussion of China's conceptualization of human rights. Central to this conceptualization is an emphasis on collective, sovereign, and developmental rights. As the chapter indicates, it is important to note that while China emphasizes collective rights, it also pays attention to individual rights. Such an approach differs from the position of "Western countries where much emphasis is put on individuals' human rights while collective human rights are neglected" (*China Daily* 2005, quoted on p. 174–75, this volume). Taylor contends that China's emphasis on sovereign and developmental rights and its Five Principles that frame its foreign policy have enabled the country's engagement with states that have troubling human rights records, such as Sudan and Zimbabwe. On the other hand, Taylor argues that these tenets of China's foreign policy have benefitted the political and other projects of these states. In the case of the Sudanese state, China has been an important ally in the international arena, especially during debates concerning its role in human rights violations in Darfur.

In addition to his discussion of China's approach to human rights and their implications for Africa–China relations, Taylor does offer some other insights, two of which are highlighted here. First, through highlights of the evolution of China's relations with Zimbabwe, he shows that China's foreign policy is not static but shifts depending on its national interests. Second, the chapter highlights the contradictory nature of China's approach to human rights and its policies in some African countries. As he contends, "Chinese support for abusive regimes

holds within it a real danger that Beijing may help to further destabilize developmental options in Africa, and in doing so directly contradict China's own pronouncements on what human rights should mean" (p. 195, this volume). Third, in an effort to avoid generalized claims about African states, Taylor points out that "the internal structure of any given African state is all-important and varies widely across the continent" (p. 193, this volume). As such, the political and economic foundations of each African state will inform its relations with China. Taking cognizance of the diversity of African state forms and the political economy histories underpinning them in discussions about China's involvement in a given African country or other processes in Africa is crucial to a deeper understanding of such relations.

Additionally, such an approach is fundamental as the struggles to dismantle frameworks that facilitate the reproduction of a "single story" (Adichie 2009) about African countries remain, as the work of Peri Soyinka-Airewele and Rita Kiki Edozie powerfully demonstrates.[15] Overall, the tendency to generalize about African countries and to focus solely on internal conditions as the only determinates of their political and economic trajectories continues. Such a "single story" approach to the study of political and economic processes in Africa is very apparent in what Thandika Mkandawire refers to as the "neopatrimonialism school," the "language" of which "has permeated news coverage of African affairs so much so that the flow of ideas and 'facts' between research results and the media has created a self-reinforcing discourse" (2015, 563). In his view, "so deeply ingrained is the view that underneath every policy lurks neopatrimonialism, that invocation of the concept has the air of irrefutable common sense" (ibid., 563–64). The adoption of such "common sense" normalizes the neo-Hegelian view of the diverse African continent that peppers dominant development discourses (Sahle 2010).

Dominant human rights discourse rarely considers the African continent as a human rights norm setter. Overwhelmingly, even though struggles for human rights and substantive forms of citizenship continue in the twenty-first century in all regions of the world, such discourse tends to represent African countries only as spaces of violation and not as places of human rights norm setting. Yet, to represent human rights violations as the only script on a diverse continent enables the reproduction of the singular narrative about the histories of human rights in Africa. It is such a view that underpins Frans Viljoen's contention that, "If Pliny had the opportunity of writing today, he would probably have coined the

phrase: 'Out of Africa, always something terrible'" (p. 203, this volume). Contrary to such a singular perspective, Viljoen demonstrates the role of African institutions, in this case the Organization of African Unity and the African Union (OAU/AU), and other developments on the continent in the evolution of international human rights law and humanitarian law.

In terms of international human rights law, Viljoen's chapter highlights how the framing of human rights in the African Charter on Human and Peoples' Rights (African Charter), which emerged in 1981, challenged the binary approach of major human rights instruments such as the two 1966 international human rights Covenants. Demonstrating an interdependent approach to human rights, the African Charter declares it is: "Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."[16] It is also important to note that the African Charter was the first human rights instrument to articulate the right to development in 1981—see Chapter 8 in this volume.

Viljoen's chapter further shows the OAU/AU's broader approach to human rights norms aimed at protecting refugees. While incorporating elements of the 1951 International Convention on refugee status, in 1969 the OAU broadened the definition of a refugee. For the OAU, "the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[17] Such a robust approach to the question of refugees by the OAU "was necessitated by the restrictive nature of the initial approach," the focus of which was on the "Fear of persecution," which "concentrated on the ideas a person holds, and not on the socio-political context itself" (p. 210, this volume).

Beyond the OAU/AU, developments in Africa have also contributed to the evolution of international humanitarian law. For example, in addition to other contributions, *The Prosecutor v. Jean-Paul Akayesu* case, under the auspices of the International Criminal Tribunal for Rwanda, resulted in rape being considered as genocide under international law.

This is an important development in the struggle against gender-based violence in the context of war—an issue that has historically been neglected in international human rights norms and transitional justice mechanisms (see Chapter 4 in this volume). In addition, Chapter 7 indicates Africans' contributions to the emergence of the International Criminal Court. Overall, the extensive examples and underlying arguments provided by Viljoen's chapter demonstrate the agency of institutions in Africa in the making of international human rights and humanitarian norms. As such, it provides an important corrective in the dominant singular narrative about human rights in Africa.

Chapter 8 begins with a discussion of Kéba M'baye's— a renowned Senegalese jurist—contributions to the emergence of the concept of the right to development. Its author indicates the contributions of M'baye's ideas to international development theorization, and thus demonstrates the agency of African intellectuals in the development of international human rights norms. One of the chapter's underlying concerns is an interrogation of what has happened since M'Baye's 1978 assertion that "a new right" was "being fashioned before our very eyes: the right to development" (1978, 13). In that regard, the chapter contends that the emergence of the 1986 Declaration on the Right to Development and its affirmation at the 1993 United Nations' Vienna World Conference on Human Rights, and other developments, are important gains in the realization of M'Baye's vision of development. Nonetheless, crucial as these developments are, the realization of such a vision continues to face significant structural, political, and other constraints. For example, while principal institutional agents of development have increasingly adopted the language of human rights, their development practices tell a different story. Beyond the contradictions underpinning the development projects of these agents, the rise of acts of terrorism and some of the responses to them by states have generated conditions that don't portend well for the realization of the human rights vision of development envisioned by M'Baye and the 1986 Declaration on the Right to Development.

The human rights norm of freedom of expression is the focus of Jane Duncan's Chapter 9. Duncan's analysis provides an insightful critique of "instrumentalist" approaches to freedom of expression. According to her, such perspectives link freedom of expression to the existence and protection of "'a marketplace of ideas' [whereby] a free contest of ideas" occurs and "is needed to assist truth-seeking" in a given society. Such instrumentalist representations ignore the socio-cultural, economic, and

political inequalities and power dynamics shaping the modalities of freedom of expression. As Duncan argues, "access to the 'marketplace of ideas' is highly uneven, as ownership of the means of communication is often highly monopolized; therefore the ability to use the right is heavily mediated by power" (p. 263, this volume).

Further, Duncan critiques "self-serving statist" claims that contend that, in light of urgent development "needs" in contemporary Africa, the human right to freedom of expression is "irrelevant" (p. 258, this volume). In addition, she engages in a reframing of the human right to freedom of expression drawing on earlier works by Issa Shivji and Mahmood Mamdani on human rights. For example, the chapter challenges the notion that freedom of expression is "a Western liberal, individual right" (ibid.). The main thrust of Duncan's chapter is a call for analysts "to theorize the historical and practical application of freedom of expression in Africa." In this regard, the chapter offers important insights in the context of social movements' struggles for freedom of expression in contemporary Africa. As it contends, freedom of expression "is not simply a liberal, Western individual right to be claimed against the state, and it is certainly not a right that 'belongs' to the media alone. There is a lot to learn about the state of freedom of expression by examining social movement activity in Africa, if freedom of expression is reconceptualized as a right practiced by collectives as well as individuals, and if it is reconceptualized as a positive right" (p. 275, this volume). Given the increasing role of the media in the political and economic arenas, the deepening concentration of media ownership, and important contributions by social movements in struggles for freedom of expression in various parts of Africa and the reframing of human rights from a historical and structuring lens, Duncan's chapter greatly enriches our understanding of contemporary debates and struggles pertaining to human rights norms on the African continent and beyond.

On September 30, 2010, the United Nations adopted a treaty on the human right to have "access to safe drinking water and sanitation" (p. 283, this volume). The authors of Chapter 10 focus on this development. They begin their analysis by highlighting key developments that laid the foundation for the emergence of the treaty, including, but not limited to, the expansion of political space and social movements' contestations concerning the nature of new water governance regimes in various parts of the global South. The chapter further situates the constitutive features of the right to water treaty within debates in the field of human rights. As

the analysis argues, water is vital to all aspects of life. As the 2010 treaty declares, "the right to safe and clean drinking water and sanitation is a human right that is essential for the full enjoyment of life and all human rights."[18] As such, its limitations notwithstanding, the authors contend that the emergence of a treaty devoted to the realization of the right to water is important for it, among other things, opens up the possibility for expansion of human capabilities (Sen 2005). In its final sections and drawing on developments in South Africa and Tanzania, the chapter demonstrates the agency of states in the emergence and evolution of new water governance regimes and the implications of these developments for the realization of the right to water, especially for the poor in urban and rural areas.

Notes

1. See the following texts for an extended discussion of the diverse origins and the contested evolution of international human rights: Ishay (2004), James (2007).
2. The AU is the successor to the Organization of African Unity, which African member states established in 1963.
3. In this volume (Chapter 7), Frans Viljoen offers numerous examples of Africa's contributions to the evolution of international human rights and humanitarian law.
4. The Protocol's substantive framing of women's rights is evident in various articles. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is available at http://www.au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa.
5. For Bentham's view of rights, see his "Anarchical Fallacies: Being an Examination of the Declaration of Rights Issues During the French Revolution," Headline Series, Foreign Policy Association 318 (1998): 56–68.
6. See, Olympe de Gouges, "Declaration of the Rights of Woman and Citizen [1791]," at http://www.fmyv.es/ci/in/women/3.pdf.
7. For an insightful discussion of her work, see Joan Wallach Scott (1989).
8. Ibid.
9. For more discussions on the work of Olympe de Gouges and responses to it see Beckstrand (2009).
10. See, http://www.fordham.edu/halsall/mod/sojtruth-woman.asp.
11. For a detailed discussion, see Howard (1990).
12. For a detailed discussion, see Oloka-Onyango and Tamale (1995).
13. See Note 1 of his chapter in this volume for his explanation of why he uses the lower case in this instance.
14. Ibid.

15. Peri Soyinka-Airewele and Rita Kiki Edozie offer a systematic discussion on what Chimamanda Adichie conceptualizes as a "single story" about political and other processes on the African continent and its attendant pitfalls. For further analysis see their chapter, "Reframing Contemporary Africa: Beyond Global Imaginaries" (2010).
16. For more details on this issue and other dimensions of the 1981 African Charter, see the African Union at https://au.int/sites/default/files/treaties/7770-file-banjul_charter.pdf.
17. The OAU's Convention Governing the Specific Aspects of Refugee Problems in Africa is available from the African Union at https://au.int/sites/default/files/treaties/7765-file-convention_en_refugee_problems_in_africa_addisababa_10september1969_0.pdf.
18. For details on the treaty, see: http://www.un.org/waterforlifedecade/human_right_to_water.shtml.

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PART I

Contemporary Developments and Human Rights

CHAPTER 2

Human Rights States and Societies: A Reflection from Kenya

Willy Mutunga

The 1990s and 2000s saw significant political and constitutional changes in various parts of the African continent. For example, between 1990 and 1999, several African countries held multi-party elections (Prempeh 2017). Further, countries such as South Africa—see David Hallowes' chapter in this volume—adopted new constitutional frameworks that paid attention to human rights issues. In Kenya, the early 1990s provided a major political opening leading to the holding of multi-party elections in 1992. However, only after a protracted popular struggle and a referendum did a democratic constitutional framework emerge in 2010. The new constitution replaced the neo-imperial one that had over the years contributed to the rise of an authoritarian state, which violated the rights of Kenyans, particularly those who challenged its political

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and economic practices. Beyond having a substantive Bill of Rights, the 2010 Constitution led to the devolution of state power in 2013 when 47 County Governments were established. The devolution of state power marks a fundamental change in processes of state building in the country.

Overall, the political and constitutional developments that have occurred in Kenya and other African countries from the 1990s to the time of this writing (2015) are important in light of the nature of state structures and political dynamics that characterized these processes prior to this period. It is these developments and similar ones in other parts of the global South that animate the chapter's central questions. Overall, the chapter's main objective is to contribute to contemporary debates focusing on the nature and struggles for human rights states and transformative constitutions in Kenya and other parts of the global South. The chapter has three major sections with a brief concluding section. The first section highlights some factors that influenced the rise of Kenya's contemporary human rights movement. In its second section, the chapter explores the idea of a human rights state. Its part three explores the 2010 Constitution and transformations in judicial practices and mechanisms, and the implications of these developments for social transformation in Kenya, including the emergence of a human rights state. The chapter concludes with a brief fourth section.

Rise of Kenya's Contemporary Human Rights Movement

Human rights ideas increasingly inform struggles for political, economic, and socio-cultural liberation. For instance, the struggle for transformative constitutions in various parts of the global South, including Kenya, was partly about the implementation of a social democratic vision of a society underpinned by human rights. From the early 1990s onward, the struggles for these constitutions and other social justice issues have been influenced by the rise of human rights movements in various parts of the global South. In the case of Kenya, human rights organizations have grown by leaps and bounds since the end of the Cold War and the emergence of significant political openings in the 1990s and 2000s. While facing major challenges, there is, in fact, a consolidated human rights movement in Kenya.[1] This is true of many countries in Africa (Mamdani 2000; Moyn 2010; Murunga et al. 2014; Mutua 2002, 2008, 2009; Mutunga 1999, 2009; Mutunga and Mazrui 2002; Ghai and Ghai 2011; Ghai and Cottrell 2004, 2011; Oloka-Onyango 1995, 1998/1999,

2000, 2002, 2015a, b, 2017; Oloka-Onyango and Tamale 1995; Ruto et al. 2009; Shivji 1989).

These organizations struggle for the rights of the youth, women, persons with disabilities, children, the aged, minorities, pastoralists, hawkers, peasants, workers, artisans, artists, writers, students, intellectuals, refugees, internally displaced persons, and many other groups. Some civil society groups challenge the violations of the rights of Kenyans by multinational corporations in the areas of environment, poverty, exploitation, debt relief, reparations, trade, indigenous knowledge, investments, and repatriation of profits (Mutunga et al. 2002).[2] Yet others have continued to agitate for the promotion and protection of economic, social, and cultural rights of Kenyans.[3] These concerns that address the whole gamut of human rights for lives and livelihoods are not idle concerns. They reflect the deep commitment of these organizations to the realization of the rights of the country's citizens, including that of self-determination.

In addition to global and other developments, the country's human rights movement owes its emergence to Kenyan intellectuals who have written tirelessly and critically on the human rights discourse.[4] For example, elsewhere, Alamin Mazrui and I have explored the issue of the conceptualization of human rights (Mutunga and Mazrui 2002, 128–32). In that work, we argued that the human rights corpus reflects diverse conceptions of liberal democracy, and pointed to the Euro-centeredness of the corpus in origin and general orientation. We also noted that some conceptions, such as the right to self-determination, have had a revolutionary and transformative character when invoked and implemented in struggles for independence. Further, we contended that citizens in the global South have used the human rights corpus in struggles against political dictatorship. Additionally, we argued that the corpus of the international human rights regime reflects a quasi-legalistic orientation, where the focus implicitly or explicitly is on remedies that amount to little more than a better domestic implementation of universal human rights instruments. Overall, our re-conceptualization of human rights dovetailed well with that of Issa Shivji, which states that "human rights talk constitutes one of the main elements in the ideological armory of imperialism," but also that human rights discourse can be an ideology of resistance (Shivji 1989, 5).[5]

In our 2002 work, we also highlighted the legacy of the Cold War and its impact on human rights discourse. The Cold War legacy's watershed moment was the Vienna Declaration of 1993, which affirmed the interdependence of various basic rights, indeed, the whole gamut of human rights.[6] We suggested that human rights does mitigate market

fundamentalism, the only discourse to do so consistently after the fall of socialism and communism in 1989. That is why from our perspective we concluded that human rights discourse has a social democratic content. We emphasized that human rights discourse can dispute and attack the conceptions of property within the dominant neoliberal economic idiom and address issues of substantive justice that fundamentally affect the way wealth and other resources are redistributed. We reminded human rights conceptualizers and activists that human rights discourse does reflect in part the great paradigms that not only exposed and demystified market fundamentalism, but also provided a philosophical foundation for rethinking political, economic, and other societal arrangements.

However, it is also important to note that the rise of the Kenyan human rights movement is attributable to reformers and activists who work in human rights groups at the community, national, and regional levels. The bulk of the youth and women[7] have emerged as soldiers of this movement, as have trade unionists and small farmers who have invoked human rights discourse in their struggles for better working conditions and fair commodity prices. There is no doubt that Kenyans are resisting human rights violations (Mutunga et al. 2002; Ruteere 2000).[8] However, there is a clear need to interrogate: what the movement is fighting for; the challenges posed to that movement; its gender composition and ideology; the limitations of human rights discourse[9]; the movement's networks; and the movement's caliber and quality, especially its leadership. Overall, the pessimism and optimism of what lies ahead needs elucidation, substantiation, and legitimation as part of the struggle toward the realization and consolidation of the social democratic vision underpinning the 2010 Constitution.

Conceptualizing a Human Rights State

There is no doubt that the concept of a human rights state has been under-conceptualized. But what is a human rights state? Could such a state midwife a social democratic state and society? Could it be the basis of the "unfinished" revolution or could it reinforce the status quo in liberal democratic societies? Could it conceptually assist in interrogating, historicizing, and problematizing the various dominant political and economic theoretical paradigms today? There is no doubt that similar questions have faced the World Social Forum since some of its membership imagines a new world that is possible through human rights and social

justice ideological, intellectual, and political lenses (Leite 2005; Metes 2004; Sen et al. 2004). In the case of states, questions concerning their nature and role continue to animate scholarly debates. Such questions remain relevant even in the twenty-first century for "to question the relevance of the state, or to reimagine its space, or to suggest alternatives, is to inquire into our very relationship with ourselves and the society we live in" (Jarvis and Paolini 1995, 4–5).[10]

Various analyses give characteristics, features, or ingredients that are a shell for depicting a conventional conceptual framework of the state.[11] These features include the jurisdiction of the state regarding identifiable boundaries and territory; a population or citizenry living within the territory; the control of the machinery of violence invariably called the instruments of law and order; control of the resources within the territory; the legal supremacy of the state over other groupings within the territory based on constitutions or other legal instruments; a history of the state; and the principle of sovereignty that gives the state an autonomy and legitimacy in the community of regional, continental, and international states.

The essence of state features is ideological and political. Hence, its numerous representations, such as the "collective capitalist," "the executive committee to manage the affairs of the bourgeoisie," a tool of the ruling classes or elites,[12] the sole definer of political space[13]; an institution that regulates class conflicts and embodies the diversity of society, a site of political struggles, "a complex of ideas and values, some of which have an institutional reality," and "a continuous public power" (Jarvis and Paolini 1995, 3, 4; Tandon 2004a, 6; Mutunga et al. 2002, 6; ibid., 21). The complexity of ideas that make up the state is part of the essence of the state, but is also a tool to critique the shell of the state. For example, the feature of sovereignty, once confronted by the reality of external forces such as the engines of globalization, cannot possibly be analyzed in a vacuum. It has to be done within the reality of globalization and the so-called new world order (Lens 1974; Mander and Goldsmith 1996; Stiglitz 2002).[14] The population of a given territory is not homogeneous. The population reflects the diversities of class, ethnicity, religion, gender, generation, region, clans, languages, history, occupation, and race (Laaksho and Olukoshi 1996, 7). Nor are the boundaries of a given territory free from critique when the history of their demarcations is taken into account or when their impact on autonomous developments of various regions is discussed (Davidson 1993, 99–117). Therefore, the

various features outlined depicting the state reflect ideas that analyze the shell and the essence of the state.[15]

In terms of the concept of "a human rights state," its emergence is recent in the scholarly domain. The first time I read of the concept or notion of a human rights state was in Makau Mutua's 1997 article.[16] I was captivated by the analysis of the limits of the human rights discourse in new South Africa and forgot to pursue the concept of a human rights state raised in the article. In November 2001, I attended a seminar organized by Mahmood Mamdani at Columbia University on the political uses of human rights discourse. One of the foci of the meeting was the limitation of human rights discourse. We did not theorize or conceptualize the category of a human rights state.[17] It was only when I joined the Ford Foundation in 2004 and the question came up of the foundational basis of human rights in all portfolios of the Foundation at its Eastern Africa Office,[18] and in particular the notion of Rights and Democracy in programming,[19] that I revisited Mutua's article. I quickly saw the need to delve deeper into the concept of a human rights state and to take Mutua's analysis further. The purpose of this analysis focusing on the conceptualization and problematization of a human rights state is simply to contribute further to the analysis on the limitations of human rights discourse and its ideological, intellectual, and political consequences in struggles for democratic transformation on the African continent and elsewhere.

What Is a Human Rights State?

Mutua begins his analysis of a human rights state by distinguishing "between a state that formally respects human rights, as do most political democracies, and a human rights state" (1997, 70). He proceeds to clarify the dichotomy by arguing that,

> To date, South Africa has had the best opportunity to create such a [human rights] state. Other states, such as Western democracies where the idea of individual rights was first born under liberalism, were not initially created as human rights states although they now embody many human rights norms in their constitutional and legal frameworks. A human rights state would not simply constitutionally guarantee civil and political rights while relegating economic and social rights to the precarious welfare state.

> Instead, in a true human rights state, all rights would be made constitutionally effective and practically realizable and enforceable. (Ibid.)

Still elaborating on the dichotomy, he states,

> A human rights state, by contrast, is a term coined here to describe an aspiration – an ideal state that would be constructed from close adherence to the prescriptions of the human rights corpus. Although a human rights state is theoretically possible given the framework of human rights law, it remains a fiction at present, not having been accomplished anywhere. (Ibid., 71)

According to this analysis, South Africa fails the test of a human rights state mainly because human rights discourse is used to consolidate the relations of production under a post-apartheid state that reproduces structures of inequality (see also Hallowes in this volume). What the human rights discourse does in the case of South Africa is merely to deracialize the apartheid state, leaving the core of its ingredients intact. But the deracialization in post-apartheid South Africa is formal, not substantive. The country is sharply divided into two nations—one First World and white, the other Third World and black. Similar parallels can be drawn both between South Africa on the one hand and Kenya and Zimbabwe on the other as settler states, and, indeed, between South Africa and the rest of independent Africa.[20]

Mutua's conceptualization is that a human rights state will enforce and realize the whole gamut of rights: political, civil, economic, social, and cultural rights. The basis of this enforcement is pegged to ensure "constitutionally effective" norms that the courts, the state, and the citizenry themselves make "practically realizable and enforceable." His conceptualization of a human rights state is, therefore, pegged to a framework of human rights law. Mutua also states that a human rights state is an ideal, an aspiration, and a fiction because its accomplishment is yet to be achieved anywhere. However, Mutua does conclusively advocate for the struggle toward a human rights state after carefully analyzing the political and legal pitfalls that hinder the realization of such a state, and does not call for, even by implication, the abolition of human rights discourse.[21]

There is no reason why a human rights state would not reflect the features of the shell and the essence of a conventional state as underlined here.

A human rights state is fundamentally a liberal democratic state that possesses the ingredients of social democracy. A human rights state retains the liberal democratic state's original revolutionary and transformative character,[22] and, therefore, has the seeds of an ideology of resistance. It reflects the legacy of the Cold War era, and it is not, as Mahmood Mamdani argues, "an imperialist Trojan Horse… but a contested terrain" (1989, 6). A human rights state emphasizes the narrow legal framework of human rights law and calls for reform within the market fundamentalism that it seeks to mitigate. Thus, in the contemporary conjuncture, it is underpinned by contradictions for such a state can be used to agitate for social transformation for a more just and different world, or it can form the basis for a world full of human rights violations.

The fundamental and consummate question is who controls that human rights state, and South Africa and the history of the ANC offer sobering thoughts for Kenyan progressives and reformers who have yet to capture political power. The revolutionaries, progressives, reformers, and activists in the ANC were unable to realize South Africa as the first human rights state in Africa or anywhere else. Some of the reasons for this defeat are given in Mutua's article,[23] where he eloquently analyzes the rhetoric behind land reforms, the reforms in the machinery of violence, and economic reforms among others. To talk of the human rights state in Kenya, therefore, is to talk of the right to transform the country and ultimately of the right to revolution if that remains on the political agenda. Kenyans have been talking about the right to revolution for over a century now. What is recent is the conceptualization and problematization of human rights discourse as an ideology of resistance. This ideology of resistance will go beyond "exposure" and "demystification" of the root causes of human rights violations. Thus, the ideology of resistance will concretely address solutions that result in fundamental social transformation in Kenya. And that may ultimately be the basis of the right of revolution in the country. In sum, it will entail a negation of rights in order to ensure their assertion. With the "right to revolution" written into the script of governance in Kenya, the chapter suggests that there is a foundation for a human rights state. From a human rights perspective, the struggle for the development of such a state has the following key transformative ingredients:

- The reform of the human rights law framework is positive, and can create democratic space for resisting dictatorship;

- In mitigating market fundamentalism, human rights discourse provides an alternative development paradigm[24];
- In challenging market fundamentalism, human rights discourse puts back on the agenda critical thinking on an alternative system to globalization and market fundamentalism;
- Human rights discourse gives ideological and political space for the critical resurrection of the non-hegemonic and inclusive paradigms that imperialist propaganda has denounced as unworkable and dead[25];
- The reform agenda based on this struggle for human rights states is qualitatively better than an agenda for the struggle for regime change that does not address fundamental problems;
- The clarion call for human rights states is a positive struggle for political power in a world that is agitating for alternatives to globalization and for a world based on global justice;
- The struggle for human rights states brings into sharp focus the question of alternative political leadership to control such a state;
- The connections among human rights, governance, democracy, and civil society are easily discernable in the struggle for human rights states[26];
- The struggle for human rights states emphasizes the limitations of human rights discourses that must be addressed for the struggle to be part of the larger struggle for social transformation.

Kenya's 2010 Transformative Constitutional Framework and the Question of a Human Rights State[27]

States that are committed to implementing transformative constitutionalism[28] understand that historicizing and problematizing human rights and social justice are critical to real change. The uses and limitations of human rights and social justice paradigms and discourses have particularly engaged scholarly debates after the collapse of the Berlin Wall in 1989 and deepening struggles for human rights and meaningful citizenship in various countries in Africa and other parts of the world. In particular, in the last few decades, tenets of the social democratic scholarly tradition have become the subject of deep inquiry as scholars and human rights activists have contested national and global neoliberal ideas and practices.

In this chapter, Kenya's transformative constitutional framework is analyzed for comparative scrutiny and interrogation. Studies from India, South Africa, and Columbia, for example, are useful because those countries are implementing transformative constitutions. They are developers and shapers of international human rights jurisprudence and international law. The emerging jurisprudence of social justice and human rights in these countries, and indeed others, is critical to these inquiries (Gargarella 2013; Langford 2008; Schillig-Vacaflor 2011; Uprimny 2011; Wolff 2012). These developments are, for instance, leading to the emergence of decolonized jurisprudence and other judicial projects. The Kenyan approach is to reinforce the strengths of such comparative progressive jurisprudence while rescuing it of its weakness.

The making of the Kenyan 2010 Constitution[29] is a story of ordinary citizens striving *and succeeding* to reject and overthrow the existing social order as a precursor for a new social, economic, cultural, and political reality. Some have spoken of the new constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future very different from the past in its values and practices. It seeks to make a fundamental break with sixty-eight years of colonialism and fifty years of independence.

In 2010, Kenyan citizens decreed that the status quo was unacceptable and unsustainable. They resolved to reconstitute and reconfigure the Kenyan state from its former vertical, imperial, authoritative, and unaccountable ogre to an accountable, horizontal, decentralized, democratized, and responsive state. Under the new constitution, the vision of nationhood would be premised on core norms, including the following: national unity, political integration, and diversity; democratization and decentralization of the Executive; devolution; public service; popular sovereignty in which the state is a servant, not master; integrity in public leadership; a Bill of Rights that provides for economic, social, and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state and society in Kenya; mitigation of the status quo in terms of land, which has been the country's Achilles' heel in its economic and democratic development; the strengthening of institutions; and the building of institutions that provide democratic checks and balances. The constitution reflects the vision of those patriots who struggled and fought against the domination, exploitation, and oppression of British colonialism. History records invoke discourses

of reform, revolution, human rights, social justice, patriotism, freedom, nationhood, and others that the 2010 Constitution decrees (Kinyatti 2008). For such patriots and other Kenyans committed to social justice, the constitution represents a framework for a much longed for social transformation of their country and for the regaining of individual and collective dignity and sovereignty. As such, the country's future popular struggles will be organized around the implementation of the constitution (Amin 2008, 17).[30]

It is of course impossible given space limitations to explore all the elements of the 2010 Constitution that provide a foundation for struggles for a human rights state in Kenya. Consequently, the discussion that follows attempts to establish the link between a human rights state as conceptualized in the previous section and the 2010 Constitution and the judicial reforms and procedures underpinning the constitution. The reconstruction of the state and its decentralization and democratization are key features of the constitution. Among other things, the Kenyan constitution places fundamental emphasis on national values and principles that impact both power and how politics is organized. The analysis takes the Judiciary as a pivotal institution under the constitution that must promote and protect the human rights state and society. Its role in the implementation of the constitution is of cardinal importance. Establishing such a link as is attempted here serves to illuminate the importance of human rights in struggles for the state form articulated in Mutua's (1997) article and revisited in this chapter.

Envisioning a Robust (Rich), Indigenous, Decolonized, De-imperialized, Patriotic, and Progressive Jurisprudence

The building of strong institutions must be the basis for the transformation of Kenya. It is a necessity born out of the history of the imperial presidency. The 2010 Constitution creates core institutions to defang the state and neuter the imperial presidency. Its norms and institutions are meant to prevent the resurrection of executive dictatorship. These include county governments, constitutional commissions, checks and balances, independence and principles of inter-dependence between the organs of the Kenyan state, and equitable distribution of national resources.[31] Below I discuss the most important of these institutions, the Judiciary and its role in developing a robust, indigenous, patriotic, and progressive jurisprudence in light of the 2010 democratic constitution.

Yash Ghai, the distinguished professor and constitutional law scholar, has argued that, perhaps in realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan constitution sets, through the judiciary, its barricades against the destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary.[32] It is remarkable and a paradox that, although disappointment with the judiciary was at least as great among Kenyans as frustration with politicians, they chose to place their faith in the institution of the new judiciary in implementing the new constitution.[33] They did so by promulgating a constitution that provides for the appointment of women and men of integrity by an independent and broadly representative Judicial Service Commission[34]; by providing for institutional and decisional independence of the Judiciary and the judicial officers respectively[35]; through the vetting of judges and magistrates who served before August 27, 2010, by a body with broad criteria upon which to determine the suitability of these judicial officers[36]; by establishing the Judiciary Fund to provide financial independence for the Judiciary[37]; and by setting up an apex court, with the Supreme Court to be the final protector and custodian of the supremacy of the constitution.[38] The Judicial Service Commission also requires the vetting of existing judicial officers and the transparent recruitment of new judicial officers, which includes public participation.

The judiciary of Kenya must rise to the occasion and shake off the legacy of colonialism and this will involve several approaches.[39] The bedrock of this new dispensation must be instilling into Kenyans and judicial officials the centrality of impartiality and integrity in the new judiciary. The judiciary cannot be suspected of deferring to the executive,[40] or bending the law to suit favored clients or close associates. The idea of receiving or soliciting a bribe should be unthinkable. Second, the position of a judge should be a hallowed one in the profession. The best lawyers should aspire to join the judiciary. Judges must be of the highest intellectual caliber, with a mastery of legal principles and techniques, an unimpeachable work ethic, and a commitment to fairness. Third, Kenya must do away with archaic and opaque ceremonies, interminable procedures, and obfuscating language that make justice remote and unreachable to ordinary people. Unacceptably, Kenya has held to these totems of a bygone era even though they have largely been abandoned in Britain, their original home. While English Court procedures have over time been made simpler, some archaic terminology has been done away with, case

management has been firmer, and ADR has become prevalent, Kenya still hears cases in driblets. These traditions are arcane with the looming ghosts of the Common Law oftentimes mandating dictatorship. In the context of the 2010 Constitution, what is needed are radical changes in judicial policies and judicial culture, and the end of colonial and neo-colonial judicial impunity. Fourth, the constitution gives the judiciary a mandate to carry out reforms to root out colonial and neo-colonial inefficiencies and injustices.

Fifth, there is an urgent need to develop new and competent indigenous jurisprudence. This last adjective is drawn from the constitution's value of patriotism. It requires the judge to develop the law in a way that responds to the needs of the people, and to the national interest. This is a robust, rich, patriotic, indigenous jurisprudence as decreed by the Constitution and the Supreme Court Act of Kenya.[41] Above all, it requires a commitment to the constitution and the achievement of its values and vision.[42]

Sixth, it is a myth that judges in the Common Law system do not make law (Sinha 2004, 26). The Constitution vacates that comforting illusion, especially in the context of human rights, when it provides under Article 20(3) (a) that "a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom."[43] This means that if an existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop that rule to make it compliant. It is matched in Article 20(3) (b) by an obligation to adopt the interpretation that most favors the enforcement of a right or fundamental freedom rather than diminishing, undermining, or subverting it. This is an obligation, not to rewrite a statute, but to read it in a way that is compliant with the Bill of Rights. The Bill of Rights and the Constitution should be used as the touchstone of legal appropriateness.[44] The Constitution says no less.[45]

The elements of a decolonizing jurisprudence, discussed here, shun mechanical jurisprudence. The decolonizing jurisprudence of social justice is not insular or inward looking. The values of the Kenyan Constitution are the exact opposite. Lessons should be drawn from other countries. The concern here with an emphasis on the generating of "indigenous" jurisprudence is simply that Kenya's jurisprudence should be built on local needs without unthinking deference to other jurisdictions and courts, however distinguished. As such, the quality of Kenyan progressive jurisprudence would command respect in these distinguished

jurisdictions. After all, Kenya's constitution is arguably one of the most progressive in the world.[46]

Commonwealth and international jurisprudence will continue to be pivotal to the development of Kenya's jurisprudence. At the same time, the Judiciary will have to avoid mechanistic approaches to precedent. It should not cherry pick precedent from India, Australia, South Africa, the US, or from wherever else on a whim just to suit the immediate purpose. Precedent has its place in the jurisprudence of each country. It is negative and mechanistic to approach precedent with a mind-set that says: "If we have not done it before, why should we do it now?" The Constitution does not countenance or encourage this approach.[47] Kenyan jurisprudence must seek to reinforce those strengths in foreign jurisprudence that fit the country's needs,[48] while at the same time rescuing the weaknesses of such jurisprudence to enrich that which is decreed by the Supreme Court Act.

The 2010 Constitution: Realizing Its Transformative Vision

The role of law in social transformation[49] has a long genealogy when posed as a question about whether law and the courts can advance, stagnate, or impede social justice.[50] This question, once the source of serious and continuous jurisprudential debates, has acquired a consensus that law, indeed, has a role to play in development. It is now generally acknowledged from this debate that law has profoundly distributive effects and it cannot be ignored as a tool for social justice.[51] This multidisciplinary consensus is shared by lawyers, economists, policymakers, politicians, and international organizations and think tanks. The two sub-sections that follow discuss two thematic issues that are important in the struggle for the realization of the transformative potential of the 2010 Constitution, including the emergence of a human rights state: rethinking jurisprudence and the Judiciary Transformative Framework.

The Constitution and Rethinking Jurisprudence

The task of growing transformative jurisprudence involves partnership between judiciaries, the legal profession, and scholars. The Bar must respond to the challenge. Standards of advocacy need to improve, and the overall quality of written and oral submissions needs to be raised. Jurisdictions of India, Namibia, Benin, South Africa, and Colombia are great partners because of their similarity to Kenya's constitution.

Decolonizing jurisprudence requires South–South collaboration and collective reflection.

The Kenyan judiciary is moving to limit excessively detailed written submissions. This makes sense only if the judges read the written submissions in advance. And they must do so with a critical eye, prepared to interrogate the arguments of counsel, and to put forward alternative ideas. It is a questionable practice to come up with ideas and authorities in the privacy of Judges' chambers when writing a judgment, if counsel has had no chance to offer an argument on those ideas and authorities. The very purpose of written submissions is to prevent such problems and to enable the judge to be well prepared in advance. A well-read judge is in a much stronger position to criticize counsel for a lack of adequate preparation. Through this dialogue, the bench can encourage higher standards of advocacy. In the long run, this process should speed up the work of the court and clear backlog. This task is being made easier by enhancing the quality and quantity of legal materials available to the bench by appointing legal researchers for all judges. It is a learning experience for the Judiciary and legal researchers to work out how the cause of justice can best be served by Kenya's Judicial Service Act, 2011.[52] This offers the bar and the bench an opportunity to make major strides in the quality of the jurisprudence in the courts.

These strides in the quality of jurisprudence in Kenyan courts can be amplified with the improvement of collegiality and co-education among judges and lawyers. This will make sure that decisions of Kenyan courts reflect the collective intellect distilled through the Common Law method, regular discourses, learning, and exchange by judicial officers. To be a good judge involves continuous training, learning, and regular informal discourses among judges without compromising the right of a judge to give dissent. Dissents have their own purpose, but consensus building is equally important.

In terms of intellectual exchanges and vibrant legal learning, Kenya's Judiciary Training Institute (JTI) is becoming the Judiciary's institution for these tasks and the nerve center of our progressive jurisprudence in the post-2010 era. In that capacity, the JTI will co-ordinate academic networks, make connections with progressive jurisdictions, and offer training by scholars and judges. The re-emergence of the JTI is crucial in the ongoing efforts to establish institutional sites that will enable the emergence of the kind of jurisprudence that I and other colleagues envision.[53] Unfortunately, in the previous era, the old Judiciary had reduced its

potential by limiting itself to hosting an annual colloquium where judges made merry and shunned intellectual reflection and engagement. The old Judiciary also reflected how hard it is for judges trained and brought up in the old style to make the adjustments that reforms require, and this shows why programs of training and induction are so necessary.

To breathe life into Kenya's constitution and jurisprudence the training at the JTI has shunned legal-centric approaches by placing critical emphasis on multi-disciplinary approaches and expertise. Further, the JTI has brought equity into training for all those in competition for scholarships and travel, in creating a culture of supporting excellence that did not exist in the previous era. Additionally, it has emerged as a critical center for the development of Kenya's robust, indigenous, progressive, and patriotic jurisprudence. Through its coordination of transformation activities in the Judiciary, it is now possible to know how many cases are in the system, find the correct data on backlog, and utilize data to assess judicial performance, thus making data the king of the reforms undertaken.[54] Through coordination by the JTI, financial and human resource manuals have been developed, and bench memoranda, codes of ethics and conduct, anti-sexual harassment policy, and transfer policy, among other policies are now available. Further, law reporting is becoming regular under the able leadership of the National Council on Law Reporting. It has also established a program of research on the "lost jurisprudence" during the years when reporting was non-existent. There is no doubt that gems and nuggets of progressive jurisprudence will emerge from this process. Further, there is great hope that the community of scholars will respond to the challenge equally. The quality and quantity of Kenyan legal literature is disappointing. Thus, there is dire need for high quality commentary on the constitution and ordinary laws.[55] High quality commentary is needed on judgments.

In addition to institutions such as the JTI, another development that augurs well with the kind of jurisprudence that this chapter envisions is the embedding of a theory of interpretation in the 2010 Constitution. The constitution is unusual in setting out a theory of interpretation. This theory shuns staunch positivism and accepts the fact that judges make law. It allows judges to invoke non-legal phenomena, thereby making the judiciary "an institutional *political actor*" (Baxi 2014, 10; emphasis original). It is a merger of paradigms that problematizes, interrogates, and historicizes all different outlooks in building a radical democratic content that is transformative of the state and society (Mutunga 1993, Chaps. II

and III). It is a theory that values a multi-disciplinary approach to the implementation of the Constitution. Specifically, Article 159(2) (e) of the 2010 Constitution provides that the courts must protect and promote the purposes and principles embedded in it.

As Chief Justice, I initially set out to establish a framework for purposeful interpretation in two Supreme Court matters.[56] In *The CCK Petition 14 as Consolidated with Petitions 14A, 14B and 14C*, the Supreme Court ruled on September 29, 2014 on the theory of the interpretation of the 2010 Constitution. The judgment mainstreamed the theory of interpreting the Constitution by making it a decision of a full bench of the Supreme Court. The courts below are bound by this theory of interpreting the constitution. Further, Kenya's theory of interpreting the constitution is neither insular nor inward looking and seeks its place in global comparative jurisprudence, equality of participation, development, and influence. The Kenyan Parliament, in enacting the Supreme Court Act 2011, has in the provisions of Section 3 of that Act reinforced this aspect of constitutional pre-occupation in its theory of interpretation. The Constitution took a bold step in providing that "The general rules of international law shall form part of the law of Kenya" and "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[57] Thus Kenya seems to have become a monist rather than a dualist state in which domestic and international law are both given effect in the Constitution.

The full implications of these developments will unfold as the courts interpret the law. It is important to note that, in the past, Kenyan judges did not ignore international law. They often quoted the Bangalore Principles on Domestic Application of International Human Rights Norms, not as binding but merely as a useful guide.[58] However, currently, the courts have greater freedom. Many issues will have to be resolved. Indeed, in light of the new constitutional and judicial reforms, there is a great opportunity for the courts to be both users of international law as well as its producers, developers, and shapers.

The task is rather easier than that faced by some court systems in jurisdictions struggling to establish the validity of their place in the constitutional scheme. The principle in *Marbury v Madison* that established the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the US Constitution, is enshrined in the Kenyan Constitution in Articles 23(3) (d) and 165(3) (d), respectively. The 2010 Constitution constitutionalizes public interest litigation[59]

that was judicially created in India (Muralidhar 2008, 108–9). Kenya's path has been smoothed: the judiciary need not strive to establish itself as guarantor of the supremacy of the Constitution, including promoting the rights of the downtrodden.[60]

Finally, Article 159(2) of the Constitution has restored "traditional dispute resolution mechanisms" with constitutional limitations.[61] Courts are not the only forums for the administration of justice in Kenya. Traditional dispute resolution mechanisms keep these institutions as free as possible from lawyers, "their law," and the "law system of the capital" (Arthurs 1985, 10).[62] The development of the "Without the Law" jurisprudence will be a critical nugget in Kenya's progressive jurisprudence. Since traditional dispute resolution mechanisms will be conducted in the many national languages of Kenyan communities, the collective outcomes of such ventures will enrich progressive jurisprudence, breathe life into the implementation of the constitution, and strengthen Kenya's diversity and democracy. This linguistic approach to traditional dispute resolution will help in the translations that have to be undertaken of the constitution to enrich the languages of the community through new vocabulary borrowed from around the globe and reflected in the constitution. Kiswahili, the national language, will be enriched for use in translating the constitution to other national languages. These unique experiences and outcomes will have their own comparative niche in the world.

The transformative constitution, a new judiciary that is developing a progressive jurisprudence to implement the constitution, and a theory of interpreting the constitution that binds all courts will lay a firm foundation for the existence and consolidation of a human rights state in Kenya. Transforming one institution can be a beacon of broad transformation, but ultimately it depends on the vision of the political leadership in power. Without commitment by the ruling elites to the transformation that the theory of a human rights state envisages, the struggle for such a state must continue.

The Judiciary Transformation Framework 2012–2016

In the coming into effect of the new phenomenon of Transformative Constitutionalism,[63] this debate has been both enriched and transformed. The very idea of a transformative constitution such as those of India, Colombia, South Africa, and Kenya is the idea that the constitutional superstructure can be an instrument for the transformation of

society, rather than a historical, economic, and socio-political pact to preserve the status quo as embedded in the earlier constitutions, such as the US or English Constitution.

In the case of Kenya, the Judiciary Transformation Framework (JTF) is the blueprint for laying a strong foundation for a transformed judiciary. The framework has four pillars: access to justice, infrastructure, transformative leadership, and the use of technology as an enabler for justice. The new judiciary dusted off many reports that had recommended radical reforms in the judiciary, but lacked the will to implement them. It set about implementing reforms that had already been agreed upon. This strategy was meant to nip internal resistance to the JTF in the bud. The reforms started at the margins because of a lack of political will internally and externally to transform the judiciary. The reforms focused on the judicial culture to build public confidence in the Judiciary. This "judiciary cultural revolution" has included re-orienting the institution to serve the citizen and the court user as a client rather than lord over them. It included simple messages to the public to demand better services from the courts coupled with basic re-training and re-immersion for judicial officers to learn the basics of public service. It included, for example, the innovation of the SIX PLEDGES, to which every judicial officer was required to adhere, being displayed on all our court stations. The first two of which, human as it is, were remarkable in their absence in the "old" Judiciary; they read:

- *We pledge to cordially greet you and welcome you to our courts.*
- *We pledge to treat you with courtesy, dignity, and respect.*

The judiciary being long regarded as distant, arrogant, bewigged, and bewildering, the deliberate attempt to humanize it won public acclaim and support. Public toilets in the courts were cleaned and the practice of charging lawyers and litigants for their use stopped.[64] After a debate, it was agreed that judges of the superior courts would not wear wigs[65]; all judicial officers, from the Magistrates to the Supreme Court, would be addressed as "Your Honour," and judges were no longer to play God.[66] Such changes are important as part of deconstructing the judiciary including titles and role of "judges" including that of the Chief Justice.[67] In the main, a pledge from judicial officers and staff was created that humanized the administration of justice; and there was rethinking around an innovation of judicial proceedings that included judgments as dialogue.[68]

The judiciary was remade into a service institution for all Kenyans. Internal equity of voices was horizontalized through a process of inclusion. A "Tea Drinking Social Movement" was started.[69] With the ushering in of a Cultural Revolution within the judiciary, drinking tea was democratized and all staff in the judiciary in all court stations were henceforth entitled to tea; something that had hitherto been a preserve of the heads of stations and their secretaries. The internal resistance to this policy, though understandable given the power dynamics around access to tea, remains one of the most bewildering aspects of our transformation.[70] This central question became a watchword: How could judicial officers and staff convince Kenyans that they would receive justice if they could not give justice to their colleagues?

Monthly tea sessions, which included the Chief Justice, staff, and judges, started at the Supreme Court. There was an important lesson here: giving the rank and file within the institution a voice and dignity to speak up and participate in the governance of the institution locked them into the transformation ideology, giving them a stake, and insuring against backsliding by their seniors. By delivering colleagues from administrative tyranny, whimsical and undemocratic transfers across court stations in the country, stagnated promotions, and sexually-transmitted promotions (STPs), and by crafting a robust anti-sexual harassment policy, everyone was given a reason to believe in an institution that could stand for their rights and for justice; and they reciprocated by serving the citizen better and finding innovative solutions to their local problems.

The move to rid the judiciary of corruption encountered the resistance of corrupt cartels inside and outside the judiciary. As such, the struggle to make the judiciary a beacon for anti-corruption continues. It is worth noting that some reforms have become irreversible, irrevocable, indestructible, and permanent. These reforms have made the judiciary a beacon of transformation for the other arms of government, state organs, civil society, and the country at large. They remain striking and glaring examples of how to breathe life into the implementation of the constitution. The reforms include promoting colleagues on merit and in a transparent and accountable manner; equalizing salary disparities to reflect the values of equity and equality; making training and travel fair and just; having in place transfer policies, authored by staff, that are fair and just[71]; making access to insurance be for all; granting access to loans and house mortgages to all; guaranteeing the pivotal position of

JTI; entrenching the existence of a Judges and Magistrate's Association and Judicial Staff Association that participate in the governance of the judiciary; ensuring that the administrative arm of the judiciary facilitates the judicial arm that ensures the core business of administering justice is not jeopardized; democratizing governance in the judiciary as decreed by the constitution; ensuring the development of progressive jurisprudence is on course[72]; making regular the project of "judgment as a dialogue" where judicial officers seek to convince the loser that they gave them justice; and creating a vibrant judicial and public constituency to make sure that these reforms are permanent.

Despite resistance from judicial officers and staff, the Office of the Judiciary Ombudsperson that receives and acts on complaints against judicial officers and staff has become a critical institution that is now irreversible. It has restored public confidence in the judiciary, as have Court Users Committees (CUCs), which are cradles of public participation in judicial affairs and judicial accountability. CUCs are grassroots structures reflected at the center by the National Council for the Administration of Justice (NCAJ), which is decreed under the Judicial Service Act. NCAJ and CUCs are the centers of inter-agency dialogue, collaboration, coordination, and interaction. They reflect the vision of the constitution that decrees robust independence of institutions, but calls for dialogue and inter-dependence for the public interest and good to nurture nationhood in Kenya.

The judiciary has been a leader in the promotion of dialogue, interdependence, and collaboration as decreed by the constitution. Although the three arms of the state are robustly independent under the constitution, the constitution decrees dialogue among them in the national interest. These dialogues have taken place through the JTI workshops between the Judiciary and security agencies, Parliament, constitutional Commissions, and other state organs. The NCAJ is a vehicle for such dialogue. Tripartite dialogues between the President, the Speakers, and the Chief Justice have taken place on an ad hoc basis and should be institutionalized. In these meetings, the judiciary has been able to clarify to the other arms what it does, can do, and cannot do. It has sought to clarify the mandates of the three arms, the sovereignty of the people, checks and balances, and the supremacy of the constitution. Through such dialogues, mental shifts in favor of the implementation of the constitution are taking place notwithstanding the resistance.

We have used scientific data in aid of the constitutional principle of accountability. Article 10 of the Constitution requires all state organs, of which the judiciary is one, to apply the national values and principles of governance enumerated thereunder, in the execution of their mandates. Article 10(2) (c), in particular, identifies "good governance, integrity, transparency and accountability" as part of the body of these principles of governance. Partly in furtherance of these constitutional provisions, the Judicial Service Act 5(2) (b) provides that, every year, the Chief Justice is required to prepare the State of the Judiciary and the Administration of Justice Report (SOJAR), present the report to the public, present it to the National Assembly and to the Senate for debate and approval, and to have the report gazetted. Suffice it to say that as detailed as the first two of the SOJAR generated by the judiciary are, neither—and in clear breach of the law—house comprising the Legislature—the National Assembly and the Senate—has debated them.

In any event, even though the accountability requirements of SOJAR's statutory provision are clear, the methodology remains a work in progress. There was, for example, the necessity and utility from the inception of measuring performance. That is why the Performance Management Directorate was set up as a fully-fledged directorate. Its positive impact on the transformation program, especially in terms of the data gathering perspective, has been remarkable. The process of preparing the first two State of Judiciary Reports revealed the centrality of data as a key driver of transformation. The empirical data and evidence served to illuminate performance and the lack thereof, and provided a scientific basis for the allocation of resources and policy decisions – decisions previously made on the basis of "felt-needs," mere observation, or past practice, referred to by economists as "path dependency." In its assessment of the outputs of courts, judges, magistrates, and other judicial staff, it has engendered internal and external accountability. The internal leadership of the judiciary is now more accountable in administrative decisions that are expected to be evidence based. Data has emerged as the king of transformation. Its neutrality and fairness leave very little room for quibbling.

Deepening the culture of data gathering and performance reporting institutionalizes accountability, induces performance through competitive and comparative tendencies, and secures transformation permanently. To entrench accountability practices as part of transformation, an expansive view of the provisions of the Judicial Service Act is necessary.

Whereas the law envisaged only a national level report to the Legislature, it was necessary to require station-based reports where judicial officers at the court level and immediate consumers of judicial services at the grassroots level could see the performance of their courts. The station-based reports are still in their infancy and the next state of the judiciary report will have a more robust design, structure, and variables. It will include the number of cases filed, cleared, and pending, financial information on the budget of the station, the amount of resources actually allocated to the individual court in every financial year for court and CUC work, and the amount of monies held as deposits.

Conclusion

The history of human rights and social justice paradigms in the African context has been richly documented.[73] The *usefulness* and *limitations* of these paradigms in social transformation can be gleaned from positions taken by five of East Africa's distinguished professors.[74] There are two contradictory human rights and social justice approaches that impact the fundamental question of transformation. Historically, rights have been both revolutionary and conservative. Rights themselves become terrains of struggle, with different groups offering alternative conceptions of rights.[75] It is important to recognize the counter-hegemonic discourse within the human rights framework, notwithstanding its Euro-centeredness in origin and orientation. For such analysis to be useful, we must understand the contemporary global context within which these paradigms operate.

Overall, and as I have argued elsewhere, transformative constitutions and their transformative constitutionalism, which anchor the consolidation of human rights states[76] and societies, can mitigate current status quos in societies that are unacceptable and unsustainable (Mutunga 2013, 20). Such progressive and transformative constitutions are, indeed, an "ordinary revolution" or a "product of a revolution," and they can be the basis of fundamental restructuring or revolution of states and societies.[77] Transformation, as the Kenyan case study shows, happens at two levels, the theoretical or visionary level and the level of implementation. At the first level, the vision of the constitution is clear as a manifesto for change and social progress. At the implementation level, ideological and political struggles abound. The Kenyan judiciary's

experience of reforms, as outlined in this chapter in the context of the 2010 democratic Constitution, is useful for it is testimony that reforms can actually take place in regimes that are anti-reform, if the leadership of an institution is ready to struggle for them. It does not matter that positive outcomes are not readily discernible. The idea is to get the sovereignty of the people, that is, ensure their material interests are reflected in the reforms and they will provide the necessary support. A striking example is one of the irreversible outcomes in the implementation of devolution in Kenya. As resources get to the counties, rural towns, and villages, particularly in areas that have been marginalized, the support of the citizens will be strengthened. Alternative political leadership will grow from these hitherto marginalized counties because the citizens will not allow their resources to be stolen. The devolution of political power expands the sovereignty of the people,[78] which can be a basis for the deepening of our transformation.[79]

To conclude here, the obvious must be stated. Even with progressive Kenyan jurisprudence based on our transformative constitution, what is now called the gospel according to Africans, it must be conceded that the project of transformation is fundamentally a political one. If the judiciary had irreversible support from the political elites, much progress could have been made, and fast. The fundamental question of who will control the human rights and social justice state in Kenya will not go away. Thus, the theoretical and practical questions on whether the paradigms of human rights and social justice can be a basis for the fundamental restructuring and transformation of the Kenya state that have animated this chapter still remain. Undeniably, all of these issues raise fundamental political questions, the answers to which will be the fundamental ingredients of political manifestos of Kenyan social movements and political organizations, including political party blocs that are ideologically and politically committed to the vision of transforming the state in post-2010 Kenya. Of course, notwithstanding the gains that Kenyans have made since 2010, such a development faces numerous constraints. However, what cannot be ignored is the fact that, with the 2010 Constitution in place, important developments have occurred in Kenya that provide citizens with strong foundations in their ongoing struggles for a human rights state and individual and collective dignity.

Notes

1. "A movement is a complex phenomenon, it is dynamic, and it grows and grows as more and more people join the 'project' (if it makes sense to them, and involves them in its deepening and broadening). *A movement is like small rivers joining to form a massive torrent*" (Tandon 2004a, 37). For more debates on African social movements, please see Mamdani (1995).
2. As Arundhati Roy has observed on page 3 of a speech given at the Opening Plenary of the World Social Forum in Mumbai, on January 16, 2004, entitled "Do Turkeys Enjoy Thanksgiving?": "A government's victims are not only those it kills and imprisons. Those who are displaced and dispossessed and sentenced to a lifetime of starvation and deprivation must count among them too. Millions of people have been disposed by 'development' projects. In the past 55 years, Big Dams alone have displaced between 33 million and 55 million people in India. They have no recourse to justice." On the same page, she adds, "In the era of corporate globalization, poverty is a crime."
3. The Kenya Human Rights Commission and Haki Jamii are the leaders in this field.
4. For further details see the following texts: Mutua (2002, 2008, 2009), Murunga et al. (2014), Ruto et al. (2009), Ghai and Ghai (2011), Ghai and Cottrell (2004, 2011), Mutunga and Mazrui (2002), Oloka-Onyango (1995, 1998/1999), 2000, 2002, 2015a, b, c), Oloka-Onyango and Tamale (1995), Mutunga (1999, 2009 2012), Shivji (1989).
5. Issa Shivji (2003) argues that, if not properly handled, human rights may not serve as an ideology of resistance. Human rights discourse could be a discourse of exposure and demystification of oppression and nothing else.
6. "It is customary to categorize human rights at three levels – the political or civil rights (or 'blue rights'), economic rights (or 'red rights'), and social and cultural rights (or 'green rights'). There is much discussion on the relative importance of these values, for example, whether democratic rights take precedence over economic rights, or whether democratic rights need to be put in abeyance until people have enough to eat and enjoy basic economic well being. These are false debates, or at best academic debates delinked from the real world. All rights must be viewed holistically, as *interdependent* whole. There is a tendency in certain circles (for example in the Millennium Development Goals – MDGs) to isolate economic rights – among them, access to basic necessities of life such as health, education, water, shelter, clothing and housing – as the 'targets' to achieve by a certain date in the future (in the case of the MDG, by 2015).

These rights are, of course, very important, but their deficit in the contemporary world cannot be understood in isolation of the *underlying causes* (national and global) that create poverty and deprivation at the national and global levels" (Kanyenze et al. 2006, 9). Yash Tandon has this to say about the universality of human rights: "It [universality of human rights] is the only measure we have for questioning derogation of state and imperial behaviour from principles of humanity. And it is the only reed the poor and the vulnerable have from being otherwise totally drowned" (Tandon 2004b, 14). In giving a solution to the crisis of the post-colonial nation-state project, Laakso and Olukoshi (1996, 33) argue that:

> The need to promote social equity, a minimum standard for human welfare, a viable economy, and a clear charter of citizen's rights which aims to promote civil liberties and human rights, political and electoral pluralism, and effective public institutions (especially in the areas of education, health, and the administration of justice) ought to be more fully recognized as urgent and brought closer to the centre stage of national political and policy discourses. These are issues which are too crucial to be left to a small, largely unrepresentative political elite, foreign agencies/donors, or market forces. A relatively strong and democratic state apparatus is necessary in Africa, if the current social crisis is to be tackled. Some of the features of "a relatively strong and democratic state" are reflected in a human rights state. See also Ghai (2001).

7. See Ruto et al. (2009).
8. Yet we cannot say that the consolidated human rights movement has a critical mass following within the country. This is a fundamental challenge to the movement if it will ever capture political power. It is arguable that, even in the middle class following, the movement needs consolidation as it is torn by the usual divisions based on ethnicity, race, gender, generation, religion, region, occupation, and clan.
9. "… a human rights approach on its own will not be effective; there are powerful vested interests and certain *power configurations* at national and global levels that need to be challenged in order to bring about necessary change" (Tandon 2004b, 5). Undoubtedly, the human rights approach can expose and demystify these vested interests and power configurations and provide some advocacy tools of challenge. Advocacy and activism have their limitations in challenging the vested interests and power configurations.
10. Antony Jarvis and Albert Paolini (1995) provide these important insights on states, particularly on pages 4–5.

11. I have found Vincent (1987, 1–44), a useful source in this endeavor. Mahmood Mamdani gives a succinct clarification of the state as follows: "The state is more than a government. It comprises all the instruments which are set up to enable a particular class to rule and includes the forces of repression (the army, the police, and intelligence), regulation (the courts) and administration (the civil service). Even in a bourgeois democracy, the elective principle is confined to the sphere of government. All other instruments of the state remain non-elective. These instruments are the real embodiment of class rule. Positions in this sector are filled in by direct appointment. This is why parliamentary democracy is just one form of bourgeois rule" (1983, 42).
12. The current US state in my view reflects these three categorizations perfectly. Just take the example that is well known of research that takes place in the military and universities, financed by the taxpayer, whose final products are handed over to the private sector for free. The private sector products end up being purchased by the state itself among other buyers. It is an example you will find repeated in quite a number of Noam Chomsky's works. For the most recent exposition of this, see Barsamian (2004). "And that's how the economy works. The core of it is the state sector" (Barsamian 2004, 19).
13. See, for origins of the modern state, Gianfranco (1990).
14. For East Africans, our intellectuals who have written on this issue: Nabudere (1977, 1981, 1980, 1982), Shivji (1976), Mamdani (1975, 1983), Tandon (1982), Khamis (1983), Anonymous (1982). Two friends of East Africans are worth reading: Rodney (1972), Amin (1989). For intellectuals who support globalization, but want an alternative form, a form that mitigates globalization and market fundamentalism, see Stiglitz (2002), Sen (1999), Singer (2002).
15. The following ideological and political categorizations of state are familiar: slave, feudal, bourgeois, socialist, communist, communal, colonial, neo-colonial, developmental, Marxist-Leninist, patrimonial, predatory, liberal, social-democratic, neoliberal, multi-racial, multi-ethnic, imperial/imperialist, federal, omnipotent, failed, fragile, lame, authentic, struggling, rogue, puppet, client, gate-keeper, squatter, free market, ethical, people's, terrorist, and welfare. For a mention of most of these categorizations in one volume, see Howell and Pearce (2001).
16. For more details, see Mutua (1997).
17. The reviews of Mutua's book, *Human Rights: A Political and Cultural Critique* (2002), to my knowledge, have not problematized the concept of a human rights state. See, for example, the review by Richardson (2004).

18. The five portfolios are Human Rights and Social Justice, Governance and Civil Society, Education and Sexuality, Environment and Development and Media, Arts and Culture.
19. The merging of programming of Human Rights and Social Justice and Governance and Civil Society, both portfolios falling under Peace and Social Justice Program of the Ford Foundation.
20. The *Bill of Rights* in the Constitutions of Kenya and Zimbabwe consolidated the rights of departing colonial power and its agents. The best example of this consolidation is the critical issue of land. The new constitutions validated what was clearly a monumental theft of the land of Africans by the imperial state of Britain and its agents, the white settlers. This issue is now agitated through mass occupations of land in Zimbabwe and transitional justice issues in Kenya where reparations for colonialism and neo-colonialism are constantly on the agenda. The Mau Mau veterans in Kenya are also demanding reparations for forced labor and torture during the British rule in Kenya. The veterans won their case filed in the UK. The British government has accepted and apologized for the atrocities perpetrated against the Mau Mau Freedom fighters. Some compensation, however insufficient, has been paid and a Mau Mau monument is being erected at the Freedom Corner, Nairobi City, with all expenses paid by the British government. The monument was unveiled in May 2015.
21. Richardson (2004) seems to suggest this.
22. To enforce and realize the whole gamut of human rights in any country the world over requires a transformative and revolutionary state!
23. See Mutua (1997).
24. Yash Tandon, *Towards an Alternative Development Paradigm*, www.seatini.org.
25. There has never been any doubt that the most fundamental criticism and analysis of market or capitalist fundamentalism have come from the Marxist paradigm as developed over years by its followers. While the political prescriptions and the experiences in various countries have brought into focus critical discussions on the viability of such prescriptions, the exposure and demystification of capitalist fundamentalism by that paradigm has never been the subject of dispute.
26. The examples are legion. Take, for example, the struggle for a new constitution. This struggle is for the construction of a new state that is opposed to authoritarianism. It is a program for reform and its ultimate provisions provide for governance, democracy, and human rights. This example is discussed in detail when the vision of the 2010 Constitution of Kenya is analyzed.
27. This section borrows heavily from an Inaugural Distinguished Lecture that I gave at the University of Fort Hare, South Africa, on October 14, 2014,

entitled: The 2010 Constitution of Kenya and its Interpretation: Reflections from Supreme Court Decisions.

28. Karl Klare argues that "transformative constitutionalism connotes an enterprise of inducing large-scale social change and through non-violent political processes grounded in law" (1998, 146, 150). This article will endorse this argument while rescuing it from its limitations.
29. See Ghai (2014, 125–27). On page 127, Ghai conceives this constitution as "a revolutionary constitution but no revolution." The discussion on objectives is one about the basic structure of the Constitution. In my opinion, the ingredients of the basic structure of the 2010 Constitution of Kenya are broad and all encompassing, reflecting the great commitment by Kenyans to fundamentally restructure the status quo of their society.
30. "The 'great revolutions' are distinguished by the fact that they project themselves far in front of the present, toward the future, in opposition to others (the 'ordinary revolutions') which are content to respond to the necessity for transformation that are on the agenda of the moment" (Amin 2008, 17). I believe we also need to debate the viability of "ordinary revolutions" as a basis of the "great" ones. Such debates have taken place in the past. See, for example, Scott (2008, 41–104).
31. Former President Moi's slogan of imperial presidency was in Kiswahili: *Siasa Mbaya, Maisha Mbaya/Bad politics begets no livelihoods!* And bad politics was any opposition to his leadership. Resources were denied to areas and communities that opposed his policies and leadership.
32. Yash Ghai, unpublished mimeograph, Nairobi 2014.
33. The High Court enjoys vast powers such as interpreting the Constitution, which encompasses a power to determine whether "anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of" the Constitution (Article 165(3) (d)), and to declare such conduct, omission, or law null and void to the extent of its inconsistency (Article 2(4)). The text of the constitution is available at Kenya Law http://www.kenyalaw.org/lex/actview.xql?actid=Const2010.
34. Article 171.
35. Article 160.
36. Section 23 of the Sixth Schedule of the Constitution.
37. Article 173.
38. Article 163.
39. See Mutunga (2013, 21).
40. The Executive is not the only force that threatens the independence of the Judiciary. Parliament's powers have been strengthened and also pose a threat. Forces from corporate, civil society, political parties, and legal and illegal cartels remain extremely powerful. Forces that divide Kenyans,

namely ethnicity, region, religion, race, xenophobia, gender, generation, clan and class, and occupation are reflected in the Judiciary itself. Community, family, and friends are forces that cannot be underestimated.

41. Supreme Court Act, 2011, No. 7 of 2011, Section 3.
42. See the Constitution of Kenya 2010: the Preamble, Articles 2(4), 10, 20(3), 20(4), 22, 23, 24, 25, 159, 191(5), and 259. These articles decree how the Constitution is to be interpreted, and, indeed, under Article 10(1) (b), "any law" would include, in my view, rules of common law, as well as statute.
43. See the Constitution of Kenya.
44. I have adverted to this *In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Supreme Court Application NO 2 of 2012 at Paras 8.1 and 8.2 of my Dissenting Opinion*.
45. Article 259 prescribes how the text of the Constitution is to be interpreted.
46. Some of the key elements to this claim are that it: is the most modern Bill of Rights in the world; uniquely provides for a theory of its interpretation; reflects a social democratic transformation in a world still dominated by contemporary capitalism called neoliberalism; and calls for a progressive jurisprudence that shuns staunch positivism and its backwardness in a world that has to change. It has been argued that the claim to progressiveness is hindered by its failure to guarantee rights for LGBTIQ persons, abortion rights, and the repeal of the death sentence. Looking at the grey areas in the constitutional provisions on these issues, one can argue that the final verdict on this debate lies with the courts. Several recent cases illustrate that Kenyan courts have not shied away from turning these gray areas black and progressive. See *Eric Gitari v Non-Governmental Organisations Coordination Board & 4 Others* [2015] eKR; *Republic v Kenya National Examinations Council & Another Ex Parte Audrey Mbugua Ithibu* [2014] eKR; *Baby "A" (Suing Through the Mother E A) & Another v Attorney General & 6 Others* [2014] eKLR. It needs to be admitted that the Constitution protects private property under Article 40 and simply mitigates relations of production in the country. See Gargarella (2013), Chapter 9. On providing fundamental changes to foreign domination of the economy and the protection of community lands, the 2010 Constitution does not go as far as the Constitutions of Venezuela, Ecuador, and Bolivia.
47. As a guide to the emerging tests by which we should judge the relevance of foreign precedents, an example is where we adopt foreign precedents but explain the parallels between that country and Kenya and its Constitution.

48. The criteria for determining our needs can be based on the discussion above on the values, vision, objectives, and purpose of our Constitution.
49. See *supra* note 30. Additionally, in my doctoral thesis, *Relational Contract Outside National Jurisdiction* (1993), particularly in Chapters 2 and 3, I attempt to problematize the various schools of jurisprudence, including the Marxist one, on this issue. Other than staunch positivists there is a consensus that the law has a role to play as an engine of social transformation. The Marxist school still problematizes in whose interests is this social transformation. See Beard (2004).
50. See *supra* note 30, and Horwitz (1992).
51. Horwitz (1992).
52. Section 7.
53. No wonder those who resist judicial transformation are now scrambling to control it. Too late, the train has left the train station and it cannot be derailed!
54. I know that those who resist our transformation call it "transgression!" When you find incompetence, thievery, dysfunction, tomfoolery, a general remarkable ease with below average, you transgress it!
55. We welcome the publication of Patrick L.O. Lumumba and Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (2014).
56. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion of the Supreme Court (Reference No 2 of 2012; In the Matter of Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 others (Petition No 4 of 2012).*
57. Article 2(5) and (6).
58. Principles 7, 8.
59. See Articles 22(2) and 258(2).
60. It is a pillar of the Judiciary Transformation that the courts in Kenya will truly be viewed as the courts for all Kenyans, and the salvation of the Kenyan oppressed and bewildered. This will happen when informal forums for the administration of justice are connected to the formal court systems under the supremacy of the Constitution. See Mutunga (2013, 23).
61. Under Article 159(3) of the Constitution, traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results to outcomes that are repugnant to justice and morality; or (c) is inconsistent with this Constitution or any written law.
62. Several passages found between pp. 1–12 and pp. 188–214 are extremely useful in the development of the "Without the Law" Jurisprudence.

63. *Supra* note 30, Sunstein (2001), Ghai (2006, 2010, 2012), Verma and Kusum (2000), Gargarella et al. (2006). This extremely useful book has three chapters on theoretical analysis on social transformation followed by case studies from Hungary, South Africa, Colombia, India, Brazil, Angola, and Bolivia.
64. In our work as judicial officers we peruse pleadings and the last prayer invariably reads: And any other relief that this honorable court deems fit to grant. We urged that access to toilets is one such relief that we should permanently give to citizens!
65. See Mutunga (2017).
66. And the Christians supported this change! There is only one Lord and that is Jesus Christ! Resistance to this change that reflects our constitutional values of equity, equality, inclusiveness, non-discrimination, and human dignity is both internal and external. Recently, a Bill in Parliament attempted to reverse this important reform without success. Such addresses have their roots in feudalism and were reflected in the structure of courtrooms that put judges on elevated platforms and pulpits. And the language of pleadings and addresses by lawyers were couched in the language of prayer, for example, "My Lord, my prayers this morning are!"
67. Upon the Supreme Court deciding against the petitioners in a presidential election in 2013, an enraged Kenyan called me Mr. Chief Injustice! This triggered the reflection stated here about demystification and deconstruction and the realization that certain addresses rationalize injustice.
68. The pledge included welcoming litigants to court, keeping eye contact with litigants and accused persons, allowing litigants and lawyers to walk out of the court to use bathrooms, and developing what we have come to call "judgments as dialogue" in line with the constitutional value of accountability. Judgments as dialogue addresses the loser in any cause in a concerted attempt to convince them that they had justice. This is done through the change of style and format of judgments that focuses primarily on the loser, giving them clear reasons why they lost and why the other party won in a language they understand. Our judgments and their format and style tend toward a singular dialogue, with the lawyers as a medium of explaining the outcome to their clients. This role is no longer one of counsel, who in the Kenyans' experience may not communicate the essence of the outcome as honest feedback. The use of short media briefs, borrowed from the Constitutional Court of South Africa, is an important ingredient of judgments as dialogue.
69. It is indeed difficult for those who are not Kenyans to understand why this is an important transformative practice. Suffice it to say that drinking tea is deeply embedded in Kenya. Access to this socio-cultural good was underpinned by power dynamics in Judiciary.

70. Judicial officers have accepted that they are missionaries for justice and that human dignity is a value in the Constitution they have sworn to uphold. It says a lot about our humanity to begrudge our colleagues tea.
71. Judicial officers and staff sometimes forget that the old judiciary transferred them at the drop of a hat, and now we have a transfer policy that respects them and that has all the ingredients of due process.
72. This can be gleaned from the decisions of particularly the divisions of Constitutional and Human Rights and Judicial Review in the High Court and Supreme Court decisions on devolution, the mainstreaming of the theory of interpreting the 2010 Constitution, and isolated decisions by judges in the stations outside Nairobi. The Supreme Court will in the near future rule on integrity and leadership, land, the death sentence, and various aspects of human rights and social justice jurisprudence. These decisions relate to the critical features and structure of the Constitution and will definitely determine the course of socio-economic, political, and cultural progress in the country.
73. Metes (2004), Sen et al. (2004), Leite (2005).
74. Professors Yash Ghai, Issa Shivji, Mahmood Mamdani, Joe Oloka-Onyango, and Makau Mutua.
75. For further elaboration, see Mamdani (2000), Shivji (2003).
76. I have defined it as a variety of a radical liberal state that has a radical social democratic content.
77. The implementation of such constitutions and their outcomes reflect struggles between the vested interests of the status quo and those of the progressive forces.
78. Dr. David Ndii has authored articles in the *Daily Nation*, in Nairobi and Kenya, in praise of devolution. It is a pity alternative leadership in Kenya is sleeping through this revolution!
79. See Forster (2015). This is a great analysis on how the state can be brought under the sovereignty of the people, the resistance from internal and foreign forces, and the role that political leadership has to play in the promotion and protection of the sovereignty of the people. For Kenya, this is an opportunity to rethink devolution of political power and whether the implementation of the constitution is a basis for more qualitative and fundamental restructuring of the society. It may be our contribution to the search of paradigms that will liberate Kenya and the world.

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CHAPTER 3

New Constitutional Order, Rights and Environmental Justice in South Africa

David Hallowes

South Africa's transition to democracy was variously hailed as a miracle, and the democratic Constitution is seen as one of the most progressive in the world. For the majority of South Africa's people, there is indeed much to celebrate: they are no longer excluded from the formal definition of citizenship and the state is no longer waging a racist war against them. However, together with other movements of the poor, Abahlali baseMjondolo (AbM) (People of the Shacks) continue to experience a war on the poor. They posed this question: "why it is that money and rich people can move freely around the world while everywhere the poor must confront razor wire, corrupt and violent police, queues and relocation or deportation?" This reality continues to haunt the new South Africa two decades later, after the euphoria characterizing the transition to multi-racial democracy and its underlying constitution order in 1994.

The struggle against the apartheid state mobilized people across the full spectrum of social relations: through labor and civic organizations, religious bodies, women's organizations, human rights groups, and in struggles for land. There were many strands to the way in which apartheid was criticized, but the dominant strands, pulled together under the

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flag of the African National Congress (ANC) and, in the 1980s, under the umbrella of the United Democratic Front (UDF), centered on race and class. Maré notes that "the gendered nature of the apartheid state was discussed far less often" and it may be added that environmental relations were scarcely mentioned (2003, 28). However "miraculous," the new constitutional order is a product of struggle. A negotiated political transition came about because, as Govan Mbeki said, "the two major political forces in South Africa had fought to a draw" (cited in Marais 2001, 85).

Overall, the transitional negotiations shaped a liberal democratic constitutional order that guaranteed the continuity of capital. It also guaranteed the continuity of the state itself. For example:

- It is the state that guarantees property relations (see below) and the democratic state has maintained the legal basis for capitalism.
- While the legitimacy of the apartheid state was challenged, the legality of the state has been maintained. The "new" state has therefore taken on all the obligations of the "old" state—including its debt and its international obligations.
- A primary function of the state is to maintain control of the territory defined by its borders. The boundary of the country, created by the colonial power of Britain, is unquestioned. It is notable that AbM posed the question above in response to the so-called "xenophobic" attacks of 2008, when thousands of people thought to be from other countries were driven from various poor settlements across the country and some were brutally killed. The claim that "foreigners are taking our jobs and houses" was made to justify the attacks, but such claims are the reflection of the emergence of the nation state in modern times and of nation building as a developmental value.

Despite this continuity of the state, there are still reasons for calling it a "new" state. It is no longer founded on racism, the "bantustans" have gone at least in formal terms, everyone is recognized as a citizen, and the rights of citizens have been expanded. These appeared as profound changes, not merely of government, but in the nature of the state itself, and they represented a substantial victory for those who were previously excluded. It is also a victory that has been claimed by the majority of people through their participation in elections.

The Constitution itself is in many ways the symbol of this victory. It does indeed reflect the limitations of transition, but it is also deeply informed by the human rights culture that evolved within the broader anti-apartheid struggle. It is not merely a symbol, but also an instrument that can be used by people to assert rights. Equally, or rather more than equally, it can be used by those already in possession of power. While the Constitution is committed to equality, as the Chairperson of the South African Human Rights Commission (SAHRC) remarked: "In practice however we have seen how those with more resources and influence have been able to use the Constitution to advance themselves while the poor and the marginalized find it difficult to access the various benefits and rights that the new dispensation offers" (SAHRC 2003).

The Bill of Rights is constantly interpreted—in the courts, in parliament, by government ministries and state bureaucrats, and by business and civil society. These interpretations represent claims to power in decision making and in the allocation of social benefits, made by or on behalf of different social constituencies. They are part of broader struggles to maintain or change relations of power.

This chapter describes those rights that are specifically relevant to supporting or limiting the realization of environmental justice. It looks at how they appear to be interpreted by the courts or government, and also advances an interpretation founded in environmental justice, particularly in relation to the Environmental right itself. It opens with a brief look at the framing of the Bill of Rights and the way in which its interpretation relates to the historical and developing context. It then looks at the so-called social and economic rights and explores the meaning given to these rights. The Property right is not generally considered a social and economic right, but, in a very real way, it is the original social and economic right. It has major implications for environmental justice, both in relation to the distribution of land and because it creates an implicit mandate for economic development determined by capitalism. Finally, the chapter looks at the Environmental right itself and considers those civil and political rights that are directly relevant to environmental justice in that context. The only explicit mandate for development is given in this right, and I argue that, in contrast to the Property right, it promises economic, social, and environmental justice. The conclusion notes the widening gulf between this promise and what the people experience.

Heart of the Constitution

The Bill of Rights is at the heart of the Constitution. The document as a whole opens with the Pre-amble, which contains a statement of the purpose of the Constitution, while Chapter 1 begins by stating the founding values of the Republic (Constitution 1996, sec. 1). These statements are held to be particularly significant and the sentiments expressed in them are echoed in the equally important opening statement on Rights:

> 7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

This statement is deliberately invoked in the section on interpreting the Bill of Rights and it leads to the criterion that interpretation should be "purposive" (ibid., sec. 39). This means that a right must be interpreted in a way that promotes the core values of the Constitution because these values say something about the purpose of the right. The Constitutional Court recognizes that this implies that it must make value judgments and also that values are not static but change over time. As this implies, the Court must take the social context, including changing social values, into account. In rejecting demands for the death penalty, however, the Court indicated that this does not mean simply following public opinion, particularly when public opinion is at odds with Constitutional values.

The social context is shaped by history and the Pre-amble makes specific reference to healing "the divisions of the past." The Court itself sees the Constitution as a product of South Africa's history and the struggle for liberation:

> The Constitution…represents a radical and decisive break from that part of the past which is unacceptable.…The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality."[1]

Purposive interpretation must therefore address this history and seek to redress the legacy of inequality.

Most rights can be claimed by "everyone." For the most part, this means everyone who comes within the jurisdiction of the South African

state, whether they are citizens or not. Certain rights, such as the political rights to participate in the formal political process—to form parties and participate in elections—are reserved for "all citizens" or "all adult citizens." Depending on the nature of the right, "everyone" may also include "juristic persons." Juristic persons are organizations that have a legal identity and can therefore appear before the courts in their own name. They include corporations and any formally constituted organizations such as trade unions, community organizations, or NGOs.

All rights are binding on all organs of state. The state must therefore uphold people's rights and people can demand that it does so. This is called the vertical application of rights because it concerns the relationship between "persons" and the state. Aspects of the rights may also be binding on "natural or juristic persons" depending on the nature of the right. This is called the horizontal application because it concerns relationships between persons. At a minimum, it means that no person can violate the rights of another—for example, by subjecting them to slavery.

Human rights are conventionally divided into two groups:

- Civil and political rights include, for example, the rights to life, to vote, to freedom of speech and freedom of association, and to a fair trial. These are sometimes called "first generation rights."
- Economic, social, and cultural rights may include, for example, rights to work and to fair working conditions, to a decent standard of living including housing, clean water, and enough food, to education, and to participate in cultural life. These are sometimes called "second generation rights."

The realization of social and economic rights appears critical to the project of environmental justice.

Social and Economic Rights

Social and economic rights were recognized in the United Nations' Universal Declaration of Human Rights following the Second World War. To give teeth to the Declaration, two separate and binding treaties were developed: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). South Africa is a party to both covenants.

Although the UN has affirmed that all the rights are "indivisible and interdependent," and that social and economic rights are as important as civil and political rights, the ICCPR in fact has stronger enforcement mechanisms than the ICESCR. Some national constitutions written since the Second World War follow the implicit bias of the Covenants. They treat civil and political rights as "fundamental rights" and put social and economic rights into a different chapter, giving them the lesser status of guidelines for state policy.

The South African Constitution does not, in theory, do this. The Bill of Rights does not label the rights as civil and political or social and economic rights and makes no distinction between them. All of the rights in the Bill of Rights are "fundamental," and this distinguishes them from ordinary legal rights conferred by legislation or common law. Of these rights, describing certain ones as social and economic is therefore partly a matter of tradition or convention and partly a matter of convenience. There are three possible ways of deciding what, in South Africa, is a social and economic right.

First, it could be decided by comparing the Bill of Rights with the ICESCR. However, the Bill of Rights does not simply reproduce the rights contained in the Covenant. For example, a right to work is given in the ICESCR, but not in the Bill of Rights. On the other hand, the ICESCR does not contain a specific environmental right, but makes a rather weak provision for "the improvement of all aspects of environmental and industrial hygiene" as part of the right to health (Article 12).

Second, the SAHRC is obliged to monitor what the state is doing to realize "the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment" (Constitution 1996, sec. 184 (3)). The Commission has grouped these rights, together with the provisions for land reform, within the Property right under the name of social and economic rights (ibid., sec. 25). Several rights which are obviously economic in nature—including freedom of trade, occupation, and profession, labor relations, and the Property right itself—are excluded from the list.

Third, it could be decided by the kind of "qualification" placed on the right. Several of the fundamental rights are "qualified." In each case, the qualification is written into the text of the right itself. Thus, the right to free speech—which is regarded as a civil and political right—excludes war propaganda, incitement to violence, and "hate speech," such as racist or sexist declarations.

The qualification placed on the rights of access to housing, health care, food, water, and social security concerns the obligation placed on the state. It reads as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights." These rights are therefore qualified only so far, as the state does not have the means to deliver on them. For the rest of this section, "social and economic rights" refers specifically to these rights. Despite the fact that it is on the SAHRC list, the environmental right itself is not qualified in this way and is discussed separately below.

The Bill of Rights imposes four basic obligations on the state: it must respect, protect, promote, and fulfill all rights. When it comes to social and economic rights, the first three obligations are relatively uncontroversial. In terms of the right to housing, for example, "respect" means the state should not act in a way that prevents people from finding housing, and may not evict people unless it gets a court order; "protect" means that it must prevent violations by others, such as landlords; and "promote" means it must create awareness of the right or be supportive of organizations that are working to realize the right.

Budlender comments that the last obligation—to fulfill social and economic rights—has been the most contentious, leading some people to conclude "that these are not rights at all, but simply aspirations" (2001, 18). This conclusion recognizes that any right guaranteed by the state has substance only if it is founded in law and can, in principle, be defended in court. If this is not so, the state can ignore the right and people cannot enforce claims made on the basis of the right.

However, several judgments of the Constitutional Court have now shown that these social and economic rights are in fact "justiciable" (meaning that they can be enforced by the courts) "in a variety of different ways" (ibid., 31). These judgments include the Certification judgment (the Court's original validation of the Constitution), the Grootboom case[2] (concerned with the right to housing), and the Treatment Action Campaign case[3] (concerned with the right to health care). The Court has also established the principle that social and economic rights are indivisible from and interdependent with civil and political rights. The right to food may therefore be reinforced by its association with the right to life.

These judgments make clear that the qualification placed on social and economic rights does not prevent people from claiming these rights,

but also acknowledge that the state cannot deliver on them immediately. The state must remedy the infringement of other rights immediately and must make adequate resources available to do so, whereas it must remedy the infringement of these rights over time. But policies and measures designed to realize these rights must be developed immediately, implemented expeditiously, and resourced adequately.

Policies and measures fall under the political authority of government—they are the responsibility of the legislature and the executive. How these rights will be fulfilled—or realized—is therefore a political decision. Since the Constitutional Court is not elected, it is reluctant to interfere with the democratic authority of parliament to decide on what policies are best calculated to realize them. Nevertheless, all legislative and executive decisions are potentially subject to judicial review on procedural or substantive grounds because policies, laws, and programs cannot be in contradiction with the Constitution. Devenish remarks that the "Constitutional Court must therefore be perceived as part of the democratic process" (2000, 12).

The Court itself does not initiate legal action: it is up to people to do that. What it does do is provide a broad avenue through which people and organizations can challenge government. Moreover, a relatively expansive definition of *locus standi*[4] enables class actions for the benefit of those who do not have easy access to the justice system. Many groups have indeed taken such actions. Judgements in cases involving social and economic rights indicate the "official" meaning given to these rights, as well as the limitations of legal recourse.

In the words of the Grootboom judgement, the question for the courts is "how to enforce [social and economic rights] in a given case" (Grootboom, para. 20, cited by Budlender 2001, 32). The relevant international law—which must be considered in interpreting the rights—is the ICESCR, and the Constitutional Court has paid attention to the authoritative interpretation of this Covenant contained in the General Comments of the UN Committee on Economic, Social and Cultural Rights. According to the General Comment, each right imposes a "minimum core obligation" on the state, and therefore provides for a minimum entitlement for people. If the state claims it does not have "available resources" to fulfill this minimum core, "it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations" (General Comment 3, para. 10, cited by Budlender 2001, 28).

On this basis, it would appear that even a government's overall budgetary allocations might be challenged.

The Constitutional Court has not used this concept on the grounds that it has not had adequate information to define a minimum core obligation. It has preferred the concept of "reasonableness" when called on to judge the policies and measures government has taken to realize the right. In the Treatment Action Campaign judgment, it indicated that, where a minimum core obligation is defined, it will be used as a measure of the reasonableness of government action taken to realize the right, rather than as an entitlement that people can demand immediately.[5] This approach, according to the Court, permits sensitivity to the context. The Court's reading of context, however, appears to be determined by the scale of the backlog to realizing social and economic rights and the presumed limits to state resources. This has two effects: first, the poor are compared only with the poor, and second, the Court tends to endorse government's representation of context.

How, then, will "reasonableness" be judged? In the Grootboom judgment, the Court found that the state could not evict the people living in the Wallacedene shack settlement without providing alternative accommodation. It argued that:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. (Grootboom, para. 41, cited by Budlender 2001, 21)

This indicates what the Court sees as the proper boundary between the authority of government and the authority of the Court. It will not enter the policy arena by deciding what will be the most appropriate measure for realizing the right. It will only decide if the actual measures adopted by government are reasonably calculated to realize the right over time. Nevertheless, the Grootboom judgment affirmed that reasonableness must also take account of the immediate needs of disadvantaged people whose rights are most at risk:

> It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realization of the right.…If the measures, though statistically successful, fail to

> respond to the needs of those most desperate, they may not pass the test. (Grootboom, para. 44, cited by Budlender 2001, 22)

It argued that, because of the time scales involved in the "progressive realisation" of the right, "the desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing program" (Grootboom, para. 65, cited by Budlender 2001, 23). It concluded that medium- and long-term planning must be supplemented by budgeted short-term plans to fulfill immediate needs and manage crises, so as to "ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately" (Grootboom, para. 68, cited by Budlender 2001, 24). The Court thus insisted that the rights of "the desperate" could not be deferred forever. Nevertheless, "relief" falls somewhat short of the realization of rights.

The decision that policies and measures must be judged on their own terms appears to exclude any challenge to the allocation of resources between budget lines. Thus, it may be argued that a particular policy or program is under-resourced and there cannot be any reasonable expectation that implementation will enable the progressive realization of the right in question. In contrast to what is implied by the General Comment, it would seem more difficult to argue that government's overall budget priorities are unconstitutional—for example, that housing is under-funded because defense is over-funded or because corporate tax has been reduced. Similarly, a legal challenge to government's overall developmental approach, on the basis, for example, that neoliberal capitalism is incompatible with the realization of rights, would appear to be out of court. Grootboom has been cited around the world as a landmark judgment, but Irene Grootboom, in whose name the case was taken to court, realized no benefit. Eight years on, she died in penury still living in a shack.

More recent judgments demonstrate the severity of the limits on social and economic rights and show the Grootboom precedent as more timid than boldly "purposive." In the Phiri water case, described briefly in Chapter 10 in this volume, the Constitutional Court specifically rejected arguments for a "minimum core" in respect of the right to water.

In another case, residents of the Joe Slovo settlement appealed their eviction by the housing authorities. According to the authorities, the

land was needed for Cape Town's N2 Gateway housing project, the people were to be temporarily housed in Delft, a remote and isolated location, and some would return to the new apartments when the project was complete. The Constitutional Court sanctioned the eviction, but required "meaningful engagement" with the residents, that alternative accommodation should meet minimum standards, and that 70 percent of the new houses should be allocated to Joe Slovo residents. This, according to Kate Tissington of the Centre for Applied Legal Studies, was merely a palliative. At best, only 1050 of the 3000 Joe Slovo households would eventually get the new housing. Meanwhile, the Delft sites were already full, the housing mostly consisted of "government shacks," and the supposedly temporary settlements were turning into permanent camps, which were less about housing than holding the poor. Tissington concluded that the judgment was "technical, cowardly and naïve" (2009).

A third judgment appears more hopeful. AbM contested the constitutionality of the Eradication of Slums Act passed by the KwaZulu-Natal provincial legislature. The Constitutional Court agreed with AbM that this law allowed, and indeed required, arbitrary evictions without recourse to the courts. The judgment thus rests on the firmer legal ground of respecting and protecting rights and adds nothing to the state's obligation to fulfill the right to housing. AbM's use of legal action was thus essentially defensive.

Ironically, this judgement was given in the week following an assault on Kennedy Road, the shack settlement in Durban where Abahlali was born. In September 2009, some forty men armed with an assortment of weapons demolished and looted a number of houses, specifically targeting those of the Abahlali leadership. Those targeted as well as other witnesses believe that the attacks were instigated by local ANC politicians. Thousands of people fled the settlement, while a local ANC councilor claimed that "harmony" had been restored. Abahlali president S'bu Zikode, whose own home was destroyed, responded: "For the ANC harmony means their power and our silence. For us our silence means evictions, shack fires, children dying of diarrhea and the organized contempt that we face day after day.…Our crime is a simple one. We are guilty of giving the poor the courage to organize the poor" (Zikode 2009). This, it seems, challenges the ANC's possession of the poor as a political asset—not just for their votes, but for the claim to represent the interests of the poor.

The Property Right

In its broad sense, property is "an institution which creates and maintains certain relations between people" (Macpherson 1978, 1). Property is central to the way resources are distributed and used. It concerns rights to resources of production—that is, land (or natural resources in general), capital, and labor—and of consumption—that is, rights related to social reproduction such as food, shelter, and education. Whereas the Environment right explicitly mandates "ecologically sustainable development," I argue that the Property right implicitly mandates a capitalist form of development that reproduces environmental injustice.

The inclusion of a Property right in the Constitution was itself a controversial issue in the political negotiations that led to the first democratic election (Constitution 1996, sec. 25). Land activists in particular saw it as maintaining the existing racist distribution of land rights and so as inhibiting land reform. Property, however, is not only about land or even about things which can be possessed. The meaning of property in the Bill of Rights covers "those resources that are generally taken to constitute a person's wealth" (De Waal et al. 2001, 415). It should be recalled that a "person" here includes "juristic persons" such as corporations.

In legal terms, property is not a thing that is possessed. It refers to rights in terms of things and anything else that can be converted to money or that provides an income. It may include, for example, rights to income from a pension or a wage, from shares in a company, from the sale of products, or from another person's use of an idea or an invention (intellectual property). To be a right, a claim to property must be enforceable. In modern property regimes, it is the state that both creates and enforces property rights. For this reason, "property is a *political* relation between persons" (Macpherson 1978, 4; original emphasis).

In real terms, there is a big difference between a wage or a pension that hardly covers people's daily needs and property that accumulates. Property becomes wealth when it produces enough income to create a surplus that is re-invested to create yet more wealth. It is this accumulated wealth that becomes capital and it is, finally, based on people's labor.

To make people work, two things are necessary. First, they cannot access enough resources to survive unless they work for persons with accumulated property. Second, wages must be low enough to ensure that most workers are not able to accumulate wealth. In colonial South

Africa, the first condition was created by dispossessing people of land, and it was reinforced by imposing taxes to ensure that they needed money. The second condition is now created automatically because so many people have no property of their own and are unemployed. The political relation maintained by the state is thus between persons with accumulated property and those without property. In this context, the demand for jobs—which is really a demand for access to the regime of property—becomes the most compelling political demand.

The inclusion of the Property right therefore has wider significance than the issue of land reform. It effectively sanctions the inherited distribution of wealth in its totality. It is, however, qualified by the right of the state to expropriate property in the public interest, subject to compensation (sec. 25 (2)), and "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (Constitution 1996, sec. 25 (4) a). Land reform is intended to "redress the results of past racial discrimination," and specifically to provide restitution for those dispossessed following the passing of the Native Land Act in 1913 (ibid., sec. 25 (8)). These clauses are qualified in the manner of the economic and social rights discussed above: the state's obligation to deliver on land reform is subject to "its available resources" (ibid., sec. 25 (5)).

While the right allows for the expropriation of all kinds of property, it seems significant that it singles out land *and* natural resources for redistribution. This perhaps indicates a sense that colonialism and apartheid deprived people of a birthright not only in terms of land, but in all natural resources (including, significantly, minerals). But because expropriation must be compensated—though not necessarily at market value—comprehensive land reform would be very expensive. It is also not a priority of the state. Nineteen years after the first democratic election, and in the centenary year of the passing of the Native Land Act, less than 6 percent of land has in fact been redistributed.

Meanwhile, the broad meaning of property is changing. In the age of globalization, it is significant that property is increasingly created not by individual nation states, but by the international system of states. Property rights are now being written, amended, and contested in a variety of international institutions. The World Trade Organization (WTO) is particularly significant because it not only provides a forum for negotiating new forms of property rights, but also a formal mechanism for enforcing these rights. Trade Related Aspects of Intellectual

Property Rights (TRIPS), for example, were given force with the establishment of the WTO in 1995. Globalized production means that any particular product may be put together from components made all over the world. Physical production is frequently located in Southern countries where it is cheaper. Intellectual property gives dominant corporations legal rights that enable them to monopolize high value activities, control production even if they do not themselves make anything, and decide who gets what profits along the production chain. Thus, even as the Constitution re-writes the rights of South Africans, property rights are being re-written on a global scale and with effects that conflict with the stated intentions of the Constitution.

The Justification of Property

Legal theorists agree that property must be "justified": any particular property relation remains legitimate only to the extent that it is socially sanctioned:

> property is a right in the sense that it is an enforceable claim…[but] while its enforceability is what makes it a *legal* right, the enforceability itself depends on society's belief that it is a *moral* right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. (Macpherson 1978, 11; original emphasis)

Property is a profoundly ambiguous concept. On the one hand, individual property in consumable goods is necessary to survival—a person who has no right to food will starve. Whether property is formally guaranteed by law or informally guaranteed by custom, some form of property is necessary in any human society. Thus, "the ultimate justification of any institution of property…has always been the individual right to life…a right to the flow of consumable things needed to maintain a [commodious] life" (Macpherson 1978, 12). In this sense, property is the original and fundamental social and economic right, and the rights of access to food and housing and so on are simply details of the property right.

On the other hand, in the last few centuries since the rise of modern capitalism underpinned by colonial and other forms of dispossession, this defence of property in general has easily been ignored. In the evolution and normalization of the modern capitalist regime, what has emerged is

a hegemonic representation and defence of a particular regime of property. Overall, the justification of the modern capitalist regime of property does this in two ways. First, it suggests that an individual property right is the same thing as a private property right. The essence of the modern sense of private property, however, is that people can be excluded. The means of exclusion is "the market"—if an individual has no money, s/he has no right to food.

Second, the difference between property in "consumable things" and accumulated property, which allows control of productive resources, is conveniently forgotten. In particular, it is forgotten that the creation of wealth within this regime of property is inseparable from the creation of poverty. The productivity of wealth is foundational to the modern justification of property. Throughout the colonial period, it was used to justify the dispossession of indigenous people. Their occupation of the land gave them no right of property because they did not use it productively for profit. As Ellen Meiksins Wood summarizes the view of seventeenth-century English philosopher John Locke: "America was the model state of nature, in which all land was available for appropriation, because, although it was certainly inhabited and even sometimes cultivated, there was no proper commerce, hence no 'improvement', no productive and profitable use of land, and therefore no real property" (2003, 96). Improvement here meant much the same as development means today.

As poverty deepens, so it is proclaimed ever more loudly that the modern regime of property is the best hope for the poor. That is, it is justified in the name of the poor. What it has to offer, and what it always promises, is jobs. Yet what it cannot offer is full employment—either nationally or globally. Full employment would create a "sellers' market" in labor, which would drive up inflation and threaten profits. Ultimately, it would prevent the accumulation of property necessary to renew the system. Unemployment is also necessary to create a labor reserve to respond to changing demands for labor.

It then becomes the function of the state to maintain "the reserve army of workers." At the same time, it must ensure that "escape routes are closed" so that people cannot survive outside of capitalism and are compelled "to sell their labour power when they are needed by capital" (Meiksins Wood 2003, 18). The political demand for jobs clearly indicates that the escape routes are indeed closed. It is also, ironically, a demand that legitimates the very institution of property that requires a reserve of unemployed poverty. Yet the scale of dispossession, nationally

and globally, is now such that millions of people scarcely make it even into the reserve army. In this context, the inclusion of social and economic rights signals the failure of the institution of property to ensure "the flow of consumable things needed to maintain life" (Macpherson 1978, 12).

In a further twist, the national economy as a whole also competes with other national economies. Individual countries are defined as much by their position in the international state system as by their internal dynamics. The "developed" countries dominate this system and come closest to full employment and the satisfaction of the needs of their populations. They can rely on a smaller reserve of poverty at home, as long as there is a larger reserve in "developing" countries. In countries which aspire to become "developed," the state must not only maintain the reserve army of labor, but must seek to empower the population as a whole, to enlarge its productive potential and promote its vitality so as to enable the country to compete in this international order. In this context, the rights to life, to health, to education, etc.—rights that are in themselves desirable—must also be seen as an effect of requirements of states in the diverse periphery of the international state system.

Productivity is thus integral to the modern state. Just as it justifies private property, it lends legitimacy to the state. The economic management of the international system of nation states rests on the unquestioned assumption that GDP growth is a self-evident good. GDP itself is measured by the sum of "value added" from all economic activity and represents the productivity of the economy. Growing productivity creates wealth and this, finally, is what development is about. Even if some benefit more than others, it is held to be in everyone's best interest. So, since the early 1990s, there has been something of a consensus that the South African economy needs to grow at 6 percent a year to create the jobs that will "lift the poor out of poverty." At the enterprise level, "value added" works in the same way—it is the measure of productivity and the basis of profit. It is also the basis of taxation and hence of the government's own income, ensuring that massive resources are dedicated to measuring it.

The representation of GDP as a technical tool of economic management conceals that it is, at its base, about relations of power. Value creation confers rights to labor as well as natural resources, and, in the last three decades, has been vigorously used to justify the corporatization or privatization of energy, water, and other public services. What gets left

out is the value subtracted: the people dispossessed, the land spoiled, and much of the cost of reproducing labor.

Dispossessing people of their land is not a relic of the history of colonialism and apartheid. The priority of productive property is evident in the Mineral and Petroleum Resources Development Act of 2002, which gives precedence to mining rights and discriminates against communal land rights. During the booming 2000s, the lives and livelihoods of thousands of rural people in Limpopo were ruined by the mining activities of the world's largest platinum producer, Anglo Platinum, according to a report by ActionAid (2008). People have lost their land, which is physically removed through open cast mining or covered with mining waste. They have lost access to drinking water, as available water is now polluted and unfit for human consumption. They have lost their livelihoods and have not received adequate compensation. Their ancestral graves have been removed. They have been excluded from decisions being made about their own future, as the mining giant established front organizations to accept relocation on their behalf. Finally, their challenges to the Anglo Platinum land grab have been met with police brutality and corporate legal action.

The Environment Right

The environment section in the Bill of Rights reads:

> 24. Everyone has the right
>
> a. to an environment that is not harmful to their health or well-being; and
>
> b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
>
> i. prevent pollution and ecological degradation;
>
> ii. promote conservation; and
>
> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This discussion of the Environmental right opens by looking at the way it is supported by several other rights. It briefly outlines particular aspects of the history of environmental injustice and shows how these rights promise to reverse the situation. It then goes on to look at the Environmental right itself. As with the Property right, this right touches

on the way in which resources are distributed, used, and controlled, and therefore is concerned with all dimensions of development. Government policies and actions on development thus imply a practical interpretation of the right, whether or not this interpretation is intended or even thought of. I argue that this interpretation does not measure up to what the right actually says. Rather, a thorough reading of the text suggests an interpretation founded on environmental justice.

Equality and Political Power

Macpherson (1978) remarks that social concerns about the environment have created substantial pressure for regulating, and thus limiting, the use of private property. Up until the 1990s, in South Africa, corporate property included a virtually unlimited right to pollute land, air, fresh water, and the oceans. Laws such as the Atmospheric Pollution Prevention Act of 1965 were not only limited and increasingly dated, but were implemented in a manner which secured the right to pollute. Since air and water carried pollution into neighboring areas, the unlimited right in the use of corporate property was exercised even at the expense of the private property rights of neighbors. Steel maker Iscor, for example, was indifferent to the impacts of groundwater pollution on neighboring farmers in Steel Valley. After fifty years of unmitigated pollution, the whole area was finally abandoned in the 2000s. Farmers secured some compensation through an out-of-court settlement, but farmworkers got nothing. The Iscor case was not exceptional. South African industry, big and small, was scarcely troubled by the concept of environmental management until the 1990s.

The ability to defend against such infringements has generally rested on the political power of the neighbors. Apartheid excluded black people from political power and actively prevented them from defending their rights. It also subordinated black people to the needs of economic development while excluding them from the benefits. Planning decisions founded on this basis had the effect of ensuring that dirty industries are mostly located in poor and black communities. At the same time, the provision of services to these communities—sanitation, water, energy, waste management, etc.—was, and continues to be, neglected. The effect is that the poor bear the brunt of environmental degradation, while the rich reap the major benefits of dirty development. This is the foundation of environmental injustice and environmental racism.

The right to Equality prohibits direct and indirect "unfair" discrimination against any particular section of the population by the state or by other persons (Constitution 1996, sec. 9 (3), sec. 9 (4)). The unequal distribution of environmental harm should therefore be seen as unconstitutional.[6] The Constitution also has the purpose of preventing political exclusion. This is expressed through the rights to Freedom of Expression and Freedom of Association, the right of Assembly, demonstration, picket and petition, and the Political rights concerned with the election of political representatives (Constitution 1996, sec. 16, sec. 18, sec. 17, sec. 19). Further, the Equality right requires the "full and equal enjoyment" of these rights (as well as all other rights) (ibid., sec. 9 (2)).

Just Administration and Information

Even where concentrated industrial pollution affected white people—as at Table View in Cape Town or the Bluff in Durban—industries were protected both by the administrative action of the state and by laws requiring secrecy. Large industries had to have permits regulating their air emissions, liquid effluent, and solid waste. However, officials followed industry's own views of what measures to prevent or reduce pollution were affordable or practical. Permits gave generous permission to pollute and were confidential, and no one was ever prosecuted for breaking their permit conditions. Most large plants were also subject to the Key Points Act, which, in the name of national security, prohibited publication of all information about the operation of plants including information about pollution. Management thus operated behind a wall of secrecy free from any effective scrutiny.

In the post-apartheid constitution, two rights guard against the collusion of state and industry. The right to Just Administrative Action requires that the state administration has to be fair, open, and accountable (ibid., sec. 33). Officials have to be ready to justify their decisions in writing if they are asked. This right is further supported by Chapter 10 of the Constitution governing public administration. The right of Access to Information has both vertical and horizontal application (ibid., sec. 32). People have the right to "any information held by the state" and to information held by others if it "is required for the exercise or protection of any rights." Most information about the operation of a plant is relevant to the environmental right so communities can demand such information from the state or directly from management.

Struggles over information have been a critical aspect of local struggles for environmental justice but the openness of the mid-1990s did not last. The 1998 National Environmental Management Act (NEMA) guaranteed rights of access to environmental information. In 2003, the relevant clauses were removed and access was made subject to the more restrictive Promotion of Access to Information Act (PAIA). The Department of Agriculture (DoA) was never much touched by the more open atmosphere of the 1990s, and blankly refused to provide the information on GM crop planting requested by the environmental organization Biowatch. In 2000, Biowatch went to court to get it. Five years later, the court affirmed the organization's right to the information in terms of PAIA, but held that it should pay the legal costs incurred by "gene giant" Monsanto because the corporation had been "forced" to join the case. The costs would have crippled Biowatch, as was Monsanto's intention. Biowatch appealed to the Constitutional Court, which heard the case in 2009. It found that the decision on costs would deter public interest litigation and so overturned the High Court order.

Meanwhile, south Durban communities were confronted by the revival of the Key Points Act, invoked by the Ministry of Defence in a letter to local industries that said that environmental information should be treated as "extremely sensitive." Commenting on this and other incidents, the environmental justice organization groundWork observed that "industry and government [are] working hand in hand to ensure that environmental information is kept away from the very people that are living on the fence-line of polluting industrial development" (2003). The introduction of the "Secrecy Bill" in 2010 confirmed the drift toward authoritarianism. The South Durban Community Environmental Alliance (SDCEA) has taken a prominent role in the Right to Know campaign mobilizing against the bill, both to protect its freedom to organize and its access to information.

Legal Standing

From about the beginning of the twentieth century, no South Africans could mount a legal challenge to environmental abuse unless s/he could show a direct interest: "some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general."[7] Any legal defense was thus bound to be based on the NIMBY (not in my backyard) principle. Yet, as Robert

Bullard showed in the US, it is easier for the wealthy to take NIMBY actions, and "private industry and public officials responded with the PIBBY principle – Place In Blacks' Backyard" (cited in Alston 1993, 188). Restricted legal standing is therefore likely to reinforce environmental injustice.

The section on Enforcement of Rights reverses this. In any matter concerning an infringement of the rights in the Bill of Rights, it gives legal standing to anyone acting for a group or class of persons; for an association; or in the public interest (Constitution 1996, sec. 38). This underscores that people have a common interest in their rights, and, in relation to the environmental right, it enables solidarity and the reframing of the NIMBY principle to one of "not in *anyone's* backyard."

The First Part of the Environmental Right

The first clause of the environmental right is concerned with the impact of environmental harm on people. It is striking in two respects.

First, it is not subject to any qualification either to the substance of the right or to the state's obligation. People's right "to an environment that is not harmful to their health or well-being" is therefore subject only to the general limitation in Section 36. Unlike most other social and economic rights, its realization is not conditional on the availability of state resources, nor is it subject to delay ("progressive realization"). The state is therefore bound to respect, protect, promote, and fulfill the right immediately. This clause of the right also has "horizontal application."[8] Thus, while the state has an obligation to protect people against infringements of the right by third parties—such as polluting industries—those parties themselves are bound by the right and people can make direct claims against them for any infringement.

It should be emphasized that the right is not to "a healthy environment." This phrasing would be vague in comparison to "not harmful." It would also make the object of the right the health of the environment rather than the environmental impact on people's health.

Noting the negative phrasing of the right, De Waal et al. conclude that "it enshrines a certain minimum standard and does not grant a positive right of indeterminate extent" (2001, 405). This interpretation seems limited. There is a danger that "not harmful" will be defined by the minimum standard set by government rather than the actual impact on people's health. The right can then come to mean "harmful within

acceptable limits." The present use of such tools of environmental management as risk assessments and environmental impact assessments (EIAs) suggest that this is indeed government's interpretation of the right.

In contrast, an environmental justice interpretation of the right must hold that "not harmful" means exactly that. It cannot mean "harmful within acceptable limits" and leave it to government to decide what is acceptable. Where "a certain minimum standard" is used, it can only be as a tool enabling the state to "respect and protect" the right. Further, government would have to be able to justify the standard by showing that it is compatible with the ordinary meaning of "not harmful."

Beyond this, it should be recalled that all Constitutional rights have both negative and positive aspects. The state is obliged not merely to "respect and protect," but also to "promote and fulfil" all rights (Constitution 1996, sec. 7(2)). To promote the right, government must ensure that people are aware of the right and have full information about actual or potential environmental harm so that they can make their own assessment. If government itself does not have this information, it should enable people to access it themselves. Finally, fulfilling the right must mean that, taken together, government actions result in the realization of the right.

Second, the addition of "well-being" to health indicates that the right must be read generously. The concept, however, is undefined and legal comment seems largely speculative. De Waal et al. argue that it admits "important concerns of environmental law such as the conservation of fauna and flora or the maintenance of bio-diversity" as an aspect of the right. They suggest it does so by including "spiritual or psychological aspects such as the individual's need to commune with nature" (2001, 406). Bio-diversity is certainly important, but this interpretation seems oddly reminiscent of the pre-democratic idea that the environment is only about nature conservation, an idea that led to the perception that the environment "is a white, middle-class issue…not relevant to…social justice" (Whyte 1995, xviii).

Glazewski remarks that well-being "provides environmentalists with a potentially powerful weapon" (2002, 175). He argues that it points beyond the "instrumental value" of a clean environment—such as good health or increased tourism revenues—and indicates an "intrinsic" value that flows from "a sense of environmental integrity." It also implies a "sense of stewardship": that people must look after the environment for

the benefit of future generations (ibid., 176). This interpretation implies that "natural and juristic persons" share the responsibilities given to the state in the second part of the right.

For environmental justice, the association of health and well-being implies a certain intimacy of people with their environments in the places where they live, work, and play. Well-being must therefore refer to people's domestic, neighborhood, work, and recreational environments—and recreation must include but cannot be reduced to communing with nature. The right thus cuts across both the system of production and of social reproduction. Within the Bill of Rights, it relates to "fair labor practices," the distribution and use of property, and all other economic and social rights (Constitution 1996, sec. 23 (1)).

Well-being thus suggests that people's living should be "commodious." For example, in terms of land reform it indicates that tinkering at the edges of the apartheid division of land is not adequate. In terms of housing, it indicates that RDP houses are inadequate and, critically, that undue service costs should not be imposed on the poor through the neglect of the basic tenets of environmental design or through unaffordable charges. The SAHRC points out that harm to health and well-being is also produced "when communities have no toilets, no water and no sanitation" (SAHRC n.d., 17). Other services such as energy and waste management should certainly be added to the list.

It is from this understanding of people situated in particular environments that a broader "sense of environmental integrity" can flow. More than this, it is from this perspective that a sense of social integrity can flow. It should be emphasized that the right is not just about the poor—it is about societal relations as a whole. It may be argued that the middle classes already enjoy commodious living—in excess. Yet that living is surrounded by walls and security systems, which are the costs of economic privilege. Excessive consumption is often a compensation for insecurity, as the term "shopping therapy" suggests. But it is also an expression of the power to consume a disproportionate share of resources at the cost of both the poor and the environment.

Excessive consumption also puts in question how the consumables are produced—particularly the energy and water used and the waste produced. Since the environmental consequences of production cannot finally be confined to the poor, insecurity becomes pervasive: even the wealthy no longer trust the food they eat or the air they breathe. If middle-class living provides a model to which the poor aspire, the poor

provide the middle classes with an image of what may become of them if they loosen their grip on resources. Development that yields these two options—barricaded consumer or economic outcast—cannot produce well-being.

This first part of the right must also be considered in the interpretation of other chapters of the Constitution. Specifically, the National Assembly, the National Council of Provinces, and the Provincial Legislatures must have regard for "representative and participatory democracy, accountability, transparency and public involvement" (Constitution 1996, sec. 57, sec. 70, sec. 116). In Chapter 7, the objects of local government are concerned with sustainable services, a healthy environment, social and economic development, and democratic, accountable, and participatory government (ibid., sec. 152). And in Chapter 10, the basic values and principles governing public administration likewise speak of development and of fairness, accountability, transparency, and participation in policy making (ibid., sec. 195). It is participation that we want to emphasize here. It is not in itself written into the Bill of Rights, but is required by the Constitution as a whole. If, as Glazewski (2002) argues, "well-being" includes a sense of stewardship, then genuine participation in political and economic decision-making is an evident necessity. People cannot care for their environments if decisions on the use or abuse of resources, and even on their own future, are made over their heads.

The Second Part of the Environmental Right

Whereas the first part of the right is concerned with the impacts of environmental harm on people, the second is concerned with the environment itself and the nature of development. The right "to have the environment protected" is nevertheless vested in people. It thus provides further justification for the expansion of legal standing discussed above. It is also to benefit both "present and future generations." De Waal et al. assert that this "constitutionalizes the notion of intergenerational equity" (2001, 406). It thus refers to the concept of sustainable development, but does so in a way that gives equal weight to present and future generations.[9] In an environmental justice reading, this does not imply a trade-off between present and future needs. Unsustainable development produces both poverty and environmental degradation in the present. Intergenerational equity can only be achieved if present development is

productive of growing social and economic equality together with environmental integrity. The second part of the right therefore resonates strongly with the first, and further emphasizes that social development is integral to the Environmental right.

The second clause is indeed subject to a qualifying phrase: "through reasonable legislative and other measures." It thus imposes a positive obligation on the state in the manner of a social and economic right, but, unlike the social and economic rights discussed above, it is not qualified by "progressive realization" or the availability of the state's resources. The phrase merely indicates that this is a "vertical" right, and "is unlikely to have a direct horizontal application" (De Waal et al. 2001, 405).

The additional sub-clauses stipulate the purposes of protecting the environment for the benefit of present and future generations. Taken together, they define what the state's obligations to "respect, protect, promote, and fulfill" this right should mean.

First, the state must "prevent pollution and ecological degradation"—that is, it must respect and protect the right. This must clearly be read in conjunction with the first part of the right in that pollution and degradation inevitably harm people's health and well-being.

The second sub-clause obliges the state "to promote conservation." It should be emphasized that conservation cannot be read to refer only to proclaimed conservation parks. It must also refer to and reinforce the meaning of "ecologically sustainable" in sub-clause iii. Conservation must therefore relate not only to the bio-diversity of indigenous species, but also of agricultural species; not only to bio-diversity, but also to the conservation of land and water; and not only to natural resources, but also to produced resources such as energy or packaging. Conservation thus applies to all forms of production, marketing, and consumption and indicates an approach that minimizes the production of waste and pollution, rather than one that only treats waste at the end of the pipeline.

The third sub-clause obliges the state to "secure ecologically sustainable development and use of natural resources." This is the means of fulfilling the right. It is important to pay attention to the implications of time in this phrasing. "Secure" is given in the present tense indicating that the state must act without delay. "Development," however, is a human process that unfolds over time and is forever open to the future—there is no end to development. What the state must do now, then, is ensure a particular approach to development: one that is "ecologically sustainable."

Since development is a human process, this does not imply that ecological systems should be as if untouched by human hands. Rather, it indicates that development concerns a relationship between the way people sustain themselves and the ecological functioning of the environment. At a minimum, this means that development should allow "renewable resources to re-accrue," but it goes much further than this (De Waal et al. 2001, 406). Human activity is an increasingly important part of the overall functioning (or failure) of ecological systems. Development, as it has been conventionally conceived, not only destroys or depletes renewable resources, but also produces huge volumes of wastes and so contaminates ecological systems to the point where they no longer function properly. This is the case, for example, with climate change. If this right is to be realized, it is no longer enough to think in terms of a "balance" or trade-off between environment and development. Rather, development must be reconceived such that human activities positively enhance the regenerative capacities of the environment.

The interpretation of the final part of this sub-clause is then vital: "while promoting justifiable economic and social development." And the critical word here is "while"—does it mean "subject to" or does it mean "at the same time as"?

In the first interpretation, ecologically sustainable development is subordinate to economic and social development and there is no necessary logic linking these orders of development. Economic or social developments may then be "justifiable" according to their own internal logics and without reference to ecologically sustainable development. The environment does not therefore need to be integrated in the original conception of economic or social policies, programs, planning, or projects. In practical terms, economic development is justified only at the project level: major developments are required to undergo Environmental Impact Assessments (EIAs) at the end of the planning pipeline *after* a project has been proposed. The meaning of "justifiable" is thus embodied in the performance of an EIA. Ecologically sustainable development is regarded as having been secured on the basis of whatever mitigation of environmental impacts is required by the EIA.

There are several reasons why this interpretation is unsatisfactory. First, had the Constitution meant "subject to," it would have said it. Second, this interpretation places a major qualification on government's obligation to protect the environment for the benefit of present and future generations. Had this been intended, it would have been included

in the initial statement of the right rather than in a sub-clause. Third, this interpretation contradicts the first part of the right to "an environment not harmful to [people's] health or well-being." The context shows that subsection (b) is intended to give effect to that right, not to limit it.[10] Fourth, this is the only right that specifically obliges government to promote economic and social development. An interpretation that separates this obligation from its context seems particularly willful. Moreover, the social dimension is already included in the initial statement that the right is to benefit present and future generations.

The Constitution surely requires a particular kind of economic and social development: it must be ecologically sustainable development. Further, this meaning must apply when the concept of development is used elsewhere in the Constitution—specifically under the "objects of local government," the "developmental duties of municipalities," and the "basic values and principles governing public administration" (Constitution 1996, sec. 152, sec. 153, sec. 195).

This conclusion fits with the second and ordinary meaning of the word "while." In this interpretation, ecological sustainability must be taken as the ground on which all state policies and programs concerned with economic and social development are based—starting with macro-economic policy. These policies cannot therefore be "justifiable" without specific reference to ecological sustainability. This means, at the very least, that people can oblige government to defend its economic and social policies on environmental grounds. A stronger reading of the right would create the basis for arguing that the Constitution requires sustainable development based on environmental, social, and economic justice.

Conclusion

Ahead of Human Rights Day in 2003, the Landless People's Movement (LPM), Anti-Eviction Campaign (AEC), Anti-Privatisation Forum (APF), Concerned Citizens Forum (CCF), and the Land Access Movement of South Africa (Lamosa) initiated a "people rights campaign." Announcing the campaign, they pointed to the limits of the "human rights" conferred by the state:

> South Africa's Constitution has been celebrated as "one of the world's most progressive" for its inclusion of wide-ranging "human rights" protections, which included socio-economic rights provisions. Yet real "human

> rights" are still denied to the poor and landless majority, and even the most basic rights are being progressively eroded through neoliberal programs such as market-led land reform, privatization and cost-recovery. We demand People's Rights Now!

Human rights day is now routinely met with protests from various groups pointing to the gulf between what the Bill of Rights seems to promise and what people actually experience. It is not merely that the state has not fulfilled social and economic rights, which, in any case, are formulated precisely because they will not be met—as an alibi for the failure of the rule of property to provide a commodious life for all. In many cases, it has neither respected nor protected even "first generation" rights.

"People's rights" implies rights brought into being by the people themselves. Nevertheless, people routinely invoke Constitutional rights in support of their struggles for justice. In doing so, they claim a broader legitimacy for their struggles. At the same time, they are actively interpreting rights and so claiming them as people's rights. In the campaign statement, "demand" is effectively addressed to government. This may be taken as practical recognition of where power lies. It announces a confrontation that cannot be avoided if people are to take power, not merely to realize rights, but to define them too.

Notes

1. State v. Mhlungu and Others (CCT25/94) [1995] ZACC 4, quoted in De Waal et al. (2001, 135).
2. Government of the Republic of South Africa and others v. Grootboom and others (CCT11/00) [2000] ZACC 19.
3. Minister of Health and others v. Treatment Action Campaign and others (No 2) [2002] (5) SA 721 (CC).
4. A person who has *locus standi*, or legal standing, has the right to appear before a court on a particular matter.
5. See South African Human Rights Commission's (SAHRC) *Inquiry into Human Rights in Farming Communities*, 2003, 12.
6. The Equality clause prohibits "unfair" discrimination. It is possible that the courts would find that the unequal distribution of pollution is discrimination, but that this discrimination is not "unfair." This would be a scandalous finding, and, in our view, difficult to reconcile with the environment right.
7. Von Moltke v. Costa Aerosa (Pty) Ltd [1975] (1) SA 255, cited in Glazewski (2002, 186).

8. This has not been tested in court, but legal comment agrees that the right will have horizontal application: see De Waal et al. (2001, 405) and Glazewski (2002, 177).
9. The established international definition of sustainable development was given in the 1987 report of the World Commission on Environment and Development (the Brundtland Report): "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."
10. Thanks to Jon White for this observation.

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CHAPTER 4

Transitional Justice, Gender-Based Violence, and Women's Rights

Evelyn Fanneron, Eunice N. Sahle and Kari Dahlgren

Although gender-based violence (GBV) in peace and wartime has been a central concern in feminist thought and practice, it was not taken seriously in national and international human rights law until recently. In recent decades, two primary developments have yielded significant progress toward addressing wartime GBV: the advancement of transitional justice mechanisms under national and international legal systems; and processes of institutionalizing women's rights in national, regional and international normative instruments, and public policy. Although these developments began as separate strains in human rights struggles, they have had a significant impact on the legal framework through which GBV can be—and has been—addressed in post-conflict reconstruction efforts.

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Overall, it has been through the gradual development of an international human rights framework, such as the Universal Declaration of Human Rights (UDHR), and further expansion of gendered rights that GBV during conflict has gained significant attention from human rights and legal standpoints. The UDHR was adopted in 1948 as a foundational component of the current international human rights regime from both a theoretical and legal standpoint. With its outlining of universal rights, the UDHR has offered liberatory possibilities in ongoing struggles against political, economic and socio-cultural forms of dispossession. It has done so by articulating rights such as the "right to life, liberty and security of person" and the right to freedom from "torture or … cruel, inhuman or degrading treatment or punishment" (UDHR 1948). Nevertheless, the UDHR's universalistic articulation can overshadow the differentiated ways in which human rights are violated for different groups. For example, the UDHR uses gender-neutral language, which fails to address the specific rights violations faced by women. As such, feminist human rights scholars have called for the engendering of traditional human rights perspectives.[1] A starting point for a feminist human rights approach to the study of women's rights is "the recognition that each of us views societal concepts and institutions from a different lens depending on our consciousness and our place in society. Starting with female life experiences as the point from which to examine human rights, certain questions become important," for example, "Why have so many degrading life experiences of women not been understood as human rights issues?" (Bunch 1995, 11).

In an effort to address some of the UDHR's weaknesses, particularly as it concerns women's experiences, in 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (United Nations 1995). CEDAW was the first human rights instrument to specifically address women's rights (Panda 2003, 12). Since then, CEDAW became the "international standard against which the treatment of all women can be measured in all spheres of life—including educational, civil, political, economic, social, and cultural rights" (Tamale 2001, 98). CEDAW outlined broader forces that lead to all forms of discrimination against women, including culturally founded ones. In terms of the latter, Article 5 of CEDAW stipulates that "States Parties shall take all appropriate measures… to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and

customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (United Nations 1995).

Progressive as CEDAW was as a normative instrument focusing on women's human rights, in its original configuration it failed to specifically address GBV until 1992. During that year, the United Nations adopted several recommendations pertaining to GBV at its 11th Session. For example, its Recommendation 24(b) calls on "state parties" to "ensure that laws against family violence and abuse, rape, sexual assault and other GBV give adequate protection to all women, and respect their integrity and dignity."[2] Further, it states that "appropriate protective and support services should be provided for victims" and that "gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention."[3] Further, Recommendation 24(e) calls on states to "identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result" and to "report on the measures that they have undertaken to overcome violence and the effect of those measures."[4] Subsequently, with the adoption of the Optional Protocol to CEDAW in December 22, 2000, CEDAW created a mechanism for individual women and groups to make complaints to a United Nations committee after exhausting local avenues for readdress.[5]

Since its emergence, CEDAW has become an important instrument for women's movements in the struggle against GBV and other violations of women's rights. For example, it has enabled the justification of interference by the international community in various parts of the world in the name of protecting the violations of women's rights that are embedded in international human rights law. In the case of GBV, where violence against women has traditionally been considered a private matter—or in the case of war, an inevitable consequence—the universal understanding and institutionalized nature of the human rights embedded in CEDAW legitimize intervention to stop such violence.[6]

Although CEDAW and the international human rights regime have thus made strides in providing tools to take action in the advancement of women's rights, it is also important to problematize such a direct causal relationship between a discourse of rights and the empowerment of women. Legitimizing the international community's interference in the promotion of women's rights can be problematic on multiple levels. For one, such interference has the tendency to paint women, especially those

in the diverse global South, as helpless victims, dependent on the international community for their voice and political agency. A discourse that paints women as purely victims may help legitimize interference by the international community, but it does so within a patriarchal framework that can perpetuate the subjugation of the women it claims to empower (Harrington 2010, 196).

A similar criticism of international human rights discourse is that it legitimizes interference into the lives of women and men that may come from very different cultural and historical contexts. As Chapter 1 highlighted, the common debate around cultural relativism and human rights centers around the idea that, while human rights are considered universal, localized understandings of rights can vary considerably from such universals. Culture can be seen in many ways as conflicting with universalized understandings of human rights, especially when applied to GBV, as the term GBV depends on discrimination based on cultural understandings of "gender."

In terms of the cultural relativism debate, we suggest that the purported conflict between culture, human rights, and GBV depends on a simplistic approach to culture that tends to represent any culture "as homogeneous, consensual, and relatively static" (Merry 2009, 89). A nuanced and complex approach to culture as articulated by Abdullahi An'Naim[7] contends that, "culture changes through an adaptive process that is comparable to but different from that of evolution in the organic realm. In this way cultures adjust and adapt to the surrounding physical and geographic as well as social environments" (An'Naim 1990, 363). Such an approach to cultural dynamics takes seriously the fact that, both historically and in the contemporary era, "African cultures" change "in interaction with other cultures, including broader global trends" (An'Naim and Hammond 2002, 14).

In the case of GBV, a perspective that sets cultural norms as always opposed to international human rights ignores local struggles against such violence, especially in the context of conflict, where the violence is often so extreme and horrendous that a direct cultural excuse does not exist. Similarly, as further discussed below, the militarization of society involves the incorporation of military values, and thus the line between some "true" culture and military culture becomes blurred, thereby illustrating the dynamic and porous nature of culture (Enloe 2007). Nonetheless, it is a fact that GBV in conflict situations depends on the gender relations and power dynamics that exist in times of peace;

conflict-generated GBV can be an exacerbation of unequal gender relations and a manipulation of these existing relations in the new militarized context. However, it is important to note that, powerful as gender power dynamics are, they do not mean that local women and men have no agency to change them, as the adoption of parliamentary bills against GBV, reforms in inheritance laws, and other human rights informed frameworks in various parts of Africa from the 1990s onwards indicate.

Building on insights from feminist scholarship on human rights and transitional justice, this chapter examines how transition justice mechanisms (TJMs) have begun to address wartime sexual violence (WSV), drawing on examples from Rwanda and briefly on Sierra Leone. We aim to contribute to debates concerned with GBV in the context of conflict by exploring what we consider to be the core roots of WSV. Such an approach illuminates our understanding of some of the sources of WSV in Rwanda and Sierra Leone and other parts of the world. In addition, through the case studies, we aim to offer insights on contributions of specific TJMs and the gaps that characterize their efforts to address WSV as part of post-conflict reconstruction processes.

Foundations of Wartime Sexual Violence

Sexual violence undoubtedly occurs in conflict situations. We have seen this in history through the well-known examples of recent conflicts in Bosnia-Herzegovina, Sierra Leone, Rwanda, the Democratic Republic of the Congo, Guatemala, and Peru. We have also observed the sexual violence occurring in United States run detention facilities, such as Abu Ghraib. Sources of WSV are complex and shaped by a range of historical, spatial, socio-political and economic factors. Consequently, our objective here is not to offer a comprehensive examination of all factors that contribute to WSV. Rather, we aim to highlight some common roots of this socio-political phenomenon. Recognizing these broad insights is not only theoretically helpful, but can shed light on the motivations and underlying political, socio-cultural and economic structures that contribute to WSV, and as such that need to be recognized in the statutes governing the work of TJMs. Further, although this chapter focuses on WSV, we situate our analysis of such violence within the broader category of GBV. From our perspective, WSV is a gross violation of the human rights of women. Such a violation affects women's ability to realize their rights in other domains that include the political,

economic and socio-cultural. Overall, it affects their ability to realize their capabilities (Nussbaum 2005; Sahle 2017). Gender based violence that occurs within the context of armed conflict occurs in a wide variety of forms; it is not limited to rape and other forms of sexual torture. Therefore, from a feminist human rights perspective, TJMs need to address such violence in a multi-faceted manner in order to adequately address the copious and intertwined violations of women's human rights in the context of war. The discussion that follows highlights four factors that we contend tend to contribute to WSV: gendered identities; militarization; legitimacy crises of the state; and gendered political-economic structures.

Gender and Gendered Identities

From a feminist human rights perspective, WSV is not merely an inevitable consequence of war, but rests on the broader politics of gender and power dynamics in specific societies. Thus, the sexual violence that women and girls face during conflict is, in part, a consequence of social constructions of gender—constructions of what it means to be masculine or feminine as well as the various symbolic meanings behind gender. As Cynthia Enloe contends, gendered identities "are packages of expectations that have been created through specific decisions by specific people" that shape female and male identities. Such a social constructionist view of identities challenges the historically hegemonic view that represents these identities as "natural" (Enloe 1990, 3). WSV and other forms of GBV are a result of the often asymmetrical nature of societal and cultural treatments of gender; thus, they are issues that must be conceptualized on a wide socio-political scale in post-conflict reconstruction efforts such as TJMs, and other political, legal and economic reforms aimed at enabling the emergence of socio-political landscapes characterized by "positive peace"[8] and well-being for all.

For the majority of women, being female is a risk factor unto itself during armed conflicts; aggressors use rape and other forms of sexual violence as weapons through which to torture, terrorize, and humiliate their victims in efforts to secure their socio-political and economic projects (Human Rights Watch 1996). As Indai Lourdes states, "war is an inherently patriarchal activity, and rape is one of the most extreme expressions of the patriarchal drive toward masculine domination over the woman. This patriarchal ideology is further enforced by

the aggressive character of the war itself that is to dominate and control another nation or people" (quoted in Manjoo and McRaith 2011, 11). The notion of control and domination in the gender dichotomy is, nevertheless, complicated, as female identities intersect with other identity markers: ethnicity, class, religion, race, and region of origin. Age plays a further role in differentiating individuals' experiences with WSV. Thus, even though this chapter and numerous works on WSV use the concept of "women" to explore the gendered nature of conflict and TJMs, one should not assume that it captures the specific experiences of girls in the context of war given the latter's social positioning, which at times leads boys, older women, and men to exercise forms of social control and oppression even in peacetime, due to age-based power dynamics in various societies.[9]

Taking cognizance of the multiple ways in which women's gendered identities intersect with other identities in a given society leads to a deeper understanding of the complexity of social identities in historical and contemporary African geographies and gendered identities' political roles in specific conjunctures. Such a complex approach to women's identities offers a deeper understanding of their experiences in the context of war. For example, during the 1990s war in former Yugoslavia, Kenya's 2007–2008 political violence following a highly contested presidential election, and Rwanda's 1994 genocide, women's experiences of WSV were influenced by other dimensions of their identities. Overall, in the context of these and other conflict situations,

> multiple binary [social identity] constructions are formed; not only is "masculine" contrasted to "feminine" within a group and "us" contrasted to "them" between groups, but "our women" are contrasted to "their women" and "our men" to "their men". "Our women" are chaste, honourable, and to be protected by "our men"; "their women" are unchaste and depraved. Wartime propaganda presents the (male) enemy as those who would rape and murder "our" women and the war effort is directed at saving "our" women. (Alison 2007, 80)

In addition to the multiple binaries that emerge in the context of conflict, women are also agents of violence that target women and men considered as enemies. For example, Hutu women were active agents of violence against Tutsi women, men, girls and boys (African Human Rights 1995). Similarly, women were not merely victims of the civil

war in Sierra Leone, but also participants in the atrocities that characterized it (Coulter 2009; Mackenzie 2012). During the decade-long civil war, women and girls were recruited—often through abduction—as combatants and composed a significant proportion of the insurgents that committed horrendous harms (Mazurana and Carlson 2004, 12; Mackenzie 2012). Overall, members of various insurgent groups—the Revolutionary United Front (RUF), Civil Defense Forces (CDF), the Armed Forces Revolutionary Council (AFRC), and the Sierra Leone Army—used women and girl soldiers in their forces, with an estimated 12,056 total girl soldiers used out of 137,865 total combatants (Mazurana and Carlson 2004, 12).

Although women and girls were combatants and committed atrocities during the civil war in Sierra Leone, they often participated due either to forced recruitment or as a last resort to protect themselves and their families (ibid., 12–13). In addition to performing roles as combatants, most women recruited took on additional roles in the conflict, including serving as cooks, porters, medical assistants, "wives," food procurers, messengers, spies, communication technicians, and diamond miners (ibid., 12). Once recruited by armed factions, many women became the "wives" of male soldiers, receiving a form of protection from their "husbands" in exchange for sex and domestic services (ibid., 11). Such wives were forced to serve their male companions in addition to: cooking, cleaning, and bearing children and taking care of them (Toy-Cronin 2010, 558). Within such relationships, women experienced rape, sexual violence, and forced pregnancies (Slater 2012, 736). Girl soldiers who were not taken on as wives were also subjected to taking on domestic roles within core groups labeled as "families" and were beaten, sexually assaulted, and raped by male combatants (ibid.). Overall, women and girls in the context of civil war in Sierra Leone didn't serve a singular role: they were involved in various tasks and their experiences of GBV were but among many others, including that of being agents of multiple forms of violence (Mauden 2011; Mackenzie 2012).[10]

Men too experience violence in the context of war. WSV against men in such contexts occurs in the same complex, gendered, racially, and ethnically constructed social, political, and economic geographies as does WSV against women. Overall, such violence targets local understanding and norms of masculinity through the violation of the rights of men of the enemy group. Further, WSV serves as a powerful tool for emasculating the masculinity of such a group (Sivakumaran 2007) and redefining

masculinity, as Chris Dolan's work on gender dynamics in the context of conflict in northern Uganda has demonstrated.[11] Sexual violence against males, then, becomes a method through which "to 'lower' the social status of the male survivor by 'reducing' him to a 'feminized male'" (Sivakumaran 2007, 271). This can also be done through rapes targeting men and in the process emasculating them, given that heterosexual masculinity is the historically privileged masculinity in most societies. As Sivakumaran argues, "when two male victims are forced to rape one another, the traditional power dynamic no longer applies. Both male victims lose their heterosexual status for the power rests with the perpetrator who was behind the rape" (ibid.). It can also be accomplished through acts which specifically target male procreative abilities, as concepts of masculinity are often linked to virility, much as femininity is to reproduction and acts of mothering—both common targets for sexual violence.[12]

Yet, while men experience sexual violence in times of peace and war, it is difficult for them to have a voice to demand justice for the violation of their human right to bodily integrity, among other rights. In the main, "even if male survivors did wish to talk about the abuse they suffered, they may find that, as victims also of masculine stereotypes, they do not have the right words to express themselves" (ibid., 255). Further, dominant local and international development actors tend to ignore men's and boys' experiences of WSV (Dolan 2011). Overall, while most attention—including in this chapter—is paid to WSV against women, the gendered dimensions of conflict also put men and boys at risk of sexual violence. While there is emerging scholarship on the theme of men's experience of WSV, the lack of sustained attention to such violence against men and boys, despite records of it occurring in numerous historical and recent conflicts, limits our understanding of the gendered dynamics of conflict. It also reminds us not to fall into equating gender with women, but again, to emphasize the debates about gendered power asymmetries that inform gender analysis (Sivakumaran 2007; Dolan 2011).

Militarization of Society

The militarization of a society during a conflict contributes to WSV. This is because, on the whole, such militarization greatly affects civilians' lives, as it changes societal perceptions and values; these values are gradually replaced by the values of the military, such as hierarchy, obedience, and

violence as conflict resolution, reflecting an internalization of conflict as well as the restructuring of society in response to the conflict it faces (Sivakumaran 2007; Dolan 2011). Within militarized cultures there exist a variety of visions of masculinity, including that of the soldier who is extreme in his violent masculinity and the soldier who plays the role of a patriarchal protector. Cynthia Enloe describes this as embracing a "patriarchal masculinized protector—feminized protected dichotomy," which is an ideal of masculinity in which the roles of protector and protected are created through gender expectations (Enloe 2016, 76).

While each of the categorizations of masculinity in war reflects concepts of gender that may contribute to sexual violence during conflicts, that of the "patriarchal masculinized protector" is important to note because when the male is set up as "protector" and the woman as "protected," women are placed at a high risk for sexual violence, as their safety is directly linked to the success of their male protectors. Rape of women becomes a metaphor for the destruction of "their" men. The intent in these rapes is to humiliate the masculine protector and symbolize his ultimate defeat. The conceptualization of the feminine is part and parcel of the drive to rape, especially in groups where individuals seek to assert their lack of femininity. For, when the feminine is perceived as weak, and the masculine as the source of strength and violence, soldiers tend to continually affirm their masculinity. Overall, "any person or group of people who think that if they are perceived to be 'feminine' they will lose political influence, credibility, or respect, are likely to take steps to avoid being perceived that way" (Enloe 2016, 67).

This need to reaffirm a sense of militarized masculinity leads to rapes that can be viewed as assertions of masculinity and socially constructed gendered needs in the context of war. In a study done by Maria Eriksson Baaz and Maria Stern on WSV by Forces Armées de la République Démocratique du Congo, soldiers classified rapes into the categories of "evil rapes" versus "lust rapes." They viewed "lust rapes" as "normal" and justified due to men's supposed sexual needs that are unsatisfied in the war setting; thus, these rapes were tied to militarized masculinity. Through this perspective, the soldiers "recast that which in 'normal' circumstances is 'abnormal' (i.e., sex by force) as 'normalized' in the military setting through discourses of disempowerment and unfulfilled masculinity [and] [I]t is through this normalizing reasoning that rape becomes a possible performative of masculinity" (Baaz and Stern 2009, 510).

Legitimacy Crises of the State

Where a state faces a legitimacy crisis and its survival is at stake, such a crisis can generate political conditions that not only lead to conflict, but also to sexual violence against women. Historically, and in recent decades, various state forms have faced legitimacy crises that have led to horrific acts of political violence. The Balkans of the 1990s, Rwanda in 1994, and Kenya in 2007–2008 are but a few examples of political geographies in which states have faced such crises in recent history.

The political violence that ensues in the wake of a legitimacy crisis of the state has gendered and other social identity dimensions. In the context of such a crisis, women from within a social group are idealized as symbols of feminine virtues, of which chastity, purity, and cleanliness are usually included (Walker 2009, 35). On the other hand, those from communities constructed as the enemy group are conceptualized as the "other." This separation between the two categories of women builds space in which acts that would be unthinkable to commit against women in the context of peace are now not only permissible, but may indeed become institutionalized, normalized, and systemic, and linked to particular political projects, specifically those of genocide, partition, or the reconstruction of the state along ethnic lines, and the re-imagining of national political space.

Such political conjunctures create socio-cultural and political-economic voids that make women vulnerable to sexual violence because of their disruption of existing social and other arrangements. While the latter are marked by gendered power dynamics and inequalities, they are systematically reconfigured in the context of conflict generated by a legitimacy crisis of the state. Consequently, while unequal and problematic from a feminist human rights perspective, pre-existing socio-political arrangements and their attendant

> normative social behaviors and positions, by their nature, constitute an *order*, and that order is in many and profound ways suspended, deformed, or destroyed in conflict situations. If everyday life in many instances is a limiting, cruel, demeaning, or defeating order for women, it is nonetheless one around which women build their lives, make their choices and compromises, and determine their behaviors. So, the idea of normative coercion and violence does not imply that all forms of coercion and violence, no matter how extreme, are to a greater or lesser extent familiar to or expected by women. (ibid., 30)

Overall, in the context of political conflict generated by a legitimacy crisis of the state, "women function as 'iconic representations' of cultural, ethnic, or national identity" (ibid.), and thus their bodies can be symbolically linked through what V. Spike Peterson and Anne Sisson Runyan call "gendered nationalism" (cited in Walker 2009, 35). In his research on sexual violence underpinning partition conflicts, Robert Hayden contends that in such contexts "mass rape" is a "communicative act" (2000, 32) for "the woman's body" becomes the sight through which men from the parties in the conflict community communicate "with each other" (ibid., citing Das 1995, 56). Further, in his exploration of the phenomenon of "mass rape" and "rape avoidance" in such conflicts, Hayden posits that "mass rape is actually a corollary of the liminality of the state when a heterogeneous territory is being sundered into homogeneous parts" (ibid., 36). This is largely because of the role rape takes on within the conflict; once employed, rape comes to mean—symbolically and literally—that a given population is no longer willing to live with the other, and thus will make it impossible for the two to coexist within given borders. Therefore, the status of a state as liminal is a precursor to the institution of rape as a weapon against a specific population. Partition (either in its literal or figurative sense) "is not only a liminal state but a time when the state itself is liminal, and the questions of whose state it is, and how the population will be defined, are open" (ibid., 33).

The 100 days of genocide in Rwanda and the years of civil war in Sierra Leone had the markings of such liminal political conjunctures. As will be discussed later, in the case of Rwanda, developments leading to the genocide itself were underpinned by a political project led by some members of the Hutu community who adopted an ethnic-based extremist ideology. This project aimed at reconfiguring the country's national and state spaces by purging what these extremists deemed as contaminating bodies.[13] Rearticulating a colonial mythology embedded in the Hamitic thesis—"that everything of value ever found in Africa was brought there by the Hamites, allegedly a branch of the Caucasian race"—the Hutu extremists deployed ideologies and engaged in practices aimed at contributing to the emergence of a pure Hutu nation (Sanders 1969, 521). One of their political ideological tactics was constructing Tutsis as invading and unwanted foreigners, who had to be eliminated by whatever means necessary. Echoing such sentiments in 1992, a powerful Hutu politician publicly declared: "the fatal mistake in 1959 was to let them [the Tutsis] get out […] They belong in Ethiopia and we are going to find them a shortcut to get there by throwing them into the Nyabarongo river

[which flows northwards]. I must insist on this point. We have to act. Wipe them all out!" (Prunier 1995, cited in Taylor 1999, 129).

While influenced by conjunctural local, regional, and global dynamics, the liminality of the state is also shaped by historical legacies and practices marking the production of state and national state spaces, and those defining political belonging and structures of citizenship. Thus, in the Rwandan example, the invoking of the Hamitic thesis in the early 1990s by Hutu extremists needs to be understood historically for its deployment drew inspiration from colonial scripts. Arguing along these lines, Christopher C. Taylor states that,

> Tutsis extremists make their version of the [Hamitic] hypothesis to claim intellectual superiority; Hutu extremists employ theirs to insist upon the foreign origins of Tutsi, and the autochthony of Hutu. No matter which side uses the Hamitic hypothesis, however unwittingly, it reproduces a colonial pattern: one that essentializes ethnic difference, justifies political domination by a single group, and nurtures a profound thirst for redress and vengeance on the part of the defavorized group. (1999, 57)

Like other socio-political processes, gender power dynamics characterized the Hutu extremists' nationalist project in the period leading to and during the genocide. These dynamics intersected with politics of ethnic identity, for their imagined pure Hutu nation in the making was not only gendered but also ethnicized. The Hutu extremists' pattern of violence against the perceived enemies of their national project demonstrates such gendered underpinnings. For example, "Tutsi men and boys, including male infants, were among the first to be killed" (Baines 2003, 487). Further, and as Erin K. Baines argues, they constructed Hutu women as the protectors of their imagined nation and Tutsi women as its enemies (ibid., 485). Yet, these extreme nationalists also targeted moderate Hutu women and men, whom they deemed enemies of their political project. For example, they called upon their followers to target Hutu men who tried to escape the sites of violence that they had established:

> If you see deserters, arrest them wherever they are, even on roadblocks, and send them back to their barracks…What are those *sons of dogs* fleeing from? … Let them save their country. They ought not to escape. Beat them up, refuse them food, drinks, take them to the authorities so that they can go back to the battlefield …They have to fight the enemy…To flee is out of the question. (Human Rights Watch 1995, quoted in Jones 2002, 68)

Gendered Political Economy

Finally, the emergence and evolution of gendered and unequal political economic structures is a contributing factor to sexual violence during conflicts. In the context of societies such as Rwanda, the historical marginalization of the majority of women in social, political, and economic spaces, and the evolution of these structures, has put such women at a higher risk for sexual violence during conflict and has reinforced the gendered power dynamics that underlie such violence. The historical position of the majority of women as second-class citizens is often represented as "traditional" and, as such, as culturally legitimate. Thus, the power dynamics and inequalities underpinning such a regime of citizenship and the historical, political and structural developments shaping them tend to be naturalized.

Women in the Democratic Republic of Congo (DRC), for example, have been marginalized through the legacy of the country's colonial political economy. In King Leopold's Congo Free State era, African participation in the economy was achieved through forced labor and taxation that effectively forced their participation in a cash economy through work in the mines and the production of cash crops. A consequence of colonial gendered economic practice was that as "men started controlling the money, women's rights and access to land and their managerial responsibilities were eroded" (Bouwer 2010, 43). The legacy of such an imposed gendered colonial political economy has laid a significant structural foundation for women's vulnerability to WSV. Thus, debates concerning conflicts such as that in the eastern region of the DRC and their attendant forms of WSV should be historicized.

Economic restructuring in the last several decades through locally mediated neoliberal development policies has further marginalized a large number of women in various parts of the world, including on the African continent. Overall, the neoliberal development model "ignores the human resource aggregates of the 'reproductive economy', and the indicators of population, health, nutrition, education, [and] skills" (Waylen 2000, 21). Thus, these policies have institutionalized strategies that enable the reproduction of gendered inequalities. For example, cuts in public spending on education and healthcare disproportionately affect women, a development that "can be traced to the biology of reproduction and to social arrangements that give women more responsibility for the care of the young, the elderly, and the ill" (Thursen 1994, 78).

Further, historical patriarchal practices that have contributed to women's marginalization, such as the colonial patriarchal land tenure system, have been reproduced with the emergence of neoliberal inspired land laws (Sahle 2017). Overall, neoliberal land restructuring projects have failed to address the gendered nature of agricultural production. Instead, neoliberal land policies have focused on the benefit of unpaid labor provided by household members in the small-scale agricultural sector, without addressing the gendered nature of production within the household (Sahle 2008). Thus, in the land sector, women end up being the "shock-absorbers" (Brodie 1994, 50) of neoliberal agrarian strategies.

The subordination of the majority of women in the evolution of any country's political and economic structures puts them at an increased risk of sexual violence in both times of war and peace. A societal political and economic landscape where women are marginalized "sends an unmistakably clear message to the broader community that women's lives matter less, and that violence and discrimination against them is acceptable" (Jefferson 2004, 2). In conflict situations, this perception becomes exacerbated as violence escalates and manifests itself in the new militarized setting.

The preceding section has focused on broader sources of sexual violence in the context of conflict in an effort to highlight some core sources of such violence. Before turning to the case studies, the analysis now turns to a brief discussion of the evolution of TJMs. The discussion briefly highlights their response to women's experiences of sexual violence in the context of war.

Transitional Justice Mechanisms and Wartime Sexual Violence: A Brief Post-1945 History

Mechanisms designed to achieve transitional justice broadly aim for building a lasting peace in the wake of atrocities.[14] In order to achieve sustainable peace, TJMs aim to promote reconciliation, accountability, and restoration of the rule of law.[15] Further, depending on their foundational mandate, they address issues of justice and peace-building.[16] The current model of transitional justice is a rather recent development in international and domestic approaches to the issues post-conflict societies face. These TJMs have their roots in the Nuremberg trials, which were of an archetypal and international character that was innovative

for holding individual leaders accountable under international law for crimes, rather than looking at state responsibility.

The Nuremberg trials represent the first judicial attempt to achieve reconciliation and future peace through holding individuals accountable for their crimes under international law, and thus constitute the historical basis for creating tribunals to adjudicate conflict-generated crimes under international law (Beigbeder 2011, 34–35). Although these trials set a significant precedent for trying and holding individuals accountable for crimes against humanity, the international community did not take advantage of this precedent until the 1990s (ibid., 49). During this period, the emergence of the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) represent a modern archetype for international tribunals designed to attain transitional justice in societies in which grave crimes against humanity have been committed (ibid.).

It is important to note that, even though court proceedings are the paradigm for transitional justice, TJMs are more diverse than simply relying on judicial means of accounting for the past. One popular alternative to relying on courts are the truth and reconciliation commissions (TRCs). Such commissions, unlike tribunals, are non-judicial entities that emerged in Latin America in the 1980s to address the legacies of repression and atrocities. Overall, TRCs have the primary goal of recording events—of finding and publicizing the truth (Triponel and Pearson 2010, 109). These commissions go further to make recommendations in light of their findings. Such recommendations are aimed at promulgating the changes necessary for post-conflict societies to move forward and create socio-political conditions underpinned by positive peace. During the 1990s, TRCs grew in popularity alongside the growth of international tribunals (ibid.). They have since become a popular strategy utilized by many local states and global actors involved in post-conflict efforts to achieve reconciliation.

Transitional Justice Mechanisms and the Question of Wartime Sexual Violence

During World War II, German and Japanese forces maintained brothels, and the Nazis sexually abused and humiliated prisoners in concentration camps (Harrington 2010). Allied forces also engaged in

sexual violence; there are instances where Allied forces took advantage of the services Axis brothels offered when they liberated regions with brothels, rather than liberate the women in these spaces (ibid.). The 1945 London Charter establishing the Nuremberg Tribunal, however, did not give the Tribunal jurisdiction over sexual violence or gender based violence.[17] The 1946 International Military Tribunal for the Far East at Tokyo (IMTFE), to the contrary, did adjudicate charges of rape against Japanese officials. However, the IMTFE didn't "prosecute rape independent of charges for 'greater' crimes" (Campanaro 2001, 2564). Further, the IMTFE ignored the hundreds of thousands of women and children that were held in rape camps during the conflict (Turano 2011, 1049). Thus, even though TJMs developed originally in the wake of World War II, these initial efforts at achieving post-conflict justice did not address the sexual violence that occurred during the war in any substantive manner.

Developments in recent decades have led to the emergence of national and global processes that signal a turning point regarding the longtime silence toward addressing sexual violence in TJMs. Such developments include the articulation of universal human rights in the UDHR, the emergence of CEDAW, and the incorporation of GBV into CEDAW. These instruments as well as other human rights instruments have generated norms that provide an opportunity for women in specific contexts to fight against the violation of their rights, including those that occur in the context of war. Further, since the 1990s, shifts in human rights discourse reflect an increasing awareness of the role of rape and gendered acts of violence in conflicts, such as the war in the former Yugoslavia (Copleon 1994, 244).[18] It is in the context of this new attention and concern around such acts that the ICTY began to develop international jurisprudence addressing sexual and gendered violence during armed conflicts (Turano 2011, 1052). As such, the rise of these tribunals marks significant achievements in the struggles against sexual violence in the context of war.[19] They have, for example, established that rape and sexual violence in the context of conflict constitute genocide,[20] and that courts can apply a joint criminal enterprise theory to rape and sexual violence, holding that consent is impossible under coercive circumstances (Turano 2011, 1052–1058). The ICC was able to use lessons from the ICTY and ICTR to further expand the definition of rape to include sexual slavery, forced pregnancy, enforced sterilization, and other sexual violence as war crimes and grave breaches of the Geneva Convention. The

ICC further adopted the ICTY and ICTR ruling that rape is a form of genocide and expanded on this to categorize persecution based on gender as a crime against humanity (ibid., 1058–1059).

The increased awareness of and attention paid to WSV is also apparent in how TRCs' mandates address women's issues and sexual violence. The statute establishing the TRC for Sierra Leone, for example, does not specifically address sexual violence or gendered issues, but its mandate to "restore the dignity of victims" has been interpreted to necessitate that sexual violence and women's experiences receive special attention (Sierra Leone TRC, vol. 3(b), 86). Following the TRC for Sierra Leone, the Truth and Reconciliation Commission of Liberia specifically spells out in its mandate that it will consider gender and gender based violence (Manjoo and McRaith 2011, 29).[21] To critically explore these issues further, we turn to a discussion of the evolution of TJMs established in Rwanda as part of the country's post-conflict reconstruction strategies, with a specific focus on their approach to WSV.

Genocide, Wartime Sexual Violence, and Transitional Justice Mechanisms in Rwanda

The 1994 Genocide and Sexual Violence

The 1994 genocide in Rwanda was a violent political conflict that affected girls, boys, men, and women. During the genocide, which began following the death of President Juvénal Habyarimana in a plane crash on April 6, 1994, Tutsis and moderate Hutus experienced horrific acts of violence unleashed by Hutu extremists. Nonetheless, Hutu extremists and other political forces linked to President Habyarimana were not the only agents of politically engineered violence during the genocide and the immediate period following it. As the 1999 Human Rights Watch report titled, *Leave None to Tell the Story: Genocide in Rwanda*[22] and other analyses[23] indicate, members of the Rwandan Patriotic Front (RPF) also committed crimes against humanity.

As with most other conflicts, the Rwandan genocide did not emerge out of a vacuum, nor did it simply arise from natural, apolitical, and ahistorical ethnic hatred, as dominant narratives about this period in Rwandan histories would have it. The genocide was a violent culmination of historical developments and their effects.[24] At the very heart

of the Rwandan genocide, however, was a major legitimacy crisis of the state and the political elite's drive for dominance, which were generated by a confluence of developments.[25] For one, Rwanda faced an economic crisis due to shifts in global coffee prices. Given the agrarian and mono-cultural bases of the Rwandan state, the Hutu elite-dominated state apparatus faced a serious fiscal crisis. Additionally, President Habyarimana and his supporters—predominantly Hutus from the northwest—had perceived the rise of the pro-democracy movement, which cut across ethnic and class lines, and an aid conditionality framework imposed by external foreign lending institutions and governments, which called for the democratization of local political space, as a threat to the pre-existing state. Furthermore, regional political dynamics, especially the instability in the DRC and Burundi and regional tensions within Rwanda, generated political anxiety for the state, as did the stipulations underpinning the Arusha Peace Accord that called for a shared governance structure.

Combined, the above factors culminated in a legitimacy crisis of the state. In response to this crisis, President Habyarimana and his allies took the path taken by political elites in the country in previous historical moments marking state building and crisis: one of ethnic-based political mobilization and manipulation. In the nineteenth century, for instance, political elites linked to a small Tutsi aristocracy created socio-political conditions in central Rwanda that contributed to the emergence of hardened ethnic identities as the group expanded its political reach. The connection between local ethnic groups and economic and political power developed through colonial and historical state building processes. According to Catherine Newbury, for example, "the introduction to Kinyaga of central Rwandan administrative structures during the reign of Rwabugiri (c. 1860–1895) brought contact with political institutions and social distinctions at a new level, and it is under these conditions that current ethnic identifications became salient" (1988, 11). Newbury argues that prior to these "political factors" making "the labels of 'Hutu' and 'Tutsi' politically meaningful and necessary in Kinyaga, social identification belonged principally to the unit that performed corporate political functions—in this case, the lineage or neighborhood residential group" (ibid.). Furthermore, Jonan Pottier contends that a close look at the land policy architecture instituted in the central part of the country by the Tutsi aristocracy in the latter part of the nineteenth century indicates that it was oppressive to the Hutus (2002, 117). Moreover, Mahmood

Mamdani systematically discusses the colonial state's deployment of racist ideologies such as the Hamitic thesis in generating racialized identities, which it institutionalized through census and ID cards, and politico-economic projects aimed at promoting and solidifying the power of the Tutsi elites aligned with its objectives (Mamdani 2001). Tutsis, who at the start of the genocide composed only 14% of the Rwandan population, were politically and economically dominant during the colonial period (Carpenter 2008, 628), while Hutus, who are the majority ethnic group, were largely excluded from positions of power during this period.

As such, while taking a different form and informed by 1990s local, regional, and global political and economic conditions, President Habyarimana's response to the legitimacy crisis of the state, which was characterized by ethnic-based political strategies that were fundamentally anti-Tutsi, had echoes of previous elite-led processes that had influenced the politicization of ethnic identities and created conditions of oppression for specific communities (Carpenter 2008, 628). During the liminal political conjuncture of the early 1990s and the genocide itself, Hutu extremists re-framed the Hamitic thesis—highlighted earlier—and constructed the Tutsis not only as foreigners but also the oppressors of the Hutu community and this framing became their clarion call. This discourse, which at its core constructed the majority Hutus as victims of the minority Tutsis, was heavily promoted by Hutu extremists during this period. Yet, it had no sound empirical basis. As Pottier argues, a close examination of the Rwandan class structure by the 1990s indicates that "the privileged class was Hutu, mainly northern Hutu, not Tutsi" (Pottier 2002). However, because the Hutu extremist nationalist discourse, which consistently and publicly invoked the dominance of the Tutsis went uncontested it "became an effective weapon to mobilise downtrodden youth against an enemy who was, in more ways than one, imagined" (ibid.). With RPF's declaration of war in 1990, this discourse gained momentum and contributed to the killing of Tutsis before the 1994 genocide (Des Forges 1999; Pottier 2002).

To achieve their objectives, the Hutu extremists used prolific political propaganda beginning in the early 1990s and during the genocide to encourage the generation, sharing, and internalization of their hate infused nationalism. While ethnic tensions, which had emerged in the country historically, contributed to the ethnic dimension of the genocide, the latter was also gendered. To be sure, the Hutu extremists' propaganda encouraged both the Hutu and Tutsi to fear and hate each

other in general, but it often targeted women (Human Rights Watch 1996). For example, while it "encouraged the annihilation of the Tutsi ethnicity" it targeted Tutsi women's sexuality in particular (Nessel 2007, 107). In 1990, Hutu extremists codified their hate ideology in what they termed "The Ten Commandments of the Bahutu."[26] These Commandments were published in their *Kangura* magazine, which played a vital role in generating and disseminating the Hutu extremists' hate propaganda. The publication encouraged members of the Hutu community to use violence against Tutsi women, stating that they were being used to hide the enemy (Human Rights Watch 1996).

Drawing on discredited colonial ideologies embraced by Tutsi elites that crafted a myth of Tutsi socio-political and racial superiority, the Hutu extremists constructed Tutsi women as enemies of their imagined nation and accused them of trying to infiltrate Hutu ranks.[27] As part of this strategy, they portrayed Tutsi women as beautiful seductress spies whose goals were to climb the ranks, destabilize Hutu control, and gain control for themselves and Tutsis as a whole (Human Rights Watch 1996; Nessel 2007, 107). A cartoon in one of the *Kangura* volumes in 1992 captures these sentiments. As Georgina Holmes describes it:

> An article entitled "The Dresses of Beauties Smell for the Hutus" is accompanied by a cartoon wherein a beautiful woman who appears to fit the colonial stereotype of the tall, slender Tutsi woman wears a strapless, floral print mini-dress, large hoop earrings and bangles. She is in an erotic pose, her left hand lifting up the corner of her dress to reveal more thigh to the – stereotypically – shorter, thicker-set Hutu man standing beside her…[the] image…confirms the extremist Hutu theory that Tutsi women "work only in the interest of their ethnic group"…[and] that Rwanda is threatened by a Tutsi-led ethnic war. (Holmes 2013, 116–117)

Tutsi women were further characterized as arrogant and as thinking of themselves as superior to Hutu men. Yet, while constructing Tutsi women as arrogant and as the arch enemies of their political project, some Hutu extremists kept them as mistresses and, as the quote above indicates, reified the colonial-generated representation of Tutsi women as beautiful and superior to Hutu and Twa women in their propaganda. Thus, while it is imperative to acknowledge the agency of Hutu extremists and other perpetrators of the genocide in studies of the genocide and its aftermath, such analysis cannot ignore the saliency of colonial

ideologies and legacies, including gendered ones, in Rwanda during this period. As Taylor states in the context of contemporary Rwanda, contemporary manifestation of "colonialism is more subtle and more difficult to overcome, for it is in the hearts and minds of every ethnic extremist, every Tutsi and Hutu and Twa, who imagines him or herself superior or who feels the need through the force of arms to overcome an imagined inferiority" (1999, 95). From his perspective, "it is this decolonization that has not yet occurred in Rwanda" (ibid.).

Like other political processes, the 1994 genocide was marked by gender dynamics. Given the gendered historical evolution of Rwanda's socio-political and economic structures, the majority of women in the country were disproportionately affected by the violence characterizing the genocide—albeit differently, based on their ethnic and other socio-politically constructed markers. In conceptualizing the gendered ramifications of the genocide, it is important not only to look at gender and sexual violence during the conflict, but also to look at gender dynamics within Rwandan society. In terms of gender dynamics, the majority of Rwandan women were considered to be dependent on male relatives, and their role was designated as that of mother, wife, and caregiver (Amick 2011, 16; Human Rights Watch 1996). Further, as data indicates, rates of domestic violence pre-conflict were high (Human Rights Watch 1996).[28]

Women's structural inequality was also evident in the economic sphere. While women contributed to the country's economy, Rwandan laws that gave their male relatives property rights prevented women from benefitting from their labor and limited their autonomy in the economic sphere (ibid.). Even in the event of a male relative's death, women were not allowed to inherit property, leaving widows who were previously economically dependent on their spouses without land in a heavily agrarian society (Nessel 2007, 110).[29] Legally, women were on unequal footing with men; Rwandan family laws were designed to ensure men were the heads of households, thus protecting patriarchal prerogatives and privilege (Amick 2011, 17). For example, women could not obtain credit without their husband's consent, and such consent was similarly required in the event that a woman wanted to engage in a commercial activity or take on employment (ibid.). The structural, political, and socio-cultural conditions that women faced contributed to the feminization of poverty in Rwanda, a development that made them especially vulnerable to multiple forms of violence during the conflict (ibid.). It is

important to note that the construction of households in naturalized and deeply patriarchal terms has not been restricted to the domain of law in Rwanda or elsewhere. In dominant economic development discourse, for example, this has been the norm in approaches such as the "unitary model" and "bargaining models" (Bergeron 2010).

At any rate, like in Bosnia in the early 1990s, sexual violence was used as a weapon of war in 1994 Rwanda. Such violence had multiple effects on survivors as they engaged in rebuilding their lives in the post-genocide period. Women who had been subjected to sexual violence were deemed to have lost their value, and were ostracized by their family and community. Overall, survivors of WSV during the genocide were not exempt from negative social consequences surrounding the incidents of sexual violence. As Human Rights Watch reports, one such survivor stated as follows: "after rape, you don't have value in the community" (1996, 17). In light of these realities, some women were abandoned by their husbands or deemed unworthy of marriage once their community learned that they were raped during the genocide (Human Rights Watch 1996; Noweojee 2004).

During the genocide, women died following brutal rape. In the eyes of the perpetrators of such violence, such deaths aided their goal of annihilating the Tutsis and moderate Hutus that they considered as political enemies. In some cases, perpetrators of the genocide "allowed" victims of WSV to "survive" so that they "would 'die of sadness'" (Human Rights Watch 1996). In such instances, sexual violence was a slow social and cultural means of killing off Tutsis and moderate Hutus that was particularly effective given that, after being raped, women were heavily stigmatized. Further, some women were taken captive during the conflict and forced into a relationship with male combatant. In such cases, the captive woman would often be locked away and forced to have sex with a male combatant over the course of the conflict. Such women were labeled as wives, and were often paired with the very same person who had killed their family members. While conflict wives typically hated and feared their captor-husband, they also depended on their captors for protection; without them, captured women concluded that they would likely die over the course of the genocide (Toy-Cronin 2010, 560). Such developments demonstrate the dynamics of power imbalance, the psychological violence, the complexity of social relations in the context of war, and effects of GBV on women's capabilities including that of "practical reason[ing]" (Nussbaum 2005, 172–173).

Overall, during the genocide, perpetrators engaged in an array of acts of sexual violence, including rape, gang rape, holding women in sexual slavery, and sexually mutilating their victims (Nessel 2007, 107). Rape and other acts of sexual violence during this period, however, were influenced by the intersection of prevailing politics of ethnicity and constructed gendered understanding of social identities, as well as the historical legacies characterizing processes of state building and re-building in different conjunctures. As this analysis indicated earlier, Tutsi women were particularly targeted by Hutu extremists because of their construction as beautiful sexual beings who seduced Hutu men in order to gain power for their community. As such, the perpetrators of sexual violence against them saw it as a means of taking revenge over their supposedly hypersexualized and manipulative nature (Human Rights Watch 1996). By harming and shaming them through their acts of WSV, Hutu extremists aimed to not only harm them individually, but also to harm the entire Tutsi community (Human Rights Watch 1996). Nonetheless, Hutu women were also victims of WSV, especially those that Hutu extremists considered traitors of their political project, such as those married to Tutsi men and others who offered refuge to Tutsi women, men, and children.[30]

It is important to note that members of the Hutu extremist militia were not the only social agents violating women's rights to bodily integrity and security as articulated in various UN human rights instruments, particularly in CEDAW. During the genocide and the immediate period thereafter, the interplay of patriarchal power, privilege, and gendered assumptions about women—albeit mediated by ideologies and politics of ethnicity—were also at work in other political sites in Rwanda. For instance, following their ascendancy to state and national power, the members of the Tutsi-led RPF coerced "surviving Tutsi women for sex, arguing that they had fought and won the civil war for them and that now they owned them" (Twagiramariya and Turshen 1998, 104). Further, members of the RPF were also agents of WSV against Hutu women. They committed such violence as "revenge" for the raping of women of the Tutsi community by Hutu extremists (ibid., 103). From a feministic analytical perspective, these acts of violence against Hutu women by this faction of Tutsi patriarchs were aimed at avenging the socio-cultural dishonor that Tutsi women had faced in the hands of Hutu patriarchs actively engaged in the genocide. Like in other societies in times of war, sexual violence against women during the period under review in Rwanda

translated to, on one level, an assault on their virtue and that of their community, due to socio-culturally constructed norms regarding women's sexual behavior and motherhood. On another level, WSV during the genocide functioned as a pathway for social reproduction in the context of Tutsi and Hutu patrilineal structures: "both sides used women as 'reproductive vessels' [and] raped women to make them bear babies of the rapist's ethnic identity" (ibid., 104). For women who survived the conflict who had been impregnated by their assailants, their children were colloquially described as "children of hate" (Nessel 2007, 109).

Rwanda's Transitional Justice Mechanisms

TJMs in Rwanda have taken on a three-pronged form. These include the ICTR in Arusha, Tanzania, an international ad hoc tribunal; efforts by national courts; and *gacaca* courts, which are inspired by local justice frameworks. The Rwandan state rejected the idea of establishing a Truth and Reconciliation Commission because, from its perspective, such a mechanism would permit continued impunity by granting perpetrators amnesty (Amick 2011, 25). Together, the three levels of TJMs have worked to prosecute perpetrators of the genocide, as well as to record past events and to promote reconciliation.[31] The analysis below describes the evolution of Rwanda's TJMs and highlights their approach to sexual violence against women during the genocide.

The International Criminal Tribunal for Rwanda

The United Nations established the ICTR in 1996. The ICTR's mandate ended in December 2015.[32] The tribunal is often regarded as groundbreaking due to its treatment of WSV under international law. Along with the ICTY, the ICTR has played an important role in establishing sexual violence during conflicts as a serious crime, punishable by international criminal law. Even before the ICTR began its court functions, its statute played an important role in reaffirming rape as constituting a crime against humanity, as established by the ICTY statute (Statute of the International Criminal Tribunal for Rwanda, art. 3). Like the Statute of the ICTY, the Statute of the ICTR permits prosecution of sexual assault as torture, an outrage upon dignity, a cause of bodily or mental harm to members of a targeted group, or rape (ibid., art. 4). The Statute establishing the ICTR, however, went further than previous

international court statutes and incorporated the Additional Protocol II to the Geneva Convention into the statute's terms (ibid.). Consolidating the Protocol into the ICTR's statute effectively extended its jurisdiction to further forms of sexual violence by prohibiting rape, enforced prostitution, and indecent assault in any form. This step signified an important development in the history of prosecuting sexual violence during armed conflicts because it consolidated international laws to give the ICTR greater jurisdiction over sexual violence (Viseur 1996, 606).

The progress made by the ICTR, however, did not end with its statute; the ad hoc tribunal significantly expanded on how existing jurisprudence approached crimes of sexual violence in the context of war. In the case of *Prosecutor v. Akayesu 1998*, the ICTR convicted an individual of rape under international law as a form of genocide and crime against humanity for the first time in history (Milne 2005, 107). Although rape was prohibited under the ICTR statute as well as the ICTY statute, *Prosecutor v. Akayesu* is the first example where a court determined that rape constitutes a form of genocide (Carpenter 2008, 647). As such, the *Akayesu* case expanded the ICTR's jurisdiction over sexual violence under the category of genocide (Milne 2005, 116). The ICTR's jurisprudence also established that persons can have command responsibility for rape as genocide. The defendant in *Prosecutor v. Gacumbitsi 1998* was the first person to be convicted of a crime against humanity after inciting others to rape. This ruling signifies a broadening of the definition of rape, as well as being able to assign command responsibility for rape.[33]

In spite of these monumental decisions, critics of the ICTR have pointed to the inconsistency within its prosecution of sexual violence. Some contend that prosecutors didn't "always" bring cases forward even when they had "evidence," and in instances where they did, the "charges [were] often added belatedly, as an afterthought, in amendments that [were] not properly integrated into cases" (Nowrojee 2004, 2). If sexual violence is to be taken seriously as a crime against humanity under international law, it needs to be given the same attention as all other such crimes. At the ICTR, however, "how, and whether, rape charges get included in a case often is based on the individual commitment of an investigator or trial attorney rather than an institutional policy" (ibid.). As such, WSV is essentially silenced in many instances, thus downplaying the role of such violence as a crime against humanity, war crime, means of torture, and tool for genocide. Furthermore, although the ICTR worked to expand how sexual violence can be prosecuted

under international law, its advances are far from comprehensive. The ICTR incorporated rape into the international legal framework, but it stopped there and did not address other forms of sexual violence. For example, forced marriages, which constituted dynamic forced relationships that extended beyond incidents of rape, were prosecuted as rape. Nonetheless, the ICTR did not treat forced marriage as a crime unto itself (Toy-Cronin 2010, 563).

Rwandan Mechanisms: National Courts and Gacaca *Courts*

The Rwandan state was not in favor of having an international court established to address its 1994 genocide; it was the sole state to vote against the establishment of the ad hoc tribunal, preferring that justice take a national form in order to bring change from within (Carpenter 2008, 640). Even though the United Nations moved forward in establishing the ICTR, the Rwandan state continued along its desired path and passed Organic Law No. 08/96 on August 30, 1996, giving domestic courts the ability to prosecute perpetrators of the genocide. The national justice system appears to have not taken this ability lightly, arresting about 120,000 genocide suspects by 2000 (Waldorf 2009, 19). However, such impressive numbers of arrests have proven problematic, with national courts unable to keep pace with the rate of incarceration, spurring overcrowding in prisons and a discontent public (Wells 2005). Further, while until 2008, Organic Law No. 08/96 considered sexual torture[34] as a Category 1 offence, the state failed to institute public policy measures to address the multiple needs of women who experienced sexual violence during the genocide. In addition, a negative view toward rape and other acts of WSV prevails and has pervaded the national justice system: officials on whom the institutional responsibility falls for ensuring justice have often neglected their duties when it comes to violence against women. According to Human Rights Watch, "some judicial investigators are unaware that rape is prosecutable," and, in other cases, officials have discouraged women from reporting rape (1996, 52).

As the national courts became overburdened by transitional justice efforts, *gacaca* courts were added to the process.[35] Among other aims, the introduction of *gacaca* courts was intended to ease the burden on national courts. With this development, the assumption was that genocide suspects could be tried with greater efficiency and in a timely manner, and that a sense of place-based justice could to some extent

emerge[36] in the process, given that the ICTR was not only externally generated but also located in Arusha, Tanzania. When compared to historical[37] *gacaca* courts, the ones created by the post-genocide state are "based on complex written law with systematic and organized administrative divisions, [and] women are included as judges and members of the general assembly … [Also, further] prison sentences can be imposed on the guilty, [and] family is not privileged, and confessions are favored, and references to religion are not included" (Amick 2011, 28). These local court mechanisms, however, are intended to fill more than a judicial function. The purpose of *gacaca* courts is, in part, to achieve reconciliation through recording history, by utilizing a holistic approach that employs political, social, and legal institutions (ibid., 28–30; Nessel 2007, 103). In this sense, *gacaca* courts share some similarities with TRC processes.

Even though the *gacaca* courts established after the genocide were intended to fulfill truth finding functions, they still faced the practical and procedural dilemmas inherent to court systems. One such issue was the breath of *gacaca* jurisdiction. Under Organic Law 08/96 and Organic Law 40/2000, genocide suspects in Rwanda were divided into four distinct categories, as can be seen in Table 4.1. In order to expedite the process, beginning in 2001, suspects accused of Category 2, 3, and 4 offenses were to be tried exclusively by *gacaca* courts, leaving only those accused of the most serious crimes, including sexual violence, exclusively in the hands of the national court system. However, there was a caveat: if the Category 1 suspect had previously confessed to their crimes within a given timeframe, they were transferred to the *gacaca* court system, and received significantly reduced sentences (Wells 2005; Human Rights Watch 1996). Until the 2008 amendment of Organic Law, sexual violence was included as a Category 1 crime. This categorization signified recognition of the severity of sexual violence and its status as one of the worst assaults during the genocide, subjecting those convicted of sexual violence to the harshest penalties possible in the Rwandan justice system.[38] National courts and *gacaca* courts divided their jurisdiction, splitting the responsibility for prosecuting sexual violence. However, in 2008, the *gacaca* laws were amended through Organic Law No. 13/2008 to give *gacaca* courts jurisdiction over acts of sexual violence. Article 9 of Organic Law No. 13/2008 reorganized categories of crimes, as demonstrated in Table 4.2, such that sex, rape, and sexual torture were newly listed as Category 5 offenses. Under the new law, *gacaca*

Table 4.1 Categories of genocide suspects under Rwandan Law[a]

Category	*Charge*
1	Being a leader of the genocide or a crime against humanity, committing acts of sexual torture, or being notorious for the excessive zeal or malice with which they committed atrocities
2	Being a perpetrator or conspirator of intentional homicide or serious assault against person causing death
3	Serious physical assault
4	Committing offenses against property

[a]Organic Law No. 40/2000; Organic Law No. 08/96

Table 4.2 Categories of genocide suspects under Organic Law No. 13/2008

Category	*Charge*
1	Planning or organizing genocide or crimes against humanity or being an accomplice to planning or organizing genocide or crimes against humanity
2	Committing crimes of genocide or crimes against humanity or encouraging others to participate in such crimes if the person was at a national leadership level
3	Inciting, supervising, or being a ringleader of genocide or crimes against humanity, or being an accomplice to inciting, supervising, or being a ringleader of genocide or crimes against humanity
4	Committing crimes of genocide or crimes against humanity or encouraging others to participate in such crimes if the person occupied a leadership position at the sub-prefecture level or commune level
5	Raping or committing sexual torture

courts were given jurisdiction over Category 3 through 5 offenses, giving them jurisdiction over sexual torture and rape (Organic Law No. 13/2008, art. 1).

Shared jurisdiction over WSV between the ICTR, national courts, and eventually the *gacaca* courts limited Rwanda's success in generating remedies that adequately addressed the gross violation of the human rights of women who had experienced WSV (Carpenter 2008, 641–643). International and national prosecutors sought custody over the same persons or pursued the same witnesses (ibid.). These efforts were further complicated by the fact that the different court systems would apply different legal standards to the same offenses, and, in the case of

gacaca courts, a different penalty structure (ibid.). Further, TJM court processes occurred in the context of a national court system, the operational capacity of which had been significantly disrupted by the genocide. Overall, the national courts did not have the resources or capabilities to hear the necessary number or levels of trials with such an immense number of perpetrators from the genocide in jail. Between 1996 and 2001, the national courts managed to prosecute only a limited number of genocide cases, and the slow pace of these courts prompted Organic Law 40/2000, giving *gacaca* courts jurisdiction over certain categories of genocide suspects.[39] In the main, the turn to *gacaca* courts was intended to ameliorate this problem (Nessel 2007, 103).

Nonetheless, both inclusion and exclusion of sexual violence from the *gacaca* jurisdiction have been problematic in different ways. On the positive side, *gacaca* courts at least offer women who experienced WSV an opportunity to access and participate in the local justice system (Nessel 2007, 103; Amick 2011, 4). Although the national courts, for a while, had jurisdiction over incidents of sexual violence when *gacaca* courts did not, the reality is that national courts rarely prosecuted for sexual violence (Waldorf 2009, 20). Giving *gacaca* courts jurisdiction meant that women who had experienced WSV at least had the option of coming forward and accessing justice, even if such justice was imperfect and limited. Moreover, excluding sexual violence from the *gacaca* jurisdiction would effectively exclude it from the court's truth and reconciliation function (Amick 2011, 4). Although *gacaca* courts do not produce written findings, they are intended to operate as a means of finding truth and promoting reconciliation. Consequently, omitting sexual violence from these functions would create an incomplete historical recording that would ignore much of the harm women faced during the genocide and in the immediate period afterward, when the RPF engaged in violence as its members embarked on a path of consolidating state power and reconstituting memories of the genocide.

Nonetheless, as mechanisms for addressing WSV, the *gacaca* courts have limitations. Factors weighing against including crimes of sexual violence in the *gacaca* jurisdiction include concerns regarding socio-cultural sensitivity toward the subject and inadequate procedural protections for women (Carpenter 2008). At the start, *gacaca* courts provided few procedural protections for participants in the system, and did not include protections specific to persons testifying regarding personally, socially, or culturally sensitive subject matters, such as sexual violence. In 2004,

however, Organic Law 16/2004 imposed certain procedural precautions and protections for women in *gacaca* courts. Evidence regarding sexual violence was to be given *in camera* so as to prevent it from being revealed publicly, among other safeguards (Organic Law 16/2004, art. 38). However, these changes did not have the effect of inspiring all judges to act in the best interest of survivors (Amick 2011, 46). Another weakness of *gacaca* courts is that, like in the national court system, there remains a severe national attitude toward prosecuting for acts of sexual violence, exacerbating the risk that sexual violence survivors will be stigmatized during the justice process. This results in a culture of fear in which many women are too afraid of the social and physical ramifications of accusing others of sexual violence or testifying in court; women are afraid of the shame and stigma surrounding telling their story (ibid., 63). They fear future ostracism and the social consequences of revealing their history with sexual violence, such as a future inability to marry (ibid.), given that their experience of WSV can lead them to being considered undesirable (ibid.). Furthermore, testifying can be traumatizing and instill a fear of reprisals (ibid., 65–66). Fear of being ostracized by family members and the wider community is not unique to survivors of WSV in Rwanda, as the work of Jok Madut Jok (2012) focusing on South Sudan has highlighted.

Given the socio-cultural negative effects that follow when communities learn that women have been subject to WSV, many women who survived incidents of sexual violence suffer in silence. Such silence is not the result of cowardice, but a result of, among other socio-cultural factors, an effort to have some measure of local belonging and for the sake of social cohesion in their families and communities. In these circumstances—which are not of their own choosing given the complex and contradictory nature of their decision-making space—they contribute to the reproduction of patriarchal silencing norms and privilege in the post-genocide era. Further, while the state claims that being Rwandan is the only identity in post-genocide Rwanda, the politics of the ethnicity and gender dynamics influence the workings of the *gacaca* courts. Overall, Hutu victims of the genocide face major obstacles in accessing justice in these courts. For example, Hutu women survivors and witnesses of the genocide are not taken seriously, and some of them end up being "denounced" and imprisoned.[40] Finally, as the detailed work of Susan Thomson demonstrates, *gacaca* courts have emerged as spaces of "fear" and as states' disciplining sites, and as "a mechanism of state

power that helps the government consolidate its hold over the country, albeit in a highly coercive and unstable manner" (Thomson 2013, 175). As part of the state apparatus, these courts fall under the auspices of "the National Service of Gacaca Jurisdictions, which is a chamber of the Supreme Court of Rwanda" (ibid., 166). The preceding dynamics of these courts indicate the importance of studying them critically. A critical approach complicates their work and contains any temptation to represent them as apolitical and benign 'traditional' institutional mechanisms that will deliver fair justice to local women who experienced sexual violence during the genocide.

Rwandan Transitional Justice Mechanisms: Concluding Reflections

The Rwandan example demonstrates an increasing attention to WSV in the context of war on the part of TJMs. Nonetheless, it also demonstrates the challenges and weaknesses of these mechanisms when it comes to addressing such violence. For example, as discussed in the preceding section, the ICTR's jurisprudence established rape as genocide and as a crime against humanity. It did not, however, consider the meaning of different forms of sexual violence, such as forced marriage, in the context of cultural understandings. Thus, even as the domestic approaches to justice increasingly address sexual violence, Rwanda's approach to sexual violence that happened during the genocide has been inadequate. Although it has been symbolically important that sexual violence is encompassed in Category 1 crimes, and that women have gained access to justice through *gacaca* courts, this attitude has not carried over to the court processes. These courts have failed to contextualize the harms against women who have experienced WSV. Overall, there remains a hostile environment in Rwanda for victims of sexual violence, and the court system has not done anything to ameliorate the situation within the courts, let alone the country at large. Further, there has been no overarching program or systematic approach to WSV at any of the court levels; thus, the Rwandan state has relegated such violence to the periphery. Survivors of WSV should be offered a safe space in which they can seek aid, support, and counseling as well as a means of seeking justice without the fear of reprisal. In order to more fully address WSV, TJMs in Rwanda and other state institutions should become more dynamic by offering

the resources, training, and support necessary to combat the continuing harms presented by sexual violence that occurred during the genocide. Without addressing this issue, it is difficult to say that either the national or international efforts to bring justice have ended the impunity of those who engaged in committing sexual violence during the conflict.

From a feminist human rights perspective, any real justice for women survivors of WSV requires that gendered inequalities be taken into account so as to contextualize their experiences.[41] The inequality that women experienced before the conflict exacerbated the effects of the harms and violence they faced during the conflict (Carpenter 2008, 651). Overall, institutional, structural, and cultural and political factors create a different background and context in which women experience and interpret WSV, which also affects how they enact their agency in mapping a meaningful future following conflict. In Rwanda for instance, the institutional, structural, and cultural impediments facing women before the conflict have affected their post-genocide experiences. After the genocide, women now compose approximately 70% of the Rwandan population, and many of them are widowed (Amick 2011, 18). Furthermore, women's access to justice is comparatively low because of cultural norms stressing that women should not expose their private and family matters publicly in general, initially prevented many women from coming forward in courts (ibid., 19). In addition, due to historical, local, and global dynamics, women are likely to have fewer resources than men in post-genocide Rwanda (ibid.). As the primary agent of human rights, the state must address existing gendered inequalities in the post-genocide era in order for actual positive peace to prevail, rather than privileging projects that ensure the consolidation of political-economic conditions to safeguard its security and survival. These projects have given rise to acts of "pretending peace,"[42] rather than the emergence of positive peace in the post-1994 period.

Although socio-cultural and political-economic realities that contributed to violence against women during the genocide still remain in the post-genocide era, some opportunities have opened for women that signal a positive development in the struggle for women's rights (Amick 2011, 20). For example, as Catherine Newbury and Hannah Baldwin demonstrate, post-genocide Rwanda has seen the rise of women's organizations with projects geared toward addressing economic and other issues affecting women, including survivors of the genocide.[43] Further, post-genocide legal reforms have seen more women engage in the public

sphere in Rwanda (Amick 2011, 20). These developments are evident in the political arena. For example, from a low base of 17.1% political representation following the 1988 election, the number of women in parliament has seen a significant increase in the last decade: 48.8% in 2003 to 53.3% in 2008 (Bauer 2012, 372). Of course, we need to be careful not to fall into the tempting trap of making simplistic and uncritical celebratory arguments that assume that, by virtue of their socially constructed gender identities, women members of parliament naturally represent the needs of women in Rwanda. Like men in Rwanda, women's identities are complex and intersect with other social identities, such as class, ethnicity, and religion. In addition, political and other ideologies mediate how women members of parliament approach debates in parliament, including those around WSV.

While being attentive to the pitfalls of essentialism and political contradictions[44] that women members of parliament have operated under in post-1994 Rwanda, it is important to note that their involvement in the political arena has been important in terms of addressing central feminist human rights concerns. For example, in a strategic alliance with a range of allies,[45] female members of parliament embarked on a struggle that resulted in the passing of the *Inheritance Law* in 1999 (Burnet 2008, 376–377). This law marks an important development in the ongoing struggles for the realization of women's social, economic, and cultural rights in Rwanda. With its adoption, "women [have] full legal rights to enter into contracts, seek paid employment, own property in their own names and separately from their husbands, and open bank accounts without the authorization of their husbands or fathers" and further, "customary inheritance practices" have changed to "g[i]ve girl-children equal rights with boy-children in matters of inheritance" (Burnet 2008, 376).

The *Law on the Prevention, Protection and Punishment of Any Gender-Based Violence* of September 2008 signaled another major achievement in the struggles for the realization of women's rights in the country. The road leading to the emergence of this law saw women members of parliament, under the auspices of their Forum for Women Parliamentarians, create a strong coalition that included male counterparts (Devlin and Elgie 2008, 250). These coalition building efforts in parliament and in the women-led NGOs sector are important in the struggle for women's rights. Beyond the coalition effort to address important feminist human rights concerns, women members of parliament in Rwanda have contributed to the transformation of parliamentary politics and culture

along positive lines as far as ongoing efforts for gender equality are considered. For example, because of women parliamentarians' "substantive Representation,"[46] male members of parliament "have begun to consider women's issues as part of their remit" (Devlin and Elgie 2008, 248).

The preceding transformations in political spaces such as parliament are important in the struggle for women's rights in Rwanda. However, the increasingly authoritarian character of the Rwandan state may derail the realization of broader women's rights.[47] Although praised for its developmentalist ideology—which some scholars have termed, albeit cautiously, as "developmental neopatrimonialism" (Booth and Golloba-Mutebi 2012)—the Rwandan state's authoritarian tendencies are evident and manifest in varying ways. The state has instituted a top down and managerial political project aimed at creating a non-ethnic national political space and identity. As part of this project, it has banned Rwandans from identifying themselves as Tutsis, Hutus, or Twas.[48] From its perspective, there is only one national identity: Rwandan. While informed by a different rationale and historical conjuncture, such a top down approach to political identity formation has a colonial marking: it is a project driven by the interests of contemporary ruling elites, which ignores the voices and everyday lived experiences of the majority of citizens, who, given the state's oppressive practices, have to act as if they are living under positive and sustainable, peaceful conditions.

Further, the state's national project ignores the gendered and ethnic dynamics that influenced women's experiences of sexual violence during the genocide. The Rwandan state's "blanket ban on ethnic tags may result in further denial of the intersection between gender and ethnic based discrimination that occurred during the genocide, and [that] still persists in different forms" (Mibenge 2008, 176). As such, the state's authoritarian stand on ethnic identification compounds the difficulties that women who experienced WSV face in seeking and acquiring justice for the harms they suffered in 1994. Further, state suffocation of the press and freedom of expression has constrained public debate; both women and men who, as citizens, demand their civil and political rights live in fear of state intimidation.[49] Consequently, while acknowledging the importance of the political openings that have emerged for women and their potential for contributing positively to the ongoing struggles for justice for women who experienced WSV, it is imperative to consider the implications of the authoritarian tendencies of the Rwandan state for these struggles. Overall, these tendencies have created an

environment that negates the protection, promotion, and realization of women's interdependent human rights embedded in the 1966 foundational Covenants[50] on human rights, and other rights instruments such as CEDAW.

Transitional Justice Mechanisms in Sierra Leone

Thus far, this chapter has indicated that, in recent decades, the long-time historical silence about WSV has to some extent been broken. As the example of Rwanda's TJMs demonstrate, the question of WSV is no longer considered a private matter or simply a national one. Further, the Rwandan case indicates that TJMs are gendered, and, although they have offered positive contributions to the ongoing struggles pertaining to WSV justice, their approach to gendered issues and such violence is limited. However, Rwanda's TJMs are not alone in these respects, as the following brief examples from Sierra Leone's TJMs' approach to WSV illustrate.

Like in other geographies of conflict, sexual violence was a common phenomenon during the civil war in Sierra Leone. Women and girls were raped and were often subject to gang rape or sexual slavery. Others were raped with objects. Sexual violence became a common feature in how each different insurgent group fought, and sexual violence was targeted at women of all different ethnic groups and ages (Nowrejee 2005, 86). Often women were raped in front of their families or community, publicizing their intimate and private anguish and subjugating them publicly. Variations of rape, of course, were not the only form of sexual violence used against women. Pregnant women frequently had their stomachs sliced open, as male combatants would bet on the sex of their fetus and the only way to find out was to remove it from the mother (ibid., 89). While WSV targeting women and girls was widespread, as we indicated earlier, they also participated in the war as combatants and engaged in acts of violence (Mackenzie 2012; Mauden 2011; Tripp 2012).

TJMs that developed in post-civil war Sierra Leone paid sexual violence special attention, as discussed below. Drawing from examples from other parts of Africa and the world, transitional justice in Sierra Leone took a dual form. A TRC and the Special Court for Sierra Leone (hereafter Special Court) worked along parallel lines to fulfill their designated roles in revealing and recording history and prosecuting those most accountable. These two mechanisms complemented each other with regard to

finding justice for victims of WSV; the TRC gave women a public voice regarding their experiences, compensating for the Special Court's ability to only address discrete instances of sexual violence and hold limited numbers of the highest-level offenders accountable. The Special Court, meanwhile, worked to achieve justice in a court setting, holding individuals accountable for their actions in a way that truth commissions cannot. This symbiotic relationship between the two mechanisms, however, only gave Sierra Leone the tools to achieve gendered justice. As such, it was the gender sensitive and sexual violence specific focus of the mechanisms that allowed both the Special Court and the TRC to effectively address sexual violence. Together, the work of the TRC and the Special Court emphasized crimes of sexual violence in efforts to attain reconciliation and build future peace for women in addition to men.

The Truth and Reconciliation Commission

The TRC (Commission) emerged through the Lomé Peace Agreement of July 7, 1999.[51] From the start, the TRC had a mandate to "restore the dignity of victims" (Truth and Reconciliation Commission for Sierra Leone 2004c, vol. 3(b), 86). Although this mandate did not specifically single out women or sexual violence as being part of this focus, the Commission interpreted this aspect of the mandate as necessitating that women's and girls' experiences and sexual violence be given particular attention (ibid.). Thus, it placed significant emphasis on gendered crimes and gender sensitivity. In light of this emphasis, the commissioners and staff underwent gender training before the start of the hearings. The training focused on international law and sexual violence, how to interview persons who had experienced sexual violence, and methods for protecting and supporting female witnesses (Nowrejee 2005, 93). In the context of the hearings themselves, the Commission was sensitive to balancing women's need for protection against a desire to speak out in a society where sexual violence carries a stigma. In doing so, the Commission offered women options as to how they wished to be heard. Women could testify *in camera*, so that they spoke only to the Commission and their identities were protected. Alternatively, women could tell their stories at a public hearing. At public hearings, women had the further choice to speak from behind a screen, protecting their identity from the live audience, or to speak openly (ibid., 94). These options expanded frameworks within which women could exercise their

agency in determining how they wanted to present their testimony and gave them the flexibility to curb the potential for negative repercussions following their appearance at the Commission.

The Commission also paid attention to the foundations of WSV and made significant recommendations that were sensitive to these foundations and to women's rights in general. Demonstrating its serious approach to the dynamics that led to WSV in Sierra Leone, the TRC situated its recommendations pertaining to the foundations of WSV in its "imperative recommendations" category.[52] Under its heading "Discrimination against Women," the TRC stated the following: "women and girls in Sierra Leone, before, during and after the conflict, were subjected to discrimination by practice, custom and law…Laws that should be repealed include those provisions that discriminate against women in relation to marriage, the administration of estates, inheritance, and divorce and property ownership" (Truth and Reconciliation Commission for Sierra Leone 2004b, vol. 2, 171). The Commission further recommended that the state "ratify the Protocol to the African Charter on the Rights of Women. The Protocol enjoins signatories to address 'Harmful Practices' against women. Harmful Practices are defined as all behavior, attitudes and practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity" (ibid.). In addition, the Commission included women and girls who had experienced WSV in their category of victims of war who should receive reparations. From the TRC's perspective, "due to their particular vulnerability either before or after the commission of the violation," victims of wartime sexual violence "suffered from multiple human rights violations" (ibid., 243).

The Special Court

In addition to the Commission, in 2000, the Sierra Leonean state requested that the United Nations establish a court in Sierra Leone to address the atrocities committed during the war, resulting in the establishment of the Special Court in 2002 that transitioned to a residual court for Sierra Leone in 2013.[53] It terms of its structure, it was a hybrid court that used both international law and domestic law to prosecute crimes against humanity, violations of humanitarian law and the Geneva Protocol, and serious crimes under Sierra Leonean law (Statute of the Special Court for Sierra Leone). Over the years, the Special Court

reached a number of precedent-setting decisions that have implications for the future treatment of sexual violence and forced marriage under international law. Although many scholars attribute much of the Special Court's success in consistently prosecuting issues of sexual violence to the dedication of the prosecutors, it is clear in the statute that from the beginning the court intended to pay special attention to such violence (Nowrojee 2004). The Special Court statute took advantage of the precedent set by the ICTR in including "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" among the violations of the Geneva Convention and Additional Protocol II. Further, as in the ICTR, the court listed rape as a crime against humanity, but added other explicit forms of sexual violence, including "sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," naming them as crimes against humanity (Statute of the Special Court for Sierra Leone, art. 2(g)).

Among the Special Court's achievements is its 2012 finding that the former president of Liberia, Charles Taylor, was guilty of "the crimes against humanity of rape and sexual slavery and the war crime of outrages upon personal dignity" (Oosterveld 2012, 8). Taylor was a key backer of prominent insurgent groups involved in horrendous crimes against humanity, including WSV against women and girls during Sierra Leone's civil war. As such, he was also "charged with assisting and encouraging, acting in concert with, directing, controlling and/or being the superior of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRIC), the joint RUF-AFRC junta and/or Liberian fighters" (ibid.).

The Special Court was also the first international court to recognize forced marriage as an international crime unto itself. In order to reach its decision, the Special Court had to grapple with how to classify forced marriage during trials. Unlike the forms of sexual violence explicitly listed in the Special Court's statute, forced marriage is unique in combining forms of sexual violence with non-sexual violence to compose a forced conjugal relationship modeled after perceptions of and expectations regarding marriage in pre-war Sierra Leone as well as during the conflict (Slater 2012, 737–738). *Prosecutor v. Brima*, *Kamara & Kanu*,[54] also known as the AFRC trial, represents the first juncture at which prosecutors pursued the independent crime of forced marriage against defendants (ibid., 737). In order to do so, the prosecutors

argued that forced marriage falls into the catch-all category of other inhumane acts under the Special Court's statute (ibid., 738). Other inhumane acts under the statute were comprised of four total elements, the last of which required that prosecutors prove that there was a "need to create a new, distinct category of crime" (Statute of the Special Court for Sierra Leone, art. 2(i)). At the trial level, the Special Court trial judges determined that prosecutors had failed to prove this final element, indicating that forced marriage is too closely related to the crime of sexual slavery to constitute a separate crime (*Prosecutor v. Brima*). In their view, they were "not satisfied that the evidence adduced by the Prosecution [was] capable of establishing the elements of a non-sexual crime of 'forced marriage' independent of the crime of sexual slavery under article 2(g) of the Statute" (Prosecutor v. Brima 215).[55] On appeal, however, the Appeals Chamber judges determined that forced marriage is distinct from sexual slavery and qualifies as another inhumane act (AFRC Appeals Chamber Decision, 195).[56]

After the AFRC Appeal, the Special Court continued to treat forced marriage as distinct from other crimes enumerated under the Special Court's statute. Soon thereafter, in the RUF trial, the Special Court issued the first convictions under international law for forced marriage and for sexual slavery (Oosterveld 2011, 61). The Special Court, however, did not apply a clear definition of forced marriage.[57] The Appeals Chamber defined forced marriage in the Sierra Leonean context as when a "perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim" (AFRC Appeals Chamber Decision, 196). The Appeals Chamber further elaborated that "unlike sexual slavery, forced marriage implies a relationship of exclusivity between the 'husband' and 'wife,' which could lead to disciplinary consequences for breach of this exclusive arrangement" (AFRC Appeals Chamber Decision, 195; Toy-Cronin 2010, 568).

Final Reflections on Transitional Justice Mechanisms in Sierra Leone

Even with all their successes, Sierra Leone's TJMs were underpinned by tensions that had gendered implications, especially for women and girls who experienced WSV during the civil war. Although the Commission

and Special Court together were able to give women and their experiences a voice as well as contextualize their experiences, women's lives were altered after the conflict. Women who became combatants' wives have been haunted by their relationship and its social and familial connotations. Due to their intimate association with fighting factions, women were often shunned by their communities, unable to return or reintegrate (Toy-Cronin 2010, 559).

Additionally, although the Special Court set precedent for how international courts may recognize and handle issues of forced marriage, this advance in jurisprudence is limited. Forced marriage still lacks any kind of clear definition (Slater 2012, 733). Neither the definition of the offense nor the Special Court's efforts to distinguish forced marriage from other forms of sexual violence are clear.[58] The Appeals Chamber made an effort to pinpoint forced marriage as exclusive and conjugal, but this is an insufficient and artificial distinction as sexual violence is not necessarily nonexclusive, and because other crimes like sexual slavery also include a level of reciprocity that the court hoped to pin down in its categorization of conjugal relationships (Toy-Cronin 2010, 568–570).

Further, in 2005, the majority of judges in the Chamber declared that "evidence" of WSV committed by members of the Civil Defence Forces (CDF), a close ally of the Sierra Leonean state in the years of war, "should be rendered inadmissible" (Kelsall and Stepakoff 2007, 356). This decision was a grave injustice for women and girls who experienced WSV in Sierra Leone. As M. S. Kelsall and S. Stepakoff argue, "the silence surrounding the prosecution of wartime rape in the CDF case may only reinforce the stigma associated with prosecuting crimes of sexual violence that exists at the local level in Sierra Leone, where rape – other than rape of a virgin – is still largely not considered a crime…By refusing to allow the prosecution to include counts of sexual violence in the indictment, the Chamber missed an opportunity to include as part of its evidence testimony about a significant aspect of the Sierra Leonean conflict" (ibid., 362).

Furthermore, the Special Court was criticized for focusing on indictments brought against only a select few individuals, ignoring lower-level perpetrators of WSV. This limitation was structural, for it stemmed from the Special Court's relatively narrow mandates in its statute coupled with its limited resources (Slater 2012, 733). Nevertheless, unlike the courts in Rwanda, the Special Court was the only judicial institution charged with prosecuting crimes arising out of the civil war. As such, these

limitations had a significant impact in that they qualitatively and quantitatively limited issues of justice to be addressed in the wake of the war to high-level crimes and the upper echelons of those responsible.

Concluding Reflections on Gendered Justice Experiences

Transitional justice mechanisms in Rwanda and Sierra Leone demonstrate important developments in the struggle against wartime violations of women's rights and acts of sexual violence during armed conflicts. These developments have contributed to breaking a historical silence regarding WSV. However, it is important to acknowledge that much work has yet to be done to more comprehensively address the injustices that women and girls who were subject to WSV face, for "gender justice often remains the exception rather than the rule in post-conflict societies" (Nowrojee 2005, 85). Commenting on limitations of TJMs, feminist scholar Catherine O'Rourke argues that the recognizing of rape as a war crime was supposed to start a dynamic conversation about women's experiences in war. Instead, it is an accomplishment that represents the beginning and the end of the conversation (2008, 277).

Overall, feminist critiques of TJMs highlight that women's experiences in wartime are reflective of cumulative harms embedded in politics, society, and culture throughout their lives, in addition to the conflict itself (O'Rourke 2012, 40). During conflicts, women and men alike may be combatants. Women and men are both affected by conflicts through witnessing deaths, experiencing loss, and dealing with any resultant economic hardship, and as agents of war-related violence. However, as indicated in our discussion of common foundations of GBV, women are also differently situated from men in a number of ways. Thus, the specific forms of violence that women experience are mediated by their socially constructed gender identities and other dimensions of their identities such as ethnicity, region, race, class, and religion.

Due to the personal and sexual nature of harms women face during conflict, coupled with their different cultural and societal experiences, women also experience TJM processes differently from men. One area that scholars have focused on extensively is the female experience of participating in trials. On the one hand, studies suggest that women's increased participation in trials will create better outcomes for women.[59] Greater participation of women in high positions in tribunals,

for example, promotes not only gender inclusion but also results in shifts in attitudes toward sexual violence (Mertus 2008, 1306). After more women were employed in more senior positions at the ICTY, for example, there was a change in the behavior of tribunal staff and female witnesses were treated with more respect than before (ibid., 1307).

Prosecution of sexual violence likewise increased and became more successful (ibid., 1305). In the ICTR's *Akayesu* trial and judgment, for example, the presence of Judge Navenetham Pillay, a female judge from South Africa, contributed to a "gender sensitivity" that the judges showed in their deliberation of this case (Askin 1999, 98). Furthermore, scholars suggest that women should participate as witnesses to a greater extent by testifying not only to sexual violence, but also by testifying more frequently regarding other circumstances and events during the conflict (Mertus 2008, 1309). At the same time, some scholars criticize how women are treated when they participate in trials. Others have indicated that trial experiences represent a narrow opportunity to reveal gendered experiences and hear women's voices (Nesiah 2006, 807).

Further, other scholars criticize trials, as women's testimony does not aid female witnesses in coming to terms with the past in order to create an improved future (Franke 2006). Witness testimony forces women to relive their experiences and be questioned by both prosecutors and the defense, often resulting in traumatic public experiences (Mertus 2008, 1312). As such, the progress made with regard to prosecuting gendered crimes is often at the cost of the individual women who have testified during trial (Franke 2006). Concerns regarding the harms that women relive, as well as the negative consequences they may face as a result of participating, apply to TRCs as well as trials. Overall, TJMs must pay specific attention to contextualized gendered harms that occur during armed conflicts. As examples in this chapter demonstrate, more must be done to expand how WSV is considered, through contextualizing the violence, promoting and improving women's participation in TJMs, and expanding conceptions of what constitutes sexual or gendered violence during armed conflicts.

With regard to building peace, a feminist human rights lens reveals that gendered peace necessitates that there be more than a lack of violence; when harms are contextualized, it is apparent that there must be a positive peace through social justice such that women and men may both experience a real security (Aoláin 2009, 1064). This perspective asks that security be thought of as a broad concept, such that it includes physical, social, and economic security, in order to address gendered needs

(ibid., 1065). Contextualized and examined as a means of obtaining a sustainable and positive peace that provides conditions for women to secure their human rights, TJMs cannot end at the same point for women as for male survivors of violence and combatants, because women face further, lingering security threats in society, whereas the majority of male survivors and combatants are relatively secure so long as fighting has ceased (ibid., 1064–1065). Thus, TJMs need to broaden their approach to WSV against women given the multifaceted harms that characterize such violence and its numerous effects. For example, the end of the civil war in Sierra Leone has not meant the end of women's and girls' encounter with war-generated "harms" as they have had to deal with the related consequences, including: "unwanted pregnancies; health problems including sexually transmitted diseases; increased poverty;" and the economic and other burdens emerging from their "increased responsibility as care givers for victims and children born as a result of sexual crimes" (King 2006, 252). As such, these women's "wounds of war still remain open" in contemporary Sierra Leone (ibid., 276). Further, given the reconfiguration of war time gender identities in simplistic terms that have mainly equated men with war and neglected the combatant role of women and girls, the main beneficiaries of post-conflict reconstruction programs have been men (Mackenzie 2012).

Thus, TJMs must take into account the gendered structures in place in a given society, as well as the specific concerns of women and girls, in post-conflict processes. It is important to recognize that, while international and domestic justice is necessary to end impunity for WSV and other practices that violate women's interdependent human rights, addressing the foundational aspects of women's social marginalization also plays a substantial role in preventing the reoccurrence of violence, as "humankind's level of tolerance for sexual violence is not established by international tribunals after war. The baseline is established by societies, in times of peace" (Ward and Marsh 2006, 29). Therefore, TJMs' deliberations and recommendations, including those concerning reparations[60] for survivors of WSV, must take into account the gendered nature of conflict and post-conflict reconstruction processes. For a positive peace to emerge, TJMs need to recognize and address the roots of WSV, which are based in longstanding gendered strategies of power in specific socio-political geographies.

Further, TJMs cannot ignore questions concerning dominant national and global institutional actors' capability and commitment to gendered issues surrounding WSV. For example, in the case of Sierra Leone, the return of democratic politics has mainly been characterized by inter-elite

competition and the mobilization of historically constructed ethnic identities, rather than a sustained and systematic response to the WSV that women and girls experienced during the civil war.[61] In addition to these features of the contemporary Sierra Leonean state that negate the access to justice for them, other constraining factors include: the state's limited capacity[62]; the economic effects of the war; and the austerity driven development policies mandated by institutions of global governance that enveloped the state's development agenda prior to and during the war, and that continue in the post-war period.

Overall, in Rwanda, Sierra Leone, and other societies engaged in post-conflict processes, political, legal, and institutional mechanisms that can hold state and external institutional actors—with overt and covert forms of power in a given country—accountable need to be at the center of TJMs' mandate and recommendations. Such mechanisms can provide women who have experienced WSV, and their allies within public institutions and civil society spaces, with important openings to hold states and other dominant institutional actors accountable for wartime gendered harms. As such, a multi-prong approach that pays attention to addressing historical and contemporary internal and external sources of violence against women in the context of war, and the creation of TJMs that pay attention to the gendered nature of conflict and post-conflict reconstruction processes, are necessary in the struggle for justice and positive peace in Rwanda, Sierra Leone, and other societies emerging from conflict. Such an approach may contribute to the emergence of conditions that enable women and girls who have experienced GBV in the context of war to demand and realize their interdependent rights.

Notes

1. See, for instance, Binion (1995, 509–526).
2. See http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm.
3. Ibid.
4. Ibid.
5. For further details, see Article 1 of the Protocol at: http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm.
6. According to Pradeep Kumar Panda, "rights are legally-binding entitlements, not charity. Rights are legitimate claims. The rights perspective… transforms needs into rights and responsibilities. The state and non-state actors have legal obligation to respect, protect and fulfill those rights. So, rights empower women" (2003, 19).

7. For an extended discussion, see An'Naim (1990).
8. Defined as "a long-term condition that must be facilitated for the future, through building trust and encouraging greater interaction between previously antagonistic parties" (Clark 2009, 196). Its opposite, negative peace conflict, has ended (ibid).
9. As Augustine S. J. Park argues, "while women and girls share experiences of gender oppression, girls are uniquely positioned as not only a marginalized gender, but also a marginalized age group. Girls, furthermore, are often subsumed under discourses of children; however, 'children' have historically and continue to be conflated with 'boys' in talk and in practice" (Park 2006, 316).
10. Tripp works offers an insightful intervention on the question of women's' and girls' agency in the context of war and other vulnerable junctures. In the main, it goes beyond a simplistic conceptualization of agency in such contexts. For more details, see Tripp (2012).
11. See Dolan (2011).
12. For more details, see Sivakumaran (2007).
13. See a detailed discussion in Taylor's (1999) book, especially in Chapters 1, 3, and 4.
14. See Triponel and Pearson (2010, 103). Triponel and Pearson identify that transitional justice combines "goals of justice for victims with the objectives of peace, reconciliation, and social reconstruction."
15. See George (2007, 62–63), O'Rourke (2012, 38).
16. For a further discussion of core aspects of TJMs, see Clark (2009, 191–205).
17. See the London Charter. Although not listed as a specific offence under the London Charter, it still would have been possible to prosecute charges of rape due to the loose wording of the charter, which allowed for prosecution of non-enumerated offences. However, no charges were brought on these grounds (Campanaro 2001). The Local Council Laws No. 10, under which lower-level Nazis were prosecuted, did include rape as an offence. No charges, however, were brought (Copleon 1994).
18. Copelon (1994, 244–45) also calls attention to the gender and racial dynamics and power inequalities underpinning this growing awareness of sexual violence against women.
19. For further discussion, see Jallow (2008).
20. See *Prosecutor v. Akayesu*, ICTR Trial Chamber Case No. ICTR-96-4-T 2, Sept. 1998.
21. For more details on the TRC, see An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, Art. VI, § 24.
22. For further details, see Human Rights Watch (1999, 702–735).
23. See, for instance, the 1997 documentary film from Danièle Lacourse, *Chronicle of a Genocide Foretold* (New York, NY: First Run/Icarus Films).

24. For an extensive discussion, see Newbury (1988), Taylor (1999), and Mamdani (2001).
25. The remainder of the paragraph draws its insights from extensive discussions in the following works: Longman (1995), Des Forges (1999), Mamdani (2001), Pottier (2002).
26. To review the Commandments, see http://www.un.org/en/preventgenocide/rwanda/text-images/Panel%20Set%202%20Low%20Res.pdf.
27. For an extended discussion on these tendencies of Hutu extremist militia, see, generally, Taylor (1999), Baines (2003).
28. Citing Government of Rwanda, Rapport National du Rwanda pour la Quatrième Conference Mondiale sur les Femmes (Beijing), September 1995, p. 19.
29. Since the genocide, Rwandan laws have changed to permit women to inherit land. Interpretation of the laws, however, is problematic, and remaining cultural factors impede women's ability to own and profit from land. See Nessel (2007, note 47).
30. For some examples, see Human Rights Watch (1996, 65–68).
31. See Amick (2011, 30).
32. See Human Rights Watch at https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors.
33. See Laviolette (1998, 93–149).
34. Given its gender neutrality, Members of Parliament viewed the term "sexual torture" as being more encompassing, for it included all victims of WSV (Mibenge 2008, 162–163). Yet, such a view ignored the concrete ways in which women, especially Tutsi women, were the main targets of such violence (ibid.), and the gendered socio-cultural framing and realities that characterized the raping and sexual harms committed during the genocide (Carpenter 2008).
35. See Nessel (2007, 103).
36. Ibid.
37. According to Charles Ntampaka (cited in Amick 2011, 28–29), traditional *gacaca* courts "did not include any written rules; remained wary of legal prescriptions that adjudicate and convict; was closely related to the family unity; favoured the role of 'head of the family'; involved forms of collective responsibility; did not promote equality; gave priority to community interests over individual rights; often deemed confessions to be a form of provocation; and drew on the sacred and the religious."
38. See Nessel (2007, 103).
39. Organic Law No. 40/2000. Note that, although *gacaca* courts are based on traditional justice systems, their modern form departs drastically from traditional procedures and practices used (Amick 2011, 28).
40. For an extensive discussion of these issues, see Thomson (2013, 172–173).
41. See Carpenter (2008, 651).

42. For a detailed discussion of this phenomenon, see Buckely-Zistel (2009).
43. For more details, see Newbury and Baldwin (2000).
44. A range of scholars has noted the increasingly authoritarian tendencies of the post-genocide Rwandan state. For example, Timothy Longman contends that this state form "continues to fall short of the standards of liberal democracy" (2011, 26). For an extended discussion, see Longman (2011, 25–47). In addition, see Longman (2006), for further discussion on the question of women in parliament in an increasingly authoritarian political landscape in Rwanda.
45. Leading among such allies were women-led non-governmental organizations and elements of the state apparatus.
46. A concept utilized to explore the extent to which women members of parliaments are concerned and advocate for women's needs. For more elaboration on this concept, see Bauer (2012, 375).
47. For a detailed discussion of these issues, see Longman (2006, 133–150).
48. See Lemarchand (2009), Buckley-Zistel (2009), and Longman (2006).
49. For an extended discussion, see Longman (2011).
50. For a detailed discussion of these Covenants, see James (2007).
51. See Sierra Leone TRC Reports: Witness to Truth 1, 23, 30–31 (2004a).
52. The other categories are "Work Towards" and "Seriously Consider" (Truth and Reconciliation Commission for Sierra Leone 2004b, vol. 2, p. 119). For the recommendations under the "Imperative" category, the Commission contended that they "ought to be implemented immediately or as soon as possible… [, that] The Government is required to implement these recommendations 'faithfully and timeously'" and that "these recommendations tend to be those that establish and uphold rights and values" (ibid).
53. For more details, see Residual Special Court for Sierra Leone at http://www.rscsl.org/.
54. *Prosecutor v. Brima* (Decision on Prosecution Request for Leave to Amend the Indictment) (Special Court for Sierra Leone, Trial Chamber 1, Case No SCSL-04-16-PT, 6 May 2004).
55. For more details, see *Prosectuor v. Brima* (Judgement, Special Court For Sierra Leone, Trial Court II, Case No. SCSL-04-16-T, 20 June 2007).
56. AFRC Appeal (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008).
57. See Slater (2012, 740–741).
58. See Slater (2012), Toy Cronin (2010).
59. See Mertus (2008), O'Rourke (2012).
60. For a seminal discussion of reparations from a gendered lens, see Rubio-Marín and Wolper (2006).
61. For an extended discussion, see Cubitt (2012, 56–81, 148–168).
62. Ibid.

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CHAPTER 5

Sexual Minorities, Human Rights, and Public Health Strategies in Africa

Marc Epprecht

Small associations to promote sexual rights, sense of community, and self-esteem among gays and lesbians began to be formed in South Africa and Zimbabwe in the 1980s.[1] These early associations tended to be in the spirit of gay liberation and pride as pioneered in the West. As such, they presented some quite profound principled challenges to traditional African cultures, to the mainstreams of Christian and Muslim faith, and to African nationalist politics. A state-led backlash against them began in Zimbabwe in 1995, in part because of this perceived cultural imperialism from the West against putatively African values. As new associations were formed elsewhere on the continent in the late 1990s and early 2000s, and as growing numbers of Africans began coming out to publicly confront myths and silences around so-called African sexuality, that backlash spread to country after country.[2] It continues in sometimes extreme articulations, as seen most recently in proposed draconian laws and constitutional amendments to preclude sexual minority rights in Uganda, Nigeria, Malawi, and Burundi, amongst others. This homophobic turn has mobilized activists in the West and piqued the interest of Western media, which, in turn, appears to have stiffened the resolve of some

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major aid donors to speak out against human rights violations. The UK and US have threatened to cut off aid to the most egregious violators.[3]

These controversies have inspired some African lgbti to strengthen their solidarity networks on the continent and with friends in the West, and to engage in even bolder activism. A BBC-produced television debate in Johannesburg featuring a long kiss by two of the lesbian debaters comes to mind as a dramatic example, and others are discussed below.[4] Yet the controversies have also encouraged many same-sex-practicing people to remain in, return to, or adapt traditional forms of discretion that allow them to avoid attention, including secretive, de facto bisexuality.[5] In the context of high rates of HIV/AIDS, however, that strategy is also decidedly risky. A number of lgbti activists and their allies have consequently adopted a more subtle strategy to promote sexual rights and sexual health that steers between confrontation and closet. This "interim" approach urges the careful use of euphemism and implicit language, and the embedding of rights and a self-esteem agenda for sexual minorities within sexual health campaigns that are ostensibly aimed at the heterosexual majority.

Can a public health approach to promoting sexual rights and, hence, enabling or abetting the development of politically self-confident gay identities, work in Africa? Does such an approach necessarily fuel "gay identity migration" from the West, as Matthew Roberts (1995, 243–64) posits, or does it, as Vinh-Kim Nguyen suggests, link new "forms of life" around sexuality to Western confessional technologies (and dollars) deployed to fight AIDS-stigma (Nguyen 2005, 245–67; 2010)?[6] In this chapter, I examine specific initiatives that are using somewhat covert means to challenge prevalent homophobic or silencing cultures. In the process, I reflect on some of the tensions and dilemmas of the public health approach in pursuit of what one recent manifesto called "erotic justice" for sexual minorities, meaning not just an end to discriminatory laws and other serious problems, but also the promotion of the idea "that sexuality, pleasure and the erotic are part of our common humanity" (Tamale 2011, 47–48). The argument draws primarily on a close reading of the pertinent texts, participatory observation of a number of regional and pan-African workshops and conferences, and reflections on the *pro bono* work I have been doing for refugee asylum claimants. As to the ethical question of broaching such "secrets" in a public forum, my view is that the health interventions discussed below are already public documents that actively solicit informed public engagement with the

issues. The exception is the leaked US embassy cables, which I have used with caution because they tend to make African leaders and US officials look more ethical (and reasonable) than their public statements often imply. My approach to all of these sources is guided by the rich tradition of feminist scholarship and activism in Africa that Ugandan legal scholar Sylvia Tamale eloquently builds upon in her work (ibid., 11–36).[7]

Safer Spaces

To begin the discussion, it is important to contest one of the more common tropes in the Western media. It is not self-evident that homophobia is a uniformly continental issue, that African cultures are inherently homophobic, or that Africa is the worst place in the world to be gay. On the contrary, many countries in Africa appear to have a de facto culture of tolerance (or indifference) to same-sex sexuality that amounts to freedom from discrimination, notwithstanding sometimes harsh laws and elite homophobic rhetoric. In addition to enjoying same-sex relations while still fulfilling social obligations of heterosexual marriage and the appearance of virility/fertility (de facto secretive bisexuality), traditional "covers" for sexual and gender nonconformity include spirit possession, woman–woman marriage, and distinct occupational or other social niches such as the *yan daudu* of northern Nigeria or the *gor djigen* of Senegal. The key proviso is that non-normative sexuality is not named as such, but takes place under the umbrella of heteropatriarchal constructions of family, faith, and African identity—don't ask, don't tell, in other words.[8]

A corollary to this point is that some of the most extreme expressions of homophobia in Africa today are directly linked to outside interventions. I want to be careful not to romanticize traditional cultures or overstate African passivity in the face of foreigners' homophobic proselytization. However, the role of US Christian fundamentalist or "ex-gay" missionaries is the subject of some compelling investigative journalism that draws attention to this pernicious external influence (Kaoma 2009; Sharlet 2010, 36–48).

It is also important to recognize recent successes in the struggle to extend human rights to sexual minorities in Africa, again notwithstanding strong appearances to the contrary. As most people know, South Africa was the first country on the continent to enshrine the principle of non-discrimination on the basis of sexual orientation in its constitution.

Since doing so in 1996, it has moved steadily to develop laws and national HIV/AIDS prevention and education policies that meet (and in some cases surpass) global best practices. In November 2007, for example, it became only the fifth country in the world to legalize same-sex marriage. But South Africa is not alone in this trajectory. Cape Verde in 2004 became the second nation on the continent to decriminalize homosexual acts over the age of consent (16 years, equal to the heterosexual age). A handful of other countries, including Gabon, Mauritius, Central African Republic, Rwanda, and Sierra Leone, have since signed or signaled their intention to support the UN General Assembly's resolution to include sexual orientation within the Universal Declaration of Human Rights. In Uganda, in 2010, the High Court upheld the right of lgbti to privacy; in Kenya, an openly gay man (David Kuria) ran for election to the Senate; in Mozambique, parliament voted in 2015 to decriminalize sodomy. Prominent African leaders and intellectuals have added their voices to the struggle to defeat homophobia on a pan-African scale.[9]

Progress toward the attainment of human rights for sexual minorities may often seem painfully inadequate when seen against headlines of homophobic hate speech and violence. A fair assessment, however, must acknowledge, first, that significant successes have occurred in Africa in the last few years, with good potential to continue to do so in the light of the profound structural changes that have favored human rights aspirations almost everywhere else in the world (urbanization, international migration, connectivity to social media, and so on). Second, a disjuncture exists between the loud expressions of homophobia, on the one hand, and popular cultures that prefer to turn a blind eye to private matters around sexuality on the other. That disjuncture suggests a greater openness to education and reasoned dialogue than is often assumed in anti-homophobia interventions and in sensationalized media accounts.

In making these points, I do not want to minimize the dangers and indignities that African lgbti and their friends and families often encounter. It remains true that on most of the continent strong social stigma attaches to open expressions of same-sex sexuality, and that this opens the door to all kinds of abuse and self-harm. Same-sex sexuality is also criminalized to various degrees in most African countries. Mostly this is achieved through laws inherited from the colonial era that focus on specific, albeit ill-defined, sexual acts—sodomy, above all, but also variations of "unnatural acts," "debauchery," "vagrancy," and even "buggery," a

term that passed out of common usage in the source country (England) many decades ago. Such laws are directly oppressive and have resulted in several high-profile cases of imprisonment. But they are also indirectly oppressive by inviting entrapment, extortion, blackmail, vigilantism, and cultivated ignorance about unsafe sexual practices. Numerous reports suggest that this situation is worsening, with an increase of violent homophobic rhetoric and acts reported in recent years. Even in South Africa, cases of homophobic hate crime are reportedly on the rise, while the government has until very recently been noticeably hesitant to incorporate this aspect of human rights into its foreign policy (Canning 2011b).

Complicating the situation is the widespread perception that human rights discourse is a not-so-subtle form of Western neo-imperialism. In the context of Western-backed structural adjustment policies that have had a devastating impact upon African economies and societies, for many Africans this is an intervention that goes too far. Mistrust of the West has been inflamed in recent years by African politicians and religious leaders, with demagogic language that links opposition to gay rights with patriotism. Western pressures on Uganda to refrain from adopting its proposed Anti-Homosexuality Bill, for example, were denounced by one prominent Christian leader as "undemocratic threats" and "homocracy" (Kron 2011).[10] Solidarity groups and NGOs in the West have also been tarred with the brush of colonialism and racism—the "Gay International" according to one academic rebuke, or "homonationalism" to another. The latter refers to activists in the West taking chauvinistic pride in their hard-won gay rights, and in that way, often unintentionally, adding to the ideological arsenal that bashes Muslims and other supposedly retrograde folks (Massad 2007; Paur 2008, 13–70; Sokari 2010).[11]

The result of all of this is that sexual rights activists in Africa commonly risk their jobs, family, reputations, and possibly even their lives to speak publicly and explicitly in favor of such rights. It is bad enough to be denounced as a pédé ("faggot"). But it hurts to be labelled as a zombie or whore to the West as well. That small numbers of individuals, associations, and networks are speaking out is thus all the more remarkable. They are conducting or supporting research that challenges the prejudices of the anti-rights position, and forming alliances both domestically and internationally to press their case to public opinion. From their own testimony, this work can have a powerful, even revolutionary, impact upon their personal sense of identity and citizenship, especially as it engages broader issues of social transformation.[12] The LGBTI

Declaration of 2010, for example, lists economic justice, democracy, and land redistribution among its goals (Tamale 2011, 182).[13]

Such sentiments have undoubtedly contributed to the successes noted above. For most African lgbti, however, a bold rights or full disclosure strategy in confrontation with the state or powerful religious groups is simply too risky, unlikely to be successful, and unattractive. The fact is that many governments in Africa are run by or beholden to populist demagogues, are corrupt, and/or are frankly uninterested in human rights of any kind beyond a cynical performance to secure aid from often equally or more cynical Western donors. Moreover, even where willing, African states typically lack the capacity or bureaucratic heft to put human rights principles into practice on many issues, not just the lgbti file. African lgbti are meanwhile so heterogeneous (by class, ethnicity, race, language, gender identity, sexual orientation, religion, age, and so on) that it is daunting almost to the point of impossible to forge a common political front. Same-sex desire also, it should be emphasized, does not negate patriotism and national or family loyalty. A human rights strategy that involves mocking African leaders and cultures in generalized terms can be directly alienating to African lgbti, as well as provoking a wider nationalist reaction against lgbti people and greater policing of homosocial or de facto gay friendly spaces.

The majority of same-sex-practicing people in Africa thus still prefer to keep a low profile, eschewing identity politics and adhering to family expectations and social norms, even as they quietly find same-sex partners or surf the net for private connections. Even activists who are unambiguously, courageously "out" as regards their sexual orientation have expressed frustration with pressure from the West to be more confrontational, and more "out" in the approved Western ways. The Rev. Rowland Jide Macaulay of Nigeria offers one sober expression of that view. Welcoming solidarity from groups and donors in the West, Macaulay nevertheless strongly urges:

> The international gay and lesbian movement is not a model for Africa. The way we approach things is very, very different. Our culture is different. One of the things we keep telling our European friends is bear with us, travel the slow pace with us. Recognize our issues. Consult us before you act on our behalf. (2011, 84–85)[14]

Dangerous Turns

It may be asked then, as some African leaders pointedly have, why not just leave things be—that is, why not employ don't ask, don't tell, and let the homophobic steam blow over? This was the gist of Zimbabwe's Prime Minister Morgan Tsvangirai's characterization of gay rights as "elitist," and is a common refrain in the confidential discussions between the US State Department and African leaders as revealed in the Wikileaks cables.[15] Unfortunately, as much as we can respect some of the merits of the "low profile" position, its sustainability in a globalizing world and in the context of high rates of HIV/AIDS is vanishingly small. Indeed, beginning in the late 1990s, tentative studies began to reveal that men's practice of hiding homosexual relationships behind the façade of a wife or girlfriend was a much more serious factor in the spread of HIV in Africa than previously assumed. One study from Abuja, for example, found that over a third of msm had HIV—up to seven times the rate found amongst the population as a whole. Another study from Kenya found that over two-thirds of msm had had unprotected intercourse with a woman in the previous year, while in Senegal, one in five msm reported practicing heterosexual anal intercourse as well as their male–male practices. In Uganda, fully 90 percent of msm informants in the first such study there had female wives. Relatively high levels of sex work, of non-consensual sex, of substance abuse, and of multiple concurrent partners, plus low levels of condom and water-based lubricant use in the context of low confidence in the healthcare system, combine to create a perfect storm of conditions for the spread of HIV. The government of Kenya estimates no less than 15 percent of all HIV infections in the country occur as a result of male–male sex. Such a toll adds to the recipe for the intensification of stigma against lgbti people (Kenya National AIDS 2011).[16]

Of course this is a huge tragedy. How many tens of thousands of people died as a result of this two-decade blind spot in HIV/AIDS strategic plans, and how many more may be endangered by new forms of stigmatization? On the other hand, many see an opportunity coming out of this research. Public health, they argue, could push the rights agenda ahead more effectively than either the gay rights or go-slow/"low profile" approaches. A third strategy has consequently emerged that expresses alarm and frustration with the silences around same-sex sexuality, while at the same time recognizing the risks and limitations of using the kinds of rights-based arguments and explicit language associated

with gay liberation in the West. In this view, the long-term objectives remain the attainment of full human rights for sexual minorities and the gradual attenuation of aspects of culture that require secrecy, public conformity to heterosexual norms, and hypocrisy. This may or may not lead some individuals to adopt some elements of Western gay identities. Even where it does not, however, and where African lgbti continue to express their respect for African faith, family, and other values, it still poses the risk of open confrontation with the state and community, against which there are very few protections. The short run therefore requires more subtlety than overt sexual rights activism. This strategy involves the use of euphemisms to obscure or dilute the homosexual aspects of the argument. As one lgbti activist in Kenya emphatically put it, "There are no gay rights!" (Kareithi 2011). This strategy also requires the submersion of normative rights and justice objectives within science-based public health arguments directed at either the whole population or at "worthy" heterosexual minorities, whose work or other circumstances make them especially vulnerable to HIV.

Can an interim, covert "health strategy" have success in protecting people and opening the door to societal acceptance of out lgbti, however that outness is articulated? Matthew Roberts (1995) was certainly optimistic in believing so. Writing long before the advent of anti-retrovirals and electronic social media in Africa, and at the very onset of political homophobia in Zimbabwe, Roberts saw AIDS as a "catalyst" for "gay identity migration." Along with tragedy, AIDS would motivate activism on sexual rights that would result in their widespread attainment in Africa and the Global South more generally by "Stonewall 50" (that is, by 2019, fifty years after the celebrated start of gay liberation in the West). Such a political and social transformation would be led by male middle-class activists supported by Western solidarity groups and donors.

This is a controversial argument on several levels. Is it possible to compromise or hide human rights principles without effectively surrendering to the opposition? Who wants to trust the middle class or Western donors? How will women who have sex with women be included in an approach that necessarily emphasizes the high-risk nature of many current msm practices? How can a stigmatized population avoid further stigmatization if publicity focuses on the health dangers they pose to the general population? How are the goals of self-esteem and political confidence nurtured among young lgbti when the main associations representing them prioritize disease and practice deception? If stealth is, in

fact, necessary for success, how ethical is it for allies to reveal and analyze the ostensible secrets? And since secrecy so often evokes an element of eroticism, could banal medical language generate unexpected ludic or "recruitment" potential that might complicate the public health agenda or give rise to its own set of scandals? It may be naïve, in other words, to assume that teachers and public health workers will remain entirely immune to the effects of talking about lubricants, pre-ejaculate, the correct application of a condom to an erect penis, and other such topics in explicit language, and that they will not be susceptible to homophobic accusations of recruitment. Indeed, according to the first-hand account of a medical professional in Abidjan, precisely that has happened, along with the emergence of other modern, liberal or "self-fashioned" sexual identities, as bold confessions of HIV status, sexual practices, and gender performance have been rolled out in the struggle to combat HIV/AIDS and stigma.[17]

Confidence in Roberts' schema is also compromised by a close examination of the one clear success he identifies in Africa, Gays and Lesbians of Zimbabwe (GALZ). Memoirs by founding members of GALZ do not, in fact, support his claim that AIDS or other health issues were a catalyst in its formation. Some of the principal gay men involved strongly accredit the pioneering role of lesbians in the process (Gays and Lesbians of Zimbawe 2002). From my own observations of the troubled transition from predominantly white to predominantly black leadership in the mid-1990s, middle-class members were not necessarily reliable in that process. Recalling the context of extreme vulnerability for those who held formal employment, it is not surprising that a ticket to London or New York was often preferable to assuming a leadership role in a publicly despised association.

Nevertheless, it is possible to discern a discreet sexual rights movement and identity formation unfolding at least somewhat as Roberts predicted, with HIV/AIDS as a motivating factor particularly in countries that lack a strong civil society. The remainder of this article considers specific manifestations of this strategy/movement, and their prospects for success.

The HIV Gambit

A number of global actors have been crucial to funding new research, enabling the construction of networks, and mobilizing opinion on

msm. The International Gay and Lesbian Human Rights Commission (IGLHRC; now, OutRight Action International), for example, made an important early intervention with its report on the failures of virtually all African countries to help African msm protect themselves against HIV (Johnson 2005). Even more significant was the first ever workshop on the topic of msm and HIV/AIDS in Africa, primarily sponsored by the US-based Population Council. Held in Nairobi in May 2008, that meeting brought together dozens of activists and public health officials from ten African nations. Its report urged African governments to recognize the existence of msm and to promote their right to health for pragmatic reasons, with all that that implies for prevention, treatment, care, and the necessity for "an overall high quality of life." But the report also endorsed avoiding the term msm in protocols and ethics applications, emphasized the need to "manage" the media so as to avoid negative publicity as programs unfolded, and advocated designing studies to include injecting drug users and the disabled, even if the principal subjects of the studies (msm) would be likely to object to these inclusions (NACC 2009).

It may be an exaggeration to describe this as a "covert" strategy; "discreet" or "two-stage" are probably more appropriate adjectives—that is, use implicit, euphemistic, or vague language and acronyms to get the foot in the door, then extend the discussions when circumstances are favorable. That strategy, it should be emphasized, is by no means new in the history of homosexualities in Africa. On the contrary, men and women have always invented words and argots to disguise activities and liaisons disapproved of by popular culture. In northern Nigeria, a highly sophisticated blend of languages and *double entendres* has enabled a sub-culture of effeminate men who sometimes have sex with men to exist more or less openly in an otherwise quite conservative Muslim society. Recent neologisms such as *kuchu* (East Africa), *nkouandengué* (Cameroon), and *saso* (Ghana) take some of the sting out of traditional ones that imply an occult meaning, or more modern pejoratives. As such, they may be facilitating a modicum of public acceptance for otherwise censured behaviors. Perhaps the best-known example of this in Southern Africa is *nkotshana* (*hungochani*, *bukhontxana*), invented by migrant mine workers in the late nineteenth century to describe a short-term male–male "marriage," but co-opted by the 1990s to mean sexual orientation and identity in the modern sense, deserving of respect.

Gay rights activism in Africa also recorded its origins in unobtrusive language. The very first attempt to organize people politically against state harassment of gay men (in South Africa in 1966) was called the Law Reform Fund. This had limited success, and in the late 1970s activists turned to more militant and explicit language. Yet after a run of gay and lesbian-named associations in the 1980s (GASA, GLOW, OLGA), something of a shift back to more neutral and inclusive language took place in the 1990s. The intention was quite deliberate—to embed the struggle for rights for sexual minorities within wider struggles for civil rights, and for women's emancipation from patriarchal laws and customs in particular. Hence Sister Namibia, the Triangle Project, the Rainbow Project, Forum for the Empowerment of Women, and the Joint Working Group. There has also been an emergence of safer social spaces for lgbti who do not necessarily want to participate in political activism, notably through lesbian soccer clubs and gay-friendly faith groups (Hope and Unity Metropolitan Community Church in South Africa, Other Sheep East Africa in Nairobi, and the Rainbow Church in Nigeria, for example).

Outside of Southern Africa, demurring to name the main intended direct beneficiaries of sexual minority rights has been a strong feature of the movement as it has developed since the late 1990s. For those without insider knowledge, it is hard to tell what issues and audiences Alliance Rights Nigeria, Freedom and Roam Uganda, the Centre for the Development of People (Malawi), Matrix (Lesotho), Andiligueey (Senegal, meaning "men working together to help other men" in Wolof), Horizon Community Association (Rwanda), and Ishtar MSM (Kenya) are addressing. Even beyond the ambiguous names, it often requires a close look at their websites to discern their priorities. CEDEP in Malawi, for example, introduces itself as working for the health of the country's "most neglected minority groups," of which msm appears down on the list below prisoners and (implicitly female) sex workers. Yet further along on the website its programs, including men's sexual health, peer education, voluntary counseling and testing, advocacy, and research, indicate an overwhelming focus on msm (CEDEP 2017).[18]

The strategic embrace of health discourses is one "cloaking" mechanism with which to slip sexual minority rights onto the local agenda. Nigeria's International Centre for Sexual Reproductive Rights (INCRESE), for example, lists diversity among its four core values, with msm as just one of its target populations. Yet it has emerged as one of

the key actors facilitating research and lobbying against proposed homophobic laws and practices in Nigeria (INCRESE 2016). The Uganda Health and Science Press Association (UHSPA) is another recent creation whose name does little to alert the opposition to its interest in sexual rights. In an important public intervention, the UHSPA is upfront that it is in fact a registered LGBTIQ organization and calls for the compete decriminalization of same-sex sexuality between consenting adults. The bulk of the memorandum, however, methodically presents a harm reduction argument against the government's proposed punitive approach to HIV infection. It stresses the public health benefits cited in the 2009 ruling by the Delhi High Court, when it struck down the Indian law against "carnal knowledge … against the order of nature" (the exact same law had been imported by the British to Uganda), namely that the law "contributes to pushing the infliction [sic] underground," and makes "risky sexual practices go unnoticed and unaddressed." The UHSPA concludes with an appeal to the "self-preservation" of the heterosexual majority by emphasizing the extent—and threat—of hidden bisexuality in Ugandan society.[19]

None of this is to suggest disingenuousness. On the contrary, health has clearly played a key, sincere role in motivating same-sex-practicing people into political activism across the continent. As Persons Marginalized and Aggrieved (PEMA, a Mombasa-based lgbti association) puts it, the group owes its existence to the lonely death of a member of the community who was ostracized by his family. In the soul-searching that followed, friends became determined to do something to address the issues that contributed to the tragedy. By its own account, PEMA quickly transformed from a male-only association to one that includes lesbians and transgender women (Gay and Lesbian Coalition of Kenya 2017). Elsewhere, msm respondent-driven sampling to investigate high death rates in the studies noted above helped to conscientize the subjects with scientific knowledge and provide them with confidence to speak out publicly.

A significant amount of gay rights activism has also simply melded into mainstream HIV/AIDS lobby groups. The strikingly successful Treatment Action Campaign is the most famous of these. TAC was founded in 1998 by Zackie Achmat and several other activists behind the sexual orientation clause in South Africa's constitution. The immediate motivation to form TAC, according to Achmat, had been the death of pioneering black gay activist Simon Nkoli, who had not been

able to access the anti-retroviral drugs that were saving the lives of better-insured, and usually lighter-skinned, citizens. TAC today makes virtually no reference to these origins and only minimally to homophobia as a stigma that has an impact on HIV/AIDS (Power 2003).[20] Other mainstream HIV/AIDS NGOs, meanwhile, have begun to incorporate msm in their vocabulary, learning in the process to be discreet. As one such worker reported from Mali, an initial lack of discretion had sparked protests against a planned workshop on HIV/AIDS and homosexuality.

> They made such a fuss about this, accusing the organizers of trying to lure teenagers into homosexuality, as a result we had to cancel the workshop. Today we try to run our activities more discreetly, we are flying under the radar. Recently we were invited to join Africa Gay, a network of LGBTI organizations that fight against HIV and AIDS, but we had to decline this opportunity for fear of protests by people. (Messie 2011)

The network referred to above may be the African Men for Sexual Health and Rights (AMSHeR), a Johannesburg-based NGO established in 2009, with a mandate "to address the vulnerability of gay and bisexual men, male-to-female transgender women and other MSM, to HIV."[21] AMSHeR was the brainchild of both HIV and human rights advocates, and indeed, its first executive director was a former employee of IGLHRC who holds a graduate degree in International Human Rights Law (Joel Gustave Nana). AMSHeR clearly indicates that it uses "a rights-based approach which recognizes the need to protect our members – who often work in repressive environments." Yet even here one can sense a gentle pulling of punches. The main stated goal is to fulfill the right to health for men who have sex with men. The rights to freedom of speech or association or privacy remain implicit. The ordering of institutional objectives also suggests an element of caution, and a hierarchy of priorities: strengthen capacity, increase the visibility of MSM issues, greater resources, an evidence base, and, lastly: "Advocate for the protection of gay men and other men who have sex with men from human rights violations" (ibid.).[22]

This is not a criticism of AMSHeR, which in fact remains quite bold in its reference to gay men and LGBT. Even msm, invented precisely to get around those identity politics, by categorizing people according to activity rather than sexual orientation, remains inflammatory in many contexts. AMSHeR found itself the focus of hostile attention in that

regard at the 2011 International Conference on AIDS and STIs in Africa in Addis Ababa. A coalition of Christian churches threatened to close down its proposed workshop on msm with a massive public protest. The crisis was only averted through the direct intervention of the Ethiopian Minister of Health.[23]

The NACC report on msm also noted that the term has been met with "obstructionism" by health officials in Zambia and Kenya. For that reason, it advocates deploying a new acronym as a preferred way to ease the concept past suspicious eyes—MARP or Most At-Risk Population. MARP refers primarily to msm, intravenous drug users, and female sex workers, but also includes presumably heterosexual long-distance truck drivers, street children, fishing and beach communities, widows, lesbians who may be subject to so-called curative rape, and any other groups whose life circumstances structurally undermine their ability to make or to negotiate safer sex choices. The NACC report explicitly advised groups seeking local research ethics approval to use the term MARP "in lieu of 'MSM'" in their applications (NACC 2009). Even this term, however, has apparently acquired a suspect meaning in the intervening years and has been replaced by Key Populations (KP's).[24]

A self-conscious need for discretion or self-censorship is not the only or even the dominant motivation behind such naming practices and lists of priorities. In at least one case, a sexual rights association adopted its present ambiguous name not out of its own sense of caution but at the direct behest of government: The Burundian *Groupe de réflexion des homosexuelles du Burundi* changed its name to Humure, meaning "do not be afraid," in order to get official accreditation as an NGO (US Department of State 2010). At the same time, there has been a flowering of explicitly lgbti associations in the past few years that reject the need for ambiguity, including the Gay and Lesbian Coalition of Kenya, the Gay and Lesbian Association of Ghana, ADEFHO (Association pour la Défense de l'Homosexualité—Cameroon), and the very outspoken Coalition of African Lesbians. The NACC report also unambiguously acknowledges that public health and human rights arguments cannot be separated, and that human rights should not be neglected: "When you walk over hot coals, you need both of your shoes" (NACC 2009, 7).

Nonetheless, the language chosen by the NACC in its strategy recommendations to get rights for sexual minorities on the national agenda is instructive. Rather than demanding, challenging, speaking up, mobilizing, and protesting, it suggests consulting, sharing, advocating,

managing, including, encouraging, non-confronting, peer approaching, engaging, integrating, sharing, and sensitizing. Also interesting are the recurrent terms "circumvent" and "avoid." The latter is implicitly recommended for activists and mid-level bureaucrats, who, rather than directly engage potentially prickly national governments and political appointees, are advised to "Advocate at the donor level of MSM in National Strategic Plans (NSPs), as most NSPs are externally funded" (ibid., 17). Similarly, NSP language can be couched in generic terms so as to circumvent national laws that criminalize same-sex practices, for example, using phrases such as "people-centered" rather than naming specific disapproved populations. The report suggests avoiding appeals to controversial human rights documents in favor of "epidemic modeling as a tool of persuasion" (ibid.).

Does the Public Health Strategy Work?

Science has a woeful history in Africa of being used to sugarcoat forced population removals, racist social engineering, and other assaults by the state on cherished aspects of African culture. Some Africans will undoubtedly perceive attempts to promote sexual minority rights under the cover of public health discourse in the light of that history, and so respond negatively. Senegal's Andiligueey was one of the first active msm health support groups in West Africa, for example, with terrifying numbers to support its arguments (up to 29 percent seroprevalence among msm versus 1 percent of adults in the general population), and a modest, muted rights agenda. It did not survive the publicity it garnered (through its AIDS initiative). Similarly, an msm drop-in center in Malindi in Kenya was closed down by public protest shortly after opening, while healthcare professionals have been implicated in the ongoing abuse of msm in Mombasa (Kenya Human Rights Commission 2011). The public health strategy also remains deeply controversial within the lgbti movement. Do the risks of a mostly male-centered, disease-focused, externally funded strategy outweigh the benefits of a more radical approach à la the LGBTI Manifesto, the trans-activism of groups like Gender DynamiX, or feminist-identified associations like the Coalition of African Lesbians (which, in 2010, became the first lgbti association to apply for observer status with the African Commission on Human and People's Rights—unsuccessfully, so far)?[25]

Despite the setbacks and unresolved debates, evidence points to some striking successes on the health track, even in countries where the political rhetoric has been most discouraging. Several African countries have officially sanctioned such an approach in principle, including the country that kick-started the political homophobia in the mid-1990s (Zimbabwe) (Zimbabwe National HIV and AIDS 2006). While the political leadership is unlikely to trumpet this move in public, and funding may not be forthcoming as required, it is nonetheless a vindication of the argument that public health pragmatism can potentially trump even the noisiest homophobic rhetoric. We can infer as much from many of the leaked US embassy cables gathering information on the issue in 2009–2010. They suggest, for example, that Rwanda's dramatic change in policy at the United Nations and in facilitating sexual minority support groups domestically owe much to the role of "Minister of Health Sezibera, one of the more influential figures in government."[26] The differential response of the Cameroonian state to rival sexual minority associations is also revealing. The msm health-oriented association Alternatives-Cameroon has long benefited from foreign funding (from the US-based Foundation for AIDS Research, notably) without incurring the wrath of the state. Indeed, the state itself has accepted foreign money—the Global Fund—with an explicit commitment to fund msm projects. When the head of the rights-oriented association ADEFHO was successful in her application for funding from the European Union, however, she was immediately threatened with arrest and a *fatwa* by pro-government youth groups.[27]

We do not yet have any close studies of institutional decision-making processes and policy formulation on the health versus rights approaches to sexual minorities, nor comprehensive fieldwork to assess the comparative views of health, rights, and status quo advocates. In their absence, it is impossible to assess how effective the health strategy is in promoting policy and attitudinal changes that open the door to the achievement of sexual minority rights. For now, perhaps an anecdote serves to illustrate how arguments that build from immediate public health needs to expansive human rights provisions can be persuasive to reasonable people even in highly conservative societies. I have witnessed this myself on several occasions—for example, at the pilot short course on MARPs at Muhimbili University of Health and Allied Sciences in Dar es Salaam in 2009. Let me finish this section with a brief account of that remarkable event.

I had been invited to address a group of about forty healthcare professionals, bureaucrats, and activists from Tanzania, Ethiopia, Kenya, Madagascar, Uganda, Kenya, and Zimbabwe on the issue of msm. Of course I assumed the audience would be open-minded to the topic—why else would the funders have invited me from halfway across the world and openly advertised my credentials and lecture titles? I therefore launched enthusiastically into a planned series of four lectures followed by small group workshops. The first day seemed to go smoothly as I focused on traditional practices and ways of not seeing. The second day, however, took a turn for the worse as I discussed the emergence of msm subcultures in prisons and industrial compounds and the rise of a gay rights movement. I presented the latter as a more or less unambiguously positive development, as it engaged with parallel struggles for women's rights and the general enrichment of civil society. The conference convener—a fluent Swahili speaker—picked up on a growing unease as I spoke, verging on rebellion. At our tea break, he took me aside to request an emergency change of program, to which I reluctantly consented. He then took over leadership and backtracked to what seemed a very simplistic level of discussion of what to do about msm in Africa. It culminated in small group discussions in which each and every group, after debating the issues as they understood them, fundamentally rejected the premises of my entire presentation of the first day and a half. They either denied the existence of msm in their own countries or brainstormed ways to catch, isolate, and/or "cure" them.

It was a deeply dispiriting turn. Nonetheless, I hung in through the next week of lectures and workshops. These focused on intravenous drug users, sex workers, and other MARP issues, with me listening and learning a lot but also intervening now and then to remind people that msm presented similar challenges. An invited member of the Dar gay community made a dramatic appearance. To my surprise, it slowly became apparent that the group was beginning to accept that msm existed on a much bigger scale than they had ever imagined. More importantly, they no longer seemed to present as much of a danger to Africa's cultural integrity as some of the other people under discussion (extortionists, and heroin or human traffickers, for example). From that point, the participants moved fairly steadily from "How do we cure them?" to a broad acceptance of a harm reduction approach through education and the protection of human rights for msm. I moved in tandem from feeling like a pariah to feeling like a VIP. Hugs, warm handshakes, and email

addresses were exchanged and it seemed, after two weeks, that a fundamental shift in thinking had taken place in a small but potentially influential group of people.

Conclusion

Many factors are at play behind the proliferation of lgbti associations and networks, and gay or gay-ish identities in Africa south of the Sahara. Health concerns are one such factor. It is impossible, however, to demonstrate a direct co-relation between these concerns and "gay identity migration" from the West or South Africa to the rest of the region. Indeed, in some countries, associations focused on rights and self-esteem came first, and health-focused initiatives followed. In other countries, the opposite happened or, more commonly, the two types of association quickly learned that health and rights need to be addressed at the same time. African efforts to mobilize and theorize the lgbti movement, meanwhile, fairly consistently stress the need not to simply replicate Western models and language, and have at times been quite critical of Western pressures to conform to those models and their associated pace of change.

I would therefore conclude, first, that Matthew Roberts was not only overly optimistic with his "Stonewall 50" prediction, but also that he overstated his case about the process of gay identity migration related to HIV/AIDS. Similarly, many factors have contributed to the emergence of the anti-homosexuality backlash in so many African countries. We might better speak of homophobias in the plural rather than a singular wave of reaction against rights for sexual minorities: traditional notions of family and respect, fundamentalist Christian and Islam ideologies, political demagoguery and anti-Western sentiment, anxieties about masculinity stemming from the economic malaise, and so on. Some expressions of these homophobias are deeply discouraging to anyone who believes that evidence-based advocacy on human rights and sexual health is guaranteed eventual success.

However, my second conclusion is that we should not let those homophobias blind us to the very real progress that has occurred in the struggle to broaden acceptance of the notion that sexual orientation and gender identity are human rights. Those successes build on a recognition that the enemies—homophobia, ignorance, disease—are complex, and that, consequently, strategies and tactics need to vary according to the

specific context in which they are encountered. Discreet, non-confrontational, and "stealthy" approaches are not mutually exclusive to the kind of bold language—including anti-sexism, anti-racism, and anti-colonialism—that contributed to the human rights revolution in South Africa. The other emerging or nascent successes in the fight for sexual minority rights suggest that it may be this very combination of approaches that accounts for the progress to this point.

Ultimately, reasoned argument based on collaboration between msm-focused initiatives and broader lgbti associations will need to be supplemented by an element of shaming and coercion in order to effect the necessary changes in the face of homophobic oppositions. Africa's tiny lgbti and msm groups, with their other often similarly vulnerable allies in civil society and ministries of health, are never on their own going to be able to move entrenched politicians or charismatic religious leaders. Additional pressure will need to come from friends on the international scene. Because of the high potential for backlash, donors will need to be careful that such interventions do not increase the exposure of sexual rights groups to further victimization. A strategic emphasis on public health, with rights discreetly embedded in the discussion, appears to be a promising way to do that.

Notes

1. Terminology is contested, so I follow consensus language (as in UNAIDS and the major NGO documents) or language as used by activists at the time referred to (hence, "gays and lesbians" in the 1980s). My one somewhat idiosyncratic exception—but see also the Preface in Zyl and Steyn (2005)—is to use the lower case for lgbti (lesbian, gay, bisexual, trans, and intersex) and msm (men who have sex with men, or, more properly, males who have sex with males), a nod to my unease at the essentialism or stability which the upper-case suggests.
2. The "coming out" story is widely attested: see for example, Nkoli (1994), Hoad et al. (2005), Goddard (2004).
3. See Long (2003), Hoad (2005), Ndatshe (2010), Thoreson and Cook (2011). Two important websites at the time of the original research (African Activist and Behind the Mask) are no longer active, but much of this information can be garnered through country-by-country reporting, plus links to key documents and local associations such as GALZ (www.galz.org). The Kenya Human Rights Commission report, *The Outlawed Amongst Us: A Study of the LGBTI Community's Search for Equality*

and Non-discrimination in Kenya (2011), provides a pioneering rights argument from outside South Africa, while the summary report of the vibrant conference in Cape Town (November 2010) on The Struggle for Equality: Sexual Orientation, Gender Identity and Human Rights in Africa can be found at http://www.boell.de/democracy/promotion/promotion-of-democracy-conference-report-struggle-equality-sexual-orientation-gender-identity-human-rights-africa-11680.html.

4. The debate "Is Homosexuality Un-African?" featured Ugandan MP David Bahati and former President of Botswana, Festus Mogae, staged before a live audience in March 2011. See http://www.bbc.co.uk/programmes/p00fjqpz.
5. I have referred to this elsewhere as "traditional closets" or "cultures of discretion," aware that the term closet inadequately captures the complexity and variety of non-disclosure situations, but that it is nonetheless commonly used and widely understood. See Epprecht (2006).
6. Another important iteration of this idea, using Roberts' exact word ("catalyst") in relation to the Treatment Action Campaign and the emergence of a "universal" dyke lesbian identity in small-town South Africa, is (Steinberg 2008, 200). For the global context, see, notably, Altman (2001), and the website of OutRight International (formerly the International Gay and Lesbian Human Rights Commission) for updates on the progress of sexual rights and sexual health struggles globally https://www.outrightinternational.org/.
7. See also Gune and Manuel (2011).
8. A significant body of scholarship makes these points, including Epprecht (2006), Gaudio (2009), Morgan and Wieringa (2005), Nkabinde (2008), the film *Everything Must Come to Light* (2002), Murray and Roscoe (1998).
9. ACDHRS and ACHPR (2009), *Pambazuka News* (2010), Writers and Academics (2011), for example, plus numerous authors in Salo and Gqola (2006), Tamale (2011), Chiang (forthcoming).
10. This same man has asked rhetorically if US President Obama wanted the people of Uganda to "eat da poo poo" as he put it in a much-ridiculed YouTube clip. See http://www.youtube.com/watch?v=euXQbZDwV0w.
11. Strong critiques of "pink colonialism" and racism within the European lgbti community around these issues can be found through the blog Black Looks, including a press release from Ugandan activists denouncing sensationalist coverage in the US media; see http://www.blacklooks.org/2010/07/beheaded-ugandan-not-an-lgbt-activist/.
12. See, for example, Willemse et al. (2009). See also the efflorescence of lgbti fiction, art, and film analyzed in, among others, Eke (2007), Epprecht (2011).

13. The origins of this manifesto are obscure. Nevertheless, the sentiments expressed there were widely shared by delegates at the Cape Town "Struggle for Equality" conference.
14. Numerous lgbti activists have urged Western donors not to provoke a further backlash against them. See Johnson (2011). On the tensions between African lgbti and Western expectations of gay identity, see Awondo (2011), Reid (2006).
15. See *New Zimbabwe*, MPs Tackle Tsvangirai over Gays, October 26, 2011. The US Ambassador's interview with Gambian President Yahya Jammeh in February 2010 is especially revealing on this point. Jammeh publicly blamed foreigners for corrupting Gambian morals and threatened to cut off the heads of homosexuals, yet is quoted as privately saying: "There are gays here in The Gambia, I know that. But they live in secret and that is fine with me, as long as long as they go about their business in private we don't mind." https://wikileaks.org/plusd/cables/10BANJUL65_a.html (accessed 19 October 2018).
16. Other statistics are taken from Niang et al. (2002), Allman et al. (2007), Wade et al. (2005), Kajubi et al. (2008), National AIDS Control Council (NACC) of Kenya and Population Council (2009).
17. Nguyen (2005) focuses on changes in the homosexual milieu, while the same author's *Republic of Therapy* (2010) takes a broader view of the impact of Western biomedical discourses on the refashioning of heterosexual identities and roles in francophone West Africa.
18. To be fair, CEDEP also collaborated in an important "outing" with the 2010 publication of Patricia Watson's *Queer Malawi: Untold Stories*. The extent to which the book will be available in Malawi is unclear, but CEDEP is acquiring a profile in the mainstream Malawian media as an advocate of gay rights.
19. See Ugandan LGBTI Community Petition Parliament over the Right to Health and HIV/AIDS, April 2011. http://uhspauganda.blogspot.com/2011/04/ugandan-lgbti-community-petition.html.
20. See also Steven Friedman and Shauna Mottiar (2006).
21. AMSHeR is primarily funded by the Dutch through AIDS Fonds and HIVOS, the UNDP, and other international non-government organizations. See also AMSHeR (2017).
22. I do not mean to invest too much into reading a simple list. But can it be coincidence that the NACC report ("The overlooked epidemic") similarly states five future priorities for prevention, care, and treatment of msm, and that the only one of these with an immediately recognizable "gay pride" or anti-homophobia focus is again placed last?
23. The Homophobic Disruption of AMSHeR's Pre-ICASA Meeting: What Really Happened. http://www.mask.org.za/the-homphobic-disruption-

of-amsher%E2%80%99s-pre-icasa-meeting-%E2%80%93-what-really-happened-2/ (accessed 5 January 2012).

24. Kenya National AIDS and STI Control Programme, at http://www.nascop.or.ke/?page_id=2079#; see also International Conference on AIDS and STIs in Africa (ICASA 2015), which also now opts for KP which, it stresses, should include "minorities of every type."
25. See http://www.genderdynamix.org.za/ and http://www.cal.org.za/. See also Coalition of African Lesbians (2017).
26. A government spokesperson recently almost acknowledged as much by claiming that its Health Development Initiative since 2009 is behind a more "positive attitude" towards sexual minorities—Dr. Aflodis Kagaba, cited in *The Mask*'s Positive Change of Attitude Towards Homosexuality in Rwanda (n.d.).
27. The threats against ADEFHO and Alice Nkom continue, described in a joint press release with the Spanish group Fondación Triángulo, *Physical Wellbeing of Activist in Cameroon Under Public Threat for Defending the Rights of Gays and Lesbians*. See also Canning (2011a).

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CHAPTER 6

Sino-African Relations and the Problem of Human Rights

Ian Taylor

Chinese economic and political activity in sub-Saharan Africa is growing at an exponential rate.[1] China is now Africa's largest bilateral trading partner. Sino-African trade in 2016 came to $82.9 billion in Chinese exports to Africa, while imports from the continent were valued at $54.3 billion (*Africa News* [Pointe Noire] March 5, 2017). Compare this to the $5 billion worth of trade China was doing with Africa in 1997 and one can quickly appreciate the suddenness of much of this activity. It should be noted that a senior economist at the Chinese Ministry of Commerce predicted in 2006 that trade volume between China and Africa would top the $100 billion mark in the next five years (*China Daily* [Beijing], January 13, 2006, 2). The bulk of this growth in trade is driven by China's desire to obtain raw materials and energy to fuel the Chinese economy and to find fresh export markets.[2]

However, China's growing interest in Africa has provoked a rash of criticisms aimed at Beijing's stance vis-à-vis governance and human rights issues on the continent. Human Rights Watch has alleged that "China's policies [in Africa] have not only propped up some of the continent's worst human rights abusers, but also weakened the leverage of others

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trying to promote greater respect for human rights" (Human Rights Watch 2006). Similarly, Amnesty International has argued that "China is having an adverse effect on human rights in other countries because by dealing with repressive regimes, such as in Sudan, and putting its economic and trading interests ahead of concern for human rights it's allowing these regimes to be provided with resources that they would not otherwise get so easily."[3] Within Africa, a range of quotes from continental newspapers illustrates African anxieties. In West Africa: "[China] is sacrificing human rights protection for natural resources. Unlike other Western countries, which bar their companies from doing business with renegade regimes, Beijing insists on dealing with the continent's most brutal and corrupt leaders" (*Public Agenda* [Accra], November 6, 2006, 3). From Southern Africa: "Sino-African relations are essentially devoid of any political content and this absence…complicates efforts at deepening and strengthening democracy and human rights.…This self-interest in China's Africa policy empties it of moral content" (*The Namibian* [Windhoek], January 19, 2007, 2). And in East Africa: "Critics…point fingers at what they say are China's business dealings with pariah states in total disregard of the issue of human rights and accountability" (*East African Business Week* [Kampala], May 1, 2006, 4).

Government and institutional leaders have joined in the criticism, with then World Bank President Paul Wolfowitz quoted as saying that Chinese banks were breaking the "Equator Principles," a voluntary code of conduct for lending that calls for lenders to ensure that projects they fund meet environmental and social standards, including human rights (*Les Echos* [Paris], October 23, 2006, 2). A Congressional subcommittee of the U.S. House of Representatives was replete with references to China's perceived amoralism vis-à-vis human rights in its diplomacy toward Africa.[4] Connecting the issue to the 2005 "Year of Africa," one British newspaper in 2006 went so far as to state that, "a year on from Live 8, China has trounced all hope of change in Africa by doing deals with its kleptocrats," adding cynically that "China will deal with anyone, and pariah states are a gap in the market" (*The Times* [London], July 4, 2006, 5).

In a nutshell, the criticism—from both the West and Africa—is that China will do business with anyone, regardless of their human rights and/or democratic record. As will be discussed below, this is arguably threatening to undermine nascent African attempts to advance new norms relating to constitutional rights and privileges on the continent, as

well as broader governance issues. Furthermore, China's behavior arguably contradicts its own understandings of human rights. Exploring why and how this is so is the subject of this chapter.

Chinese Conceptions of Human Rights in Beijing's Diplomacy

According to one analyst, "No issue in the relations between China and the West in the past decades has inspired so much passion as human rights," and this topic is certainly central to many criticisms of Sino-African relations (Wan 2001, 1). Yet the very notion of human rights is essentially a contested concept between Beijing and the West, despite, as both Foot and Kent have demonstrated, China gradually becoming more amenable to universal norms (Foot 2000; Kent 1999). Conventionally, the Chinese discourse of rights has centered on the duties of citizens as part of a society to help construct a prosperous and robust nation. This has certainly generally underpinned Chinese positions post-1949 and dominates Beijing's thinking on the subject today. Briefly summarized, China's current discourse on human rights is grounded in a communitarian focus on social solidarity and obligations toward others, coupled with an aspiration to advance societal concord. That China is perceived as being unstable also drives the desire to place considerable priority on social stability. In short, it is a discourse informed by pragmatic nationalism, with a strong emphasis on developmentalism.[5] The report Jiang Zemin delivered at the 15th National Congress of the Communist Party of China on September 12, 1997 stakes out this position quite clearly:

> The fundamental task of socialism is to develop the productive forces. During the primary stage, it is all the more necessary to give first priority to concentrating on their development. Different contradictions exist in China's economy, politics, culture, social activities and other areas, and class contradictions, due to international and domestic factors, will still exist within a certain scope for a long time to come. But the principal contradiction in society is the one between the growing material and cultural needs of the people and the backwardness of production.…Hence *we are destined to make economic development the central task of the entire Party and the whole country and make sure that all other work is subordinated to and serves this task*. [emphasis added]

Jiang goes on to note that "Development is the absolute principle," but adds that "it is of the utmost importance to balance reform, development and stability and to maintain a stable political environment and public order. Without stability, nothing could be achieved" (Zemin 1997). If one accepts this Chinese discourse on human rights and the centrality of development, then China has made quite considerable progress over the last few decades. Indeed, as Burstein and de Keijzer point out, "To the Chinese, the human rights to food, clothing, shelter, economic development, and security…are paramount over traditional Western-style individual political liberties. Judged by this standard, China in the last twenty years is a leader, not a laggard, in promoting the human rights of its people" (1999, 136).

Equally, China has become socialized into the international human rights regime in ways that some observers often overlook. It is important to note that in 2004 a proposed amendment to the Chinese Constitution was adopted by the Second Session of the Tenth National People's Congress, which stated that the Chinese state respects and safeguards human rights. This was the first time that the concept of human rights had been included in China's constitution and the event reflected a massive move forward from the time, less than twenty years ago, when the notion of human rights was largely unmentionable in China. While international pressure has played a role, Beijing has also engaged in a proactive role in transforming the human rights discourse. Indeed, Chen argues that there have been cognitive changes on the part of the Chinese government and that Beijing has internalized international human rights norms.[6] In other words, the debate over China's human rights stance and its diplomacy is not static, nor is it simply part of a public relations exercise.

However, it is in the clash with Western ideas and the notion that Beijing has not gone far enough that China finds itself under attack in Africa (and elsewhere). The liberal notion that states must guarantee individual freedom is seen as an abstraction by Beijing, particularly given its strong emphasis on social stability. As a Chinese commentary on human rights put it, "human rights [are] enjoyed by the collective in addition to individuals' human rights. The individuals' interests are upheld via the realization of collective interests. So, China attaches importance to collective human rights as well as to individuals' human rights. This is in contrast to Western countries where much emphasis is put on individuals' human rights while collective human rights

are neglected" (*China Daily* [Beijing], December 12, 2005). This has become a well-worn position from Chinese officials when discussing China's non-interference stance in Africa. For instance, "When asked about China's investment in nations with records of human rights abuses – notably Sudan and the Central African Republic – [Foreign Minister Li Zhaoxing] replied curtly: 'Do you know what the meaning of human rights is? The basic meaning of human rights is survival – and development'" (*Associated Press* [Bissau], January 8, 2007, 1). Springing from this is a deep reluctance to censure regimes deemed to be transgressing international norms. As the Chinese Ambassador to Eritrea put it, "There are no rogue states. China has been labeled this in the past and other governments should not criticize."[7]

It is in the disjuncture between Chinese understandings of human rights and those of the West that China's Africa policy attracts condemnation. Equally, it is in China's insistence on the principle of non-interference in internal affairs that Beijing becomes vulnerable to Western critiques, primarily because it is arguably providing a discourse on human rights that can be exploited by African autocrats, which is then compounded by a further discourse on sovereignty and non-interference that can act to protect such malefactors.

Importantly, China still adheres to the Five Principles of Mutual Coexistence, formulated in 1954 and set out as guidelines for Beijing's foreign policy and its relations with other countries.[8] The Five Principles are mutual respect for each other's territorial integrity; non-aggression; non-interference in each other's internal affairs; equality and mutual benefit; and peaceful coexistence. Though these principles originally only prescribed relations between China and India, by the 1970s they had come to be applied to relations with all states. It should be noted that China's White Paper on its Africa policy, released in 2006, expressly states that "China stands ready to develop friendly relations and cooperation with all countries on the basis of the Five Principles of Peaceful Coexistence" (People's Republic of China 2006, 3). Non-interference in the affairs of a sovereign state—central to the Five Principles—is then connected to the issue of human rights in a quite distinct fashion. Accordingly, from the Chinese position,

> human rights are something covered by the sovereignty of a country. A country's sovereignty is the foremost collective human right.…And sovereignty is the guarantor of human rights.…In the humiliating old days,

> China was bullied by foreign powers. Its sovereignty was trampled on, and also the Chinese people's human rights. So the Chinese people know very well that sovereignty is a pre-condition to their enjoying human rights. In sum, there would be no human rights to speak of in the absence of sovereignty. (*Xinhua* [Beijing], December 12, 2005, 1)

It might be ventured that there remain a couple of essential points to China's position vis-à-vis human rights in its diplomacy. The first is the weight attached to material rights to development through economic wealth. A Chinese commentary on Beijing's stance on human rights makes this quite clear and argues that such a position is in line with the UN's own Declaration of Human Rights: "The Universal Declaration of Human Rights is the first international document ever to put forward the principle of respecting and guaranteeing the most fundamental of human rights, reflecting the importance attached by the international community to the promotion of human rights and basic freedom. China's human rights outlook is in keeping with the basic principles of the Universal Declaration of Human Rights" (ibid.). And indeed, China's focus on economic and developmental human rights does gel with some of the Declaration's articles, notably article 25 and its assertion that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." This comfortably fits with China's focus on developmentalism. But, as in all other countries, other articles of the Declaration are effectively deemed secondary, such as article 18's claim that "Everyone has the right to freedom of thought, conscience and religion," article 19's claim that "Everyone has the right to freedom of opinion and expression," and article 20's assertion that "Everyone has the right to freedom of peaceful assembly and association."

The second element of China's stance on human rights in its foreign policy is an emphasis on the principle of non-interference in domestic affairs and the importance of state sovereignty. In Chinese diplomacy, sovereignty trumps other norms, including that of democracy—except in reference to Taiwan.[9] Liberal democracy has in fact been held up by the Chinese as a source of much of Africa's woes (going directly against the Western mainstream view that it is a *lack* of democracy that helps account for Africa's maldevelopment). During the high-water mark of the democratic swell in Africa in the late 1980s/early 1990s, when a number

of African autocrats were being peacefully removed through the ballot box, Beijing dismissed the process as an "obsession" and a "temptation" (*Xinhua* [Beijing], July 1, 1992, 1). Later, however, as Africa's democratization began to fade, Chinese official media dubbed the whole experience a "disaster," arguing that "multi-party politics fuelled social turmoil, ethnic conflicts and civil wars" (*Xinhua* [Beijing], December 22, 1994, 2; *Beijing Review* [Beijing], July 29–August 4, 1996, 4). A commentary by He Wenping, director of the African Studies Section at the Chinese Academy of Social Sciences in Beijing, equally stated that "After the end of Cold War, in order to bring Africa into the orbit dominated by them, Western countries pursue[d] forcefully so-called 'political democracy' in Africa, and put the aids linked up with democracy. This policy dampen[ed] seriously African countries' national pride and national feeling, producing the social turbulence in Africa" (Wenping 2003). Chinese diplomatic statements have actively downplayed the importance of democracy, linking it to Beijing's stance on human rights and asserting that "For a starving man, which should he choose, bread or ballot, if he is supposed to choose only one? The ballot is of course important. But he must feed himself with the bread before he can cast a ballot" (*Xinhua* [Beijing], December 12, 2005, 2). This view is welcomed by various African leaders for quite specific reasons, something that explains why many African leaders are falling over themselves to welcome China.

China and Politics in Africa

It is a fact that China's discourse on human rights and its stress on sovereignty and non-interference finds very fertile ground in Africa. The Chinese are more than aware of this, with He Wenping stating that "We [China] don't believe that human rights should stand above sovereignty.…We have a different view on this, and African countries share our view" (quoted in Mooney 2005, 2). Problematically, while China's alternative discourse on human rights might be genuinely held, it is doubtful that many African elites engage in this type of philosophizing and reflection. Instead, for many African autocrats and incumbents, China's "human rights outlook" is simply something that can be cynically deployed for self-protection and justification.[10] This situation stems from the nature of the state in most African nations. Many African elites lack any real form of a consensual aspect to their regimes. Their power is articulated through both the threat and concrete use of violence *and* the

distribution of material advantage to factions in neo-patrimonial regimes. In the absence of these twin tactics—both inimical to enduring development and stability—many of Africa's governing elites cannot rule. Within post-colonial Africa, the non-hegemonic nature of Africa's ruling classes has forced them to take direct charge of the state itself.[11] However, African leaders have relied on effective control and patronage rather than on building a hegemonic integral state. They control the state, but it is a state that their own practices undermine and subvert. Key to this is the reality that power in Africa is essentially reliant upon capturing the state—or at the very minimum being associated with those who have done so. This is generally an indispensable requirement for achievement, accumulation, and self-enrichment. In place of a secure project that connects diverse ranks of society, in many parts of Africa a fundamentally unpredictable and personalized structure of power exists. Despotism holds sway and political supremacy—inextricably linked to the amassing of wealth—is sustained through patrimonial power by means of the appropriation of state resources. Graft is the adhesive that joins the system and connects the "Big Man" and his rapacious ruling class together in a mutually beneficial arrangement (Fatton 1988, 36).

Problematically, it is because Beijing neither criticizes the lack of democracy in Africa nor strives to advance intrusive projects associated with human rights that China is a collaborator favored by many African leaders and their neo-patrimonial regimes. A key reason for this is that the type of governance strictures and values that underpin the liberal democratic project and are promoted by the West cannot be hurriedly implemented without undermining the basis upon which most African presidents and their followers base their rule. Many African elites obviously baulk at furthering such a project. After all, "It is highly unlikely that African ruling classes will choose to adopt the principles of market rationality when they know full well that their power depends on their capacity to use the state as a predatory means to acquire wealth and build political clientele" (Fatton 1990, 469). In contrast, China is a partner that does not seek to interfere and in fact provides a discourse around human rights and state sovereignty that patrimonial leaders can embrace as a means to legitimize their own rule and ward off Western interference.[12] As one Zimbabwe an critique put it,

> China creates the impression that these are sovereign states and their relations with it are the ultimate expression of their sovereignty. Thus it

> doesn't give a tinker's cuss what the world or those suffering under the jackboots of these dictatorships think about this issue.…This has obviously been good music to the ears of African leaders for whom the words democracy, good governance, observance of human rights and macroeconomic management to international standards are like a red rag to a bull. (*Financial Gazette* [Harare], November 8, 2006, 5)

This is why within numerous African states there is an effective meeting point between China's diplomacy in Africa and many of the continent's elites. Indeed, at the China–Africa Seminar on Human Rights, held in Beijing in October 2004, there were repeated assertions of a commonality of interests between Beijing and Africa. In such a milieu, the perpetual question becomes how might Africa engage with and exploit the increased engagement by China to benefit the ordinary people and promote development in an environment of such elite depredation.[13]

However, it is important to point out that the debate over China's Africa policies vis-à-vis human rights is not simply a Beijing versus the West disagreement. Crucially, a number of key African leaders interested in the continent's regeneration have been promoting values that are arguably contrary to China's stated positions. A discussion of this is important to contextualize Chinese behavior in Africa *and* emphasize that criticism of Beijing is not simply Western in origin.

Africa's Emerging Norms and China

China's policies arguably undermine emergent attempts to promote human rights and good governance in Africa, as crystallized in the New Partnership for Africa's Development (NEPAD). NEPAD has been enthusiastically pushed by a select number of countries in Africa as a means to stimulate what has been termed the "African Renaissance." Launched in Abuja, Nigeria in October 2001, it is ostensibly a development program to spearhead Africa's renewal.[14] China has proclaimed public support for NEPAD and at the Second Ministerial Conference of the China–Africa Cooperation Forum in 2003, Joaquim Chissano, then president of Mozambique, was active in inviting Beijing to take a leading role in NEPAD's implementation (*People's Daily* [Beijing], December 16, 2003, 4). It should be pointed out that in any public statements linking China and NEPAD together, mention of democracy and governance is studiously avoided, despite the centrality of these notions in

NEPAD documents and in stark contrast to the promises made when African leaders are seeking to promote NEPAD and secure funding from Western sources.

Indeed, NEPAD has a great deal to say on democracy and governance and in some ways may be seen as a Democratic Charter for Africa. Paragraph 43 of the NEPAD document asserts that "Democracy and state legitimacy have been redefined to include accountable government, a culture of human rights and popular participation as central elements," while Paragraph 45 says that "Across the continent, democracy is spreading, backed by the African Union (AU), which has shown a new resolve to deal with conflicts and censure deviation from the norm"—the norm being "accountable government, a culture of human rights and popular participation as central elements." As a result, says Paragraph 49, "African leaders will take joint responsibility for…promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels." This is particularly imperative because "African leaders have learnt from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development" (Paragraph 71). Indeed,

> Development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the New Partnership for Africa's Development, Africa undertakes to respect the global standards of democracy, [of] which core components include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organised to enable the populace [to] choose their leaders freely. (Paragraph 79)

Thus, "The New Partnership for Africa's Development has, as one of its foundations, the expansion of democratic frontiers and the deepening of the culture of human rights. A democratic Africa will become one of the pillars of world democracy, human rights and tolerance" (Paragraph 183). Compare such sentiments to China's position that developmentalism essentially comes before issues such as political rights and democracy.

Indeed, China's stated thinking on such matters, as well as the policy of non-interference and an emphasis on state sovereignty above all else (which plausibly provides a defense for offenders), has provoked

concern amongst commentators within Africa. As one analysis has framed it, "While in some countries China's involvement appears benign, in others its approach undercuts efforts by the African Union (AU) and Western partners to make government and business more transparent and accountable" (Africa–China 2006, 16855). And an African Union official has commented that "On human rights, there is a danger that China might serve to help rollback initiatives such as NEPAD, even if unintentionally. The problem is that whilst China talks of 'Africa,' they are really talking about regimes."[15] A fundamental concern regarding China's African ventures is that Beijing's no-questions-asked practices and the stress on non-interference threaten to reintroduce practices that NEPAD is supposedly looking to move away from. China's economic power in such circumstances may only bolster those African elites who have always been reluctant to subscribe to NEPAD's governance goals. Here it is important to note that the lack of African buy-in poses an equal—if not more substantial—threat to NEPAD's future than Beijing.[16] But China's current role remains potentially problematic. As one South African newspaper put it,

> Chinese aid is likely to subsidise profligate and/or dictatorial governments, as it is to advance the welfare of ordinary Africans. These developments threaten a project of particular importance to President Thabo Mbeki, and through him, to South Africa. One of the objectives of the New Partnership for Africa's Development (NEPAD) of which Mbeki is a co-architect is to promote corruption-free, good governance in Africa, for its own sake as well as a means of securing sustained developmental assistance.…Aid that fails to advance democratic government, no matter whence it comes, is counterproductive. (*The Star* [Johannesburg], July 4, 2006, 6)

After all, the recovery plan was based on a basic quid pro quo, namely that African countries will set up and police standards of good government across the continent—while respecting human rights and advancing democracy—in return for increased aid flows, private investment, and a lowering of obstacles to trade by the West. But many African leaders, eyeing the allure of Chinese investment—coming as it does with very few strings attached and certainly nothing as tiresome as respecting political rights or democracy—may ask, Why bother any longer with NEPAD?[17]

This reality is probably why President Mbeki of South Africa warned against a possible new form of colonization stemming from China's growth in Africa. Mbeki was quoted as declaring that:

> The potential danger in the relationship between Africa and China is that it is possible to build…an unequal relationship, the kind that has developed between African countries as colonies—including this one—and the colonial powers. In terms of this the African continent exported more material and imported goods, condemning it to underdevelopment, being only a supplier of raw materials. I'm saying this is a potential danger in terms of the relationship that could be constructed between China and the African continent. (quoted in *Mail and Guardian* [Johannesburg], December 13, 2006)

As a report on Mbeki's remarks put it, "critics have said China is too happy to support repressive African regimes. Mr. Mbeki's latest comments appear to be a hardening of his position on the subject" (*Daily Trust* [Abuja], December 18, 2006). The case of Zimbabwe suggests that Chinese engagement may indeed undermine the sorts of governance standards that NEPAD has been seeking to advance.

Zimbabwe and Beijing

As Harare's economy collapsed, Robert Mugabe has groped for much-needed allies as part of his process of regime survival. In return for supporting Mugabe's regime with infusions of credit, equipment, and military supplies, "Chinese state-owned enterprises…assembled a portfolio of shares in some of Zimbabwe's prize assets" (Melville and Owen 2005). As one report put it, "the Chinese have stepped in where other developing nations (even Libya) have feared to tread" (ibid.). Politically, at the height of the land invasions the leader of the Communist Party of China, Wei Jianxing, commented that "China fully supports the Government of Zimbabwe's land redistribution programme" (*Herald* [Harare], June 14, 2002, 1). Premier Wen Jiabao also commented that "China respects and supports efforts by Zimbabwe to bring about social justice through land reform" (*Herald* [Harare], December 17, 2003, 3).

Why Chinese products and investors flooded such a crisis-prone country is simple: "Zimbabwe's deteriorating political situation and

asset-hungry officials may deter most private investors, but the Chinese government can instruct managers of state enterprises to take the risk, rely on good intergovernmental relations to guarantee investment flow, and depend on state coffers to absorb any loss in the last resort" (Owen and Melville 2005, 2). In both economic and political matters, Zimbabwe and China, in the words of the Zimbabwean government mouthpiece, "struck a telepathic understanding" (*Herald* [Harare], August 4, 2005, 2). China actively supported Mugabe right up until his removal in 2017 and in return Mugabe backed up Beijing at international fora. For his part, Mugabe was profoundly—and publicly—gratified by Beijing's support. At the second Sino-African trade summit in Addis Ababa in December 2003, "Zimbabwe's President Robert Mugabe launched into a tirade against Britain and the USA, calling on African leaders to turn their backs on Western countries and to focus on better relations with China, which he said respected African countries" (*Cameroon Tribune* [Yaounde], December 17, 2003, 6). In turn, Chinese official sources described Mugabe as "a man of strong convictions, a man of great achievements, a man devoted to preserving world peace [and] a good friend of the Chinese people" (*Financial Times* [London], July 27, 2005, 3).

Beyond the rhetoric, China provided arms and security equipment to Mugabe's regime in order to enable it to defend itself from the Zimbabwean people. A US$240 million deal between China and Zimbabwe was perhaps the largest example of this. Harare's defense minister told parliamentarians in June 2004 that the deal included twelve jet fighter aircraft and one hundred military vehicles (*Vancouver Sun* [Vancouver], October 28, 2004, 8). Such purchases were required to replace existing vehicles and aircraft that are no longer operational owing to the lack of spare parts and maintenance under Western sanctions. According to one report, "Chinese and Zimbabwean military ties are among the closest on the African continent. In April 2005, Zimbabwe's air force received six K8 jet aircraft to be used for training jet fighter pilots and for 'low intensity' military operations, and the year before, a Chinese radar system was in-stalled [*sic*] at Mugabe's $13 million mansion in the Harare suburbs" (Eisenman 2005, 4). Since then, "Rumors abound[ed] that China has sold Zimbabwe's internal-security apparatus water cannons to subdue protesters and bugging equipment to monitor cell phone networks" (*New York Times* [New York], July 25, 2005, 6). Why this was so was explained by a Zimbabwean analyst, who

commented that "It is important to note…that Chinese 'non-interference' policy cannot be permanent. The Chinese are well aware of this themselves. Where deals are signed with unpopular dictatorial regimes that could later be revised by a new government, it becomes necessary for the Chinese to protect such regimes. This explains their arming of the ZANU-PF government" (Karumbidza 2007, 88–89). Indeed, in 2006, Mugabe told an audience, "We want to remind those who might harbor any plans of turning against the government: Be warned, we have armed men and women who can pull the trigger.…The defence forces have benefited from government's Look East policy through which they have not only acquired new equipment but also learned new military strategies" (*Business Day* [Johannesburg], August 16, 2006, 4).

Arguably, China's role in Zimbabwe gave cause for alarm. As one report noted, "only the Chinese…are prepared to assist [ZANU-PF] to stay in power against the wishes of their own people.…[The Chinese] have no compunctions about democracy or human rights, only a single-minded obsession with control. And since their own people do not enjoy democratic freedom of expression and participation, they have no check on what types of regimes they support elsewhere" (*Sokwanele Special Report* [Cape Town], June 21, 2005, 3). Indeed, "Not only is it China's protection from strong Western punitive measures that is attractive to African leaders, but Beijing's investments come with no conditionality related to 'good governance'" (*Sunday Herald* [Harare], August 28, 2005, 2).

Yet it appears that China's ardor for a Zimbabwe under Mugabe began to cool due to the declining economy. Ironically, given Beijing's studious disinterest in the internal affairs of Harare, this backing off was due to the Zimbabwean government's own incompetence and malgovernance. "Sources privy to the developments [said] China's relations with Zimbabwe, which include diplomatic support, trade deals and close military ties, could be under strain as a result of government's failure to service its debts" (ibid.). In fact, China went out of its way to avoid Mugabe as the situation in Zimbabwe declined. In early 2007 President Hu Jintao visited Africa, but Zimbabwe was not visited.[18] Previously, in April 2006, Hu had visited a number of African countries, but missed out Harare, and in June 2006, Premier Wen Jiabao visited Egypt, Ghana, the Democratic Republic of the Congo, Angola, South Africa, and Tanzania, but avoided Zimbabwe. A report commented that "no matter how the Zimbabwean government sees it, the Chinese move is clearly intended as

a deliberate snub on Zimbabwe. It speaks volumes about the significance the Chinese attach to their relations with Zimbabwe. What is increasingly clear is that the Chinese view Zimbabwe with the same suspicion as does the West. The only difference is that the Chinese do not say it" (*Sunday Herald* [Harare], August 28, 2005, 1). Clearly, "Relations [between Harare and Beijing] don't appear to be as intimate as we have been led to believe" (*Zimbabwe Independent* [Harare], January 26, 2007, 3). This pointed to the reality that China needs good governance as much as any other investor, a point to which we return below. But with regard to Zimbabwe, there were credible claims that immediately prior to the coup, one of the architects of the event met two of the most senior members of the Chinese military. The head of the Zimbabwe Defence Forces (ZDF), General Constantino Guveya Chiwenga, met both Li Zuocheng, chief of the joint staff of China's People's Liberation Army (PLA), and China's defence minister, General Chang Wanquan. As one report framed it, the visit provoked "suspicions that Chiwenga may have travelled to Beijing to warn China's leadership of the impending move against Mugabe, or perhaps even to seek its blessing or help. Li Zuocheng, a rising star in China's 2.3 million-member military, reportedly enjoys close ties to the Chinese leader, Xi Jinping" (*Guardian* [London] November 16, 2017). If this was the case, China's interests clearly trumped any notional loyalty to Mugabe. In sum, though China developed a rapport with a regime that is broadly considered a pariah, there were limits. Mugabe's Zimbabwe was without doubt a government with an awful human rights record and, because of this, Beijing stood accused of supporting a repressive government and defying international consensus, as well as subverting embryonic efforts to endorse progressive change. In doing so, however, China also attracted considerable criticism and hostility from within Zimbabwe and will have to live with this now that the Mugabe regime has fallen. Other countries associated with former unpopular administrations—the Americans in Iran and the French in Côte d'Ivoire—have had to live with the negative fall-out when their client regime is toppled. China faces the same danger with its courting of Mugabe.

A Continental Practice

Elsewhere in Africa, China has been accused of similar dealings with illiberal regimes. For instance, in Nigeria, huge concerns over human rights

issues and underdevelopment in the Niger Delta have been overlooked by Chinese policy makers as they seek to access Nigeria's oil. To be fair, Western actors could be accused of the same practices, but there are serious problems in Sino-Nigerian relations, centered around the oil industry, that undermine efforts by local activists to improve human rights in Nigeria. Though the Niger Delta region produces 90 percent of Nigeria's oil and over 75 percent of the country's export earnings, very little of the wealth has been seen by residents in the Delta and human rights abuses by the Nigerian military are rampant. In early 2006, the Movement for the Emancipation of the Niger Delta (MEND) began attacking oil installations and kidnapping foreign oil workers. As a result, Nigeria has turned to China for military supplies to protect the oil fields after a senior Nigerian naval official stated that Nigeria "felt let down" by US reluctance to provide more support, specifically 200 patrol boats to guard the Delta. Washington, although offering military technical assistance and training, has so far provided only four old coastal patrol boats, owing to anxiety over the levels of corruption within Nigeria's security forces and widespread human rights violations by the same actors. Given that Nigerian security forces are responsible for "politically motivated killings; the use of lethal force against suspected criminals and hostage-seizing militants in the Niger Delta; beatings and even torture of suspects, detainees, and convicts; extortion of civilians"; and "child labour and prostitution, and human trafficking," Washington's reluctance to supply such elements is perhaps understandable (Library of Congress 2006, 22). China, however, needs little urging to sell weapons to such actors and is able to fill a gap left by squeamish Western nations. This frustrates human rights activists: "When America balked at supplying Nigeria's trigger-happy military, China offered dozens of patrol boats. 'They are impossible. They just don't care what we or anyone else says', complained a member of one Dutch human rights advocacy group" (*The Guardian* [London], March 28, 2006, 2). But Nigerian elites are less troubled. As one report put it,

> Nigeria is reportedly seeking to buy naval patrol boats from China to help protect its Niger Delta rigs from rebel attack, at a time when traditional allies are nervous of sending more weapons into an already volatile region. One Niger Delta state governor, reacting to concerns over attacks on Shell's facilities and rumours the firm might even pull out of the region,

> grinned and [said] "If the Brits don't want the oil, we'll sell it to the Chinese." (*Agence-France Presse* [Lagos], April 26, 2006, 1)

While such posturing might cheer the hearts of Nigeria's elites, China is faced with somewhat different circumstances and, as in Zimbabwe, is finding that its investments and operations in Africa can never be divorced from the issues of governance and human rights. For example, following Hu Jintao's April 2006 state visit to Nigeria and the inking of a $4 billion infrastructure investment deal, Nigerian militants from MEND informed Chinese companies to "stay well clear" of the Niger Delta or risk facing attack. MEND also claimed responsibility for a car bomb attack near the port town of Warri, stating that the explosion was "a warning against Chinese expansion in the region," adding that "The Chinese government by investing in stolen crude places its citizens in our line of fire" (*Financial Times* [London], May 1, 2006, 6). Militants have followed this up with a campaign of hostage taking; five Chinese workers were kidnapped in January 2007 by MEND and, although they were released after two weeks, it was revealed by the *People's Daily* that fourteen Chinese workers had been kidnapped in Nigeria in the first two months of 2007 alone (*People's Daily* [Beijing], March 7, 2007, 2). Where does this leave Beijing's stance of "non-interference"?

Of course, China's stance has been seen most notoriously in Sudan, and indeed Sino-Sudanese links have proved to be amongst the most controversial of China's contemporary foreign policy initiatives, leading to threatened boycotts of the 2008 Beijing Olympics, now dubbed the "genocide Olympics" by some campaigners. China is now Sudan's largest investor, with an investment estimated at $4 billion. Apart from the governance and human rights issues in Khartoum, Beijing's weapons-exporting policy and its past involvement in Sudan's civil war, as well as now in Darfur, have been heavily criticized. It should be noted that China is the only major arms-exporting power that has not entered into any multilateral agreement setting out principles, such as respect for human rights, to guide arms-export licensing decisions. Instead, Chinese actors have been keen to supply the Sudanese government with fighter aircraft and an assortment of weaponry. Apart from the profits accrued from these arms sales, the policy helps consolidate and protect Chinese shares in the exploitation of Sudan's oil reserves. Reports say that the Sudan air force is equipped with $100 million worth of Shenyang fighter planes, including a dozen supersonic F-7 jets (Smith 2000).

The motivation for such supplies is simple. The state-owned Chinese company China National Petroleum Corporation (CNPC) owns the largest share (40 percent) in Sudan's largest oil venture, the Greater Nile Petroleum Operating Company. CNPC's equity oil from the project is around 150,000 barrels a day. With proven reserves of 220 million tons, the project is amongst the largest China has undertaken overseas. Problematically, during the civil war, Sudanese government forces, armed with Chinese weapons, used CNPC facilities as a base from which to attack and dislodge southerners in the vicinity of the new oil fields. And Khartoum used the receipts generated by China's oil fields in Sudan to finance its ethnic cleansing of non-Muslims in the southern part of the country. Consequently, China has been strongly criticized by various non-governmental organizations, with Amnesty International stating in June 2006 that "China has transferred military, security and police equipment to armed forces and law enforcement agencies in countries where these arms are used for persistent and systematic violations of human rights" (Amnesty International 2006, 16). China, for its part, deployed its "alternative" reading of human rights to block United Nations action in the country, with the Chinese ambassador to Sudan, Deng Shao Zin, stating that Beijing was "opposed to any intervention by the United Nations in the internal affairs of Sudan under the pretext of human rights violations" (quoted in Morahan 1999).

It should be said that Beijing has welcomed the recent peace agreement signed in early 2005 between the North and South, and China has committed around 200 troops to the United Nations Mission in Sudan (UNMIS), the international force formed to oversee the ceasefire. Given that oil agreements signed by Khartoum will be respected, this is perhaps no surprise. As has been mentioned, Beijing has used its position at the United Nations to head off Western pressure on Khartoum—particularly over human rights abuses in Darfur. In mitigation, China maintains that it is working hard to encourage the Sudanese government to resolve the conflict. But United Nations investigators have found that most of the small arms in the conflict in Darfur are of Chinese manufacture, despite an arms ban within the region. Amnesty International has reported that China provided hundreds of military trucks to Sudan in 2004 at the height of the three-year-old Darfur conflict and that the Sudanese army and the Janjaweed militia had used these vehicles for travel and for transporting people for execution. China in turn rejects such charges on the grounds that other countries similarly export arms and equipment.

As Chinese Deputy Foreign Minister Zhou Wenzhong was quoted as saying, "Business is business. We try to separate politics from business.…I think the internal situation in the Sudan is an internal affair" (quoted in *New York Times* [New York], August 22, 2005, 5).

Though there is evidence that China is shifting its position (appointing a special envoy to focus on Darfur in May 2007, for instance), Beijing's role in Sudan has tarnished the Chinese desire to promote China as a responsible international actor, committed to China's "peaceful development" and active within multilateral fora as a sensible and globally minded power. Instead, until recently, Beijing has expended its energies in trying to change resolutions at the UN on Darfur that call on Sudan to "cease" all military flights over the region to a milder request that it should "refrain." Everything has been cast by China as "complicated" and this depiction has been used by Beijing to drag its feet over Sudan, if not actively block attempts to resolve the issues. Given that over 100,000 people have been killed so far in Darfur and millions have been forced to flee, China's diplomatic stance over Darfur and Sudan has been problematic, to say the least.

In another oil-rich nation, Angola, China has been accused of similarly turning a blind eye to malgovernance and human rights abuses. Infamously, China stepped in when Luanda was negotiating a new loan with the International Monetary Fund (IMF). The IMF was demanding that transparency measures to improve governance be included, but China's export-credit agency, Exim Bank, stepped in and offered a low-interest $2 billion loan to Angola, tied to a deal to ultimately supply 40,000 barrels per day of crude oil to China. The Angolan Embassy in London declared that the deal "cannot be matched on the current international financial market, which imposes conditions on developing countries that are nearly always unbearable and sometimes even politically unacceptable…In the case of the agreement recently signed with the Chinese bank, no humiliating conditions were imposed on Angola" (Embassy of Angola 2004). The Angolan Ambassador in China later boasted that "Africa can [now] develop by its own effort with China's help…without any political conditions" (*Xinhua* [Beijing], January 24, 2006, 1). However, Douglas Steinberg, Angola country director for the humanitarian NGO CARE, noted that "When I hear of this big Chinese loan [I think] it distorts the whole process and gives a lot more flexibility for Angola not to comply with the conditions for other deals.…It allows the government to escape…transparency" (IRIN 2005). The danger

is that China's relationship with Angola allows the elites in Luanda to continue to be corrupt and ignore governance norms—all in the name of "non-interference" in domestic affairs. Yet this inherently violates Angolans' human rights. As Human Rights Watch put it,

> From 1997 to 2002, unaccounted for funds amounted to some US$4.22 billion. In those same years, total social spending in the country – including Angolan government spending as well as public and private initiatives funded through the United Nations' Consolidated Inter-Agency Appeal – came to $4.27 billion. In effect, the Angolan government has not accounted for an amount roughly equal to the total amount spent on the humanitarian, social, health, and education needs of a population in severe distress.
>
> Due at least in part to such mismanagement and corruption, the government also has impeded Angolans' ability to enjoy their economic, social, and cultural rights. It has not provided sufficient funding for essential social services, including healthcare and education. As a result, millions of Angolans continue to live without access to hospitals and schools, in violation of the government's own commitments and human rights treaties to which it is a party. (2004, 1)

This reality points to an inherent contradiction in China's stance on human rights in its international diplomacy toward Africa and calls for a re-think on the part of Beijing.

China's Diplomatic Contradictions?

Arguably, China's policies in Africa thus far may be seen to be undermining emergent attempts to promote human rights and good governance in Africa, as developed in NEPAD. Certainly, this has been averred by various commentators. From Beijing's perspective, however, as claimed in a Chinese embassy press statement, "[China and Africa] support each other in international affairs, especially on...major issues such as human rights [to] safeguard the legitimate rights of developing countries" (Embassy of the People's Republic of China 2004, 1). The Beijing Declaration of the Forum on China-Africa Cooperation, reiterated in late 2006, stated that

> Countries that vary from one another in social system, stages of development, historical and cultural background and values, have the right

> to choose their own approaches and models in promoting and protecting human rights in their own countries. Moreover, the politicisation of human rights and the imposition of human rights conditionalities on economic assistance should be vigorously opposed as they constitute a violation of human rights. (quoted in *Xinhua* [Beijing], October 19, 2006, 1)

Hence, China (and forty-eight of fifty-three African state leaders) assert that seeking to encourage universal human rights in Africa is itself an abuse of human rights.

There is clearly a great deal of shared ground between Chinese notions of governance as it relates to human rights and democracy and the approach of several African leaders. Many, if not most, African rulers do not share the West's concern over human rights and democracy, certainly not in the same way. These leaders thus weigh up China's expansion into Africa and relations with Beijing with an approach very different from some Western understandings of what is at stake. One report asserts that "In fact, China and Africa to a large extent share the same attitude towards human rights. By and large, they put economic rights over political rights and assign the highest priority to the right to development" (*New Straits Times* [Singapore], January 5, 2007, 7). It is certainly true that China and African presidents to a large degree share the same attitude toward human rights and good governance. But this is not because African leaders put economic rights over political rights, nor because they allocate the maximum precedence to national development. National development and a broad-based productive economy are far less of a concern to elites within most African political systems than the continuation of the gainful utilization of resources for the individual advantage of the ruler and his clientelistic networks. In fact, development might stimulate opposition.[19] As Bertrand Badie explains,

> On the one hand, economic development is a goal that every head of state must pursue…On the other hand, an overly active policy of development risks producing several negative results: It would valorise the competence of the technocratic elite relative to that of the fragile political elite, break up social spaces and favour the constitution of a civil society capable of counterbalancing the political system, and indeed, neutralise neo-patrimonial strategies. (2000, 19)

In short, the idea that resources should rather be channeled toward the nebulous concept of "national development" is, in the main, not on the agenda of many elites in Africa, as wealth generation and survival do not depend on productive development. Unfortunately for Africa, elite survival (or access to rents to distribute to patronage networks in order to retain key support) can be based on the capture of relatively limited geographic areas. That is all (to varying degrees) that is required to lubricate the machinery of patronage. In other words, investment in infrastructure and the advancement of policies that bring in revenue for the elites but also benefit broad swathes of the population (general agricultural policies that encompass large sections of the community) are not required. The "politics of development" is continually hidebound by such realities (Lewis 1996). As a result, "China's economic and political support could offer African politicians increasing leeway in misusing public funds or manipulating institutions to preserve their own power" (Lewis 1996, 1). Indeed, as one Gambian commentary put it,

> By dangling her seemingly vast wealth and wide array of resources before the eyes of salivating African leaders, China has now secured bilateral relations with all but five of the 53-member nations of the African Union.… [M]any African governments will be laughing all the way to the bank. If only these funds will be utilised for the purpose of nation buildings [*sic*] to enhance the quality of living of the impoverished African people, and not the usual looting by the recursive supply of military turned civilian dictators and corrupt officials. (Ceesay 2006)

It is of course important to note that China's policy of non-interference in domestic affairs is long-standing and is not specific to Africa.[20] It is historically rooted in China's years of humiliation in the nineteenth century and non-interference was established early on as a mainstay of Beijing's foreign policy. Article 54 of the first plenary session of the Chinese People's Political Consultative Conference indeed asserted that "the principle of the foreign policy of the People's Republic of China is protection of the independence, freedom, integrity of territory and sovereignty of the country." This, combined with particular understandings and interpretations of what constitutes human rights and democracy explains China's current stance toward such issues, whether in Africa or elsewhere. China's focus on cooperative development as the crucial human right, rather than individual civil and political liberties, has to be

grasped. Certainly, "If the West fails to take these different perceptions into account, it will never deal effectively with the challenges posed by China in Africa" (Shinn 2006, 2).

In this regard, much criticism of China's Africa policy vis-à-vis human rights and governance is rather misplaced—the policies are not specific to Africa. The difficulty arises because such attitudes converge with those of African leaders who are more than happy to have an ally that does not demand conditions and answers as to where the money is going, or the number of political prisoners, or the lack of elections. The nub of the problem is found within Africa itself, within the neo-patrimonial regimes that have so damaged the continent and who are little bothered by ideas of genuine development. As a source within the African Union put it, "totalitarian regimes in Africa are the problem. If China was engaging with serious governments the relationship would be very different – and better."[21]

In fact, it could be argued persuasively that China, like all other external actors in Africa, is simply acting in a pragmatic and self-interested manner. In this sense, condemning China's policies in Africa misses the point. The problem is not necessarily Beijing, but is rather found in the nature and edifice of most African nations. Obviously, there is justifiable disquiet that Beijing's Africa policies may undermine political and economic reform on the continent, as well as nascent attempts to advance such movement. However, the reasons for Africa's current predicament are complex and erecting a potential scapegoat to blame for Africa's woes makes little sense. Before critiquing China's role in Africa vis-à-vis governance and human rights, analysts need to understand not only China's particular human rights discourse but also the nature of most African states, for that is where the real problem lies. The internal structure of any given African state is all-important and varies widely across the continent. For example, the fact that South Africa is a rather consolidated democracy by African standards makes a huge difference to how Pretoria—as opposed, say, to Sierra Leone—deals with China. Political freedom and critical associations (in relation to the issue of China, trade unions are of particular importance) are factors that make the difference, not China's policies toward South Africa per se. Fundamentally, Beijing's engagement with Africa is grounded in pragmatism and so it is up to each African state to negotiate how and where this relationship is shaped. The abandonment of ideology for economic growth by China actually affords Africa a greater degree of space in its connection with

China—but only if this maneuverability is used wisely by Africa's elites. That is the key issue.

Having said all that, there is a certain illogicality in China's position on human rights in its Sino-African diplomacy. It is acceptable to recognize that different conceptions of human rights as well as different interpretations of the Universal Declaration exist. As mentioned, the Chinese discourse on human rights places the right to food, clothing, shelter, and economic development to the fore and Beijing has been quite active in asserting that its primary mission is to develop its productive forces. In this formula, giving priority to development is central. As cited earlier, the key to China's policy is the slogan "Development is the absolute principle." From this perspective, the liberal conceptions of human rights advocated by the West potentially threaten the much-desired stability that Chinese policymakers view as essential to advancing development. This is certainly the message communicated in China's Africa policies. So far, so good. But what if Chinese diplomacy and activities with regard to certain African regimes not only clash with the advancement of universal (that is, Western) norms of human rights, but actually help to further undermine the development that is ostensibly essential to Beijing's own definition? What if, even if we accept China's alternative readings, Beijing's diplomacy in Africa helps to consolidate governments that, as explained above, actively obstruct development? As Human Rights Watch observed, in Angola,

> Had the government properly accounted for and managed…disappeared funds it is likely that more funds would have been allocated to the fulfilment of economic, social, and cultural rights, such as increased spending on education, health, and other social services. The government of Angola has not complied with its obligations under international human rights law because it has misallocated resources at the expense of the enjoyment of rights. (Human Rights Watch 2004, 1)

And it is difficult to see how the average Zimbabwean's human rights to subsistence and development are being promoted when there is 80 percent unemployment, inflation is running at 11,000 percent per year, and black market exchange rates are reaching 300,000 Zimbabwean dollars to one US dollar (when Mugabe took over it was a dollar for a dollar). If it supports such governments, it could be argued, China cannot avoid being implicated.

Obviously, China's non-interference policy is that sovereignty trumps everything and so it is up to each country to decide what to do with Beijing's assistance. But if sovereignty is the guarantor of human rights, as per the Chinese position, and sovereignty is being used to effectively undermine developmentalism, then there is a profound contradiction at the heart of China's discourse on human rights. Surely in such cases, China is complicit in not only siding with autocrats and undermining a nascent human rights regime, but also in participating in undermining its own conception of human rights—one based on development—as well as its own interpretation of the link between human rights and sovereignty. Chinese support for abusive regimes holds within it a real danger: Beijing may help to further destabilize developmental options in Africa, and in doing so directly contradict its own pronouncements on what human rights should mean.

Having said all of the above, China's studious non-interference policies and lack of concern over the records of its partners in Africa is not the end of the story. It is a fact that China must, sooner rather than later, face up to the human rights conditions of the places where it does business. It is here that China's interests in Africa come together with those of the West, and that is why China's engagement with Africa may not, in the long term, be as negative as some observers have claimed. It must be emphasized that China's policies toward Africa are evolving and maturing and that Beijing is going through a steep learning curve.[22] It is true that at present there appears to be divergence between Western and Chinese policy aims regarding governance issues in Africa. But this can only ever be temporary in nature if China wishes to have a long-running and stable relationship with Africa. China is like all other actors in Africa—it needs stability and security in order for its investments to flourish and for its connections with the continent to be coherent. Western nations have learned that propping up dictators willy-nilly is neither sustainable nor desirable, and China will likewise learn this as its relations with Africa continue to unfold. Thus, ultimately there can only be convergence between Chinese and Western policy aims in Africa vis-à-vis governance and human rights. Of course, it should be noted that

> European and North American leaders…tend to give their African counterparts lessons on democracy, respect for human rights, and governmental transparency – even if such lessons are also exercises in Western hypocrisy. France, for instance, maintains privileged relations with the

> corrupt regimes of oil-rich Gabon, ruled since 1968 by Omar Bongo, and of Congo-Brazzaville (Republic of the Congo). And the United States has been wooing African dictators such as Teodoro Obiang and Eduardo dos Santos, who rule oil-rich, poverty-ridden Equatorial Guinea and Angola, respectively, both since 1979. (*Inter Press Service* [Johannesburg], November 15, 2006, 1)

It is important to remember this when discussing some of the more critical aspects of China's emergence as a new actor in Africa.[23]

Yet it remains true that those interested in human rights in Africa must engage with Beijing in identified areas where mutual interests converge, and work with serious African governments to advance the interests of the continent and the present state of human rights in Africa. Portraying China as a monolithic menace to Western interests in Africa only plays into the hands of a whole host of unsavory autocrats on the continent who delight in such rhetoric and, more crucially, has the danger of becoming a self-fulfilling prophecy.[24] Such a stance is likely only to further damage the cause of human rights in Africa. China has an influence in Africa that it has yet to use fully and it is certainly a potential lever for change.[25] Realistic, mature, and reasoned debate on how China might help support the advancement of human rights in Africa is thus needed. Indeed, a key issue is how to engage Beijing in initiatives to advance progressive change in Africa.[26] An engagement with China on its own conceptualization of what such rights are seems apposite. Here, a conversation about how some of Beijing's behavior in Africa arguably undermines its own positions on human rights and their stated link with development, and how this subverts China's own long-term interests, is perhaps the best way forward—one that can be both constructive and productive.

Notes

1. For broader discussions of Sino-African ties, see Taylor (2006), Tull (2006) and Taylor (2004). For an earlier treatment, see Taylor (1998).
2. See Taylor (2006).
3. Sariah Rees-Roberts, a press officer for London-based Amnesty International, quoted in *UN Integrated Regional Information Networks* (Dakar), June 27, 2006, 1.
4. Statement of Ms. Carolyn Bartholomew, Commissioner, US-China Economic and Security Review Commission in the Hearing before the

Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations, House of Representatives, One Hundred Ninth Congress, First Session, July 28, 2005, Serial No. 109–74 (Government Printer, Washington DC, 2005), 17.

5. Robert Weatherly (1999) argues that in China, Confucianism, Republicanism, and Marxism have come together over time to produce today's emphasis on socio-economic and collective rights and the importance of citizens' duties vis-à-vis the exercise of their rights.
6. See Chen (2005).
7. Shu Zhan, interview by author, June 29, 2006, Asmara, Eritrea.
8. Acting Head, Political Affairs Section, Chinese Embassy, interview by author, August 13, 2006, Windhoek, Namibia.
9. See Taylor (2002).
10. David Jabati, interview by author, June 7, 2006, Freetown, Sierra Leone.
11. By the ruling class, I refer to the top echelons of the political elite and bureaucracy, the leading members of the liberal professions, the nascent bourgeoisie, and high-ranking officers in the security forces. See Markovitz (1987).
12. Pamela Mbabazi, interview by author, November 2, 2006, Mbarara, Uganda.
13. Christopher Parsons, interview by author, June 8, 2006, Freetown, Sierra Leone.
14. See Taylor (2005).
15. African Union official, interview by author, May 15, 2007, Addis Ababa, Ethiopia.
16. A point made to me in a seminar on Sino-African relations organized by the Centre for Chinese Studies, University of Stellenbosch, South Africa, August 17, 2006.
17. Henning Melber, interview by author, August 14, 2006, Windhoek, Namibia.
18. The countries visited included Cameroon, Liberia, and Sudan—but also, importantly, Zambia, Namibia, South Africa, and Mozambique—or most of Mugabe's neighbors.
19. Students of mine at Mbarara University of Science and Technology, Uganda, were very forceful in arguing this line during a course I taught on "Africa in the global political economy" in November 2005. Their strength of feeling on this issue was most thought-provoking.
20. Chinese diplomat, interview by author, May 15, 2007, Addis Ababa, Ethiopia.
21. African Union official, interview by author, May 16, 2007, Addis Ababa, Ethiopia.

22. Conversations with Professor Pang Zhongying of Renmin University, Beijing, on Sino-African relations during seminars organized by the *Centro di Alti Studi sulla Cina Contemporanea*, in Turin and Naples in April 2007 have greatly contributed to my understanding of this ongoing process.
23. A point made to the author during an interview with an official from the Ministry of Foreign Affairs, Ethiopia, May 16, 2007, Addis Ababa.
24. Senior Western diplomat, interview by author, June 30, 2006, Asmara, Eritrea.
25. Western diplomat, interview by author, May 15, 2007, Addis Ababa, Ethiopia.
26. Saffie Koroma, interview by author, June 7, 2006, Freetown, Sierra Leone.

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PART II

Human Rights Norms: Emergence, Features and Tensions

CHAPTER 7

Africa's Contribution to the Development of International Human Rights and Humanitarian Law

Frans Viljoen

Africa is associated more with human rights problems and humanitarian crises than with their solutions, more with the need for international human rights law than its application, and more with the failure of international law than with its success. If Pliny was writing today, he would probably have coined the phrase, "Out of Africa, always something terrible."[1]

This chapter sets out to show that this exclusive negativity is misplaced. Africans and African issues have also given rise to solutions and have played an active role in the development of international human rights and humanitarian law, sometimes even initiating new paradigms.

This chapter is a slightly revised reprint of F. Viljoen's 2001 "Africa's Contribution to the Development of International Human Rights and Humanitarian Law," *African Human Rights Law Journal* 1 (1): 18–39 (see http://www.ahrlj.up.ac.za/viljoen-f).

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The focus of this chapter is on a particular area of international law; an assessment of Africa's impact on international law in general is not attempted here.[2]

Africa and the Development of International Human Rights Law

The essential features of international human rights law as we know it were formulated between 1945 and 1966. During this period, the United Nations (UN) General Assembly adopted the Universal Declaration of Human Rights[3] (Universal Declaration), subsequently elaborated in the International Covenant on Civil and Political Rights[4] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[5] (ICESCR). The fact that these three instruments, with the Optional Protocol to the ICCPR[6] (OPI), have become known as the "International Bill of Rights" is indicative of their collective foundational nature.[7] The influential European regional human rights system also came into being during this period.[8] During this period, the number of independent African states increased from four to thirty-seven. After gaining their independence, these states became members of the UN almost immediately. Despite, or maybe owing to, their colonial past, African states gradually extended their initial interest into vigorous participation in the international arena. I argue here that Africa contributed meaningfully to the renewal and redefinition of international human rights law during this process, and I investigate aspects of the "African contribution" to this development.

The African Charter on Human and Peoples' Rights

The most frequently cited evidence of the "African enrichment" of international human rights law is the African Charter on Human and Peoples' Rights[9] (African Charter). The OAU Assembly of Heads of State and Government adopted this regional instrument in 1981. It entered into force in 1986. Today, all fifty-three OAU member states are party to the African Charter.

Common wisdom has it that the African Charter is "autochthonous" in its inclusion of the concept of "peoples," its enumeration of individual duties, the non-justiciability of the dispute settlement procedure, its anti-colonial stance, its emphasis on morality, and its placing of first

generation rights on par with second and third generation rights.[10] All these aspects represent the introduction of a series of ambiguities into the bipolar structure of the international human rights discourse. The international system, as it had developed by the 1970s, is premised on the dichotomies of "individual vs. community," "rights vs. duties," "first vs. second and third generation rights," and "enforceability vs. non-enforceability."[11] In each instance, one of these polarities is privileged: what matters are individual rights, of the "first generation," which are enforceable.

The African Charter's greatest contribution was unmasking the pretense of these strict dichotomies, showing that the dualities can be bridged, and alerting us to the reality of the ambiguity inherent in their co-existence.

Western-dominated discourse privileges the individual. Human rights instruments postulate an autonomous, independent individual (complainant), who is prepared, ultimately, to dissociate from others and enter into legal battle with the collectivity (the state). The African Charter treats a human being both as an individual and as a member of a collective (the "people"). Generally, "every individual" is a bearer of rights under the African Charter. The communal aspect is emphasized in the rights guaranteed to "peoples"[12] and in the recognition of the family as the "natural unit and basis of society."

One reason the Universal Declaration was not adopted as a binding document was Western opposition to implementing second generation rights in the same way as first generation rights. The subsequent creation of the two covenants stands as an illustration of this split. The same bipolarity is reflected in most international human rights treaties,[13] domestic human rights regimes, and in regional-level agreements.[14]

The African Charter does not offer any basis for a distinction in the implementation of various categories of rights. Civil and political rights are included next to socio-economic rights. The Preamble states that "civil and political rights cannot be dissociated from economic, social and cultural rights" (arts. 16 and 17). No difference in the implementation of the two "categories" of rights is provided for. However, some of the socio-economic rights are internally qualified, such as the right to enjoy the "best attainable" state of physical and mental health (art. 16(1)).

The dominant discourse at the end of the 1970s referred to "rights" only. By implication, duties were underplayed, as they were regarded as

a threat to the concept of "rights."[15] The African Charter departs from the premise that rights and duties inevitably exist concomitantly. The Preamble draws the inference that "the enjoyment of rights and freedoms also implies the performance of duties." A list of duties is provided in article 29 of the African Charter, each implicitly embodying the "values of African civilization" (African Charter Preamble). The principle that rights and duties are reciprocal is the basis of article 27(2),[16] which may be described as a general limitation provision.

Despite the fact that many quasi-judicial monitoring bodies have been established, the discourse (at least at the regional and domestic levels) privileges enforceable judicial means. At the time the African Charter was drafted, the two other existing regional systems each provided for a court as the final arbiter for resolving disputes. The African Charter opts for a quasi-judicial institution, the African Commission on Human and Peoples' Rights (African Commission). The African Charter and the African Commission emphasize amicable settlements between parties.[17] The argument that the preference for a commission above a court reflects an inherently "African" concept of dispute resolution may be countered by an examination of the political context at the time of drafting. Weakening the implementation mechanism was most likely a compromise necessary to ensure the support of rulers not yet completely committed to human rights, democracy, and the rule of law.[18]

The African Charter on the Rights and Welfare of the Child

The 1989 Convention on the Rights of the Child[19] (CRC), which entered into force in 1990, has subsequently been ratified by all African member states of the UN except Somalia.

Even before the entry into force of the CRC, the OAU Assembly of Heads of State and Government adopted a regional parallel to the CRC: the African Charter on the Rights and Welfare of the Child[20] (African Children's Charter). Its entry into force required fifteen ratifications (African Children's Charter, art. 47(2)). This number was only reached after almost a decade, at the end of 1999.

In a number of respects, the African Children's Charter provides a higher level of protection for children than its UN equivalent. Some of the most dramatic differences are highlighted below.[21]

* Under the African Children's Charter no person under 18 is allowed to take part in hostilities (African Children's Charter, art. 22 (2)). The CRC allows children between 15 and 18 to be used in direct hostilities (CRC, art. 38(2)).[22]

* The CRC allows -the recruitment of youths between 15 and 18 (art. 30(3)), whereas the African Children's Charter requires states to refrain from recruiting anyone under 18 (African Children's Charter, art. 22(2)).

* Child marriages are not allowed under the African Children's Charter (art. 21(2)).[23] The same is not true of the CRC, where the age of majority may be set to below the age of 18 (CRC art. 1).

* The scope of the protection of child refugees is broader under the African Children's Charter, which allows for "internally displaced" children to qualify for refugee protection (African Children's Charter, art. 23(4)). The causes of internal dislocation are not restricted, but may take any form, including a breakdown of the economic or social order.

* Under the African Children's Charter, the best interest of the child is "the primary consideration" (African Children's Charter, art. 4(1)), not merely "a primary consideration," as provided for in the CRC (art. 3(1)).

Each of these aspects resonates with the precarious position in which children find themselves in Africa. Although not restricted to Africa, child soldiers, child marriages, and child refugees are recurring problems on the African continent.

As in the CRC, the African Children's Charter provides for a supervisory body. The body established under the African Children's Charter, called the Committee of Experts, has a broader mandate than the CRC Committee. The African Committee of Experts is not only tasked with examining state reports, it also makes recommendations arising from individual or interstate communications (African Children's Charter, art. 44). In fact, acceptance of this complaints mechanism is part and parcel of ratifying the African Children's Charter. This contrasts sharply with the mandate of the CRC Committee, which provides only for the examination of state reports (art. 44).

Apart from setting higher standards in numerous areas, the African Children's Charter also incorporates some uniquely "African" features. As in the "mother" document, the African Charter, duties are placed

on individual children (African Children's Charter, art. 31). However, it should be noted that collective or "peoples' rights" are not included in the African Children's Charter.

Africa and the International Protection of Refugees

The UN Convention on the Status of Refugees[24] (UN Refugee Convention) was adopted under the auspices of the UN in 1951 and entered into force in 1954.[25] The socio-political context of its adoption explains many of this Convention's features. The early 1950s were characterized by the aftermath of the Second World War and the beginning of the Cold War. The main contributors to the relevant deliberations were Western European powers. Their main concerns arose from their experiences during the world war (such as Jews fleeing Nazi persecution) and from a new problem: ideologically based defections from the East to the West.

Three important limitations of the Convention as it was originally implemented are related to these factors. First, the basis on which someone qualifies for refugee status is limited to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" (UN Refugee Convention, art. 1(A)(2)). This criteria relates mainly to a subjective requirement, "fear," that for each individual case has to be assessed for its "well-foundedness." In addition to this individualistic focus, the definition of the listed grounds is very restrictive and does not take into account other factors (such as natural disasters or internal wars) that may be just as instrumental in making people refugees. Second, a temporal limit was provided in the original Convention. The "fear" had to be "as a result of events occurring before 1 January 1951" (ibid.). This cut-off date underlines the close link to the preceding war and its effects. The third limitation, of a geographical nature, was included as an option that states could adopt at ratification (or accession). By making a declaration, states could specify that the "events" referred to in the Convention should be understood to mean "events occurring in Europe" (ibid., art. 1(B)(1)). Few states have made such a declaration (Weis 1970, 449).

In light of the above, it is unsurprising that African states saw the Convention as a "European instrument" (ibid., 452). The perception of exclusion was exacerbated in the 1960s when it became clear that refugee problems in Africa were ongoing, and, most often, had started well

after 1951. These dislocations arose on a massive scale, and were mostly caused by internal conflicts. Early examples were the many refugees fleeing conditions in the Congo (later Zaire, now the Democratic Republic of the Congo) and Nigeria.

In response to African criticism and efforts to adopt an African convention separate from the UN Convention, a brief Protocol to the 1951 Convention[26] was adopted by the UN in 1966 and entered into force in 1967 (Patel and Watters 1994, 243). The Protocol dispenses with the temporal and geographic limitations in the 1951 Convention. In the Preamble to the Protocol, "consideration" is given to the fact that "refugee situations have arisen since the Convention was adopted." Since 1967, the Convention has applied equally to everyone who qualifies for refugee status. However, the definition of "refugee" was left intact. African states actively supported the adoption of the Protocol.

After the adoption of the 1966 Protocol, African efforts to elaborate a separate UN instrument dealing with refugees were channeled into adopting a complementary regional instrument, with the result that the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) was adopted in 1969 (Weis 1970, 453).[27]

Both the historic framework and the Convention title indicate that this regional instrument should be viewed in conjunction with, and supplementary to, the international Convention that had been in existence since 1951. After 1967, efforts became directed at a regional supplement to the UN Convention. Thus, the OAU Refugee Convention recognizes the 1951 Convention (as modified by the 1967 Protocol) as "the basis and universal instrument relating to the status of refugees" (OAU Refugee Convention Preamble, para. 9).[28] The OAU Refugee Convention goes further by adapting universal norms and standards to deal with the challenges facing Africa.

By January 31, 2001, forty-eight states in Africa had ratified or acceded to the UN Refugee Convention. Of all the international human rights instruments, only the Convention on the Rights of the Child enjoys broader African ratification. Three of the five states that have not yet ratified the UN Refugee Convention are island states: Cape Verde, the Comoros, and Mauritius.[29] The other two non-ratifying African states are Eritrea and Libya.

The OAU Refugee Convention entered into force on June 20, 1974 (Patel and Watters 1994, 245).[30] By January 31, 2001 it had been

ratified by forty-four OAU member states. Of the ten non-ratifying states, all but three (Comoros, Eritrea, and Mauritius) have at least ratified the UN instruments. This means that the more universal instrument has been accepted by more states in Africa than the regional supplement. Four states (Botswana, Côte d'Ivoire, Kenya, and South Africa) ratified the OAU Refugee Convention after 1990, indicating that the instrument retains its relevance in Africa today.

In an attempt to understand why an "African supplement"[31] to existing international refugee law was added, one should note the distinctions between the two systems. In this way, one may ascertain how the African contribution differs from its global equivalent.

The OAU Refugee Convention largely restates the exact wording of the UN Convention, but the term "refugee" is broadened. The global instrument allows for a "well-founded fear of being persecuted" as the only basic requirement for refugee status. The OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality" (art. 1(2)). This extension was necessitated by the restrictive nature of the initial approach to refugees. "Fear of persecution" focuses on the ideas a person holds, and not on the socio-political context itself. This has led Oloka-Onyango to conclude that "the overall ideology of those grounds…[is] rooted in the philosophy that accords primacy of place to political and civil rights over economic, social, and cultural rights" (1996, 364). This broadened definition allows for many more factors to be invoked by people seeking refugee status. These factors include serious natural disasters (such as famine, which has become prevalent in Africa) and factors that do not affect the whole country.

The UN Refugee Convention's definition assumes that each individual will be screened in order to establish whether they have a "well-founded fear of persecution." Such a system is obviously only manageable when persons flee as individuals or in small groups. When questions about refugee status arise in cases of mass migrations, the application of such a test becomes impossible. It is exactly the latter type of situation that prevailed and still prevails in Africa. This necessitated an approach in which cumulative and objective factors could be determinative of refugee status. Such factors are events "seriously disrupting" public order and "foreign domination" (OAU Refugee Convention, art. 1(2)).

In the OAU Refugee Convention, the grounds on which refugees lose their status as refugees ("cessation of status") or persons are disqualified from refugee status ("exclusion from status") are again derived from the UN document. But again, the OAU Refugee Convention adds to the list. The widened scope created by the broader definition of "refugee status" is narrowed by virtue of these additional grounds for exclusion and cessation of refugee status. Three additional categories are included in the OAU document: anyone guilty of acts contrary to the purpose and principles of the OAU; anyone who has seriously infringed the purposes and objectives of the OAU Refugee Convention; and anyone who has committed a serious non-political crime outside his country of refuge after his admission to that country of refuge (OAU Refugee Convention, art. 1).

The OAU Refugee Convention is explicit about the obligation of states to grant asylum to refugees, in contrast to the UN Refugee Convention, which is silent on this issue (OAU Refugee Convention, art. 2(2)). The duty on states under the OAU Refugee Convention is "to use their best endeavors…to receive all refugees" (art. 2(1)). The way in which this duty was phrased led Weis to conclude that the requirement is recommendatory, rather than binding (Weis 1970, 457).[32] Also, because these endeavors must be "consistent with their respective legislation," states need merely comply with internal laws, whatever their content (OAU Refugee Convention, art. 2). This provision may be viewed as a precursor to the inclusion of "claw-back" clauses in the African Charter.[33]

The OAU Refugee Convention asserts that a refugee has to conform with the law in the state of refuge. He or she must also "abstain from any subversive activities against any Member State of the OAU" (art. 3(1)). In this regard, states have the obligation to prohibit refugees from attacking other OAU member states through acts of armed aggression or the use of mass media (art. 3(2)). Although the basis of the prohibition of the use of force and of disseminating propaganda for war has its roots in international law, the OAU Refugee Convention is unique in placing a duty on the host state to ensure compliance.

An interesting innovation in the OAU Refugee Convention is the duty placed on the country of origin in relation to returning refugees. States must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them (Weis 1970, 463).

The OAU Refugee Convention has rightly been declared a progressive contribution to international refugee law. It presents a clear

example of how a regional instrument can supplement an international regime by addressing problems specific to that region. The restrictive definition of "refugee" under the UN Refugee Convention has made the application of the Convention difficult in regions other than Africa. For example, mass migrations owing to political violence and instability have highlighted the inadequacy of the UN Refugee Convention's definition in Latin America. Protection was granted by the Inter-American Commission to "persons who have fled their country because their lives, safety, or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disrupted public order."[34] This broadened definition incorporates much of the African instrument, but does not grant refugee status merely because persons had to leave their country due to disturbed public order.

Africa and the Protection of the Environment

In recent times, the influence of the environment on the wellbeing of individuals has been a growing concern. Although the protection of the environment is primarily dependent on non-legal factors (such as government policy, local and international economic forces, demographics, and natural elements), international treaties may also play a part by creating or stimulating an appropriate (legal) framework to improve environmental protection. The African Charter devotes one article to the right to a generally satisfactory environment "favorable to the development of all peoples" (art. 24). The adoption of this provision should be seen in the context of the two treaties (one earlier and one later than the African Charter) that deal more specifically with the environment. These treaties are discussed briefly below. Moreover, in the more recent Treaty Establishing the African Economic Community (AEC)[35] (Abuja Treaty), specific provision is also made for the environment and the ban on import of hazardous waste into Africa and across African borders (Abuja Treaty, art. 58 and art. 59).

The African Convention on the Conservation of Nature and Natural Resources

In 1968, the OAU Heads of State and Government adopted an African instrument on the environment, the African Convention on

the Conservation of Nature and Natural Resources in Algiers.[36] It entered into force on June 16, 1969. This Convention concerns itself primarily with wildlife, but also extends to many other issues, such as the use of natural resources like soil and water. It has been described as the "most comprehensive multilateral treaty for the conservation of nature yet negotiated," in which environmental concerns and development are linked (Lyster 1985, 115).[37] As is the case with other treaties on the environment, no administrative structure has been created to ensure its implementation. As a result, the Convention's provisions have been largely ignored. Still, the Convention "has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of national legislation is based" (ibid., 115). By 1985, twenty-eight states had become party to the Convention. A further fourteen had at that stage signed the treaty, without ratifying it.[38] Between 1985 and 1997, the number of ratifications rose by only one,[39] indicating that this Convention has lost some of its initial appeal.

The Bamako Convention[40]

The Bamako Convention on the Ban of the Imports into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa was adopted on January 30, 1991 by a conference of ministers of the environment from fifty-one African states that were all members of the OAU.[41] This followed on the heels of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, adopted under UN supervision on March 22, 1989.[42]

Given the high degree of specialization and uniformity due to standardized technical terminology, it is hardly surprising that the regional treaty borrows extensively from its international predecessor. Both the sequence of issues dealt with and the wording of articles correspond very closely in the two instruments.[43] The Bamako Convention has only one additional article, dealing with its registration with the UN, once it becomes operational. The other twenty-nine articles of the respective documents deal with the same subject matter, using almost the same formulations, although there are a few significant differences.[44]

* As its title suggests, the Bamako document deals specifically with the importing of hazardous waste into Africa and its movement across

African borders. It places a total ban on the import of waste into the continent and regulates waste movement within Africa itself. The Basel Convention, in contrast, contains no ban. It is regulatory in that it permits and regulates all transboundary movement of hazardous waste.[45]

* The scope of the Bamako document is more extensive, as it broadens the definition of "hazardous waste."[46] The inclusion of artificially created radioactive waste in the list of controlled waste streams is of particular relevance.[47]

Other minor changes may be observed. For instance, the Basel Convention requires twenty ratifications before its entry into force, whereas the Bamako Convention requires ten ratifications.[48] The former entered into force on May 5, 1992.[49] As of December 31, 1992, only three African states had ratified the Basel Convention: Mauritius, Nigeria, and Senegal.[50] As of the same date, of the three, only Mauritius had also ratified the Bamako Convention. Apart from Mauritius, two other African countries (Tunisia and Zimbabwe) had by then ratified the regional instrument. The Bamako Convention entered into force on April 22, 1998.[51]

Africa and the UN Human Rights Treaties and Treaty Bodies

Six major human rights treaties, each providing for a treaty monitoring body, have been adopted under the auspices of the UN: the International Convention on the Elimination of All Forms of Racial Discrimination[52] (CERD); ICCPR; ICESCR; the Convention on the Elimination of All Forms of Discrimination Against Women[53] (CEDAW); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[54] (CAT); and the CRC.

African states were particularly instrumental in the adoption of the first of these six treaties, CERD, in 1965.[55] Formal acceptance of the treaty norms by African states is impressive. By January 1, 2001, forty-four of the fifty-three African UN member states had accepted CERD, forty-five had accepted the ICCPR, forty-three had accepted the ICESCR, forty-eight had accepted CEDAW, thirty-two had accepted CAT, and fifty-two had accepted CRC.[56] The optional individual complaints mechanisms of the First Optional Protocol to the ICCPR (OPI),

article 14 of CERD, article 22 of CAT, and the Optional Protocol to CEDAW have enjoyed lesser but still significant African acceptance.[57] Africans have also served on all six treaty monitoring bodies.[58]

Despite the reluctance to comply with their obligations to submit periodic state reports, African participation has enriched the reporting process (Heyns and Viljoen 2001, 17–19). Numerous individual communications have been brought against African states, especially under OPI. Africans residing in European states have brought a number of communications against these states, especially under article 22 of CAT.

Africa and the Development of International Humanitarian Law

International humanitarian law deals mainly with the protection of individuals (or groups) in times of war. International humanitarian law aims to ensure less inhumane warfare, whether of an international or non-international character. International humanitarian law is distinct from international human rights law as it allows for the deprivation and extensive diminution of rights (for example, allowing lawful killing). Ultimately, however, they serve the same goal: the protection of the dignity and humanity of everyone.[59]

The International Criminal Tribunal for Rwanda (ICTR)

On November 8, 1994, the UN Security Council adopted Resolution 955, establishing an international tribunal to prosecute and punish individuals responsible for the genocide and other serious violations of international humanitarian law committed in Rwanda between January 1 and December 31, 1994.[60] This followed in the footsteps of, and was institutionally linked to, the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993.[61]

The ICTY was the first truly international tribunal to prosecute serious violations of international humanitarian law, and the ICTR extended the ambit of the ICTY's protection. The ICTY covered violations arising from an international armed conflict, whereas the ICTR was created to deal with violations arising from an internal (non-international) conflict.[62]

Both the creation of the ICTR and its functioning have enriched international humanitarian law. The ICTR became, in *The Prosecutor v. Jean Kambanda*, the first court to find an individual guilty of the crime of genocide.[63] This decision brought to life the UN's Convention on the Prevention and Punishment of the Crime of Genocide,[64] which had largely been a dead letter since 1948. It should be recalled that it was proposed during the deliberation of the 1948 Convention that a court be created to implement its provisions. As a compromise, no implementing mechanism was created. Thus, the judgment in *The Prosecutor v. Jean Kambanda* served as an important precedent for the International Criminal Court (ICC).

Kambanda pleaded guilty to charges of genocide, conspiracy to commit genocide, incitement to commit genocide, complicity in genocide, and crimes against humanity. In setting out the basis for his guilty plea, Kambanda admitted, amongst other things, the following (para. 39 of the judgment).

* There was, in 1994, a widespread and systematic attack against the civilian Tutsi population.

* The purpose of the attack was to exterminate the Tutsi.

* As Prime Minister, he headed the Council of Ministers. At these cabinet meetings and meetings of *préfets,* the course of the massacres was actively followed, but no action was taken to intervene.

* He issued the Directive on Civil Defence, which encouraged and reinforced the Interahamwe, who were committing the mass killing of the Tutsi civilian population.

For the first time since the Nuremberg trials, a high-ranking government official was held accountable for grave violations of humanitarian law. Jean Kambanda was the Prime Minister of the Interim Government of Rwanda from April 8 to July 17, 1994. The Interim Government was established after the air crash on April 6, 1994, in which President Habyarimana was killed. Kambanda's convictions resulted from acts committed in a position of power, as he exercised de jure authority over the members of his government, as well as de jure and de facto authority over senior civil servants and senior officers in the military.

He was sentenced to life imprisonment. The fact that he held such a high government position was taken into account as an aggravating factor (ICTR Statute, art. 6(2)). The ICTR made the following observation:

> The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population. (para. 44 of the judgement)

The ICTR found the presence of mitigating factors in the fact that Kambanda's example of pleading guilty was likely to encourage others to recognize their individual responsibility (para. 61 of the judgement). Despite the presence of mitigation, the court concluded that the aggravating factors "negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post, at the time he committed the said crimes" (para. 62 of the judgement).

By January 30, 2001, a further ten members of the former cabinet were awaiting trial (including the Ministers of Foreign Affairs, Information, Education, and Family and Women Affairs).

In *The Prosecutor v. Jean-Paul Akayesu,* for the first time, an international court applied rape in an international context.[65] It declared that rape amounts to genocide if committed with the intention to destroy a particular group. Initially, the indictment against Jean-Paul Akayesu did not contain specific charges of sexual crimes. An amendment to the indictment, in 1997, added a count of crime against humanity (rape).[66] Accompanying this amendment, paragraphs 10A, 12A, and 12B were inserted into the indictment. These paragraphs set out allegations that displaced Tutsi women, who had sought refuge at the bureau communal, were subjected repeatedly to sexual violence. Jean-Paul Akayesu, it was further alleged, knew of and encouraged the commission of these crimes.

On this basis, the ICTR Chamber found Akayesu guilty of crimes against humanity. However, the Court went further. It found, of its own accord, that the same acts also constituted genocide (paras. 731 and 734 of the judgement). Article 2(2) of the ICTR Statute does not refer explicitly to sexual crimes, but makes reference to acts "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

The Tribunal concluded that the rapes met this requirement, remarking as follows:

> Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. (para. 731)

This case has been singled out for its "immense factual and jurisprudential importance" (Magnarella 1998, 537). It stands as the first instance of rape being included in the definition of genocide. Stated differently, it has now been established that rape may be committed with genocidal intent.

The ICTR has also explored and elevated into the international discourse an important aspect of traditional African society, that of restorative justice. The Tribunal Registrar has established a program for victims, especially victims of rape and other sexual crimes. This emphasis on restorative justice rather than on (only) retribution has influenced the provision for a Trust Fund under the ICC Statute (art. 79).

The Establishment of the International Criminal Court

The process of establishing the ICTR contributed to international law by creating the much-needed spark for the establishment of an International Criminal Court. The Yugoslav crisis had (re)opened the debate about the need for a supra-national jurisdiction to secure accountability after cases of violations of human rights. The fact that the Rwandan genocide ensued after the ICTY was created was a persuasive argument for the creation of another court or the extension of the ICTY mandate. As in the Yugoslav case, the main motivation was to ensure accountability. Not creating a court to deal with the Rwandese genocide would have led to a very legitimate objection that double standards were being applied, and that the Rwandese conflict was being taken less seriously than the European conflict.[67]

However, the very creation of the court for Rwanda brought to the fore the problem of proliferation. Maybe there was scope for one more court to be established, but how many after that? Problems related to the establishment of multiple tribunals include limited resources, personnel duplication, and time delays in establishing a tribunal infrastructure to deal with ad hoc conflicts. Against this background, parties elaborated and eventually agreed on the ICC Statute.[68] As a result, something that had seemed unthinkable not long before was realized.

Africa and Mercenaries

Although mercenarism has existed from time immemorial, it only became an issue in international humanitarian law in this century. During the sixteenth century, for example, the use of mercenaries was the

unquestioned norm (Botha 1993, 78). In the first comprehensive codification of humanitarian law, the 1907 Hague Convention, the recruitment of mercenaries was prohibited. When the UN was formed in 1945, the single provision in the Hague Convention was still the only reference to mercenarism in international law. The UN Charter went no further than stating the general principle that states should refrain from the use of force against "the territorial integrity or political independence" of another state (UN Charter, art. 2(4)). Viewed against the background of the realities of the Second World War and the ideological conflicts flaring up immediately thereafter, mercenaries hardly merited any attention (Taulbee 1985, 339, 345).

The independence of states previously under colonial rule coincided with an increase in and a changing attitude toward the use of mercenaries. It became a focus of concern, especially in Africa. Concern was first raised about the situation in the Congo in the early 1960s. During the civil war, the Katangese secessionist forces of Moise Tshombe were assisted by mercenaries from Europe and South Africa (Mourning 1982). Subsequently, the government of Mobutu Sese Seko also employed foreign soldiers. Other African examples over the last few decades are Nigeria, Angola, the *coup d'état* by the French national Bob Denard in the Comoros, and the attempted *coup d'état* in the Seychelles by mercenaries under the leadership of Mike Hoare.[69]

Gradually, mercenarism became an issue discussed in international political fora. At the regional level, first the OAU Council of Ministers and later the Assembly of Heads of State and Government denounced these activities. At the global level, the UN General Assembly followed in 1968 with Resolution 2465, termed "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," which declared the use of mercenaries against national liberation movements in colonial territories to be a criminal act.[70] This is evidence of how an African concern has been given global recognition.

On the legal plane, Africa also played a leading role. The first treaty dealing specifically with mercenaries—the OAU Convention on the Elimination of Mercenarism in Africa (OAU Mercenarism)—was adopted under the auspices of the OAU in 1977.[71] After the required number of states ratified the Convention in 1985, it entered into force (Naldi 1989, 102). It defines a mercenary as a non-national of the state against which he is employed. This includes a person who "links himself

willingly" to groups or organizations aiming to overthrow or undermine another state or aiming to obstruct the activities of any liberation movement recognized by the OAU (art. 1).

The African initiative impacted international law in two major ways.

* First, the African initiative led to the inclusion of an article dealing with mercenaries in the 1977 Geneva Protocol I Additional to the Geneva Convention of 1949.[72] According to this protocol, a mercenary "shall not have the right to be a combatant or a prisoner of war" (art. 47(1)). The article is a product of compromise, not going as far as the OAU Convention had already gone or as African states required.

* Second, a movement for an international convention on the recruitment, use, financing, and training of mercenaries was launched at the UN. In 1979, the UN General Assembly adopted a resolution dealing with the "use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination." An ad hoc committee for the drafting of an international convention was established. After years of debate, the General Assembly adopted the Convention Against the Recruitment, Use, Financing and Training of Mercenaries.[73]

Drawing international attention to mercenarism is an African achievement. It shows the increasing prominence of Africa in the UN. However, as Taulbee has argued, one has to question the substantive impact of these provisions. Viewed globally, mercenaries have played a very limited role in modern warfare and conflict. The African stance can be explained primarily by the fact that the mercenary has become "the symbol of racism and neo-colonialism within the Afro-Asian bloc," because the recurring scenario has been one of "white soldiers of fortune fighting black natives" (Taulbee 1985, 342). Given the repeated involvement of South African mercenaries in African conflicts,[74] the cohesiveness of Africa's approach becomes all the more understandable. One must also not lose sight of the context—the sovereignty of the newly independent Africa states was easily threatened, especially in the absence of a loyal citizenry and a loyal and well-trained armed force. Seen from this perspective, the outlawing of mercenaries had little to do with the protection of human rights, but was rather intertwined with a movement to consolidate power in the hands of African rulers.[75]

Conclusion

Regional human rights treaties adopted under the auspices of the OAU have enriched international human rights law significantly over the second half of the twentieth century. The African Charter represents a clear break with numerous dichotomies that characterized international law. African states responded to defects or omissions in UN treaties on refugees, the environment, and children. The UN Refugee Convention of 1951 (and the 1967 Protocol thereto) was supplemented by the OAU Refugee Convention of 1969, which provided, amongst other things, for an extended definition of "refugee." With respect to the environment, the Basel Convention (1989) was expanded with the adoption of the Bamako Convention (1991). As far as children's rights are concerned, the African Children's Charter (1990) followed on the heels of the CRC (1989), increasing the protection of children in important respects with particular relevance to Africa.

As UN members, African states and their nationals also participated in the UN human rights treaty system.

Africa has also played an important role in the development of international humanitarian law. The ICTR, established to provide international justice after the genocide in Rwanda, became the first international tribunal to address the effects of an internal armed conflict. The ICTR also became the first tribunal to find that rape may constitute genocide. By convicting a high government official, the ICTR demonstrated unequivocally that the international trend favoring impunity could be reversed. The ICTR served as an important precedent for the establishment of the ICC. The OAU's adoption of a treaty dealing with mercenaries served as an example for a later treaty developed under UN auspices.

This article has not given a comprehensive overview of African involvement in and contributions toward international human rights and humanitarian law. Treaties dealing with other aspects, such as landmines and women's rights, have not been discussed here. Recent progress toward a Protocol to the African Charter on the Rights of Women underscores the fact that the African contribution to the development of international law will continue in this century.

Notes

1. In his book *Natural History*, Pliny referred to the common Greek saying that Africa always produces some novelty ("semperaliquid novi Africam adferre") (Book VIII, 17). In his *Historia Animalium*, Aristotle referred

to the old saying "Always Something Fresh in Libya." In *The Works of Aristotle Volume IV*, translated by Darcy W. Thompson and edited by John A. Smith and William D. Ross (Oxford: Clarendon Press, 1910).

2. On African participation in, for example, the composition of and cases brought before the International Court of justice, see Bedi (1998). On the contribution of the Organisation of African Unity (OAU) to the development and expansion of international law, see Elias (1988) and Maluwa (2000).
3. UN General Assembly, "Universal Declaration of Human Rights," December 10, 1948, 217 A (III) [*Universal Declaration*].
4. UN General Assembly, "International Covenant on Civil and Political Rights," New York, December 16, 1966, *United Nations Treaty Series*, vol. 999, No. 14668 (entered into force March 23, 1976) [*ICCPR*].
5. UN General Assembly, "International Covenant on Economic, Social and Cultural Rights," New York, December 16, 1966, *United Nations Treaty Series*, vol. 993, No. 14531 (entered into force January 3, 1976) [*ICESCR*].
6. UN General Assembly, "Optional Protocol to the ICCPR," New York, December 16, 1966, *United Nations Treaty Series*, vol. 999, No. 14668 (entered into force March 23, 1976) [*OPI*].
7. See Henkin (1987).
8. The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted under the auspices of the Council of Europe, and entered into force on September 3, 1953. "Convention for the Protection of Human Rights and Fundamental Freedoms," Rome, November 4, 1950, *European Treaty Series* (ETS) No. 5.
9. Organization of African Unity, "African Charter on Human and Peoples' Rights," June 1, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (entered into force October 21, 1986) [*African Charter*].
10. See for example, Benedek (1985, 59) and Umozurike (1997).
11. For an analysis of dichotomies from a feminist perspective, see Murray (2000).
12. For example, arts. 20–24 African Charter.
13. See art. 4 of the 1989 Convention on the Rights of the Child (see note 19), which draws a distinction in "implementation" between "the rights" generally, and economic, social and cultural rights.
14. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), dealing almost exclusively with civil and political rights, was later supplemented by the European Social Charter (1961), dealing with socio-economic rights. The implementation of the two instruments differs, as complaints may be brought only under the first, whereas states have to report under the second.

15. In the Cold War context, a political dimension was added, as the West regarded the concept of "duties" as socialist in nature.
16. Art. 27(2) states that rights must be "exercised with due regard to the rights of others, collective security, morality and common interest."
17. Art. 48 African Charter and comments by Commissioners during the examination of state reports at various sessions.
18. See M'Baye (1992, 164–65).
19. UN General Assembly, "Convention on the Rights of the Child," New York, November 20, 1989, *United Nations Treaty Series*, vol. 1577, No. 27531 (entered into force September 2, 1990) [*CRC*].
20. Organization of African Unity, "African Charter on the Rights and Welfare of the Child," July 1, 1990, *OAU Doc. CAB/LEG/*24.9/49 (entered into force November 29, 1999) [*African Children's Charter*].
21. For a more detailed discussion, see Viljoen (1998).
22. The UN General Assembly adopted an Optional Protocol to the CRC regarding the involvement of children in armed conflict on May 25, 2000. UN General Assembly, Resolution 54/263, "Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography," New York, May 25, 2000, *UN Treaty Series*, vol. 2171 No. 27531 (entered into force January 18, 2002) [*A/RES/54/263*]. State parties are required to take "all feasible measures" to ensure that children under 18 do not take direct part in hostilities (art. 1 of the Protocol) and to ensure that children under 18 are not "compulsorily recruited into their armed forces" (art. 2 of the Protocol). The Protocol entered into force on January 18, 2002.
23. Read with art. 2, African Children's Charter.
24. UN General Assembly, "Convention Relating to the Status of Refugees," Geneva, July 28, 1951, *United Nations Treaty Series*, vol. 189, No. 2545 (entered into force April 22, 1954) [*UN Refugee Convention*].
25. For the text of this Convention, see Patel and Watters (1994, 231).
26. UN General Assembly, "Protocol Relating to the Status of Refugees," New York, January 31, 1967, *United Nations Treaty Series*, vol. 606, No. 8791 (entered into force October 4, 1967).
27. Organization of African Unity, "Convention Governing the Specific Aspects of Refugee Problems in Africa," Addis Ababa, Ethiopia, September 10, 1969, OAU Doc CAB/LEG/24.3 (entered into force January 20, 1974) [*OAU Refugee Convention*]. The text of the Convention is reprinted in Heyns (1996, 34), http://www.up.ac.za/chr/ahrdb/ahrdb.html.
28. See also art. 8(2): "The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention."

29. The fact that they are island states is probably significant in that their geographic location has in the past left these states largely unaffected by flows of refugees. It may further reflect an "island" mentality in terms of which these states are reluctant to open up their borders (and legal systems) for the potential impact of "continentals."
30. For the most recent status of ratifications, see https://au.int/sites/default/files/treaties/7765-sl-oau_convention_governing_the_specific_aspects_of_refugee_problems_in_afr.pdf.
31. The OAU Refugee Convention recognizes the UN Convention and Protocol as "the basic and universal instrument" on the topic (Preamble).
32. However, see art. 12(3), African Charter, which provides for the right "when persecuted, to seek and obtain asylum."
33. An example of such a clause is the phrase "provided he abides by the law" in art. 10, African Charter.
34. Organisation of American States, September 24, 1984, "Annual Report of the Inter-American Commission on Human Rights (1984–85)," OAS Doc. OEA/Ser.L/V/II.66/doc.10. This definition was subsequently affirmed by the General Assembly of the Organisation of American States. See Arboleda (1991).
35. African Union, "Treaty Establishing the African Economic Community (AEC)," Abuja, June 3, 1991 (entered into force May 12, 1994) [*Abuja Treaty*].
36. Organisation of African Unity, "African Convention on the Conservation of Nature and Natural Resources," Algiers, September 15, 1968, OAU Doc CAB/LEG/24.1 (entry into force June 16, 1969).
37. See for example, ibid., art. 7.
38. For a list of these states, see Lyster (1985).
39. Only Gabon has become a party since 1985, in 1988.
40. "Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa," Bamako Mali, January 30, 1991, *United Nations Treaty Series*, vol. 2101 No. 36508 (entered into force April 22, 1998) [*Bamako Convention*].
41. See text in (1993) 1 *African Yearbook of International Law* 269–93; and https://au.int/en/treaties/bamako-convention-ban-import-africa-and-control-transboundary-movement-and-management.
42. "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal," Basel, Switzerland March 22, 1989, *United Nations Treaty Series*, vol. 1672, No. 28911 (entered into force May 5, 1992) [*Basel Convention*]. See text in *International Legal Materials* 1989 28 (3): 649–86, 657.

43. Both envisage implementation primarily through national institutions, with transnational institutions in the form of a secretariat and conference (see arts 5, 15, and 16 of the Bamako Convention).
44. See in general, Ouguergouz (1993) and Tladi (2000).
45. See Cheyne (1994).
46. See Ouguergouz (1993, 201).
47. This aspect has probably inhibited ratification by countries like South Africa.
48. Art. 25 of both Conventions.
49. See Ouguergouz (1993, 196).
50. Ibid.
51. Based on information provided by Tiyanjana Maluwa, in his capacity as legal counsel of the OAU. The Bamako Convention envisaged its entry into force on the ninetieth day after the deposit of the tenth instrument of ratification by the signatory states. This was interpreted to mean that only the ratification of the original signatories to the treaty would count in computing the ten ratifications, and not ratifications by states that acceded to the treaty only after its adoption. This happened on January 21, 1998, when the tenth original signatory state (Benin) deposited its instrument of ratification. No secretariat has as yet been established, mainly because of a lack of funds (according to officials of the South African Department of Foreign Affairs).
52. UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination," New York, March 7, 1966, *United Nations Treaty Series*, vol. 660, No. 9464 (entered into force January 4, 1969) [*CERD*].
53. UN General Assembly, "Convention on the Elimination of All Forms of Discrimination Against Women," New York, December 18, 1979, *United Nations Treaty Series,* vol. 1429, No. 20378 (entered into force September 3, 1981) [*CEDAW*].
54. UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," New York, December 10, 1984, *United Nations Treaty Series,* vol. 1465, No. 24841 (entered into force June 26, 1987) [*CAT*].
55. See Schwelb (1966, 998).
56. See http://www.un.org/ENGLISH/bible/englishinternetbible/partl/chapterlV (accessed February 1, 2001).
57. By January 31, 2001, three African states had made declarations in terms of art. 14 of CERD, 31 had accepted OPI, 6 had made a declaration in terms of art. 22 of CAT, and three states had accepted the Optional Protocol to CEDAW.

58. For a detailed overview of this and other aspects of African involvement in the UN system, see Viljoen (1999, 109).
59. See Meron (1997).
60. UN Security Council, Resolution 955, "On Establishment of an International Tribunal and Adoption of the Statute of the Tribunal," (S/RES/955) November 8, 1994 [*ICTR*]. The resolution was adopted by 13 votes to 1 (Rwanda), with 1 abstention. The Statute of the ICTR [*ICTR Statue*] is annexed to the Resolution. The Statute provides that Rwandan citizens responsible for violations "committed in the territory of neighboring states" may also subjected to the jurisdiction of the ICTR (art. 1 of the ICTR Statute). The text of the Statue is available at *International Legal Materials* 37 (5) (1998): 999–1069.
61. UN Security Council, Resolution 827. "International Criminal Tribunal for the Former Yugoslavia," (S/RES/827) May 25, 1993 [*ICTY*].
62. Art. 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II is included in the jurisdiction of the ICTR (art. 4 of the ICTR Statute) and not in that of the ICTY. See also Lee (1996, 38).
63. *The Prosecutor v. Jean Kambanda (Judgement and Sentence)*, ICTR 97-23-S, International Criminal Tribunal for Rwanda (ICTR), September 4, 1998.
64. UN General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide," Paris, December 9, 1948, *United Nations Treaty Series,* vol. 78, No. 1021 (entered into force January 12, 1951).
65. *The Prosecutor v. Jean-Paul Akayesu (Judgement and Sentence)* ICTR 96-4-T, International Criminal Tribunal for Rwanda (ICTR), September 2, 1998.
66. See Magnarella (1998, 532).
67. See Akhavan (1996).
68. UN General Assembly, "Rome Statute of the International Criminal Court," Rome, July 17, 1998, United Nations vol. 2187, No. 38544 [*ICC Statute*]. Text available at *37 International Legal Materials 999.*
69. On their prosecution in South Africa for contraventions of the Civil Aviation Offences Act 10 of 1972, see *S v. Hoare* 1982 4 SA 865 (N).
70. UN General Assembly, Resolution 2465, "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," (A/RES/2465(XXIII)) December 20, 1968.
71. Organisation of African Unity, "Convention on the Elimination of Mercenarism in Africa," July 3, 1977, CM/433/REV L ANNEX 1(1972) (entered into force April 22, 1985).
72. "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts

(Protocol I)," Geneva, June 8, 1977, *United Nations Treaty Series* vol. 1125, No. 17512 (entered into force December 7, 1978).

73. UN General Assembly, Resolution 44/34, "International Convention Against the Recruitment, Use, Financing and Training of Mercenaries," (A/RES/44/34), New York, December 4, 1989, *United Nations Treaty Series,* vol. 2163, No. 37789 (entered into force October 20, 2001).
74. In the 1990s, the private South African firm Executive Outcomes played a prominent role in, for example, Angola and Sierra Leone. In both these instances, they were on the payroll of the government in the countries concerned. Newly elected president of Sierra Leone, Ahmed Tejan Kabbah, relied on the presence of Executive Outcomes to keep rebel forces at bay and ensure stability. In 1996, Executive Outcomes was paid US$1.2 million per month, making up a considerable percentage of state expenditure ("Kabbah Strikes Back" (1996) *Nov/Dec Africa Today*, 43–44).
75. The 1990s saw the emergence of a corporate army, Executive Outcomes. It played an active role in numerous African conflicts, especially in Angola and Sierra Leone. Obvious concerns have been raised: leaders with little popular support may remain in power, despite national disintegration (and disintegration of the military forces), through the control of state finances. In the process, democracy may be thwarted, and national resources may become directed at the survival of a leader rather than the improvement of citizens' quality of life. On the other hand, Executive Outcomes has served as a "private Pan-African peace-keeping force of a kind which the international community has long promised, but failed to deliver" (Pech and Beresford 1997). In both Angola and Sierra Leone its intervention contributed to an eventual peace process. The absence of any meaningful role played by the OAU or the UN has created the room for the involvement of Executive Outcomes in internal African conflicts.

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CHAPTER 8

On Kéba M'Baye and the Right to Development at 30

Eunice N. Sahle

The renowned Senegalese jurist Kéba M'Baye is credited with coining the term "the right to development" in 1972 (Mokhiber 2011, 2). Throughout the 1970s and 1980s, his interest in rethinking development through a human rights lens continued. During his tenure at the United Nations (UN), for example, his advocacy for the emergence of an normative instrument devoted to the right to development led the Commission on Human Rights to authorize an exploration of what it termed as: "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order" (ibid., 2). By the late 1970s, M'Baye contended that "a new right" was "being fashioned before our very eyes: the right to development" (1978, 13).[1] For M'Baye, the emergence of the right to development was not accidental, but rather a result of "reformist and revolutionary ideas of the late eighteenth and early nineteenth centuries" (1978, 14) and other developments pertaining to human rights norms in the post-World War II period. Optimistic as he was about the emergence of a right to

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development, M'Baye was acutely aware of tensions that would characterize attempts to blend dominant development ideas and human rights norms. As he stated, "the association of 'development' and 'right' is somewhat venturesome" (1978, 1).

M'Baye's conceptualization of development was deeply grounded in historical, structural, and other critical human rights analytical concerns. For him, a human rights approach to development had to incorporate a historical understanding. As such, analysis of contemporary development processes in formerly colonized countries had to consider the legacies of colonial economic strategies and their effects. According to M'Baye, these legacies continued to set structural limits for economic development (1978, 7) in such countries. Thus, his approach significantly departed from dominant development theories that tend to ignore historical legacies, structural inequality, and other power dynamics in their conceptualizing of development. Take, for example, his approach to the international trading system. Contrary to dominant development discourse that presents this system as free, equal, and as one governed by fair trading rules, M'Baye argued that it was marked by inequality.[2] A core root of that inequality was the incorporation of African countries in the global economic and political system in different historical junctures on unequal terms. Overall, M'Baye contended that it was the dominant industrialized countries in the world economy system that benefitted from the historical, political, and structural dynamics governing international trade, while countries in the global South "had to pay more and more for manufactured goods" (1978, 5; Prempeh 2008). For M'Baye, the inequality characterizing the global economy was one justification for the adoption of a right to development (1978, 7).

M'Baye's contention that colonial practices remained salient in economic trajectories of African countries was not aimed at discounting African agency in the making of local political and economic landscapes. Rather, it was to call attention to the ways in which historical and contemporary power arrangements and structural and political realities set the parameters of human and institutional agency in economic and political processes in a given country in Africa. Demonstrating such an approach in her study of various but intersected dimensions of European colonialism and their legacies in Africa, Peyi Soyinka-Airewele states:

> The countries that epitomize the African postcolonial embody the contradictions of formal independence—of indigenous agency, identities, and

> cultures subsisting in the transmutated presence of colonial empire, which persists, not as a vestigial social, institutional, and political-economic ghost, but, in several countries, as tangible cultures, monuments, hierarchies, and institutions. (2010, 103)

Beyond his attention to historical and structural dynamics that underpin the contemporary world economic system, M'Baye's vision of development from a human rights perspective broadened the definition of development. For M'Baye, development was more than quantifiable measures: "quality" had to be "its yardstick" (1978, 4). In his view, the objective of development processes was to contribute to social, political, and economic conditions that enabled human and social development for all (ibid.). Arguing along these lines, he contended that, "it is not a longer life for every person that matters but a better life" (ibid.). From his perspective, a society for which the primary concern was "ever greater production and on ever increasing consumption" was "without a shadow of a doubt [one] condemned to fatal contradictions and chaos" (ibid.). In the main, his human rights approach to development moved beyond the narrow definition of development that permeates dominant development discourse, the focus of which tends to be the level of a given country's gross domestic product (GDP). Such a focus neglects the effects of levels of GDP in a given juncture on human flourishing and dignity (Pogge 2008; Wettstein 2009).[3]

What has happened since the late 1970s when M'Baye claimed that the right to development was "being fashioned before our eyes" (1978, 13)? The premise of this chapter is that, since then, there have been some developments that augur well for M'Baye's human rights vision of development. For example, the emergence of the 1986 Declaration on the Right to Development (DRD) is a pivotal development in terms of a norm devoted to his core concerns. However, while principal institutional agents of development have increasingly adopted the language of human rights, there has not been a substantive reorientation in their development discourse. Furthermore, they have narrowed the scope of the DRD. In addition, in the last few decades, acts of terrorism by non-state actors and the nature of some responses to them by states have disconcerting implications for the right to development. The chapter is divided into two parts, with the first one focusing on constitutive elements of the DRD and their relevance to international development theorizing from a human rights perspective. With a focus on principal

institutional agents of development, Part II of the chapter provides examples that indicate their lack of substantive interest in promoting the core aims of the DRD thirty years after its emergence.

Toward a Human Rights Approach to Development: The 1986 Declaration on the Right to Development

The DRD goes a long way in combining civil, political, economic, social, and cultural rights. The basic indivisibility of human rights is a fundamental tenet of its conceptualization of development as a human right.[4] Such a premise is important in light of the binary approach to human rights that has characterized the evolution of international human rights instruments in the post-World War II period. For example, such thinking is what led to the emergence of two separate international human rights covenants in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. In terms of development theorizing, the DRD provides some important interventions, some of which the analysis focuses on next.

While the DRD continues to face significant challenges, its vision of development pays attention to issues that remain relevant to debates in development theory and practice. For example, an active citizenry is one of the constitutive elements of the DRD's vision of development. From its perspective, "every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[5] In dominant development discourse, local citizens tend to be viewed as docile objects of development awaiting liberation from developed and modernized visionaries mainly from the global North. Such an approach to development has neo-colonialist linings. The latter characteristic has led some observers to categorize the work of non-governmental organizations (NGOs) in the development sphere in Africa as a contemporary manifestation of colonial missionaries' logics (Manji and O'Coill 2002).[6]

Overall, dominant development discourse tends to not only ignore the voices of local social actors but also their agency—albeit under challenging structural conditions—in economic and other processes of social change. Summarizing elements of such discourse, Arturo Escobar

describes them as a "literature, in which there exists a veritable underdeveloped subjectivity endowed with features such as powerlessness, passivity, poverty, and ignorance, usually dark and lacking in historical agency as if waiting for the (white) Western hand to help subjects along" (1995, 8). The preceding approach has had a long history in dominant development discourse as it pertains to the African continent (Sahle 2010). As such, the stress on centrality of local participation in development processes in various articles of the DRD is an important shift. Its articulation of citizens' participation in development processes signals that, at their core, such processes should be envisioned and practiced not in a managerial version, but in a participatory democratic manner. In addition, such processes are political; consequently, their review and contestation by citizens is central. Some of the preceding ideas are embedded in Kenya's recent 2010 Constitution, a development that has resulted in the devolution of state power and the embedding of public participation as a constitutional norm.[7] As the author's ongoing research on devolution in Kenya indicates, for example, under the leadership of Governor Kivutha Kibwana, a well-known human rights scholar and advocate, such developments have contributed to the emergence of a substantive participatory and sustainable development vision in Makueni County.[8]

Equality and fairness are other ideas that underpin the DRD vision of development. Such a vision is embodied in its Preamble, which defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."[9] DRD's focus on human flourishing and emphasis that development should benefit all citizens indicates a shift from the historical focus on GDP as the main measure of such a process. As suggested earlier in the highlights of M'Baye's approach to development from a human rights perspective, a GDP-centric approach tells us very little about the effects of development in a given country. Take for instance the question of GDP's effects on poverty levels. To assume that high levels of economic growth automatically alleviate poverty sheds limited light on the numerous forms of capabilities deprivations (Sen 1999) generated by conditions of poverty in a given historical moment and country. Moreover, even though it is represented as an objective fact by its proponents, "the trickle-down effect of economic growth" that underpins dominant neoliberal development theory's

mainly GDP-oriented approach to development "is anything but a proven reality" for the "reality rather suggests that a majority of the poor remain unaffected by it" (Wettstein 2009, 102).

Like M'Baye's vision of development, the DRD framing of development doesn't ignore pre-existing structural inequalities emerging from historical and contemporary economic processes. Its right to development perspective pays attention to injustices emerging from "all forms of racism and racial discrimination, colonialism, [and] foreign domination."[10] In terms of structural inequalities at the global level, the DRD's Article 3(3)[11] calls on states to "fulfil their duties in such a manner as to promote a new international economic order." DRD's approach to development departs from dominant development discourse, which neglects historical and other sources of structural inequalities. Further, that discourse represents development as a neutral process, thus ignoring its effects such as those highlighted by M'Baye (1978) and other scholars (Escobar 1995; Mamdani 1996; Mkandawire 2014; Sahle 2010; Soyinka-Airewele and Edozie 2010; Tully 2008).

In terms of theoretical debates in human rights, the DRD shares some affinity with the cosmopolitan[12] school. These similarities have implications for its vision of development. To begin with, individuals situated in given societies are the unit of moral concern (Pogge 2008; Wettstein 2009), and are the main focus of development processes and objectives in the DRD's vision of development. In its Article 1(1), the DRD conceptualizes the right to development as "an inalienable human right."[13] Further, in its Article 2(1), it declares "the human person" as the "central subject" of development processes, and the "beneficiary" of such processes.[14] Moreover, the DRD's Article 2(2) stipulates that "all human beings" have a duty in "development" processes "individually and collectively," and it also states that individuals have "duties to the community" (ibid.). As such, while the DRD places individuals at the center of its moral concerns, it doesn't abstract them from societal settings for individuals don't exist in a vacuum: they are embedded in communities underpinned by local and global political, economic, cultural, and social dynamics. Such an approach to the nexus of the individual-community in the context of redefining development as a human right is close to M'Baye's conclusion that it was "superfluous to indulge in rhetorical speculation on whether the right to development" was "really a collective or an individual right" (1978, 2). Theorizing the right to development from a collective perspective, N. J. Udombana suggests

that it can be considered "as the aggregate of the social, economic, and cultural rights of all the individuals constituting a collectivity," or conversely "as the economic dimension of the right to self-determination" (2000, 769). While the DRD's nuanced approach to the individual vs collective human rights debate merits attention, its underlying anthropocentrism needs further interrogation, particularly in light of increasing attention to biocentrism and debates concerning the Anthropocene.[15]

A second similarity that the DRD shares with the cosmopolitan school in the field of human rights is its broad approach to assigning obligations[16] regarding the right to development. Overall, human rights instruments or conceptualizations that ignore the question of responsibilities are "incomplete" in debates concerning human rights and justice (Wettstein 2009, 133). Of course, the issue of how we assign human rights responsibility continues to be highly debated, especially in the "assigning responsibilities"[17] school in the field of human rights, in which the central question, as Andrew Kuper states, is "who must do what for whom" (2005, xxii)? In any event, the DRD's approach to assigning human rights duties is multi-scalar. The DRD conceptualizes states as the primary agents of the right to development. In that regard, it calls on states to create "national and international conditions" that facilitate the "realization of the right to development."[18] From the DRD's perspective, "individually and collectively," we all (locally and globally) have obligations to "promote and protect" what it calls "an appropriate political, social and economic order for development."[19] In terms of development practices, Article 4(1) of the DRD declares that all states "have the duty" to generate policies that enable the "realization of the right to development." The local-global approach to allocating duties related to the human right to development is a departure from standard development discourse, which tends to focus on de-historicized internal factors, especially state practices in Africa, as the sole determinants of development processes and human rights practices. As argued in Chapter 1, such perspectives contribute to the reproduction of a singular narrative about political and other trajectories of countries in Africa.

From a cosmopolitan human rights perspective, moral obligations such as those embedded in the DRD do not end at the local community and national levels. Such a view of moral obligations has a long genealogy in various religious traditions and cultures in various parts of the world (Ishay 2004). Further, such notions also underpin Stoics' ideas

about citizenship and human interconnectedness and political belonging. Historically, and in the contemporary era, cosmopolitan ideas have been embedded in human rights thought, especially when it comes to questions pertaining to assigning responsibilities for rights. In any event, from a cosmopolitan perspective, a core factor uniting the human family is the capacity for reason. For Stoics, then, human beings were "'citizens' of a more fundamental community than that of their particular city, state or empire of which they might be political citizens: the latter citizenship [was] an accident of birth and circumstance" (Dower 2003, 6). As Martha Nussbaum states:

> The Stoics, who followed [Diogenes'] lead, further developed his image of the *kosmou polites* (world citizen) arguing that each of us dwells, in effect, in two communities—the local community of our birth, and the community of human argument and aspiration that "is truly great and truly common, in which we look neither to this corner nor to that, but measure the boundaries of our nation by the sun" (Seneca, *De Otio*). … With respect to the most basic values, such as justice, "we should regard all human beings as our fellow citizens and neighbors (Plutarch, *On the Fortunes of Alexander*)." (1996, 7)[20]

From a cosmopolitan human rights perspective, the practice of dumping hazardous waste and chemicals in Africa and other parts of the global South by global North entities, for instance, ignores human and environmental interconnectedness, and the human rights obligations of such actors (Adeola 2001; Gwan 2002; Koné 2014; Madava 2007). At their core, such practices treat Africans as not deserving equal moral concern and as not being part of a universal moral community in which each human being is treated equally. In light of these realities, the DRD's approach to assigning obligations related to human rights offers a normative lens, which might open opportunities to challenge what the philosopher Achille Mbembe terms an "international division of life" (2005), the underpinnings of which are ideas and practices that have historically and in the contemporary era considered some lives more human and relevant than others.

In recent decades, the cosmopolitan approach to assigning human rights duties has gained momentum under contemporary conditions of economic globalization underpinned by neoliberal theory of development. For some scholars, those conditions have eroded "statist responsibility, creativity, capacity and autonomy," thus limiting the ability

of states to meet their obligations to citizens (Falk 2002, 15). In this context, argues Richard Falk, individuals can no longer view the state through a traditional lens, and, in the specific case of rights, individuals need to seek "the extension of rights in various directions, and with respect to overlapping frameworks of authority, while the state is losing much of its grip as the main arena" (ibid., 16). While the emergence of multi-level forms of governance might portend well for the realization of the right to development (and other rights in general), particularly with regard to assigning responsibilities for the realization of this right, it is crucial to remember that power dynamics will influence how such a development translates at the level of practice. Furthermore, it goes without saying that in light of historical and contemporary developments such as neo-Hegelian views about the African continent and political and economic practices of dominant actors in the current world order (Sahle 2010), for the most part, the universalistic humanism embedded in cosmopolitan thought rings hollow.

This section has focused on some of the constitutive elements of the DRD and their contributions to development theorizing. To begin with, the DRD's placing of the flourishing of individuals and their historically situated communities at the center of development processes interrupts the uncritical focus on levels of a country's GDP as a pivotal marker of such processes. In addition, its call for an active citizenry in development processes is a welcome departure from the passive forms of citizenship that underlie orthodox development theory. Further, the DRD's multi-scalar approach to assigning obligations regarding the right to development calls into question national-centric perspectives. The latter tend to ignore the international dimensions of development processes in Africa and elsewhere, and their effects. Moreover, its attention to historical and contemporary sources of inequalities such as colonialism and the modalities of the international economic order reiterates some of M'Baye's core development concerns from a human rights perspective. Yet, thirty years after its emergence, the DRD's vision of development remains a significantly constrained project at the level of practice.

The Right to Development at 30

In the last few decades, especially since the 1990s, the fusing of human rights and development ideas has become a common practice in international development circles. Increasingly, nongovernmental organizations

(NGOs) such as Oxfam, CARE, and others have framed their development discourses through the language of rights (Offenheiser and Holcombe 2003, 285). In the case of CARE, it has developed what it terms a "benefits-harms" approach to its human rights approach to development (Cornwall and Nyamu-Musembi 2004, 1429). The aim of this approach is to evaluate the extent to which local social differences influence how individuals "experience harm or benefit from" a given development project (ibid.). The NGOs' turn to a human rights approach to development is evident in the following areas of their work: "project and program design, human rights education, participation, and accountability standards" (Nelson and Dorsey 2003, 2017).

While there is no consensus on the question of the merging of human rights and development ideas, scholarly debates concerning these two areas—which have different intellectual histories and concerns—have also grown in the last decades (Cornwall and Nyamu-Musembi 2004; Hamm 2001; Sano 2000; Sengupta 2001; Udombana 2000; Uvin 2002; Wettstein 2009). Further, global governance institutions (GGIs) have adopted the language of human rights in their development discourse. For example, the World Bank has declared that its "economic and social approach to development advances a comprehensive, interconnected vision of human rights" (1998, 3). The United Nations Development Programme (UNDP) has stated that it "supports 'human rights for development' in more than 100 countries and connects partners in a global network" and further, that its "work" in the area of rights is "about expanding choices and protecting rights and freedoms."[21] From a 1970s vantage point, when M'Baye suggested that a right to development was on the verge of becoming a reality, the emergence of the DRD and the preceding developments in spaces of international development represent important strides in efforts aimed at fusing human rights and development ideas. Nonetheless, as some examples will show in the next section, there has not been a substantive entrenching of the DRD's vision of development in principal institutional sites of international development. Further, the rise of terrorism by non-state actors and some state responses to this development have significant implications for the DRD.

Institutions, Development Practice, and the DRD

From the early days of the post-World War II period, states and GGIs have been key actors in the evolution of development discourse. From a

historical perspective, their role is not surprising. Even though, in recent decades, dominant development discourse has called for the rolling back of the role of the state in the economic sphere, such a turn does not negate the fact that states have and continue to play a central role in the emergence and dynamics of the modern world economic system (Polanyi 2001).[22] At a minimum, the world economic system depends on functioning states with some measure of bureaucratic and coercive power and public authority to enforce local, regional, and global contracts and other mechanisms and processes that underpin it. Further, powerful GGIs such as the World Bank and the IMF have historically and in the contemporary era played a pivotal role in the emergence and evolution of development ideas and policy practices. While not the only generator of human rights norms, the United Nations remains the dominant institutional space for their formation and global embedding.

While NGOs are increasingly conceptualized as agents of human rights (O'Neill 2001), dominant institutions remain central to debates pertaining to human rights, including that of development, in light of their enormous forms of power and capabilities (Green 2005; Pogge 2008; Wettstein 2009). For example, GGIs and large corporations are central in debates pertaining to human rights, including that of development. Furthermore, in the evolution of the modern political and economic world system, such institutions have emerged as "the primary actors on the human stage" (Goodpaster 1983, 9, as quoted in Wettstein 2009, 149).[23] Further, in the contemporary epoch, "their influence on our lives is so pervasive and omnipresent that denying their moral responsibility seems almost cynical" (ibid.). Overall, when compared to individuals, states and GGIs have expansive forms of power. Hence, this section's focus on the major institutional actors—mainly states and GGIs—in its discussion of the DRD thirty years after its emergence.

In the case of states, they play an important role in the formation and diffusion of human rights normative instruments. For example, African states made a significant contribution to the merging of human rights and development ideas. Their 1981 African Charter on Human and Peoples' Rights (the Charter), which came into force in 1986, was the first human rights instrument to articulate the right to development. In its Article 22(1), the Charter states: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" (Organization of African Unity 1981, 7).[24]

Further, in its Article 22(2), it declares that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development" (ibid., 7).

While states and GGIs play important roles in the emergence of human rights norms, they also oppose them; further, they engage in practices that narrow the scope of human rights, as the evolution of the DRD indicates. When the DRD emerged in 1986, it was not welcomed by several states, including some of the most powerful states in the world political and economic system. The United States cast a negative vote, while "eight abstained"—these included "Japan, Germany and the United Kingdom."[25] However, at the 1993 UN World Conference on Human Rights in Vienna, a consensus seemed to have emerged on the right to development. The consensus is embodied in the Vienna Declaration and Plan for Action (VDPA). Nonetheless, evidence of the fragile nature of such a consensus continues to emerge. For example, in 2003, the UN's Commissioner on Human Rights attempted to strengthen the DRD by requesting, among other things, that:

> the Sub-Commission on the Promotion and Protection of Human Rights prepare a concept document establishing options for the implementation of the right to development and their feasibility, inter alia an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address, for submission to the Commission at its sixty-first session for its consideration and determination of the feasibility of those options. (United Nations, E/CN.4/2003/L.14, 2)

When the above request was brought to a vote, forty-seven countries voted in favor, while Australia, the United States, and Japan voted against the request. Further, Korea and twelve others, including countries that construct themselves as supporters of human rights and security such as Canada and Sweden, abstained from the vote. The United States' historical opposition and ambivalence to the right to development—and in general, economic, social, and cultural rights—is captured in the following comments made by one of its representatives at a meeting with the Working Group on the Right to Development on February 10, 2003: "The realization of economic, social and cultural rights is progressive and aspirational. We do not view them as entitlements that require

correlated legal duties and obligations. States therefore have no obligations to provide guarantees for the implementation of any purported 'right to development'" (quoted in Qerimi 2012, 94).[26]

In addition to some states overtly opposing the DRD, since its emergence, there has been a narrowing of its scope. For example, while there was a consensus on the right to development at the 1993 World Conference on Human Rights, some of the substantive aims of this right as envisioned by M'Baye and the DRD were narrowed by UN member states. As the discussion indicated earlier, in light of historical and ongoing structural inequalities, M'Baye considered the establishment of a new international economic order as an important foundation for the realization of a human right-based process of development. In 1986, The DRD rearticulated the idea in its Article 3(3), which declares: "States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States."[27] However, in the 1993 VDPA focusing on the right to development, there are no references to the need for the creation of a new international economic order as articulated by M'Baye and the DRD. What it states is that "the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level."[28]

Overall, international obligations to the human right to development have been relegated to the background by principal international agents of development such as GGIs. While, since the late 1990s, the World Bank has adopted the language of human rights (World Bank 1998), and its Comprehensive Development Framework (CDF) stresses that "Long-term, holistic vision; Country ownership; Country-led partnership; and Results focus"[29] are the pillars of its development approach, its commitment to the tenets of the neoliberal development model remains—although in a modified form from their earlier hyper renderings in the 1980s and parts of the 1990s. However, the language of partnership, local ownership, and other keywords of the World Bank's CDF fail to address its role and those of other GGIs in contemporary economic, political, and institutional conditions in Africa that negate the realization of human rights, including that of development. For example, their neoliberal informed state reforms have had negative effects on state capacity in various parts of Africa. As such, while their earlier hyper

neoliberal project has been modified—although the European Union-led[30] economic austerity measures in Greece and other countries tell a different story—because of their failures and the struggles against them by civil society groups, and the 2007–2008 global economic crisis, their structural and other legacies are evident in various parts of Africa. As Thandika Mkandawire argues, the World Bank's and other international financial institutions' (IFIs):

> massive interference with and experimentation on local institutions, and their assumption of policy "ownership" undermined the legitimacy of local political and bureaucratic actors by reducing their effectiveness through one-size-fits-all reform. The view of the IFIs was that African countries had bloated civil services; Africa now has the lowest number of civil servants per 100 citizens….Much of the institutional reform focused on enhancing the restraining arms (independent central banks, courts, policy, accounting tribunals), rather than the transformative arms of the state (the so-called spending ministries in charge of social services, industry, agriculture, infrastructure, and so on). The state was effectively removed from the development policy arena, which was occupied by peripatetic experts [thus] fencing off key institutions from local political oversight. The extent to which the donors controlled African economies became an embarrassment to the donors themselves, and they began to fret about "ownership" and "partnership." (2014, 174)

While the World Bank and other GGIs are key institutional agents in the economic arena in African countries, it is important to note their effects are mediated by local historical, structural, and political conditions. Further, it is imperative to acknowledge the agency of Africa states in development processes, even in the era of neoliberal strategies. For example, their New Economic Partnership for Africa's Development (NEPAD) is an indigenous version of the neoliberal development paradigm. Like the CDF, it adopts the language of "partnership" and "local ownership" in its development framework (Sahle 2008). However, while acknowledging their agency, one cannot ignore the power imbalance underpinning their relationship with the GGIs, especially for highly indebted countries such as Malawi and others. Overall, while taking cognizance of local institutional and other modes of agency, the GGIs and states in the global North still have expansive forms of power that set the parameters of how their much-invoked keywords such as "partnership" and "local ownership" will translate in a given country. In the

main, overt, covert, and structural forms of power (Gill and Law 1988; Sahle 2010) underpin GGIs' relations with several African countries. These forms of power stem from their ability to, among other things, determine who has access to loans, and, in the case of the World Trade Organization, the modalities underpinning access to global markets. In addition, GGIs' central role in the production, dissemination, and re-defining of international development knowledge (Escobar 1995, 2008; Goldman 2005; Sahle 2010) is a crucial aspect of their interconnected forms of power. The manifestation of their power is aptly captured by Susan Strange, when she states:

> Power over others, and over the mix of values in the system, is exercised within and across frontiers by those who are in a position to offer security, or to threaten it; by those who are in a position to offer, or to withhold, credit; by those who control access to knowledge and information and who are in a position to define the nature of knowledge. Last but least, there is the production structure, in which power is exercised over what is to be produced, where, and by whom on what terms and conditions. (1996, ix)

Institutions, Terrorism, and the DRD

While the focus thus far has been on highlighting examples of states' and GGIs' practices of narrowing, opposing, and subordinating the DRD's aims, it is important to note that these are not the only developments that do not augur well for a substantive embedding of its objectives thirty years later. Acts of terrorism by non-state actors and some responses to them by states and GGIs are other developments that have negating effects on the DRD's objectives. It is crucial to note, however, that even though our focus here is on some responses of states and dominant institutional actors to terrorism, and their implications for the DRD, more scholarly attention needs to be paid to the growth of non-state terror networks, for their projects do not portend well for the realization of the right to development and other human rights. For example, the kidnapping of 276 school girls in Nigeria by Boko Haram negates their right to education (Sahle 2017). Given its interdependent approach to human rights, the DRD invokes the right to education as part of its approach to development.[31] Overall, acts of terror by Boko Haram in Nigeria, Al Shabaab in East Africa, and Al Qaeda in the Islamic Maghreb

(AQIM) violate all rights. The disruption of everyday socio-cultural, political, and economic activities by their acts of terror generates extensive human insecurities. The basic fact is that acts of terrorism have horrific effects on all human rights: from the right to life to that of development.

Historically and in the contemporary era, states have a duty under international law to ensure security for their citizens, and also collectively to institute measures aimed at sustaining peace at the international level. Thus, in light of acts of terrorism by non-state actors in recent decades, they have established various measures aimed at containing these human rights negating developments. For example, in 2013, the East African Community (EAC) adopted two frameworks to address what it considers as security threats, including terrorism: a Protocol on Peace and Security (PPS) in addition to one on Co-operation in Defense Affairs (PCDA). In terms of terrorism, the PPS's Article 6 outlines EAC objectives as follows: "(1) The Partner States agree to cooperate in counter terrorism measures within the Community," and "(2) For the purposes of paragraph 1, the Partner States undertake to: (a) jointly formulate strategies and mechanisms for the operationalization of counter-terrorism measures; (b) jointly formulate strategies and mechanisms to combat terrorism; (c) jointly formulate strategies on how to conduct joint operations; and (d) conduct combined operations or joint operations within the context of the Community, the African Union and the United Nations."[32] At the national level, countries such as South Africa, Kenya, Ethiopia, Uganda, and Mauritius have adopted various counter-terrorist legislative measures.[33] Beyond the African continent, Canada, the United States, Guyana, Australia, Singapore, India, Sweden, Italy, the United Kingdom, and Iran are other examples of countries that have adopted such frameworks.[34]

From a human rights perspective, concerns have emerged pertaining to states' responses to acts of terrorism by non-state actors. Critics of counter-terrorist frameworks that have emerged in various parts of contemporary Africa highlight their expansive and ambiguous definition of acts of terrorism. Such framing strategies have implications for human rights. For Makau Mutua, an international law scholar and founding member of the Kenyan Human Rights Commission, Kenya's 2003 anti-terrorist "Bill defines terrorism in such broad and vague terms that it cannot withstand the scrutiny of logic. Terrorism is such an innocuous

bogeyman that it can be used as an open-ended excuse to deny suspects a broad range of constitutional guarantees" (quoted in Lumina 2007, 61). In the case of Ethiopia, the state's "broad" definition of terrorist acts in its 2009 anti-terrorist measures, for instance in its Article 6, provides an opportunity for its agents to categorize any published material as an expression of "support of terrorism" (Sekyere and Asare 2016, 362). Additionally, under these measures, "many journalists and politicians are serving various prison terms" (2016, 362) in Ethiopia, a development that violates their rights including that of development. South Africa's 2004 Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 also defines acts of terrorism broadly (Cachalia 2010). Counter-terrorist measures such as those highlighted above have implications for the realization of the aims of the DRD, and the realization of rights articulated in other human rights instruments. For example, the expansive definition of terrorism raises questions about the ability of citizens to participate in development processes as articulated in the DRD.

At the global level, acts of terrorism have contributed to the incorporation of security logics in the development discourse of key institutional actors. Consequently, development concerns such as poverty are increasingly approached through the lens of security—a process that scholars are increasingly referring to as the securitization of development. The latter development draws heavily on the work of the Copenhagen School in the field of security studies.[35] Overall, "to say that an issue has become securitized, means that it has not only been represented as an existential threat to a referent object such as national or international security by a securitizing agent, which could be a state or a non-state actor, but also that it has been accepted as such in the public domain" (Sahle 2010, 160).[36] In the case of Nigeria, for example, Boko Haram has securitized what it defines as a Western approach to education, which, from its perspective, is a threat to its socio-cultural and political project.

In its articulation of securitization practices by states and non-state actors, the Copenhagen School contends that they are underpinned by "a specific rhetorical structure…survival, [and] priority of action because if the problem is not handled now it will be too late, and we will not exist to remedy our failure" (Buzan et al. 1998, 26). In the aftermath of the 9/11 terrorist attacks in the United States, GGIs and states in the global North have increasingly represented poverty and other central

concerns of development in such a securitized lens. In a speech in 2002, for example, the then President of the World Bank James D. Wolfensohn stated:

> Poverty is our greatest long-term challenge: grueling, mind-numbing poverty that snatches hope and opportunity away from young hearts and dreams just when they should take flight and soar; poverty that takes the promise of a whole life ahead and stunts it into a struggle for day-to-day survival; poverty that, together with its handmaiden, hopelessness, can lead to exclusion, anger, and even conflict; poverty that does not itself necessarily lead to violence, but which can provide a breeding ground for the ideas and actions of those who promote conflict and terror. (Wolfensohn 2005, 330)

Of course, Wolfensohn's concerns about poverty are important for, in all parts of the world, those living under conditions of poverty face significant challenges in developing their human capabilities (Sen 1999), and in realizing their human rights including that of the right to development. Nonetheless, his speech needs to be considered in the context of a post-9/11 geopolitical order, which has resulted in the securitization of poverty in dominant development discourses. Overall, his speech's rhetorical structure stressed the idea that the 9/11 terror attacks signaled that poverty was an existential threat. Further, in his view, the attacks indicated that there were no longer "imaginary walls" that would "protect" what he termed as "us" (ibid.) from terrorism. He went on to declare that "if we want stability for our economies, if we want opportunities for growth in the years ahead, if we want to build that better and safer world, fighting poverty must be part of our quest for national and international security" (ibid., 336). Like the World Bank, the European Union has securitized its development approach. As its Commission states, "the EU will treat security and development as complementary agendas, with the common aim of creating a secure environment and of breaking the vicious circle of poverty, war, environmental degradation and failing economic, social and political structures" (cited in Keukeleire and Raube 2013, 559).

The securitization of development in the era of war on terror by principle institutional agents of development has implications for the realization of the objectives of the DRD. To begin with, it has effects on the underpinnings of international cooperation aimed at promoting the right to development. In the age of securitization of development, the

security of the state, preservation of political order, and augmentation of politico-economic regimes deemed as good partners in the war on terror subordinate human rights concerns, including that of the right to development. For example, while at the rhetorical level the EU invokes the promotion of human rights and democracy as pillars of its foreign policy in North Africa, these "normative objectives" have been put on the back burner "or mobilized as part of [its] securitization" projects (Joffé 2008, 158). While acknowledging the power inequalities between African states and those in the global North, some African states have, however, gained from the securitization turn in the arena of international development. For example, securitization of development has seen the EU support "*good enough governance*" (Eder 2011, 444; original emphasis) and not their—and other states' in the global North—much taunted agenda of promoting good governance, democracy, and human rights in Africa.

Like in the era of the hegemony of modernization theory and geopolitics of the Cold War, in the contemporary conjuncture, international development institutions and states in the global North have their policy priority when it comes to their relations with African states. Overall, supporting their partners in their counter-terrorist strategies is at the forefront of their development agenda. In the case of North Africa, the EU, for example, considers "authoritarian regimes"[37] as stabilizing institutions that provide "predictability" and are moreover "reliable counter-terrorism partners" (ibid.). North African states are not the only ones to have gained from the securitization of development by states in the global North. As Jonathan Fisher and David M. Anderson argue, "the Chadian, Ethiopian, Rwandan and Ugandan regimes…have clearly benefited from the securitization of development over a sustained period and have used this process to build semi-authoritarian and illiberal states" (2015, 137). In these political geographies, the DRD's mandate for "states" to "encourage popular participation" of citizens "in all spheres as an important factor in development and in the full realization of all human rights" is at risk. In the case of Rwanda, the state:

> has systematically intimidated, co-opted, and suppressed civil society, so that [the country] today lacks independent social organizations capable of articulating most public interests. [Further] the regime tolerates very little public criticism, strictly limiting freedoms of speech, press, and association. Political parties are restricted and intimated, while constraints and manipulation of the electoral process have prevented elections from being truly free and fair. (Longman 2011, 26–27)

In addition to prioritizing their security over human rights concerns, states in the global North—with the consent of political elites in some African countries—continue to focus on their own economic interests, rather than contributing to the creation of an international economic order that facilitates the realization of the right to development, which includes the right of local citizens "to exercise their inalienable right to full sovereignty over all their natural wealth and resources."[38] In the case of the US, its securitized approach to development is epitomized in its establishment of Africa Command (AFRICOM). As the author has argued elsewhere, the emergence of AFRICOM is aimed at securing economic interests for the US in the context of the competition for African natural resources by countries such as China and others (Sahle 2010). Other US security projects in Africa are also geared toward serving the state's national interests, rather than contributing to the emergence of conditions that enable the realization of the right to development. For example, the US's "Trans-Sahara Counter Terrorism Initiative, which in addition to providing military training in Chad, Niger, Mauritania and Mali ensures the deepening of the [US's] military presence 'between oil-rich' North and West Africa" (ibid., 172). Further, in North Africa, the EU's securitized approach to development is aimed at securing member countries' energy and other economic interests (Eder 2011).

As this section has indicated, while the last few decades have seen a human rights turn in the development discourses of states and GGIs, challenges remain at the level of practice. In the main, the consolidation of a modified neo-liberal project by these institutional agents of development, in addition to their narrowing of M'Baye's and the DRD's vision of development, pose significant challenges to rethinking development processes through a human rights lens in all parts of the world. Additionally, the securitization of development in the post-9/11 geopolitical order constrains the embedding of such a lens at the level of development practice in the contemporary juncture.

Conclusion

This chapter's central concern was to explore some key developments since M'Baye's contention in the late 1970s that "a new right" was "being fashioned before our very eyes: the right to development" (1978, 13). Its focus on the DRD has demonstrated a major development in the rise of a human rights–development nexus. The chapter has

contended that while states and GGIs invoke the normative language of human rights and democracy, their development practices remain informed by neoliberal ideas, albeit in a modified form from the height of Structural Adjustment Policies (SAPs) in the 1980s and parts of the 1990s. Nonetheless, as the work of Mkandawire (2014) indicates, the structural and other legacies of SAPs remain. Further, the chapter has highlighted the human rights implications of acts of terror committed by non-state actors and the counter-terrorist measures introduced by states. These trends have led to the securitization of development. The latter, as the chapter has argued, has significant implications for the DRD. The chapter's underlying premise, however, is that these developments do not mean that there are no openings for the emergence of development approaches infused by human rights thinking. As the chapter has indicated, with the devolution of state power in Kenya in 2013, for example, a development vision characterized by core elements of the DRD and which echoes M'baye's vision has emerged in Makueni County. Thus, while highlighting the limiting effects of powerful institutional development actors and other developments in the realization of the right to development, it is imperative to remember that these institutional and political realities are mediated by numerous factors including political agency—even in a constricted form—such as the one that is evident under the human rights informed leadership of Governor Kibwana in contemporary Makueni County.

Notes

1. M'Baye 1978, 1. For more details, see his paper, "Emergence of the 'Right to Development' as a Human Right in the Context of a New International Economic Order," which he presented at a 1978 United Nations Education and Scientific Council (UNESCO) conference titled "Meeting of Experts on Human Rights, Human Needs and the Establishment of a New International Economic Order." In his paper, M'Baye not only explores the idea of development and its existence in International Law, but he also pays attention to the international aspects of the right to development. For more details, see http://unesdoc.unesco.org/images/0003/000358/035854eb.pdf.
2. For more discussion of the international trading system and its implications for the African continent, see Njinkeu and English (2008); Prempeh (2006).

3. For Pogge, a "good" life or one that is "worthwhile, in the broadest sense" is a central feature of human flourishing (2008, 33).
4. In its Article 6(2), the DRD declares that "equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights." See United Nations 1986, A/RES/41/12, available at http://www.un.org/documents/ga/res/41/a41r128.htm.
5. See Article 1(1) of the DRD at ibid.
6. Manji and O'Coill contend that the nature of contemporary NGOs' involvement "in 'development' represents a continuity of the work of their precursors, the missionaries and voluntary organizations that cooperated in Europe's colonization and control of Africa. Today their work contributes marginally to the relief of poverty, but significantly to undermining the struggle of African people to emancipate themselves from economic, social and political oppression. NGOs could, and some do, play a role in supporting an emancipatory agenda in Africa, but that would involve them disengaging from their paternalistic role in development" (2002, 568).
7. 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.
8. For more details, see Eunice N. Sahle (forthcoming).
9. See the second paragraph of the DRD's "Annex" at http://www.un.org/documents/ga/res/41/a41r128.htm.
10. See the DRD's Article 3(3), at http://www.un.org/documents/ga/res/41/a41r128.htm.
11. See ibid. for more details.
12. For a critique of this school of thought's approach to assigning more obligations to human rights and justice, see Miller (1998).
13. See http://www.un.org/documents/ga/res/41/a41r128.htm.
14. For more details, see Article 2(1) and (2) at ibid.
15. For further debates on these issues, see Kotzé (2014) and Waldmüller (2015).
16. See Chapter 10 in this volume for a discussion of the question of assigning responsibility for human rights obligations in the field of human rights.
17. See, especially, Kuper (2005); Green (2005); Pogge (2008).
18. See Article 3(1) of the DRD, at http://www.un.org/documents/ga/res/41/a41r128.htm.
19. Ibid.
20. For an extended discussion, see Nussbaum (1996).
21. UNDP's vision and strategies of incorporating human rights in its development is available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_human_rights.html. And also at http://www.undp.org/content/undp/en/home/librarypage/results/fast_facts/fast_facts_humanrightsandundp/.

22. Karl Polanyi's work, *The Great Transformation: The Political and Economic Origins of Our Time* (2001) provides a deeply historical examination of the political and conditions that influenced theemergence and evolution of the world economic system.
23. See Green (2005); Pogge (2008); Wettstein (2009).
24. For more details, see Article 22(2) of The 1981 African Charter on Human and Peoples' Rights at http://au.int/en/sites/default/files/treaties/7770-file-banjul_charter.pdf.
25. For more details, see Cornwall and Nyamu-Musembi (2004), endnotes 32 and 33.
26. For more details, see Article 22(2) of The 1981 African Charter on Human and Peoples' Rights at http://au.int/en/sites/default/files/treaties/7770-file-banjul_charter.pdf.
27. See United Nations, Declaration on the Right to Development at http://www.un.org/documents/ga/res/41/a41r128.htm.
28. See The Vienna Declaration and Plan for Action at http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf.
29. Details of the CDF are available at web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTWEBARCHIVES/0,MDK:22201409~menuPK:64654237~pagePK:64660187~piPK:64660385~theSitePK:2564958,00.html.
30. See the BBC's 2012 reporting of the "EU austerity drive country by country" at http://www.bbc.com/news/10162176.
31. See DRD's Article 8 at http://www.un.org/documents/ga/res/41/a41r128.htm.
32. The PPS is available at https://www.google.com/webhp?ie=utf8&oe=utf8#q=EAC+Protocol+on+peace+and+security.
33. For the Ethiopian case, see Sekyere and Asare (2016). For other examples, see Lumina (2007).
34. See Lumina (2007) for further discussion.
35. For a leading text from the Copenhagen School, see Buzan et al. (1998).
36. See also Buzan et al. (1998, 25).
37. This echoes the era of the Cold War and hegemony of modernization theory, see Sahle (2010).
38. See the DRD, Article 1(2).

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CHAPTER 9

Beyond Human Rights Ideology: Struggles for Freedom of Expression in Africa

Jane Duncan

The discourse on human rights in Africa—including the right to freedom of expression—is contested terrain, and has been for some time now. An example of earlier debates took place in 1989, when several key African intellectuals were brought together to discuss "the state and constitutionalism in Africa" (Shivji 1989). At the time, the soviet bloc was crumbling, and neoliberalism had begun its march across the African continent. For a variety of reasons, many liberation movements that ascended to office after the first wars of liberation took on authoritarian characteristics, leading to the shrinking of mass-based political activity, the professionalization of political activity, and the rise of imperial presidencies (Mamdani 1991, 351–66; Okoth-Ogenda 1991, 16–17).

This chapter attempts to build on the debates of that period, especially the work of Mahmood Mamdani (1990, 427–67), who has grappled with the question of how to reconceptualize what Shivji (1989, 1991, 2001, 2003) has termed "human rights ideology" from the perspective of the African working class. It attempts to locate the right to freedom of expression within this alternative framework, and contests

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the idea that there is no other conception of freedom of expression other than being a Western liberal, individual right, as it has been characterized by legal philosophers such as Larry Alexander (2005). It also rejects the authoritarian and self-serving statist arguments about freedom of expression being irrelevant to Africans in the face of more pressing needs: an argument generally summed up as "what use is free speech to a starving peasant"? It then suggests a research agenda that attempts to theorize the historical and practical application of freedom of expression in Africa.

Admittedly, the defense of freedom of expression is often associated (incorrectly) with the work of media freedom done by non-governmental organizations (NGOs), which tend, rather problematically, to reduce freedom of expression to a media right. Although it is often not recognized, African social movements are contesting this narrow focus and are reinventing freedom of expression through their practice, as their struggles are inherently struggles for a voice. Also, in certain conditions, social movement struggles can become struggles against repression. The central role of social movements in expanding spaces for free expression needs to be recognized; agency in this regard does not just belong to journalists.

Human Rights: Natural or Ideological?

What is a human right? Allen Buchanan and David Golove posit a definition that has assumed the status of "common sense" in many human rights circles, namely that a human right is a moral entitlement that accrues to all people, regardless of political affiliation, race, ethnicity, religion, or belonging to any other social grouping (2004, 868–934). Human rights are therefore natural rights that pre-date their codification into law. The natural rights theory is generally used to argue for universalist positions on human rights, where human rights are inalienable entitlements of all people, that exist objectively and independently of differences in culture, ideology, or value systems (University of London 2007). The natural rights definition has been criticized for idealism, as it assumes that there is an immutable set of characteristics that make up human nature, and that the realization of human rights involves the actualization of innate characteristics that attach to all human beings (Shivji 1989, 45).

Positivist definitions of human rights do not assist either, as they proceed from the assumption that rights are created by law, rather than the law codifying a pre-existing right. Therefore there is no concept of rights outside of state law, which in reality has become an argument for the preservation of the political and economic status quo, by those who have the power to codify their conception of human rights into law (ibid., 21, 49).

As other chapters in this volume have indicated, the dominant human rights agenda is codified into multilateral instruments such as the United Nation's International Covenant on Economic, Social and Cultural Rights (ICESC), and the International Covenant on Civil and Political Rights (ICCPR). The ICESC contains socio-economic and cultural and environmental rights, or what in human rights parlance are generally termed second generation rights, while the ICCPR contains civil and political rights, or first generation rights. The ICESC merely binds state parties to undertake steps to realize these rights progressively: a qualification which makes this Covenant virtually unenforceable. This can be contrasted with the ICCPR, which binds state parties to undertake respecting these rights (Weiss 1994). What this means is that the rights that could potentially be used to change material conditions can simply be ignored by countries who have signed the Covenant, and there is no real recourse at a multilateral level. So, while these Covenants appear to offer a veneer of international human rights, in reality they legitimize a highly unequal global order.

It can therefore be inferred that the dominant human rights discourse is not ideologically neutral. As Mamdani has argued, globally, human rights discourse has become an ideological and political initiative with a strong US flavor, in that it frames human rights within the general context of the "rule of law." In the United States, this approach emerged in reality as a check on popular sovereignty, and therefore served a stabilizing and conservative function (Mamdani 1990, 238–39). Given its conservative leanings, this approach represented an attempt to replace a discourse on power with a discourse on rights. According to Mamdani, "It was thus a rearguard action that sought to displace the discourse of revolution with that of reform. For the fact is that apartheid can be dismantled and the agenda for human rights realized in South Africa without transfer of power from the minority to the majority" (ibid., 239–40). According to Shivji, the dominant individualist approach to human rights tends to focus on the violation of human rights by African leaders,

while failing to focus on the imperialist context that gave rise to these incidents. Through this sleight of hand, it is able to bracket out the role of the West in creating the conditions for systematic rights violations (Shivji 1989, 53).

Essentially, both natural rights and positivist definitions of human rights have tended to see individuals as the main rights holders, especially those rights that receive the most protection—another indication of the ideological nature of human rights discourse. But the concept of a "natural individual" vested with pre-political rights is a historical product of capitalist property relations and forms of production, and personal freedom has in reality been the freedom enjoyed only by those who developed within the relationships of the ruling class (Marx 1978, 146–202). In other words, in unequal societies, the ability to individuate is available to a select few.

In outlining the conditions for freedom of the working class, Marx recognized a difference between negative freedom and positive freedom. Negative freedom means the lack of forces that prevent an individual from doing whatever they want. Positive freedom is the capacity of a person to determine the best course of action and the existence of opportunities for them to realize their full potential. For Marx, negative freedom was a bourgeois concept, as it is the freedom primarily of those who own the means of production. Positive freedom is built up as a result of the struggle of the working class, and gives the working class an opportunity to develop as human beings. But he argued that both negative and positive freedoms need to be advanced.[1]

Marx's views are echoed in Shivji and Mamdani's calls for a historically situated discourse on human rights, which expands the human rights agenda, rather than denouncing it as what Mamdani terms an "imperialist Trojan horse" (1990, 241). Shivji has argued for the importance of continuing to recognize that human rights is an ideology, rather than an "extra-ideological" body of moral entitlements. Rather than dismissing rights ideology entirely, an alternative human rights ideology must be advanced that legitimizes and mobilizes people's struggles. Shivji attempted to do this by identifying two rights as foundational rights in Africa: the right to self-determination (including the right to resist imperialism) and the right to organize. He noted that these rights remain untheorized in their practical and historical application to Africa, but they have found concrete expression, to an extent, in the Algiers

Declaration of 1976, which is rooted in an anti-imperialist perspective (Shivji 1989, 109).

The Declaration groups rights into the following categories: the right to existence, the right to political self-determination, the economic rights of people, the right to culture, the right to environment and common resources, and the rights of minorities. Collective rights are emphasized rather than individual rights, and what in dominant human rights discourse would generally be considered second and third generation rights are given priority. It also makes these rights enforceable and recognizes the right to engage in armed struggle in defence of these rights (Shivji 1989, 111–15).

The strategic deployment of the dominant human rights ideology may also be necessary in highly repressive environments. Mamdani has argued that in pre-revolutionary situations, a focus on human rights may have reformist outcomes, but in situations where repression has stabilized, it may be necessary to win these rights before conditions are created for an upsurge in struggle (1990, 241). He argued further that it might not be tactical to denounce the human rights agenda even in pre-revolutionary situations. According to Mamdani:

> The point is not to oppose one-sidedly the demand for human rights and the rule of law; it is, on the other hand, to struggle towards a definition of the agenda of human rights and the rule of law that will not displace the discourse on power and popular sovereignty but will in fact lead to it. To do so, of course, is not possible without arriving at a conception of rights that flows from a concrete conceptualising of the wrongs on the continent. (ibid.)

Clearly, what is needed is a definition of freedom of expression that does just that, and now these points will be used to critique the dominant conception of freedom of expression.

Freedom of Expression: A Liberal Right?

The dominant definition of freedom of expression is found in article 19 of the United Nations (UN) Universal Declaration on Human Rights, which reads as follows: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas

through any media and regardless of frontiers" (United Nations 1948). The United States' First Amendment is also framed largely as a negative freedom, where the government has a duty of non-interference.[2] However, it differs from the UN Declaration in that it protects freedom of speech, which is a narrower concept than expression: the latter includes speech as well as expressive conduct.

Larry Alexander (2005, 148) has argued that the right to freedom of expression in the UN Declaration and the First Amendment is largely associated with the political philosophy of liberalism, which requires an evaluative stance of governmental neutrality when it comes to the content of expressive conduct or speech. The mainstream liberal account of the right's history generally traces its genesis back to Socrates. It then identifies particular milestones in the development of free speech, including the persecution of Socrates and Galileo Galilei; while they may not have been direct advocates of the right, they are meant to have advanced it accidentally (Hargreaves 2002, 301). John Milton, John Stuart Mill, and Tom Paine are considered to be free speech's founders, and their defenses of the right are meant to have informed many major declarations of rights (Smith and Torres 2006).

Justifications for freedom of expression have been based on natural rights and instrumentalist theories. The natural rights approach incorporates a belief that individuals have a "natural" tendency to freedom of expression that they will exercise in the process of realizing their innate character as human beings. Censorship, however, prevents them from exercising this natural ability and should therefore be resisted. This notion has been linked to democracy in that—it is argued—democratic governance creates the best environment for the successful realization of an individual's potential.[3] While citizens foreswear certain freedoms through a social contract when consenting to be governed, natural rights, such as the right to freedom of expression, should be placed above government interference.

Instrumental arguments start from the position that freedom of expression is an instrument for uncovering truth, or in attaining a democratic society. These arguments can be traced back to Milton, and were developed by Mill. Essentially, free and open discussion, freedom of enquiry, and the interplay of competing beliefs will inexorably lead to the truth. Furthermore, a free contest of ideas will enable people to pick for themselves which version of the truth they agree with. However, this assumes that there is a rational link between the right to free speech and

an increase in knowledge and understanding (Hargreaves 2002, 302). Another argument is that free speech is essential for a democracy; but this argument becomes dangerous if it is used to subject ideas to a veto by a majority in a democracy. Hence, those holding minority views are in need of special protection to ensure that they give their consent to being ruled by the majority (ibid., 305).

The two instrumentalist arguments mentioned above are often linked, in that the attainment of truth through untrammelled public debate is meant to be a precondition for an efficient democracy (where the form of democracy referred to is generally representative democracy). A key assumption in instrumental theories of freedom of expression is that the market offers a vital antidote to political despotism, the great leveller where individuals meet as equals and establish forms of government and civil society through the social contract. In turn, freedom of expression is conceptualized as a "marketplace of ideas," where a free contest of ideas is needed to assist truth-seeking; so truth is arrived at once people have had an opportunity to sift the good ideas from bad ideas, and then make informed decisions.

In the literature on the dominant conception of freedom of expression, a great deal of attention is generally paid to the freedom of the press in checking the excesses of government. These arguments have also been linked to representative democracy, in that people need to be informed about abuse of power in order to hold their government representatives true to their original mandates. The press plays a watchdog role in this regard, acting as the conduit for information about abuse and corruption.[4] Dominant conceptions of freedom of expression are also fairly hostile to understanding freedom of expression as a positive right. According to Larry Alexander, the right to freedom of expression is normally considered at its core to involve a negative obligation primarily on the part of government not to censor communication, although this obligation can extend to non-governmental actors (2005, 4).

There are several difficulties with the dominant conception. Firstly, it fails to acknowledge that access to the "marketplace of ideas" is highly uneven, as ownership of the means of communication is often highly monopolized; therefore, the ability to use the right is heavily mediated by power. During the most recent imperialist phase of globalization, commercial media have become characterized by an increasing concentration of ownership, which has had dire consequences for the diversity of media messages, as fewer and fewer people are engaged in the

control of more and more information (Duncan and Seleoane 1998, 18). Secondly, the notion of the free flow of information and ideas—so central to dominant conceptions of freedom of the press—may in reality mask ideological interests.[5] Thirdly, freedom of expression is conceptualized as an individual right, not a collective right, which means that it becomes difficult to recognize situations where a collective right to freedom of expression is violated, and consequently where collectives assert their right to freedom of expression as a collective. This means that in historical accounts of freedom of expression violations, censorship of individuals (journalists in the main) receives priority, not the repression of organized formations, which may mean that the extent of censorship may be deliberately underestimated.[6] There may well be unstated class biases around how freedom of expression violations are recorded as well, as records tend to be skewed toward what could crudely be termed "bourgeois" forms of expression (such as the mainstream media), rather than "working class" forms of expression (such as pickets, pamphlets, and marches, or other forms of non-media related expressive conduct).[7] Fourthly, freedom of expression is understood as a right that is claimed mainly against the government, whereas in reality in repressive situations, governmental and non-governmental actors often collude. Also, as critical political economy of the media theorists have argued, market forces can also be highly censorious of information (Herman and Chomsky 1988; McChesney 2003; Murdock and Golding 1979, 2005; Williams 2001).[8] Lastly, freedom of expression is understood mainly as a negative right, which makes it difficult to place positive obligations on governments and other power-holders to provide resources to enable the freedom of expression.

Toward a Radical[9] Definition of Freedom of Expression in Africa

Needless to say, a radical definition of freedom of expression would need to take all of these weaknesses in the dominant conception into account. The intention here is not to write an alternative history of freedom of expression in order to argue that the right is inherent to African societies. Such an approach would lapse into an idealist conception of history as a history of ideas, not a social history based in part on material conditions of life (Shivji 1989, 43). Rather, the intention is to suggest some

of the main elements of a historically situated definition of freedom of expression in politically radical African politics, and in the process begin to reformulate freedom of expression as an ideology of resistance.[10]

A radical definition of freedom of expression would need to turn Alexander (2005) on his head, and prioritize freedom of expression as a positive freedom while defending it as a negative freedom. So while measures are taken to stop censorship, positive obligations must be put on power holders to level the playing field when it comes to access to the means of communication. Freedom of expression is not just about freedom from censorship. It is about reversing the privatization of and socializing the information commons, coupled with critiques of the enclosure of the information commons by big business, which uses instruments such as intellectual property laws to suppress free speech and creativity (McLeod 2005). It should also be borne in mind that, in many African countries, threats to freedom of expression come from both markets and states. But what needs to be more clearly understood is the way in which multinational capital colludes with states to ensure a climate of maximum profitability, a development that can lay bare the centrality of this collusion to repressive practices in Africa (Nyamnjoh 2004, 60).

State authoritarianism has a long history in post-colonial Africa and has led to numerous restrictions on freedom of expression. As far back as 1989, Okoth-Ogenda (14–15) noted the tendency for many African states to form what he terms "imperial presidencies," where the president claims the exclusive constitutional right to direct the affairs of state. This leads to a state form in which the office of the president becomes supreme over all organs of government, and the separation of powers between the legislature, judiciary, and the executive is unsettled in favour of the executive. Imperial presidents also tend to become immune from legal processes, so the president becomes "above the law." This feature of imperial presidencies has a direct impact on freedom of expression, as the holder of office is protected from criticism through the promulgation of "insult laws," the violation of which can be considered a criminal offence. Also, the concept of "national security" becomes elastic in this case, paving the way for draconian national security laws that are permanently available and useable (that is, they do not need the declaration of a state of emergency in order to be invoked) (ibid., 17–18).

A series of changes to the global political economy were to disadvantage Africa even more profoundly, leading to the further marginalization of the continent. Uneven investment in countries capable of attracting

foreign investment has fueled regional disparities, and prompted millions of Africans to migrate to growth centers like Johannesburg, Nairobi, Lagos, and other emerging centers (Cheru 1996, 146–47). Structural adjustment policies have had a profound impact on democracy generally in Africa, including on freedom of expression. Fantu Cheru has contested the view that repression in Africa is solely a result of authoritarian governments. Rather, he has argued, African governments were willing to suppress domestic opposition to the austerity measures of structural adjustment programs in return for aid from Western donors. Ironically, such repression fueled rather than discouraged popular resistance (Cheru 1996, 154). Citing Richard Falk, Osei Kwadwo Prempeh noted the inherently undemocratic and even anti-democratic tendencies of neoliberalism (Falk and Gill, in Prempeh 2004, 581).

In fact, there are cases where blatant freedom of expression violations have taken place, and foreign donors have failed to act decisively as it has not been in their interests to do so. A case in point involved the murder of Mozambiquan journalist Carlos Cardoso, who was murdered after he investigated the contradictory effects of the World Bank and International Monetary Fund's structural adjustment policies in Mozambique. Both agencies have touted Mozambique as a good governance success story, given its high levels of growth, yet Cardoso exposed how such growth did not flow from good governance. Rather, it benefited a small elite, and was the result of drug trafficking and money laundering (Mabota 2006, 28).

State control of media still dominates the media landscape in Africa, and to the extent that these media act as voices primarily of ruling parties, they present the most significant obstacle to media freedom. Radio is the most popular and accessible medium, and state owned and controlled stations continue to dominate national radio. However, more regional or local commercial radio stations are establishing themselves in countries that have liberalized their broadcasting markets. This suggests that it is still very difficult for commercial radio to afford to operate on a national footprint. Community radio is growing, although definitions of community radio remain contested. The Democratic Republic of the Congo (DRC), especially, has experienced an explosion of new radio stations. Television growth has been slow, owing to high entry and running costs, with the medium being dominated by state television. Newspapers are the least accessible media, with an urban-centric bias. A bias toward

tabloidization is evident. Unlike radio growth, newspaper growth is uneven across the continent. Owing to the lack of commercial advertising, newspapers rely heavily on state advertising. Access to the internet is low, but growing, especially given the increasing penetration of internet-enabled mobile phones, although the continent still displays wide disparities in internet access. Mobile phones are becoming an increasingly important means of disseminating small amounts of information and intensifying existing social networks, although they cannot replace desktop computers that are capable of processing larger amounts of information and displaying it on larger screens; to this extent, the mobile phone cannot be considered a true gateway into the "information society" as its inherent capabilities limit its ability to play this role. Extensive mobile use is also constrained by high costs (Bornman 2012, 278–92). What this brief survey of media access implies is that, if African media are to become conduits for freedom of expression, then much more needs to be done to socialize access to the media, which means strengthening freedom of expression as a positive right.

However, it is important that freedom of expression is broadened out from being interpreted as a "media right." In his analysis of human rights activity in East Africa, especially in Uganda, Mamdani has noted that freedom of expression became a rallying cry for the middle class, which was concretely formulated as a call for press freedom (1990, 144–46). While press freedom did become the stuff of political struggle in the years after the defeat of the Idi Amin regime, the middle class did not show nearly as much enthusiasm for the defense of the right to political organization. He attributed this to the fact that large sections of society, including the middle class, had come to consider politics to be a professional rather than a popular activity. However, the struggle of organized workers centered on winning the right to free and autonomous organizations. What is implicit in Mamdani's analysis is that class interests led to an inherent bias in how freedom of expression was taken up and struggled for; this is in spite of the fact that the right to organize is inherently linked to freedom of expression in its broader sense, in that organization is necessary for the working class to claim a voice, and repression of such organizations violates—amongst other rights—the right to freedom of expression. Popular forms of expression used in the process of collective struggle are especially important to protect, including demonstrations, gatherings, pickets, pamphleteering, public meetings, and other direct

forms of expression. But these forms of expression do not receive nearly enough attention as compared to media freedom.

Another difficulty is that freedom of expression work tends to be based, unproblematically, on neoliberal "solutions" to Africa's problems, and is therefore easier to justify in terms of good governance conditionalities imposed by the World Bank. While freedom of expression is not formally part of the package of conditionalities, there have been indications that the World Bank has considered imposing media freedom as a subset of governance conditionality, after masked police officers forcibly stopped the publishing of *The Standard* newspaper in 2006 (Hoffman 2006). Imperialist and sub-imperialist powers responsible for the exploitation of Africa's natural and human resources may even have a vested interest in the freedom of expression and information being reduced to media rights, of concern to media organizations only. This narrowing allows the freedom to be promoted only to the extent that optimum environments for foreign investment and resource extraction are secured. As a liberated media, especially a liberated private media, is necessary to ensure a corruption-free investment climate, the liberalization of media has become a donor priority. However, given the limited outreach of much private media, these media can all too easily tend toward serving elite interests, rather than being mass media in the truest sense of the term. But a liberated people may pose a threat to these arrangements. So imperialism has a vested interest in freedom of expression organizations remaining silent on broader instances of repression. As a result, there is also a need to "rescue" freedom of expression work from the neoliberal project in Africa on the levels of theory and practice (Duncan 2006, 53–57).

One of the ways of doing this is to link freedom of expression to the right to organize: a foundational right as proposed by Shivji, as organizations are forms of collective expression. There should be a clear bias toward defending and advancing collective and popular forms of expression, rather than focusing on the expression rights of individuals only. This does not mean that protecting media freedom should not be given attention; but it needs to be recognized that unless defenses of media freedom have a mass base, they are unlikely to be effective.

In many countries, protest action has been the target of especially vicious state repression. For instance, in Angola, protest action against forced evictions and transport costs has attracted the wrath of the

authorities. Police have used excessive force against gatherings, even killing protestors (Amnesty International 2006, 57–58). However, the media's outreach tends to be confined to urban areas, especially to the capital, Luanda, and the media that does exist in the provinces is largely state owned. This is leading to a situation where many human rights abuses remain underreported; therefore, it is impossible to hold the government to account properly. In fact, according to Jeanette Minnie, the pure lack of media remains a key problem in Angola (Minnie 2004, 30–31).

In the DRC, dozens of people, including children, were killed by the police during demonstrations against electoral delays in January and June of 2005 (Human Rights Watch 2006, 93–95). However, freedom of expression organizations have tended to focus on the repression of journalists only.[11] Uganda has also been beset by police violence against demonstrations on various matters, including an amendment to the Constitution lifting the limit of two terms that the president could serve (Amnesty International 2006, 265). In Swaziland, gatherings have also been suppressed by force, despite demonstrators being unarmed.

In South Africa, there has been an upsurge in mass struggle, especially since 2004 when service delivery uprisings gripped the country.[12] Since 2004, about 10 percent of these gatherings have consistently been declared illegal, and, in fact, 2004 saw the first reported post-apartheid death of a protestor, Tebogo Mkhonza, after the police shot into the crowd. Repression of more popular forms of expression, which began in earnest with the social movement struggles of the early 2000s, has now affected the media, with more censorship becoming evident.

Repression has also heightened in the context of the war against terror, since the events of September 11, 2001, in the United States. Definitions of "terrorism" and "terrorist act" have become so elastic that many militant actions (armed and unarmed) fall within their scope. Countries with geopolitical influence on the continent are especially contested as imperialist powers have a particular interest in maintaining control over them, such as Kenya, Zambia, Nigeria, and, increasingly, the DRC. The horn of Africa has become especially strategic for the United States as a staging post on the continent for the war against terror, fueling extremely repressive situations in these countries. In fact, Ethiopia and Eritrea have become two of the most brutally repressed countries on the continent, with mass opposition and the media having been crushed.

Zimbabwe also passed the Suppression of Foreign and International Terrorism Act in 2007, which makes a provision for the criminalization of the promotion of terrorism and mercenary activity. The definition of "foreign or international terrorist organization"[13] and "mercenary"[14] are so broad that even advocacy against illegitimate governments would be covered. No exceptions are made for armed struggles against colonial or imperialist forces. In addition, the government has committed itself to the "harmonization" of anti-terrorism measures with international developments. The US is also becoming increasingly interested in the oil reserves of Nigeria and Angola, and, as a result, they may also become hotspots for anti-terrorism measures. These accounts make it clear that repression is not simply occurring at the hands of African governments; often they act as the local policemen of imperialist powers, whose geopolitical and economic interests are what really lie behind heightened repression.

Freedom of Expression and Social Movements

If media freedom organizations do not have the mass base to realize freedom of expression, then which organized formations do? The centrality of social movement activity to freedom of expression has been recognized for some time now (albeit indirectly). This centrality flows from the fact that social movements are often the most effective forces for liberation in many African countries, as they represent what Fantu Cheru has referred to as a "popular resistance from below," which focuses on "articulat[ing] alternative visions of survival and democratic governance" (quoted in Saul 2005). By struggling to expand spaces for their own activities, they expand spaces for all repressed voices, and hence are potentially radical forces for change in terms of how human rights work is taken up and practiced, and may lead the way in the reframing of the debate around rights. According to Shivji, "Ultimately, it seems to me, human rights activities cannot be separated from the general struggle of the people against oppression. In other words, human rights struggles are an integral part of general social movements and that is where human rights activity should be presently located" (1989, 89).

State repression may even lead to programmatic shifts of social movements, in that policing itself may become the focus of protest action, which politicizes protest rights and makes them part of basic democratic demands (Escobar 1993, 514). For instance, during the struggles

around the United Nation's World Summit on Sustainable Development (WSSD) in Johannesburg, activists organized a freedom of expression march to protest against the banning of gatherings over the WSSD period,[15] and state repression has become a standing item on the agendas of many South African social movements (McKinley and Veriava 2005, 43–44).

In theorizing social movement-driven human rights activity, questions relevant to freedom of expression arise. These include the relationship between radicalization and repression, and include attempts to understand at what point constraining factors such as state repression trump political opportunities for collective mobilization. Other questions might include whether framing democratic demands in terms of human rights struggles automatically makes social movement struggles rights-based and therefore potentially reformist. Questions of internal democracy, which Prempeh raised, would also be considered, for example: how are voices represented in social movements? Who gets to speak? (Prempeh 2004, 592).

Yet the mainstream of social movement theory provides insufficient tools of analysis to develop answers to such questions. Fitzgerald and Rodgers (2000) have argued that much social movement theory has analyzed movements from a reform perspective, where they make demands to be accommodated within the dominant system, rather than seeking fundamentally to transform that system. The emphasis on the former can be found in resource mobilization theory, which tended to privilege the study of bureaucratized, middle-class orientated "movement industries" at the expense of grassroots movements (Tarrow 1998, 16). It stands to reason, then, that this tradition of social movement theory will not have been too concerned with questions of repression, as reform movements are less likely to attract the wrath of the state than radical ones.[16]

Yet even radical social movement theory has its limitations if imported uncritically. Fitzgerald and Rodgers (2000) have presented a typology for the study of radical social movements, which they claim are characterized by non-hierarchical leadership, an internal culture of participatory democracy and promotion of indigenous leadership, and a radical agenda geared toward structural change, non violence, and anti-militarism. They also tend to be ignored by, or misrepresented by, the media and have limited resources, while being subjected to intense opposition and government surveillance. While this typology is useful, it is only of partial

relevance to African social movements, as the emphasis on non-violent direct action—including the use of strikes, sit-ins, free speech campaigns, boycotts, and mass meetings—precludes the possibility of using violence as a strategy when conditions make it necessary. In fact, the Algiers Declaration defends the use of force as a weapon of last resort if fundamental rights are seriously disregarded (Universal Declaration, in Shivji 1989, 115).

Some African social movement theorists of the recent past have also tended to analyze social movements from a reform perspective. For example, Cheru gives a useful account of African social movements seeking to reverse the negative effects of globalization. Among these movements is the human rights movement, which by focussing on shelter, development, and the rights of displaced people, has made human rights work socially relevant to African societies. Yet, it is clear from Cheru's analysis that these movements are not revolutionary in nature, focussing as they do on "significant social reform and a reduction of economic inequality"; in fact, he argues that "new social movements must come to terms with the fact that revolution is no longer an option. Even the most radical groups have to accept that if they are to play a crucial role in bringing changes to Africa…The only realistic option for reducing corruption, making political systems more responsive, and bettering the lot of the poor is to democratise both democracy and capitalism" (1996, 159). In terms of Cheru's prescriptions for social movements, the realization of human rights would become an end in itself rather than a strategic focus to clear space for a challenge to state power.

By contrast, Osei Kwadwo Prempeh's analysis of African social movements reflects a more upbeat analysis of the revolutionary potential of African class-based social movements. He argues that movements have been formed to give Africans a voice in the resistance to neoliberal globalization; freedom of expression through collective action is therefore a foundational value of these movements, but this does not make these movements rights based in the sense that the realization of rights is an end in itself (Prempeh 2006, 75–76). While class-based social movements may use human rights discourse to articulate their demands at times, what distinguishes them from rights-based movements is that they maintain their critique of the limitations of the law as an instrument of liberation, given that the law tends to codify existing power relations

(Ballard et al. 2006, 17). In other words, they are alive to the difference between reforms and reformism.

New social movement theories in the continental European tradition have also gradually abandoned class analysis, which means that, increasingly, they lack the explanatory power to theorize class-based, African social movement struggles. The European tradition has justified its hostility to class analysis by stating that focussing on class leads to class reductionism, where all social conflict is reduced to class conflict around the means of production, and where any other social conflict pales in significance. This tradition has asserted the importance of other non-class identities, and has led to the constituting of social movements based on ethnicity, religion, and gender (generally termed "identity movements"). It has asserted that these new social movements have replaced the older movements based on the conflict between labor and capital in industrial societies, and struggle for autonomy and self-determination rather than maximizing influence and power. Hence, culture has become the principle field of conflict, rather than politics or the economy, and new social movements also tend to recruit on a non-class basis. As a result, these movements tend to lack an effective strategy for confronting state power, confining much of their contestation to the symbolic terrain (Buechler 1995, 441–58). Buechler concludes that "the historical specificity that gives new social movement theory much of its analytical power means that the theory (in all its variants) only applies to a limited number of movements in Western society with mobilisation biases towards white, middle class participants pursuing politically or culturally progressive agendas" (Buechler 1995, 460).[17] These theories tended to marginalize studies of grassroots-based, anti-capitalist movements and render the struggles of such movements invisible.

This is not to say that identity questions are not relevant to radical social movements, as they enable theorists to understand when collective identities can be galvanized into collective action (Ballard et al. 2006, 6–7). In fact, censorship and repression may become a programmatic focus of social movements when a feeling of persecution becomes a collective identity, and is acted upon. In a study of repression and collective action in the West Bank, Marwan Khawaja has argued that in an environment conducive to resistance, repression will actually encourage collective action instead of deterring it. If the existing organizational infrastructure is strong, then repression will fuel prolonged resistance,

partly because repression strengthens the impression that the state is illegitimate and creates an environment for "cognitive liberation," which gives individuals in social movements a sense of common purpose and reinforces their resolve (Khawaja 1993, 47–71). This has been supported by della Porta, who has argued that repression creates the need on the part of protestors to punish the unfair state, and that the need to do something about repression becomes more urgent for some activists (1997, 123).

A case in point is the radicalizing effect of the execution of Nigerian author Ken Saro-Wiwa and eight other compatriots of the Movement for the Emancipation of the Niger Delta (MEND), which according to Sasha Osha was a turning point for the movement. Part of Saro-Wiwa's success was to use his profile as a writer to internationalize the struggle related to the exploitation of oil resources by multinational companies such as Shell, with the collusion of the Nigerian government. However, state repression of the Ogoni people's mobilization did not have the desired effect, as repression came after the groundwork had been laid for massive mobilization. Although, some of this mobilization became, rather problematically, ethno-nationalist in nature (Osha 2006, 25). In spite of this, and in spite of tensions between "radicals" and "moderates" in the movement, the hostage taking, and other violent actions (such as the blowing up of oil supplies in the Niger delta), violence has been understood within MEND as a tactical response to heightened repression by the Nigerian authorities with the support of oil multinationals. The increased US military build-up in the Niger delta also suggests that, in time, anti-terrorism measures will be used to quell the uprising.

However, radicalization does not automatically lead in revolutionary directions. According to della Porta, repression tends to discourage peaceful and more moderate protest action, while fueling more violent and extreme protest action. This may actually lead to the development of small armed groups that substitute themselves for mass activity (della Porta 1997, 123). The challenge repressed social movements face is to remain a genuine voice for the voiceless, as too much repression may lead to the elimination of democracy in movements and the demobilization of women in particular (McKinley and Veriava 2005).

In spite of the increasingly unclear distinction between rights-based and class-based movements, there are still meaningful distinctions to be made. Owing to the fact that they are more likely to attract the wrath of

the state, radical social movements are more likely to reinvent freedom of expression than moderate movements. Struggle for freedom of expression becomes a condition for mobilization.

Conclusion

In this chapter, I have attempted to argue that freedom of expression is capable of a radical interpretation. It is not simply a liberal, Western individual right to be claimed against the state, and it is certainly not a right that "belongs" to the media alone. There is a lot to learn about the state of freedom of expression by examining social movement activity in Africa, if freedom of expression is reconceptualized as a right practiced by collectives as well as individuals, and if it is reconceptualized as a positive right. Also, freedom of expression requires a contest for state power and the expansion of the commons in order for expression to genuinely be free. By taking these factors into account, it may be possible to move beyond the form of human rights discourse that characterizes the dominant conception of freedom of expression.

Clearly, more work needs to be done to theorize this right through concrete studies of social movement activity in Africa. A research agenda should consider a number of questions. How should freedom of expression be defended in broader society, and how should it be practiced internally? Should movements struggle to move beyond a stance of evaluative neutrality when it comes to expressive conduct, or should some messages be prioritized more than others? A radical definition of freedom of expression will probably not abandon the principle of evaluative neutrality,[18] but will seek to create the conditions for a genuinely free contest of ideas. After all, the liberal conception of the governmental position of "neutral arbiter" fails to acknowledge that this role is generally far from neutral, and rather privileges dominant ideas in a disguised fashion. Should a rooted definition of freedom of expression include limitations? If so, what should they look like? Should the freedom of expression of counter-revolutionary groups be limited? There are myriad problems that have been confronted by movements, old and new, and that provide rich material to begin to answer these questions. And once this happens, then perhaps we will begin to address Shivji and Mamdani's challenge to theorize the right to freedom of expression in its practical and historical application to Africa.

Notes

1. "A socialist society that has been established from a capitalist society will strengthen 'negative freedoms', while ushering in real 'positive freedoms' across the board, ensuring equal and free access to social services by all. Free activity for the Communists is the creative manifestation of life arising from the free development of all abilities of the whole person…Only in community [has each] individual the means of cultivating his [*sic*] gifts in all directions; only in the community, therefore, is personal freedom possible. In the previous substitutes for the community, in the State, etc. personal freedom has existed only for the individuals who developed within the relationships of the ruling class, and only insofar as they were individuals of this class" (Marx and Engels 1845).
2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (U.S. Constitution, First Amendment).
3. See Green's summary of Rousseau's ideas on the relationship between natural rights and democratic citizenship in Green (1993, 3). In relation to freedom of expression, see Mehra (1986, 6–7).
4. This view is implicit in a section of Justice Hugo Black's ruling in *New York Times v. United States*, "…The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people." And in *Mills v. Alabama*, the Supreme Court noted, "The press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve" (quoted in Mehra 1986, 11–12).
5. The US in particular has used "the free flow of information" idea as part of its foreign policy to further commercial goals by entrenching its primacy as information provider in the New World Information Order, and, politically, to cast suspicions on alternative forms of social organization, especially in the Soviet Bloc countries. For a relatively uncritical look at the motivation behind the "free flow of information" policy of the United States during the Cold War years, see Ungar (1990). For a more critical appraisal of this aspect of US foreign policy, see Schiller (1979, 353). Also see Mehra (1986, 25–50). Noam Chomsky and Edward Herman have also debunked the "myth" that the media are independent

and report without fear of favor in the United States, and have developed what they term a "propaganda model" to explain how they filter information to the benefit of the ruling elites (1988, 1–2).

6. Alice Mabota has noted in relation to Mozambique that, while the country has been feted recently for advances in media freedom, freedom of expression more broadly has been declining. This has allowed the International Monetary Fund and the World Bank to portray Mozambique as a success story, as it fails to measure repression of popular resistance to its own policies (2006, 26–27). Needless to say, this narrow view is rather self-serving as it allows the two institutions to portray Mozambique as their success story.
7. I use the terms "bourgeois" and "working class" advisedly here, as I am aware that the boundaries between mainstream media and popular forms of expression can be rather porous.
8. As Arundhati Roy has argued, "We know that while, legally and constitutionally, speech may be free, the space in which that freedom can be exercised has been snatched from us and auctioned to the highest bidders" (2003, n.p.).
9. I use the term "radical" to refer to anti-imperialist, anti-capitalist, and socialist perspectives.
10. Having said that, it must be acknowledged that the continent has a rich, alternative history of freedom of expression to offer. A number of the key liberation movements of the 1950s and 1960s focussed on both practical and ideological tasks: as Shivji has put it, they included an "insurrection of ideas," and not just an insurrection of actions. As many of these struggles took on the character of national liberation struggles, they tended to include demands for cultural sovereignty, and led to an upsurge in cultural expression as the struggle unlocked the creative capacities of the people. For instance, Franz Fanon (1963, 194–97) has documented how, in the Algerian anti-colonial struggle against French domination, cultural struggle was one of the main planks of the resistance struggle, leading to an efflorescence of literature, the reawakening of oral traditions, and the assertion of indigenous art forms considered by colonial powers to be the "dregs of art." This resurgence of popular forms of expression led to artists demanding the right to express themselves objectively in institutions, which in turn led to demands for state support for popular arts as part of the national liberation movement's demands. There were many other examples where resistance included struggles for freedom of expression.
11. See the various entries on the suppression of freedom of expression on the International Freedom of Expression Exchange website, at http://www.ifex.org/en/content/view/full/35/.

12. In response to a Parliamentary question put by Member of Parliament for the Independent Democrats (ID), Patricia De Lille, on November 9, 2007, the Minister of Safety and Security released figures on the number of protests for 2005/2006 and 2006/2007. These statistics point to a sharp increase in protest action since the release of the 2004/2005 figure of 5800 protests: in 2005/2006, an estimated 10,763 recorded protests took place, and in 2006/2007, there were an estimated 9446 protests. The largest number of protests took place in KwaZulu/Natal, with the province accounting for about one fifth of the recorded protests for 2005/2006 (National Assembly 2007).
13. "foreign or international terrorist organisation" means any association of persons formed with a view to:
    a. overthrowing or taking over the government of any State by unlawful means or usurping the functions of such government; or
    b. conducting a campaign or assisting any campaign against the lawfully established government of any State with a view to securing any of the objects or purposes described in paragraph (a); or
    c. engaging in foreign or international terrorist activity, whether or not such organisation is designated, and includes any branch, section or committee of the organisation and any local, regional or subsidiary association forming part of such organisation (Suppression of Foreign and International Terrorism Bill 2006, clause 2.).
14. "mercenary activity" means the following:
    a. the doing of any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a State; or
    b. personal involvement or the rendering of private military-related assistance in an armed conflict between two or more States or within a State (Suppression of Foreign and International Terrorism Bill 2006, clause 2.).
15. McKinley and Veriava (2005, 43–44).
16. A case in point is the regulation of gatherings in Johannesburg. According to a research report produced by Research and Education in Development, the Johannesburg Metropolitan Police Department is discriminatory toward social movements such as the Landless People's Movement and the Anti-privatisation Forum, having routinely prohibited their gatherings on the flimsiest of excuses. On the other hand, no gatherings of the Treatment Action Campaign or the Congress of South African Trade Unions were prohibited during that period. The first set of movements are often considered to be more radical in their politics than the second set of movements, which are considered to be closer to the ruling African National Congress-led alliance (Research & Education in Development and Freedom of Expression Institute 2005).

17. Fitzgerald and Rodgers (2000, 574) have also cautioned against embracing uncritically the "cultural turn" in social movement theory, which established itself as a countermodel to resource mobilization theory. This theory tended to prioritize the study of what Tarrow has called the "life-space demands" of identity-based new social movements, rather than the movements based on the "old structural programmes of the past," and which engaged in production-based class struggles (1998, 17).
18. Noam Chomsky made an argument that may appear on the surface of things to be indistinguishable from the liberal viewpoint, but that has much to recommend it from a radical standpoint as well: "If you believe in freedom of speech, you believe in freedom of speech for views you don't like. Goebbels was in favor of freedom of speech for views he liked. So was Stalin. If you're in favor of freedom of speech, that means you're in favor of freedom of speech precisely for views you despise" (Chomsky 1992).

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CHAPTER 10

The UN's Human Right to Water in the Context of New Water Governance Regimes in South Africa and Tanzania

Eunice N. Sahle, Mary Galvin, Benjamin Pierce and Kara Todd

In the last three decades, human rights developments and contestations about them have occurred in the context of highly contested processes linked to what scholars, policy makers, and civil society groups broadly refer to as neoliberal globalization.[1] One of the key human rights developments in recent years is the United Nations (UN) Human Rights Council Resolution 15/9 (HRC15/9) articulating the human right to "access to safe drinking water and sanitation."[2] The UN adopted Resolution HRC15/9 as a treaty on September 30, 2010. As such, this

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treaty is now a constitutive feature of contemporary international human rights law. This chapter examines some developments that influenced the emergence of HRC15/9, and the contributions and limitations of the latter through a human rights lens. Further, drawing on empirical examples from South Africa and Tanzania, it critically explores the extent to which water governance regimes that have emerged in these countries in recent decades can promote the realization of the human right to water, especially for the poor, in both urban and rural geographies.

The discussion that follows is divided into three sections. Given that human rights instruments emerge out of complex local and global developments in a specific conjuncture, the first section pays attention to some developments, which the chapter suggests contributed to the emergence of HRC15/6. The second section foregrounds HRC15/6's core features in the context of debates in the field of human rights and highlights their contributions to these debates. Section three examines the rise of new water governance regimes in South Africa that emerged in a global neoliberal context, which was mediated by popular struggles involving citizens' particular demands to realize their constitutional socio-economic rights, and the state's political agency. Further, it highlights implications of these regimes for the realization of the human right to water, especially for the poor. For comparative purposes, the chapter briefly discusses two features of neoliberal development discourse that have influenced the emergence of new water governance regimes in Tanzania, and their implication for the achievement of the goals of HRC15/6 for the poor. Overall, given that it cannot cover all the human rights implications of the new water governance regimes, the chapter highlights their gendered, class, and spatial effects.

Emergence of the Human Right to Water Treaty

Like other human rights instruments, HRC15/9 did not emerge in a vacuum. The interplay of several factors, four of which we highlight here, contributed to it becoming part of international human rights law. First, in addition to important human instruments that emerged from 1948 to the 1980s, especially the two 1966 interdependent Covenants[3] on human rights, important developments at the UN from the 1990s onward contributed to the emergence of HRC15/9. To begin with, during this period, UN global conferences placed the issue of sustainability on their agenda. For example, the UN's 1992 Rio Declaration on Environment and Development stated that, "in order to achieve sustainable

development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[4]

The focus on sustainability continued at the UN's World Summit on Sustainable Development in Johannesburg, South Africa, in 2002. The Summit's report called for the establishment of measures that would "increase access to sanitation to improve human health and reduce infant and child mortality," and for "prioritizing water and sanitation in national sustainable development strategies."[5] These conferences' inclusion of environmental issues at the forefront of their agenda provided regional and global institutions and other social actors a discursive and political opening to consider water as an urgent social policy issue.

Beyond the holding of global sustainability conferences, other developments at the UN played a vital role in the emergence and adoption of HRC15/9. In its 2002 General Comment No. 15, for example, the UN's Committee on Economic, Social and Cultural Rights declared that "water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights."[6] Further, the General Comment outlined the obligations of states in the realization of the human right to water.[7] Other important developments included UN's Resolution 7/22 appointing an "independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation" in 2008, and Resolution 12/8, which welcomed the expert's report in the same year.[8] Further, on 28 July 2010, the UN's General Assembly passed Resolution 64/262, which recognized "the right to safe and clean drinking and sanitation as a human right."[9]

Scholarly debates in various fields, especially in political science, human rights, moral philosophy and international development studies, are a second factor that played a role in the rise of HRC15/9. In the sub-fields of international relations and international political economy (IR/IPE) in political science, for example, the concept of human security gained traction in the immediate post-Cold War period. The development was a result of the work of scholars such as Kenneth Booth and J. Ann Tickner, who increasingly challenged the historical focus on state security in IR/IPE.[10] While distinct from human rights in some respects, the human security discourse focused on issues concerning human well-being, flourishing, and "emancipation" (Booth 1991, 319). For Booth, "emancipation is the freeing of people (as individuals and groups) from those physical and human constraints which stop them carrying out what they would freely choose to do" (ibid.).

Human security ideas share intellectual kinship with debates concerned with expanding human capabilities—discussed shortly—in the field of human rights and moral philosophy. At any rate, by the 1990s, the concept of human security became solidified in fields such as international development and human rights, and in policy debates. In terms of the latter, the human security discourse, for example, provided the ideational foundation for important UN development frameworks that emerged in the first decade of the twenty-first century, such as the Millennium Development Goals (MDGs) in 2000.[11] The link between HRC15/9 and MDGs is clear, for one of the latter's objectives was to "halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation" (UN 2000, n.p.).

Finally, the expansion of political space in various parts of the global South played a role in the national embedding of human rights discourse and the emergence of HRC15/9. This development was a result of local and global developments. At the global level, processes of political globalization—such as the emergence of an international development discourse intensively promoting procedural democracy and human rights in the 1980s and in the post-Cold War period—were on the rise. These developments dovetailed well with political processes in several countries in the global South, the main one being transitions to democratic politics. In Latin America, for example, struggles for democracy led to the end of military dictatorships in countries such as Chile, Argentina, and Brazil in the 1980s.[12]

On the African continent, the 1990s saw the intensification of struggles for democracy and human rights leading to transitions to multi-party democracy in countries such as Kenya, Ghana, Zambia, Malawi, and South Africa. While these transitions were shaped by local historical legacies, the balance of political forces, and other factors, one of their significant results was the expansion of political space—albeit limited, given the politico-economic elite's pact making strategies that set the parameters of shifts to procedural multi-party politics in various parts of Africa (Bond 2000). Their limitations notwithstanding, these transitions contributed to the rise of numerous civil society groups, including human rights movements and organizations on the continent. In Malawi, for instance, the dismantling of the authoritarian state in 1994 created favorable conditions for the creation of one of the country's leading human rights organizations, the Centre for Human Rights and Rehabilitation in Lilongwe,[13] among many others.

Overall, the expansion of political space in various parts of the global South created opportunities for citizens involved in human rights struggles to challenge neoliberal economic and political practices of the state and institutions of global governance, which they considered as major impediments to human well-being and dignity, environmental justice, and other human rights concerns. Neoliberal development and economic ideas and practices gained momentum globally from the 1970s onward, and, while modified from the mid-1990s and following the 2007–2008 global economic crisis, they have continued to inform economic policy in the twenty-first century in important ways. For proponents of neoliberal development discourse, an optimal state form is one where its role in the economy and social sectors is limited. From their perspective, state economic practices are characterized by numerous bureaucratic bottlenecks and tendencies to allocate resources irrationally, and further, they hinder the emergence of a competitive private sector given the monopolistic and unproductive nature of public enterprises.[14]

The rise of neoliberal economic globalization has seen the promotion of private sector involvement in key economic and social sectors. Privatization of publicly owned enterprises has been one of the strategies promoted by local advocates of neoliberal economic development, such as the late President Kamuzu Banda of Malawi, General Augusto Pinochet of Chile, and their global supporters—mainly the World Bank, the International Monetary Fund (IMF), and dominant states in the global North. From their perspective, privatization measures contribute to, among other things, economic growth and efficiency and the expansion of the local entrepreneurial class. For civil society organizations, the tenets of neoliberal development doctrine briefly highlighted here were major impediments to the realization of human rights, including that of development—see Chapter 8 in this volume.

In any event, with the ascendancy of neoliberal ideas and practices, privatization arrangements gained momentum in Africa and elsewhere in the water sector (Bakker 2010; Goldman 2007; McDonald and Ruiters 2005). While ideas of cost-recovery, efficiency, and profit-making were central organizing principles of these arrangements, the latter took various forms: from private ownership, to management contracts, to having the state apparatus—at various geographical scales—as the main agent responsible for water provision. Overall, in the era of neoliberal economic globalization, a discourse constructing water as a commodity rather than as a public good, which the state would have both moral,

political, and legal obligations to provide to citizens, has emerged in various spaces of development knowledge production and policy formation, and dissemination. In this regard, for instance, Michael Goldman states that the World Bank Institute's "Water Policy Capacity Building Program alone has trained more than 9000 professionals from ninety countries between 1994 and 2001" (Goldman 2009, 149). The strategic and important role of such training in promoting the privatization of water is evidenced by the fact that "almost half of the participants… surveyed (by the Bank)" stated that it had resulted in the reconfiguration of "water management policy in their own countries" (Pitman 2002, 10, cited in ibid.).

Powerful as neoliberal economic globalization strategies are in shaping the reconfiguration of water governance regimes in various parts of the world, including South Africa and Tanzania, their implementation has been highly contested. In the case of the privatization of the water sector—a strategy that has greatly influenced the rise of these regimes—this process has been highly contested by diverse civil society groups both in the global North and South. For current purposes, a brief example from Ghana will suffice. From the late 1990s, the Ghanaian state, with heavy financial backing from the World Bank and the IMF, and states in the global North embarked on the restructuring of the water sector with the goal of establishing a privatized water governance regime. This development was part of the country's neoliberal development project, which, while mediated by historical developments and the agency of local states and citizens, had socio-cultural, political, and economic effects.[15]

A central feature of the Ghanaian state's privatization project for the water sector was a plan to reserve the historically "profitable" urban water governance geographies for the private sector and the "unprofitable" rural ones for the public sector.[16] The preceding strategy by the state was influenced by the World Bank's policies of economic "unbundling" and, in general, decentralization.[17] The latter is a core element of the World Bank's neoliberal economic development project, which entails the separation of "the unprofitable sectors of the production process of a good or service" (Amenga-Etego and Grusky 2005, 278).

However, it is important to note that, like in other parts of the world, discourses of decentralization in Ghana or elsewhere in the global South (see the case of Tanzania in this chapter) have multiple aims and their modalities are influenced by numerous factors beyond neoliberalism.

Nonetheless, the World Bank's project of decentralization and its "unbundling" strategy are very much rooted in its neoliberal efforts to roll back the role of the state in economic and social sectors. As Amenga-Etego and Grusky argue, "while decentralization can increase local participation, and improve the accountability and transparency of government…it is primarily driven by fiscal concerns," and in Ghana, this process "set the stage not only for devolving the provision of water and sanitation services to the district level, but also placed new fiscal burdens on the mostly impoverished rural population" (ibid.).

The Ghanaian state's privatization plans were nonetheless highly challenged by a coalition of groups in civil society under the auspices of the National Coalition Against Privatization of Water (NCAPW) (Agyeman 2007, 532). NCAPW was part of a group of global civil society organizations and networks of water justice activists that maintained an ongoing pressure on national governments throughout UN discussions leading to the emergence of HRC15/9. For members of NCAPW, water was vital for survival, and social reproduction, and as such they were committed to struggling for its protection as a basic human right. From their perspective, water was "a fundamental human right, essential to human life to which every person, rich or poor, man or woman, child or adult is entitled" (Amenga-Etego and Grusky 2005, 284). The emergence of NCAPW was significantly aided by Ghana's transition to democracy in the 1990s, regional and global developments such as the increasing adoption of human rights norms by the Organization of African Unity and its successor organization, the African Union,[18] and processes of political globalization promoting human rights discourses, respectively. In its struggles to protect water as a human right, NCAPW repertoires of collective action[19] included, but were not limited to:

> Public awareness campaigns in the form of T-shirts, car stickers, banners, educational materials with basic information on their views on privatization. Community mobilization through Local Action Committees (LACs) to organize communities to demand water as a right…Media campaigns, including newspaper articles, radio and TV shows, lobbying Government and the World Bank [and] research, including social impact assessment of water privatization in other countries, surveys identifying basic obstacles to access to safe potable water, documentation of public health, gender and other impacts of the water crisis and alternative models to the privatization of water. (Agyeman 2007, 532–33)

The discussion thus far has focused on key developments that the chapter suggests contributed, in different but complementary ways, to the adoption of HRC15/9. Further, it has indicated the importance of paying attention to the interplay of political and other developments at a range of political scales in debates concerned with the rise of international human rights instruments. In addition, it has demonstrated the contested nature of processes of neoliberal economic globalization such as privatization of water, and in the process foregrounded the agency of citizens and states in the global South in the evolution of these processes. The subsequent analysis examines HRC15/9 in the context of debates in the field of human rights.

Situating the Human Rights to Water Treaty

The rise and evolution of human rights discourse has been a highly contested and at times violent phenomenon. Historically, some social forces have viewed the emergence of a given human rights instrument as an important tool in the struggle for human dignity and justice, while others have challenged such development. For instance, human rights activists challenged the exclusionary nature of human rights developments of the eighteenth and nineteenth and parts of the twentieth centuries, which excluded numerous people, including people of African descent enslaved in the Americas, indigenous peoples, and colonized Africans. The denial of their rights was influenced by the racist intellectual and ruling ideologies of these periods.

As this volume's Chapter 1 indicates, the evolution of human rights has been highly contested and the rise of HRC15/9 has been no different: it has not only been constructed as an important development in the struggle for human rights, but also heavily criticized. While at times framed differently to reflect contemporary intellectual, political, and economic currents, critiques of HRC15/9 share some similarities with criticisms that have been leveled against other human rights instruments in the post-1948 period. For example, a core criticism of HRC15/9 is that it assumes that there is a singular universal ethic based on human rights philosophy and developments from "the west."[20] Critics arguing along these lines contend that the idea of a universal human ethic that shapes how people utilize and view natural resources such as water is simplistic. For such critics, human ethics are pluralistic and are rooted in given socio-cultural, economic, and political contexts. Other critics contend

that HRC15/9 takes a state-centric rather than a communal approach to human rights, and that it promotes a liberal individualistic vision of rights and neglects group rights.[21]

This chapter's perspective, and that of the volume in general, is that contestations about human rights norms and developments such as those surrounding HRC15/9 are crucial. As Chapter 1 in this volume argued, "open critical scrutiny is essential for dismissal as well as for defence" of any human rights instrument and its underlying philosophical and other assumptions (Sen 2005, 161). Along these lines, then, in what follows we briefly highlight what we consider as HRC15/9's importance from a human rights perspective, before turning to the cases studies, which will, among other things, illuminate tensions underpinning it and the challenges of achieving its goals in South Africa and Tanzania in the contemporary conjuncture.

The Right to Water in the Context of Human Rights Debates

Although characterized by limitations, HRC15/9 marks an important development in debates and struggles for human rights. First, this treaty frames human rights in a holistic manner. Invoking Resolution 64/292 of 2010, HRC15/9 declares: "the right to safe and clean drinking water and sanitation [is] a human right that is essential for the full enjoyment of life and all human rights" (2010, 2). Further, it "affirms that the human right to safe drinking water…is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity" (ibid.). This is a significant departure from the dominant tradition in the field of human rights, which in general tends to construct human rights in binary terms. The latter approach sheds very limited light on our understanding of the history, practices, and philosophical foundations of human rights. A holistic approach to rights, such as the one framing the human right to water, demonstrates "the nature and range of human rights" and enables "us to see much more clearly their manifold interrelationships" (Donnelly 2003, 32). Moreover, such an approach shows that "our lives—and the rights we need to live them with dignity—do not fall into largely separate political and socioeconomic spheres. Economic and social rights are violated by or with the collusion of elite-controlled political mechanisms of exclusion and domination" (ibid., 32–33). For example, in different historical

moments in various countries, "civil and political rights" have been "violated" by a range of powerful actors in their efforts "to protect economic privilege" (ibid., 33).

Second, from a capability approach to human rights, HRC15/9 is an important development in the struggle for what Martha Nussbaum and Amartya Sen refer to as human capabilities.[22] For Sen, "the capability of a person reflects the alternative combinations of functionings the person can achieve, and from which he or she can choose one collection" (Sen 1993, 31). He continues on to suggest that "the functionings relevant for well-being vary from such elementary ones as escaping morbidity and mortality, being adequately nourished, [and] having mobility… to complex ones such as…achieving self-respect [and] taking part in the life of the community" as well as "appearing in public without shame," as Adam Smith argued in a different context (ibid., 36–37; Adam Smith 1776, cited in ibid.). The simple fact is that water is essential to life and well-being. Yet, as HRC15/9 states, "884 million people lack access to improved water sources" and "approximately 1.5 million children under 5 years of age die and 443 million school days are lost every year as a result of water and sanitation-related diseases" (HRC15/9 2010, 2). Such social realities in the water sector "are violations of the most fundamental rights of millions of people and are thus a matter of justice, no matter what. Hence they constitute an unconditional and universal claim for improvement" (Wettstein 2009, 132). Thus, even though articulating the "the content and addressees" of the right to water and sanitation in a given context "can indeed be difficult and controversial… this neither negates its ethical status as a matter of justice nor is a sign of weakness of its underlying principles" (ibid.).

Having access to clean water contributes to every aspect of our basic existence, including social reproduction, food production, maintaining healthy bodies, and many others. Consequently, the emergence of a treaty focusing on the human right to water has the potential of contributing to the expansion of human capabilities for many people in the world who currently have no access to safe water. Further, the treaty provides citizens with a strong moral,[23] philosophical foundation, which they can utilize to diagnose, predicate, and engage in collective action on issues pertaining to the realization of the human right to safe water.[24] Collective action for the realization of the human right to water has the potential of leading to the establishment of institutional mechanisms and other processes that can enable individuals to "achieve valuable

functionings" such as education and health, thus expanding their capability and opportunity "to lead the kind of lives they value – and have reason to value" (Sen 1999, 18). As Nussbaum and Sen contend, "the capability" each of us has "corresponds to the freedom that" we have "to lead one kind of life or another" (1993, 3). In this regard, having a choice in one's life is a form of social privilege that has significant impact on our life chances and our ability to claim human rights, and to flourish in all aspects of our lives.

Third, HRC15/9 not only articulates the human right to water, but also it assigns responsibilities to an institution as the primary agent for the realization of this right. In terms of corresponding duties and their bearer, HRC15/9 posits: "States have the primary responsibility to ensure the full realization of all human rights, and that the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations" (2010, 2). Other state obligations are listed in Table 10.1.

It is important to note that even though HRC15/9 constructs the state as the primary agent responsible for the realization of the water as a human right, it also leaves open the involvement of other agents in the water sector. As it posits, "States, in accordance with their laws, regulations and public policies, may opt to involve non-State actors in the provision of safe drinking water," but they should ensure that these actors "fulfill their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them" (2010, 3). Overall, HRC15/9's approach to assigning obligations for the human right to water falls under what human rights scholars refer to as perfect obligations.[25] Analysts consider human rights duties as perfect when "the right at stake, the corresponding obligations deriving from them, and the respective obligation bearers, are clearly identifiable," whereas in the case of imperfect obligations, "only the rights at stake are clearly identifiable, while the corresponding obligations, as well as the potential obligation bearers, remain unspecified and contingent" (Wettstein 2009, 124). Thus, under the rubric of HRC15/9, the duties to the human right to water can be conceptualized as being a case of perfect obligations. As for the right at stake, it is clearly stated in the previously highlighted HRC15/9's holistic approach to the human right to water.

Nonetheless, while HRC15/9's approach to human rights and duties falls under the category of perfect obligations, there is a case to be made

Table 10.1 HRC15/9: State obligations[a]

HRC15/9 Calls upon states:
8. (a) To develop appropriate tools and mechanisms, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation, including in currently unserved and underserved areas;
(b) To ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein;
(c) To pay particular attention to persons belonging to vulnerable and marginalized groups, including by respecting the principles of non-discrimination and gender equality;
(d) To integrate human rights into impact assessments throughout the process of ensuring service provision, as appropriate;
(e) To adopt and implement effective regulatory frameworks for all service providers in line with the human rights obligations of States, and to allow public regulatory institutions of sufficient capacity to monitor and enforce those regulations;
(f) To ensure effective remedies for human rights violations by putting in place accessible accountability mechanisms at the appropriate level;
9. *Recalls* that States should ensure that non-State service providers:
(a) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity;
(b) Integrate human rights into impact assessments as appropriate, in order to identify and help address human rights challenges;
(c) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms.

[a]Adapted from the UN's HRC15/9 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/33/PDF/G1016633.pdf?OpenElement

in this regard for imperfect obligations: the human right at stake is clear, however, the nature of corresponding obligations and who the non-state duty bearers are is contingent on state actions. The fact that HRC15/9 and other human rights instruments embody imperfect obligations does not mean that these obligations or embedded rights are irrelevant. As Sen contends, while "imperfect obligations are ethical demands that stretch beyond the fully delineated duties," they nonetheless "involve the demand that" social agents with the capacity to contribute to the realization of a given right should accord them "serious consideration" (2004, 3199). In the main, when it comes to the twin concepts of imperfect and perfect obligations to human rights, "the difference lies in nature and

form of obligations, not in the general correspondence between rights and obligations" (ibid., 341).

While acknowledging the importance of assigning human rights obligations to institutions such as states, the chapter is not arguing that as social agents such institutions readily fulfill whatever obligations that human rights instruments and constitutional frameworks assign to them in a mechanistic and unproblematic manner. Such a view of institutions naturalizes and de-politicizes them. Like other institutional actors, states are influenced by ideological, historical, and local and global developments in their approach to their responsibility to human rights, including that of water. Thus, while the UN seems to take the question of assigning primary responsibility to states in the realization of the human right to water seriously, its conceptualization of states' role in the emergence and implementation of human rights not only de-politicizes their role in these processes, but also human rights practices in general.

Historically and in the contemporary era, states have never been neutral institutional actors in their approach to human rights. As such, their role in the delivery of the human right to water needs to be problematized and not assumed as benevolent, or as always being in the service of the public good for the majority of citizens. Further, and as our case studies will indicate, the treaty blankets out the role of current national and global economic development policies and other conditions limiting the possibility of achieving its goals. Overall, HRC15/9 neglects the implications of historical and contextual factors, such as the priorities of local elites and those of institutions of global governance, and the increasing economic role of the Chinese state—see Ian Taylor's chapter in this volume—in Africa, for the promotion and fulfillment of the human right to water, and of other rights in general.

The preceding discussion has analyzed core elements of HRC15/9 in the context of important debates in the field of human rights. While acknowledging its contributions, we suggest that it is important to explore the ambiguities underpinning this human rights instrument. Although exploring all of them is beyond the scope of this chapter, teasing out some of them, as we have done here, contributes to debates in the field of human rights concerned with the question of assigning responsibility and others. At a minimum, such a critical, analytical, and contextualized approach to the study of HRC15/9 and other human rights instruments promotes, as argued in Chapter 1, "public reasoning"[26] on important national and global public policy issues in the field of human rights.

The chapter now turns to a discussion of the evolution and core features of contemporary water governance regimes in South Africa and briefly Tanzania, and pays attention to the implications of these developments for the realization of the human right to water, particularly for the poor and other marginalized social groups.

Evolution of the Water Governance Regime and the Human Right to Water: Post-apartheid South Africa

In order to facilitate the transition to democracy in 1994, the African National Congress (ANC) entered negotiations around the constitution and formed a government of national unity that constrained its ability to tackle systemic change to South Africa's economy (Bond 2000). Although the middle class has rapidly expanded, albeit with a huge debt load and under constant threats of job-shedding, the staggering levels of poverty remain and a large proportion of the population is socially marginalized. The legacy of apartheid continues to dominate poor people's socio-political and economic realities.

At the time of the transition in 1994, the new government was challenged to address (redress) the gross inequality in services that had characterized apartheid. Such inequality was particularly acute in the case of water services. It was estimated that 30% of the South African population lacked access to adequate water supply services and that 50% were without adequate sanitation (Colvin and Gotz 2004, 4). While important progress has been made in the water sector, it is located within broader neoliberal economic policies that often serve to diminish such gains. The high cost of food, transportation, electricity, and education in the face of high unemployment creates competing budget demands that make it difficult for poor households to pay for water.

This section of the chapter explores the evolution of water governance regimes in post-apartheid South Africa. The analysis demonstrates that while these state-led regimes signal a major shift from those of the apartheid era that heavily limited the development of human capabilities, their ability to deliver the human right to water is still constrained. Although many water sector leaders have been committed to ensuring universal access to water, implementation has been situated within a complex environment: transforming the national Department of Water Affairs and establishing a local government system, while facing human

resource and financial constraints. Further, the lack of structural change in South Africa often undermines the pursuit of socio-economic rights—see David Hallowes' Chapter 3 in this volume. In addition, in the midst of mediated human agency and local historical, political, and economic conditions, the global neoliberal context has influenced the post-apartheid state's decisions and approaches in the water sector.

The discussion that follows is divided into three parts: the first reviews the role of the state in the evolution of water governance regimes and its recognition of the human right to water. The second part considers how this has played out in practice. The final part notes the achievements and the limitations of South Africa's post-apartheid water governance regime from a human rights perspective.

Contextualizing the Emergence of South Africa's Post-apartheid Water Governance Regimes

In crafting its economic policy in the post-1994 transition period, South Africa's leaders deliberated over their approach—in particular, their relationship to the global neoliberal paradigm, creating tensions within the post-apartheid political alliance comprising the ANC , South African Communist Party, and Congress of South African Trade Unions. Whether that economic approach was decided when the ANC made an economic deal prior to the transition or whether there were simply "telling clues" at that stage remains an issue of debate (Saul 2014).[27] What is clear is that the commitment of millions of South Africa's citizens struggling against apartheid and their visions of the new South Africa required leaders to formulate policies to address the shocking socio-economic inequality left by apartheid, and to meet the expectations of the new democratic state.

During its transitional negotiations, particularly the drafting of a new constitution, the ANC focused not only on the political right to vote, but also on socio-economic rights, historically enshrined in the 1955 Freedom Charter and then the 1994 Reconstruction and Development Programme. The ANC's approach to human rights during that period was influenced by the pressure of its civil society allies in the Mass Democratic Movement. The new constitution emerged in 1996, and recognizes socio-economic rights, as evidenced by clauses such as "Everyone has the right to have access to sufficient food and water,"

and the constitution is considered one of the world's most progressive and impressive constitutions.[28] To realize such rights, the new ANC government set out to implement its Reconstruction and Development Programme (RDP), which specified ambitious targets for housing, jobs, and water provision, amongst other areas. It set up a large scale rollout of infrastructure to meet the needs of millions of citizens without access to water. In the short term, it aimed "to provide all households with a clean, safe water supply of 20–30 litres per capita per day (lcd) within 200 metres." The RDP set out to provide services progressively, as specified in the constitution. This would start with "some for all"; in other words, the goal was to provide basic services to all citizens and then to move to providing a higher level of services. In the medium term, the RDP aimed "to provide an on-site supply of 50–60 litres per capita per day" (ANC 1994).

Even with a 1996 shift to a locally mediated neoliberal macroeconomic policy articulated in the state's Growth, Employment and Redistribution (GEAR), which embraced neoliberal tenets such as privatization and removal of exchange controls, the state restated the government's commitment to the human right to water. The Water Services Act (no. 108 of 1997) states that its main objective is "to provide for—(a) the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being." Further, the Act specifies that municipalities' Water Services Development Plans "must show the number and location of people who cannot get water services in the next five years, the reasons for this, and a reasonable time-frame for giving access to these rights."[29] This was reinforced by the Municipal Systems Act (no. 32 of 2000): "A municipality must give effect to the provisions of the constitution and ensure that all members of the local community have access to at least the minimum level of basic municipal services."[30]

The right to participation in local government processes by citizens, which reinforces the human right to water, is also well established in the legislation. The constitution states that the "objects of local government are…(e) to encourage the involvement of communities and community organizations in the matters of local government."[31] This is supported by the RDP, in sec. 2.6: "Consultation with communities is essential in the provision of water." The right of communities to participate is also addressed in the Municipal Systems Act, particularly in consultative processes around Integrated Development Plans and Water Services

Development Plans, and in the Department of Water Affair's Regulation Strategy in terms of Citizen Charters.

What is most notable in South Africa is the gap between this impressive legislation and policies, and the reality of many citizens. It is possible to attribute this to a deliberate "talk left, walk right" approach on the part of the state or to emphasize the enormous challenges in implementation (Bond 2004b). However, this section argues that the state's approach was influenced by the principle of addressing equity through the implementation of the human right to water, in the context of its neoliberal economic policy framework. Part two illustrates how the desire to enshrine the human right to water was offset by experiments with service delivery approaches, how recognition of their consequences resulted in adjustments to the state's approach, and finally, how citizens experienced and responded to these developments.[32]

State, Water Governance Regimes, and the Human Right to Water in Practice: 1990s

The 1990s were a period of service delivery experimentation, alongside the process of amalgamating local government authorities that were racially divided under apartheid and negotiating new demarcations of municipalities to ensure their economic viability. While local government was undergoing transformation, the Department of Water Affairs and Forestry owned and remained formally responsible for the operations and maintenance of the extensive number of new (and old) water systems throughout the country. It engaged a non-governmental organization called the Mvula Trust and the private sector as its delivery arms.

Under apartheid, the Department of Water Affairs and Forestry focused on engineering, dams, and managing water resources. Post 1994, the Department had to provide infrastructure to millions of poor people, many in rural areas and former bantustans.[33] Following the multiracial democratic vote in 1994, the Department established a community water supply and sanitation programme,[34] and rapidly grew from approximately 4000 to 24,000 staff members (Colvin and Gotz 2004). A range of stakeholders reviewed its implementation of RDP projects, which were implemented by the Department itself or by consultants through BOTT (Build, Operate, Train, and Transfer). The emphasis was on meeting targets and providing a universal basic supply of water. The future scope to sustain or improve these systems received little consideration.

At the time, the rollout of infrastructure was not conceptualized as meeting people's "right to water" as much as a moral imperative to redress the past. The longer term impact and implications of decisions about design and standards on the right to water were rarely considered (Galvin 2009). However, there was a new awareness of the role of community participation, which was also emphasized in the legislation emerging from all sectors at that time (Hemson and Galvin 2006).

Leaders also sought to develop new capacities to deliver RDP water schemes, namely through the formation of the Mvula Trust between 1993 and 1996. The Mvula Trust installed water systems in rural areas in which local communities played a direct role in their construction. It supported communities to establish local systems in which households made small monthly contributions to a maintenance account run by the community committee. It established itself as one of the government's key water services and sanitation delivery arms, becoming a large quasi-governmental NGO. According to its website, from 1994 to 2000, the Mvula Trust disbursed over R300 million for water services, extending coverage to over a million people.[35]

Various water management regimes involving the private sector were also explored by the state. For instance, the national government encouraged and facilitated public–private partnerships (PPPs). The National Treasury in particular established a dedicated unit in mid-2000, and one of its employees reported that the Treasury facilitated the signing of an average of two public–private partnerships each year from 1997 to 2002 (Burger 2006). In the early 1990s, three municipalities, Stutterheim, Fort Beaufort (Nkonkobe), and Queenstown, contracted a subsidiary of Suez-Lyonnaise-Ondeo called Water and Sanitation Services South Africa (WSSA). The lease form of the three contracts stipulated that the WSSA was responsible for the management, operations, and maintenance of water services and sewer systems. It was also obliged to rehabilitate some of the existing water and sewer infrastructure.[36] Yet all of these contracts reportedly experienced problems by 2002—the Nkonkobe contract was nullified by a court decision; there were bad relations between the council and WSSA in Stutterheim; and there were strikes in Queenstown (Hall 2002; Ruiters 2005). Another experiment, a twenty-year BOOT contract for a water recycling plant, was designed and negotiated in 1998 by the eThekwini Municipality.[37] The contract was with Durban Water Recycling (a purpose-built company whose principle shareholder is a subsidiary of Vivendi Water) to finance, build, and operate the plant for

some years, and then hand it over after twenty years (with the 45% building cost paid by the Development Bank of Southern Africa).[38]

Finally, in 1999, the then Borough of Dolphin Coast (Illembe Municipality) signed a thirty-year concession agreement with Siza Water Pty (Ltd), then owned by SAUR (Galvin 2009). The same year, the Nelspruit Municipality signed a thirty-year concession agreement with Biwater-Nuon (Hall 2002). Further, with the City of Johannesburg facing enormous financial problems, Johannesburg Water signed a five-year management contract with a consortium called Johannesburg Water Management (JOWAM), in which Suez was the major stakeholder. JOWAM's expertise would build the capacity of the staff, get systems in place, and turn the utility around financially (Galvin 2009).

Given the local and global economic policy context, it is not surprising that one of the main tenets of neoliberalism, full cost recovery, took centre stage in the water sector. With the exception of the Dolphin Coast and Mbombela (Nelspruit), municipal systems remained firmly in public hands. Thus, while most people did not encounter privatization, their public providers introduced full cost recovery as a means of financing water services. The neoliberal economic climate shaped the policies on the ground, and citizens became customers. Suddenly the issue of full cost recovery became central, and municipalities began cut-offs to force people to pay. The number of cut-offs in the 1990s has been hotly contested, beginning with a report by the Municipal Services Project (MSP) stating that the number of water cuts nationally due to non-payment between 1994 and 2001 could be estimated at ten million (McDonald 2003). However the then Minister of Water Affairs Ronald Kasrils argued that these figures were "considerably overestimated" and did not tally with the data collected by the Human Sciences Research Council (HSRC). He quotes Mark Orkin, the CEO of the HRSC: "the figure is a misplaced extrapolation by a researcher of an HSRC survey and considerably overestimates the phenomenon." The HSRC estimated that less than 2% of all connected houses were affected by water cuts at any point during the period of the 2001 survey (Kasrils 2003). Nonetheless, David McDonald maintains that the ten million figure is a true representation of the water crisis at the community level. He explains that it was generated from a representative national survey of approximately 2500 people conducted in 2001 by the MSP and the HSRC. The MSP did not only rely on HSRC data, but also on statistics from the Department of Provincial and Local Government, which reported 133,456 water

disconnections in the last quarter of 2001. This means that about 500,000 people were affected by water cuts over a three-month period. At this rate, McDonald (2003) argues, the estimated ten million water cuts from 1994 to 2001 was justifiable.

The State, the Political Economy of Free Basic Water, and Implications for the Human Right to Water: 2000–2008

In 2000, with the process of amalgamation and demarcation completed, the country's first fully democratic local government elections were held. The new local government water governance regime replaced the former racially based one and extended its coverage with municipalities. This meant that many municipalities were extended to include historically poor and often unserviced areas that were neglected under the apartheid system. Although newly established municipalities lacked capacity, the constitutional directive (schedule 4B) that water systems are a municipal competency was implemented. Systems were transferred from national to municipal government, which often required the Department of Water Affairs and Forestry to refurbish assets before transferring ownership to municipalities.

Once responsibility for water systems was devolved to the municipal level, two shifts occurred. First, there was increased focus on choice of water management regime. The Municipal Systems Act (no. 32 of 2000) established municipalities as Water Services Authorities, with the power to choose Water Services Providers (WSPs). The logic behind the division was to ensure that municipalities remained in the position of authority and responsibility for water services, including regulation (while the Department regulates the entire system), while allowing them to select other institutions to provide water (to operate and maintain systems). They could choose to act as WSPs themselves or could contract the private sector. As a result of trade union pressure from the South African Municipal Workers Union (SAMWU), section 78 of the Act called for a formal process of considering public provision as the first option. Section 78 was based on a Framework Agreement between SAMWU and the South African Local Government Association, arising from SAMWU's opposition in principle to privatization, in all its forms, as contrary to the South African constitutional commitment for the state to respect, protect, and fulfil its human rights obligations. In addition, SAMWU generated a worker-specific critique of privatization,

contending that the latter results in job losses, lower pay, and attacks on benefits and working conditions.[39]

Resistance to privatization grew globally, as evidenced in the Cochabamba, Bolivia, water war, as well as events in South Africa. Not only were South African civil society groups active in the earlier mentioned World Summit on Sustainable Development in Johannesburg, but groups such as the South African Water Caucus and the Anti-Privatisation Forum also held leaders to account at the World Water Forums in Cancun and Kyoto and stood up against privatization. Pressure for the public sector—particularly new municipalities—to deliver was building. With little scope for additional water concessions in South Africa, due to both public pressure and unforthcoming financing, the government's eagerness for privatization became more tempered. It is in this context that a range of institutional arrangements in which the private sector plays a role, that fall on a continuum between full concessions and leases and public delivery, emerged. As an example, and according to a senior advisor at the National Treasury, the PPP Unit has completed 23 PPP projects, with total project values in excess of R35 billion, and is currently involved in "PPP-like" undertakings worth nearly R60 billion. Pressure for the private sector to play some role is based on arguments about the lack of expertise on the part of municipalities to care for and maintain existing water infrastructure, pointing to the "dismaying" results of programmes that monitor the quality of water and wastewater treatment plants (the "Blue Drop" and "Green Drop" programmes) (Aiello 2012).

In addition, the government moved away from full cost recovery with the introduction of a "free basic water" policy. In 2000, there was an outbreak of cholera, resulting in 265 deaths in five provinces and 117,147 people infected.[40] A report by the MSP found that the policies of cost recovery had disadvantaged those for whom even a small charge of about R20 a month was too much. At its epicentre, it was reported that those who could not afford the new charges being implemented in August 2000 were returning to traditional and untreated water sources and were falling victim to the disease (Hemson 2006).

In response, the national government introduced a policy consistent with its original people-centered, equity oriented approach. In September 2000, President Mbeki and then Minister of Water Affairs Ronald Kasrils announced the adoption of free basic water (FBW), a free

lifeline of six kilolitres per household per month. How this was implemented by municipalities varied: some targeted the free basic water and required proof of "indigence," while some large metros provided a credit on all household bills. Although sometimes problematic in implementation, this was an important victory in South Africa, and it is often referred to outside of the country as an example of efforts to implement the right to water. Providing free basic water was an acknowledgement that people have certain socio-economic rights by virtue of being a human being. This is supported by the Bill of Rights, which specifies the "right to life" (section 11), as well as the right to "access to sufficient food and water" (section 27, 1b). These provisions of the constitution echo the holistic approach to human rights underpinning HRC15/9.

Yet it is ironic that the amount of free basic water, which appears to be based solely on a moral imperative and to have a rights base, was based on the eThekwini (Durban) Municipality's experience with revenue collection. The municipality found that rather than spend a given amount to post bills and collect revenue from the urban poor it could use these funds to provide six kilolitres of free water. At any rate, a more pointed example of the economic logic framing the basic right to water is evident in local municipalities which have a negligible basis for cross subsidization. Although they are provided with funds to cover free services from the Treasury, the "equitable share" is calculated on the number of households requiring free services. It is used at the discretion of the municipality, not only for the actual free services. Driven by this economic logic, municipalities require poor people who want to receive free basic water to provide proof of "indigence." Instead of free basic water being treated as a right that all citizens can embrace proudly and with dignity, having to claim indigence arguably compromises an applicant's sense of dignity, for this requirement signals them as being members of a "failed" household.

Interface Between Users and Government and Implications for the Human Right to Water: 2008–Present

The introduction of free basic water removed the issue of revenue collection from rural households using standpipes, as it was calculated that a household could not physically carry more than the free six kilolitres. In metros like eThekwini, people accessing free basic water in peri-urban areas were provided with ground tanks with a six kilolitre capacity that

were filled (or topped up) once a day. However, in most urban and many peri-urban areas, household water usage is metered.

Given the contested nature of full cut-offs, new "credit control" technologies to get people to pay were tested, and in each case local people protested against them. Instead of cutting off people's water, municipalities found odious ways of limiting it. For example, a "trickler" could be installed by welding a coin with a small hole over the end of the tap, allowing a trickle of drinking water for human survival. In Durban in 2001, a Concerned Citizen member named Christina Manquele litigated against the Council, arguing that disconnections breached her right to water. While she lost the case on the basis that she had not limited herself to free basic water and had tried to reconnect illegally, the municipality then stated that it would use tricklers so that everyone could access the free basic water amount. After an eight-year disconnection battle during which people reconnected themselves and widened the drip hole in tricklers, and physically fought those sent to disconnect water to the point that they came accompanied by guards, the City agreed to a moratorium on evictions and services disconnections in 2007 (Desai 2002; Loftus 2005). Local citizens were finally in a position from which they could successfully discuss and negotiate with the municipality over water services issues (Hemson and Galvin 2006).

Another method tested, which has subsequently been introduced in various parts of the African continent, was the use of pre-payment meters. Strong arguments have been made about how pre-payment meters compromise the human right to water, but the counter-argument emphasizes the need for municipalities to have revenue to provide a service (Galvin 2013a). In South Africa, the City of Johannesburg introduced pre-payment meters with automatic cut-offs in Soweto, cutting people off after using the monthly FBW allocation unless they could pay for additional "credit" on their water card (Flynn 2005). This meant that citizens unable to pay for additional water had no access to water after using the FBW allotment. Citizens from Soweto took the City of Johannesburg to court over the constitutionality of pre-payment meters and the need for a greater FBW allocation. In *Lindiwe Mazibuko and Others vs. the City of Johannesburg and Others* (2009), the Constitutional Court ruled that it was up to the City of Johannesburg to provide for pre-payment meters in its bylaws, and that it was the state's role to determine what the right to water entails and what steps it could take to ensure its progressive realization.[41]

As activists rallied around the Mazibuko court case against prepayment meters, the case began to represent more than a rejection of this technology and a demand for an increase in the amount of free basic water. The popular slogan "Destroy the meter and get free water" was an expression of the notion that governments can and should cover unlimited free water for all poor people. While most activist leaders recognize the need for some (highly subsidized) payment for water usage past a basic amount so that the service can be run and maintained, social movement members differ in whether they believe the right to water means that it should be provided free of cost (Mirosa and Harris 2012, 939). Payment for water services is often treated by critical scholars and activists as "commodification" of a public good. The commodification of what such a view considers as public goods such as water and education is rejected as part of the government's neoliberal approach.

Overall, when "drawing a line" in interpreting what meets the right to water and what does not, the municipality, its policies, and its governance become paramount. Local specificities all enter into the equation: how tariffs are structured in an area, the potential for cross subsidization, the operation of the municipality, issues identified by civil society and communities, and the responsiveness of local government. These differences are evident in community responses to a similar technology being used in eThekwini and in Cape Town, called flow limiters and water management devices, respectively. In both cases, the technology allows the household to access a set amount per day and then it cuts off. In eThekwini, the system allows households to request a greater amount of water and to negotiate usage with the municipality; in contrast, the technology has been forced on Cape Town households and comes with no choice of amount, and protests have emerged in response.

Yet, it is the overall ethos of local government that has resulted in users' high level of mistrust of state water policies. Most municipalities have become increasingly corporate, with only formal "customer" relations and pro forma consultation, and few opportunities for full participation. In addition, while people are squeezed to consume even less water, they see that those in industry, agriculture, and mining are provided with cheap electricity and water. The expansion of energy and other resource extraction through coal and coal fired stations, fracking in the Karoo and possibly in many other areas, and sand dune mining will have a devastating impact on South Africa's water resources in terms of pollution and the massive quantity of water used (Greenpeace 2012; Galvin 2013c). The recent National Water Resources Strategy 2 fails to

set priorities between these users and indicates a special relationship with the corporate-driven Water Resources Group.

Overall, in this context of growing despondency over the state's policies on water provision, the sort of "social contract" proposed in the Local Government Turn Around Strategy seems worlds away from reality. The willingness of many users to engage with the government has been eroded, which they are expressing through popular resistance and despondency with South African political process (Galvin 2012). Resistance has not only been expressed through protests, but also through reconnections, destruction of pre-payment meters, and litigation (Bond and Dugard 2008).

From Apartheid to Post-apartheid: Concluding Notes from a Human Right to Water Perspective

From a human rights perspective, South Africa has made some important gains in the delivery of water services: the inclusion of the right to water in its constitution and development policies, the provision of infrastructure to millions of households who lacked access, and the introduction of a free basic water policy to cover the needs of the "indigent" population. South Africa's water services have remained in the hands of the public sector, with significant private sector involvement limited primarily to two concessions and a few management contracts.

However, more critical reflection shows that its successes have been constrained by the political and economic environment in which the state operates. While cost recovery has been tempered, the affordability of the tariff just over the free basic amount remains an issue for poor and often large households with competing financial demands. People's access to water is limited by additional factors, including, but not limited to, the policy of having citizens prove their indigence before they can access free basic water, technological limitations placed on the amount of water they can access, and water systems that are no longer working because they have not been maintained or designed for rapidly increasing demand.

Further, pre-existing social inequalities based on race, class, gender, location, or health status are often exacerbated by water services provision, as apparent in the following three examples. First, many argue that class apartheid replaced race apartheid in South Africa. The inequities between class groups are powerful, and the common situation whereby relatively affluent officials and consultants debate the ability of

the poorest South Africans to pay for water is ironic at best. Second, the rural and gendered realities are often lost on well-intentioned development practitioners as well as within social movement organizations.

Development practitioners refer to improving water access (women tend to be reallocated to other tasks given their multi-roles in their communities) or placing women (who tend to be local elites) on water committees as empowering women (Galvin 2011). Moreover, the urban bias toward social movements results in the assumption that rural users naturally benefit from their successes. The Mazibuko case argued for an increased amount of free basic water, yet the state has yet to deliver the basic amount to many rural areas. Finally, people living with HIV/AIDS (PLHA) who are sick require up to 100 litres of water per day and their ability to access this water depends on service delivery levels. PLHA frequently return to rural areas when they are bedridden, where services levels are typically the worst. In areas where water is metered, this increased need increases the vulnerability of users who may no longer be working (Galvin 2013b). Having discussed water governance regimes in the context of South Africa, the chapter now turns to a brief discussion of Tanzania's new water governance regime in the context of neoliberal restructuring.

Tanzania: Water Governance Regimes in the Era of Neoliberal Economic Reforms and the Human Right to Water

Globally, neoliberal development theory calls for a diminished role in the economy and places a strong emphasis on market-driven economic development in all sectors of the economy, including water. Yet in terms of the water sector, "it is African countries, and the smallest, poorest and most debt-ridden countries that are being subjected to IMF conditions on water privatization and full cost recovery" (Bond 2004a). While some proponents of neoliberal development discourse focus on state corruption to justify privatization, others claim that countries in the global South are not able to effectively manage natural resources such as water on their own. Instead, institutions like the World Bank should be entrusted with advising the state on how to maintain profits from water provision, "since costs are more easily recovered from functioning supplies" (Norwegian National Committee for Hydrology 1983, 1).

Patrick Bond counters this claim by highlighting that institutions of global governance, leading among them the World Bank and the IMF, make it impossible for African states to domestically fund such water schemes. As cutting expenditures is a general prescription for debt relief, the result is that soon the money is no longer there to effectively manage local water supplies (Bond 2004a).

While it is important to highlight the structural and political power of these institutions in the emergence of neoliberal influenced water governance regimes, it is crucial to highlight that African states have been key actors in the implementation of such regimes. Such a local-global analytical lens offers a deeper understanding of processes that have shaped the rise and evolution of these regimes, which the analysis suggests have significant implications for the realization of water as a human right in contemporary Tanzania and other parts of the world.

Like in the South African context, the Tanzanian state has played a major role in the reconfiguration of the country's water governance along neoliberal lines. However, in contrast to South Africa, the political economy of debt in the context of neoliberal development discourse and the nature of the state-led processes of de-centralization have meant that the possibility of the state fulfilling its moral and legal obligations as articulated in HRC15/6 is significantly limited. Such comparative insights are important for they signal the importance of paying attention to historical and contemporary conditions that influence the ability of specific state forms to promote, protect, fulfill, and respect their human rights duties. The chapter's brief analysis of the reconfiguration of Tanzania's water governance regime begins with highlights of the decentralization processes promoted by the state and institutions of global governance, and its implications for the achievement of the human right to water. This is followed by a discussion of the privatization and debt relief nexus in the water sector. The analysis concludes with a discussion of the neglected gender aspects of Tanzania's water governance regime.

Decentralization and the Emergence of a New Water Governance Regime

In addition to the trend of foreign direct investment and neoliberal influenced practices of cost-recovery in the water sector, a process of decentralization by the Tanzanian state has contributed to the rise of a new

water governance regime in the country. The 1982 Local Governments Act (the Act) played a key role in this process. This act detailed the public services for which local governments were responsible and assigned the provision of water to local governments. According to the Act, these authorities would deliver the service, while the national government remained in control of water policy-making. In implementing this decentralization project, the state seems to have been inspired by the subsidiarity principle, which entails that public services and the financial responsibilities associated with these services be accorded to the "lowest government level that can perform each function efficiently" (Kuusi 2009, 12). These state-led decentralization efforts were concurrently promoted by neoliberal development theorists and institutions of global governance from the 1980s and beyond. For example, in one of its reports in 1993, the World Bank declared that "serious institutional deficiencies and resulting government failure in many water resources agencies" led it to develop a strong push toward decentralization (also referred as "user participation" or "unbundling" in most of its publications) and privatization (Easter and Horne 1993, 2).

In the water sector, the state's decentralization efforts in the 1980s and 1990s led to the emergence of a new water governance regime that became embedded in its 2002 National Water Policy. The latter explicitly decentralized water governance from the national government to the community and municipal government levels (Doering 2005, 37). In evaluating the results of this regime, in its 2008 Water Sector Development Strategy report, which laid out the long-term water policy, the state complains of the struggles in fully adhering to a policy driven by the decentralization of the water supply. For example, the report highlights what it terms as the "failings" of many community water systems, and attributes these failures to a number of factors, among them a "lack of involvement of communities in the design and construction of the schemes," and a "lack of awareness…of the communities' responsibilities."[42] Yet, the same report illustrates the state's ceding of responsibility to provide public services to the local governments without a complete corresponding transfer of resources to those local governing structures. Overall, under the guise of promoting autonomy and flexibility for local governments, the state has provided a structurally problematic framework for communities to adequately provide water, for it has failed to provide financial resources to support its decentralized water governance regime. Essentially, as per this regime, Community Owned Water

Supply Organisations were given a title, but not much more, as the 2008 report indicates: "These bodies may take various legal forms," the report explains, and "will be expected to meet all the costs of…maintaining their water supply systems through charges levied on water consumers" (ibid., 43). Ironically, this reliance on consumer fees to fund the water utility was one of the major criticisms that the state levelled against the City Water Services—highlighted shortly—yet it reproduced them in its creation of a decentralized water governance regime.

The logic of cost-recovery that the state expects to drive Community Owned Water Supply Organisations' practices in the provision of water has led many communities to contract out their water utility responsibility, thus furthering the privatization (discussed shortly) project of Tanzania's water management systems. Overall, decentralization or "unbundling" of the state's responsibility in the water sector has had significant effects on the state's capacity to fulfil its moral and legal obligations to citizens, such as those underpinning the human right to water. As Amenga-Etego and Grusky argue: "when essential human services are provided by the state, the unique taxing powers of governments provide them with the capacity to redistribute income and implement cross-subsidies with the intent of increasing social equity and the well-being of the entire population. This redistributive capacity is often lost when essential services are unbundled and privatized" (2005, 279).

Privatization–Debt Nexus and the Rise of a New Water Governance Regime

The Tanzanian state's refusal to institute neoliberal reforms came to an end in the mid-1980s, and since then the state's development policies have been underpinned by core features of neoliberal development discourse, such as the privatization of public sector owned enterprises. A core factor enabling the privatization of the country's water sector is to be found in the IMF's debt relief conditionality policy. In the case of Tanzania, to qualify for debt relief through the Highly Indebted Poor Country (HIPC) framework, the IMF required the state to privatize Dar es Salaam's water supply (Tanzania Gender Networking Programme 2013, 3; also see Bayliss 2003, 521). The privatization requirement spread to other public utilities as part of the debt relief requirements of the HIPC initiative (Bond 2006, 29). Overall, the IMF required

Tanzania to institute neoliberal economic reforms—commonly referred to as structural adjustment programs (SAPs)—as a prerequisite for debt relief.

To meet the IMF's HIPC requirements calling for the privatization of Dar es Salaam's water sector, the state awarded a contract to City Water Services in 2003 (Bayliss 2003, 512). This private firm, owned by United Kingdom and Germany interests, was eventually joined by Superdoll, a private Tanzanian firm (Pigeon 2012, 41). The terms of the contract stated that City Water Services was to manage Dar es Salaam's water system while the government would retain actual ownership of this system. Two years into the agreement, the government claimed that City Water Services was not meeting all the terms of the contract, including revenue targets. The World Bank, a primary institutional proponent of neoliberal development schemes worldwide, identified flaws in City Water Services' operations; its report on the matter stated that it was "hard to perform worse than DAWASA," the state-owned enterprise that had previously managed Dar es Salaam's water system, "but that's what happened" (Rice 2007, n.p.). Further, reports indicated that Dar es Salaam residents received higher water bills under City Water Services' management than prior to the privatization of these services in 2003. As the debates escalated, the Tanzanian government ended the contract, and arrested and deported the senior management at City Water Services in 2005 (ibid.). With this development, a newly created, state-owned Tanzanian enterprise, Dar es Salaam Water and Sewerage Corporation (DAWASCO), gained control of the city's water provision services (Mascarenhas 2005, 18).

While the preceding development indicates the agency of the state in the embedding of neoliberal economic practices in Tanzania, it is also important to note that the contracting of water services to City Water Services resulted in an increase in Tanzania's foreign debt, thus deepening the state's structural dependency on external funding for its economic and other projects. For example, to finance its water governance regime under conditions of locally mediated neoliberal development dynamics, Tanzania took out a loan of $143 million from the following external lending institutions: the World Bank, African Development Bank, and European Investment Bank (ActionAid International 2004, 5).[43] In the main, the state's structural dependency on institutions such as the World Bank to finance the reconfiguration of the pre-existing water governance regimes limits its capacity to meet its

human rights obligations pertaining to water and other rights. Moreover, the obligation to pay the debt generated by the privatization of Dar es Salaam's water sector then, like other forms of foreign debt owed by the state, fell on the shoulders of Tanzanian citizens. This development placed a heavy financial burden on Tanzanians, especially the poor, during a period of rising economic insecurities generated by other neoliberal economic policies, such as the removal of subsidies in sectors such as education, health, and agriculture.

Further, while making some inroads in providing water to Dar es Salaam residents following the cancelling of the City Water Services contract, DAWASCO, maintained a neoliberal policy thrust in the provision of water (Pigeon 2012, 41). From the start, DAWASCO's main objective has been "full cost recovery," and this priority has meant that the state cannot "meet its obligations" in providing water services to citizens living at the lowest income levels in areas of the city (ibid.). Overall, inherent contradictions remain in such projects and approaches to the delivery of safe and clean water. As Patrick Bond posits, "there exists a classic problem…whether a state can pass along implementation responsibilities to a delivery agent while still holding control over basic services policy (e.g., on coverage, quality, access, cost, labor conditions, etc., all of which the private sector would ordinarily skimp on to the public's detriment)" (Bond 2004a).

Beyond urban geographies such as Dar es Salaam, the state instituted neoliberal inspired water governance regimes in rural spaces. For example, beginning in the mid-1990s, in the Pangani and Rufiji river basins, the state introduced the policy of water usage fees, whereas it had traditionally provided water to local citizens at no cost, and as such, now limited the possibility of the latter to expand their human capabilities (Hatibu et al. 2004, 1). This implementation of a 'cost-recovery' policy was influenced by the neoliberal ideological assumption that, when it comes to allocating resources, states are inherently wasteful. Further, the Pangani and Rufiji river basin projects were attempts to fuse elements of market principles with public sector imperatives within the water sector. In lieu of a tax proportionate to the amount of water one consumed, the state introduced a flat tax rate of $35 USD annually for all small-scale users who consumed 3.7L/s or less (ibid., 7). The flat tax marginalized the poor because they were forced to spend a higher proportion of their income on water fees. Further, such policies were a key source of conflict around water access in Tanzania. For example, due to the reality of

social stratification among upstream and downstream users, conflicts over water usage emerged in these areas (ibid., 3). Overall, the cost-recovery schemes in the Pangani and Rufiji river basins were detrimental to the local population and actually exacerbated problems of water access.

The introduction of fees due to the privatization of the water supply is problematic to the state's obligation to deliver the human right to water. Although privatization is often touted by its proponents as the answer to a state's inability to provide water to all citizens, the for-profit model of water provision often makes this difficult to accomplish. In their research of privatized water systems around the world and their effects on the poorest citizens, Emanuele Lobina and David Hall conclude that the "empirical evidence suggests that the profit motive may be extremely difficult to reconcile with service delivery to the poor" (2003, 29). The ultimate problem resides in the conflict between the motives of private water providers and the inability of the poor to pay for water given historical and contemporary social and structural inequalities. As Hall and Lobina note, "the poor are not profitable," and private operators are faced with the decision to either pull out of a water provision agreement due to an inability to maximize profit, or remain in an agreement even though profits are not what they expected. The former can lead to what the authors refer to as "water poverty," a situation in which citizens cannot pay water fees and thus are forced to rely on other (potentially dangerous) sources of water (ibid., 30).

Tanzania's New Water Governance Regime and the Human Right to Water: Gendered Dimensions

As the preceding discussion indicates, developments in the 1980s and 1990s led to the emergence of a new water governance regime in Tanzania. This regime was underpinned by locally mediated neoliberal ethos of privatization and decentralization. Overall, the new water governance regime has failed and has had negative effects on the poor. As Janne Lykke Facius explains, drawing on developments in the Rufiji and Pangani river basins, "the new system failed as a registration tool, a taxation tool, and a water management tool and contributed to aggravating rural poverty" (2008, 51). Overall, by late 2002, 14% of urban residents (in Dar es Salaam) and 60% of rural residents lacked adequate access to water. In eight districts, less than 10% of the population had their water access improved under the new water governance regime (Mascarenhas 2009).

While largely ignored, the preceding developments have gendered and socio-class dimensions. From one lens, the core features of the new water governance regime in Tanzania limit the realization of the human right to water for poor women and men and their families, especially those living in rural geographies. Nonetheless, while this regime has negative effects on both rural women and men, given pre-existing gender inequalities and those generated by the state's neoliberal economic development practices,[44] women have been disproportionally affected. For example, a large proportion of women and children (mainly girls) in poor households have the responsibility of providing water for their family (UN 2005, 5). Furthermore, women carry the heavy weight of tasks associated with social reproduction, such as water provision, cooking, washing, and many more.

The above tasks have gendered effects. In terms of water provision, for example, if a poor family lives within 400 meters—walking distance to a water source—which meets the Tanzanian state's definition of having access to water, female members of a given family will make a fifteen-minute round trip for each bucket of water required (United Republic of Tanzania 2002, 59). However, as most poor families do not live in areas that have access to clean water, as defined by the state, these women must walk much farther and wait in long lines to get water (TGNP 2009). From a capability human rights perspective, this social reality has, among other things, negative implications for their health. For instance, in addition to the health risks posed by handling unclean water, the task of carrying large quantities of water on one's head can have negative physical effects and cause spinal injury (Conant 2005, 32). In the case of young girls from poor families, since carrying water is such a lengthy and arduous task, it alone often prevents them from going to school, thus limiting their opportunity to expand their capabilities; this is a development that can have negative, gendered, societal impacts (UN 2005, 6).

Overall, the lack of easy access to clean water under the new water governance regime has gendered impacts for, among other effects, it causes numerous health and social problems for Tanzanian women and girls, especially those from poor families. Yet, these gendered effects are ignored in the crafting and implementation of neoliberal inspired policies in the water sector, such as full cost recovery in Tanzania. Echoing such a sentiment, a participant at the 2009 Regional Water Conference in

Dar es Salaam aptly questioned, "Why do women carry the consequences of failed policy, literally on their heads and bodies" (TGNP 2009)?

To conclude, like other socio-political developments, the state-led processes that led to the emergence of new water governance regimes in Tanzania were not gender neutral. Overall, the core features of this regime have gendered effects, and poor women, particularly in rural areas, have been disproportionately affected by them. Yet, the state has remained silent on the gendered characteristics of its new water governance regime. From a capabilities human rights perspective, in its push for the emergence of a new water governance regime, the Tanzanian state has thus far failed to create the necessary conditions to systematically address the gender inequalities in water provision. Overall, its water policies should be re-thought in a manner that seriously considers the gendered, spatial, and social class dimensions that limit the majority of women and girls in the country in terms of accessing their basic human right to water. The neglect of these dimensions remains a significant constraint on the agency of poor women and girls in their varied struggles to expand their human capabilities in contemporary Tanzania.

Conclusion

This chapter has highlighted key developments that contributed to the emergence and adoption of the human right to water treaty and the contributions of the latter to debates in the field of human rights. Further, the chapter has demonstrated the role of the state in the emergence of new water governance regimes in South Africa and in Tanzania, showing the mediated nature of global neoliberal economic development ideologies and the political agency of African states. While acknowledging the importance of the measures introduced by the post-apartheid state to address "water poverty" in the country, especially among the poor, the chapter has also demonstrated their limitations. It has also highlighted the limitations of Tanzania's new governance regime. In addition, the chapter has highlighted the gendered, social class, and spatial effects of these new water governance regimes, thus challenging their representation as neutral developments in dominant discourses pertaining to their formation and implementation.

Overall, the chapter has demonstrated the underlying tensions that continue to characterize international human rights norms, even as they are increasingly embedded in regional, national, and global normative

instruments aimed at addressing urgent issues such as the provision of safe water. To address the gap between the strong ethical vision underpinning the human right to water and its implementation, and based on insights from the chapter's case studies, it is clear that difficult questions concerning the nature of political economy dynamics and the gendered, social class, and spatial inequalities, and other dimensions of contemporary water governance regimes in South Africa, Tanzania, and elsewhere need to be attended to in intellectual, public policy, and civil society circles.

Notes

1. See the following works for discussions of key elements of processes of neoliberal globalization and their mediated and contested nature: Scholte (2005) and Mensah (2008).
2. The focus of this chapter is the water aspect of this treaty. Thus, throughout the chapter, HRC15/9 will stand for the human right to water. For details on HRC15/9, see https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/33/PDF/G1016633.pdf?OpenElement.
3. The aims of Article 11, paragraph 1 and Article 12, paragraphs 1–2 of The Covenant on Economic, Social and Cultural Rights, for instance, are closely linked to those of HRC15/9. For details on this Covenant, see http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.
4. See Rio Declaration on Environment and Development 1992, 1: http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf.
5. See *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 2002, 15: http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf.
6. See Committee on Economic, Social and Cultural Rights 2002, 1: http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf.
7. Ibid.
8. For Resolutions 7/22 and 12/8, see http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf and http://www.un.org/en/ga/64/resolutions.shtml, respectively.
9. See http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292.
10. See Booth (1991), Ticker (1992), and Sahle (2010).
11. For details on the Goals, see http://www.un.org/millenniumgoals/.
12. See the following for a detailed discussion of transitions to democracy in Latin America: Fitzsimmons (2000), Smith (2009), and Jaquette (1994).

13. Interview with Ollen Mwalubunju, one of the founders of the Centre, 1998 Lilongwe, Malawi.
14. For core tents of neoliberal discourse of rolling back the state including privatization, see Mkandawire (1999), Bond (2002), Hutchful (2002), and Harvey (2005).
15. For a detailed discussion of the rise and the contradictions of the neoliberal economic project in Ghana, see Hutchful (2002).
16. For extensive discussions of the privatization of the water sector and responses to it in Ghana, see Amenga-Etego Grusky (2005), Yeboah (2006), Agyeman (2007), and Bayliss and Fine (2008). It is important to note that the privatization of the water sector was one of the conditions set by the World Bank and the International Monetary Fund for Ghana's access to loans from these institutions. See Amenga-Etego and Grusky (2005).
17. For further details, see Amenga-Etego and Grusky (2005, 279). However, it is important to note that, while acknowledging that, given its symbolic, political, institutional, and economic power, the state has an important role to play in the provision of public goods, like other institutions, states are not neutral and their policies have contradictory effects. For instance, as McDonald and Ruiters argue in their discussions of alternatives to privatization of what they term as "essential services" such as water, "state (i.e. public) ownership can serve elite and corporate needs and marginalize the poor" (2012, 5).
18. Viljoen (2007) provides a very comprehensive history and discussion of human rights instruments established by these organizations.
19. For theoretical and other insights on social movements, see Tilly (2013).
20. See Howard (1990) for an extended discussion of analytical and other limitations of utilizing this term in human rights discourse and her examination of the individualistic vs. group rights debate in Africanist scholarship on human rights. Further, see James' extensive demonstration of the agency of intellectuals, civil society groups, states, and other social agents outside of Europe, United States, and Canada in the making of the modern human rights framework, especially the UDHR and the 1966 Covenants. For example, in debates leading to the crafting and adoption of the UDHR, "Latin American states provided passionate support for the human rights cause. Guatemala and Paraguay (together with Egypt and Mexico) argued for human rights to be recognized as an essential purpose of the United Nations" (James 2007, 119). Additionally, "Brazil, the Dominican Republic, and Mexico called for" (ibid.) "respect for human rights and fundamental freedoms without discrimination against race, sex, condition or creed" (Lauren 1998, 190, cited in James 2007, 119–20). Also, "China took the baton from Japan in arguing for the

recognition of principles of racial equality and self-determination" (ibid.). To enrich human rights discourse, it is important to historicize the evolution of human rights discourse in all its complexity and contradictions as James attempts to do in his 2007 work. Such an approach would, among other things, ensure that the agency of people and institutions from other parts of the world is not erased in the field of human rights.

21. For criticisms and prospects of the human right to water, see Sultana and Loftus (2012) and Bakker (2010). On human rights and cultural universalism, see Abdullahi A. An-Na'im (in this volume), and for related debates, see Howard (1990), Taylor (1999), and Sen (1999).
22. For an extending discussion of the notion of capability, see Sen (1999) and Nussbaum (2011).
23. As Sen posits, human rights are "primarily ethical demands" that "include significant and influenceable economic and social freedoms" (2004, 319–20). From his perspective, "the ethical force of human rights is made more powerful in practice through giving it social recognition and an acknowledged status" (ibid., 343).
24. Benford and Snow discuss three categories of collective action frames by social movements: "diagnostic, prognostic, and action mobilizing" (2000, 615). For more details, see Benford and Snow (2000, 613–18).
25. In the field of human rights, scholars attend to the question of assigning responsibilities through the lens of perfect and imperfect obligations drawing on the work of Immanuel Kant in moral philosophy, especially from his text *The Metaphysics of Morals* (1996).
26. In calling for ongoing transnational public discussions on human rights, Sen posits that "the force of a claim for a human right would be seriously undermined if it were possible to show that they are unlikely to survive open public scrutiny" (2005, 160).
27. Marais argues that in 1994 the "real issue was the terms on which inclusion and assimilation occurred, specifically, which social classes' interests would be privileged" (2011, 78). Bond (2004b) asserts that there has been no shift from the 1993 Normative Economic Model to GEAR to ASGISA to the current National Development Plan.
28. The Constitution of the Republic of South Africa, Act no. 108 of 1996, section (27.1.b).
29. The Water Services Act (no. 108 of 1997).
30. Municipal Systems Act (no. 32 of 2000) (section 73.1.c.).
31. Constitution of South Africa, section 152 (1).
32. This is often described as a Polanyian (1944) double-movement in which society resists the extension of market relations into areas such as labor and land, which would threaten society itself. In this case, water can be priced and appear as a commodity, but can never be fully commoditized

without threatening the existence of society (or at least a significant part of it).

33. Apartheid leaders formed ten "bantustans" in South Africa as homogenous territories for designated "tribes." The so-called "TBVC States" of Transkei, Bophuthatswana, Venda, and Ciskei were declared "independent" by the apartheid regime.
34. This programme became the water services department once the Water Services Act was passed.
35. See http://www.mvula.co.za.
36. For details of these leases, see Ruiters (2005), Plummer and Waddell (2002), and Smith and Ruiters (2006). Stutterheim: 10-year affermage; Queenstown: 25-year concession lease agreement; Fort Beaufort: water privatization act.
37. In 1999, Durban Water Recycling (Pty) Ltd. (Vivendi is the major stakeholder) was awarded a 20-year concession contract (Build Own Operate and Transfer) for a water-recycling project in South Africa, treating 10% of the city's wastewater. See http://www.durban.gov.za/City_Services/water_sanitation/Services/Pages/durban-recyling.aspx.
38. This is being embraced by the Water Resources Group as an example of how to deal with failing waste water treatment plants in South Africa.
39. See http://samwu.org.za.
40. See http://www.municipalservicesproject.org/publication/still-paying-price-revisiting-cholera-epidemic-2000-2001-south-africa.
41. Section 27(2) of the Constitution states that: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the right to water.
42. For more details, see National Water Sector Development Strategy, 2006–2015 (The United Republic of Tanzania), 51 at: https://www.maji.go.tz/sites/default/files/u12/natinalwaterstrategy1.pdf.
43. For more details on this development, see ActionAid International, "Turning off the Taps: Donor Conditionality and Water Privatization in Dar es Salaam, Tanzania." Available at: https://www.actionaid.org.uk/sites/default/files/turningoffthetaps.pdf.
44. For a discussion of Tanzania's neoliberal economic practice and responses, see Chachage and Mbilinyi (2003).

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