The Dichotomy between Cultural Relativism and Universalism: *A Case for Universalism in the Application of International Human Rights Standards in Post-colonial Africa*

by

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Dedicated to my parents: my Mother, Nyanayul Ayuel Leknyang Ayuel and my late Father, Dau Deng Agieu Kur.

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Abstract

This thesis critically examines the rift between cultural relativism and universalism in international human rights discourse with specific reference to human rights violations in Africa. It specifically makes the case for universalism, holding that certain core human rights values are generally cross-cultural and must apply to all contemporary societies, notwithstanding the popular contention in the Global South that human rights are alien to no-Western societies, considering that they principally originated from the Judeo-Christian tradition which is allegedly incompatible with non-Western culture. Furthermore, the fact that human rights have emerged as effective mechanisms for the ultimate protection of human dignity, in addition to the emerging evidence of an engulfing cosmopolitan culture, makes them appropriate for cross-cultural application. Finally, this thesis argues that the archaic conceptualisation of culture— which infuse our understanding of the rights concept—as a static set of homogeneous patterns and beliefs is increasingly obsolete and, thus, largely immaterial.

List of Abbreviations Used

ACHPR	the African Charter on Human and Peoples' Rights; African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights
AU	African Union
CPRs	Civil and political rights
COAS	Charter of the Organization of American States
DRMC	Declaration of the Right of Man and the Citizen
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECSRs	Economic, social and cultural rights
EU	European Union
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAU	Organization of African Unity
OAS	Organization of American States
PACHPRWA	Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations

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Chapter 1: Introduction

1.1. The Study Framework/Thesis Outline

This thesis seeks to make the case for universalism and the application of international human rights standards in post-colonial Africa, contrary to the popular African contention that international human rights values are alien and, therefore, inappropriate for application to Africa.

The thesis consists of four main chapters. Chapter 2 explores and provides a working legal definition of the concept of human rights. It also deals with the scope and types of protected international human rights, or the so-called three generations of human rights.

Chapter 3 explores the ongoing debate between cultural relativism and universalism in human rights discourse. It concludes by arguing that while cultural relativism and universalism are not necessarily mutually exclusive concepts, universalism must trump cultural relativism in the event that the two values cannot be amicably reconciled.

Chapter 4 deals with selected examples of human rights abuses in Africa as context to the discussion that follows in Chapter 5. In particular, the chapter deals with female genital mutilation as an example of cultural practices that grossly violate fundamental rights and freedoms of the individual. The other selected example is the ongoing case of genocide in the Sudan's Western region of Darfur as an example of human rights violations by States and/or non-State actors.

Finally, Chapter 5 deals with the justification for global human rights standards. In this respect, the argument is that despite differences as to culture, political ideology, religion or public policy priorities, a case for the universality of human rights standards can be grounded in at least 5 main

theories which are discussed under five main sections. In Section 1 (universalism as a moral obligation), an argument is made that the quest for creating a truly universal community is partly a moral obligation. Human rights, by their very nature, are an ultimate expression of not only our abhorrence for injustice, but also of our commitment to an understanding that the idea of human rights essentially means nothing if human rights are not universal. This section also argues that human rights represent a higher moral order and our common aspiration as members of a single and indivisible humanity.

Section 2 (universalism as an inherent aspect of human dignity*)* argues that human rights, insofar as they are a means for protecting the fundamental rights and freedoms of the individual are, by extension, a means for protecting the dignity of the human person. Since human dignity is a measure of the individual's inner worth, it is an immutable human attribute that cannot be considered as a function of culture, religion or political ideology, the three concepts that go to the heart and roots of the debate as to the universality of human rights.

Section 3 (universalism as a necessity) argues that even if it can be concluded that human rights are Western values, their universality must be upheld, having regard to the consequences of denying their validity and universal application. In essence, the argument here is that upholding the validity and universal application of human rights minimises the chances for the repetition of horrors of a magnitude similar to those seen in the 20th century, especially during the Second World War. As well, this section argues that universalism ensures that States do not have unfettered discretion as to the determination of the list of human rights. In a way, if States were allowed to determine which values should qualify as human rights, they would often resort to

dealing with sets of rights that may not deserve the status of human rights. Such an approach would undermine the validity of the internationality of the human rights regime.[1]

Section 4 (universalism versus State sovereignty) argues that sovereignty is not just an entitlement but a concept that embodies a responsibility for every State. That is, under the international human rights regime, States must meet certain minimum human rights standards, including the protection of the rights of their citizens and all residents within their jurisdictions. The underlying assumption is that, in rare circumstances, the international community— in the event that a State has failed to meet the requirements of certain minimum human rights standards—deserves the right to intervene in the internal affairs of States. This is exemplified by the international community's intervention in Kosovo and Libya.

Finally, Section 5 (universalism as a limitation on the right to culture) argues that the idea of the right to culture provided for in Article 27 of the International Covenant on Civil and Political Rights and also set out in, and protected by, other international human rights instruments, effectively precludes the promotion or maintenance of harmful cultural practices, such as female genital mutilation, widow inheritance or double limb amputation, among others. *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (PACHPRWA),[2] for instance, provides that States have an obligation to modify their cultures with the goal to eliminating such harmful cultural practices.

Chapter 6 is the concluding chapter. It outlines the findings that the conflict between universalism and cultural relativism in human rights discourse arises from two main elements

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[1] Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa: Cross-Cultural* Perspective (Washington D.C.: Brookings Institution, 1990) at 8.

[2] *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, African Union, 11 July 2003, available at: http://www.refworld.org/docid/3f4b139d4.html [accessed 23 May 2014], Art. 4.

namely, political antagonism and cultural dichotomy between the West and non-Western societies. Both elements are deeply rooted in the historical relationship between the West and non-West. The fact that history apparently portrays the West as the "master" and the non-West as the "victim" of Western exploitation implies that the motive of the West will often be subjected to scrutiny even when there is no evidence of ulterior motive on its part. In this regard, the human rights project is viewed generally by most of the developing world as a disguised form of Western moral imperialism or assertion of Western cultural hegemony over the non-West.[3] In the context of post-colonial Africa, the opposition to the human rights concept can partly be explained by several factors, including appeals to past historical injustices. African political elites often invoke this part of history to stir up anti-Western sentiments among their people but often as a clever ploy to tighten their grips on power and to effectively choke political dissidence. In essence, the African case against the application of international human rights standards, frequently disguised as cultural relativism that has come to be the dominant African perspective on human rights:

> is simply a tool of authoritarian regimes and despots who use the cultural relativity of human rights argument as a veil to shield their actions from external scrutiny and as validation of their...treatment of [their own] citizens.[4]

In other words, it is the political and economic elites employing such strategies that benefit from the rejection of human rights, at the expense of common people. The underlying motive for the elites' rejection of human rights is that human rights could not only be used to hold others accountable but themselves as well. Human rights, in essence, have an empowering capacity in the sense that they provide individuals with the ability to protect themselves from undue

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[3] Makau Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Virginia J. Int'l L.,* at 344-345.

[4] Jonathan Patrick, "An Examination of the Cultural Relativity of Human Rights" (2001) 36, Associate, *Baha'i Library online:* available at: http://bahai-library.com/series/Associate [retrieved on July 5, 2014].

exploitation by the State and its elites. Seen this way, human rights have the potential to alter power dynamics and to ultimately challenge the status quo and powers that be.

To begin with, this chapter provides a general overview of the historical evolution of human rights. First, it reviews the conception and understanding of the notion of rights in the ancient and medieval eras of Western Europe. Second, it examines the ideas of natural law and natural rights theories in modern Europe and their nexus to the development of the modern human rights concept. Third, it analyses how the notions of natural law and natural rights, along with the transformative ideas of the Enlightenment Era in Europe, inspired the American and French Revolutions that ultimately provided the legal impetus for the enthronement of the protection of individual rights. Fourth, the chapter emphasises the unique contribution of the League of Nations as well as early political initiatives to internationalise human rights protection. As well, the chapter provides a brief survey of the Nuremberg Trials as a seminal moment for introducing the notion of individual criminal liability in international law. Finally, the chapter provides an overview of the contemporary human rights system at both international and regional levels.

1.2. Origins and Evolutions of the Human Rights Concept

1.2.1. The Concept and Practice of Human Rights

The adoption of human rights as universal legal mechanisms for the protection of fundamental rights and freedoms of individuals and groups is probably one of the greatest achievements of the 20th century. This development was important because until then, international law was limited to having States as its subjects and principal actors. The introduction of human rights as core aspects of international law was thus extremely significant. This was not only because it dealt with individual rights, making human beings the subjects of international law and providing

them with active standing to invoke that law, but also because it expanded, more generally, the scope of international law from its narrow focus on States to include non-governmental organisations and, more recently, multinational corporations.[5]

As a species of international law, the international human rights regime is unique in the sense that it is rooted in the idea of universal human dignity, which is a function of the inherent worth of the human person and his or her right to lead a dignified life and existence.[6] The notion that human dignity is universal and that every individual and (ethnic, religious, cultural or political) group must be treated with equal respect, concern, and consideration irrespective of race, religion, culture, political ideology or public priorities, implies that what happens to individuals and groups inside the borders of a State does, in certain circumstances, become an issue of legitimate concern to other States.[7] Seen this way, human rights standards must apply globally so that States that do not meet the required minimum Standards of human rights protection are subjected to international scrutiny. This approach markedly departs from the archaic historical standards of legal positivism and State sovereignty, both of which postulate that whatever a State does in its own territory, insofar as it is sanctioned by its legislative authority or acts of State officials, is legitimate and beyond external criticism. International human rights law is an outgrowth of how the tragic events of the 20th century, especially of World War II, have—in fundamental ways—challenged this view.[8]

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[5] Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6 *NW J. Int'l Hum. Rt.,* 222 at 235-7.

[6] Francis M. Deng, *Identity, Diversity and Constitutionalism in Africa* (Washington D.C.: USIP, 2008) at 143.

[7] David Miller, "Responsibility to Protect" (2006), *Memo for the Workshop on Global Governance*, Princeton University, at 2, online at: http://www.princeton.edu/~pcglobal/conferences/normative/papers/Session6_Miller.pdf [accessed July 4, 2014].

[8] Sally Engle Merry, "Changing Rights, Changing Culture," in Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: CUP, 2002) at 39.

While the concept and practice of human rights have proliferated today, it is important to emphasise that, inasmuch as the core purpose and object of the human rights notion is the protection of human dignity, the idea of human rights is, in and of itself, not a novel philosophical or legal invention *per se*. This is evident from the fact that while the expression "human rights" was not commonly used prior to the establishment of the United Nations (UN) in 1945, the concept "can be traced back well before the 20th century."[9] In the strictest sense, human rights ideas date far back to the Stoic era in ancient Greece, Rome and medieval times.[10]

1.2.2. Ancient and Medieval Conception of Rights

The current concept and practice of human rights is different in context and content from its ancient and medieval antecedent because, in those early societies, rights were "always linked to the privileges and obligations attached to one's place in the social hierarchy."[11] However, in the later period of the Medieval Age, there was a popular understanding that rights should be perceived as "implicit in the natural order of things."[12] The result was a mixed conception of rights. In one context, rights and roles were specifically determined on the basis of customary conventions between subjects and their sovereigns. In most cases, this determination was largely based on one's class and social standing in the community. Alternatively, rights and obligations were conferred on individuals irrespective of birth, social rank or other factors. Much of this was refined by both customary conventions and more importantly by religious cosmology. The

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[9] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials* (London: BIIC Law, 2008) at 2.
[10] Virginia Leary, "Effect of Western Perspectives on International Human Rights," in Abdullah Ahmed An-Na'im & Francis M. Deng Eds., *Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Ins. 1990) at 17-8
[11] Michael Goodhart, "The Origins and Universality in Human Rights Debate: Cultural Essentialism and the Challenge of Globalization," (2003) 25 *Hum. Rt. Qrtly* 935 at 947.
[12] *Ibid.*

religious connotation of rights was based on the idea that such an order was divinely pre-ordained.[13]

It follows that in both ancient and medieval times, the enjoyment of rights was contingent on an individual's status in society (that is, rights were enjoyed differently depending on whether one was a peasant or a lord), the nature of society (the enjoyment of rights differed from one locality to another) or whether the social convention was informed by divine commandment.[14]

Strictly speaking, however, ancient and medieval societies never conceived of rights as legal entitlements that could apply to everyone in their own societies, let alone considered universal in application. Two reasons may account for this. First, in ancient and medieval times, rights were only enjoyed by those who had citizenship in a particular body politic. Such enjoyment often depended in turn on whether one was male or female. This is evident from the fact that in most cases, "rights were privileges given to citizens and often women, slaves and foreigners were not recognised as citizens."[15] Second, ancient and medieval societies had a widespread practice of institutional slavery. In fact "one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece."[16] Furthermore, even the most supposedly forward looking communities, such as Medieval Christians, were complacent in the existence of slave and master classes. That the medieval societies would sanction slavery is ironic, considering that their philosophers, such as Thomas Aquinas, had such a profound understanding of nature as to

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[13] Heiner Bielefeldt, ""Western" versus "Islamic" Human Rights Conceptions?: A Critique of Essentialism in the Discussion on Human Rights" (2000) 28 *Pol. Theo*., 90 at 94-109; Michael Goodhart, "The Origins and Universality in Human Rights Debate...," *supra* note 7 at 947-950.

[14] John Locke, "The Second Treatise of Government," in Peter Laslett, Ed. *Two Treatises of Government 2nd Edition* (Cambridge: CUP, 1967) §54 & Michael Goodhart, "The Origins and Universality in Human Rights Debate...," *supra* note 7 at 947.

[15] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9.

[16] Mahmoud Mamdani, "The Social Basis of Constitutionalism in Africa" (1990) 28 *J. of Mod. Afr. Stud*. 359-360.

sacralise natural law which they ranked above and beyond all forms of law. For Aquinas and his contemporaries, natural law was deemed to confer "certain immutable rights upon individuals as part of the law of God."[17] Yet, their intellectualism considerably failed to articulate that such law, which in today's phraseology would be the equivalent of human rights, applied to all human beings equally. This self-contradiction explains why Christians of the Aquinas era recognised slavery as a legitimate institution at the expense of equality and freedom for all human beings especially for all Christians, who had all the reasons, including their faith in one God, to consider themselves as equal. In other words, there is not, in fact, evidence of a widely accepted ecclesiastical doctrine or scripture that supported a conception of "'equal and inalienable' individual human rights held"[18] by every member of the Christian faith, let alone all human beings as citizens of the Kingdom of 'one true God.'

Despite their defective understanding as to the moral equality of all human beings, the ancient and medieval societies' conception and understanding of the notion of rights would later resonate with pre-modern and modern European societies, when natural law and natural rights theories became not only the reigning principles but also provided fertile grounds for the development of modern human rights ideas.

1.2.3. Pre-Modern and Modern Conceptions of Rights: Natural Law, Natural Rights and Human Rights

It is clear from the foregoing that in ancient and medieval times, the concept of rights and legal entitlements was based on a variety of theories, such as the duty of the sovereign to act justly and to further the common good, the dictates of divine will which informed natural law or local customs, and certain political arrangements between subjects and their rulers.

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[17] Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed*, Human Rights: Conceptions and Standards* (New York: Ashgate & UNESCO, 2000) at 37.

[18] Jack Donnelly, "The Relative Universalism of Human Rights" (2007) 29 *Hum. Rt. Qrtly*, 281 at 287.

The dominant mode of thought, particularly in pre-modern time, was to see rights not as universal entitlements, but as privileges that could only be enjoyed at the discretion of political authorities whose decision was informed by those perspectives. "In other words, the traditional forms of power were assumed to be undifferentiated and were legitimised in terms of an absolute monarch acting as a direct servant of God via the doctrine of the Divine Right of Kings."[19] This suggests that most of the time, subjects did not have any standing to make legal claims against unjust decisions of a sovereign for the simple reason that the sovereign's decision-making process, by virtue of its association with divine command, was considered essentially infallible.[20]

As well, in medieval and pre-modern times, the concept of individual rights was not well developed, since individual rights were perceived or thought to be subsumed under group rights. Although the conception of rights as communal entitlements began to fade with the onset of the modern era, the notion that individual rights derived from the group rights was apparent in the work of certain modern philosophers.[21] Rousseau, for instance, described the individual as a member of the community—*moi humain*, suggesting that collective rights were the superimposing structure in the hierarchy of rights.[22] The dominant ideas in modern times were, however, those of natural law and natural rights, both of which were fully embraced by the modern West as evidenced in John Locke's work on natural rights theory which was rooted in the "State of Nature," as discussed below.[23]

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[19] Neil Stammers, *Human Rights and Social Movements* (New York: Pluto Press, 2009) at 48 and Michael Mann, T*he History of Social Power: History of Power from the Beginning to AD 1760, Vol. 1* (Cambridge: CUP, 1986) at 475-83.

[20] Jack Donnelly, "The Relative Universalism of Human Rights...," *supra* note 18 at 286.

[21] C. MacPherson, "Natural Rights in Hobbes Locke," in D.D. Raphael Eds., *Political Theory and the Rights of Man* (London: Macmillan, 1976) at 1-2.

[22] Declan O' Sullivan, "Is the Declaration of Human Rights Universal"? (2000) 4 *The Int'l J. Hum..Rt.* 25 at 35.

[23] Jack Donnelly, "The Relative Universalism of Human Rights..."*supra* note 18 at 286.

However, in a strict sense, these concepts and their nexus to individual rights were not new to modern philosophers either. In essence, the theory of natural law can be traced back to ancient Greeks, particularly to Sophocles and Aristotle whose ideas on the subject were later refined by the Stoics during the Greeks of Hellenistic period and further elaborated during the Roman Empire. The essence of natural law, to the Greeks, was based on the principles of justice as anchored in the "right reason." The idea of right reason was predicated on objective reasoning which was thought to be both eternal and unalterable.[24]

The natural law philosophy was particularly important in a Europe consumed and ensnared by endless violence. This is evident in John Locke's 17th century work on Two Treatises on the Government[25] in support of the 1688 Glorious Revolution[26] in England.[27] According to Locke, men and women in the "State of Nature" are in a condition of perfect equality and freedom. For this very reason, all human beings are not just naturally equal but also independent. In such a state, each individual has the ultimate authority to execute the law of nature, since no one is subjected to the authority of another person.[28] That is because the State of Nature is a condition in which there is no common protector and each individual is entitled to the right of "self-help."[29] However, because everyone is entitled to protect his or her rights by executing the law of nature, the State of Nature is inherently undesirable. In other words, the State of Nature is a state of perpetual personal insecurity.

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[24] Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed*, supra note 17 at* 36.
[25]John Locke, "The Second Treatise of Government," in Peter Laslett, *supra* note 14 at § 4: 1-8.
[26] The *Glorious Revolution* of 1688 refers to the overthrow of the English King, James II, by the union of English lawmakers and the Dutch army in support of the Dutch Stadtholder William III. William III Subsequently ascended to the English throne and became William III of England.
[27] Jack Donnelly, *International Human Rights: Dilemma in World Politics, 3rd* Ed. (Boulder: Westview, 2007) at 42.
[28]Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed*, supra* not 17 at 37.
[29] Jack Donnelly, "Human Rights and Western Liberalism," in Abdullahi Ahmed An-Na'im & Francis Deng, *Human Rights in Africa: Cross Cultural Perspective*s (Washington D.C.: Brookings Institution, 1990) at 34.

In order to escape from this undesirable condition, men and women find it necessary to enter into the State of "Civil Society" by means of a social contract[30] with one another to form a government which assumes the authority of the common protector of individual rights. Thus, all those who enter into a social contract must ultimately give up their natural authority of self-help and ability to execute natural law, by transferring all their rights (except the right of self-preservation) to a common public authority, which Thomas Hobbes refers to as Leviathan.[31] The Leviathan executes the law of nature and settles disputes on their behalf.[32] In this respect, Locke's strongest argument is that in the State of Nature, every individual has "the rights to life, liberty and property which were their own"[33] prior to their entry into the social contract or Civil Society. The Leviathan governs in accordance with the powers conferred upon it by the social contract, or what Rousseau refers to as the *General Will.*[34] According to Locke, a government which fails to fulfill its duty to protect the rights entrusted to it by individual contractors, or a government which itself "systematically invades" the rights of its own subjects has no right to obedience from the subjects. This suggests that a government is obliged to protect individual rights. Where it fails to do so, it forfeits both its right to govern and of the legitimacy of its office.[35] For Locke, thus, the concept of natural rights justifies revolt against political absolutism. In essence, Locke's contention underscores "an argument against arbitrary rule, against absolute

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[30] Jean-Jacques Rousseau, *The Social Contract and the Discourses*, Trans. G.D.H. Cole (London: Everyman, 1993), a general read.
[31] Thomas Hobbes, *The Leviathan*, Reviewed by A. P. Martinich (Peterborough: Broadview Press, 2005), especially Parts I and II.
[32] Jack Donnelly, "Human Rights and Western Liberalism...," *supra* note 29, at 34.
[33] Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed*, supra note 17 at* 37.
[34] Jean-Jacques Rousseau, *The Social Contract and the Discourses*, Trans. G.D.H. Cole, *supra* note 30 at 205.
[35] Jack Donnelly, *The Concept of Human Rights* (London: St. Martin's Press, 1985) at 27-44.

power, against unlimited royal prerogative and unconditional duty to obey, the right of conquest, tyranny, usurpation and so forth."[36]

The evolution of the rights conception from natural law to natural rights is important in the way it shifts emphasis from a communal or collective rights reasoning to an individual rights philosophy. Generally, natural law was deemed as the ultimate law against which the justness or unjustness of positive laws was determined. That is, in order to dispute or contest the validity of a public authority or justness of a human made law, an appeal was made to natural law which was understood to be synonymous with the law of God. Natural law eventually evolved into natural rights.[37] The latter were considered to be the practical manifestation of the former. In principle, an individual could directly appeal for redress by making specific claims (such as the right to property) on the basis of natural rights. Thus, natural law was basically distinguishable from natural rights in the sense that while natural law provided the basis for limiting excessive State authority visa-a-vis the individual, natural rights provided the basis for the individual to make specific claims against the State or government.[38]

In this sense, natural rights principles have contributed to the development of the human rights concept because they justified "an appeal from the realities of naked power to a higher authority which asserted human freedom and equality from which other human rights easily flowed both domestically and internationally."[39]

Most commentators identify the source of human rights with natural rights derived from natural law. The former is seen as having provided the crucible or philosophical foundation for the

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[36] Jack Donnelly, "Human Rights and Western Liberalism...," *supra* note 29 at 52.
[37] Neil Stammers, *Human Rights and Social Movements, supra* note 19 at 44-80.
[38] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism, Vol.6*. (London: Sage, 1990) at 48.
[39] Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed, *supra* note 17 at 38.

development of universal human rights.[40] Like the divine command, however, natural law and natural rights theories have been found to be just as vague as they are controversial. Essentially, theorists disagree as to their precise content. It is for their vagueness that legal positivists[41] ultimately rejected them.[42] Notably, since the end of World War II, specific or binding recourse is no longer had to the concepts of divine law, natural rights nor uncritical adherence to legal positivism. Instead:

> to judge whether a rational law is good or bad, just or unjust,... one may refer to the rules of international human rights law, as defined in the relevant human rights instrument which have been brought into existence since 1945.[43]

Nonetheless, recourse to the rules of international human rights law to judge the justness or unjustness of a law would come to pass more than one and a half centuries after natural law and natural rights ideas had inspired the 1776 American and 1789 French Revolutions respectively. The American and French Revolutions used the ideas of natural rights "as the basis for constructing new political orders."[44] In fact American and French constitutional values were based on this liberal political philosophy.

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[40] James Silk, "Traditional Culture and the Prospect for Human Rights in Africa," in Abdullahi Ahmed & Francis Deng, *Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Inst., 1990) at 21.

[41] As discussed later in Chapter 5, legal positivism, as opposed to natural law, is a theory which holds that what counts as law is what legitimate sources of law in the form of statutes, written rules, regulations, or legal principles expressly state as such. Law, according to this theory, what the government has recognised and handed down as law. For more discussion on this see Martin V. Totaro, "Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development" (2008) 48, *Virginia J. Int'l. L.,* 719 at 723-6.

[42] Legal positivism enjoyed tremendous currency till the end of the late 19th century. But following the tragedies of wars and violence in Europe, legal positivism ultimately fell out of favour with legal academics and philosophers.

[43] Paul Sieghart, *The International Law of Human Rights* (Oxford: Claredon, 1983) at 15.

[44] Jack Donnelly, *International Human Rights: Dilemma in World Politics..., supra* note 27.at 42.

1.2.4. The Age of Enlightenment and the American and French Revolutions

The development of natural law and natural rights theories arose against the backdrop of the Age of Enlightenment[45] that preceded the modern era[46] during which the notion of natural rights had become so central to European political thought that they ultimately provided the crucible for the Protestant Reformation and philosophical thought during the Age of Enlightenment.[47] In fact, the Lockean theory of natural rights and its emphasis on the idea that every individual human being "has the right to life, liberty and property and that the State is entrusted to protect these rights through the rule of law"[48] inspired the 18th century political thought in Europe and North America, especially in France and the United States.

As previously mentioned, the 1776 American Revolution and the subsequent Declaration of Independence[49] from Great Britain envisioned a free America premised on the values of the right to life, liberty, and the pursuit of happiness.[50] Indeed, the 1791 American Bill of Rights entrenched the right of conscience and religion, freedom of expression and the press, freedom of association, protection against unreasonable search and seizure and the right to procedural

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[45] The Age of enlightenment was a time in the 17th century during which the mode of thought in Europe shifted away from divine contemplation to intellectualism, rationalism or life of reason, individualism and science. This period strongly produced irresistible civilizing purchase in Western culture, leading to improvement in government practices, cultural and social attitudes, and more generally, the recognition that individuals have rights separate from that of the group. For more on this discussion see Wilkes Donald E. Jr., "The Anti-Enlightenment and Human Rights" (2008), *Popular Media*, Paper 164. http://digitalcommons.law.uga.edu/fac_pm/164 [retrieved on July 4, 2014].

[46] Modern era is the period that begun in 16th century and immediately preceded the Middle Ages. It is characterised by political revolutions (such the French Revolution) and industrial revolution. For more on this, see Edward Mead Earle,*An Outline of Modern History: A Syllabus with Map Studies* (Boston: Harvard UP, 1921).

[47] Michael F. Curry, "Losing Faith: Rationalizing Religion in Early Modern England" (2010) 11 *Intersections online,* 207 at 207-212, Steven Forde, "Natural Law, Theology, and Morality in Locke," (2001) *Am. J. Pol. Sc.,* 45, no. 2 at 397; and Christopher Hill, *The world turned upside down: radical ideas during the English Revolution* (New York: The Viking Press, 1972) at 147.

[48] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 2.

[49] The [American] Declaration of Independence (1776), available online at http://www.archives.gov/exhibits/charters/declaration_transcript.html [retrieved on May 22).

[50] *Ibid.,* at para. 2.

fairness or due process.[51] Similarly, the 1789 French Revolution which was based on the Declaration of the Rights of Man and the Citizen[52]was also based on a broad set of legal principles that were entrenched in the new French Constitution. This Constitution provided for the "right to life, liberty, property, security and resistance to oppression, equality before the law, freedom from arbitrary arrest, presumption of innocence, freedom of expression and religion and the right to property."[53]

It follows that the rights ideas conceived during the period of Enlightenment and the American and French Revolutions were unique because they dealt with the rights discourse in a philosophical context that emphasised the importance of the individual. More specifically, they dealt not only with the concepts of natural law and natural rights but also substantiated their formulations from abstract concepts to ideas that could be translated into practical legal programs, such as the right to denounce or change one's religion or the right to own property individually or in association with others. The end result was a philosophy of human rights that put the individual front and centre of legal protection.[54]

Thus, although the notion of individualism had long been an English idiom, it was the American and French Revolutions that gave it the necessary legal recognition, a significant step towards providing the foundation for the modern human rights regime. To the extent that the legal concept of the right to life, for instance, was incorporated in Article 1 of the *Universal Declaration of Human Rights*[55] (UDHR or Declaration), modern human rights concepts can

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[51] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials*..., *supra* note 9 at 2.
[52] The [French] Declaration of the Rights of Man and the Citizen (1789).
[53]Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 2.
[54] Mahmoud Mamdani, "The Social Basis of Constitutionalism in Africa...," *supra* note 16 at 359-360.
[55]*Universal Declaration of Human Rights*, UNGA, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 22 May 2014].

ultimately be traced back directly to the early Western ideas of natural rights that inspired new revolutions in that part of the world.[56]

1.3. Early Human Rights Movements

In the turn of the 19th century, arose many human rights movements such as those for the rights of religious and ethnic minorities, movements opposed to discrimination against women and colonialism, and those in favour of better laws of armed conflicts. However, it is the abolitionist movements that remain the best known early organized expressions of human rights norms.[57]

Generally, the activities of these movements provided the necessary legal impetus for the development of modern human rights, beginning with the establishment of the early human rights courts, particularly for the suppression and elimination of slavery, following the signing of bilateral treaties, initiated by the United Kingdom.[58] Signed between 1817 and 1871, these treaties between Britain and countries like Spain, Portugal and the Netherlands, culminated in the creation of the first anti-slavery human rights courts in 1819. These courts sat on a permanent basis and were presided over by judges who applied international law to free nearly 80 000 slaves, all of whom were found illegally aboard trading vessels.[59]

The creation of these courts followed the official ban of slavery in 1807 when the United Kingdom and the United States passed landmark legislations that 'criminalised' slavery.[60]

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[56] Tom Hadden, "Pendulum Theory of Individual, Communal and Minority Rights," in Simon Caney & Peter Jones, *Human Rights and Global Diversity* (London: Frank Press, 2011) at 78.
[57] Jenny S. Martinez, "The Anti-Slavery Courts and the Dawn of International Human Rights Law" (2007) 117 *The Yale L.J.* 550 at 554.
[58] Jenny S. Martinez, "Human Rights and History" (2012) 126 *Harvard. L. Rev.,* 121 at 26-36.
[59] Jenny Martinez, "The Anti-Slavery Courts...," *supra* note 57 at 552-3
[60] *Ibid.,* at 554.

Despite the enactment of these laws, the trans-Atlantic slave trade would continue for another 60 years.[61]

The early abolitionist movements were, thus, the most successful international human rights campaigns, not only because their work was boosted by the early human rights courts established under international treaties, but also by international networks of non-State actors. These anti-slavery campaigns played a significant role in changing public attitudes towards slavery and the need to improve working conditions.[62] But until then, human rights struggles were limited geographically. Again, the significance of these developments was that they aroused international interest in the creation of global human rights standards.[63]

1.4. Internationalising Human Rights: The League of Nations and Early Political Initiatives

Following the devastating impact of the First World War in Europe, the 1919 Versailles Treaty established the League of Nations (the League) to promote cooperation among Member States, keep the peace and to prevent threats to international order and security. Although the League did not extensively address broad-based human rights issues, it was able to address concerns of discrimination against religious and ethnic minorities, and the lingering vestiges of slavery, the rights of women and children as well as refugees.[64]

More importantly, however, there were contemporary efforts to introduce a wide range of international human rights principles and to make the protection of individual rights a fundamental objective of the League. For instance, the then United States President, Woodrow

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[61] Jenny Martinez, "The Anti-Slavery Courts...," *supra* note 57 at 553-4.
[62] Neil Stammers, *Human Rights and Social Movements*, *supra* note 19 at 70-80.
[63] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 2.
[64] *Ibid.,* at 2.

Wilson, put forward a proposal that would require the League Members "to pledge that they would make no law interfering with freedom of religion.[65]" Although this proposal was supported by U.S. allies, including the United Kingdom, it was ultimately dropped from the League's agenda following an additional suggestion by the Japanese representative, Baron Makino, that "the pledge should also include a commitment to equal treatment of all races and non-discrimination in the treatment of aliens."[66]

Wilson's proposal was ultimately jettisoned, probably because the Japanese demand ran counter to the political interests of the West, especially the United States where race relations were still at their crudest. Nevertheless, the fact that an institutionalisation of global human rights regime was part of the League's agenda was a significant step forward as it would lay the foundation for the future revival of the idea and the creation of modern human rights institutions. Wilson's ideas would later become instrumental and fundamental to the function of the successor of the League— the United Nations. The impetus to the development of human rights under the United Nations followed a speech by yet another American president, President Franklin Roosevelt, who succeeded President Wilson in 1933. In his 1941 speech to Congress, Roosevelt proclaimed four types of universal freedoms, namely, the freedoms of speech, conscience, freedom from want and from fear, saying that:

> in the future days, which we seek to make secure, we look forward to a world founded on four essential human freedoms. The first is freedom of speech and expression everywhere in the world. The second is freedom of every person to worship God in his [or her] own way everywhere in the world. The third is freedom from want which, translated into world terms, means economic understanding which will secure to every nation a healthy peace-time life for its inhabitants—everywhere in the world. The fourth is freedom from fear which, translated into world terms, means a world-wide reduction of arrangements to

[65]Virginia Leary, "Effect of Western Perspectives on International Human Rights," in Abdullah Ahmed An-Na'im & Francis Deng Eds., *supra* note 10 at 19.
[66] *Ibid.*

> such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour—anywhere in the world.[67]

These political initiatives by both Presidents Wilson and Roosevelt and their allies would ultimately become the catalyst for the future development of human rights under the auspices of the United Nations (UN).

1.5. The United Nations and the Universal Declaration of Human Rights

The failure of the League to prevent international conflict, necessitated the creation of a global institution that would be more inclusive, more proactive and more effective than the League. At the end of the Second World War, the international community, under the leadership of the United States, agreed to establish a centralised global system—the United Nations. Under its Charter,[68] the UN was conceived on the promise of economic development and effective enforcement of international law. On October 24, 1945, the League gave way to the UN which came into existence with a global membership of 51 sovereign States.[69] As of 2014, this membership has nearly quadrupled with 193 full-fledged Member States.[70]

During the drafting of the UN Charter in San Francisco, California, Edward Stettinius, a former U.S. Secretary of State, strongly argued that human rights protection must be at the heart of the new organisation. He specifically urged that Roosevelt's four freedoms and related rights concepts be incorporated into the relevant UN documents, particularly the UN Charter. Stettinius' urging bore fruit. For instance, although vague, the most relevant provisions of the

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[67] Franklin Roosevelt, "Address of the President of the United States" (1941), 87 *Congressional Record Vol. 87,* part I (Washington D.C.:, Government Printing Office, 1941) at 47.

[68] *Charter of the United Nations* (1945) 1 UNTS XVI.

[69] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 2.

[70] United Nations, "Human Development Index" (2014), United Nations Development Program, available online at: https://data.undp.org/dataset/Table-3-Inequality-adjusted-Human-Development-Inde/9jnv-7hyp [retrieved on June 10, 2014].

Charter that relate to human rights are those in Articles 55 and 56, both of which were later the first to be given practical "content" through the adoption of the 1948 Universal Declaration of Human Rights (UDHR).[71]

The drafters of the UDHR in San Francisco represented various States and regions of the world. Although a significant and influential majority were from Europe and North America, there were also non-Westerners (many of whom, however, had received their education in the West). The leading member of the Committee was a Canadian, John P. Humphrey, who was at that time the Director of the Division of Human Rights at the UN Secretariat. Other leading members were P.C. Chang of China (now Taiwan), Charles Malik of Lebanon, René Cassin and Jacque Maritain of France, Eleanor Roosevelt of the United States (the Chairperson of the Commission), and Hansa Mehta of India.[72]

As Secretary of the group, Humphrey was charged with the responsibility to put the first draft together. He got most of his provisions from the proposed declarations which were submitted to the Committee by various Western organisations and individuals. These declarations closely followed the provisions of the French Declaration on the Rights of Man and Citizen (DRMC), the U.S. Bill of Rights and the U.S. Declaration of Independence. The proposals from Latin America drew inspiration from the Inter-American Declaration on the Rights and Duties of Man which had extensive provisions on economic, social and cultural rights.[73]

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[71] Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights* (Indianapolis: Bobs-Merril, 1973) at 509.

[72] Albert Verdoodt, *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme* (Louvain-Paris: Edition Nauwelaerts, 1963) at 332-4. Also see Virginia Leary, "Effect of Western Perspectives on International Human Rights," *supra* note 10 at 20.

[73] Albert Verdoodt, at 57-8, 61.

The drafting process, however, was not devoid of controversy. For instance, the inclusion of economic, social and cultural rights in the Declaration raised eye-brows in the West just as did the extensive provisions on civil and political rights become a cause for concern among non-Westerners.[74] Humphrey was, for instance, asked by P. C. Chang to explain what philosophical doctrine informed and provided the basis for his first draft. To this question, Humphrey replied that he did not base his draft on any particular philosophy or doctrine.[75]

Most accounts tend to agree that even though Humphrey was tactically able to evade the question, it was obvious that his civil and political rights provisions were drawn mainly from the American and French revolutionary ideas, while the provisions on social and economic rights were evidently borrowed from the Latin American proposals.[76] Humphrey's draft was finally submitted to the Committee for revision. It is believed that much of the editorial work was done by René Cassin of France whose version was ultimately adopted by the Committee. It is for this reason that Cassin is often cited as the author of the Declaration.[77] Having regard to the relevant facts, however, such an attribution is most probably misplaced. If Caesar should be granted his due, then one would think that Humphrey deserves the accolade as the author of the UDHR. Notwithstanding his or her editorial contribution, no editor should receive the distinct honour of authorship for work done by an entirely different person.

Despite the emphasis on human rights, the San Francisco Conference did not have the time to draft a broad-based catalogue of human rights; it was decided that detailed provisions on human rights should be left to the General Assembly of the UN. It would take nearly 20 years before the

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[74] John Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Dobbs Ferry, 1984) at 2, 31-32.
[75] Virginia Leary, "Effect of Western Perspectives on International Human Rights," *supra* note 10 at 21.
[76] I. Szabo, "Historical Foundations of Human Rights and Subsequent Developments," in Karel Vasak & Philip Alston, Eds., *The International Dimensions of Human Rights,* Vol. 1 (Westport: Greenwood, 1982) at 11-42.
[77] Virginia Leary, "Effect of Western Perspectives on International Human Rights," *supra* note 10 at 21.

International Covenant on Civil and Political Rights[78] (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* [79](ICESCR) were ultimately adopted. The development of modern human rights would, in the meantime, proceed on the basis of the framework provided by the Declaration and on the basis of the precedent created by the Nuremberg Trials under the *Nuremberg Charter*.[80]

1.6. The Nuremberg Trials: A Seminal Moment of Individual Rights Protection.

While the foregoing outlines incremental steps toward a full-fledged establishment of the international human rights regime, it was the devastating effects of the World War II and the resulting Nuremberg Trials that provided the necessary impetus for such developments.

The events of the Second World War were very dramatic. This led to the contention that the concept of legal positivism implied that what States did to individuals inside their borders was insulated from external criticism. The efforts to repudiate the validity of the legal positivist theory were in part due to the "revulsion against Nazism which revealed the horrors that could emanate from a positivist system in which the individual counted for nothing."[81]

Recourse had to be had to a new legal thought which represented a seismic shift from the international law's preoccupation with States to individual rights protection irrespective of territorial residency.[82] Under the authority of the Nuremberg Charter, the Nuremberg Trials of individual Nazis accused of massacring nearly six million Jews and millions of other non-Jews set a unique precedent by introducing the concept of *individual criminal responsibility* for

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[78] *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171.
[79] *International Covenant on Economic, Social and Cultural Right* (1993) 993 UNTS 3.
[80] *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the Major war criminals of the European Axis* (1945) 8 UNTS 280.
[81] Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed*, supra* note 17 at 43-3.
[82] E. Messer, "Pluralist Approach to Human Rights" (1997) 53*, J. of Anthrop. Res*. 293 at 299.

international crimes committed by individuals either of their own accord or on behalf of a State.[83] This concept was clearly a "marked departure, an innovation, from existing customary or treaty law, as were the notion of crimes against peace and crimes against humanity."[84] In effect, the Nuremberg Trials not only gave rise to modern international criminal law but are, indeed, "the seminal moments in the turn to international law as a mechanism for protecting individual rights."[85] The emphasis on individual criminal responsibility was not intended to shift accountability away from States. Rather, the emphasis was intended to put weight on the recognition that the horrors of state-sponsored mass murders of certain groups of people based on their identities were fully accounted for by punishing all the parties, including individuals: the operating minds of such human rights violations.[86]

This historical survey shows that the creation of the contemporary international human rights regime was, by and large, prompted by various historical events that made it necessary to create an international system to regulate State power and to protect individual and group rights from state-induced abuses and horrors such as the Holocaust.[87] The net result of the rights evolution thus provided a solid foundation for the contemporary understanding of the human rights corpus.

1.7. The Contemporary International Human Rights System and the Question of Universality

The foregoing has outlined the process that ultimately led to the adoption of the UDHR which, as discussed, was not without controversy. Besides the debate surrounding the suitability of either

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[83] Lynn Sellers Bickley, "U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?" (2000) 14 *Emory Int'l L. Rev.* 213 at 265.

[84] Makau Mutua, "Never Again: Questioning the Yugoslav and Rwandan Tribunals" (1997) 11 *Temp. Int'l & Comp. L. J*. 167 at 171

[85] Jenny S. Martinz, "The Anti-Slavery Courts..." *supra* note 57 at 554.

[86] Thomas Franck, "Individual Criminal Liability and Collective Civil Responsibility" (2007) 6, *Washington UN. Glob. Stud. L. Rev*. 567 at 572.

[87] E. M. Zechenter, "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" (1997) 53 *J. Am. Anthrop. Res*.53 at 319-20.

civil and political or economic, social and economic rights, there were also heated debates in respect of whether the Declaration should be considered binding.[88] While the mainstream view now is that the Declaration contains some core customary international human rights norms, the fact that the UDHR could be interpreted either way (see Chapter 3 for more explanation) necessitated, in part, the adoption of two other international human rights instruments.[89]

By 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted. The two Covenants and the UDHR constitute the International Bill of Human Rights (IBHR) which provides an authoritative statement on international human rights values. In other words, the IBHR mandates the fulfilment of "the minimum social and political guarantees recognised by the international community as necessary for a life of dignity in the contemporary world."[90] With some reservations, these documents have been ratified by most States, suggesting that most States have expressly agreed to be bound by the standards established by these and other human rights instruments, such as those dealing with racial discrimination, women's and children's rights or with torture.[91]

When the UDHR was adopted by the United Nations in 1948, it was generally assumed that human rights, by their very nature, are inherently universal. It was also assumed that the rights values enshrined in the Declaration and reaffirmed in 1966 by the ICCPR and ICESCPR, as well as by other international human rights instruments, would apply globally, irrespective of

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[88] D.J. Driscoll, "The Development of Human Rights in International Law," in W. Laqueur & B. Rubin, Eds., *The Human Rights Read* (New York: New America Library, 1979) at 4-5, 41-56.
[89] IIdiko. Szabo, "Historical Foundations of Human Rights and Subsequent Developments...," *supra* note 76 at 29.
[90] E. Schwelb & P. Alston, "The Principal Institutions and Other Human Rights Bodies Found in the Charter ," in Karel Vasak & P. Alston, *Eds., The International Dimensions of Human Rights*, Vol. 1 (Westport: Greenwood Press, 1982) at 254-260.
[91] Jack Donnelly, *International Human Rights: Dilemma in World Politics, supra* note 27 at 8.

differences as to culture, religion, political ideology or public policy priorities.[92] However, following the independence of many African and other States in the developing world, a litany of concerns has arisen as to the legitimacy of the international human rights regime, particularly in respect of the extent to which human rights are or ought to be considered universal.

As they have taken their respective places in the society of nations and asserted themselves in fundamental ways, the arrival onto the world stage of these post-colonial African countries (most of which were under or were just emerging from colonial rule at the time the UDHR was adopted) has posed a significant challenge, if not a threat, to the presumption of the universality of human rights standards. As will be explored in more detail throughout this thesis, these States advance a number of arguments in respect of their concerns as to the appropriateness of this presumption. For instance, many States and their elites, especially from Asia and Africa, argue that their regions were either not represented or under-represented during the drafting, deliberation and subsequent adoption of these instruments.[93] They also argue that much of the content of the human rights regime is alien to them. In particular, they cite cultural differences as the key feature that distinguishes their conception of human rights from that of the West. In specific terms, they argue that while Western culture is predicated on individualism—which in whole or in part provided the basis upon which the international human rights regime was conceived—their cultures, by contrast, are founded on collectivism, or the idea that an individual does not have a separate existence from that of the group.[94] For non-Western societies, it is argued that individual rights are generally subsumed under the rubric of group rights. As such, the insistence on the part of the West to apply human rights concepts to non-Western societies,

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[92] Francis Deng, *Identity, Diversity and Constitutionalism in Africa …*, *supra* note 6 at 145.
[93] Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (Albany: State University of New York Press, 2007) at 1–28.
[94] Makau Mutua, "Savages, Victims and Saviours: The Metaphor of Human Rights" (2001) 42 *Harvard Int'l L. J.,* at 201-245.

holus bolus, is viewed as tantamount to manifest imperialism and disrespect for non-Western cultural values.[95] It is for this very reason that in its short duration, the human rights regime has been viewed by much of the developing world as a modern form of subordination or Western imperialism.[96]

To the extent that the liberal individualist West prefers civil and political rights (CPRs) over economic, social and cultural rights (ESCRs), while the collectivist non-Western societies arguably prefer ESCRs as well as solidarity rights over CPRs, the discrepancy between human rights standards and cultural norms essentially gives rise to "an opposition between universalism, in the form of a transnational, but European derived conception of rights, and relativism in the form of respect for cultural differences."[97]

While this debate rages, the elephant in the room is that unacceptable levels of human rights violations are taking place on a daily basis. Africa, in particular, has been the scene of perhaps the worst human rights violation, in the last 30 years especially. These violations arise from the actions of both States (such as genocides) and non-State actors,[98] as well as from the continuation of harmful cultural practices, such as female genital mutilations (largely practised in Muslim majority African countries like Sudan and Somalia), double limb amputations (again exclusively practiced in Muslim cultures), or ritual sacrifice of individuals born with albinism (commonly practised in Tanzania).

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[95] Diana J. Fox, "Women's Human Rights in Africa: Beyond the Debate Over the Universality or Relativity of Human Rights" (1998) 2 *Afr. Stud. Qrtly*., 3 at 8-10.

[96] Makau Mutua, "What is TWAIL?" (2000), Proceedings of the 194th Annual Meetings, *The America Society of International Law*, at 31.

[97] Sally E. Merry, "Changing Rights, Changing Culture...," *supra* note 8 at 32.

[98] John H. Knox, "Report of the Independent Expert on the Issue of human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment" (2012), *Human Rights Council*, UNGA, A/HRC/22/43 at 12-17.

In the context of this debate, this thesis seeks to establish how the argument for the universality of human rights standards can be made with regard to their application to post-colonial Africa. The arguments for this are set out especially in Chapter 5.

1.8. The Spread of Human Rights Practice: Regional Human Rights Systems[99]

In recognising that human rights values are not entirely divorced from cultural contexts and in order to alleviate the stalemate between cultural relativism and universalism, the United Nations has accepted that alongside the global human rights regime, the enforcement of human rights can also take place at regional levels. For this reason, tremendous efforts have been made to develop distinctive regional human rights concepts with the goal to mitigate the tension between universalism and specific cultural rights values.[100] While there are many regional human rights regime, this discussion will be limited to three major regional human rights regimes for Europe, the Americas and Africa. Each of these systems is briefly discussed below.

1.8.1. The European Human Rights System

Based in Strasbourg, France, the European human rights regime is one of the oldest human rights systems in the world. It was initiated by the signing of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*[101] in 1950 and its entry into

[99] The ddiscussion on international human rights Covenants is more complex than the discussion on regional human rights regimes. Because of this complexity, this thesis will not be dealing with discussion on the practice, enforcement mechanisms, and monitoring of the implementation of the two international human rights Covenants.

[100] Alison Renteln, *International Human Rights Universalism versus Relativism...*, *supra* note 38 at 35.

[101] *European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 11 ETS 5.*

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force in 1953. As of 2014, the ECHR has 47 Member States with a population of about 820 million people.[102]

The adoption of the ECHR was based on at least two assumptions. First, it was thought that the inauguration of ECHR would serve as a collective regional response to the heinous atrocities of the Second Word War. The idea was that governments that observe human rights are less likely to be aggressive against other States. Second, by extension, it was specifically believed that the ECHR would be a deterrent to Germany (having been perceived as an aggressor), making it a force for peace, if fully integrated into a European Community.[103] From the look of things, these reasons have, arguably, been vindicated.

The main objectives of the ECHR are to protect and promote human rights, the rule of law and democracy. In pursuit of this goal, the ECHR seeks to supervise and monitor the protection of human rights and fundamental freedoms, support and promote democratic, and political, and legislative reforms, cultural diversity and training on human rights.[104] It also identifies multivariate forms of social threats and tries to find solutions to them. As well, the ECHR promotes equality between sexes and mandates Member States to promote and protect CPRs and a few ESCRs within their jurisdictions.[105] The European Court of Human Rights has emphasised that, pursuant to Article 1 of the Convention:

> it is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its

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[102] Council of Europe, "Secretary General Thorbjørn Jagland: Europe in Biggest Human Rights Crisis Since the Cold War"(2014), available online at: http://hub.coe.int/en/web/coeportal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1840811&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=0 [retrieved on June 10, 2014].

[103] Henry Steiner & Philip Alston, *International Human Rights in Context, Law, Politics and Morals: Text and Materials Second* Edition (Oxford: OUP, 2000) at 786.

[104] Luzius Wildhaber, "The European Court of Human Rights in Action" (2004) 21, *Ritsumeikan L. Rev.* 83-92.

[105] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 46-48.

> provisions, the Court exerting its supervisory role subject to the principle of subsidiarity.[106]

Being one of the oldest human rights systems, the ECHR was not only the first comprehensive human rights treaty to institute an international complaint process and thus provides a means for redress of individual cases: it is also the most judicially developed international human rights regime, and hence has the world's most extensive jurisprudence on human rights.[107]

The main judicial body under the ECHR is the European Court of Human Rights (the Court) whose primary purpose is to ensure that States comply with their obligations under the treaty. Another important institution created by ECHR is the European Council of Ministers. Each of these bodies derives its legal authority from the ECHR Charter.[108] The Convention permits States and individuals (Article 24) and non-governmental organisations (Article 25) to lodge complaints against a State Party directly "to the Court, or the Council of Ministers, whose decisions are binding."[109]

1.8.2. The Organisation of American States

Based in Washington D. C., the Organisation of America States (OAS) is the oldest of the three major regional human rights systems, having been created by the *Charter of the Organisation of American States (COAS)*[110] which entered into force in 1948. Other important legal documents are the *American Declaration on the Rights and Duties of Man*[111] and the *Inter-American*

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[106] *Z. and Others v. the United Kingdom* [200], ECHR 2001-V, 103.
[107] Henry Steiner & Philip Alston, *International Human Rights in Context, Law..., supra* note 103 at 786.
[108] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials…, supra* note 9 at 48.
[109] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 38 at 36.
[110] *Charter of the Organisation of American States*, (OAS) 30 April 1948, available at: http://www.refworld.org/docid/3ae6b3624.html [accessed 23 May 2014].
[111] *The Inter-American Declaration of the Rights and Duties of Man* (1948) 159, AG/RES (XXVIII-0/98).

Convention on Human Rights.[112] As of 2014, OAS has 35 Member States from North America, the Caribbean and Central America.[113]

The most important judicial institutions under OAS are the Inter-American Commission on Human Rights (created under the OAS Charter) and the Inter-American Court on Human Rights (created by the Convention). The primary objective of the OAS is to strengthen collaboration among Member States, promote peace and Security, democracy, socio-economic development and alleviate poverty. With a broad jurisdiction to receive human rights complaints, the Commission has interpreted its jurisdiction and powers liberally and broadly so as to be able to effectively carry out its investigative functions. It investigates individual complaints to establish their merits under Article 47. Once the Commission has established the merit of a complaint, a preliminary report on merits is subsequently sent to a violating State which is then advised to remedy the defect under Article 48. Where a State fails to follow the Commission's recommendation within a given timeframe under Article 46, the Commission then publishes a final report that includes its legal opinion and recommendations and forwards it to the Court for a binding decision.[114] Once the Court receives complaints referred to it by the Commission for adjudication, its subsequent decision is final and is not subject to appeal.[115]

1.8.3. The African Human Rights System

The African human rights system is the most recent and the least developed of the three major regional human rights institutions. The African Union (AU) is the main regional organisation which aims to integrate the continent economically, culturally and socially and to strengthen

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[112] *Inter-American Convention on Forced Disappearance of Persons) 1994)* 68, OASTS 33 ILM 1429.
[113] Organisation of American States, "Member States" (2014), online at: http://www.oas.org/en/member_states/ [retrieved on June 11, 2014].
[114] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 60.
[115] *Ibid*., at 54.

solidarity among its diverse peoples.[116] As of 2014, the AU membership stands at 54 when South Sudan became its 54th Member State, following the latter's independence from the Sudan in 2011.[117] With the exception of Morocco[118] which withdrew its Membership in 1985 following the Organisation of African Unity (OAU)'s recognition of the (still) disputed Western Sahara as a self-governing territory, all African States are Member States of the AU.[119]

The AU became the successor organisation to the now-defunct OAU, the latter having been formed in Addis Ababa, Ethiopia, in 1963.[120] At the time of its formation, the OAU's primary function was to eradicate colonialism on the continent.[121] In other words, "the most important goal of the OAU from its inception in 1963 was to support the struggle for political independence of all colonies in Africa."[122] However, for reasons beyond the scope of this chapter, the OAU was not successful in addressing many important issues affecting post-colonial African societies. This led to its demise in 2001.[123] As a consequence, the AU was instituted with a more robust mandate, relative to its predecessor. For instance, the AU's mandate has expanded to include the protection and promotion of human rights on the continent. Pursuant to this objective, African leaders have committed to promote and protect human rights, good governance, democracy, popular participation in the political process, justice and the rule of law,

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[116] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 64.
[117] African Union, *The African Union Handbook 2014, First Edition* (Addis Ababa: African Union Commission, 2014) at 12.
[118] All African States are Member States of the AU and recognise Western Sahara as a self-governing territory. This recognition resulted in the withdrawal of Morocco's membership from the AU because Morocco claims that Western Sahara is part of its territory. See Institution for Security Studies Africa, "The AU" (2014), available online at: http://www.issafrica.org/topics/african-union [retrieved on June 11, 2014].
[119] The African Union (AU) is the successor organisation to OAU which ceased to exist in 2001.
[120] Exploring Africa, "The Birth of the African Union" (2014), available online at: http://exploringafrica.matrix.msu.edu/students/events/africaunion.php [retrieved on June 11, 2014].
[121] Henry Steiner & Philip Alston, *International Human Rights in Context, Law, Politics and Morals: Text and Materials Second* Edition (Oxford: OUP, 1996) at 690
[122] Exploring Africa, "The Birth of the African Union...,"*supra* note 120
[123] *Ibid.*

respect for human rights and equality of sexes as well as eradication of political and criminal impunity.[124]

The AU's commitments to human rights actually stem from the OAU's initiatives following the adoption of the *African Charter on Human and Peoples' Rights*[125] (ACHPR also known as the Banjul Charter) in 1981, in Banjul, The Gambia. The Charter came into force in 1986.[126] As part of the AU's human rights mandate, the Banjul Charter requires Member States to cooperate and coordinate with one another to improve and achieve a better life for the people of Africa. It also mandates States to promote international cooperation in line with the UN Charter and the UDHR.[127]

The Banjul Charter is distinguishable from any other international and regional human rights documents in two main respects.[128] First the African human rights system is the only international human rights regime that concurrently protects ESCRs and CPRs in a single instrument. This integration clearly underscores the fact that human rights are, indeed, indivisible, interdependent and interrelated. Second, the Banjul Charter recognises the rights of people to self-determination far more broadly than all other international legal instruments. Under the Banjul Charter, the right of self-determination includes the right of people to be free from colonial domination, to freely dispose of their wealth, their national resources, the right to social and cultural development, and the right to national and international peace and security.

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[124] *The Constitutive Act of African Union*, Preamble & Arts. 3 & 4.
[125] *African Charter on Human and Peoples' Rights ("Banjul Charter")*, OAU, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html [accessed 26 May 2014].
[126] B. Ndiaye, "The Place of Human Rights in the Charter of the Organisation of African Unity," in K. Vasak. & P. Alston, Eds., *The International Dimension of Human Rights, Vol. 2* (Westport: Greenwood Press, 1982) at 610.
[127] Henry Steiner & Philip Alston, *International Human Rights in Context, Law..., supra* note 121.
[128] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 9 at 66.

Self-determination also includes the right of people to a healthy and satisfactory development.[129] In so recognising both CPRs and ESCRs—and in contrast to other human rights systems— the Banjul Charter makes clear the African view that there is a fundamental nexus between the concept of individual rights and the notion of peoples' right to self-determination as two legal principles that are interrelated and mutually reinforcing.

The main human rights institutions under the African human rights regime are the African Commission on Human and Peoples' Rights (the Commission), and the African Court on Human and Peoples' Rights (the Court). The Commission was created under the Charter in 1987 to provide an "oversight and interpretation of the Charter."[130] Under Articles 45 and 47-51 of the Banjul Charter, the Commission has jurisdiction to deal with a broad range of issues including the promotion and protection of human rights, conducting field studies and making reports on their findings. It is also empowered to receive individual and inter-State communications or petitions.[131] It receives and assesses cases on admissibility and merits, having regard to facts. Once it has established merits, the Commission (whose decision is quasi-judicial in character hence non-binding) makes a preliminary report and recommends the violating State to informally remedy the breach. Where the State does not honour its obligation as recommended, the Commission ultimately makes the final report and submits the case to the Court for final adjudication.[132]

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[129] The *Banjul Charter*, Arts. 20-25.
[130] *African Commission on Human and Peoples' Rights*, "African Charter on Human and Peoples' Rights," available at http://www.achpr.org/instruments/achpr/ [retrieved on June 5, 2014].
[131] The African Commission on Human and Peoples' Rights, "Circle of Rights: Economic, Social and Cultural Rights: A Training Resource" (2014), *Human Rights Resource Centre*, Module 28, online at: http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm [accessed on July 5, 2014].
[132] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials…*, *supra* note 9 at 70.

The Court has 'compulsory jurisdiction' to adjudicate on matters that have been submitted to it by the Commission, Member States or inter-governmental organisations.[133] In addition, the Court has an 'optional jurisdiction' to adjudge matters brought before it by individuals and/or any non-governmental organisations that have been granted an observer status by the AU. The Court is also empowered to provide non-binding advisory opinions often at the request of Member States or observer, so long as the case for which the judicial opinion is being sought is not under any judicial consideration by the Commission, or by any court of competent jurisdiction on the territory of any Member State.[134] This how the system would operate in principle, but whether any of these is functional is another issue altogether.

The foregoing demonstrates that the development of human rights has come a long way. Though far from perfect, the international system of human rights owes its existence to incremental works of individual States, organisations and individuals. And whereas it is true that certain parts of the world have contributed more to its development and promotion, international human rights cannot be considered as work or heritage of a particular cultural tradition.

Once again, this thesis seeks to establish that most of the human rights values enshrined in the International Bill of Human Rights are inherent and universal and that they are applicable to Africa, contrary to the prevailing African argument that human rights are alien, and therefore inappropriate for application to Africa. In other words, the thesis suggests that there are core human rights norms that are so essential that, as envisioned by the international human rights regime, they must be considered universal.

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[133] *African Commission on Human and Peoples' Rights...*," *supra* note 130.
[134] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials*, *supra* note 9 at 70.

Chapter 2: Definition and Scope of International Human Rights

2.1. Human Rights: A Definition

One of the significant challenges in dealing with the notion of human rights and their application in contemporary society is the lack of a precise or conventionally agreed definition of the concept. In part, this imprecision arises from the wide variability of national cultures, political ideologies, legal traditions and religious customs. This variability, in turn, affects the way human rights are or would be defined and applied by each tradition as absence of a global consensus on human rights values makes room for cultural, ideological and religious differences to inform what definitions of the concept a society adopts. For instance, as opposed to a Western definition of human rights that is imbued with the pre-eminence of sacralised individual rights,[1] an African definition would be informed by the African concept of 'collective rights' just as an Islamic definition would include unique Islamic conceptions of the same. Other traditions such as Confucianist or Buddhist orientations would similarly define human rights in accordance with their cultural understanding of the concept. Such global discrepancies create uncertainty as to the precise content, understanding or interpretation of human rights. This consequently makes the universal definition of human rights quite untenable as any attempt to arrive at such a definition runs the risk of not only being underinclusive but also being less meaningful to those that are apparently excluded by such a definition.[2] For the purposes of this work, nonetheless, a working definition is necessary.

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[1] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism* Vol. 6 (London: Sage, 1990) at 40-1.

[2] Santino M. Dau, "The African Concept of "Collective Rights:" Does it Still Endure?"(2013), LL.M., *Schulich School of Law*, Dalhousie University [Unpublished], at 3.

2.1.1. Tracing the Definition

2.1.1.1. Rights versus Claims

For quite a number of legal scholars and philosophers, the term *right* is generally synonymous with the term *claim*.[3] In this sense, a right may be described as "a justifiable claim, on legal or moral grounds, to have or obtain something or to act in a certain way."[4] Feinberg contends that "to have a right is to have a claim to something and against someone, the recognition of which is called for by legal rules, or in the case of moral rights, by the principles of an enlightened conscience."[5]

Legal rights are, however, different from *claims* in the sense that "although rights do not have absolute priority, they do typically have *prima facie* priority over competing claims."[6] Similarly, a right is distinguishable from demand because a right "is justified, either by the appeal to pre-existing legal rules or to morality,"[7] whereas a demand can sometimes be arbitrary and in fact unreasonable. Generally, thus, a right is not only a valid legal claim[8] but it is essentially "a claim that people are entitled to make on others or on the society at large by virtue of their status."[9]

2.1.1.2. Human Rights as Valid Legal Claims

Human rights have been defined by some scholars as 'special types' of legal rights which are not just fundamental but also "paramount moral rights."[10] Others define human rights as "claims

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[3] J. Feinberg, *Social Philosophy* (New Jersey: Englewood Cliffs, 1973) at 64-66.
[4]Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism, supra* note 1 at 40.
[5]Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy First Ed.* (New Jersey: Princeton University Press, 1980) at 159-60.
[6]Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Ed.* (Denver: Westview, 2007) at 22.
[7]Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism*, *supra* note 1 at 40.
[8] *Ibid.*
[9] Kwasi Wiredu, "An Akan Perspective on Human Rights," in Abdullah Ahmed An-Na'im & Francis Deng, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 243.
[10]Jack Donnelly, *International Human Rights, 3rd Edition ..., supra* note 6 at 22.

that people are entitled to make simply by virtue of their status as human beings."[11] In this sense, human rights are specifically seen as unique, cross-cultural, *or sui generis* legal claims because they are claims with trans-cultural attributes and application, hence are considered to be claims that are so important that they "cannot be outweighed by any other considerations."[12]

The most widely occurring and cited definition, however, is that human rights are legal entitlements that are so fundamental that they must be considered "universal moral rights...[of] which no one anywhere may be deprived without a grave affront to justice."[13] In this case, the term 'justice' refers to the constant determination and "perpetual will to render" to every human person what is his or her due, ratified by moral and legal rules of fairness and natural justice.[14] From a cross-cultural perspective, Marks and Claphan go further to define human rights as those "rights or claims one has because he or she is a human being, rather than because he or she belongs to a particular political [or cultural] community."[15]

Since there exists a broader conception of the human rights concept, the definition of human rights, for the purposes of this thesis, is limited to legal rights or claims that are cognizable and are therefore potentially enforceable. It is worth emphasising again that "a legal right is a right that enjoys the recognition and protection of the law. Questions as to its existence can be resolved by simply locating the relevant legal instrument or piece of legislation."[16] In light of this

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[11]Kwasi Wiredu, "An Akan Perspective On Human Rights," in An-Na'im and Deng, *supra* note 9 at 243.
[12]Jerome Shestack, "Philosophic Foundations of Human Rights," in J. Symonides Ed., *Human Rights: Concepts and Standards* (Aldershot: Ashgate and UNESCO, 2000) at 33.
[13] Maurice Cranston, "Are There Any Human Rights?"(1993) 112 *Daedulus* 4 at 12-13.
[14] David Miller, "Justice" in David Miller, Ed., *Blackwell Encyclopaedia of Political Thought* (Oxford: Basil, 1987) at 260.
[15] Susan Marks & Andrew Clapham, *International Human Rights Lexicon* (Oxford: OUP, 2005) at 387.
[16] Andrew Fagan, "Human Rights" (2014), *Internet Encyclopedia of Philosophy*, available online at: http://www.iep.utm.edu/hum-rts/ [retrieved on July 1, 2014].

discussion, the relevant definition of human rights pertains to those rights that are 'concrete and not abstract' and therefore enforceable under the regime of international human rights.[17]

For this chapter, human rights refer to "rights of every single human being, regardless of jurisdiction or other factors such as ethnicity, nationality, or religion, to be treated with an attitude expressing that his or her *dignity* and *intrinsic* value as human being is important."[18] Since human rights are intended to protect the intrinsic worth of the human person, they must fundamentally be considered inviolable, subject to such limitations as may be prescribed by a just and reasonable law.[19] For example, while the right to life is an inalienable one, some States have insisted that capital punishment is a permissible form of punishment under their domestic laws. Even the international human rights regime appears to condone capital punishment. For instance, Article 6 (1) of the ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[20] This suggests that an individual may be deprived ("non-arbitrarily) of such a right only in accordance with the principles of fundamental justice. For greater certainty, Article 6 (2) of the ICCPR states that:

> in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.....[21]

Even the Second Optional Protocol to the ICCPR which urges States to abolish death penalty allows States to take only necessary steps to abolish capital punishment within their jurisdictions but does not go far as to ban capital punishment in its entirety.[22]

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[17] Paul Gaffney, *Ronald Dworkin on Law as Integrity: Rights as Principles of Adjudication* (Queenston: Mellen University Press, 1996) at 84.
[18] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials* (London: BIIC Law, 2008) at 4.
[19] *Ibid.*
[20] *ICCPR, Art.* 6 (1).
[21] *Ibid.,* Art. 6 (2).

2.1.2. The Nature and Features of Human Rights

The definition of human rights which I adopt for the purposes of this chapter underscores the fundamental aspects of the nature and characteristics of international human rights.

First, the definition emphasises that human rights are *inherently universal* in that they are possessed by all human beings[23] and hence, apply "only to human beings."[24] Second, being legal claims to which everyone, by virtue of his or her humanity, is entitled, human rights "must be possessed *equally* by all human beings,"[25] since "we either are or are not human beings equally."[26] Third, since human rights are possessed by all human beings, we can easily rule out certain rights such as those that individual persons might possess by virtue of their status as parents or public officeholders, for example, as falling outside the scope of human rights.[27] Forth, given that human rights are universal and possessed equally by all human beings, they are inherently *inalienable* subject to such reasonable constraints as may be prescribed or 'guaranteed by law.'[28] Fifth, human rights must be assertable or claimed by any individual or group 'against the whole world.' Along these lines, Donnelly suggests that:

> one 'needs' human rights principally when they *are not effectively guaranteed* by national law and practice. If one can secure food or equal treatment through national legal process, one is unlikely to advance a human rights claim.[29]

The corollary to this is that human rights, by their very nature, have an empowering capacity. They are, as such, the idiomatic "language of the *victim and the dispossessed*. They usually seek

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[22] *Optional Protocol to the International Covenant on Civil and Political Right (1996) 999 UNTS* 171, Art. 1 (2).
[23] This discussion is in this thesis only limited to 'human rights,' notwithstanding the fact that there is a live debate as to whether similar rights should be extended to non-humans, such as animals, in order to end or eliminate animal suffering and adopt a robust protectionist approach to animal welfare. For more discussion on animal rights, an interested reader may refer to Clare Palmer, *Animal Rights* (Aldershot: Ashgate, 2008).
[24] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism*, *supra* note 1 at 47.
[25] *Ibid.*
[26] Jack Donnelly, "Relative Universality of Human Rights" (2007) 29 *H.R. Qrtly* 281 at 282.
[27] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism*, *supra* note 1 at 47.
[28] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials*, *supra* note 18.
[29] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Edition..., supra* note 6 at 22.

to alter legal or political practices."[30] To claim one's human rights is to seek to change political and economic structures and practices so that it is no longer necessary to make a human rights claim, since the very practices that lead to violations of human rights will have been eradicated when they are sufficiently observed by the institutions or individuals who often violate them.[31] Sixth, "the subject of the rights can be an *individual or a group* and the object is that which is being laid claim to as a right."[32] Seventh, human rights have the characteristic of *conferring* moral standards of both national and international *political legitimacy* on governments because a government is likely to be considered legitimate, by its citizens and the world at large, when it meaningfully respects and complies with the views, rights and decisions of its citizens.[33] Eighth, and perhaps more importantly, "the concept of human rights renders *status distinction* such as race, gender, and religion politically and legally irrelevant and demands an equal treatment for all, regardless of whether they fulfil the expected obligations to the community."[34] This goes to bolster the idea that the geographical or cultural origin of human rights has no bearing on the legitimacy and validity of human rights as a universal concept.

Finally, the definition of human rights underscores that, having regard to the level of protection that is or should be accorded to them, human rights are of two dimensions, namely *basic* and *fundamental* human rights. According to James Silk, basic rights are *primary* or necessary rights because they are condition precedents to the invocation of other general rights of a civil,

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[30] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Edition..., supra* note 6 at 22.
[31] *Ibid*., at 23.
[32] Ronald Cohen, "Endless Teardrops, Prolegomena to the Study of Human Rights in Africa," Ronald Cohen, Goran Hyden & Winston P. Nagan, *Human Rights and Governance in Africa* (Orlando: UFP, 1991) at 4.
[33] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Edition*,..., *supra* note 6 at 22.
[34] Rhoda E. Howard, *Human Rights and the Search for Community*, (Boulder, Westview, 1995) at 1.

political, economic, social or cultural nature.[35] They include the rights to life, liberty, and security of the person. It is virtually impossible, for instance, "for one to enjoy political, economic, or cultural rights if one is dead, in extreme physical pain from torture, or arbitrarily in prison."[36] This explains why basic rights are inherently individualistic in nature because the right to life, for instance, can only be possessed by an individual and not by the group. This further suggests that, logically, only an individual's right to life can reasonably be protected, since the biological fact of life can only be possessed by an individual, not the group. This is manifest from the fact that when an individual dies, the group remains, as long as other individual members of that group are alive.

Fundamental human rights, on the other hand, refer to those rights that must be met for the full enjoyment of basic human rights. Here, the word 'fundamental' "must mean more than important if human rights are to have any significance."[37] The right to marry, for instance, is a fundamental human right. Yet one's basic right to life must, first and foremost, be protected for the right to marry to be triggered. This right is also individualistic in the sense that in an ideal liberal society, it is the individual, not the group, who makes the decision to marry or not to marry. I hasten to add that certain aspects of human rights fall in the grey area between basic and fundamental human rights. The right to property, which supports the basic right to life, falls in between the two types of rights.

It is also worth emphasising that it is not necessary for the victims of human rights violations to discover or recognise that their rights are being violated in order for human rights claims to be

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[35]James Silk, "Traditional Culture and the Prospect for Human Rights in Africa," in Abdullahi An-Na'im & Francis Deng, Eds., Human Rights in Africa: Cross Cultural Perspectives (Washington D.C.: Brookings Inst.1990) at 318.

[36] *Ibid.*

[37] *Ibid*., at 299.

triggered. For example, it is not necessary for rural villagers to recognise that an oil company engages in the violation of their rights by contaminating or polluting the environment (including drinking, irrigation and river water systems, in a manner that results in the death of their livestock, badly needed fish in the river or fundamental changes in the local ecosystem), for their human rights claims to be triggered. Nor is it necessary for a victim of female genital mutilation to know that her human rights are being violated by being forced to undergo a harmful cultural practice that involves mutilating some of her vital biological organs. Instead, it is sufficient that an individual or a group, in whole or in part, is substantially deprived, in one way or another, of the enjoyment of human rights.

This thesis seeks to assert that since international human rights instruments that have codified basic and fundamental human rights have been endorsed by the community of nations, they occupy a higher status than ordinary rights (rights that may not be considered human rights but are still considered legal rights, all the same). They are not only above and beyond other rights, such as for instance, parental rights or the right to run for an elected office.[38] Human rights, by their very nature, are rights that presuppose universality, hence cannot be denied by the State without "a fair judicial reason."[39]

2.2. The Tripartite Division of International Human Rights

2.2.1. The Conceptual Framework

The scope of the international human rights promulgated in the UDHR in 1948 and subsequently affirmed by the 1966 and international human rights instruments can, generally speaking, be subsumed under three main rubrics known as categories or the so-called "generations of human

[38] James Silk, "Traditional Culture and the Prospect for Human Rights in Africa...," *supra* note 35 at 319.
[39] Rhoda Howard, *Human Rights and the Search for Community*..., *supra* note 34 at 1.

rights, according to Karel Vasak.[40] For reasons discussed later in this Chapter, the term "generation" or "category" is employed here to indicate that in practice, civil and political rights are perceived to be fundamentally different from economic and cultural rights and that the two sets of rights require different approaches if they are to be realised by individuals and groups.[41] This classification also provides a useful framework for understanding the evolution and the scope of international human rights protection and related controversy over which of these sets or categories of human rights is more important or requires a more urgent protection and promotion than others.[42]

The adoption of the twin human rights Covenants and the ensuing debate as to which of these categories of human rights are more important than others, marked the emergence of the first two generations of human rights. Since then, the third generation, now known as collective rights, has been added. The division of human rights into three generations can conveniently be called the *Vasak Model*, after the French Scholar, Karel Vasak, who first came up with this system of classification and called them '*generations of human rights.*'[43]

The first generation, also known as *liberté*, consists of civil and political rights. This type of rights was first enunciated in the UDHR (in Articles 3-21) in 1948 and emerged in an obligatory form in 1966 when the ICCPR was adopted, subsequent to which it came into force in1976.[44] As noted by Smagadi, these rights protect the individual from unreasonable State interference with the individual's liberty and his or her right to participate in the political process or public life. As well, CPRs protect the individual against excessive intrusion into his or her physical integrity or

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[40] Karel Vasak, was a French scholar and the first jurist to coin the term after dividing human rights into three categories which he referred to as "generations of human rights."
[41] Kamal Saroop Srivastava, *Human Rights in Modern World* (Jaipur: RBSA Publishers, 2010) at 231.
[42] Francis Deng, *Identity, Diversity and Constitutionalism in Africa* (Washington D.C.: USIP Press, 2008) at 150.
[43] Declan O'Sullivan, "Is the Declaration of Human Rights Universal"? (2000) 4 *The Int'l J. H.R* 25 at 34.
[44] *International Covenant on Civil and Political Rights: Authentic Text* (1966) 999 UNTS 172.

security of the person. This suggests that CPRs protect the individual from arbitrary detention, torture, execution, cruelty, or from inhumane or degrading punishment by State authorities.[45] They also protect the presumption of innocence and the right to a fair trial before an impartial tribunal and guarantee equal protection and non-discrimination on grounds of race, colour, gender or national origin, among others. CPRs also protect free speech, mobility or residency rights and guarantee to the individual the right to conduct their own affairs or lives as they deem fit, even if their choices are not approved by the norms of the community in which they live.[46]

Civil and political rights are largely expressed in negative terms, and are generally connoted by the expression "freedom from" (interference by the State), implying that the State must not unduly interfere with the rights and freedoms of the individual. In essence, they guarantee that the individual must have a zone of exclusive personal activity and reasonable autonomy.[47]

The second generation of human rights, also known as *egalité*, was also first proclaimed by the UDHR in 1948, but legally recognised in 1966 in the ICESCR which, like ICCPR, came into force in 1976. ESCRs are derived from the principles embedded in Articles 55 and 56 of the UN Charter, which served as precursors to Articles 22 through 28 of the UDHR. These Articles provide for the rights to reasonable housing, healthcare, education and employment,[48] and the right to fair or reasonable working environment, the right to vacation and leisure and to social

[45] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 18 at 6.
[46] Rhoda E. Howard, *Human Rights and the Search for Community…*, *supra* note 34 at 8.
[47] Francis Deng, *Identity, Diversity and Constitutionalism in Africa, ..., supra* note 42 at 150-151.
[48] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials...,supra* note 18 at 6.

security or partaking in the cultural life of a religious, ethnic or linguistic community.[49] ESCRs also include the rights to food and language, among others.[50]

ESCRs particularly arose from the "socialist tradition as a response to what was perceived as the "abuses of capitalist development and its underlying and essentially uncritical conception of individual liberty, which tolerated, and even legitimised the exploitation of working class and colonial peoples."[51] Though economic, social and cultural rights were not favoured by the West from the outset of their drafting, John Humphrey, the then Secretary of the UDHR Drafting Commission, was determined to include them in his first UDHR draft that was ultimately reviewed and adopted by the Commission, albeit, with some revisions.[52]

Unlike civil and cultural rights, *egalité* are often expressed in positive terms, and generally connoted by the expression "right to" (as in the 'right to food'). Some scholars argue that these rights were championed by socialist States during the Cold War and are rooted in the concept of welfare economics. The latter notion is premised on the idea of basic (social and economic) and secondary (civil and political) needs of the human person.[53] Viewed from this perspective, ESCRs clearly place a positive obligation on the government to promote or protect particular human rights, and to ensure the promotion of "equitable production and distribution of values and capabilities."[54]

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[49] Sally Engle Merry, "Changing Rights, Changing Culture," in Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: CUP, 2002) at 40.
[50] Rhoda E. Howard, *Human Rights and the Search for Community*..., *supra* note 34 at 11.
[51] Francis Deng, *Identity, Diversity and Constitutionalism in Africa, ..., supra* note 42 at 151.
[52] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism...,supra* note 1 at 33.
[53] Ronald Rich, "The Right of Development: A Right of People?" (1985) 9 *Bulletin of the Aust. Soc. Legal. Philosophy* 120 at 123.
[54] Richard N. Kiwanuka, "The Meaning of People in the African Charter on Human and Peoples' Rights" (1988) 82 *American Journal of International Human Rights* at 84.

The emphasis on the negative and positive connotations associated with the first and second generations of human rights respectively is quite significant. This is because the ongoing debate between the liberal West, on the one hand, and former Eastern European States (with the support of most developing States), on the other, emanates basically from the very nature of the positive and negative connotations attached to the first and second generations of rights. Because a negative right is seen as obliging a State "to refrain from interfering with someone's action,"[55] these rights are seen generally as reflecting a Western, especially Anglo-Saxon, traditions and therefore align neatly with the Western cultural understanding of human rights. A positive right, on the other hand, "imposes an obligation on the State to do something for someone."[56] These connotations—restraining a State from acting in a certain way or compelling it to take a positive action to protect or promote individual rights –are significant in terms of understanding the context of the West versus East debate on human rights.

The third generation of human rights, known as *fraternité*, solidarity or group rights, consists of collective or peoples' rights. These rights, "especially those which refer to the rights of indigenous peoples are among the most recent rights, although their precedents in minority language rights and rights to self-determination developed early in the twentieth century"[57] in Europe. They "include the right of self-determination, indigenous peoples' rights, the right to a clean environment, and the right to development."[58] According to Francis Deng, collective rights are basically "attuned to the communal and collective basis of individuals' lives."[59]

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[55] Richard N. Kiwanuka, "The Meaning of People in the African Charter…," *supra* note 54.
[56]Aphrodite Smagadi, *Source of International Human Rights..., supra* note 18 at 6.
[57]Sally Engle Merry, "Changing Rights, Changing Culture," in Jane K. Cowan, et al..., *supra* note 49 at 40
[58]Aphrodite Smagadi, *Sourcebook of International Human Rights Materials..., supra* note 18 at 6.
[59] Francis Deng, *Identity, Diversity and Constitutionalism in Africa..., supra* note 42 at 151.

It should be noted that *fraternité* share some characteristics of both *liberté* and *egalité* because "they draw upon and conceptualise the demands associated with the first two generations of rights."[60] For instance, a right to culture may include freedom from assimilation, or the right to natural resources may be read as a right against exploitation.

Most scholars agree that collective rights contain six distinct sets of rights which are further grouped into two subcategories of three sets each. The first subcategory includes "the rights to political, economic and cultural self-determination, the right to economic development and social development and the right to participation and benefit from the economic heritage of mankind..."[61] Together, these rights "reflect the emergence of the Third World nationalism and its revolution of rising expectations...."[62] The second subcategory of collective rights include "the right to peace, the right to health and sustainable environment and the right to humanitarian relief." [63] The inclusion of the right to 'humanitarian relief' connotes potential lack of capacity on the part of the modern nation-State to cater for essential services to its citizens in certain circumstances and "in certain critical aspects."[64]

Finally, collective rights inherently manifest certain dimensions of individual rights. As will be discussed in the next chapter, it is often, perhaps erroneously, assumed that most CPRs are individual rights. Such an assumption becomes the source of contention between those who see group or collective rights are more important than individual rights. This conflict, between collective and individual rights in the human rights discourse, occurs on at least two main levels. The first level is "about which rights might be held by a group versus an individual's rights."[65]

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[60] Francis Deng, *Identity, Diversity and Constitutionalism in Africa..., supra* note 42 at 151.
[61]Kiwanuka, "The Meaning of People in the African Charter on Human and Peoples' Rights...," *supra* note 54 at 84.
[62]*Ibid.*
[63]*Ibid.*
[64]Francis Deng, *dentity, Diversity and Constitutionalism in Africa..., supra* note 42 at 151.
[65] *Ibid*., at 149.

The second level "is about whether the recognition of group rights somehow diminishes, subordinates, or places in jeopardy, individual rights."[66] This scholarly and live debate is more vibrant in Africa where scholars are torn between traditionalism and progressive ideology.

The dominant pre-colonial African view of rights was and still is that "group rights have merits in and of themselves and are independent of, though not unrelated to, individual rights." [67] This view perceives of the individual as one defined by two variables: identity and culture, and depicts the individual as inseparable from the group. The result is that duties, rather than rights, are more pre-imminent in a collective rights context.[68] Such a conceptual framework creates a system in which claims are based on the philosophy of "mine" (individual claims) rather than "ours" (group claims). In a system based on individualism, on the other hand, the individual is considered separate from the group. Accordingly, individual rights rather than his or her responsibilities and duties to the group are more important than rights. This system basically negates that idea that the collectivity is more important than individual. It is thus argued that "...the ultimate purpose and justification of group rights is not the protection of the group as such but the protection of the individuals who compose it."[69] Accordingly group rights must be considered subordinate to those of the individual.

While some have argued that collective rights are, in fact, "not human rights in the conventional sense...,"[70] some scholars, especially from Africa and much of the Global South, hold that collective or peoples' rights are genuine human rights in the legal sense of the term.[71] As such,

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[66] Francis Deng, *Identity, Diversity and Constitutionalism in Africa..., supra* note 42 at 151.
[67] *Ibid.*
[68] Howard, *Human Rights and the Search for Community*, *supra* note 34 at 41.
[69] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) at 67.
[70] Francis Deng, *Identity, Diversity and Constitutionalism in Africa*, *supra* note 42 at 149.
[71] *Ibid.*

the concept of "collective rights" has become a core aspect of the international human rights regime because of their popularity among certain populations or regions of the globe.[72]

While the third generation of human rights has now become part of international human rights discourse, the first and second generations were contemplated right from the outset of the process leading up to the drafting of the UDHR. The inclusion of the second generation was significant because the prospect of economic, social and cultural rights (ESCRs) being considered enforceable obligations, was initially unacceptable to most Western countries. Nevertheless, because the UDHR was only a declaration considered as having no legal effect, there was little room for Western representatives[73] on the Drafting Commission to oppose the inclusion of ESCRs. It follows that, insofar as the UDHR was presumed to be non-binding on Member States, the inclusion of social and economic rights into the UDHR as part of fundamental human rights was accepted overwhelmingly. However, it was also contemplated that a different but legally binding single instrument would soon follow the UDHR. In fact it was proposed by the Soviet representative that "similar articles of the Declaration and the Covenants be drafted concurrently. The Commission however, decided to concentrate primarily on the Declaration."[74]

It would take nearly 20 years for the first binding international human instruments, namely; ICCPR and ICESCR, to be adopted. The delay resulted not only from the view that it was necessary to provide a detailed and more carefully thought out system of human rights but more

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[72] Kiwanuka, "The Meaning of People in the African Charter on Human and Peoples' Rights," *supra* note 54 at 82.

[73] "Western representatives" here refer to representatives from Western European and North American governments who took part in the drafting process. Most States in the West did not want the UDHR to be a binding document because of their concern about the inclusion of ESCRs which, they argued, should not be binding obligations.

[74] Anatoly Movehan, "The Origins of the Covenants on Human Rights," in Sarislav Ponomarenko, Trans., *Human Rights and International Relations* (Moscow: Progress Publishers, 1988) at 78.

importantly because of Western unwillingness to agree on having both ESCRs and CPRs in one binding human rights instrument. In fact, from the outset, and subsequently, the U.S., not only attempted to frustrate efforts to include any binding international obligations in the Declaration but also expressed its concerns about any future covenants that would envision the same ideas.[75]

Essentially, this goes to show that much of what was happening on the international stage concerning the conception and development of the international human rights regime was more about public relations than it was about a genuine commitment to the protection and promotion of international human rights. In reality, the West in general, and America in particular, was only pushing for aspirational human rights goals rather than legal commitments. This explains why the international quest to adopt a single human rights instrument for both CPRs and ESCRs was ultimately defeated. In part, much of that political brinkmanship is attributable to the dynamics of the Cold War.[76] It was also partly attributable to the fact that the U.S. and its Western allies did not only relentlessly romanticise CPRs but also, as a united front with its nearly insurmountable political clout, continued to downplay the relevance of ESCRs. Thus, the tactical American manoeuvres through diplomatic and economic threats delayed not only the drafting process, but also prevented the drafting "of a meaningful international agreement on human rights."[77]

To the extent that the underlying fundamental question— whether one or two covenants should be written—ultimately received an entirely different meaning,[78] the debate was diverted by the

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[75]Anatoly Movehan, "The Origins of the Covenants on Human Rights…," *supra* note 74 at 79.
[76] Kiyoteru Tsutsui, "Human Rights and Democracy as Global Ideal" (2009) 16 *The J. Int'l Inst.* at 12.
[77] Anatoly Movehan, "The Origins of the Covenants on Human Rights...,"*supra* note 74 at 79.
[78] The tensions of the Cold War between the US., and the Soviet Union shifted the meaning of the debate away from a human rights dialogue to an ideological one and ability of each superpower to assert its political hegemony over the globe. For more on this discussion, see Sylvia Chan, *Liberalism, Democracy and Development* (Cambridge: CUP, 2002) at 39.

two architects of the Cold War: the U.S. and the Soviet Union, resulting in a stalemate, particularly on the issue of whether ESCRs should even be considered human rights, hence part of a binding international human rights regime.[79] In the end, when an amended draft that included civil, political, social, cultural and economic rights in a single instrument was put to a vote, the amendment was vehemently rejected by a tiny coalition that included veto-wielding States such as the United States, France and the UK while 25 States, including the Soviet Union, China, Ukraine and many eastern European States, voted in favour of the draft. Thus, the debate on the creation of two separate instruments was won by the Western argument that, unlike CPRs, ESCRs could not be considered meaningful objects of judicial claim and protection.[80] But as Movehan has observed, the argument that CPRs are inherently judicial rights whereas ESCRs are not is significantly flawed. "The rights and freedoms of the individuals, secured in an administrative law must be and are subject to law enforcement...irrespective of whether they are civil, political, economic or social"[81] in nature.

2.2.2. Classification of Human Rights: Debates and Justifications

The classification of international human rights into three generations pursuant to the *Vasak Model* demonstrates that human rights are ranked in an order of preference or importance.[82] The ranking appears to show that the first generation are more important, followed by the second generation and finally the third generation, in that order. This *apparent ranking* arises from the

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[79]Michael J. Dennis & David P. Stewart, "Justiciability of Social and Cultural Rights: Should There be An International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?" (2004) 98 *Am. J. Int'l L*. 462 at 468.

[80] William Twining,"Abdullahi An-Na'im," in William Twining Ed., *Human Rights Southern Voices: Francis Deng, Abdullahi Ahmed An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge: CUP, 2009) at 101.

[81]Anatoly Movehan, "The Origins of the Covenants on Human Rights...," *supra* note 74 at 81.

[82] As discussed previously, the West is traditionally inclined to prefer CPRs over ESCRs while much of the non-West, arguably, prefers ESCRs and solidarity rights.

fact that certain types of human rights are generally preferred by various traditions, based on at least two related factors.

First they arose as a result of preference for certain sets of rights by particular cultural traditions, depending on the extent to which each category of rights is compatible with the values cherished by that culture. This partly explains why the West generally prefers civil and political rights over the other two generations of rights or why solidarity rights are generally favoured in Asia, Africa and Latin America and by the indigenous peoples around the world.[83] The first view is intimately related to the second factor which constitutes a major basis for this apparent hierarchical order: political ideology, which played out through to the end of the Cold War and effectively allowed political blocs or alliances to define their preferred sets of rights and to either exclude or narrow the scope of other types of human rights. Blocs of States did this to suit their political preferences, rather than as an honest pursuit of international standards of human rights.[84]

As discussed, the idea that civil and political rights are placed in the first generation of human rights, a position which apparently accords them the first consideration, basically reflects the Western bias during the Cold War days when Western Europe and North America "deliberately downgraded economic, social and cultural rights."[85] As Donnelly has observed, the West also wilfully downplayed the importance of not only social and economic rights but also other CPRs that did not suit the interest of the ruling elites in the West. For instance, the West was not interested in promoting rights pertaining to equal protection and racial discrimination—preferring, instead, to protect and promote selective provisions of the ICCPR. Similarly, the

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[83] Ruth Gavison, "On the Relationships Between Civil and Political, and Economic, Social and Cultural Rights" (2003) *Glob. Hum. Rt*., 23 at 36-37.
[84] Makau Mutua, "Change in the Human Rights Universe" (2007) 20 *Harvard.H.R.J.*at 3.
[85] *Ibid.*

Soviet Union, with the backing of the Third World, prioritized ECSCRs, especially in respect of poverty, healthcare and unemployment issues.[86]

Notwithstanding the peaceful end to the Cold War in the 1990s, the West has relentlessly continued to reject the idea that there should be any sort of economic entitlements to the individual, terming such a concept as economic 'utopianism' or blind idealism, that is inherently antithetical to the very meaning of human rights.[87] A number of reasons explain why the West prefers CPRs over ESCRs.

First, a number of Western thinkers argue that in comparison to civil and political rights, social and economic rights are not intrinsically fundamental human rights. As such:

> economic, social and cultural entitlements to socially provided goods , services and opportunities such as food, healthcare, social insurance and education are at best less important than civil and political rights such as due process, freedom of speech and the right to vote.[88]

In this respect, it is argued that ESCRs, such as the right to a paid vacation, are not essentially considered human right at all.[89] Tied into this idea is the underlying general assumption that "governments can guarantee civil and political rights even when they cannot guarantee economic rights."[90] This view relates to the cost associated with implementing social and economic rights. The idea is that CPRs can immediately be realised since the only thing the government needs to do is to honour its commitment not to interfere with individual rights and freedoms (such as non-discriminatory treatment) as opposed to ESCRs which require the State to take positive steps to ensure that they promote and protected human rights.

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[86] Jack Donnelly, *International Human Rights...,supra* note 6 at 6.
[87] Rhoda Howard, *Human Rights and Search for Community...,supra* note 34 at 2.
[88] Jack Donnelly, *International Human Rights..., supra* note 6 at 25.
[89] Mathias Risse, "A Right to Work? A Right to Leisure? Labour As Human Rights?" (2009) 3 *L & Eth. Hum. Rt* 1 At 1.
[90] Howard, *Human Rights and the Search for Community..., supra* note 34 at 3.

The second reason for the Western rejection of ESCRs has much to do with Western liberal capitalist orientation, or what Rhoda Howard refers to as "radical capitalism."[91] Radical capitalism, Howard has observed, is an economic doctrine that views the concept of rights from a conservative or narrow perspective, focusing mainly on rights that protect private property. "As long as private property is protected, contracts are honoured and the rules of competition are fair,"[92] everything else falls in line. This means that what is, in fact, necessary, is the provision of a safe and secure environment in which every individual is free to carry out his or her own affairs in peace and tranquility. The underlying assumption of this doctrine is that ESCRs are, by default, automatically secured when CPRs are protected, implying that what is needed is a very limited set of human rights that a liberal but limited regime or government can effectively protect.[93] This restricted scope of human rights protection is often referred to as "social minimalism" whose patrons or proponents do not accept the idea that there is such a thing as a common or collective responsibility to promote social security. Instead, they maintain that every individual is on his or her own and has the responsibility to look after his or her "own security in a fair market system."[94] Adherents of this philosophy essentially reject market regulation or Keynesianism. For this reason, social minimalists maintain that an observance of ESCRs simply diverts attention from any meaningful efforts to secure CPRs. Observance of ESCRs, it is argued, can only accelerate pushing CPRs "out of the realm of the morally compelling into the twilight of utopians."[95] Accordingly, any attempt at protecting, defending and promoting ESCRs is widely viewed by radical capitalists or social minimalists as a thinly veiled "rejection of free

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[91] Howard, *Human Rights and the Search for Community*..., *supra* note 34 at 3.
[92] *Ibid.*
[93] Carnes Lord, "Human Rights Policy in a Non-Liberal World," in Marc F. Platter, Ed., *Human Rights in Our Time: Essays in Memory of Victor Baras (*Boulder: Westview, 1984) at 132.
[94] Howard, *Human Rights and the Search for Community*..., *supra* note 34 at 3.
[95]Maurice Cranston, "Are There Any Human Rights?...," *supra* note 13.

enterprise."[96] For these reasons, as far as the status of the ICCPR or that of the ICESCR is concerned, the West has been adamantly reluctant to put in place any meaningful enforcement mechanisms for the implementation of ESCRs.

Third, a number of Western proponents of civil and political rights contend that most first generation rights are, by nature, judicial rights. This is because most civil and political rights are deemed to be rights that individuals can claim against the State, since they arise from illegitimate or unfair action or inaction on the part of the State. In this sense, most civil and political rights are considered to be 'absolute rights' that require the State to keep a reasonable distance from the zone of individual activity.[97] On the other hand, it is argued that ESCRs, especially at the domestic level, are not justiciable and cannot be legitimately claimed against the State, since they do not arise from unlawful action by the State against the individual or group of individuals. If they are rights at all, it is argued, they should be realised rather gradually, insofar as they require the State to take positive steps to foster their realisation and enjoyment by the individual.[98]

The second generation consisting of ESCRs is generally favoured by the Eastern cultural tradition represented mainly by the former republics of the Soviet Union and their developing counterparts in Africa, Asia and Latin America. Because of the ideological opposition between the East and the West, most accounts agree that ESCRs arose as "a counterforce to the first generation of civil and political rights..."[99] As previously discussed, the West was adamantly opposed to the inclusion of the ESCRs into the Declaration. Nonetheless, since it was generally

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[96]Makau Mutua, "Change in the Human Rights Universe...,"*supra* note 84.

[97] Bingham Centre for the Rule of Law (UK), "Building Human Rights into Practice" (2012) *A Training Manual On International Human Rights*, available online at: http://www.biicl.org/files/5930_building_human_rights_into_practice_-_english.pdf [retrieved on June 6, 2014].

[98] Jose Opie, "A Case for Including Economic, Social and Cultural Rights in the New Zealand *Bill of Rights Act* 1990)" (2012) 43 *VUWLR* at para.190.

[99] Francis Deng, *Identity, Diversity and Constitutionalism in Africa..., supra* note 42 at 151.

perceived that the UDHR did not have legal teeth, "Western drafters were convinced to include [the ESCRs] as they would be non-justiciable in character."[100]

The third generation of human rights is strongly favoured by most States in Asia, Africa and Latin America as well as by indigenous peoples around the world. Collective rights are not as well developed and widely recognised as the first two generations of human rights, probably because they have less appeal to both Eastern and Western traditions. However, particular sets of collective rights, such as the right to self-determination provided in Common Article 1 of the ICCPR and ICESCR, are the exception to the underdeveloped status of collective rights in international law.[101]

There are two types of self-determination: internal self-determination and external self-determination. Although the relevant human rights documents do not precisely distinguish the concept in this manner, international law scholarship and national jurisprudence have provided adequate interpretation of both concepts (of internal and external self-determination), as evidenced in the Canadian Supreme Court decision in the *Re Quebec Secession Reference.*[102] However, the UN Charter, 1945, has settled that "self-determination, primarily in its internal form as a form of self-government, has been accepted in law...with no specific obligation imposed on States to accept it, even in this weakened form." [103]

Like ESCRs, collective rights have not been spared by radical capitalists or social minimalists. In particular, the United States which, in the context of the deliberative process leading up to the

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[100] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism...,supra* note 1 at 30.
[101] Milena Sterio, "On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule" (2010) 19 *Minnesota J. Int'l. L* 137 at 138.
[102] Reference Re Secession *of Quebec,* [1998] 2 SCR 217, 161 DLR (4th) 385, 55 CRR (2d) 1.
[103] Laura Westra, *Human Rights: The Commons and the Collective* (Vancouver: UBCPress, 2011) at 110.

adoption of the *Declaration on the Right to Development*[104] in 1986, made clear its view that collective rights are not worth any legal recognition. The U.S. did not only cast the only negative vote, but also withdrew "from the Working Group of Governmental Experts on the Right to Development."[105] In casting its vote and affirming that human rights are hierarchically ordered, the U.S. argued that:

> the Right to Development is little more than a rhetorical exercise to enable the Eastern European countries to score points on disarmament and *collective rights* and to permit the Third World to distort the issues of human rights by affirming equal importance of [ESCR] with civil and political rights by linking human rights in general to its utopian aspiration for a new international economic order.[106]

Nevertheless, the notion of collective rights has, in recent years, become a core issue in international human rights discourse, especially in the context of re-characterising or re-theorizing the concept of the rights of people or "as a response to concerns about and mobilization by indigenous peoples. Such developments signal a significant historical shift."[107] Also, as mentioned previously, the idea of collective rights is gaining momentum in Africa, mainly among the continent's political and economic elites. This is probably because collective rights conform to the time-tested African conception and practice of human rights.

In rejecting Western emphasis and political belittling of collective rights, a number of African political leaders and scholars have been quick to point out two inter-related deficiencies about the nature of the international human rights regime. First, they argue that the West places undue

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[104] Declaration on the Right to Development (1986) UGNA A/RES/41/128. http://www.refworld.org/docid/3b00f22544.html [accessed 2 April 2014].

[105] Virginia Leary, "The Effect of Western Perspectives on International Human Rights," in Abdullah Ahmed An-Na'im & Francis Deng, Eds., Human Rights in Africa: Cross Cultural Perspectives (Washington D.C.: Brooking Institution, 1990) at 28.

[106] Philip Alston, "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 *Harvard H.R.Y.B* 3 at 22.

[107] Jan Cowan, Marie-Bénédict-Dembour & Richard Wilson, Eds., "Introduction," in Jane Cowan, Marie Bénédict-Dembour and Richard Wilson, *Culture and Human Rights: Anthropological Perspectives* (Cambridge: CUP, 2001) at 9.

emphasis on individual rights—often considered to be most of CPRs—at the expense of group rights which, it is contended, is at the heart of the African notion of human rights. In other words, by sacralising the individual, the international human rights system practically dispenses with collective rights and alienates Africa from being an active participant in shaping the evolution of the global human rights regime.[108]

Particular attention is also drawn to the Western idolization of democratic rights. This idolisation is seen as an attempt to overlook the social and economic aspect of human rights. In fact, the dominant African position argues that in relation to collective rights, social, economic, civil and political rights are difficult to realise. They thus urge a selective implementation of human rights, based on the urgency of certain types of human rights. As such:

> in the circumstances in which modernisation is taking place in most of the African countries today, democracy is not a viable political institution because political and economic demands cannot be met [synchronously] and thus must be suppressed by denying civil and political rights.[109]

This argument underscores the fact that there is a wide spread ambivalence in Africa about which types of human rights ought to be given priority, and which ones may reasonably be suspended until such time as circumstances may permit equal protection of all categories of human rights. This further suggests that Africa is "more concerned with achieving economic and social development and maintaining the stability of its government than with recognising and promoting rights and freedoms."[110]

At first blush, this ambivalence appears to be well founded, having regard to the fact that "increasingly, conditions are being created in Africa which on the one hand, necessitate the

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[108] James Silk, "Traditional Culture...,"*supra* note 35 at 301.
[109] *Ibid.*
[110] Kébba M'Baye, "Human Rights in Africa," in Karel Vasak and Philip Alston, Eds., *The International Dimensions of Human Rights, Vol. 2 (*Westport: Greenwood Press, 1982) at 591-2.

[strict] observance of human rights, while on the other, make the observance of human rights difficult in the social and economic context."[111] Some in fact argue that when viewed in the context of democracy, CPRs can be a recipe for national disintegration in a developing country. It is partly on this account that "several African States have often chosen to deliberately violate the human rights of their citizens in order to avert social and political disintegration." [112] What this view appears to advance is that a simultaneous protection of civil and political rights and social and economic rights is likely to stagnate the decision-making process.[113] Such a stalemate, it appears, would ultimately leads to slow economic growth because it delays the implementation of political decisions, especially on matters of national importance such as national security. The overall consequence is public discontent which may incite recourse to arms by citizens to redress political grievances against intransigent and unresponsive governments.[114]

This reasoning, however, is seriously flawed for at least two reasons. First, certain civil and political rights, such as access to justice or fair trial, the right to life, liberty and security of the person, prohibition of torture and freedom against slavery, arbitrary arrest or right to participate in the political process are so basic as to be impossible to suspend or defer on account of national economic imperatives under any circumstances. That certain rights (because they are absolute rights) are not derogable under any circumstances is provided for in Article 4 of the ICCPR. For instance, an individual's right to life, right against torture, or the right to fair trial, cannot be suspended on account of national economic development because they are so basic as to warrant immediate protection. Second, the idea that CPRs cannot be implemented concurrently with

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[111] James Silk, "Traditional Culture...," *supra* note 35 at 301.
[112] S.K.B Asante, "Nation Building and Human Rights in Emergent African Nations" (1969) 2 *Cornell I.L.J.*, at 93.
[113] This may include economic and political decisions such as when a State borrows money from other countries or international institutions such as the IMF and World Bank. The process may be sabotaged by political opposition.
[114] Ronald Cohen, "Endless Teardrops: Prolegomena to the Study of Human Rights in Africa...," *supra* note 32 at 5.

ESCRs is misleading. There is no sufficient evidence that a simultaneous enjoyment of ESCRs and CPRs hampers economic growth. To the contrary, if human beings are or should be treated as rational agents then a holistic approach to human rights would promote more economic development. For, it is when individuals are confident that they are safe and secure from harm or political persecution by their own or a host government that they are more likely to invest in long term economic structures which have the potential to enhance economic development.[115] On the contrary, "strong governments, rapid economic development and high standards of living and international peace and security are ideas which are meaningful only insofar as they enrich the lives of individuals." [116] In other words, the protection of CPRs includes the ability of individuals and groups to petition their government to take positive steps to protect and promote their rights. It is on this account that some scholars have argued that no major famine has ever occurred in free and democratic states with a vibrant free press. This in turn leads to better economic outlook for a country and its people. The African country of Botswana is often cited as evidence that a concurrent protection of CPRs and ESCRs ultimately leads to economic growth.[117]

2.2.3. Concluding Remarks on Scope and Debate On International Human Rights

The grouping of international human rights into three generations or categories appears to divide the political world into three main cultural or political blocs, namely, the liberal west, the Communist East, and the developing world, as if they are neatly sealed compartments. In fact, this categorization assumes that each of these three blocs has fixed standards of human rights without anything in common. In other word, this categorisation is often made as if "each of the

[115] S.K.B Asante, "Nation Building and Human Rights in Emergent African Nations...," *supra* note 114 at 101.
[116] *Ibid*.
[117] Shashi Tharoor, "Are Human Rights Universal?" (2000) 26 World Pol. J. *World Policy Institute*, available at http://www.worldpolicy.org/tharoor.html [retrieved on June 7, 2014].

three worlds is virtually hermetically sealed off from the others."[118] The fact is that human rights, whether they are individual or collective in nature, whether they are civil, political, social or economic, are inherently inalienable and of equal value. Because there is no disagreement on the fact that humanity is universal, there must be no dispute about whether certain core human rights precepts should apply across cultures and ideologies in order to further the cause of the protection of human dignity.

The position of the United Nations on this debate, as settled in the 1993 *Vienna Conference,*[119] is that "all human rights are universal, indivisible, and interdependent and interrelated."[120] The Vienna Convention mandates every State to promote and treat human rights "in a fair and equal manner on the same footing and with the same emphasis."[121] Although the Vienna Declaration was more cautious in recognising the significance of culture in the context of human rights, it emphatically resolved that:

> while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be born in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.[122]

It is worth note that a meaningful approach to the universality of human rights standards should not be based on the questions about their origins, or premised on their validity within traditional cultural frameworks. Instead, significant regard should be had to the functions of human rights in the context of each society as a member of the international community, and whose citizens, as human beings, deserve to enjoy a dignified life and existence. While a contextual approach to human rights will "ultimately depend on the time, place, institutional setting, level of crisis and

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[118] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...," *supra* note 43 at 35.
[119] *Vienna Declaration and Programme of Action)1993)*, UNTS A/CONF.157/23.
[120] *Ibid*., Art. 5.
[121] *Ibid.*
[122] *Ibid.*

other circumstances,"[123] there are basic standards of protection that each society, regardless of its culture or religion, must meet.

In summary, there is no ranking or hierarchy of human rights except where "some rights, presented by international covenants, are stipulated to be non-derogable and thus are more fundamental than other, more peripheral rights."[124]As a matter of state practice, however, civil and political rights are, arguably, readily observed and promoted. This indicates that the emphasis on equal protection of all categories of human rights rather suggests a theoretical approach. In reality, however, CPRs are more widely accepted than ESCRs in international law.

Despite the unifying theme about the universality of international human rights and the authoritative statement by the Vienna Declaration, cultural relativists, especially from Africa, continue to challenge the legitimacy of the international human rights system, particularly as regards the universality of human rights. The next chapter discusses the dichotomy between universalism and cultural relativism in international human rights discourse.

[123] B. Winston, "Human Rights" (1984) 6 *Hum.Rt. Qrtly* 268 at 268-9.
[124] Declan O' Sullivan, "Is the Declaration of Human Rights Universal...?" *supra* note 43 at 50.

Chapter 3: The Dichotomy Between Cultural Relativism and Universalism

3.1. Introduction

Since the 1970s, cultural relativists and universalists have engaged in a heated debate regarding the validity and applicability of international human rights norms to non-Western societies.[1] This debate, in part, arises from the relativist notion that since there exists no pure moral or legal standards against which the observance or violation of human rights may be judged, no society should arrogate to itself the authority to sit in judgment over other societies. It is on this basis that cultural relativists criticise the West for using apparently 'neutral' or 'innocuous' ideas, usually disguised as universal human rights standards, to achieve Western cultural hegemony over the rest of the world.

While Chapter Two attempted to provide a working definition of human rights and to explore the content of the ongoing debate about the different types of human rights and their relative importance to different legal traditions or cultures, this chapter further extends the scope of that debate in the context of the dichotomy between cultural relativism and universalism in international human rights discourse.

First, the chapter explores the historical context and evolutions of cultural relativism, the dominant African perspective on cultural relativism and its place in the contemporary international human rights discourse. Second, the chapter explores the doctrine of universalism, both in its historical and contemporary contexts in international human rights discourse. The chapter then concludes that despite the diverging views between the two schools of thought, the two theories are not necessarily mutually exclusive. However, where international human rights

[1] Michael Goodhart, "The Origins and Universality in Human Rights Debate: Cultural Essentialism and the Challenge of Globalization," (2003) 25 *Hum. Rt. Qrtly* 935 at 938.

values cannot amicably be reconciled with cultural values (in critical circumstances such as when a cultural context provides for capital punishment against women in the event of adultery for instance), international human rights values must trump cultural norms.

3.2. Cultural Relativism

3.2.1. Definition

Championed by an American anthropologist, Franz Boas, and elucidated by his students, Ruth Benedict and Melville Herskovits in the 1940s, the theory of cultural relativism has now become a core aspect of international human rights discourse. As an anthropological construct, cultural relativism is predicated on the principle that "all cultures and all value systems, while distinct, are equally valid."[2] As such, the scope of an individual's legal entitlements or claims ultimately becomes a function of "local cultural traditions...."[3]

Cultural relativism, thus, "holds that moral codes and social institutions reflect a vast scope of cultural variability and that such variations should be exempt from the criticisms of outsiders."[4] On their part, Boas, his students and colleagues argued that the fact that European scholars have historically attributed to themselves 'noble' cultural values is informed by their familiarity with Europeans civilisation. This is why they judge other cultures unfavourably, because they use the Eurocentric standards to evaluate foreign or non-Western cultures. Evaluative standards, they argue, are thus inherently culturally subjective.[5] Their approach rests on a widely accepted but

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[2]Ayodeji K. Perrin, "Human Rights and Cultural Relativism: The "Historical Development" Argument and Building A Universal Consensus" (2005) at 3, available online http://www.academia.edu/2282438/Human_Rights_and_Cultural_Relativism_The_Historical_Development_Argument_and_Building_a_Universal_Consensus

[3]*Ibid*.

[4]Bonny Ibhawoh, "Restraining Universalism: Africanist Perspectives on Cultural Relativism in Human Rights Discourse," in Paul Tiyambe Zeleza & Philip J. McConnaughay Eds., *Human Rights: The Rule of Law and Development in Africa* (Pennsylvania: University of Pensylvania Press, 2004) at 25.

[5] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism,* (London: Sage, 1990*)* 64-5.

valid assumption that cultural relativism is a philosophical doctrine, which, " in recognising the values set up by every society to guide its own life, lays stress on the dignity inherent in every body of custom, and on the need for 'tolerance'[6] of conventions, though they may differ from one's own."[7]

It is on this basis that some scholars argue that cultural variability "would deem documents such as the Universal Declaration of Human Rights as nothing more than a futile proclamation from the West, endeavouring to assert their moral principles as superior and essential for all cultures."[8]

This philosophy, nevertheless, is deeply rooted in Western history, dating back to ancient Greece. In order to appreciate how cultural relativism has become a robust concept in international human rights, a brief overview as to its origins and evolution is important.

3.2.2. Historical Context and Evolution of Cultural Relativism

Many scholars believe that the dichotomy between cultural relativism and universalism is not a novel concept. It is essentially the same debate that has been going on since, at least, the fifth century B.C., especially among ancient Greek sophists, and carried on by pre-modern and modern Western philosophers such as Hume and Montaigne.[9]

One of the recorded historical contexts of cultural relativism in ancient Greece relates to the antagonism reflected in Sophocles' *Antigone* between the title character and King Creon. Antigone's brother was sentenced to death because he had fought against the City Polis and the

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[6] Some scholars such as Alison Renteln argue that the use of the term "tolerance" to imply that cultural relativism should to accommodate other cultures as a compromise for mutual co-existence is inaccurate because it would imply that there is something inherently objectionable about other cultures that the person evaluating them would have to suppress. Such a theory would require that the assessor be 'non-judgmental' or non-interventionist.' For more on this aspect, See Alison Renteln, *International Human Rights*, *supra* note 5 at 76.

[7] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism, supra note 5.*

[8] Declan O' Sullivan, "Is the Declaration of Human Rights Universal"? (2000) 4 *The Int'l J. H.R* 25 at 26.

[9] Paul F. Schmidt, "Some Criticisms of Cultural Relativism" (1955) 70 *Journal of Phil.*780 at 783.

King ordered that he not be buried, as dictated by custom.[10] Antigone, nevertheless, went ahead and buried her brother in contravention of city laws.[11]

What is important in this anecdote is that Antigone courageously rejected the customary tradition, rigorously sanctioned by royal writs. In so doing, Antigone argued that such a writ was invalid because it did not come from the Supreme Being nor was the validity of such a law recognised by the gods. In other words, Antigone did not think that the King's edict was rational enough to override the unwritten but unalterable laws of gods, laws that are higher than the commands of any earthly ruler. To Antigone, the King was only a mortal man who had no authority to desecrate such eternal laws, for such divine laws were not of today, yesterday or tomorrow but everlasting.[12] Aristotle's explanation on the distinction between the two kinds of laws discussed by Antigone (that is God's law or natural law and human law) clearly dichotomised the relationship between particularism and universalism, or rather, between just and unjust laws and/or actions.[13]

For Aristotle, a law is particular when it is laid down by the community to specifically apply to its members. This law may be written or unwritten. The universal, on the other hand, refers to natural or divine law—that is, a law that is permanently binding upon all people including those who have no association or covenant with one another.[14] It follows that the dichotomy between the concepts of cultural relativism and universalism was, in fact, "framed at the start of the

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[10] Ildiko Szabo, "Historical Foundations of Human Rights and Subsequent Development," in K. Vasak & Philip Alston Eds., *The International Dimensions of Human Rights Vol.* 1 (Westport: Greenwood, 1982) at 11-12.
[11] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism, supra* note 5 at 17.
[12] Jerome J. Shestack, "The Philosophic Foundations of Human Rights" (1998) 20, *Hum. Rt. Qrtly*., 201 at 206.
[13] Clinton T. Curle, *Humanité: John Humphrey's Alternative Account of Human Rights* (Toronto: UTP, 2007) at 12.
[14] Henri Bergson, R. Ashley Audra and Cloudesley Bererton, Transs., *The Two Sources of Morality and Religion* (Notre Dame: University of Notre Dame Press, 1977) at 40.

Western tradition. And one of the areas in which we currently feel its pinch the most, is in the realms of international human rights which purport to be universal ...." [15]

As a robust theory of international law of human rights today, cultural relativism asserts that:

> human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal.[16]

This clearly echoes the views of this philosophy's early modern proponents, namely; Boas and his colleagues who developed this influential theory and situated it squarely in anthropological discourse as a critique of the Eurocentric and Darwinian theories which were often used in classical European literature to depict non-European cultures as "primitive" and/or to portray non-European peoples as both culturally and intellectually inferior.[17] In their approach, Boas and his colleagues argued that it is virtually "impossible to evaluate different cultures by universal standards because even when such other cultures are [apparently] offensive, they are still valued by their members as the best way of life for themselves."[18]

In this context, it is clear that cultural relativism, in its modern form, arose in reaction to European ideas of cultural evolutionism, which posits that human societies and their cultural values develop from a 'primitive' or savage stage to more modern or advanced systems, and that in this regard, European or Western culture was superior to all other cultures. Accordingly, the latter were deemed to have been at their rudimentary stages of development, relative to Western

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[15] Clinton T. Curle, *Humanité: John Humphrey's Alternative Account of Human Rights*..., *supra* note 13 at 12.
[16] Diana Ashton-Shenker, "The Challenge of Human Rights and Cultural Diversity" (2014), United Nations: Background Notes, available online at: http://www.un.org/rights/dpi1627e.htm [retrieved on June 8, 2014].
[17] M. J. Herskovitz, "Introduction," in F.. Herskovitz, Ed., *Cultural Relativism: Perspectives in Cultural Pluralism* (New York: Random House, 1972) at 8-9.
[18] Sally Engle Merry, "Changing Rights, Changing Culture," in Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, Culture and Rights: Anthropological Perspectives (Cambridge, CUP, 2001) at 32.

culture which ranked above them in substance and specifically in the quality of its moral judgment as well as intellectual progress.[19]

Cultural relativism, as developed by these scholars, was so riveting that its ideas influenced the statement issued by the Executive Board of the American Anthropological Association submitted to the UN Commission on Human Rights in 1947. The statement expressed strong objections to the draft of the Universal Declaration of Human Rights. In part, it argued that if a human rights declaration was to be legally binding cross-culturally, it should first reflect universal values by ensuring that its philosophical anchoring was not limited to North America and Western Europe. The statement pointed out that:

> *because of the great numbers of societies that are in intimate contact in the modern world, and because of the diversity of their ways of life, the primary task confronting those who would draw up a Declaration on the Rights of Man is thus, in essence, to resolve the following problem: How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?*[20]

The statement went on to say that certain Eurocentric ideas had been used to promote a European worldview, or *weltanschaung*. These ideas, according to the statement, had given rise to inappropriate concepts, including the flawed "whiteman's burden," or the view that people of European ancestry, by reason of their perceived intellectual and cultural superiority and other apparent endowments, were commissioned by God to civilize and enlighten the less fortunate of humankind. In fact, these same ideas had for a long time been used to justify slavery, mostly of

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[19] Andreas Kronenberg, "Where are the Barbarians?: Eurocentricism versus the Illusion of Cultural Universalism: The Answer of an Anthropologist to a Philosopher" (1984) 7 *Ult. Reality and Meaning,* 233 at 235.

[20] Executive Board, American Anthropological Association, Statement on Human Rights (1947) 49 *Am. Anthologists, New Series* 4, Part I, 539 at 540.

the people of African descent. They also led to the colonial scramble for Africa, and to justify colonisation and domination of millions of people in non-Western societies around the world.[21]

The influence of cultural relativism, at that time, appeared to foster a new way of thinking and cultural awakening. This awakening, nevertheless, did not last long. Its earlier popularity, especially in academic circles, lost traction in the international human rights discourse soon after the UDHR was adopted in 1948.

The second phase or revival of cultural relativism came to prominence in the 1990s, when the idea of relativism was picked up by developing countries, first predominantly by Asian countries, most of which were still under colonial rule when the UDHR was adopted. In preparation for the World Conference on Human Rights, the 1993 *Bangkok Declaration*[22] (then organised by most South and East Asian countries but also attended by Iran and Cuba) adopted a strong position on human rights stating that:

> while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural or religious backgrounds.[23]

The Bangkok Declaration also emphasised that Asia itself is culturally and economically heterogeneous and that its varying levels of cultural, economic development and political structures "will make it difficult, if not impossible, to define a single distinctive and coherent human rights regime that can encompass the vast region, from Japan to Burma with its confucianist, Buddhist, Islamic and Hindu traditions."[24] The Bangkok Declaration also "asserted

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[21] Sally Engle Merry, "Changing Rights, Changing Culture...," *supra* note 18 at 33-34.
[22] *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok* [1993].
[23] *Ibid*., Art. 8.
[24] Bihari Kausikan, "Asia's Different Standards," in Henry J. Steiner & Philip Alston, Eds., *International Human Rights in Context: Law, Politics and Morals* (Oxford: OUP, 1996) at 227.

territorial integrity and national sovereignty against what was viewed as an intrusive Western pressure on the internal politics of the signatory States via human rights advocacy."[25] These Asian States did not just seek to "resist Western-cum universal human rights in order to preserve their own cultural values,"[26] but also argued that Western values were "fundamentally incompatible with Asian values which ought to receive priority."[27]

Some scholars, however, maintain that the rejection of the global human rights regime in this manner, properly understood in its context, is merely a clever ploy by the political and economic elites of these countries to bolster cultural and State sovereignty and for political dictators to firmly perpetuate their grips on power and have a free hand in suppressing internal political dissidence, often at the expense of their poor masses. Succinctly put, "it is often the dictators, the fundamentalists, and the multinational companies who chant the mantra of cultural relativism for their own benefit."[28] It is in this context that the argument for cultural relativism has become irresistible in many parts of the developing world, particularly Africa.[29]

As the dichotomy between cultural relativism and universalism has gained momentum in recent years, it is becoming increasingly apparent that a strict "commitment to universality necessarily implies a rejection of particularity in that sphere of existence; likewise, a commitment to particularity necessitates a rejection of universality in that sphere."[30] This suggests that any endorsement of cultural relativism implies a rejection of universalism and vice versa. It is in this

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[25] Clinton T. Curle, *Humanité: John Humphrey's Alternative Account of Human Rights..., supra* note 13 at 14.
[26] Jane Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, "Introduction," in Jane Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, *Culture and Rights: Anthropological Perspectives*, supra note X at 6.
[27] Jack Donnelly, *International Human Rights, 3rd Edition,* (Boulder: Westview Press, 2007*)* at 25.
[28] Elizabeth Zechenter, "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" (1997) *53 J. Anthrop. Res*. 319 at 340.
[29] Jan Cowan, Marie-Bénédict Dembour & Richard Wilson, "Introduction...," *supra* note 26 at 7.
[30] Clinton T. Curle, Humanité: John Humphrey's Alternative Account of Human Rights..., *supra* note 13 at 14.

context that the gist of the debate between cultural relativism and universalism in contemporary human rights discourse in international law must be understood.

3.2.3. Cultural Relativism in Contemporary International Human Rights

The vigor with which the case for cultural relativism is made, or international human rights are rejected by cultural relativists, can be distinguished at different levels. While some proponents of this philosophy acknowledge that certain core concepts of international human rights are, in fact universal, there are those who contend that global cultures are so different as to be incompatible both in context and content. The latter maintain that moral or legal norms developed in a particular cultural setting cannot find any meaningful purchase or fertile ground in other cultural traditions whose value systems are different from, or diametrically opposed to, the value system of the originating culture. There are thus two major variants of cultural relativism, depending on the strength of the opposition to the international human rights regime. While this distinction will not be emphasised in the discussion that follows, a few observations are made here.

The first variant of cultural relativism is referred to as "essentialism,"[31] or what Howard refers to as "cultural absolutism."[32] Donnelly calls it "strong cultural relativism."[33] Whatever the terminology, the central tenets of this form of cultural relativism include the notion that "there are no absolute values or principles by which any culture or society can be judged apart from those of [that] culture itself."[34] This suggests that the appropriate code of moral behaviour expected of a free person or group is simply that which is adhered to by the culture within which

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[31] "Essentialism" in this context implies that there is a tendency on the part of some scholars to present their views as if those views reflect the views of the entire group, essentially making the entire group appear as if it is a single block from whom the speakers have mandates as their representatives

[32] Rhoda E. Howard, "Cultural Absolutism and the Nostalgia for Community," (1993) 15 *Hum. Rt. Qrtly* at 315.

[33] Jack Donnelly, "Cultural Relativism and Universalism of Human Rights" (1984) 6 *Hum.Rt. Qrtly.,* at 401.

[34] Michael Goodhart, The Origins and Universality in Human Rights Debate...," *supra* note 1 at 938.

that individual or group is situated, considering that the "moral values (and thus the conception of human rights) are determined by history, culture, economic or social force"[35] prevailing within a given culture. This suggests that "an individual, by definition, is his [or her] collective identity, his [or her] culture."[36] An individual's freedom to act and to self-judge can only be defined within the context of that culture, as an individual is only free when he or she lives in accordance with how his or her society defines the idea of freedom, and given that a society's set of values is defined by a code of beliefs that provides absolute standards of moral judgment and evaluation. Accordingly, whatever the society has defined and decreed as just is eternally just.[37]

From this perspective, strong cultural relativists maintain that cultural "values and basic concepts are non-translatable and non-transferrable."[38] Once again, this suggests it is not possible for a self-determining culture to borrow or be borrowed from, since the very meaning of cultural autonomy is the right of each culture to have full dominion on its people and their destiny.[39] In this regard, it is maintained that since an individual's moral conduct is defined and programmed by his or her culture, the issue is not a choice between universalism (measured by global or external standards) and cultural relativism (measured by the local or internal standards), but between an individual's own standard vis-a-vis his or her communal culture. This leaves only one choice, which is one's own culture, the only standard perceived to be valid by the individual conducting the assessment. For strong cultural relativists, a commitment to international human rights standards can only amount to self surrender to cultural particularism based on Western values.[40] "The Western philosophy upon which the United Nations Charter and the Declaration

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[35] Jack Donnelly, *International Human Rights, 3rd Edition..., supra* note 27 at 37.
[36] Rhoda E. Howard, *Human Rights and the Search for Community..., supra* note 32 at 41.
[37] Donnelly, "The Relative Universalism of Human Rights" (2007) 29 Hum. Rt. Qrtly 281 at 294.
[38] Michael Goodhart, "The Origins and Universality in Human Rights Debate...,*supra* note 1 at 939.
[39] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...," *supra* note 8 at 27.
[40] *Ibid.,* at 32.

are based provides only one particular interpretation of human rights,"[41] and yet "this Western notion may not be successfully applicable to non-Western societies due to ideological and cultural differences."[42] As such, it is argued that there can be no valid universal human rights system because the conceptual underpinnings of the human rights standards found in the UDHR, ICCPR and ICESCR are entirely foreign to non-Western traditions. To argue that such values must be applied to non-Western societies *holus bolus* is to deliberately offend the principles of "communal autonomy and the right to [cultural] self-determination."[43]

Within the essentialist framework, "all questions about the origins or the universality of human rights become questions about their validity"[44] and authenticity, rather than applicability. Since Western and non-Western values are viewed as mutually exclusive, the natural conclusion for essentialists is that if it can be proven that human rights, indeed, are Western concepts, then they are not universal, and therefore void *ab initio,* on the grounds that there are no shared values between the West and the rest of the world.[45]

The second variant of cultural relativism, generally referred to as "weak cultural relativism"[46] or, or more properly, *classical cultural relativism,* opposes universalism on two grounds. First, while it acknowledges that certain aspects of human rights are truly universal, it also maintains that "certainly, culture is an important source of validity of moral rights."[47] In this respect,

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[41] Michael Goodhart, "The Origins and Universality in Human Rights Debate...," *supra* note 1 at 939.
[42] *Ibid.*
[43] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...,"? *supra* note 8 at 26.
[44] Michael Goodhart, "The Origins and Universality in Human Rights Debate...," *supra* note 1 at 941.
[45] Heiner Bielefeldt, " Western versus Islamic Human Rights Conceptions: A Critique of Cultural Essentialism in the Discussion on Human Rights" (2000) 29, *Pol. Thry*, 90 at.92
[46] Donnelly, "Cultural Relativism and Universalism of Human Rights...," *supra* note 33 at 401-2.
[47] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...,"? *supra* note 8 at 28.

classical relativism "accepts a weak notion of universalism,"[48] but strongly contends that cultures only provide checks and balances on excessive approach to universalism.[49] On this account, classical relativism (hereafter, 'cultural relativism') basically rejects *absolute* universal moral tyranny, often disguised in the name of universalism. It contends, instead, that a moral code developed in one cultural tradition cannot indiscriminately be applied nor have moral purchase cross-culturally without some form of modification or objection, especially where it has significant inconsistencies with the moral values of the receiving culture. Cultural relativism thus calls for mutual respect for all cultures. Without such tolerance, the imperatives found in the Declaration are seen as "having no normative force in the face of divergent traditions."[50] Culture, it is argued, is uniquely "powerful in the way it shapes an individual's perceptions."[51] Cultural relativism therefore urges that human rights must be interpreted within the context of cultural heterogeneity and without designating one standard as the meta-law above all other moral standards. Accordingly, universal standards on human rights can be arrived at on the basis of universal consensus that takes into account the importance of global cultural variability.[52]

The second ground on which classical relativism rejects the universalism of human rights relates to "the prioritization of civil and political rights."[53] A major relativist concern here is that such prioritization underestimates the importance of ESCRs and collective rights which are thought to be more important to non-Western and developing societies.[54] In this vein, cultural relativism

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[48] M. Anne Brown, *Human Rights and the Borders of Suffering: The Promotion of Human Rights in International Politics* (Manchester: MUP, 2003) at 61.
[49] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...,"? *supra* note 8 at 28.
[50] Jack Donnelly, "The Relative Universalism of Human Rights...," *supra* note 37 at 294.
[51] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism*, *supra* note 5 at 62.
[52] Colleen Good, "Human Rights and Relativism" (2010) 19 *Machester J. of Phil*.27 at 38.
[53]Eva Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse,"1997) 19 Hum. Rt. Qrtly, 136 at 157.
[54] *Ibid.*

rejects as undue, the importance placed on CPRs because such an emphasis implies giving less consideration to the other categories of human rights.

By and large, cultural relativism's main contention is that global cultures "manifest so widely and diverse a range of preferences, morality, motivations and evaluations that no conception of human rights can be said to be self-evident and recognised at all times and places"[55] without modification of some kind. This suggests that while "for every culture, some moral judgments are valid, no [single] moral judgment is universally valid."[56]

At a practical level, it is contended that non-Western traditions cannot, lock, stock and barrel, subscribe to the ideals of international human rights as enshrined in the International Bill of Human Rights and other pertinent human rights instruments. Relativism, in this sense, seeks to force the emergence of a revised international human rights regime in order to accommodate the views of the societies that feel excluded. This suggests that "the creation of an alternative system of human rights or more correctly, an alternative system for the achievement of social justice or the protection of human dignity, [could be] a valid substitute for international human rights."[57]

Similarly, cultural relativists argue that while the existing international human rights system may be acceptable in terms of its fundamental elements and framework, the characterisation of particular cultural practices—such as female genital mutilation (FGM)—as torture or cruel, inhumane or degrading treatment (under Article 5 of UDHR and Article 7 of ICCPR) is considered unfair and unacceptable.[58] Relativists also consider as mischaracterisation the interpretation of certain religious dogmas as oppressive. They, for instance, take issue with the

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[55] Jerome J. Shestack, "The Philosophic Foundations of Human Rights...," *supra* note 12 at 228.
[56] John J. Tilley, "Cultural Relativism" (2002) 22 *Hum Rt. Qrtly.,* 501 at 505.
[57] Eva Brems, "Enemies or Allies?...," *supra* note 53 at 144.
[58] *Ibid.*

interpretation of Article 18 of ICCPR that provides not only for the freedom of conscience but is also interpreted to negate the validity of apostasy. Relativists in this sense "reject either specific rights or reject the specific content or interpretation of those rights."[59]

Cultural relativists also seek to promote the view that human rights disguise Western arrogance, or a neo-imperialist approach to global issues. Their skepticism about the efficacy of universalism thus involves highlighting the detrimental impact of the continuing vestiges of political and economic domination by the West. For this reason, they call attention to "the civilisationally asymmetrical power relations embedded in the international human rights discourse."[60] They essentially argue that the case for the universality of international human rights standards should clearly be seen for what it is: a form of "imperial humanitarianism."[61] This is why relativism questions the presumption about Western ethnic or cultural superiority.[62] In other words, relativism urges universalists to abandon the "ill-conceived notion of absolute moral scale by means of which some cultures are judged morally superior to others."[63] This is why relativism ultimately "opposes ethnocentrism and its moral self-centredness, while promoting the recognition of cultural relativity which carries its own values."[64] It suggests a new approach that would include a broad range of cross-cultural meanings that go beyond individualistic standards chosen by the West. Weak cultural relativism thus argues that cross-cultural fertilization is necessary if human rights concepts are to have universal legitimacy.[65]

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[59] Eva Brems, "Enemies or Allies?..," *supra* note 53 at 144.
[60] Anthony Woodiwiss, "Human Rights and the Challenge of Cosmopolitanism" (2002) 19 *Theory, Culture and Soc.,* 139 at 139.
[61] Jack Donnelly, "The Relative Universalism of Human Rights...," *supra* note 37 at 298.
[62] M. Herskovitz, *Cultural Relativism: Perspective in Cultural Pluralism*, *supra* note 17 at 26-7.
[63] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism...*, *supra* note 5 at 72.
[64] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...,"?*supra* note 8 at 26.
[65] Makau Mutua, "Change in the Human Rights Universe" (2007) 20 *Harvard.H.R.J.*at 3- 5.

In summary, the distinction between weak cultural relativism and strong cultural relativism is that weak cultural relativism accepts that every cultural tradition is relatively valid and considers its moral norms to be the best. It therefore urges that if international human rights regime is to be held valid and universal, it should incorporate cultural elements from every society, as a matter of global consensus.

Strong cultural relativism (essentialism), on the other hand, argues that cultures are mutually exclusive and therefore diametrically opposed. Since there is no such a thing as a universal culture, nothing can be found to justify the idea of universal human rights.[66] This suggests that what is valid in one cultural tradition may be abhorrent in yet other cultures. It is for this reason that strong cultural relativism maintains that a conception of an international human rights system is impossible because there can be no basis for universal standards of human rights since rights are relative to cultures.

As mentioned and discussed later in the chapter, the latter argument, however, should clearly be seen as an attempt by many post-colonial non-Western political leaders and economic elites to consolidate their power. This underlying motive is often disguised in the name of preserving or reviving uncontaminated pre-colonial cultural values.[67] It is in this context that the dominant African perspective on cultural relativism should be understood.

3.2.4. The Dominant African Perspective on Cultural Relativism

Some scholars argue that the idea of human rights did not exist at all in all ancient traditions, suggesting that the concept and practice of human rights is essentially not to be found in non-

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[66] Shashi Tharoor, "Are Human Rights Universal?" (2000) XVI *World Policy Journal*, World Policy Institute, at 1. Available online at: http://www.worldpolicy.org/tharoor.html. [retrieved on June 9, 2014].

[67] Ajnesh Prasad, "Cultural Relativism in Human Rights Discourse" (2007) 19 *Peace Rev: J. Sc. Just*. 589 at 594.

Western legal and moral thought prior to their contacts with the West.[68] Donnelly has specifically charged that pre-colonial African societies did not conceive and practice human rights.[69] A number of African scholars however, dispute Donnelly's contention. Asante, for example argues that pre-colonial African cultures robustly embraced the ideas and practice of human rights in a manner that was largely consistent with modern human rights values, notwithstanding "occasional aberrations on the part of a despotic ruler."[70] Accordingly, the observance and practice of human rights in pre-colonial African societies included a robust respect for the right to life, liberty and integrity of the person.[71] As discussed below, other African scholars argue that pre-colonial African societies, in fact, practised basic human rights but only in the form of group rights.[72]

Regardless of what the status of human rights were in pre-colonial African societies, it is self-evident that both post-colonial African societies and the West[73] differ not only in terms of the philosophical underpinnings of the human rights concept but also in terms of cultural thought patterns from which human rights values largely draw their legitimacy. As well, the two traditions differ in respect of the types of human rights that should receive more attention, especially as to content, validity, interpretation and policy priorities to be accorded to various types of human rights. This divergence arises partly because since 1948, and especially

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[68] Alison D. Renteln, *International Human Rights: Universalism versus Relativism..., supra* note 5 at 37.
[69] Jack Donnelly, "Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights" (1982) 76 *Am. Pol. Sc. Review* 303 at 308.
[70] S.K.B. Asante, "Nation Building and Human Rights in Emergent African Nations" (1969) 2 *Cornell In. L. J* at 73.
[71] Osita Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: MacMillan Publishers, 1984) at 12-13.
[72] Asmaron Legesse, "Human Rights in African Culture," in Kenneth W. Thompson, Ed. *The Moral Imperatives of Human Rights: A World Survey* (Washington D.C.: University of America Press, 1980) at 128.
[73] Reader's attention is drawn to the fact that while a reference to "Africa" or the "West" is used here to connote a specific geographical area that is assumed to have a uniform culture, the idea of a communal culture has changed a lot over the past several decades as a result of the impacts of technology, immigration, colonialism etc. Since its colonial days, Africa for instance, has borrowed a lot from the West. It now uses Western models, such as the concept of nation State, as part of its structural systems. Nevertheless, for the purposes of this thesis, a reference to Africa or West is used for simplicity purposes.

following its political independence from colonial rule, Africa has insisted on the need for incorporating a uniquely African conception of human rights into the international human rights regime. This emanates from a popular perception among African political leaders and elites that human rights are not what they actually claim to be. It is for this reason that they want to originate a new system, a new thinking and practice of human rights that must include a uniquely African concept of human rights "that is different and separate from the modern international law concept."[74]

There are, however, a range of diverse views on whether African societies have established values that are unique to the continent, or indeed, whether there is, in fact, an African version of human rights, considering that there are as many African cultural relativists as there are African universalists. This intellectual diversity is evident from the fact that several African scholars "adopt a liberal approach and concur with the universal consensus reflected in the International Bill of Human Rights."[75] Because of the political dimension to the international human rights discourse, cultural relativism appears to carry the day in Africa. For this reason, this thesis will use the expression, "dominant African perspective" (as opposed to "the African perspective") to reflect the most commonly held view on human rights on the continent. The dominant African position on cultural relativism rests on several grounds.

First, it is argued that like pre-colonial African rights systems, the post-colonial African human rights systems are based on collective legal rights, as opposed to the corresponding Western

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[74] James Silk, "Traditional Culture and the Prospects for Human Rights in Africa," in Abdullahi Ahmed An-Na'im and Francis Deng, Eds., Human Rights in Africa: Cross-Cultural Perspectives (Washington D.C: Brookings Institution, 1990) at 317.

[75] Rhoda E. Howard, "Group versus Individual Identity in the African Debate on Human Rights," in Abdullahi Ahmed An-Na'im and Francis Deng, Eds., Human Rights in Africa: Cross-Cultural Perspectives (Washington D.C: Brookings Institution, 1990) at 160.

conception in which human rights are predicated on a sacralised individual.[76] Prakash Sinha observes that the conception and formulation of international human rights contains three key elements that not only reflect the Western heritage of human rights, but which also make the current international human rights standards inapplicable to non-Western societies, especially Africa. Sinha first argues that in Western tradition, the fundamental social unit of the society is the *individual,* as opposed to the *family*.[77] Second, the *mode operandi* for taking stock at human existence in Western society is by means of *rights* as opposed to *duties.*[78] Finally, Sinha argues that "the primary method for securing rights is through *legalism* where rights are claimed and adjudicated upon, not through *reconciliation*, *repentance* or *education* [*rehabilitation*]."[79] A related contention is that in pre-colonial African societies, human rights notions were fundamentally predicated on "ascribed status," implying that those who were not citizens by birth or acculturation, and thus had no status in the community, were not protected under the kinship rules unless, as strangers, they negotiated some form of protection with their host community.[80] Hence, by the very nature of pre-colonial Africa, it is argued, the amicable co-existence of group rights and individual rights was possible because individual rights were derived from that of the group.[81]

Since the pre-colonial African conception of individual human rights was based on a system in which the interest of the community was pre-eminent, it is suggested that an African human

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[76] James Silk, "Traditional Culture and the Prospects for Human Rights in Africa...," *supra* note 74 at 308.
[77] Prakash Sinha, "Human Rights: A Non-Western View Point" (1981) 19 *Archiv Für Rechts and Socialphisophie.* LXVII at 77
[78] *Ibid*.
[79] Bonny Ibhawoh, "Restraining Universalism: Africanist Perspectives on Cultural Relativism...," *supra* note 4 at 26.
[80] Chris Mojekwu, "International Human Rights: The African Perspective," in Jack Nelson & Vera Green, Eds., *International Human Rights: Comparative Issues* (New York: Human Rights Publ. Group, 1980) at 86-8.
[81] Rhoda E. Howard, "Group versus Individual Identity in the African Debate on Human Rights," in Abdullahi An-Na'im & Francis Deng, *supra* note 75 at 162.

rights system should be predicated on group rights.[82] This implies that since the current human rights regime elevates the individual above and beyond the society, the contention is that international human rights standards are not suitable for application in post-colonial Africa, at least without reference to group protection.

Third, most African leaders and scholars are also opposed to the universality of human rights because Africa had no adequate representation in 1948 when the UDHR was drafted, deliberated and subsequently adopted. Africa was under-represented mainly because, except for Ethiopia, Liberia and South Africa, the whole of Sub-Saharan Africa was still under colonial rule. Ghana was the first to become independent, but only in 1957. For this reason, it is argued that human rights have no moral purchase in societies which "were not adequately represented in the meetings that defined them—societies moreover, who do not have the liberal and socialist worldviews that decisively shaped the norms laid down."[83] Consequently it is said that these societies should not be bound by international human rights norms, since doing so amounts to subjugation to Western imperialism, the concept of which led to colonialism. Furthermore, as discussed in Chapter 5, it is argued that the imposition of Western human rights values is an affront to the sovereignty of these new States because it negates the right of self-determination.[84]

Fourth, most Africans reject the universality of human rights because of its hierarchical approach to human rights. The Western argument that civil and political rights are more important than other types of human rights is a case in point. Because of Africa's economic underdevelopment, there is a popular view on the continent that what Africa needs most at the moment are social and economic rights. That is to say, while Africans realise that CPRs are not unimportant, they also

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[82] James Silk, "Traditional Culture and the Prospects for Human Rights in Africa...," *supra* note 74 at 310.
[83] Paul Tiyambe Zeleza & Philip J. McConnaughay Eds., *Human Rights: The Rule of Law and Development in Africa* (Pennsylvania: University of Pennsylvania Press, 2004) at 25.
[84] *Ibid.*

reckon that the priority for Africa now is economic development, not CPRs.[85] The latter can wait until such time as economic conditions on the ground may permit. For the moment, CPRs are seen as "somehow antithetical to domestic cultural practice; and therefore not the proper subject of enforcement..., or international scrutiny."[86] In this vein, it is contended that States with differing economic achievements or:

> with different historical traditions and cultural backgrounds also have a different understanding and practice of human rights. Thus one should not and cannot think of human rights standards and models of certain countries as the only proper ones and demand that all countries comply with them.[87]

To this argument, Nyerere adds:

> what freedom has our subsistence farmer? He [or she] scratches a bare existence from soil, provided the rains do not fail; his [or her] children work by his [or her] side without school, medical care.....Certainly, he [or she] has freedom to vote and to speak as he [or she] wishes. But these freedoms are much less real to him [or her] than his freedom to be exploited. Only as his [or her] poverty reduces will his [or her] political freedoms become properly meaningful and his right to human dignity becomes a fact of human rights.[88]

Nyerere goes on to suggest that while the CPRs are not per se objectionable, Africa should practice human rights in line with its pre-colonial values. For Nyerere, "the primacy of economic rights in Africa is time honoured, far older indeed than the current debates about human rights."[89] Nyerere adds that no one would enjoy CPRs unless they have a "full belly."[90] Nyerere's "full-belly thesis" implies that CPRs follows ESCRs.

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[85] Rhoda E. Howard, "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights Evidence from Sub-Saharan Africa" (1983) 5 *Hum. Rt. Qrtly*, 467-90.
[86] Francis Deng, *Identity, Diversity and Constitutionalism in Africa* (Washington D.C.;, USIP, 2008) at 145.
[87] *Ibid.*
[88] Bonny Ibhawoh,, Quoting Nyerere in "Restraining Universalism: Africanist Perspectives...," *supra* note 4 at 36.
[89] Timothy Pernyhough, "Human Rights and Pre-Colonial Africa," in Ronald Cohen, Goran Hyden & Winston Nagan, Eds., *Human Rights and Governance in Africa* (Florida University of Florida Press, 1988) at 43.
[90] Bonny Ibhawoh, "Restraining Universalism: Africanist Perspectives on Cultural Relativism...," *supra* note 4 at 36.

Finally, most African States and scholars are opposed to universalism on account of what they see as hypocrisy or double standards on the part of the West. This charge allegedly involves the prescription of grand Western ideals of human rights which are held on paper but not practised. Garaudy, for instance, argues that the American Declaration of Independence and the French Declaration On the Rights of Man and the Citizen majestically proclaimed that "all men are born free with equal rights. The former was to retain the slavery of the blacks for a century"[91] while "the latter was to deprive more than half of the French nation of the rights to vote as passive citizens because they had no property."[92] In France, then and even now, "no one is a citizen without property."[93] This argument squarely attacks the ostensible presentation of international human rights as universal values as being out of touch with Western practice. It, instead, holds that international human rights standards are only a subtle way of advancing Western interests.[94]

While the relativist argument is not without merit, the fundamental question is whether human rights are truly universal.

3.3. Universalism

3.3.1. Historical Context and Development

By its very nature, the international human rights system is necessarily a universalist conception.[95] This is expressly acknowledged by the UN Charter, the International Bill of Human Rights and other human rights instruments such as the *Women's Convention*[96] or

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[91] Roger Garaudy, *Human Rights and Islam: Foundation, Tradition and Violation* (London: SCM Press, 1990) at 55.
[92] *Ibid.*
[93] *Ibid*.
[94] Declan O' Sullivan, "Is the Declaration of Human Rights Universal...,"*supra* note 8 at 48.
[95] Peter Jones, "Human Rights and Diverse Cultures: Continuity or Discontinuity?" in Jones Simon Caney & Peter Jones, *Human Rights and Global Diversity* (London: Frank Press, 2011) at 27.
[96] *International Convention on the Elimination of All Forms of Discrimination Against Women* (1979) 1249 UNTS 13.

Convention on Racial Discrimination,[97] *Children Convention,*[98] among others. These instruments postulate that human rights are available to all people irrespective of their differences as to race, colour, gender, culture, age, religion, or other distinction that may be used as a basis for differential treatment.

By way of its historical context, the 1215 Magna Carta (besides Sophocles' *Antigone* previously discussed) is often invoked as the most primordial starting point for a universalist view of human rights or as being the first to enthrone the concept of individual rights, having been enacted when King John of England, during the feudal era, was compelled by some of his subjects to accept limitations on his royal powers in order to protect their rights.[99] Furthermore, following years of war, repression and oppression in Europe, scholars like Rousseau, Locke and Kant would later be inspired by the principles put forth in the Magna Carta documents. They consequently espoused and advocated the idea that men and women are naturally born free, equal and independent.[100] Together with the liberal ideas found in the U.S. Declaration of Independence and French Declaration on the Rights of Man and the Citizen, the revolutionary ideals of rights discourse and natural equality provided the necessary impetus to the Western efforts to promote and protect human rights.[101] This discourse would later inspire abolitionist movements because, as Western countries later "came to realize the contradiction between their political values and the practice of slavery, they instigated [the creation of] an abolition movement."[102] For instance, the 1890 *Sixteen Nations Agreement Act* concluded in Brussels, Belgium, established a broad or

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[97] *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) 660 UNTS 195.
[98] *International Convention on the Rights of the Child* (1989) UNTS 3.
[99] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 5 at 18.
[100] Steven Forde, "John Locke and Natural Law and Natural Rights Tradition" (2014), Natural Law, Natural Rights, and American Constitutionalism, available online at: http://www.nlnrac.org/earlymodern/locke [accessed on June 8, 2014].
[101] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 5 at 18.
[102] *Ibid.*

comprehensive system of laws to secure the eradication of the obnoxious practice of slave trade.[103]

Schwelb has alternatively observed that the abolition of slave trade has been found by the International Court of Justice to be the starting point for the development of universalism and a precursor to the universal Declaration of Human Rights.[104] Other initiatives that led to the enthronement of individual human rights include the persecution of Christians in Turkey, progroms against Russian Jews, and blatant violations of fundamental civil liberties in Spain.[105] More importantly, the signing of various Geneva Conventions such as the earlier Geneva Treaty of 1864, followed by the Geneva treaties of 1907 and 1929,[106] all of which were aimed at protecting "the rights of the wounded, civilian populations and prisoners of war during armed conflicts," [107] did not just add more impetus to, but were indeed instrumental in expediting, the universal human rights revolution.

However, as will be discussed in chapter 5, the international consensus towards universalism was certainly accelerated by the horrors of World War II. The Nazi Regime's execution of its 'Final Solution' saw nearly 6 million Jews and people of other nationalities— including people of Roma and Polish origins, among others—nearly exterminated. Consequently, many people came to realise that what a State does to its citizens, even if it is ordained by that State's positive laws, should no longer be considered exclusively a matter of national or internal affairs.[108] The boost

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[103] Hug Fischer, "Suppression of Slavery in International Law" (1950) 3 *Int'l L. Qrtly* at 503.
[104] E. Schwelb, *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights 1948-1963* (Chicago: Quadrangle, 1964) at 17.
[105] H.Tolley Jr., *The UN Commission on Human Rights* (Boulder: Westview Press, 1987) at 1.
[106] D.J. Driscoll, "The Development of Human Rights in International Law," in W. Laqueur & B. Rubin Eds., *The Human Rights Reader* (New York: New American Library, 1979) at 41-56.
[107] C. Dominicé "The Implementation of Humanitarian Law," in Karel Vasak & Philip Alston Eds., The *International Dimensions of Human Rights, Vol. 2* (Westport: Greenwood Press, 1982) at 427-447.
[108] *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government Against the Negro People* (New York: International Publishers, 1970) at 20.

for this idea followed the proclamation of the Four Freedoms by President Roosevelt of the United States, as discussed in Chapter One.[109]

The international interest in the protection of human rights partly fostered the adoption of the first international legal instrument—UDHR—which acknowledges, in its Preamble, that human rights aspire to create "a world in which human beings shall enjoy freedom of speech and freedom of belief, and freedom from fear and want..."[110] and that human rights are "a common standard of achievement for all peoples and all nations in order to secure the universal and effective recognition and observance"[111] for the protection of the dignity of the human person. The UHDR is thus generally seen as the centrepiece that sets out broad principles on human rights, while the Covenants, more substantively, elaborate these principles.[112] The universality of human rights is therefore evidenced by the express endorsement (by all States) of the internationally recognised set of values that we now call international human rights.[113]

3.3.2. Universalism in Contemporary International Human Rights

While the above historical contexts put universalism in perspective, the doctrine of universalism, properly understood from its evolutionary perspective, emanates from the general assumption that since the international human rights documents were adopted by the United Nations, the catalogue of human rights in these instruments and those that are derived from them must first

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[109] Virginia Leary, "The Effect of Western Perspectives on International Human Rights," in Abdullahi Ahmed An-Na'im and Francis Deng, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C.:, Brookings Institution, 1990) at 19.

[110] *Universal Declaration of Human Rights* (1948) 217 A (III), Preamble, para.2.

[111] *Ibid.,* Preamble.

[112] James C. N. Paul, "Participatory Approaches to Human Rights in Sub-Saharan Africa," in Abdullahi Ahmed An-Na'im and Francis Deng, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C.:, Brookings Institution, 1990) at 215.

[113] Jack Donnelly, "The Relative Universalism of Human Rights...," *supra* note 37 at 288.

and foremost be held as universal.[114] Human rights, as such, are seen as a set of values that represent global consensus on ways of protecting the dignity of individuals and groups. "Such consensus...could be taken as a list of what ought to be human rights,"[115] notwithstanding cultural, religious or ideology differences. By arriving at such a consensus, what the international community has endeavoured to achieve is to designate a core of basic and fundamental rights that are common to all cultures, despite conceptual differences on rights values in some respects.[116] This implies that even though most human rights concepts originated from the Judeo-Christian tradition and thus are seen as inherently Western in origin and context, "the values that underlie the principles of human rights are of universal validity."[117] This universality, as mentioned earlier, is self-evident, having regard to the wide endorsement by States that human rights treaties have received, including not only treaties on peremptory norms but also those that deal with racial discrimination and children.[118]

The more philosophical conceptualisation of universality of human rights standards comes from the essence of the definition of human rights itself: the idea that human rights are inherently "universal rights in the sense that they are held universally by all human beings."[119] This implies that the international human rights instruments essentially codify enduring moral values about the intrinsic worth of a human person, values that nearly every society has traditionally cherished or celebrated in different forms. Indeed, "*most* societies and cultures have practiced human rights

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[114] Francis Deng, *Identity, Diversity and Constitutionalism in Africa...supra* note 86 at 144.
[115] Rhoda Howard, *Human Rights and Search for Community*, *supra* note 32 at 13
[116] Declan O'Sullivan, "Is the Declaration of Human Rights Universal?...," *supra* note 8 at 32.
[117] Francis Deng, *Identity, Diversity and Constitutionalism in Africa..., supra* note 86 at 144.
[118] Christina Lafon, " Accountability Global Governance: Challenging the State Centric Conception of Human Rights" (2010) 3 *Ethics & Glob. Pol*., 193 at 208.
[119] Jack Donnelly, "The Relative Universalism of Human Rights...," *supra* note 37 at 282.

throughout most of their history."[120] Some think that "*all* societies cross-culturally and historically manifest conceptions of human rights."[121]

Even if the historicity of human rights is disputable, it can be argued that no society would object to the validity of the broad formulations enshrined in Articles 3 through 22 of the UDHR. For example, the idea that "everyone has the right to life" or that "everyone has the right to liberty and security of the person" as acknowledged in Articles 6 (1) and 9 (1) of the ICCPR, speaks to conditions that are basic to the survival of the individual, which no single culture or country can reasonably deny. Neither can the rights to social and economic security be said to be incompatible with any cultural values. In fact, most countries that have written constitutions have codified similar provisions in them.[122] Evidently, the claim that such rights are inherently incompatible with non-Western values, when in fact States have made such provisions part of their domestic legal systems, may as well be considered as *kulturkrampfs or fits of spite.*[123]

Universalism of human rights therefore "reflects the universal quest for human dignity and equality that transcends cultural values across the globe."[124] This is evident, for instance, from the Preambles of the UN Charter, the UDHR, ICCPR and the ICESCR which state that the dignity and the worth of the human person or the recognition of the inherent nature of human dignity and human rights lie at the heart of the international human rights regime. Specifically, the Preamble of the UDHR provides that "the recognition of the inherent dignity and of the equal

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[120] Jack Donnelly, "The Relative Universalism of Human Rights...," *supra* note 37 at 284.
[121] Adamantia Pollis & Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," quoted in Jack Donnelly, "The Relative Universalism of Human Rights" (2007) 29 *Hum. Rt. Qrtly* 281 at 284.
[122] Saroj K. Patnaik, *United Nations, India and the New World Order* (New Delhi: Mittal Publ, 2004) at 184
[123] Sylvia R. Lazos Vargas ""Kulturkrampft [s] or "Fits of Spites"? Taking the Academic Culture War Seriously" (2005) 35 *Seton H. L. Rev*. 1309 at 1310.
[124] Francis Deng, *Identity, Diversity and Constitutionalism in Africa..., supra* note 86 at 144.

and inalienable rights of all members of the human family"[125] provides the nucleus for human rights protection. It follows that if the object and purposes of the human rights system is the protection of human dignity and the worth of the human person, then any view that rejects the universality of human rights standards on the charge of being Western in origin "is not only empirically questionable but also does a disservice to the cause of human rights."[126]

The notion that human rights should and ought to be fundamentally viewed as universal values is embedded in the very idea of universal humanity itself. To deny that certain cultures ever cherished or celebrated the noble concepts of human rights at all "is to aggravate divisiveness on the issue, to encourage defensiveness or unwarranted self-justification on the part of the excluded and to impede progress towards a universal consensus on human rights."[127] Similarly, to say that human rights values are a reserve of certain cultures is to be oblivious to the function of human rights as instruments for protecting the dignity of the individual irrespective of their origins. Since the significance of human rights lies in their ability to protect the dignity of the human person, their universality cannot be denied.

Human rights are thus not alien to Africa just because they originated outside of Africa. Nor are they diametrically incompatible with African cultural or moral values. What is important is not where human rights first originated, but the functional foundation of human rights as shields against the violation of human dignity. Africa can borrow foreign ideals if it aspires to advance the cause of human dignity. There is, thus, nothing wrong with African cultures borrowing, adopting, emulating or adapting themselves to, the ideas of human rights. To borrow is not a

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[125] UDHR, *supra* note 110, Preamble, para. 2.

[126] Francis Deng, "A Cultural Approach to Human Rights Among the Dinka," in Abdullahi Ahmed An-Na'im and Francis Deng, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C.:, Brookings, Institution, 1990) at 261.

[127] *Ibid.*

deficiency. The problem is "not in borrowing but in the confusion surrounding cultural and traditional values and their applications as they relate to [cultural or political] oppression."[128]

As Renteln notes, most of the values enshrined in the human rights documents actually represent cross-cultural views of right, suggesting that there is a pre-existing consensus upon which global human rights are or should be grounded. On that basis, the human rights regime can establish reasonable universal standards that are suitable for all societies irrespective of their differences as to culture, religion, public policy priorities or political ideology. [129]

This does not mean that every country must accept certain core human rights values without question. To argue for the universality of human rights standards, Francis Deng observes, "is not to deny the significance of the cultural context for the definition, the scope and the degree of protection of human rights."[130] Universality does not imply uncritical acquiescence or affirmation of such human rights values. Rather, universalism simply serves as a limitation on cultural particularism or specific values that do not promote respect for and protection of individuals and groups across cultures and religions.[131] As such, "to say that there are human right at all is to say that there are certain standards below which no State or society can go regardless of its own cultural values."[132] Hence, insofar as they are accepted as human rights, they must apply universally, having regard to reasonable limits set by just and fair laws and juridical reasons.

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[128] Emma LaRoque, "Re-examining Culturally Appropriate Models in Criminal Justice Application," in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Differences* (Vancouver: UBC Press, 1997) at 86.

[129] Clancy Wrights, "Western Human Rights in a Diverse World: Cultural Suppression or Relativism?" (2014) E-International Relations Students, available online at: http://www.e-ir.info/2014/04/25/western-human-rights-in-a-diverse-world-cultural-suppression-or-relativism/ [retrieved on June 10, 2014].

[130] Francis Deng, "A Cultural Approach to Human Rights Among the Dinka...," *supra* note 126 at 261.

[131] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Ed..., supra* note 27 at 37-8.

[132] James Silk, "Traditional Culture and the Prospect for Human Rights in Africa...," *supra* note 74 at 316.

In summary, the doctrine of universalism rests on the idea that while cultural values are not irrelevant to the concept of human rights and their contextual application, human rights practices cannot be reduced to any particular society because they have been practised by all societies for most of human history.[133] The core values of this doctrine must transcend "any differences which exist in place and time between peoples"[134] becaue they meaningfully express a "belief in the single cosmopolitan culture, which ties all differing indigenous cultures of the world together."[135]

This thesis seeks to suggest that despite global variability as to culture, religion, political ideology or public policy priorities, there is a core of fundamental human rights values that cannot be confined to any particular culture, religion or to a nation's stage of economic development, and that those values command the respect of all societies. In the words of Sassòli, these core:

> principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind.[136]

It therefore follows that cultural relativism and universalism are not necessarily mutually exclusive concepts.

3.4. Reconciling Cultural Relativism with Universalism

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[133] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Ed..., supra* note 27 at 39
[134] Declan O'Sullivan, "Is the Declaration of Human Rights Universal?...," *supra* note 8 at 64.
[135] *Ibid*.
[136] Marco Sassòli Antoine A Bouvier & Anne Quintin, *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Vol., I,3rd Edition (2007)*, available online at http://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf

This thesis seeks to establish that the core principles of international human rights are universal. In so arguing, it acknowledges that some of the arguments of cultural relativists cannot be lightly dismissed for a variety of reasons.

First, it must be acknowledged that the modern conception and practice of human rights, originated from the West. As well, it is true that most of those who participated in the drafting and deliberation of the International Bill of Human Rights were from the West.[137] This is why Western influence, as evidenced by the language used in the UDHR as well as the Covenants is unmistakable in most provisions in these instruments. Article 17 (1) of the UDHR, for example, provides that "everyone has the right to own property alone as well as in association with others."[138] Although this perspective on private property rights is very common now in the legal systems of many States including post-colonial African societies, this idea, at the time of the adoption of the UDHR, was quite typical of the Western approach to property rights. That is, the Western liberal conception of human rights holds out the individual as a sacred, isolated, independent and free entity. The individual, as such, becomes a direct depository of human rights, and entirely separate from the society. The same Western conception of human rights can be seen in Articles 19, 20 and 21 of the UDHR which entrench democratic principles of governance. Yet, as mentioned, such conceptions are no longer true of Western culture alone, since these cultural values, mainly spurred by liberal capitalism, colonialism and migrations, have been adopted by most non-Western societies in the contemporary world.

It should be noted that, notwithstanding the Western dominance during the original drafting, one would be remiss not to acknowledge the fact that non-Western societies have had an influence in

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[137] Michael Goodhart, "The Origins and Universality in Human Rights Debate...," *supra* note 1 at 943.
[138] UDHR..., *supra* note 110, Art. 17

the drafting of human rights documents. For instance, the UDHR provides "references to economic and social rights that are not included in [most] Western documents on human rights."[139] Arguably, the inclusion of such references is attributable to the participation of members from non-Western countries such as India, Cuba, Panama, Chile, and Lebanon in the drafting. In fact, Article 28 of the UDHR which provides for the social and international realisation of human rights and freedoms was specifically introduced into the UDHR by Charles Malik, the Lebanese representative.[140]

Second, it must also be acknowledged that not all those who invoke universalism do so with all good intentions. At certain times, political and economic interests may be wrapped up in universalist ideals. For instance, American foreign policy has frequently been suspected of disguising American interests in the form of human rights, suggesting that such narrow interests are universal values. That is why many people, not just in the developing world but also in the West, tend to accept the idea that Americans sometimes subscribe to views that presume that what is good for Americans is also good for the whole world.[141] When political interests are advanced through such "ideological garbs," the threshold for suspicion is raised, polarisation ensues and the argument for particularism becomes plausible.[142] Critics can take advantage of this 'false universalism,' "to advance misguided arguments for cultural relativity."[143]

There is, however, no question that most of the developing countries' reasons for rejecting human rights standards or their argument for cultural relativism are mere political ploys to

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[139] Virginia A. Leary, "The Effects of Western Perspective on International Human Rights...,"*supra* note 109 at 21.
[140] *Ibid.*
[141] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Ed.., supra* note 27 at 52.
[142] Bala A. Musa, "Dialogic Communication Theory, African Worldview and Human Rights," in Bala A. Musa & Jerry Komia Domatob, Eds., *Communication, Culture and Human Rights in Africa* (Lanham: UAP, 2011) at 9.
[143] Jack Donnelly, *International Human Rights: Dilemmas in World Politics3rd Ed..., supra* note 27 at 52.

protect the political interests of those in power. That is why even dictators frequently invoke relativism to cover up their human rights abuses.[144]

Furthermore, cultural relativism arguments are made as if cultures or cultural values are static or uniform. Yet cultures, by their very nature, are dynamic and generally malleable, since they add, drop or borrow values from time to time and place. Brems suggests that it would be reasonable for cultural relativists to recognise that cultures are neither fixed nor monolithic, and no single individual or group is vested with the sole right to determine the essence and confines of a particular culture. Such an essentialist approach ignores differences that exist in each cultural tradition or group.[145] It is also evident that in Africa, ordinary people do not really care much about where ideas of human rights come from. What they care about most is where they will get their daily bread. This also "suggests that the role of the government elites at international settings may not be indicative of the traditional value systems which they are supposed to represent."[146]

In essence, cultural relativism and universalism are not diametrically opposed nor actually mutually exclusive. The potential for the harmonious co-existence between the two doctrines "lies in the hypothesis that every culture has humanitarian ideals or principles that could contribute to the redefining and promotion of universal standards as the latter adopt local and national standards."[147] This is plausible considering that the ultimate goal of international human rights values is to serve as a least common denominator for the protection for human dignity, commensurate with how the need for this protection is respected in all cultures. This is the most

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[144] Elizabeth M. Zechenter, "In the Name of Culture: Cultural Relativism and the Abuse of the Individual...," *supra* note 28 at 340.
[145] Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism" (1998) 13 *Hypatia*, 1 at 2.
[146] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 5 at 53.
[147] Francis Deng, "A Cultural Approach to Human Rights Among the Dinka...," *supra* note 126 at 261.

important goal that the International Bill of Human Rights and other human rights instruments endeavour to achieve.

It follows that the popular argument in Africa that human rights are incompatible with African values because the former are focused on the individual while the latter are collective is not sustainable. A close examination reveals that the international human rights system provides for both individual and collective rights. Donnelly observes that the provisions on equality and non-discrimination in Articles 1, 2 and 7 of UDHR reflect the inherent right of the individual and the group to be free from discrimination individually and collectively.[148] Similarly, Articles 4 and 6 of the UDHR guarantee "an individual's fundamental status as a person and full member of the community by outlawing slavery and assuring to all the recognition as a person before the law."[149] The fact that the right against slavery is expressed as an individual right is inherent in the nature of human rights protection itself. Protection against slavery is inherently individualistic even if it expresses a group value. In this regard, protection from slavery, must first and foremost, be expressed as an individual right. It is the individual who needs protection from slavery.

Certain rights can only be expressed in individualistic terms. For instance, the right to life, liberty and security of the person as found in Articles 3 and 5 of UDHR, which prohibit 'torture, cruel, or degrading treatment' can only be expressed as individual rights, since it is only the individual, not the group, that can lose their life or whose liberty can be restrained by the State .[150] This set

[148] Jack Donnelly, "Cultural Relativism and Universalism of Human Rights...," *supra* note 33 at 417.
[149] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...,"? *supra* note 8 at 45.
[150] *Ibid.*

of rights "reflects basic, widely held values which represent a minimal modern consensus on virtually universal guarantees against the State."[151] It is, therefore, difficult:

> to imagine cultural arguments against recognition of the basic rights of Articles 3 through 11 [because] they are also clearly connected to the basic requirements of human dignity and are stated in sufficiently general terms that any morally defensible contemporary form of social organisation must recognise them.[152]

There are also various instances in which collective rights occur in the international human rights regime. The right to "participate in the cultural life of the community provide[s] a social dimension to personal autonomy"[153] is found in Article 27 of the ICCPR. This is a right that reflects the traditional worldview of an African society.

Furthermore, the African concept of collective rights is certainly no longer the dominant conception and practice of human rights in post-colonial African societies. For instance, several provisions of the *African Charter on Human and Peoples' Rights* (the Banjul Charter)[154] clearly demonstrate that the idea of collective rights is surely on the decline in Africa. Contrary to the contention by Africa cultural relativists, the Banjul Charter provisions bear striking similarity to those that are found in the international human rights documents. This means that most provisions of the Banjul Charter, like those in the International Bill of Human Rights, place the rights of the individual above and beyond that of the group.[155] This is the case with respect to Articles 2 through 17 of the Banjul Charter which provide for freedom from discrimination (Art. 2), equality (Article 3), right to life (Article 4), freedom from torture, cruel, inhumane and

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[151] Declan O'Sullivan, "Is the Declaration of Human Rights Universal...,"? *supra* note 8 at 45.
[152] Jack Donnelly, "Cultural Relativism and Universal Human Rights...," *supra* note 33 at 416.
[153] Jack Donnelly, *International Human Rights: Dilemmas in World Politics,3rd Ed....*, *supra* note 27 at 24.
[154] *African Charter on Human and Peoples' Rights ("Banjul Charter")*, OAU, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html [accessed June 2014].
[155] Santino Dau, "The African Concept of "Collective Rights:" Does it Still Endure?" (2013), LL.M., *Schulich School of Law,* Dalhousie University (Unpublished) at 28.

degrading treatment (Article 5), individual liberty (Article 6), fair trial (Article 7) and freedom conscience (Article 8). Similarly, the Charter provides that everyone has the right to freedom of speech (Article 9), association (Article 10), assembly (Article 11) and movement (Article 12) just as an individual has the right to participate in the political process (Article 13) and property (Article 14). Social and economic rights can be found in Articles 15-17. For instance, the right to work (15), health (Article 16) and education (Article 17) are also provided for. Finally collective rights are provided in Articles 18 through 24 inclusive.[156]

Clearly the fact the Banjul Charter—which is an instrument that was drafted and adopted by Africans—apparently elevates the individual as an independent depository for human rights makes the argument for collective rights in the context of the post-colonial African society redundant and unsustainable. This suggests that the pre-colonial African and post-colonial African societies are two different societies and that the human rights ideas which were relevant in pre-colonial African societies may not, to a considerably extent, be relevant to the day-to-day Africa. This is why the idea of subsuming individual rights under group rights, for all practical reasons, has little purchase, if any, in post-colonial African society. That collective rights and should overshadow the importance of individual rights was cogently expressed by two renown African human rights scholars, namely Abdullahi An-Na'im and Francis Deng who argue that:

> the significance of the community should not be exaggerated and allowed to overshadow the vital place of the individual for the relationship between the two is mutually augmented as it is constrained.[157]

[156] *African Charter on Human and Peoples' Rights* ("Banjul Charter"), *supra* note 154, Arts. 2-24.
[157] Abdullahi Ahmed An-Ana'im & Francis Deng, "Introduction," in Abdullahi Ahmed An-Na'im & Francis Deng, Eds., *Human Rights in Africa*: *Cross Cultural Perspectives* (Washington D.C.: Brooking Institution, 1990) at 3.

This thesis, however, first and foremost, suggests that "universalism and relativism are positions which do not exist independently from each other"[158] because human rights protect both the individual and the group. As such, the rights found in the Covenants and UDHR can be understood as the human rights of the individual as an independent entity, as a member of the group or as a member of an ethnic, cultural or religious minority. As such, it is logical to accept the fact that "there is a continuum of rights some of which are granted exclusively to individuals, some of which are, in effect, granted both to groups and ...some of which are granted exclusively to groups."[159] In addition, the concepts of individual duties (Articles 27-28) towards his or her family, society, the State as well as other legal institutions and fellow human beings are merely aspirational in character as they mean not much in the way of legal imperatives in practice.

This thesis argues that the ideas and practice of human rights, whether individual or collective rights, are not alien to Africa and that "such notions were the foundations of social and political society."[160]

Again, it is worth emphasising that cultural relativism and universalism are not mutually exclusive, notwithstanding the fact that some levels of discomfort in their mutual co-existence may be inevitable. It is my contention that Africa, like all other societies, can make do with a certain level of discomfort in respect of the application of international human rights standards, for certain levels of discomfort can be tolerated with little or no substantial harm. This would be a better approach as opposed to an outright rejection of the human rights concept altogether.

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[158]Jane Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, "Introduction," in Cowan, Dembour & Wilson, *supra* note 26 at 28.

[159] Tom Hadden, "Pendulum Theory of Individual, Communal and Minority Rights," in Simon Caney & Peter Jones, *Human Rights and Global Diversity* (London: Frank Press, 2011) at 78.

[160] Makau wa Mutua, "The Banjul Charter and the African Cultural Finger Print: An Evaluation of the Language of Duties" (1994) 35 *Virg. J. Int'l. L.,* 339 at 346.

Chapter 4: Selected Human Rights Issues in Post-colonial Africa

4.1. Introduction

Insofar as human rights are primarily defined as individual claims against the State or society, it can be argued that the history of human rights violations is as old as the history of any organised society itself. This is because as individuals compete over resources to satisfy their needs, certain rights are likely to be affected. In other words, the rights of the least competitive individuals are more vulnerable unless there is a system in place to regulate and mediate the competition to settle the consequential disputes.

Many African cultural relativists would, however, disagree with such a proposition, since they argue that pre-colonial societies were immune from such a competition. This argument is based on the assumption that the nature of social organisation in pre-colonial African societies crowded out the vice of individualism which allegedly begets an unhealthy competition over resources. This competition ultimately creates a society of economic inequality, and thus perpetual conflict which consequently withers away the bonds that hold the society together.[1] This is why African essentialists urge for a return to pre-colonial African conceptions of human rights. They assert that those conceptions adequately protected the needs and interests of the individual as a member of a group or collectivity, permitting little competition for access to resources to satisfy personal needs. It is for the same reason that they maintain that what makes the West— and all societies

[1] Cornelius F. Murphy, "Objections to Western Conceptions of Human Rights" (1981) 9 *Hofstra L. Rev.,* at 443-447.

based on Western values—vulnerable to human rights violations is individualism which inheres in such competition.[2]

Essentialists thus paint "the African world before colonialism as peaceful, cooperative and fulfilling."[3] They claim that a pre-colonial African society was structured in such a way as to have the effect of minimising or avoiding social discord, alienation or human rights abuses. For this reason, it is maintained that if the current concept of human rights were based on the pre-colonial African principle of collectivism, then "human rights of the individual ... [would be] inappropriate and irrelevant in a communal setting."[4]

This flows into a related relativist argument that the prevalence of human rights abuses is a product not just of colonialism but also of Africa's blind adoption of European models of governance. This would suggest that human rights violations are Western imports to Africa, a terrible legacy of the colonial era. Colonial "legacies, [especially] in the areas of civil and political rights in the administration of judicial rights, were clearly undemocratic,"[5] since the colonial State and its legal systems were imposed on Africans, with colonial courts being predominantly used to enforce all kinds of taxes such as head tax and hut tax, for example.[6]

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[2] Asmaron Legesse, "Human Rights in African Political Culture," in Kenneth W. Thompson, Ed., T*he Moral Imperatives of Human Rights: A World Survey* (Washington D.C.: University of America Press, 1980) at 124, and Olusola Ojo, "Understanding Human Rights in Africa," in Jan Berting et al., Eds., *Human Rights in a Pluralistic World: Individuals and Collectivities* (Westport: Meckler, 1990) at 27-33, Rhoda Howard, "Group versus Individual Identity in the African Debate on Human Rights," in Abdullahi An-Na'im & Francis Deng, *Human Rights in Africa: Cross-Cultural Perspectives* (Washing D.C: Brookings Inst, 1990) at 162-3.

[3]Rhoda E. Howard, *Human Rights and the Search for Community*, (Boulder, Westview, 1995) at 86.

[4]*Ibid.*

[5] James Silk, "Traditional Culture and the Prospects for Human Rights in Africa," in Abdullahi An-Na'im & Francis Deng, *Human Rights in Africa: Cross-Cultural Perspectives* (Washing D.C: Brookings Inst, 1990) at 294.

[6]Minasse Haile, "Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality," in (1984) 24 *Va. J. of Int'l* L 575 at 591-2.

In most cases, colonial laws were used to subject Africans to involuntary servitude or co-opt them into the government apparatus for political control. This created a situation where the observance of the Westernized concept of human rights was necessary, given that colonialism resulted in complex forms of social stratifications that ultimately destroyed pre-colonial African institutions which adequately protected the people, regulated the relationship between individuals and constrained political authority within a given African society, much as it regulated the relationship between a society and its neighbours.[7]

As well, European colonial legacies arising from undue social and political control had the effect of completely replacing traditional economic structures.[8] For instance, Africa's adoption of liberal capitalism means that the pre-colonial African system which necessitated collectivism had to give way to individualism. This suggests that in a post-colonial Africa, individuals' allegiance has shifted from family and clan to nation. This implies that Africans are, consequently, forced to move from their natal villages to cities and towns looking for jobs and better opportunities since pre-colonial African institutions of governance were replaced by European institutions and liberal capitalist systems. What this means is that Africa is now structured on individualism which contains all the ingredients of what makes a society vulnerable to human rights abuses. Individual rights, rather than collective rights, as a result, become the *lingua franca* of the modern Africa. This has allegedly made the application of

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[7] Claude E. Welch., Jr., "Human Rights as a Problem in Contemporary Africa," in Claude E. Welch & Ronald I. Meltzer, Eds., *Human Rights and Development* (New York: NYU Press, 1985) at 11-15.

[8] James Silk, "Traditional Culture and the Prospects for Human Rights in Africa...," s*upra* note 5 at 294.

collective to the new Africa difficult. For relativists, therefore, only a return to the original conceptions of human rights can save Africa from the wrath of human rights abuses.[9]

While this argument is plausible in some respects, cultural relativists seem to ignore the fact that many African cultural practices, such as female genital mutilation, forced marriage, child marriage, child labour, widow inheritance, ritual sacrifice of individuals living with albinism (in some African countries like Tanzania), capital punishment for adultery, discrimination against or subjugation of women, double-limb amputation for theft as sanctioned by Sharia law in countries like Sudan and Somalia, and a litany of other abusive practices and beliefs cannot, under any circumstances, be said to be legacies of colonial rule. These customs are perennial African issues.[10] They were there before colonial rule in Africa, and have remained, even after the end of colonialism. This takes me back full circle to my earlier contention that human rights violations are as old as the history of any organised society itself. Some of these centuries-old practices, properly analysed, clearly constitute heinous human rights atrocities, committed on Africans, in Africa, by Africans. These, along with more modern ones, are among the most pressing human rights issues in Africa.

While it is beyond the purview of this thesis to provide a full catalogue of human rights abuses in Africa, this chapter highlights two of the most pressing ones: *female genital mutilation* and *"mass crimes"* in Africa, the latter being considered in the context of genocide in the Sudan's western region of Darfur. In addition to others that will be referred to intermittently throughout

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[9] Vincent O. Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (The Hague: Martinus Nijhoff Publishers, 2001) at 21.

[10] Linda Camp Keith & Ayo Ogundele, "Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences On Human Rights" (2007) 29 *Hum. Rt. Qrtly*, 1065 at 1097.

this thesis, their discussion provides a substantive and contextual background to the argument for universalism in Chapter 5.

The discussion on female genital mutilation and mass crimes is important in the context of human rights discourse pertaining to Africa. Female genital mutilation may, for instance, be a long cherished cultural tradition among practising communities. However, this practice is compatible neither with the traditional African concept of collectivism nor with modern human rights values, irrespective of how its proponents attempt to portray it. Similarly, mass crimes, such as genocide, war crimes or crimes against humanity, remain the gravest human rights violations known to humanity. The last section of this chapter underscores the fundamental premise that failure to bring to justice those responsible for the perpetration of mass crimes in Africa constitutes a violation of the rule of law.

4.2. Female Genital Mutilation

4.2.1. Characterisation and Prevalence.

This practice is sometimes referred to as female genital surgery (FGS) and involves surgical operation around the female genital area, allegedly for initiation purposes. [11] However, since 1996, the World Health Organisation (WHO) has attempted to portray the practice as humiliating to women, considering that "girls and women sometimes express feelings of humiliation, inhibition and fear that have become part of their lives as a result of enduring genital

[11] Christine Mason, "Exorcising Excision: Medico-Legal Issues Arising From Male and Female Surgery in Australia" (2001) 9 *J. L. Med.,* at 58.

mutilation."[12] As a consequence, the practice is now more accurately described as female genital mutilation (FGM).[13]

In Africa, FGM predominantly occurs among Muslim communities in about 20 countries across the continent. The practice can also be found in various parts of Asia—where it probably originated,[14] particularly from the Middle East—and in Europe and North America where pockets of non-Western immigrants continue to follow the custom while in their respective host countries, often in great secrecy "next door" or in some secluded neighbourhoods.[15] In Africa, FGM is more widespread in the countries north of the Equator, specifically in North Africa. That this practice has a Middle Eastern origin is very clear from some of the Arabic names assigned to certain types or forms of FGM. The practice affects over 74 million African girls and young women annually.[16]

4.2.2. Forms of Female Genital Mutilation

There are at least three forms or types of FGM, based on how deep the cut is. The first one is called the *sunna*. This is the shallowest operation which basically involves the removal of the prepuce or tip of the clitoris with a cutting implement (which could be a sharp knife or a blade).[17] The second type of FGM is referred to as *excision* or *clitoridectomy*. This operation involves a total removal or excision of the entire clitoris, including labia minora as well as the external parts

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[12] World Health Organisation ,"Female Genital Mutilation: Integrating the Prevention and Management of the Health Complications into the Curricula of Nursing and Midwifery" (2001), *A Teacher's Guide*, at 3 & 94, available at: http://www.who.int/gender/other_health/teachersguide.pdf [retrieved on June 12, 2014].

[13] Pia Grassuvaro Eleanora & Franco Viviani, "At the Roots of Ethnic Female Genital Modification," in George C. Denniston, et al, Eds., *Body Integrity and the Politics of Circumcision: The Culture, Controversy and Change* (New York: Springer Press, 2006) at 50.

[14] WHO, "Female Genital Mutilation...," *supra* note 12 at 37

[15] Pia Eleanora & Franco Viviani, "At the Roots of Ethnic Female Genital Modification," *supra* note 13 at 50.

[16] K. Boulware-Miller, "Female Circumcision: Challenges o the Practice as a Human Rights Violation" (1985) 8 *Hrvd Women's L. J.* 155 at 56.

[17] Anna Funder, "De-Minimis Non-Curat Lex: The Clitoris, Culture and the Law" (1993) 3 *TRNATLCP* 417 at para. 435.

of the female genitalia.[18] The third type of FGM is the deepest type of cut and is referred to as *excision and infibulations*. It is also known as *pharaonic* circumcision, and involves the total removal of the clitoris, labia minora as well as most parts of labia majora. After the operation is over, the two parts of the genitalia are tightly fastened together in some way by means of thorns or by sewing them together with the aid of catgut.[19] Alternatively, the vulva is entirely scrapped and then the limbs of the girls are firmly tied together for at least a week till such time as healing or death, whichever occurs first, takes place. Only a small opening for vital biological responses by the body is left.[20]

This ordeal is endured by millions of girls and women who suffer consequences range between death and health complications, from varying forms of sexual incompetence to infertility to permanent physiological issues.[21] In some societies, women have to continually undergo the operation throughout their lifetime. For instance, women who have undergone infibulations often have to be cut again in order to facilitate intercourse and may be cut yet again for the purpose of child delivery. Worse still, these women may be sewn up again after delivery if their husbands so desire. The cycle then continues repeatedly throughout a woman's reproductive life.[22]

4.2.3. Justifications for Female Genital Mutilation

There are as many defenders as there are critics of FGM. Defenders advance several reasons to justify the continuation of the practice. First, they argue that the practice is not as harmful as Western critics claim it is. Instead, they contend that practising communities have, for centuries,

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[18]Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism* (London: Sage, 1990) at 56.
[19]B. R. Huelsman, "An Anthropological View of Clitoral and Other Female Genital Mutilations," in T. P. Lowry, & T.S. Lowry, Eds., *The Clitoris* (St. Louis: Warren H. Green, 1976) 111-161.
[20]Anna Funder, "De-Minimis Non-Curat Lex: The Clitoris, Culture and the Law...," *supra* note 17.
[21] *Ibid.*
[22]Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 18 at 57.

done it for many reasons that allegedly include improvement of a woman's health, sexual purity or facilitation of sexual relations. It is also argued that FGM increases a woman's fertility or that it protects the baby during childbirth from coming into contact with infected female genitals.[23] FGM is also justified on account of religion, since the practice is also believed to be a religious mandate or on account of a communal identity, and as a custom that trains young women in the virtue of endurance and prepares them for major challenges later on in their adult lives.[24]

On the basis of custom, for instance, some argue that FGM is a centuries-old practice that has a sentimental cultural value or attachment to the practising communities. Accordingly, the use of the term "mutilation" to describe the practice is not only inappropriate but negates its intrinsic value, the very reason it is so near and dear to the heart of those of who practice it, a sign of adulthood. Proponents urge the use of the expression, "external female genital modification," in order to remove the "semantic connotation" that looks at it only from a negative angle. They argue that circumcised girls, after all, do not see themselves as having been mutilated in any way.[25] For this reason, it is argued that the negative connotation attached to it has a lot to do with the fact that the practice has no Western origins. Mugo, for instance, argues that "when [Western] women pierce their tongues, belly-buttons, [or] their labia majora in order to place rings there, nobody calls such a practice mutilation."[26] For defenders like Mugo, the objective of Western human rights advocates is "to dismiss the entire heritage as a mutilating culture."[27] Such

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[23] Marie-Bénédicte Dembour, "Following the Movement of the Pendulum: Between Universalism and Relativism," in Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: CUP, 2002) at 60.

[24] Anna Funder, "De-Minimis Non-Curat Lex: The Clitoris, Culture and the Law...,"*supra* note 17 at 435.

[25] Pia G. Eleanora & Franco Viviani, "At the Roots of Ethnic Female Genital Modification…," *supra* note 13 at 50.

[26] Micere G. Mugo, "Elitist Anti-Circumcision Discourse as Mutilating and Anti-Feminist," (1997) 47 *CWRLR* 461 at para. 466.

[27] *Ibid*., at 466.

a hostile approach, she argues, can only "stifle a meaningful dialogue that could be had, were the Western approach to the practice more civil and respectful towards practising cultures."[28]

Another defence or justification for the continuation of the practice is that the operation has positive health effects and improves women's "procreative capacity."[29] FGM is therefore seen as having the capacity to increase female fecundity or the number of children per woman and, hence, is necessary for reductive purposes. That is, the severing of the female external genitalia makes the vagina a lot narrower and thus makes sexual intercourse more desirable because it ultimately leads to "maximum satisfaction of the sexual act, thus increasing reproductive success."[30] This argument obviously flies in the face of biological logic. That is, if the most sensitive part of the female organ is removed, FGM should necessarily reduce sexual desire on the part of the female victim. Overall FGM would be expected to reduce reproductive frequency in women. It may also lead to health complications that could result in sterility on the part of the woman. And when a mutilated woman dies (since this is not an infrequent occurrence) how could she give birth?

The third reason in support of the practice is the "preservation of the moral purity of women,"[31] through abstinence. This appears plausible, considering that by removing the sensitive parts of a woman's sexual organs, the natural effect is the reduction of a female's sexual desire. FGM, as such, is partly practised in order to encourage abstinence on the part of wives as well as fidelity

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[28]Micere G. Mugo, "Elitist Anti-Circumcision Discourse as Mutilating and Anti-Feminist... *" supra* note 26 at 466.
[29] Pia G. Eleanora & Franco Viviani, "At the Roots of Ethnic Female Genital Modification…," *supra* note 13 at 51.
[30] *Ibid.,* at 52.
[31]Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism* ..., *supra* note 18 at 57.

to their husbands. This is why some argue that, by extension, FGM is also intended to preserve virginity for girls.[32]

Finally, it is often argued that the process is consensual in the sense that no coercion is involved. Instead, young girls often eagerly look forward to the ceremony. In addition, the operations are normally carried out by women, suggesting that the argument that men are responsible for the continuation of the practice cannot be sustained. Furthermore, proponents urge the West to understand that the validity of certain cultural practices must be judged from their acceptance in a particular community, rather than using external adjudicative standards that are alien to African cultures.[33]

To the forgoing justifications for FGM, the following concerns can be raised. The idea that the determination of the validity of a particular cultural practice should be based solely on internal standard ignores the fact that there is an internal power interest that ensures the continuation of the practice. In other words, if the practice is valued, in part, because it leads to sexual satisfaction for men, then it is clear that men in practising communities, overtly or covertly, will continue to support its continuation because it fulfils their sexual egos. Furthermore, the argument that it is women who crave the operation is attributable to the fact that most women, especially in remote communities, are not being made aware of the consequences of such operations on their bodies.[34] To create awareness and enable girls and women to make informed consent and choices about FGM, the society as a whole, ought to be informed so that the

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[32] Allan Worsely, "Infibulation and Female Circumcision: Study of A Little-Known Custom" (1938(45 J. of *Obst. & Gyn. of the Brit. Emp.* 686-691.

[33] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism …*, *supra* note 18 at 57.

[34] World Health Organisation, *et al*, "Eliminating Female Genital Mutilation: An Interagency Statement" ((2008), at 15, available online at:

http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf [retrieved on June 12, 2014].

decision as to the appropriateness of the practice is socially driven, and therefore, a collective choice. Hence, in order to mobilise the entire society for awareness purposes and create:

> sustained abandonment of female genital mutilation, communities must have the opportunity to discuss and reflect on new knowledge in public. Such public dialogue provides opportunities to increase awareness and understanding by the community as a whole on women's human rights and on national and international legal instruments on female genital mutilation. This dialogue and debate among women, men and community leaders often focuses on women's rights, health…and brings about recognition of the value of women in the community, thus fostering their active contribution to decision-making and enhancing their ability to discontinue the practice.[35]

Furthermore, the idea that FGM preserves women's purity is not just fraught with double standards, since there is no corresponding practice to control the purity of their male counterparts. It also fails to recognise that inherent in this practice is the creation of false consciousness where from birth, young African girls and women are taught to be reserved and to minimise contacts, even communication, with men, and to live their entire lives for their actual or future husbands. From the moment they are born, therefore, girls are bred to know that keeping themselves pure for their own husbands is the ideal standard for womanhood. When such indoctrination is coupled with the idea that FGM leads to a woman's general and physical wellbeing, virginity, marriageability and being a 'proper wife,' it becomes virtually impossible, for an average African girl to understand that the practice can inflict grievous physical and psychological harms upon her.[36] Through acquiescence, FGM becomes a necessary rite of passage for most of its victims.

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[35] World Health Organisation, *et al*, "Eliminating Female Genital Mutilation*...," supra* note 34.

[36] A. Talle, "Female Circumcision in Africa and Beyond: The Anthropology of a Difficult Issue," in Y. Hernlund & B. Shell-Duncan, Eds., *Transcultural Bodies: Genital Cutting in Global Context* (New Brunswick: Rutgers University Press, 2007) at 91-106.

Moreover, the fact that young girls are eligible for marriage only if they are operated upon makes it impossible for them to evade it, considering that all forms of FGM are in fact, "prerequisites to marriage."[37] Furthermore, most girls have no capacity to resist because nearly everyone in the community would gang up against them, or because they are too young to withstand the pressure and the ensuing social ridicule. By reason of age, most young girls lack the capacity to understand the meaning and the impacts of the operation on their future sexual or biological functioning. By the time they come to such a realisation, it is often of no consequence since the results of the operations are irreversible. It follows that even if they allegedly give their consent, such a consent is hardly valid because it is not full and free or informed. In other words, the alleged consent is vitiated by age, duress (such as not being able to find a future husband if they fail to undergo the operation) or peer pressure. As well, there is often no safe exit for girls who would also wish to dissent and denounce the custom.[38]

The contention that FGM is somehow comparable to the Western practices involving the piercing of lips or labia majora in order to 'place a ring there,' as argued by Mugo, is impeachable. These Western practices are totally different from the gruesome practice of FGM for a variety of reasons. First, these Western practices are mostly done for fun, in a general sense. Second, there is no evidence that Westerners who participate in these practices are ridiculed or rejected by society as potential marriage partners. Third, tattooing or piercing poses, if any, very minimal health risks to participants. Besides, they are not mandatory. Fourth, where necessary, substitute consent for piercing is often provided by a parent or another adult in *loco parentis* for under-age girls or boys. Finally, the Western practices of tattooing or piercing are reversible whereas for FGM, the consequences are permanent. They instead "affect the reproductive health

[37] Pia G. Eleanora & Franco Viviani, "At the Roots of Ethnic Female Genital Modification…," *supra* note 13 at 50.
[38] G.I. Serour, "Medicalization of the Female Genital Mutilation" (2013) 19, *Afr. J. Urol.,* 145 at 147

of women and increase the risks for the unborn child."[39] This can hardly be said of Western practices of tattooing or lip-piercing.

In short, the idea that the FGM operation carried out on helpless minors can be justified on account of culture must invoke moral disgust and horrors, especially in a 21st century Africa.[40] This practice does not only deny innocent minors the right to determine their own sexual destiny, "full enjoyment of their personal, physical and psychological integrity"[41] and the right to derive their personal understanding as to the concept of purity when they come of age. Rather, the practice is also a deliberate strategy to assert and project male power over women. It demonstrates a settled intent by men to control, manage and regulate women's sexual lives for their advantage and selfish pleasure. Surely there can be no valid consent where the right to liberty and sexual self-determination is subject to the whims of others. More importantly, even if the practice were solely done on mature women, it can be argued that no one knowing full well the consequences of such a practice on their physical and personal wellbeing would consent to being so physically violated or harmed in such a manner.

4.2.4. Public Measures to Eradicate Female Genital Mutilation

Vibrant campaigns against FGM have pushed some African States, through public policies or direct legislations, to put in place mechanisms for combating the practice. For instance, the Government of the Sudan, since 1974, has maintained that FGM is a repugnant practice that requires immediate eradication. To that effect, the government has passed "a formal legislation forbidding female genital mutilation or more precisely infibulations."[42] This law amended the

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[39] G.I. Serour, "Medicalization of the Female Genital Mutilation…," *supra* note 38 at 146-7.
[40] Marie-Bénédicte Dembour, "Following the Movement of the Pendulum: Between Universalism and Relativism..," *supra* note 23 at 60.
[41] G.I. Serour, "Medicalization of the Female Genital Mutilation...," *supra* note 38.
[42] World Health Organisation, *Minority Rights Group International, Report 92/3 (1992)* at 11.

1946 provision of the *Sudan Penal Code,* enacted by colonial government under the auspices of Great Britain and "allows a term of imprisonment for up to five years and/or a fine."[43] The 1974 Amendment also made it a "criminal offence, under Article 248 of the *Sudan Penal Code*...,to merely remove the free and projecting part of the clitoris."[44] It is not clear what the penalties are in the event that someone is convicted of a "criminal offence" under the law.

Similar steps have been taken in Kenya. For instance, in 1982, the Kenyan President, Daniel Torotich arap Moi, moved to abolish the practice in his country, following the deaths of 14 children who underwent excision. Under the legislation that followed, a traditional practitioner, man or woman, found performing the operation, in whole or in part, commits an indictable offence and is subject to arrest and prosecution pursuant to the provisions of the *Chiefs Act.*[45]

Other African countries have also sought to eradicate the practice, but these efforts have done little to end this reprehensible and harmful custom, especially in remote villages. The most recent field studies in some countries show that little has changed in terms of the general attitude towards the practice. For instance, a 1990s-study involving 3, 210 women and 1, 545 men in the Republic of the Sudan, and aimed at ascertaining general opinion on the validity and continuation of the practice revealed that "the ratio of those who favoured continuation ...to those who did not was five to one for women and seven to one for men, although the majority was against the most severe pharaonic type."[46] Again, this is probably because, as previously discussed, local populations, especially girls and women, have not been sensitised enough to understand the harmful consequences of the practice.

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[43]Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals, Text and Material* (Oxford: OUP, 1996) at 245

[44] *Ibid.*

[45] *Ibid*., at 246.

[46]Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 18 at 57.

4.2.5. The Position of International Human Rights on Female Genital Mutilation

The practice of FGM is a typical example of how the conflict between international human rights standards and culture is acutely heightened. Only until recently, international human rights organisations have been careful how they engage this delicate issue. The reason is that international intervention in matters relating to customs and cultural practices is generally considered to be a very sensitive issue. Even legal commentators spoke with extra caution until feminism brought the matter to the fore.[47]

As a cultural issue, FGM was similarly considered off limits in international law for at least two reasons. The First relates to the need to exercise reasonable restraint on culturally sensitive issues. This understanding called for limited involvement on the part of outsiders. For this reason, international organisations were specifically reluctant to intervene in FGM issues, given especially that "the custom is accepted as moral and legitimate in the societies in which it occurs."[48] Furthermore, as discussed previously, the fact that a girl may not be married unless she is circumcised militated against intervention on the part of outsiders. The latter did not want to be seen as making personal decisions for girls, considering especially that such decisions have serious long term consequences on individual girls such as being rejected by their own society. Second, the violation of women's rights through FGM and other harmful domestic practices has long been viewed as belonging entirely in the private sphere, a domestic matter that must be deal with at that level. This is why the issue of FGM in Africa has largely been off the agenda of most

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[47] *United Nations Assembly Resolution 34/180* (1979) on the Convention on the Elimination of All Forms of Discrimination Against Women (art. *5* (a)): Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children, at 2.

[48] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 18 at 57.

international human rights organisations, until feminism-inspired activities took bold initiatives to confront it head on.[49]

Legal feminism has challenged "the traditional separation of public from private in international law discourse because its serves as a tool for excluding gender issues."[50] This viewpoint rightly sees FGM as "deeply linked to the denigration of women as inferior beings."[51] Feminism attacks the absolutist relativist view that when culture and rights conflict, the communal right to culture must supersede human rights values. Feminism, as such, sees the elevation of communal culture as a deliberate attempt at marginalizing women's concerns on certain flimsy grounds, including the idea that human rights are 'Western constructs.'[52] Furthermore, feminists assert that FGM is not just a violation of fundamental human rights. It also amounts to torture under Article 5 of UDHR and Article 7 of the ICCPR, both of which provide that "no one should be subjected to torture or cruel, inhuman or degrading treatment or punishment."[53] While it may be argued that the practice of FGM is not captured by the definition of torture under Article 1 of the UN *Convention on Torture,*[54] it should also be noted that this definition is not only limited to unlawful acts of government officials or agents. In recent years, the term torture has come to include acts of private citizens or non-State actors who inflict pain or suffering on individuals with the consent or acquiescence of State officials or its agents. In its most unequivocal comment yet, the UN Committee Against Torture has clarified that:

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[49]Ann Funder, "De-Minimis Non-Curat Lex: The Clitoris, Culture and the Law…," *supra* note 17 at para. 435.
[50] Ediberto Roman, "A Race Approach to International Law (RAIL): Is There New Need for Yet Another Critique of International Law?" (2004) *U.C. Davis. L. Rev.,* online at http://www.law.ucdavis.educ/lawreview/Roman.pdf>,access on 10/04/2014
[51]Eva Brems, " Enemies of Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights" (1997) 19 *Hum. Rt., Qrtly.,* 136 at 149.
[52] *Ibid.*
[53] UDHR, Art. 5, and ICCPR, Art. 7.
[54] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) 1465 UNTS 85.

> where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill- treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non- State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or *de facto* permission.[55]

The Committee has also taken further steps to apply "this principle to States Parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking."[56]

FGM can also be criticised on two other grounds namely, on grounds of health, and on the ground that it is a violation of the UN *Convention on the Rights of the Child (the Children Convention).*[57] On health grounds, it has been observed that in most FGM operations, the surgical process is carried out by people who have little or no modern training. It is not done under medical observation or hygienic/ anti-septic conditions, nor are anaesthetics applied to ease pain or prevent bacterial infection. Furthermore, it is often the case that one crude, unsterilized, cutting implement is used, on different individuals. This raises major health concerns, including sexually transmitted diseases such as HIV/AIDS.[58] As a result, this practice, which "integrates the issues of physical, mental and sexual health as well as [that of the] child's

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[55] UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), *Human Rights Library*, available online at: http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html [retrieved on June 28, 2014]. Part IV at 2.

[56] *Ibid.*

[57] *Convention on the Rights of the Child* (1989)1577 UNTS 3.

[58] Abdulmumini A. Oba, "Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism?" (2008) 8 *Glob. Jur. Fontiers*, 1 at 12.

development,"[59] is also offensive to the general sense of good health, in both African and non-African societies.

FGM should also be viewed as a violation of the Children Convention which mandates Member Parties to promote and protect the rights of children. The Children Convention demands special protection for children to prevent their exploitation, and to enhance their "education in conditions of peace and security."[60] When FGM is carried out on minors who have no idea what its consequences are, the practice grossly violates the girl child's right to her sexuality and her sexual identity.[61]

Yet, the Children Convention "is premised upon the notion that concepts such as human rights or children's rights are not negotiable at the local level and that differences between cultures and between individuals within cultures can be ignored."[62] Again, this is based on the idea that the Children Convention has fixed the boundaries of childhood by defining who a minor is irrespective of race, colour, gender or rank of birth. This expressly suggests that the parameters of 'normal' or acceptable standards of childhood are definitively settled in international human rights.[63] Such parameters have "laid down guidelines for what is and is not acceptable for children,"[64] guidelines with which FGM is clearly inconsistent.

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[59] Alison Renteln, *International Human Rights: Universalism versus Cultural Relativism..., supra* note 18 at 58.
[60] *Convention on the Rights of the Child…*, *supra* note 57, Preamble.
[61] K. Boulware-Miller, "Female Circumcisions: Challenges to the Practice...,"*supra* note 16 at 67.
[62] Heather Montgomery, "Imposing Rights? A Case Study of Child Prostitution in Thailand," in Jane Cowan, Mare-Bénédict Dembour & Richard A. Wilson, Eds., *Culture and Human Rights: Anthropological Perspectives* (Cambridge: CUP, 2001) at 82.
[63] *Ibid.*
[64] *Ibid.*

4.2.6. The African Charter on Female Genital Mutilation and the Rights of the Child

Similarly, the *African Charter on the Rights and Welfare of the Child*[65] emphasises the importance of an African child to society[66] and the responsibilities of the community towards children.[67]

But there are also limits to how far the community's responsibilities towards a child can be exercised. In this context, since FGM and other communal practices are harmful to the rights and welfare of the child, such practices are precluded by the right to culture protected by ICCPR or the Banjul Charter.

Finally, the practice of FGM also violates the *Protocol to the African Charter on Human and Peoples' Rights on Women's Rights,*[68] often referred to as the Kigali Protocol. While *The African Charter on Human and Peoples' Rights* (ACHPR or Banjul Charter)[69] does not mandate African States to protect the rights of women in the continent, fierce campaigns and protests by women's rights activists in Africa have served to highlight the fact that the continent's overwhelming support for the rights to culture has led to widespread discrimination against women at various levels in society. By 2003, these protests had forced the AU to expand the scope of the Banjul

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[65] *African Charter on the Rights and Welfare of the Child* (1990), OAUGA, CAB/LEG/24.9/49, online at: http://www.refworld.org/docid/3ae6b38c18.html [accessed 11 April 2014]

[66] 32 African States are parties to the African Charter on Welfare of the Child. For further details, please see African Commission on Human and Peoples' Rights, available online at: http://www.achpr.org/instruments/child/ratification/ [retrieved on June 12, 2014].

[67] Heather Montgomery, "Imposing Rights? A Case Study of Child Prostitution in Thailand…," *supra* note 62 at 84.

[68] *Protocol to the African Charter On Human and Peoples' Rights on Women's Rights in Africa,* AUGA, July (2003), online at: http://www.refworld.org/docid/3f4b139d4.html [accessed 10 April 2014].

[69] *African Charter on Human and Peoples' Rights ("Banjul Charter", supra* note 65.

Charter to include the protection of women's rights. This ultimately led to the adoption of the Kigali Protocol which now deals with a variety of women's rights and other issues in Africa.[70]

On paper, the Protocol adopts a holistic approach to African women's rights. In fact the Kigali Protocol is the first human rights treaty of its kind to give women the "right to control their fertility, to choose any method of contraception, to have family planning education, and also the right to medial abortion."[71] It also squarely confronts the problem of FGM and calls upon States "to not only punish but also take precautionary steps by elucidating and raising awareness"[72] about it. As well, it "lists a number of practices considered harmful to women. The Protocol stipulates that Sates are obligated to modify the social and cultural patterns of conduct...with the view of ...eliminating harmful and traditional practices."[73] Finally, the Kigali Protocol requires the States to eliminate discrimination against women and to enact and implement appropriate legislations or regulatory measures "including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women."[74] In essence, this Protocol protects the right to equal legal protection for men and women without subjecting one to the other.

In practice, however, most African political leaders do not seem to follow the ideals of their convictions. In other words, while African States are bound by these regional and international human rights norms, these obligations are not often observed in practice. Experientially, African women, like children, remain among the least protected groups on the continent. That is why

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[70] Robert Wyrod, Between Women's Rights and Men's Authority: Masculinity and Shifting Discourses of Gender Difference in Uganda" (2006) 22 *Gen. & Soc.* 799 at 802.
[71] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials* (London: BIICL, 2008) at 68.
[72] *Ibid.,* at 70.
[73] Jessica Almq Visit, *Human Rights, Culture and the Rule of Law* (Oxford: Hart Publishing Press, 2005) at 22.
[74] *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa..., supra* note 68, Art. 5.

FGM remains an issue in African society. Some scholars are of the opinion that given its tortuous nature and consequences, FGM should be eradicated without further debate. Jane Cowan and her colleagues, for instance, are of the view that FGM "should be eradicated without any need for further discussion."[75] Yet, considering the conflicting opinion as to which one between the right to culture and individual rights should trump the other, such good intentions may continue to fall on deaf ears.

The fundamental goal of human rights, however, "is to subordinate cultural sovereignty to the protection of human dignity and equality for all."[76] Put differently, the guiding principle, in such situations, is that international human rights standards should override cultural sovereignty.[77] This argument is even more compelling in the context of FGM, especially in light of the fact that the interest of the child is significantly affected, and considering that the rights of the child require special protection from the State, the community and the international community. This position should not be negotiable. Thus while FGM may be of a lower tier human rights issue relative to the issue of mass crimes in Africa (discussed in next section), the practice remains one of the gravest human rights concerns on the continent.

4.3. Justice, Peace or Impunity: Mass Crimes and their Nexus to the Rule of Law in Africa

4.3.1. Introduction

As discussed in Chapter 1, the scope of individual rights protection has dramatically increased since the adoption of the UHDR in 1948. In part, this is due to "the increased recognition that a

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[75] Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds.,"Introduction," in Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, Eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: CUP, 2002) at 28.

[76] James Silk, "Traditional Culture and the Prospects for Human Rights in Africa…," *supra* note 5 at 316.

[77] *Ibid.*

number of nations share many fundamental legal values and expectations,"[78] including the international consensus on the fact that individuals must be accorded due protection from "depredations against their person" by States and from State policies that substantially injure their rights and freedoms such as the right to be treated with equal respect and consideration.[79]

Under both domestic and international law, the legal concepts of *nulla poena sine lege and nullum crimen sine lege* are enduring fundamental principle of justice.[80] Their importance is premised on the general proposition that where there is no law proscribing an individual's conduct (action or omission), his or her the conduct, however repugnant or unconscionable it may be, should not be criminalised in hindsight or after the fact. This is the basis of the principle of *ex post facto* law.[81]

The cardinal point is that, prior to the adoption of the 1948 *Genocide Convention,*[82] the punishment of certain crimes that are now universally condemned, was only a prerogative of States, hence of a domestic nature.[83] The international punishment of genocide has since received more international legal impetus following the adoption of the *Rome Statute*[84] in 1998. This statute entered into force in July, 2002 and expressly recognises that, besides the domestic legal dimension to the "Universally Condemned Crimes,"[85] the punishment of not only genocide

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[78] M. Cherif, Bassouni, "Human Rights in the Context of Criminal Justice: Identifying international Procedural Protections and Equivalent Protections in National Constitutions" (1993) 3 *Duke J. of Comp. & Int'l L*. at 235.

[79] Lung-Chu Chen, *An introduction to Contemporary International Law: A Policy Oriented Perspective* (New Haven: Yale University Press, 1989) at 204-5.

[80] Jerome Hall, *General Principles of Criminal Law* (Indian: Bobs-Merrill, 1960) at 27, 35.

[81] M. Cherif Bissiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge: CUP, 2011) at 300.

[82] *Convention on the Prevention and Punishment of the Crime of Genocide (*1948) 78 UNTS 277.

[83] Elies van Sliedregt Desislava Stoitchkova, "International Criminal Law," in Sarah Joseph & Adam Macbeth, Eds., *Research Handbook on International Human Rights* Law (Cheltenham: Edward Elgar Publ, 2010) at 241.

[84] *Rome Statute of the International Criminal Court* (2010) 2187 UNTS 90. http://www.refworld.org/docid/3ae6b3a84.html [accessed 13 June 2014].

[85] Robert J. Currie, *International and Transnational Criminal Law* (Toronto: Irwin, 2010) at 26.

but also war crimes, crimes against humanity and aggression,[86] is an area of international jurisdiction, especially international criminal law.

More importantly, there is an indisputable nexus between international criminal law and international human rights law. For instance, the UDHR (Article 14) and the ICCPR (Article 15) permit "conviction and punishment for acts or omissions which constitute crimes under national or international law at the time of commission."[87] Accordingly, "human rights have been and continue to be an animating force behind the development and application of ICL [international criminal law]...."[88]

There are thus two interlocking areas of international law relevant to the analysis of these types' of horrors. First they are human rights abuses. Second, by reason of the level of atrocities and scope involved in their commission, they have also acquired the status of "crimes" under international law, and thus constitute crimes for which there must be individual criminal liability. This makes individuals engaged in these types of crimes both criminal and human rights offenders.[89]

Notwithstanding the fact that a network of interlocking mechanisms of international criminal and human rights law have been devised to hold individual perpetrators accountable, the menace of gross human rights abuses of these kind is disturbingly still too real today.

The continent of Africa, especially in the last three decades, has endured far more than its fair share of human rights abuses, notably, genocides, war crimes, crimes against humanity and, to

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[86] *Rome Statute*…, *supr*a note 84, Art. 5 (1).
[87] Cherif Bassouni, "Human Rights in the Context of Criminal Justice...," *supra* note 78 at 290.
[88] Robert J. Currie, *International and Transnational Criminal Law…, supra* note 85 at 27.
[89] Andrew D. Mitchell, "Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimman v. Thompson*" (2000) 24 *Mel. Univ. L. Rev.* 15 at 22.

some extent, wars of aggression. While the 1994 Rwandan genocide is often cited as the apex event, mass human rights atrocities in post-colonial Africa go back to the 1960s, or the so-called Africa's "decade of independence."[90] For instance, crimes of gigantic proportions took place in Nigeria during the Biafra war (1967-1970),[91] just as the minority rule in apartheid South Africa occasioned major atrocities in that country.[92] Similar crimes were also committed in the Sudan during that country's civil wars between mid1956 and 2005,[93] during Idi Amin's rule in Uganda (1971-1979),[94] during the Communist rule of Mengistu Haile Mariam in Ethiopia (1974-1991) and in the Sierra Leonean civil war between 1991 and 2002,[95] and many ongoing crises in several other African countries.

The 1994 genocide in Rwanda, and the preceding events featuring similar predation on human rights seem to have taught Africa very little, if any, seeing that the continent has failed to put in place mechanisms to prevent crimes of similar nature and magnitudes from occurring again. It is no wonder that unimaginable human carnage continues in Darfur or the 2007-2008 post-election violence in Kenya was not prevented. Similarly, the unfolding internecine carnage in South

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[90] Donna Bryson, "Africa Marks 1960, When 1/3 Gained Independence" (2010), Associated Press, available online at: http://www.gmanetwork.com/news/story/191880/news/world/africa-marks-1960-when-1-3-gained- [retrieved on August 12, 2014].

[91] William Over, *Human Rights in the International Public Sphere: Civic Discourse for the 21st Century* (Stamford: Ablex Publishing Corp., 1999) at 107.

[92] Lovell Fernandez, "Reparation for Human Rights Violations Committed by the Apartheid Regime in South Africa," in Albrecht Randelzhofer & Christian Tomuschat, Eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) at 187

[93] Francis Deng, "Human Rights Among the Dinka," in Abdullahi Ahmed and An-Na'im & Francis Deng, Eds., *Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 262.

[94] Thomas Melady & Margaret Melady, "Myths and Realities About Idi Amin Dada's Uganda" (1979) 22 *Afr. Stud. Rev*. 127 at 130.

[95] Iryna Marchuk, "Confronting Blood Diamonds In Sierra Leone: The Trial of Charles Taylor" (2009) 4 *Yale J. of Int'l Aff.* 87 at 97.

Sudan and Central African Republic, combined, could ultimately lead to far greater human catastrophes than the Rwandan Genocide.[96]

These catastrophes are not isolated. Africa has been subjected to senseless mass violence, perpetrated mostly by the political class. Mariam summarises the African political malady in these words:

> the inconvenient truth about Africa today is that dictatorship presents a far more perilous threat to the survival of Africans than climate change. The devastation African dictators have wreaked upon the social fabric and ecosystem of African societies is incalculable. Over the past several decades, bloodthirsty dictators like Idi Amin, Zaire's ...Mobutu Sese Seko, Central African Republic's Jean Bedel Bokassa, Zimbabwe's Robert Mugabe, Sudan's Omar al-Bashir, Chad's Hissiene Habre, and the political fraternal twins Mengistu Haile and Meles Zenawi of Ethiopia have been responsible for untold deaths on the continent. Millions of Africans have starved to death because of the criminal negligence, depraved indifference and gross incompetence of African dictators, not climate change. Millions more suffer today in abject poverty because corrupt African dictators have systematically siphoned-off international aid, pilfered loans provided by the international banks and plundered the tax coffers. Africans face extreme privation and mass starvation not because of climate change but because of the rapacity of power-hungry dictators. The continent today suffers from a terminal case of metastasized cancer of dictatorships, not the blight of global warming.[97]

To Mariam's argument may be added the glaring evidence that the latest trend in Africa is much less about negligence than an effective involvement of the political elites in mass rampage. These mass crimes on the continent are often engineered and perpetrated by political elites who seek to retain the reins of power through hooks and crooks. Unfortunately, they are often not held accountable because the judicial systems are too compromised to bring them to book. For Rwanda, a special tribunal under the aegis of the United Nations Security had to be formed to try

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[96] Salil Shetty, "Lessons from Beyond the Grave for Central African Republic and South Sudan" (2014), *Think Africa Press,* online at: http://thinkafricapress.com/central-african-republic/lessons-beyond-mass grave [retrieved on June 28, 2014].

[97] A. G. Mariam, "The Toxic Ecology of African Dictatorships" (2014), *The World Post*, available online at: http://www.huffingtonpost.com/alemayehu-g-mariam/the-toxic-ecology-of-afri_b_382115.html [Accessed June 14, 2014].

the suspects because Rwanda, just like Sierra Leone eight years later, did not have the capacity to try the suspects.[98]

In the case of Darfur, the Sudanese government did not only deliberately obstruct the investigation process but also frustrated all attempts to bring to justice the perpetrators or suspects of the Darfur genocide. As a result, al-Bashir, the current President of the Sudan, indicted by the International Criminal Court (ICC). Bashir has, however, since refused to cooperate with the Court. The first and second arrest warrants were subsequently issued against him, on March 4 2009 and July 12, 2010 respectively.[99]

Kenya too failed to hold to account those accused of masterminding the 2007-2008 post-election violence that killed nearly 1400 people in that country. The suspects include the sitting head of State and President of Kenya, Uhuru Kenyatta, and his Deputy, William Ruto. Both men have since been indicted by the ICC and have chosen to cooperate with the Court. Since his initial appearance on April 2011, Mr. Ruto has since appeared several times before the ICC[100] in The Hague, Netherlands.[101] Kenyatta is yet to make his first court appearance.

Nevertheless, the fact that a sitting African Head of State could be subjected to international criminal jurisdiction has created a huge controversy in Africa. To many African political leaders and their supporters, this is a humiliation. Worse still, that such a tribunal sits in Europe, vindicates the argument of those who see the Court as one of the institutions for perpetuating the

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[98] *Security Council Resolution S/RES/955 (1994)*, UN 8 November 1994, S/RES/955 (1994) (on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal).

[99] *The Prosecutor v. Omar Hassan Ahmed Al Bashir (Omar Al Bashir)*, ICC-02/05-01/09: First Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March, 2009) & Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July, 2012).

[100] *The Prosecutor v. William Samoei Ruto &Joshua arap Sang (*2012), ICC-01/09/-01/11-01.

[101] Charles Onyango-Obba*, Daily Monitor*, "Why Kenya Has Presidential Debate but in Uganda, Museveni Won't Show," online at http://www.monitor.co.ug/OpEd/OpEdColumnists/CharlesOnyangoObbo/Kenya-has-presidential-debates-but-Uganda-Museveni-won-t-show/-/878504/1705304/-/a0cdxu/-/index.html (January 27, 2013) [accessed on April 2014].

unfinished "neo-colonist projects rather than an impartial organ of justice."[102] Others argue that prosecuting a sitting African Head of State makes the search for a peaceful solution to any conflict considerably elusive. This is why the AU has taken the position that Heads of State should remain immune from criminal prosecution while in office.[103] Other African countries, especially those from which the suspects hail, frequently invoke ideas of neocolonialism or Western political imperialism to shore up their own political support. Their aim, it seems, is to stoke anti-Western sentiments among their populations in order to frustrate the cases before the ICC. Some overtly agree with the Ethiopian Prime Minister, Hailemariam Desalegn, that the Court is only "hunting Africans."[104]This suggests that the Court is not really committed to the cause of human rights and justice. Surprisingly, such utterances have led many commentators to begin to harshly arm up to "the notion that the Court has a racist, neocolonialist agenda."[105]

Whatever their motives are, it is ironic that while African political leaders go around crying "crocodile tears" about the plights of their people and making bold statements about their commitment to observe and protect human rights, they do not see as shocking to their conscience the ease with which they ruthlessly kill their own citizens. They are quick to exhume harsh colonial treatment of Africans, forgetting that their crimes are just as repugnant.

The sections below, briefly analyse the Darfur genocide as an example of mass crimes and human rights violations in Africa. They also argue that the international community's reluctance

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[102] Kirsten Ainley, "The International Criminal Court on Trial" (2011) 24 *Camb. Rev. Int'l Aff*, at 309.

[103]Dapo Akande Max du Plessis & Charles Chernor Jalloh, "Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC" (2010) *Institute for Security Studies*, available online: http://www.elac.ox.ac.uk/downloads/AkandeDuPlessisJallohICCPositionPaper.pdf [retrieved on June 14, 2014][at 18: http://www.bbc.com/news/world-africa-24173557 [accessed on April 10, 2014].

[104] Kurt Mills, "Bashir is Dividing Africa: Africa and the International Criminal Court" (2012) 34 *Hum. Rt. Qrtly*, 404 at 435.

[105]BBC, "Kenya's Ruto Formed Militia for War, ICC hears" (Sept. 10, 2013), online at: http://www.bbc.com/news/world-africa-24028714 [accessed on April 10, 2014].

to bring to account the perpetrators of such gross atrocities is not just a failure of international law but ultimately a violation of the rule of law which goes to the heart of human rights.

4.3.2. The Carnage in Darfur: A Violation of the Promise of "Never Again?"

Darfur has been the scene of horrendous human rights abuses for nearly 12 years now, partly as a result of historical rivalries between the African and Afro-Arab communities of the region, both of which have inhabited the area for centuries. As well, and perhaps more importantly, the shocking human rights abuses in Darfur are due to the raging civil war between the Darfurian rebels and the Sudanese Government since 2003. The rebels argue that their region has severely been marginalized due to unbalanced dispensation of economic resources and political power which they see as favouring the Afro-Arab regions in the country.[106]

Though ethnic rivalries have been part of this vast region's history, this conflict has, since 2003, assumed a new dimension. On the side of the Sudanese government are the Sudanese military, the Sudanese security apparatus and the deadly Arab paramilitary group or militia known locally as the *Janjaweed*. The *Janjaweed* have acted and "benefited from impunity for their actions"[107] on behalf of the junta of al-Bashir. They are equipped, trained and directed by government troops. They move on horseback or on mounted military vehicles.[108]

Assisted by warplanes, the *Janjaweed,* especially between 2003 and 2006, put the whole region to both "fire and the sword," literally wiping out hundreds of civilian villages and settlements.

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[106] Ifeonu Ebrerechi, "Armed Conflicts in Africa and Western Complicity: A Distinctive Case for African Union's Cooperation with ICC" (2009) 3 *Afr.J. Legal. Stud.,* 53 at para.3.

[107] Errol P. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham, UK; Northampton, MA: Edward Elgar Press, 2010) at 58-59.

[108] James Traub, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* (New York: Douglas and McIntyre, 2006) at 209.

They also uprooted millions of farmers from their lands.[109] Meanwhile, across the country, innocent persons of Darfuri origin were targeted and discriminated against based on allegations of being sympathetic to the rebels.[110]

Properly described as "genocide" by the United States and by the United Nations as one of the worst humanitarian crises of this century, the Darfur carnage has evidently posed a significant moral challenge to Africa and the international community.[111] At the time of this writing, millions of Darfuri civilians are still "stranded in sprawling, squalid refugee camps that themselves are under constant threats of attack and demolition"[112] while "as many as 400, 000 have died from slaughter and from starvation and diseases that followed."[113] By 2008, Darfur was literally reduced to a killing field, a *Golgotha,* as civilians died in staggering numbers that have not been seen since the Rwandan genocide in 1994.[114]

Properly understood, what is happening in Darfur is a campaign to get rid of the people of African descent, because they are seen as posing a serious threat to the creation of a monolithic Islamic-Arab State in the Sudan. It is a gradual but surely tragic Rwandan-type catastrophe that is unfolding, a clear violation of the international community's promise of "never again." As remarked by one commentator, "we say, "never again" until it happens again and then we do nothing."[115] The slogan or declaration, "never again," was made by "the victorious powers after World War II [and] was intended to encapsulate humanity's resolve to banish human rights

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[109] James Traub, *The Best Intentions: Kofi Annan and the UN …, supra* note 108.
[110] *Hamid v. Canada (Ministry of Citizenship and Immigration),* 2007 F.C.J. 1546 at para. 13.
[111] Christley Mawdsley, "An Interest in Intervention: A Moral Argument for Darfur" (2008) 10 *Afr. Stud. Qrtly.*, at 95-7
[112] *Hamid v. Canada (Ministry of Citizenship and Immigration)…, supra* note 110 at para. 13.
[113] Ibid.
[114] Robert O. Collins, "Disaster in Darfur: Historical Overview," in Samuel Totten & Eric Marckusen, Eds., *Genocide in Darfur: Investigation the Atrocities in the Sudan* (New York: Routledge,, 2006) at 20.
[115] Nicholas Kristof, "Dodging Bombers in the Sudan" (2012), *The New York Times*, online at: http://www.nytimes.com/2012/02/23/opinion/kristof-dodging-bombers-in-sudan.html?_r=2&hp.

misery in all its ramifications, whether arising from physical abuse or from want."[116] But as it has been seen time and time again, the promise of "never again" has turned to be a matter of lip-service. What is happening in Darfur is the latest in a series of such breaches and international negligence.

As a consequence, and prior to the indictment of al-Bashir, a number of individuals were accused of perpetrating violence in Darfur. The Government, nevertheless, refused to cooperate and bring the culprits to justice. Becaue of this, and despite repeated attempts by the ICC to bring those suspects to justice, the ICC ultimately indicted al-Bashir who, as expected, refused to cooperate with the Court. Subsequently, an arrest warrant against him was issued in 2009. Among other charges, Bashir is accused of being an indirect co-perpetrator of violence against the civilian population in Darfur.[117] He has also been charged with being a:

> *de jure* and *de facto* President of the Republic of the Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003...and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the... counter-insurgency campaign...; further…there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the Republic of the Sudan, including the Sudanese Armed Forces and their allied *Janjaweed* Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan.[118]

Ironically, by siding with Bashir, the culprit, Africa and the African Union appear to prefer impunity over justice and criminal accountability, as demonstrated by the following discussion.

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[116] Shedrack C. Agbakwa, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Corner Stone of African Human Rights" (2002) 5 *Yale Hum. Rt. & Devt. J.,* 177 at 180.

[117] Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort…*, *supra* note 107 at 89.

[118] *Prosecutor v. Omar Hassan Ahmad El-Bashir (Omar El Bashir*) [2010]…, *supra* note 99.

4.3.2.1. The Role of African States Parties in Hindering Prosecution of Al-Bashir

African States constitute one of the largest regional blocs in the ICC membership[119] and their cooperation, or lack thereof, could impact the operations of the Court in very fundamental ways. It is worrisome that since the issuance of the arrest warrant against al-Bashir, their cooperation with the ICC has generally remained ambivalent, and in fact leaning towards al-Bashir and against the ICC. In an unprecedented move in 2010, the African Union passed a resolution calling for non-cooperation with the ICC.[120] The AU cited many reasons, including the notion of 'peace-first-justice-later' in Darfur, as well as the nagging concerns about whether the ICC has legal jurisdiction to prosecute a sitting Head of State. Failure to comply with the resolution, the continental body warned, would lead to unspecific measures against cooperating States.[121]

Such a move is contemptible because it is intended "to place an entire category of people outside the remit of justice including sitting Heads of Government."[122] That justice should be postponed for the sake of peace remains controversial although such an approach may be appropriate in

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[119] As of 2014, there are 122 States Parties to the *Rome Statute*. Of this total, 34 States are from Africa, 18 from Asia-Pacific States, 18 from Eastern Europe, 27 from Latin America, and 25 from Western Europe and North American States. For further information, please see http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [retrieved on June 14, 2014].

[120] African Union, "Decisions and Declarations" (2009), Assembly of the African Union: 13th Ordinary Session, available online at:

http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf [retrieved on June 2014]. For further information, see Dapo Akande Max du Plessis & Charles Chernor Jalloh, "Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC" (2010) *Institute for Security Studies*, available online: http://www.elac.ox.ac.uk/downloads/AkandeDuPlessisJallohICCPositionPaper.pdf [retr. June 14, 2014].

[121] "African Union: "ICC Non-Cooperation Thwarted but African States Should Do More to Uphold the Rights of African Victims," (2013), *International Criminal Justice Program*, available online at: http://www.npwj.org/ICC/AU-and-ICC-African-States-should-uphold-rights-African-victims.html-0 [accessed on April 10, 2013].

[122] *Ibid.*

certain but rare circumstances. However, the idea that the Court should postpone the trial of al-Bashir and his co-perpetrators for political convenience is a suggestion that reflects poorly on the image and mandate of the Court.

Despite the AU's call, some African States have made it clear that their obligations under the Statute are sacrosanct. Botswana, for example, has openly declared that it "cannot associate herself with any decision [of the AU] which calls upon her to disregard her obligations to the International Criminal Court."[123] South Africa and Uganda have similarly expressed the same position as regards their legal responsibilities to the Court.[124] In fact, prior to the AU's ultimatum, other African States Parties had facilitated the work of the Court and its Prosecutor by providing protection to the victims and witnesses involved in some cases and by facilitating the initial appearances of individual indictees who voluntarily agreed to go before the Court.[125] This level of cooperation was generally seen as "a growing indication that…African States... [were] beginning to break away from the criticisms of the ICC by the African Union."[126] This cooperation has, however, since dwindled considerably.

4.3.2.2. Accountability or Immunity: Peace or Justice?

The AU's call for non-cooperation with the ICC has significantly impeded progress on the case against al-Bashir as he and his fellow indictees travel leisurely far and wide to different parts of the continent and the Middle East, despite the existence of outstanding arrest warrants against them. By pressing for peace over justice, the AU appears to imply that "justice and

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[123]Botswana: "Botswana Supports the Warrant of Arrest Issued by the ICC" (2011), *Ministry of Foreign Affairs and International Cooperation*, online at: http://www.icc-cpi.int/iccdocs/asp_docs/Statement/Botswana-ST-08July11-ENG.pdf [retrieved on July 10, 2014]..

[124] Afro News: "al-Bashir would be arrested in South Africa: Zuma," online at: http://www.afrol.com/articles/36228.

[125] Chief Prosecutor, *Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR* 1593 at (2005) at para. 14.

[126] Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, *supra* note 107 at 86.

accountability [even] for the most serious international crimes must be trumped by the search for a peaceful solution in Darfur."[127]

The dichotomised debate between peace and justice is not new as has spawned volumes of legal and political literature. While such a debate is beyond the scope of this chapter, it is important to mention in passing that, in the context of Darfur, the question of whether justice is a perquisite for peace and vice versa cannot be taken lightly. Proponents of justice for the Darfur victims argue that prosecution of high ranking officials (including al-Bashir) charged with horrendous crimes of such nature must be a priority. They argue that prosecution places blame squarely on those responsible for the most egregious crimes against humankind. In their opinion, prosecution effectively achieves this purpose because it defines such acts as crimes committed by specific individuals. Prosecution, as such, reduces the named individuals' standing in society and thus acts as a deterrent against individual leaders' initiatives to mobilise groups that ultimately aid in the commission of such crimes on their behalf.[128] The gist of this argument seems to be that prosecution "individualises guilt and marginalises abusive leaders."[129] It is further argued that being a court of last resort, the ICC acts when concerned States are not just reluctant but unwilling or unable (because the national justice system is weak or corrupt) to prosecute the perpetrators. Prosecution, therefore, does not interfere with, but indeed complements, national legal systems.[130]

The opponents of prosecution (or proponents of peace), on the other hand, argue that situations such as what is taking place in Darfur are complex because they arise out of political discontent

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[127] Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, *supra* note 107 at 90.
[128] Laura Davis, "The ICC: A Straw Man in the Peace versus Justice Debate" (2013), *Africa's Mediators' Retreat—Oslo Network Forum of Mediators*, at 44.
[129] *Ibid*., at 43.
[130] *Ibid*., at 43-44.

or misgovernance. Mbeki and Mamdani, for instance, argue that the Darfur situation, like that of South Sudan, is a typical example of "mass violence" which is rather more political than criminal in nature. Mass political violence, they argue, "has a constituency and is driven by issues, not perpetrators."[131] Those against prosecution also argue that the ICC is not only politically biased but overtly discriminates against Africans. They additionally maintain that by indicting leaders of highly divided societies, such as the Sudan, prosecution thwarts any meaningful efforts for peace, leaving indicted leaders with no alternative other than to keep on fighting and with little incentive for a peaceful settlement of conflicts. Moreover, such indictments seemingly galvanise mass political support for indictees as is purportedly the case with respect to the situation of President Uhuru Kenyatta and his Deputy President, William Ruto of Kenya, both of whom rode into the presidency in the 2013 presidential elections in Kenya on anti-Western waves.[132]

This thesis takes issues with the position taken by the "peace-first" proponents and agrees with Beny's reasonable contention that "judicial processes—whether in formal statutory courts or in traditional fora—are a critical means to address the victims' claims, even if they are incapable of making the victims fully whole again."[133] Several reasons explain the deficiency of the argument contending that peace follows justice.

First this argument makes it loud and clear that human dignity and the imperatives of universal justice against the most serious violations of human rights can simply be bargained away in order to protect government officials. Yet justice for the victims of the types of crimes with which al-

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[131] Thabo Mbeki and Mahmoud Mamdani, "Courts Cant' End Civil Wars" (2014), *The New York Times*, online at: http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html [retrieved on July 10, 2014].

[132] Laura Davis, "The ICC: A Straw Man in the Peace versus Justice Debate...," *supra* note 128 at 6 and 44-45.

[133] Laura Nyantung Beny, "Think Courts Aren't Relevant? Ask the Victims" (2014), *United to End Genocides*, available online at: http://endgenocide.org/think-courts-arent-relevant-ask-victims/ [retrieved on July 10, 2014].

Bashir has been charged cannot be bargained or deferred without a moral affront to natural justice. That the AU has the audacity to defy international legal edicts against perpetrators of such heinous crimes indicates that fundamental human rights violations in Africa can simply be traded for political convenience and that justice can be compromised for the so-called considerations of peace. This makes legal accountability a matter of luxury.[134] But peace without justice is a short-term goal. In fact, trading justice for peace is a recipe for more violence, given that "persistence of impunity and lack of accountability…sow the seeds for new conflicts and atrocities by ruthless leaders who manipulate past injustices ...[for] their own political ends."[135]

The crimes al-Bashir has been accused of are so grave and serious as to shock the 'conscience of humanity.'[136] More importantly, to advert or wish that justice be trumped by the search for peace in Darfur is to make a fallacious diagnosis of the underlying causes of the conflict in the region. After all, al Bashir has been in power by the sheer use of force since 1989, when he took power through a military coup. Since then, every single day he has spent in office has meant precious loss of innocent lives, both at the hands of the military and security apparatuses.

Blatant criticisms against the ICC, and labeling it as an instrument of Western imperialism, are therefore unfounded. That peace is a significant requirement for the enjoyment of human dignity is indisputable. However, avenues for the search for peace are not within the jurisdiction of the ICC, since the ICC is not a peace-making institution. There are appropriate forums other than the ICC for realising peace. For instance, Article 16 of the Rome Statute expressly reserves such powers to the UN Security Council or to the Assembly of States Parties. It is "not for the ICC

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[134] Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, *supra* note 107 at 92.
[135] *Ibid.*
[136] *Ibid.,* at 20-21.

Prosecutor, Chambers or Registrar to make decisions based on, or even taking into consideration, political issues."[137] The ICC is an institution whose mandate is to fight impunity and bring justice to those to whom it has otherwise been denied. In particular, the principal function of the Office of the Prosecutor is to investigate and prosecute crimes that fall within the Court's jurisdiction, not to find a peaceful settlement to the crisis that triggers the commission of such crimes in the first place. That is why bringing al-Bashir to justice would send a clear message to perpetrators across Africa that 'justice is not negotiable' and that the "ICC …does not have a simple choice of justice over peace."[138]

The AU's non-cooperation ultimatum with the aim of thwarting the prosecution of al-Bashir and his counterparts like Kenyatta, is also predicated on the idea that a sitting Head of State has absolute immunity. The AU cites the *Arrest Warrant Case*[139] to support its argument for al-Bashir's immunity.

However, it is clear from the Rome Statute that no one is exempt from criminal accountability simply by virtue of his or her official capacity or status.[140] Article 27[141] of the Statute specifically provides that:

> official capacity as a Head of State or Government, *shall in no case* exempt a person from criminal responsibility….*Immunities* …which may attach to the official capacity of a person…, *shall not* bar the Court from exercising its jurisdiction over such a person.

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[137] African Union: ICC Non-Cooperation Thwarted but African States Should Do More …," *supra* note 121.
[138] Errol Mendes, *Peace and Justice at the International Criminal Court…, supra* note 107 at 90.
[139] *Democratic Republic of the Congo v. Belgium)* (ICJ), [2002], I.C.J. Report 2002 at 3.
[140] Remigius Oraeki Chibueze, "The International Criminal Court: The Bottlenecks to Individual Criminal Liability in the Rome Statute" (2010) 12 *Ann. Surv. Of Int'l & Comp. L.* 185 at 189.
[141] *Rome Statute…, supra* note 84, Art.2.

As such, al-Bashir's status as a Head of State does not exempt him from criminal accountability under Article 27 (1) without violating the rule of law.

Similarly, the AU's citing of the *Arrest Warrant Case,* a decision of the international Court of Justice (ICJ), to support its position ironically undermines its argument. This is because, whereas it is true that this decision stands for the proposition that certain State Officials generally enjoy immunity from prosecution while in office, the AU appears to be wilfully blind to an important *dictum* in that case, especially where the ICJ noted that State officials are not immune from prosecution where they are *accused of committing most serious international crimes* before a court or tribunal of competent jurisdiction established pursuant to authority of the UN Security Council and/or the Rome Statute. In its own words, the Court observed that, State officials:

> ...may be subject to criminal proceedings before certain international criminal courts …established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter…and the 1998 Rome Convention.[142]

The implication is that proceedings against al-Bashir and his fellow indictees under the Statute do not violate the principle of immunity *ratione personae.* For the heuristic purposes, it should be noted that the concept of:

> immunity from prosecution may be either personal or functional in nature. Personal immunities are time limited and operate to deny a particular court jurisdiction over a particular person while that person is in office. Functional Immunities present a permanent bar to adjudication because they attach to the act rather than to the actor.[143]

Robert Currie notes that while personal immunity protects individual offices, functional immunity, on the other hand, protects specific acts of State officials. He also notes that the two types of immunity, however, are not synonymous with the defence for criminal responsibility

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[142]*Democratic Republic of the Congo v. Belgium)* (ICJ), [2002]…, *supra* note 139*,* at para. 61.
[143] Robert J. Currie, *International & Transnational Criminal Law, supra* note 85 at 539.

and, hence, cannot operate to excuse criminal liability. Rather, the concept of immunity operates to negate the ability of the court to exercise jurisdiction over certain public officials on policy grounds. [144] In this sense, *rationae personae* or personal immunity is one that attaches to certain class of State officials, including Heads of State and governments, while in public office.[145] But as the *dictum* in the *Arrest Warrant* case appears to suggest, this rule may not shield State officials to whom it applies from international criminal liability since the rule "appears to apply only as regards prosecution before national courts."[146] As such, *immunity personae rationae* has not been found to be a bar to criminal responsibility before a competent international criminal tribunal.[147]

Furthermore, since the Darfuri situation was referred to the Court by the Security Council under Chapter VII of the UN Charter, it can be argued that African States Parties' obligations to the ICC trump their obligations mandated by resolutions passed by regional organisations. This reasoning comes from the UN Charter itself where it is provided that a Member State's Charter obligations supersede other obligations. Specifically, Article 103 of the UN Charter provides that:

> [i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[148]

These include obligations under resolutions issued by the AU. To argue otherwise is to make Article 27 of the *Rome Statute* redundant and non-operable, and to generally undermine the

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[144] Robert J. Currie, *International & Transnational Criminal Law, supra* note 85 at 540.
[145] Ibid.
[146] *Ibid.,* at 543-4.
[147] Malcolm D. Evans, *International Law, 2nd* Edition (Oxford: OUP, 2006) at 417-8.
[148] *Charter of the United Nations*, United Nations (1945) 1 UNTSXVI, Article 103.

function of the Court, considering especially that this provision goes to the object and purposes of the Rome Statute and the mandate of the Court. This essentially suggests that the failure of African States, such as Chad, Djibouti, Zambia Malawi, and Nigeria, which al-Bashir visited after the arrest warrant against him was issued by the Court constitutes a violation of their responsibilities as UN Member States and their duties under the UN Charter and ultimately violates the rule of law, as discussed below.

4.3.2.3. The ICC Controversy in Africa and its Impacts on the Rule of Law

Following the failed threat by the AU to pull out of the ICC *en mass*e, one of the accusations that that is made against the Court is that it has been unfair to Africa.[149] The underlying reason for these accusations is, nevertheless, political in nature, for sentiments like this are normally used by politicians and elites to shore up support by voters since they help stir up anti-Western sentiments and conceal the ruling class' wrong doings. This perpetuates political and criminal impunity and violates the important principle of the rule of law.

The rule of law, it is suggested, involves substantive restrictions on the actions of public officials and private citizens alike, because it does not only shield individuals from perverse and unreasonable exercise of public power, but also "provides a bulwark against some abuses of private power."[150] Others have referred to the rule of law as "the absolute supremacy, or predominance, of regular law, enforceable in ordinary courts as opposed to the influence of arbitrary authority."[151] This implies that the rule of law is:

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[149] Errol P. Mendes, *Peace and Justice at the International Criminal Court…, supra* note 107 at 86.

[150] Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 *McGill L.J.* 573 at para. 122

[151] Ada O. Okoye, "The Rule of Law and Sociopolitical Dynamics in Africa," in Tiyambe Zeleza & Philip McConnaughay, *Human Rights, The Rule of Law and Development in Africa* (Pennsylvania: UPP, 2004) at 71.

> primarily concerned with ensuring a government of laws, not of men, the end being the establishment and preservation of a just and orderly society..., an ideal model of legal authority in which government by rules takes precedence over government by the will of those holding official power, the latter being no more than 'a wheel in the machine and never its ghost.[152]

This also suggests that in requiring strict conformity with prescribed legal rules, the rule of law constrains the government so that it official conduct is reasonably predictable. This way, the rule of law protects individuals and groups by prescribing procedural legal guarantees or rules that protect them from unfair and oppressive actions of the government.[153]

It is worth emphasising that adherence to the rule of law is not only restricted to acts of governments and government officials. It also applies to any institution that has the capacity to breach the requirement of fair and equitable treatment of individuals and groups or violate human rights. This view "has the effect of extending the concept [of the rule of law] beyond governments to quasi-legislative, judicial and executive actions of non-governmental bodies or groups, which in the African context includes town unions, welfare associations and other organizations of civil society."[154] This is plausible, considering that non-governmental institutions have the capacity to violate or injure the rights of individuals and groups over which they exert control and authority in the same way governmental institutions do. The rule of law, therefore, includes the regulation of the "conduct of every form of constitutional authority in human association."[155] The overall effect is that the rule of law eliminates differential treatment of individuals on any grounds save as provided or required by a just and fair and reasonable law.

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[152] Ada O. Okoye, "The Rule of Law and Sociopolitical Dynamics in Africa...," *supra* note 151.
[153] *Ibid.,* at 72.
[154] *Ibid.*
[155] Ibid.

Yet, for obvious reasons, many political leaders in Africa are not subject to the rule of law even when they have manifestly perpetrated acts of serious and grave violence against humanity. They act as if they are above the law, and some in fact are perceived or perceive themselves as such, since they are the only ones who wield power and make laws. In fact in practice, the burdens of the law are only for the subjects even if the laws on paper may prescribe holding the leaders accountable. This is precisely why domestically, most African political leaders are never held to account for their political inequities and criminal actions. They openly flout the rules and legal systems to promote their political interests, manipulate their own citizens and hold them hostage to their political egos and insatiable lust for power. This explains why leaders who have shot their way on to the political throne, like al-Bashir and Kenyatta, can maim as many as hundreds of thousands and yet remain far from the reach of the force of law. The laws, it appears, were not meant for them. All this a is a result of the fact that most African judicial systems are so compromised that political elites can manifestly show their wanton disregard for the right to life and yet blame such moral failings on neocolonialism and Western imperialism. They overtly violate their citizens' rights to life, liberty and security of the person and get away with it. Some are even rewarded for so doing.

The concept of the rule of law also encompasses the idea of individual responsibility. It would seem to demand that no one should be allowed to invoke the past to justify their criminality. The invocation of neocolonialism, Western imperialism or labeling of human rights as alien values should not, under any circumstances, be valid excuses for justifying the killing of one's own people. These values are universal and "are to be found in every civilization throughout the world and history."[156] Justice for African victims, not political convenience or other

[156] Paul Siehart, *The International Law of Human Rights* (Oxford: Claredon Press, 1983) at 15.

considerations, should come first. Hence, the tendency of African political leaders to allow political interests to override the right to life of their own people is a petty way of juxtaposing African and Western values. It shows that the right to life of the individual can cheaply be sacrificed at the altar of political convenience, a clear violation of the rule of law which itself "is a fundamental principle of human rights."[157]

It follows that the Africa's resistance to ICC jurisdiction, to which they willingly subscribed in the first place, is an attempt to circumvent criminal justice and to maintain tight control over national institutions and people. The promise of human rights is that "the problems of cruel conditions of life, State instability and other social crimes could be contained if not substantially eliminated through the rule of law...[and] through constitutionalism."[158]

In the context of Africa, this promise appears to have been swept away in a blink of an eye, following especially the AU's ultimatum to African countries against cooperating with the ICC. Ironically, pursuant to the African Charter vision, African leaders have purportedly declared "their commitments to promote and protect human and peoples' rights..., respect the sanctity of human life, condemn and reject ...impunity and political assassination...."[159] In making such a solemn promise to the African people only to act to the contrary, post-colonial African leaders have clearly chosen to violate their peoples' human rights in the most shocking ways possible.

The most fundamental question is, therefore, how should the argument for the universality of human rights standards be approached in the face of gross violations of human rights in post-colonial Africa? Chapter 5 discusses and attempts to provide an answer to this question.

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[157] Paul Siehart, *The International Law of Human Rights, supra* note 156.
[158] Makau Mutua, "Terrorism and Human Rights: Power, Culture and Subordination" (2002) 8 *Buffalo Hum. Rt. L. Rev*., at 301
[159] Aphrodite Smagadi, *Sourcebook of International Human Rights Materials*…, *supra* note 71 at 64.

Chapter 5: Human Rights Standards: A Case for Universalism

5.1. Introduction: Sources of International Human Rights

As discussed in Chapter 2, the idea that human rights are inherent and inalienable is predicated on the belief or theory of the notion of equal and universal humanity. This theory does not have to justify what makes us human beings, since humanity is self-evident and since human rights are owed to each and every individual by virtue of his or her humanity. This notion was recognised in the U.S. Declaration of Independence which rightly declared "it to be self-evident that all men [and women] are created equal."[1] Given that humanity is self-evident, the theory must, instead, justify why human rights are inalienable and, more importantly, universal.[2] Universality can be achieved if the theory can provide compelling justifications as to why human rights must apply equally to everyone, every time, everywhere.

Such justifications are generally derived from two major sources: natural science and/or philosophy. It is these justifications that must provide the legal and moral or philosophical basis for the grounding of international human rights standards, considering that the existing international human rights instruments, in and of themselves, are insufficient to resolve the nagging and fundamental questions as to whether the set of human rights principles they enumerate are Western or are, in fact, universal values.[3]

Scholars have sought to justify the theoretical underpinnings of the universality of the human rights concept, by using a variety of comprehensive doctrines that attempt to support the moral equality of all human beings. For instance, some have sought to encode the validity of human

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[1] Declaration of Independence: A Transcription [1776], http://www.archives.gov/exhibits/charters/declaration_transcript.html [accessed on August 13, 2014].
[2] Amartya Sen, "Elements of a Theory of Human Rights" (2004) 32 *Phil. & Pub. Aff.*, 315 at 17.
[3] Alison Renteln, *International Human Rights: Universalism versus Relativism vol. 6* (London: Sage, 1990) at 54.

rights in natural law, or in divine commands.[4] Others have simply sought to achieve the same in political ideology in order to further the common good of humanity, or in utilitarian principles to 'produce virtuous citizens' that care for and about one another.[5] Some scholars have similarly sought to found the universality of human rights doctrine in the ability of human beings to use language, the reciprocal responsibility for one another and on the basis of the human capacity to conform to universal moral standards.[6] Finally, justification for and legitimacy of universalism has also been sought in theories about human needs, human dignity, the pursuit of justice or reaction to injustice, or in equal respect and consideration for all.[7] Accordingly, "the content of the concept of human rights depends on the basis of moral authority from which it derives its legitimacy."[8] There are, thus, as many theories of justification for the universality of human rights as there are rights theorists.[9]

However, whether the justification or legitimacy of the universality of human rights is based on philosophy or science, there appears to be a number of scientific or philosophical grounds to which human rights theorists refer, including; "(1) divine authority, (2) natural law, (3) intuition (that is certain actions are obviously wrong because they violate inalienable rights)…, (4) ratification of international instruments; [and (5) human needs]."[10]

This thesis does not, however, intend to ground its arguments for universalism on any of these theories, considering that most of these theoretical bases do not provide a satisfactory

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[4] Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 The *Am. Pol. Sc. Rev*., 303 at 307.
[5] Jack Donnelly, "The Relative Universality of Human Right" (2007) 29 *Hum. Rt. Qrtly* 281 at 290.
[6]D. N. Husak, "Why There Are No Human Rights" (1984) 10 *So. Theo. & Pract.,* 125 at.128
[7]Michael Goodhart, "The Origins and Universality in Human Rights Debates: Cultural Essentialism and the Challenge of Globalization" (2003) 25 *Hum. Rt. Qrtly* 935 at 940.
[8]Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 9.
[9]H.L.A. Hart, "Bentham On Legal Rights," in A.W.B. Sampson Ed, *On Jurisprudence, 2nd Edition* (Oxford: OUP, 1973) at 171-201.
[10]Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 9.

justification as to the universality of human rights. For instance, a theory based on divine authority is bound to be insufficient to ground universalism, for the simple reason that there are conflicting religious doctrines as to the objective dictates of divine canons that are advanced by each of the major religious traditions. Besides, none of these divine tenets is subject to proof.[11] The near incompatibility of various religious doctrines makes it virtually impossible to reach a global consensus as to the content or objective interpretation of human rights.

Furthermore, with respect to a theory based on human needs, one of the problems is that human needs vary significantly from place to place, particularly on account of environmental, economic or political factors, such as peace and war, or whether one lives in a poor or rich society. The construction of "needs" in a given context may also be a function of a political philosophy inspired by a temporary political interest, or reflect the taste and personalities of those in power. This is why there is no "universal assent to the ordering of human needs as evidenced, for example, by the relative support of the two Covenants on human rights."[12] During the Cold War, for instance, the Communist Bloc sought philosophical justifications for human rights in communist ideals, while the West sought its justification in liberal political philosophy and capitalist ideals. Many developing countries, including those in Africa, on the other hand, unsuccessfully sought to establish a Third Way, founded in cultural philosophies such as African socialism, *ubuntu* or *ujama.*[13]

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[11]Jack Donnelly, "Human Right and Human Dignity…, *supra* note 4 at 398.
[12]Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 9.
[13] Bonny Ibhawoh & J.I. Dibua, "Deconstructing *Ujamaa:* the Legacy of Julius Nyerere in the Quest for Social Economic Development in Africa" (2003) 8 *Afri J. Pol. Sc*., 59-78.

From a practical standpoint, then, an attempt to establish an authoritative list of human rights based on human needs is virtually untenable, as such an attempt could only produce a deficient or limited list of rights, ranging from the right to physical security to social and psychological needs. This suggests that the needs-based or science-based theory of human rights is incapable of supplying a comprehensive universalist theory of rights. For it is not necessarily what we need to survive or be comfortable that alone engenders a meaningful existence for the human person. Rather, what an individual needs most is adequate and holistic protection that will enable him or her to live and enjoy a dignified life and existence.[14]

Nor is it plausible to make the case for the universality of human rights on the basis of a philosophy of natural law from which the concept of natural rights was derived, especially in light of modern and early modern Europe. The major defect of natural rights theory about human rights is its failure to adequately and comprehensively conceptualise abstract ideas like the right to work, employment, equity or the idea of equal pay for equal work.[15] It follows that, natural rights theory cannot justify universalism, for the simple reason that there is a great deal of difficulty with respect to how norms which are supposed to be considered as part and parcel of the law of nature and, therefore, *prima facie* inalienable, should be conceptualised.[16]

Finally, the natural rights doctrine is insufficient to justify universalism, considering that ideas about natural rights vary from one theory to the next, depending on how each theorist conceives of "nature." This explains why natural rights theories fell out of favour among early

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[14] Jack Donnelly, *International Human Rights: 3rd Edition* (Boulder: Westview, 2007) at 23.

[15] Paula Määttä, *The ILO Principle of Equal Pay and Its Implementation* (Tampere: Tamp. Univ. Press, 2008) at 381-412 and Laura Roskos, "International Law, National Sovereignty and Local Norms: What's to Become of CEDAW in the U.S.?" (2003), *Consortium on Gender, Security and Human Rights*, Working Paper No. 103 at 4-10.

[16] Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14 at 24.

legal scholars and philosophers— although it briefly gained momentum at the end of World War II before it once again ultimately vanished, once and for all.[17]

The fact that natural rights could not provide a substantive basis for articulating human rights prompted some scholars in the 18th and 19th centuries to argue that the only set of logical rights that could be had were legal rights.[18] Nevertheless, legal positivism, as discussed later herein, proved problematic for the simple reason that it would appear to legitimate and insulate iniquitous State laws which often lacked internal moral consistency.

While few theories on human nature and human rights have universal acclaim and acceptance, what follows are some of the most widely accepted theoretical justifications for human rights and their universality. These theories are especially relevant in the context of Africa's continuous struggle to grapple with the legitimacy of the concept of human rights, despite the fact that every single sovereign African country is a member of the international community and has pledged to protect, defend and promote human rights in accordance with their duties and obligations as stipulated under the international human rights treaties they have signed. For the purposes of this thesis, the discussion will be limited to five theories, discussed in five different sections. The discussion will assume that all States are Members of the UN.

In Section One, I argue that human rights are universal moral obligations. In Section Two, I argue that the universality of human rights is inherent in the very nature of universal human dignity. In Section Three, I present human rights as limitations on the concept of State sovereignty. Section Four contends that the universality of human rights must be upheld as a

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[17] Jerome Shestack, "The Philosophic Foundations of Human Rights," in J. Symonides Ed*, Human Rights: Conceptions and Standards* (New York: Ashgate & UNESCO, 2000) at 38.

[18] H.L.A. Hart, "Bentham On Legal Rights," in A.W.B. Sampson Ed, *On Jurisprudence, 2nd Ed*., *supra* note 9.

necessity. Finally, in Section Five, I argue that universalism serves as a limitation on the right to culture. In the final section, I conclude that notwithstanding diversity as to culture, political ideology or religion, there are, at least certain human rights that are or must be considered universal. Moreover, these core human rights are not just legal constructs but are moral, as they are legal, imperatives that protect the essence of the intrinsic human value that inheres in every single individual human being.[19]

5.2. Universalism as a Moral Obligation

5.2.1. Introduction

In this section, I argue that human rights do not only represent a set of codified universal moral norms, but that they represent a significant global convergence on moral norms. These arguments enjoy considerable resonance in Africa, since in pre-colonial African societies, the dividing line between rights, morality and religious precepts was thin and blurred. Moral obligations were, in fact, perceived as the more compelling responsibility, given that they were regarded as duties from which no transgression was permitted.[20]

The quest to create a truly universal community, in which every individual is valued both as a separate entity and as a member of a (social, religious, cultural or linguistic) community, is as much a legal responsibility as it is a fundamental moral obligation. This obligation is inferred from the fact that human rights were first understood as moral rights before they evolved into legal rights, following their codification by the relevant international human rights

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[19] Tom Campbell, 'Human Rights: Moral or Legal?" in David Kinley, Wojciech Sadurski & Kevin Walton, Eds., *Human Rights: Old Problems, New Possibilities* (Cheltenham: Edward Elgar, 2013) at 1-26

[20] Abdullahi Ahmed An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 3.

instruments.[21] Human rights, therefore, reflect a global vision of shared moral norms, irrespective of differences as to race, ethnicity, culture, language, gender, age, political ideology or a given nation's stage of economic development. This aspect is captured by Article 2 of the UHDR which provides that:

> everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[22]

This Article also provides that no one shall be discriminated against on such grounds as "political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[23]

It follows that insofar as human rights values represent the collective conscience of the international community and its resolve to protect group and individual rights, they represent or reflect a higher moral order of human aspirations.[24] They also reflect the collective consensus on social and cultural achievements for the whole of humanity. Such an understanding is significant enough to warrant their promotion and enforcement at the global level. To argue that such values have no purchase in certain societies or cultures is to devalue the moral content of such cultures or societies. Similarly, to contend that human rights standards should not apply to those cultures is to acquiesce to doing the exact opposite: human wrongs. This would call into question the self-excluded community's claim to uphold moral ideals. "The idea of human rights... implies that there is a certain irreducible moral value in

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[21] Andrew Fagan, "Human Rights" (2014), *Internet Encyclopedia of Philosophy*, University of Essex, available online at: http://www.iep.utm.edu/hum-rts/ [retrieved on July 1, 2014].
[22] UDHR, Art. 2.
[23] *Ibid.*
[24] Yougindra Kushalani, "Human Rights in Asia and Africa" (1983) 4 *HR. L.J.* 418 at 420.

each individual human being"[25] regardless of where they come from. Donnelly has rightly observed that the essence of human rights or stated goal is justified by their ability to protect an individual's moral worth rather than by some external account about an individual as dictated by the society from which he or she hails from.[26] This understanding renders appeal to culture; religion or political ideology irrelevant.

Below, I discuss the relative nature of morality (5.2.2) and human rights as moral rights (5.2.3). I then conclude this section with a discussion on human rights as values that represent codified global convergence on morality (5.2.4).

5.2.2. The Relative Nature of Morality

One of the major difficulties in making the case for the validity and universal application of human rights from a moral perspective is that morality is a highly contested and subjective concept. This subjectivity arises from the fact that each cultural or religious tradition (as defined by its philosophies, beliefs and cultural norms), for instance, has historically attempted to portray its moral values as the most authentic and objective. This is why each asserts and holds itself out as superior to others.[27] As such, each tradition strives to show that its moral code warrants being considered the universal template for all other traditions.[28]

Even among major religions, there are varying internal diversities on the notion of universal morality. Some Christians, especially the Protestants, for instance, do not subscribe to the idea of universal morality because they do not believe that "morality... transcends cultural and

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[25] Jack Donnelly, "Human Rights and Western Liberalism," in Abdullahi Ahmed An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 35.
[26] Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14.
[27] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 48.
[28] Jack Donnelly, "The Relative Universality of Human Right…," *supra* note 5 at 293.

religious diversity."[29] They rather believe that religious morality and commitments are products of specific religious or historical convictions and are therefore not commensurable with one another.[30] In essence, they believe in moral particularism and argue that we all live in a world of fragmented global moralities that inform our ideas on human rights.[31] The implication of this argument is that even members of the Christian faith, let alone those of different religions like Judaism, Buddhism and other creeds etc., do not believe in the concept of universal morality.

This is the kind of argument that absolute relativism tries to promote, based on the belief that each culture must follow its own philosophical doctrines from which it draws its moral norms and authority. It is for this reason that some scholars advance the proposition that since the moral values of different cultures are different and irreconcilable, it is not feasible to search for cross-cultural universals. Such an inquiry, they maintain, is bound to end in futility. To them, global moral convergence is simply untenable.[32]

Yet, as it will be discussed in subsection 5.2.4 below, one can argue that moral convergence on the part of various global cultures is real. Bidney, for instance, argues that cross-cultural findings demonstrate that no single culture condones or entertains culpable acts such as treason, rape, murder or torture, just as nearly all societies recognise the basic rights to personal property.[33] This suggests that there are common moral threads that cannot be limited to any particular society, a testimony to the existence of not just cross-cultural moral

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[29] David Little, "Christian Perspectives on Human Rights," in Abdullahi Ahmed An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 59.
[30] *Ibid.*
[31] Stanley Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* (Notre Dame: UNP, 1983) at 63.
[32] Alison Renteln, *International Human Rights: Universalism versus Relativism vol.6…, supra* note 3 at 13, 78.
[33] D. Bidney D, "Cultural Relativism," in D. Sills Ed., *International Encyclopaedia of Social Sciences 3rd Ed.* (New York: Free Press, 1968) at 545.

fertilization but also for mutual understanding among believers of diverse global cultures. To negate the validity and universality of human rights standards on account of variations on moral perspectives is, therefore, superficial for at least two reasons.

First, the concept of human rights, as a derivative of universal moral norms, does not have to be grounded in or derived from a divine or spiritual perspective. Rather, it needs to be grounded in the ephemeral precept of golden rule, a principle which, according to Howard, can be found in all religious and cultural traditions and pursuant to which everyone should treat everyone else as he or she would wish to be treated.[34] This essentially suggests that all religio-cultural traditions share, celebrate and promote the enduring philosophy of the golden rule from which we can draw common moral teachings. The second and related reason for the superficiality of the relativist argument against presenting human rights from a moral perspective is that the fact that every society believes that its moral standards represent the best does not imply that different societies do not have shared or common moral values.[35] There is such commonality, and it is predicated on an understanding that "a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom or autonomy."[36]

Human rights are, therefore, not derived from any particular cultural, religious or political ideology. Instead, their underlying values represent moral threads that spell out our common abhorrence for injustice and the desire to preserve the integrity of the individual in their

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[34] Rhoda Howard, "Group versus Individual Identity in the African Debate on Human Rights," in Abdullahi Ahmed An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 162.

[35] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 13.

[36] Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 43.

communities.[37] This leads to the natural conclusion that since human rights do not draw their validity from a particular cultural or religious heritage, they are the middle ground between all variants of moralities and, as discussed below, represent an overlapping moral consensus among different religious and political doctrines, contrary to the above argument for religious moral particularism.

"An overlapping consensus describes the domain within which doctrines register identical claims even though outside that domain, they continue to register different and conflicting claims."[38] This ensures that human rights provide the "multiple grounds" which make them capable of addressing "a wide range of issues... while circumventing not merely inconclusive but often pointless disputes over moral foundations."[39] Seen this way, human rights must reject any appeal to moral theology or particularised cultural philosophy in order to avoid being rejected by other religious or cultural traditions on specific grounds. They represent a secular version of our fundamental human and social needs and are, as such, a superior species of morality that "exist as a strong set of normative principles influencing the actions both of States and citizens."[40]

Finally, as a concept that represents an overlapping moral consensus among all cultures, human rights may be taken to represent what Michael Walzer calls *thin morality*.[41] From an historical and cultural perspective, Walzer distinguishes two variants of moral principles, namely, *thick morality* and *thin morality*. Thick morality is the equivalent of a particularist view of human rights discourse. According to Walzer, thick morality exemplifies a particular

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[37] Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 43.
[38] Peter Jones, "Human Rights and Diverse Cultures: Continuity or Discontinuity?" in Simon Caney & Peter Jones Eds., *Human Rights and Global Diversity* (London: Frank Cass, 2001) at 35.
[39] Jack Donnelly, "The Relative Universality of Human Right…," *supra* note 5 at 293.
[40] Rhoda Howard, *Human Rights and the Search for Community* (Boulder: Westview Press, 1995) at 15.
[41] Michael Walzer, *Thick and Think Morality* ((Notre Dame: University of Notre Dame Press, 1994).

nation's understanding of morality because it relates to the distinctive historical experience of its people and its stage of economic development. Such an understanding of morality may not be applicable to other societies or States, even States that are at the same stage of economic development as the subject society.[42] Thick moral values, as such, represent shared historical values among the people of that nation. These values draw upon a society's historical and cultural tradition, and appeal to norms that are considered as 'home truths.' They ultimately represent a particular stage of cultural and economic evolution of a society, making it quite specific and non-transcultural.[43]

Thin morality, on the other hand, symbolises universal moral values in the sense that it is informed by cross-cultural ideologies that every society cherishes. Put differently, thin morality represents cross-cultural or 'common truths' rather than 'home truths,' suggesting that this brand of morality "does not depend on having lived in any particular traditions. It is intelligible to everyone, accessible everywhere, resonates in settings that otherwise seem far apart."[44]

Walzer's thin morality is the equivalent of what Alasdair MacIntyre refers to as "unitary rationality."[45] This brand of morality, MacIntyre suggests, demonstrates that there exists a single standard or conception of moral rationality, one which every informed person can readily acknowledge as valid and reasonable irrespective of its origins.[46] The strand of moral rationality associated with human rights is, thus, one that is objective and is not tainted by previous commitment to a particular theory. It is one that ultimately leads to a similar

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[42]Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: OUP, 2005) at 387.
[43]*Ibid.*
[44]*Ibid.,* at 389-390.
[45] Alasdair C. MacIntyre, *Three Rival Versions of Morality: Encyclopedia, Genealogy and Tradition* (Notre Dame: University of Notre Dame Press, 1990) at, 14, 25, 62.
[46]Clinton Curle, *Humanité: John Humphrey's Alternative Account of Human Rights*, (Toronto: UTP, 2007) at 18.

conclusion when the relevant data is examined by any well informed and open minded person who abides by the standards of rational method of inspection or inquiry.[47] This is clearly the type of moral context of human rights standards.

The common theme that runs in respect of all moral universals is that "a *minimum absolute* standard or core postulate of any just and universal system of human rights must include some recognition of the value of individual freedom or autonomy"[48] in making moral choices, insofar as such individual choices do not encroach upon the rights of others. The 'minimum absolute standard' approach to human rights avoids the controversy often associated with the relative nature of morality. This way, human rights concepts help the universalist approach to circumvent the defects of essentialism, given that it is predicated on individual freedom and autonomy rather than on social goals that are highly contested, even within the same society.

This approach also comports with Immanuel Kant's compelling concept of the 'categorical imperative'[49] which maintains that individuals must be treated as an end in and of themselves, not as means to achieve some end. According to Kant, an individual must be treated as a transcendental subject capable of acting autonomously and of making independent moral choices.[50] Kant's moral approach is significant because "being transcendental, *a priori*, and categorical...,[it] overrides all arbitrary distinctions of race, creed and customs and is universal in nature."[51]

It follows that in approaching human rights from a moral perspective, one must search for commonalities or areas of overlapping moral consensus by exploring various cultures and

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[47]Alasdair C. MacIntyre, *Three Rival Versions of Morality…," supra* note 45.
[48]Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 43.
[49]Immanuel Kant, *Foundations of the Metaphysics of Morals* (Indianapolis: Bobbs-Merrill, 1981) General read.
[50]Michael J. Sandel, *Liberalism and the Limits of Justice, Second Edition* (Cambridge: CUP, 1998) at 7.
[51] Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 43.

religious systems with the intent to find within them the core moral values that are not unique but that are common to all. This mitigates the effect of having to confront the problem of unbridgeable doctrinal conflicts between diverse belief systems each of which is near and dear to the heart of its adherents.[52] This does not mean that there will always be perfect avoidance of conflict over moral values across different societies. However, since human rights values steer clear or distance themselves from any particular religion or political ideology, the concept of universalism as a moral obligation stands for a cross-cultural brand of morality that is second to none. The notion of human rights must thus be understood as a set of high moral ideals and a brand of morality that is common and shared by all members of humankind.[53] It follows that while human rights are not a perfect species of morality, their inherent imperfections can be tolerated. These are the ideals or moral rights codified by international human rights instruments, as discussed below.

5.2.3. Human Rights as Moral Rights

While the previous sub-section has attempted to establish that human rights represent the least common denominator for various global moral norms, this sub-section intends to establish that human rights must first be understood as moral rights. That is, the argument in this section is intended to emphasise the moral nature of human rights and to argue that the legal basis of human rights *per se* is not sufficient to ground their universality. In other words, the legal foundation of human rights, in and of itself, is not sufficient to warrant their enforcement at the international level unless they are also backed up by the force of moral argument. For this reason, a brief discussion as to the moral foundation of human rights is in order. While this

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[52] Peter Jones, "Human Rights and Diverse Cultures: Continuity or Discontinuity?...," *supr*a note 38 at 35.
[53] Laura Westra, *Human Rights: The Commons and the Collective* (Toronto: UBP, 2011) at 25.

subsection might have some overlap with subsection 5.2.2, such an overlap is inevitable for the purposes of emphasis, considering that presenting human rights as moral rights, a *priori*, is a fundamental premise of this thesis.

A moral right refers to an independent claim or entitlement "whose justification does not depend on whether any legal or political system is willing to recognise"[54] it as a valid claim. Seen this way, human rights are moral rights because they are prior to and "independent of legal rights."[55] This juxtaposition is significant because it is from this distinction that human rights must be understood as moral obligations that call for universal enforcement. As well, the distinction implies that as moral obligations, human rights are imperatives from which no derogation, save as may be prescribed by a just law, is permitted.

Appreciating human rights as moral imperatives is also fundamental in the sense that "human rights are best thought of as potential moral guarantees for each human being to lead a minimally good life."[56] This suggests that where a State makes no provision to legally recognise the existence of a particular right that objectively qualifies as a human right, international human rights, as moral imperatives, must be invoked to fill the vacuum.[57]

Similarly, conceptualising human rights as moral rights is fundamental because if human rights were not to be understood as moral rights it would be difficult to make any meaningful suggestions and changes to a particular law and the legal system as a whole. The validity and recognition of legal rights in most, if not all, jurisdictions correspond to their moral validity. For instance, legal scholars and natural rights theorists speak of certain rights, such as the

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[54] Laura Westra, *Human Rights: The Commons and the Collective…, supra* note 53.
[55] David Kinley, Wojciech Sadurski & Kevin Walton, *Human Rights: Old Problems, New* Possibilities (Northampton: Edward Elgar, 2013) at 29.
[56] Andrew Fagan, "Human Rights...," *Internet Encyclopedia of Philosophy…*, *supra* note 21.
[57] Alison Renteln, *International Human Rights: Universalism versus Relativism...supra* note 3 at 46.

rights to life, liberty or self-preservation,[58] the right to own property individually and in association with others and the right to participate in the political process as rights that are pre-ordained by nature.[59] This clearly establishes that the human rights values enshrined in the human rights instruments, including the universal Declaration, are codified moral norms which exist prior to their legal recognition by a society.

The Kantian concept of categorical imperative (discussed briefly previously) and John Rawls' notion of "the original position" presuppose that there exist cross-cultural moral principles that are objectively discernible.[60] Again, this demonstrably establishes that human rights must not only be seen as a codification of the true and eternal laws but most importantly as a "political specification of ...the supreme principles of morality which requires that we treat people as ends, never as means ...."[61]

What is significant about the Kantian and Rawlsian moral rights theories is that despite the existence of a myriad theories about competing moralities, there exists one, true and eternal brand of morality and a common pattern of moral thought which is universal. Specifically, the Rawlsian moral rights theory of the *original position* postulates that "individuals behind a veil of ignorance,"[62] if stripped of their distinctive identities such as race, gender and cultural or political heritage, will objectively, select or choose an optimal principle of justice which is equitable and consistent with the rights and freedoms of all others. To be suitable for this task,

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[58] Thomas Hobbes; J.C.A. Gaskin, *Leviathan* (Oxford: OUP, 1998) at 9, 36.
[59] H. A. Hart, "Are There Any Natural Rights…," *supra* note 9 at 1-25.
[60] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 49-50.
[61] Jack Donnelly, *International Human Rights, Third Ed…, supra* note 14 at 24.
[62] John Rawls, "Two Concepts of Rules" (1955) 64 *The Philos.l Rev.* 1 at 3-32.

an individual in the original position must be risk-averse but not envious of other free and equal citizens.[63]

Applied to the context of international law of human rights, this principle maintains that individuals stripped of their cultural values or heritage would be inclined to elect optimal principles of justice, based on consensual moral values that are cross-cultural and consistent with the rights and freedoms of all, without biased distinctions as to culture, religion or political ideology.[64] Every State is therefore obligated to observe the moral rights codified as human rights without deviation save and except as may be guaranteed by fair and equitable juridical reasons.

As such, a government whose legal system deviates from the prescription of the values of human rights as moral rights is illegitimate.[65] According to Rawls, "human rights express a minimum standard of well-ordered political institutions for all peoples who belong...to a just political society of peoples." [66]

In summary, the contention here is that human rights are independent legal rights that are innately and inheres in every single human person. This is why Smagadi argues that, as moral rights, human rights exist in nature irrespective of whether or not they have been codified by a State. Their codification or express inclusion into the national legal system, nevertheless, effectively boosts their protection by the State. This suggests that human rights are primarily

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[63]John Rawls, Erin Kelly, Ed. *Justice as Fairness: A Restatement* (London: Hvrd Univ. Press, 2001) at 84, ş.24. 2
[64]Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 50.
[65] Laura Westra, *Human Rights: The Commons and the Collective*…, *supra* note 53 at 22, 25.
[66] John Rawls, "The Law of Peoples," in Thomas Pogge & Darrel Moellendorf, *Global Justice: Seminal Essays, Global Responsibilities,* Vol. 1 (St. Paul: Paragon, 2008) at 441

moral rights that take the form of legal rights when they are codified by States for the purpose of according them legal protection in an intelligible manner.[67] All this goes to show that:

> the evolution of human rights law during the past decades does not mean that human rights have only been discovered recently. It [simply] means that the international community realized human rights violations and proclaims the importance of human rights values and its obligation to defend them.[68]

Having established that human rights are moral norms and that they are binding on every State not just because they are Member States to the human rights Conventions but also because human rights are moral values whose universality is not justified only by their legal basis, it would amount to moral failure on the part of the international community not to speak out against violations of human rights in any State that does not observe its required minimum standards of moral obligations.[69]

This suggests that there must be cross-cultural moral consensus on such cultural practices such as female genital mutilation, double limb amputation and other harmful cultural practices that are very common in certain parts of Africa, as discussed in Chapter 4. The continuation of such practices or customs, however hoary or ancient the traditions in which they occur might be, cannot be justified under any circumstances.[70]

Africa must accept that times have changed and so have values that determine rights dispensation. No State can be permitted to violate any certain core human rights values such as, *inter alia,* the right to life, the right against torture, the right to procedural fairness, etc., with impunity. The standards set by the prevailing cosmopolitan moral culture as codified by

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[67] Smagadi Aphrodite, *Sourcebook of International Human Rights Materials* (London: BIICL, 2008) at 4.
[68] *Ibid.*
[69] K. M'Baye & Ndiaye, "The Organisation of African Unity (O.A.U.)," in K. Vasak Ed. *The International Dimensions of Human Rights* (Westport: Greenwood Press, 1982) at 588-9.
[70] Declan O' Sullivan, "Is the Declaration of Human Rights Universal?" (2000) 4 *The Int. J. Hum. Rt.,* 25 at 49.

the relevant international human instruments have been accepted as binding by all cultures, notwithstanding specific interpretations as to their substantive meanings that may warrant permitting States to interpret certain human rights provisions within the acceptable limits[71] of margin of appreciation.[72]

5.2.4. Human Rights as Codified Universal Moral Convergence

That human rights represent codified moral norms shared by various global cultures suggests that there is an indisputable global convergence on moral values, notwithstanding the significance of certain moral values to particular cultures.[73] The existence of cross-cultural moral threads or enduring moral ideals that all cultures share, regardless of their differences as to religion, culture or political ideology, indicates that no single society, taken as a whole, tolerates injustice or condones deprivation of an individual or group of their core entitlements such as the right to life, against torture or right to own property, only to give a few examples.[74] Furthermore, the fact that an overwhelming number of States have endorsed, signed and ratified the International Bill of Human Rights proves that the majority of States, as representatives of their peoples, have expressly agreed to be bound by human rights treaties. This is a testimony of their commitment to uphold and promote human rights. As well, it demonstrates their willingness to abide by the global standards based on shared moral norms.

That there exists global convergence on moral norms that are now considered human rights is evident even among non-Western countries such as Japan, South Korea and increasing

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[71] Jack Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6 *Hum Rt. Qrtly* 400 at 401-404.

[72] The doctrine of 'margin of appreciation' in European human rights jurisprudence, found in ECHR, Art. 8(1). was developed by the European Court of Human Rights in light of cultural differences among the EU Member States. The doctrine permits the Court to factor into its decision making the fact that, having regard to differences in culture, social or political system, States may have differences as to the interpretation of certain provisions of the Convention.

[73] A.K. Tomeh, "Moral Values in a Cross-Cultural Perspective (1968) 74 *J. Soc. Psych.* 137 at 137-138.

[74] D. Bidney, "Cultural Relativism…," *supra* note 33.

numbers of Asian countries, which are using human rights not as mere slogans but as a "contemporary political expression of their deepest ethical and cultural values and aspirations."[75] It is also evident that the fundamental acknowledgment that human beings are equal by virtue of their personhood has globally been endorsed by all societies and within and among civilizations based on the values enshrined in the Universal Declaration of Human Rights and other human rights instruments.[76] In fact, it is the convergence on global moral principles that ultimately led to the abolition and condemnation of institutions such as slavery and caste systems, since such institutions, by their very nature, substantially negate the idea of moral equality of all human beings and the significance of universal humanity.[77] This similarly underscores the existence of global efforts to create universal human rights standards and to establish a cosmopolitan moral society in which everyone can bring legal claims when their human rights are transgressed. This approach creates a moral world in which both the weak and the strong are on equal legal footing.[78] Seen this way, the universal moral rights system suits cosmopolitan culture in which every individual is viewed as a member of the human family and as a depository of human rights, irrespective of his or her place of birth or social affiliation.[79]

This argument highlights the fact that much of the relativist contention is redundant, considering that no specific culture or a comprehensive moral philosophy is wholly compatible or incompatible with the legal norms established by the international human rights

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[75] Jack Donnelly, "The Relative Universality of Human Rights…," *supra* note 5 at 290.
[76] Jack Donnelly, *International Human Rights, Third Ed…, supra* note 14 at 46.
[77] Declan O' Sullivan, "Is the Declaration of Human Rights Universal..." *supra* note 70 at 30.
[78] *Ibid.,* at 30, 48.
[79] Robert Cryer, *et al, Research Methodologies in International EU and International Law* (Oxford: Hart Publishing, 2011) at 44.

regime.[80] For instance, despite their significant reservations as to the appropriateness of human rights values to their society, the Dinka[81] people of South Sudan (as a microcosm of the contemporary African society) uphold quite a robust notion of universal moral rights as part of their moral system and as "an integral part of the principles of conduct that guide and regulate human relationships and constitutes the sum total of the[ir] moral code and the social order."[82]

Such an understanding explains why increasing numbers of African scholars, both in principle and in deed, reject the idea that the core ideals of human rights are alien to their cultures or traditions.[83] For this reason, these African scholars— despite a strong African opposition to human rights— are increasingly coming to realize that human rights standards represent codified and cross-cultural fertilization of moral values that should not exclusively be considered as a cultural or moral heritage of only certain cultures.[84]

An understanding of human rights as representing universal convergence on moral values is also evidenced by the fact that virtually every country with a codified constitution has incorporated these rights and freedoms into its constitution even if the elites, due to some vested interest, may not believe in protecting and promoting them.[85] Once again, this is evidence of global moral convergence which vests the international community, under the auspices of the United Nations, with the moral authority to apply universal moral standards to

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[80] Jack Donnelly, *International Human Rights, Third Ed…, supra* note 14 at 46.
[81] The author's is of the Dinka background and will from time to time, throughout the thesis, make reference to Dinka due to his familiarity with the Dinka culture.
[82] Francis Deng, "A Cultural Approach to Human Rights Among the Dinka," in Abdullahi Ahmed An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990) at 271.
[83] Abdullahi An-Na'im & Francis Deng, *Human Rights in Africa., supra* note 20 at 5.
[84] Makau Mutua, "Change in the Human Rights Universe" (2007) 20 *Hrvd. Hum Rt. J. at 3*.
[85] Nancy Flowers, "A Short History of Human Rights" (2014), *Human Rights Here and Now:* Celebrating the Universal Declaration of Human Rights," available online at: http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm [retrieved on July 1, 2014].

assess every State's commitment to and observance of human rights and to criticize the conduct of States on legal grounds where it is reasonably warranted. In this respect, a State's appeal to sovereignty must not carry any moral force or be permitted to adulterate the ideas of human rights, nor carry the same moral force as that of human rights where there is a conflict between the two sets of values. Furthermore, even if a State has not ratified human rights treaties and, hence, cannot be chastised for violating its obligation as stipulated by the treaties, the international community can still apply such standards to hold States accountable on moral grounds, considering that, as discussed in previous subsections, human rights are moral obligations[86] that should override the precepts of legal positivism.[87]

It is worth emphasising again that, as a secular modern means for protecting our social and psychological needs, human rights connote the existence of an overriding moral force that must disregard any distinctions as to race, ethnicity, age, culture, political ideology or religion. They stipulate that all human beings are "entitled to the same minimum [standard] of concern and respect merely as human beings,"[88] for it is the essence of common humanity that human rights strive to protect. Our common humanity must thus inspire efforts to search for and live by the principles of immutable human characteristics. Human rights, as such are capable of insulating individuals against inhuman treatment and brutality by States and powerful private entities. Again this understanding comports well with the Kantian idea that the fundamental goal of moral ethics pertains to the metaphysical concept of personhood, a philosophy which,

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[86] This argument would apply to a hypothetical situation where a State is not a party to the United Nations. This thesis, however, assumes that all States are Members of the United Nations and Parties to international human rights Conventions.

[87] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 139-140.

[88] Peter Jones, "Human Rights and Diverse Cultures: Continuity or Discontinuity?...," *supra* note 38 at 27.

accordingly, holds that every individual is naturally born free and is inherently predisposed to "take personal responsibility as a free and rational agent for one's system ends."[89]

The natural corollary to this argument, as discussed earlier, is that certain moral and legal values are so fundamental that our treatment of fellow human beings and, ultimately, their humanity must not be merely based on artificial conventions of law. Humanity is independent of legal positivism. This is why our approach to laws must be informed by the moral worth and dignity of the individual, first and foremost. The notion that human rights must be perceived as universal moral values can only be reassuring to the extent that the defects of legal positivism are not permitted to override our universal commitment to the protection of the individual. This is to say that human rights values must prevail over the positivist contention that, however repugnant it may be or it may disregard the integrity of the individual, law must be obeyed at any instant. For instance, the edicts of the Hitler regime in Germany and those of the apartheid South Africa, however repugnant to moral law they were, had to be strictly obeyed and executed because they were legal imperatives commanded by a legitimate State authority.[90]

The goal of human rights as a declaration of our universal moral convergence and of humanity's collective moral conscience is to reject extreme legal particularism. Legal commands that lack internal moral consistency are unjust and must be overridden by the principles of human rights, just as the global human rights system must reject the positivist presumption that all sources of legal authority must flow "from what the State and State

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[89]Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 43.
[90] *Ibid.*

officials have prescribed."[91] A legal positivist approach to human rights is deficient in the sense that it has the potential to expressly crowd out *the ought* of the law. This is clearly why the international community has the duty to speak out and to proactively protect victims of global crimes such as genocides, war crimes and crimes against humanity, or victims of outdated cultural practices such as female genital mutilation, double limb amputation or capital punishment for adultery as commonly practiced in some areas of Africa. In fact, the idea that human rights serve moral obligation purposes is basically implied by the nature of the international human rights regime itself.[92]

The global human rights system, as such, must present itself as a system of belief in a cosmopolitan moral society, one that ties all global cultures into a continuum or single culture, bounded together by common moral standards. These standards must make any claim for particularism or cultural relativism entirely redundant.[93] This new global moral culture, represented by common strands of morality, continues to envelope all the world cultures as a result of transnational business activities, music, immigration, or technology, etc., and, thus, "serves as an inter-cultural law, establishing universal standards—including the area of human rights"[94] which primarily protects the dignity and the personhood of the individual.

In the context of Africa, the fundamental promise of this belief must lead to the conclusion that any African defence of cultural particularism or cultural relativity is to be considered entirely defective. Human rights are recognised universal values whose standards must

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[91]Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 43.
[92]Jack Donnelly, *International Human Rights, Third Ed…, supra* note 14 at 187.
[93] Declan O' Sullivan, "Is the Declaration of Human Rights Universal?...," *supra* note 70 at 33.
[94] *Ibid.,* at 34.

provide the necessary moral template for adjudging the validity of cultural practices.[95] Again, extreme appeal to cultural particularism has and must have no place in a post-colonial African society that is embedded, or has rather embedded itself into the society of nations, one in which Africa is recognised as a full and morally-abiding member of the cosmopolitan community.

5.3. Universalism as an Inherent Aspect of Human Dignity

5.3.1. Introduction

No thinking is more central to the international human rights system than the idea that human rights are first and foremost an effective means of protecting the dignity and the worth of the human person. Human dignity describes an abstract notion that encompasses "the broadest shaping and sharing of all values, material and non-material."[96] It goes to the very worth of an individual as a human person.

As a universal attribute that inheres in every human person, the concept of human dignity demands that every human being be treated in accordance with his or her immutable worth, an affirmative legal recognition that every individual in the society deserves to be treated equally and respectfully, and with consideration regardless of where they come from.[97] This approach embodies the notion that all human beings are naturally born as free and independent agents and are equal in dignity and moral worth. Seen this way, the approach to human rights from the perspective of human dignity encourages not just cross-cultural fertilization but one makes

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[95] Kevin Walton, "Human Rights as Moral Rights," in David Kinley, Wojciech Sadurski & Kevin Walton, Eds., *Human Rights: Old Problems, New Possibilities* (Cheltenham: Edward Elgar, 2013) at 28-38.
[96] Francis Deng, *Identity, Diversity and Constitutionalism in Africa* (Washington D.C.:UISP, 2008) at 9.
[97] Robert F. Gorman & Edward S. Mihalkanin, *Historical Dictionary of Human Rights and Humanitarian Organizations: Historical Dictionaries of International Organizations,* No. 12 (London: Scarecrow Press 1997) at 1.

the concept of human rights more appealing to every culture that prides itself on being a champion of human dignity.

In this section, I argue that since human rights are rooted in the very idea of universal human dignity, the protection of human dignity is central to the international human rights regime (5.3.2). As well, I argue that human dignity is a universal attribute that is entirely independent of culture, religion or political philosophy (5.3.3). Accordingly, since the goal of human rights is to protect the intrinsic value of the individual person, the validity and universal application of, at least certain core human rights, must be upheld and applied cross-culturally.

5.3.2. Human Dignity is Central to International Human Rights Protection

The notion of human dignity is not only essential and central to human rights but also necessary for a comprehensive conceptualizing of human rights as truly equal and inalienable universal values. That the protection of human dignity constitutes one of the core purposes of international human rights institution is expressly provided in the Charter of the United Nations, the UDHR, the two Covenants and other international human rights instruments. The Preamble to the UN Charter, for example, proclaims that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in *the dignity* and *worth of the human person*, in the equal rights of men and women and of nations, large and small."[98] The UDHR similarly provides that our indelible commitment to the protection of human dignity is intended "to promote social progress and better standards of life in larger freedoms."[99]

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[98] *Universal Declaration of Human Rights* (1948) 217A (III), Art. 2.
[99] *Ibid.,* Preamble para.5.

Thus, although "the formulation of human rights standards and procedures are fraught with controversy, their basis in the universal concept of human dignity is not only inherent but also often explicitly recognised in human rights instruments."[100] This suggests that in order to enable individual or group victims to assert human rights claims against the dominant global cultures or within States, universalism must first and foremost be appreciated as a 'necessary condition' to achieve that objective.[101] This is to say that a human rights claim can also be exerted against the dominant Western culture but only if the party claiming human rights violations acknowledges and recognises them as valid and binding.[102] This recognition at law would serve as a strong basis upon which all equality seeking groups, including women, indigenous peoples, and developing countries, can assert their human rights claims and protection. Such recognition, as well, would be the basis for asserting human rights claims for internally oppressed groups in the continent of Africa where gross human rights abuses are exponentially on the increase.[103]

An approach to human rights from the human dignity perspective should, in this regard, be influential in Africa, given that the pre-colonial African conception of human rights was predicated on the notion of human dignity which defines the inner being of the human person and his or her moral worth in relation to others and the society at large.[104] In fact, the entire justice system in pre-colonial African society was founded on the idea of human dignity and religious morality. This is evident in the way African societies "articulated a vision that

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[100] Francis Deng, *Identity, Diversity and Constitutionalism in Africa…*, *supra* note 96 at 144.
[101] *Ibid*., at 144-5.
[102] Makau Mutua, "Change in the Human Rights Universe…," *supra* note 84 at 3-5.
[103] Francis Deng, *Identity, Diversity and Constitutionalism in Africa, supra* note 96 at 147.
[104] Rhoda E. Howard & Jack Donnelly, Human Dignity, Human Rights and Political Regimes" (1986) 80 *Am. Pol. Sc. Rev*., at 802.

elevated human dignity ... [and] provided rules governing the just distribution of the good"[105] to that effect.

Whereas some Western scholars have observed that the African conceptions of the abstract notion of human dignity and the legal principles of human rights are intrinsically not synonymous, these arguments presuppose a narrow Eurocentric view of rights as legal claims that are strictly enforced in a zero-sum game manner, with the attendant result that, in a Western-style adversarial context, one party loses as the other gains.[106] Yet, legal rights did not and still do not have to be enforced in the same way they are generally enforced in the West. Different societies, having regard to their different cultural, social and political structures, adopt "their own institutions and enforcement procedures that might differ from those of the West but are nonetheless effective within the context."[107] This simply suggests that as long as there were procedural rules— whether enforced by means of persuasion, reconciliation or popular consensus as it was done in pre-colonial Africa—the means elected to protect human dignity is irrelevant. The two concepts of human dignity and human rights should therefore be seen as complementary and mutually reinforcing.[108] Consequently, while human dignity is the end in itself, human rights are merely a tool for protecting the dignity of the human person which, in the general African worldview, is universal. For instance, the Dinka people of South Sudan see all human beings as children of God, and the dignity which such a view:

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[105]Robert Wyrod, "Between Women's Rights and Men's Authority: Masculinity and Shifting Discourses of Gender Difference in Uganda" (2006) 22 *Gender and Soc*. 799 at 801.
[106] *Ibid.*
[107]Abdullahi An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives...*, *supra* note 20 at 3.
[108]*Ibid.*

> accords to the individual as God's child is the basis for the universality of human rights among the Dinka. According to the Dinka moral code, every human being, regardless of race or religion has a moral or spiritual value that should be respected.[109]

The Dinka society essentially believes that an individual's interest is fully secured when he or she cares for the interest of his or her fellow human beings as individuals members of a group.[110]

It can thus be established that the fundamental goal of human rights is the protection of human dignity and that the African notion of human dignity is, in fact, consistent with the modern concept of human rights. This clearly demonstrates that even if the two concepts are, technically, not equivalent, the distinction is inconsequential since human rights are a means to the end of the protection of human dignity[111] and because they are essentially intended to protect the individual against State-induced abuses, including common State practices in Africa, such as torture, mass starvation or the deprivation of all means of livelihood as tools to bring about an individual submission to the authority of the State.[112]

Having established that human dignity is universal and is the central focus of the international human rights regime, the next question is whether human dignity can be defined and conceptualised in relation to economic, political, religious or the cultural ideology of a given society. The following discussion establishes that human dignity is entirely independent of these or other variables.

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[109] Abdullahi An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural Perspectives...*, *supra* note 20 at 10

[110] Francis Deng, Identity, *Diversity and Constitutionalism in Africa…,supra* note 96 at 144.

[111] Michael Goodhart, The Origins and Universality in Human Rights Debates…," *supra* note 7 at 943.

[112] Rhoda E. Howard, "Group versus Individual Identity in the African Debate on Human Rights…," *supra* note 34 at 165.

5.3.3. Human Dignity is Independent of Historical, Political and Cultural Variables

Finally, human dignity is a universal attribute that cannot be defined as a function, or in terms, of a given society's history, economic development, cultural values, religious or political ideology. In this vein, John Humphrey argues that, as a measure of human worth, human dignity exists independently of religion, culture, linguistic or political ideology,[113] notwithstanding the artificial parameters by which an individual might be defined. This understanding is premised on the belief that human rights "rest on account of a life of dignity to which [all] human beings are 'by nature' suited."[114] This view similarly conforms to the Confucian maxim that human beings are, by nature, alike in countless ways and that what sets them apart are their social or cultural habits.[115] Therefore any argument against the application of the universal standards of human rights on account of cultural, religious or political orientations cannot be sustained, because such variables cannot conclusively define the set of rights to which an individual is entitled by virtue of his or her humanity. Suggesting otherwise ignores the dignity interest of the individual who is entitled to a certain basic core of protection. This implies that the happenstance of being born into a particular religious or cultural tradition has no bearing on the intrinsic worth of the individual and his or her right to be treated with dignity and respect. Similarly, since human rights are inherent, universal and inalienable rights that cannot be overridden by subscription to religious or cultural, linguistic or ideological orientations or traditions, human dignity cannot be defined in relation to other

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[113] Bradley R. Munro, "The Universal Declaration of Human Rights, Maritain and the Universality of Human Rights," in William Sweet, Ed., *Philosophical Theory and the Universal Declaration of Human Rights* (Ottawa: UOP, 2003) at 122.

[114] Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14 at 23.

[115] Ashley Montagu, *Statement on Race: An Annotated Elaboration and Exposition of the Four Statements on Race Issued by UNESCO 3rd Edition* (London: OUP, 1972) at 137-138.

variables than itself.[116] This is why human rights values must check the competence of the State in respect of its ability to define what is in the best interest of the individual as discussed below.

5.4. Universalism versus Sovereignty: Between Sovereignty and Responsibility to Protect

5.4.1. Introduction

The enduring principle of State sovereignty—classically understood as referring to a State's absolute authority over the people and the territory under its control—is codified in the UN Charter Article 2 (7). While this concept still endures, my argument in this section is that the traditional understanding of State sovereignty has significantly been attenuated by, among others, a sovereign State's voluntary decision to enter into international agreements, including agreements on human rights, with other States. I also argue that the UN Charter Article 2 (7) — which was, in fact, included at the urging of the representatives of less powerful States during the drafting of the Charter in 1945—was intended to protect smaller States from interference in their domestic affairs by the more powerful Members of the UN.

This is so because in recent years, a practice has developed to enable the international community to place limits on how far a State may exercise its sovereign rights.[117] The idea of universal humanity, in exceptional cases, obliges the international community to intervene in matters that were once considered too sacrosanct to warrant intervention in the domestic affairs of States. This developing concept of customary international law which indicates the international community's manifest intent to intervene in domestic affairs of States is

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[116] E.M. Zechenter, "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" (1997) 53 *J. Am. Anthrop. Res.* at 319-320.

[117] Gareth Evans, et al, *The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty* (Ottawa: Int'l Devt Research Centre, 2001) at 15, s. 2.24.

exemplified by the international humanitarian interventions in several countries such as Somalia in 1992,[118] Ivory Coast in 2010,[119] Kosovo in1999[120] and Libya in 2011.[121] Subject to certain thresholds of situational assessment, these interventions demonstrate the international community's resolve to intervene to assist fellow human beings whose lives are deliberately subjected to imminent perils by unlawful actions of States.[122]

Circumstances warranting intervention includes situations where a State employs a disproportionate use of force against its own citizens that has resulted or has the potential to result in genocide, war crimes or crimes against humanity. Such proactive initiatives are not just necessary for the protection of individual rights but also for the promotion of international peace and security. More importantly, international interventions, in this respect, underscore the importance of the idea that all human beings, as members of the human family, venerate the immutable concept of our common humanity, which calls for a universal approach to human rights protection.

5.4.2. The Doctrine of State Sovereignty in International Law and Politics

The international system is structured on the legal fiction that a sovereign State has exclusive jurisdiction over an internationally recognised territory, individuals and resources, as well as events that occur in that territory.[123] To say that a State has sovereignty over a specific territory is to say that a State, in the strictest sense, is the sole authority within that jurisdiction

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[118] *UN Security Council, Resolution on Somalia* (1992), UNSC S/RES/733), 23 January 1992.
[119] *UN Security Council Resolution on Ivory Coast* (2010), UNGA (S/RES/1962), 10 December, 2010.
[120] *UN Security Council Resolution on Kosovo* (1999), UNSC (S/RES/1244), 10 June, 1999.
[121] UN *Security Council Resolution on Libya* (2011), UNSC (S/RES/6498), 17 March, 2011.
[122] Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights" (2004) 2 *NW.J. Int'l Hum. Rt*., at 4.
[123] Michael Ignatieff, *Human Rights: The Midlife Crisis* (New York: Rev. Books, 1999) at 62.

and thus subject to no higher power other than itself.[124] In its classical sense, the notion of sovereignty implies that a State has an exclusive and:

> complete freedom of action, in international law, to deal with its own nationals..., to make use of the public domain..., to enter into legal relationship with other sovereign States, to become a member of international organisations of universal vocation... and to make war, through the scope of that sovereign freedom ....[125]

The traditionally, the doctrine of sovereignty assumes that no State can object to the idea that, as a matter of natural justice, its "citizens are entitled to [reasonable]…treatment and [provision of] certain basic goods and services, protection and opportunities."[126] As well, the traditional concept of sovereignty was premised on the assumption that a State would always act in accordance with the best interest of its people and therefore other States have a duty not to intervene or interfere with the internal affairs of States, insofar as each State is able to meet its international obligations, including the responsibility to protect its citizens.[127]

Embedded in the idea of sovereignty is also the doctrine of the right of people to self-determination, as provided in the UN Charter Article 1 (2) and Common Article 1 of the ICCPR and ICESCPR. It has been contended that the elevation of the right of peoples to self-determination to the status of erga omnes in international law was largely championed by African States [128] with the support of the Soviet Union [129] and other developing countries

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[124] Abraham N. Shulsky, "Human Rights and International System," in Marc F. Plattner, Ed., *Human Rights in Our Time: Essays in Memory of Victor Brass* (Boulder: Westview Press, 1984) at 23.
[125] Paul Sieghart, *The International Law of Human Rights* (Oxford: Claredon, 1983) at 11.
[126] Jack Donnelly, "Relative Universality of Human Rights…," *supra* note 5 at 292.
[127] Armand de Mestral and Evan Fox-Decent: Rethinking the Relationship Between International and Domestic Law" (2008) 53 *McGill L.J.* 573 at para. 23.
[128] Jan Klabbers, "The Right to be Taken Seriously: Self-Determination in International Law" (2006) 28 *Hum. Rt. Qrtly,* 186 at196.
[129] This is arguable because the idea of self-determination dates back precisely to the First World War when the League of Nations undertook the responsibility to grant the right of self-determination to ethnic, linguistic and cultural minorities in Europe. For more on this, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP, 1995).

during the colonial era.[130] Regardless of who was the brainchild behind the idea, the important point is that self-determination currently operates on the premise that the State is "the protector of its peoples from eternal threat of neocolonialism and other subtle but profound forms of external domination."[131] This suggests that a sovereign State must be free from external influence and that, as a symbolic surrogate of its peoples' rights, the State is viewed as having the responsibility to protect the integral aspects of the life of its people, having regard to their way of life and social and economic development, among others.[132]

Nevertheless, the interaction between international human rights standards and sovereignty subtly reveals a latent misalignment between the two concepts, considering that the adoption of human rights standards appears to sit uncomfortably with an international system that is ordered around the grand vision of non-intervention. This has raised (sometimes legitimate) concerns, among developing States, concerns which are generally rooted in the assumption that human rights policies are meant to regulate State conduct, especially the way in which a States treats its citizens and all those who come be under their direct or implied jurisdiction. As such, international human rights policies are often viewed as a form of unjustifiable interference or intrusion in the internal affairs of sovereign States.[133]

In this sense, international human rights polices apparently violate the principle of self-determination: the idea that a society is legally ordained to freely chart its own course including the right to choose for itself a way of life that comports well with the general interests of its constituents. This includes the right of a free society to choose a form of

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[130] James Paul, "Participatory Approach to Human Rights in Sub-Saharan Africa," in An-Na'im Ahmed An-Na'im & Francis Deng, Deng, *supra* note 19 at 216.
[131] *Ibid*., at 216.
[132] See Claude E. Welch., Jr. and Ronald I. Meltzer Eds. *Human Rights and Development in Africa* (Albany, State University of NY Press, 1984) for more discussion on this idea.
[133] Jack Donnelly, *International Human Right, Third Ed…., supra* note 14 at 28.

governments that conforms to its structures and meets the aspirations of its peoples.[134] Nonetheless, because human rights policies are seen as an intrusion in the domestic affairs of States, many States in Africa are increasingly of the view that, since international human rights ideas reflect the religious and cultural values of the West, it would be preposterous to require African States to accept to be assessed on Western standards. Such an approach to human rights is not only construed as amounting to undue interference in the exclusive domestic affairs of States, but is ultimately considered as a subtle form of neocolonialism.[135]

However, those who believe in the idea of universal standards of human rights, and thus in a weakened form of sovereignty, contend that international interference is warranted when a government evidently fails to provide adequate protection for basic and fundamental human rights. This contention logically justifies intervention in the event of a government's deliberate commission or omission that ultimately results in its failure to fulfil its legal obligation to protect the rights of its citizens. As discussed in Chapter 1, such a government is generally viewed as illegitimate.[136]

Sovereignty may also be lawfully infringed when a State fails to protect the rights of aliens or foreign nationals in its territory. That is why every State has the right to demand adequate and decent treatment of its nationals in the territory of other States.[137] Traditionally, a host State's failure to provide adequate protection to foreign nationals was generally understood as a violation of the 'personal sovereignty' of the State to which such individuals belonged. This also explains why from early times, this enduring international law principle (although its

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[134]Jack Donnelly, "The Relative Universality of Human Right…," *supra* 5 at 297.
[135] Rhoda Howard, *Human Rights and the Search for Community…, supra* note 40 at 12.
[136] R.J. Vincent, *Human Rights & International Relations* (Cambridge: CUP, 1986) at 127.
[137] Timothy G. Nelson, "Human Rights Law and BIT Protection: Areas of Convergence" (2011) 12 J. *Wrld. Invest. & Trad.,* 27 at 28-29.

contours have since changed significantly) imposes an inviolable obligation on every State to ensure that their territories are safe especially for foreign nationals, notwithstanding that a State may not be required to fulfil such obligations in respect of its own citizens.[138] This state of affairs gives rise to the concept of *international minimum standard* of treatment for aliens, a "standard of justice recognised by the law of nations."[139]

In essence, the doctrine of international minimum standards pertaining to the treatment of aliens or foreign nationals reigned at the time when the concept of human rights was not developed. These standards only applied to foreign nationals residing within the jurisdiction other than that of the State of their citizenship. This doctrine, which still exists in some weakened form today (especially in the international law of foreign investment), requires the host State to provide protection for the right to life, liberty as well as property of foreign nationals, both in law and in fact.[140]

However, the requirements of the minimum standards of personal or property protection in traditional international law are radically different from the standards required by international human rights. For instance, since the violation of the rights of foreign nationals (in the traditional sense) was considered as a violation of sovereign rights of the State to which such individuals belonged, the traditional international minimum standards "could not recognise the rights vested in any individual against the sovereign State"[141] as his or her due rights. Instead, the traditional minimum standard held that where the proprietary rights of an alien were

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[138] Paul Sieghart, *The International Law of Human Rights…, supra* note 125 at 11-13.
[139] OECD, Directorate for Financial and Enterprise and Affairs, "Fair and Equitable Standard in International Investment Law" (2004), *Working Papers on International Investment,* Number 2004/3, at 32.
[140] Edwin Borchard, "The Minimum Standard of Treatment of Aliens" (1940) 38 *Mich. L.Rev.* 445 at 446-450 and M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: CUP, 1994) at 8-20, 27-37.
[141] Paul Sieghart, *The International Law of Human Rights…, supra* note 125 at 12.

unduly violated or illegally expropriated, the compensation was due to the State whose citizens' rights were breached by the acts of the host State. This clearly suggests that the compensation was not due to the individual complainant or victims.[142] This approach contrasts sharply with international human rights standards which presume that the individual is in fact the depository of human rights protection regardless of his or her nationality, ethnicity, race, or gender, among others.

Under modern international law, therefore, the traditional notion of State sovereignty has, therefore, been attenuated in two main ways. The first is that the manner in which a State treats not just foreign nationals and their property but also its own citizens, has become a matter of legitimate concern to the international community. This is based on the idea that whatever happens to citizens of other States has an impact on the citizens inside the borders of other States as well.[143] This includes for example, the spillover effect of violence and refugees such as it is the case in the situation of South Sudan where the fighting between the government and the rebels has courted the involvement of its neighbours such as Uganda, Sudan and Eritrea.[144]

The second way in which sovereignty has been attenuated is by the development of superior international human rights standards by members of the international community. These new standards may be used to assess the validity of municipal laws including the conduct of sovereign States within their jurisdiction and are increasingly being considered as yardstick for

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[142] Paul Sieghart, *The International Law of Human Rights…, supra* note 125 at 12-15.
[143] C.A.J. Coady, *The Ethics of Armed Humanitarian Intervention* (Washington D.C.: USIP, 2002) at 16.
[144] International Crisis Group, "South Sudan: A Civil War by Any Other Name" (2014), at 22-26, available online at: http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/south%20sudan/217-south-sudan-a-civil-war-by-any-other-name.pdf [retrieved on July 7, 2014].

measuring the validity of national laws of States, including their constitutions.[145] In essence, this shows that international human rights standards work in the opposite direction to that of the nearly obsolete theory of legal positivism which does not even acknowledge, but indeed robustly negates, "the existence of a society of States for the simple reason that it was unable to find a treaty or custom, proceeding from the will of States, which could be interpreted as the legal foundation of a community of States."[146] This way, international human rights standards serve as a limitation on the right of sovereignty as discussed below.

5.4.3. Human Rights as Limitations on State Sovereignty: A Balancing Act

Based on the preceding discussion, it can be argued that one of the principal functions of human rights is to negate the presumption of absolute sovereignty. This argument rests on the logical deduction that when States enter into bilateral or multilateral agreements, they implicitly agree that their sovereignty will be subject to some restrictions to the extent or scope of the obligations set out in those agreements. For instance, a State may agree to enter into a security agreement with another State or States, and therefore agrees to intervene in the face of external aggression against a party to that treaty. A State entering into such an agreement is no longer in a position to choose to or not to go to war, if that treaty is implemented in accordance with the principle of *pacta sunt servanda*.[147]

In the same way, by agreeing to be parties to international human rights treaties, States must also interpret treaty provisions in accordance with standards established by international law. Articles 26, 31 and 32 of the *Vienna Convention on the Law of Treaties,*[148] for instance, require States to implement and observe their human rights treaty obligations by taking a *bona*

[145]Paul Sieghart, *The International Law of Human Rights…, supra* note 125 at 15.
[146] Leo Gross, "The Peace of Westphalia, 1648-1948" (1948) 42 *Am. J. Int. L*. at 20.
[147]Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14 at 28-9.
[148]*Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331.

fide approach to the interpretation of the human rights treaty provisions, since human rights treaties are, in and of themselves, within the category of multilateral agreements that require States to honour their public commitments.[149]

It is thus settled that "international law, including international human rights law, is the record of restrictions on sovereignty accepted by States."[150] This suggests that the premise of international human rights treaties involves a balancing act, a trade-off between a State's claim of sovereignty and the obligations set out (or imposed on State parties) in those treaties. As such, *international legislation*— that is, international treaties and declarations, especially multilateral treaties, including those which deal with international human rights— impose legal rules and restrictions on sovereignty with the sole intent to regulate State conduct.[151]

International legislation, nevertheless, differs considerably from domestic legislation in a number of critical respects, the chief of which is the idea that domestic legislation or statutes are generally passed or enacted by the majority of the members of national assemblies (at least in democratic States) and are binding on all citizens and residents of a State whose national assembly passes it. Save for express or implied exceptions, there are no reservations whatsoever in the application of domestic legislations.[152] Moreover, a domestic law can be repealed by the majority of the national assembly without express consent from any other party. A piece of international legislation, on the other hand, is generally a consensual arrangement between two or several sovereign States, all of which are equal and independent

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[149] *Vienna Convention on the Law of Treaties*, *supra* note 148 Arts. 26, 31 and 32.
[150] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 22, 26.
[151] Henry Steiner & Philip Alston, Eds*., International Human Rights in Context, Law, Politics and Morals, : Text and Materials, Second Edition* (Oxford: OUP, 2000) at 105.
[152] *Ibid.*

and are entitled to make reservations under an international treaty.[153] In addition to States' authority to make reservations by stating that certain provisions of the treaty will not be applicable to them, the rules of international legislation provide that any "[a]lteration to its terms by one State party generally requires the consent of all other States."[154] Yet, following World War II, States have increasingly come to recognise the importance of their responsibility to uphold and promote international human rights and that reservations should only be invoked sparingly.[155]

There has therefore been a paradigm shift from the narrow concept of the minimum standards required for the treatment of aliens and their property to a more robust and broad scope of individual protection regardless of citizenship. This is clear from States' affirmation and commitment to uphold and promote universal human rights so that the manner in which a sovereign State deals with its own citizens (or a portion thereof) or aliens becomes a question of legitimate interest to other States and international human rights institutions. This follows that internal State practice of injustice against its citizens must trigger the international community's responsibility to protect, an understanding that comports well with the celebrated statement by Martin Luther King that an "injustice anywhere' is injustice everywhere."[156]

The adoption of international human rights has evidently broadened or expanded the scope of international law and moves its attention away from a narrow focus on States as its subjects and principal players, to include individuals and nongovernmental organisations as well as

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[153] Henry Steiner & Philip Alston, Eds., International Human Rights in Context…, *supra* note 150 at 105.
[154] *Ibid.*
[155] Nicholas J. Wheeler, "Humanitarian Vigilantes or Willing Entrepreneurs: Enforcing Human Rights in International Society," in Simon Caney & Peter Jones Eds., *Human Rights and Global Diversity* (London: Frank Cass, 2001) at 143.
[156] *Ibid*., at 154.

multinational corporations as international legal persons.[157] This is the basis upon which the *Nuremberg Charter* was founded. That is, the principal conceptual innovation inaugurated by the Nuremberg framework was intended to broaden the scope of international law and to introduce the concept of personal responsibility so that the directing minds of State actions are also made subjects of legal accountability in international law. These include not just non-governmental organisations and international business corporations but also, and most importantly, individuals who actually plan and execute such State conduct.[158] By so doing, the Nuremberg Trials have permanently "pierced the veil of sovereignty and made a State's treatment of its own citizens a proper concern of international law."[159] This makes sense, considering that the traditional objective of international law was to enhance understanding among States and to promote international peace, order and security. To the extent that the behaviour of several States during the world wars in the first half of the 20th century negated the presumption that the State was the legitimate surrogate of the interests of its citizens— and yet individual citizens became the ultimate victims of iniquitous internal State behaviour—it was evidently necessary to expand the scope of international law to include the protection of individual rights. This makes the promotion and protection of human rights in the 21st century international community "an important purpose in the UN Charter as is the interest to promote international peace and security."[160] By piercing the veil of sovereignty, international human rights, therefore, make human beings not just objects but also subjects with the standing to access remedies in international law.

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[157] Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6 *NW J. Int'l Hum. Rt.,* 222 at 235-7.

[158]Reinhold Gallmetzer and Mark Klamberg, "Individual Responsibility For Crimes Under International Law: The UN Ad Hoc Tribunals and the International Criminal Court" (2007) *Social Science and Research Network*, at 60, available online at: http://ssrn.com/abstract=1576024 [retrieved on July 18, 2014].

[159] Jenny S. Martinez, "Anti-Slavery Courts and the Dawn of International Human Rights Law" (2008) 117 *The Yale. L.J.* at 550 at 634.

[160] Nicholas J. Wheeler, "Humanitarian Vigilantes or Willing Entrepreneurs...," *supra* note 155 at 143.

By means of human rights conventions, the international community unequivocally imposes stringent obligations on the government of sovereign States in respect of "what they may or may not do to individuals over whom they are able to exercise State power."[161] Even powerful States now fully recognise and acknowledge that their sovereignties are subject to international human rights standards. In fact, contrary to the popular cultural relativist claims about human rights being an instrument of Western imperialism, Western countries such as the United States have often been subjected, and indeed compelled, to change behaviour when scrutinised according to international human rights standards. The cases of human rights abuses in Abu Gharib and Guantanamo Bay are prime examples.[162] These situations have been highlighted to showcase blatant culture of human rights violations on the part of the U.S., much to the peril of its own image, both at home and abroad. Not only has this scrutiny forced America to change the way it treats its prisoners there is indisputable evidence that, although America has not fully taken responsibility for these atrocious crimes, the American behaviour towards prisoners has changed and that several prisoners have been set free as a result.[163] As a consequence, there have been on and off talks about the necessity of closing the Guantanamo Bay detention facility.[164] This means that however powerful some States may be, they can no longer easily obstruct the robust rules of global constraint, especially as to their ability to place their national interests above and beyond those of other States or individual rights (at least overtly), nor do whatever they wish within their territories.

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[161] Paul Sieghart, *The International Law of Human Rights…*, *supra* note 125 at 15.
[162] Marcy Strauss, "The Lessons of Abu Ghraib (2005) 66, *Ohio St. L. J.,* 1269 at1283.
[163] David Cole, "What to Do About Torturers" (2009) 56 *NY. Rev. Bks*., at 8.
[164] Shahdi Mokhtari, *After Abu Ghraib: Exploring Human Rights in America and the Middle East* (Cambridge: CUP, 2009) at 86.

International human rights standards have therefore established that there is a limit to what a State can or cannot do, and to what is tolerable or intolerable in accordance with those standards. The net result is that State governments that consistently engage in gross rights abuses are considered pariahs on account of their propensity to violate universal human rights standards.[165]

The contention that universalism serves as a check on excessive exercise of the right of State sovereignty has also been made evident in a number of international interventions in internal affairs of States in, at least, the last 20 years. For instance, the 1989 Tianamen Massacre by the then Chinese Government drew a strong universal condemnation against the Peoples' Republic of China for the killing of non-violent student demonstrators. This did not only lead to diplomatic isolation of China, but also raised important questions as to the legitimacy of the Chinese government of the time.[166] Similarly, as highlighted in Section 5.4.2, the UN Security Council's authorisation of humanitarian interventions in Somalia, Rwanda, the former Federal Republic of Yugoslavia, East Timor and Sierra Leon, among others, demonstrate that absolute sovereignty is a thing of the past. More and more such interventions have become not uncommon in recent years.

For instance, the Sudanese Government has been the subject of severe UN sanctions and trade embargos not only for its cosy association with terrorist organisations but also for its engagement in acts of genocide against a portion of its population in its Western region of

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[165] R.B. J. Walker and Saul Mendlovitz, "Interrogating State Sovereignty," in R.B. J. Walker and Saul Mendlovitz Eds., *Contending Sovereignties: Redefining Political* Communities (Boulder, Premier Publishers, 1990) at 1.

[166] Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14 at 29.

Darfur.[167] As a result, the Sudanese President, Omar al-Bashir, has been indicted by the ICC, subsequent to which he has become an international criminal fugitive as a result of his failure to comply with summons from the ICC Trial Chamber, as discussed earlier in Chapter 4. Similarly, with regard to Kenya, where the sitting President has been charged with commission of mass international crimes during the 2007/8 post-election violence, a number of States have said they would only have 'essential contacts' with President Kenyatta until such time as he is cleared of the criminal charges against him and his Deputy.[168] More recently, a number of Western countries have suspended their financial aid to Uganda because President Museveni has signed into law an invidious bill that ensures that anyone found guilty of encouraging, promoting, engaging or intending to engage in same sex behaviour or conduct faces a life time in prison.[169]

All of this goes to show that the international human rights regime can be an effective check on what a State can do, not only to aliens or foreign nationals, but also to its own citizens within its jurisdiction. It demonstrates that international human rights have the capacity to change both internal and external State behaviour. This does not just affirm that there is a humanitarian component to human rights, but also that the international community has justifiable and excusable concerns in the internal affairs of States. These concerns may legitimately warrant international humanitarian intervention, whether military or otherwise. As regards other forms of international intervention, States have in recent years individually or

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[167] Lauren Ploch Blanchard, "Sudan and South Sudan: Current Policy Issues for Policy and U.S. Foreign Policy: CRS Report for Congress" (2012), *Congressional Research Service*, at 27-31, online at: 7-5700 www.crs.gov , R42774.

[168] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (2010), Public Statement: The Office the ICC Prosecutor, available at: http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf [retrieved July 3 2014].

[169][Ugandan] *Anti-Homosexuality Act* (2014), Art. 12 (2).

in concert with other States devised specific or general responses to gross violations of basic and fundamental human rights by other States. These responses have ranged:

> from inaction, to diplomatic initiatives and censure, to economic incentives and sanctions, to arms embargoes, to military intervention, and, in the post-Cold War years, to *ad hoc* international criminal prosecutions and, in 2002, to the establishment of a permanent international criminal court.[170]

This suggests that an African State that engages in behaviour that substantially breaches the fundamental tenets of international human rights norms, especially those that pertain to violations of the right to life of individuals or other egregious behaviour, cannot legitimately invoke cultural relativism or sovereignty as a shield to insulate itself from international scrutiny. Where necessary, the international community is possessed with the moral obligation and authority to intervene to protection human life and property.

The question is whether international interventions in the face of grave humanitarian circumstances substantially interfere with the sovereign rights of States, and are therefore, not legitimate under international law. The following discussion establishes the legality of international intervention in the affairs of States.

5.4.4. The Legality of International Intervention in the Internal Affairs of States

The principle of non-intervention in the domestic affairs of States is enshrined in Article 2 (7) of the UN Charter which provides that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."[171] As regards military intervention specifically, Article 2 (4) of the UN Charter provides that "all Members shall refrain in their international relations from the

[170]Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights…," *supra* note 122 at 13.
[171] *UN Charter*, Art. 2 (7).

threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."[172]

While Article 2 (7) was arguably inserted into the Charter at the urging of smaller States to ward off undue interference in their internal affairs, the legality of intervention in the domestic affairs may be predicated on two main presumptions namely; the interpretation of the UN Charter and customary international law.[173]

In accordance with the interpretation of the Charter, there is a general consensus that intervention or use of force is illegal under international law. There are, however, two specific circumstances under which the use of force may be legal in international law: if the use of force has been duly authorised by the UN Security Council under Article 39 of the UN Charter, or as a matter of self-defence under Article 51 of the UN Charter (in the event of an armed attack or aggression against a State by another State or group of States). The International Court of Justice (ICJ), for instance, held in *DRC v. Uganda*,[174] that both the power of the UN Security Council to authorise the use of force and the concept of (individual or collective) self-defence are to be invoked in rare circumstances and are, ironically, premised on the notion that all States have a duty under international law to promote and maintain international peace, order and security and that the use of force can only be an option in the event of an armed attack by a State-aggressor or where failure to act would jeopardise international peace and security.[175]

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[172] *UN Charter*, Art. 2 (4).
[173] Nicholas J. Wheeler, "Humanitarian Vigilantes or Willing Entrepreneurs...," *supra* note 155 at 142-3.
[174] *DRC v. Uganda, ICJ Reports* (2005), [2005] I.C.J. Reports 2005.
[175] *Ibid.,* at para. 143, 172-173.

However, a reasonable argument may be made that "the promotion of human rights should rank alongside peace and security in the hierarchy of Charter principles."[176] This argument is inferred from the UN Charter's preambular emphasis on the peoples of the United Nations' commitment to reaffirm their faith "in fundamental human rights," in addition to the obligations set out in Articles 1 (3), 55 and 56 of the UN Charter, all of which require Member States to take action individually or in concert with other States, to promote the cause of human rights.[177]

What this really means is that the principle of non-intervention found in Article 2 (7) of the Charter "shall not apply in case of massive human rights violations because this is a matter of [legitimate] international concern."[178] This further suggests that where the UN Security Council fails to take appropriate measures to stop human rights abuses, individual States are unilaterally entitled to take the law into their own hands, as the norms of international human rights regard States as law enforcers in their own right. In such circumstances, States' unilateral action to protect human rights dispenses with the need for authorisation by the Security Council.[179] Furthermore, failure to act in the face of a mammoth humanitarian crisis is not just a neglect of duty but a moral affront to justice. For example, when massacres of such magnitude as what is now taking place in the Central African Republic or increasingly so in South Sudan, take place, the non-interference doctrine must be disregarded, for such acts are clearly barbaric and so despicable as to outrage the conscience of humanity. Such an understanding extends to a situation where individuals' lives are at the mercy of their own

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[176] Nicholas J. Wheeler, "Humanitarian Vigilantes or Willing Entrepreneurs...," *supra* note 155 at 143.
[177] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publishers, 1988) at 131.
[178] Nicholas J. Wheeler, "Humanitarian Vigilantes or Willing Entrepreneurs...," *supra* note 155 at 143.
[179] *Ibid.*

government, and the level of violence has certainly become "so great that every decent person would say that something [has] to be done to end the killing [and where] the primacy of halting the slaughter is greater than formal respect for international law."[180]

The concept of State sovereignty could also be lawfully infringed in accordance with the principles of customary international law. A customary rule of international law provides that binding legal rules can be derived from the opinions or the actions of States over a period of time. Insofar as the conduct of a given State does not prove its status as a consistent objector, such a rule or principle is automatically binding on States without their express consent.[181]

That the rules of customary international law also apply to international human rights principles is clear from the fact that in recent years, nations have, reluctantly but surely, come to accept the idea that international intervention is invocable when States, governments or any party to a civil war or any conflict, causes tragedy of such magnitude as to be a significant threat to international peace, order and security.[182] Where the Security Council has failed to act in the face of such a tragedy, States have the right to act on evidence that the Security Council has negligently or deliberately failed to live up to its duty. That is to say, in the 21st century, the responsibility to protect must fall on States acting individually or in concert with other States to avert an impending or ongoing humanitarian catastrophe.[183] Thus, while the UN Security Council is the formally recognised international law enforcement institution, States under customary international law are entitled to take measures to protect victims of unjust or unlawful State actions in the form of massive human rights violations.

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[180] Germany Ministry of Foreign Affairs, *Electronic Telegraph*: "Germany Will Send Jets to Kosovo," quoted in Nicholas J. Wheeler, *supra* note 154 at 151.
[181] *Anglo-Norwegian Fisheries, U.K. v. Norway*, Order, 1951 I.C.J. 117 at 137.
[182] René Provost, *International Human Rights and Humanitarian Law* (Cambridge: CUP, 2002) at 278.
[183] T. Modibo Ocran, "The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping" (2002) 25 *Boston Coll. Int'l & Comp. L. Rev*. at 9.

Under international law, however, the legality of this "international humanitarian intervention," which can be seen as an enforcement tool for international human rights, is limited in two ways. First, it is generally limited to situations of genocides, seen by many scholars as presenting the most compelling circumstances in response to which international intervention might be undertaken.[184] There is no evidence of developing custom that intervention may be justifiable for most other aspects of international human rights violations, including situations involving erga omnes or *jus cogens* violations such as slavery or torture. A recourse to courts, instead of intervention, in the latter cases, is the most preferred as it is a minimally impairing means for obtaining redress.[185]

The second limiting factor for international intervention is that, to the extent that it is considered lawful,[186] it is considered to be a right of, and not a duty on, States.[187] Since there is no requirement on the part of States to take positive steps to intervene in even most dire humanitarian circumstances, the limited scope of international intervention makes this doctrine an imperfect international policy.

Yet the characterisation of humanitarian intervention as merely a legal right, but not a legal duty, is oblivious to the language that has, in recent years, been used to justify military intervention in several instances. In 2011, for example, substantive ethical arguments were raised to support the case for military intervention in the Libyan crisis. One prominent moral argument was that the international community in certain circumstances has a duty to

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[184] Hagar Taha, *The Failure to Protect Again: A Comparative Study of International and Regional Reactions Towards Humanitarian Disaster in Rwanda and* Darfur (London: Lambert, 2011) at 1.
[185] Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14 at 186.
[186] The legality of humanitarian intervention is complex in the sense that, as discussed, it may occur outside of the UN Security Council authorisation. For more on this, a reader may refer to: Nicholas J. Wheeler, "Humanitarian Vigilantes or Willing Entrepreneurs: Enforcing Human Rights in International Society," in Simon Caney & Peter Jones Eds., *Human Rights and Global Diversity* (London: Frank Cass, 2001).
[187] Jack Donnelly, *International Human Rights, Third Ed…., supra* note 14 at 186.

intervene to save civilians lives and property especially in the face of the mass human rights atrocities against civilians by the Libyan regime.[188]

Lack of international intervention in certain cases such as slavery, dictatorship, etc., however, does not mean that States are not permitted from speaking out against such obnoxious practices. Under international law, it is not enough for States to protect their citizens from external aggression. States also have the responsibility to protect their citizens from mass atrocities including but not limited to international crimes such as genocides, war crimes, crimes against humanity or ethnic cleansing. This duty is inherent in the very nature of international law and has been reaffirmed by the United Nations over the years, such as in the 2005 *World Summit Agreement,*[189] requiring States to meet certain minimum standards of responsibility towards the protection of the rights of their own populations.[190]

When a State fails to meet certain minimum standards of responsibility, other States not only reserve the right of criticism but also have other options including economic sanctions such as trade embargos, severing of diplomatic ties or withholding of economic aid, or restriction on revenue generating activities and diplomatic travels for high ranking government officials. These exist among other nuanced possibilities within the power of each State or group of States acting together to effect a change of attitude on the part of the offending State.[191]

The relevance of international intervention as part of human rights protection in the context of Africa is that the continent has been inordinately blighted by gross violations of human rights,

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[188] Francis E. Ramoin, "Why Intervention in Libya was Justified: A moral, political and operational defense for the coalition's military intervention in the 2011 Libyan uprising" (2012) at 1, available online at: http://www.e- ir.info/2012/01/25/why-intervention-in-libya-was-justified [accessed on May 25, 2014].

[189] *World Summit Outcome : resolution / adopted by the General Assembly* (2005), UNGA 2005, A/RES/60/1.

[190] Luke Glanville, "The Responsibility to Protect Beyond Borders" (2012) *Hum. Rt. L. Rev.* 32 at 3.

[191] United States Institute of Peace, *Confronting Crimes Against Humanity: A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors* (Washington D.C.:, USIP Press, 2008) at 15

particularly in the last 30 years. What makes the problem even worse, as discussed in Chapter 4, is that such violations are mainly committed by political elites or those at the helm of power. By virtue of their official authority, these elites often use brute force to commit horrendous acts against the very people they are supposed to protect. The best examples are those of the Presidents of the Sudan, Omar al-Bashir and Kenya's Uhuru Kenyatta. When a political leader is determined to physically eliminate a section of his or her own people for nothing other than the sheer lust for and clinging on to power, and the domestic system fails to hold such a leader to account, the international community reserves the right to intervene to protect the rights of the targeted individuals and groups. Similarly, when a State, like Uganda or Nigeria, sends individuals to jail for life simply because they are gays or lesbians, the responsibility to protect the rights of victims rests squarely with the international community. "The victimisation or diminishment of human beings whose affections happen to be ordered towards people of the same sex is anathema"[192] in a post-colonial African world.

As a general rule, a State's failure to protect should warrant the corresponding responsibility on the part of the international community. That is, when a State non-trivially fails to fulfil its fundamental responsibility, and it is subsequently established that the State had or has the capacity to protect but fails to do so, or is itself the transgressor against the rights of individuals, other States should move in to fill the vacuum since such a State, by its very act or omission, has not only failed to govern but has ultimately forfeited its sovereignty over the individuals or territory over which it exercises or is supposed to exercise jurisdiction.[193] This argument is based on the assumption that sovereignty is in fact a contract between the people

[192] BBC: "Archbishops Criticize Nigerian and Ugandan Anti-Gay Laws" (January 2014), available at http://www.bbc.com/news/uk-25959942 [accessed n May 25, 2014].

[193] Barry M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities" (1992) 16 *Fordham Int'l. L. J.* 119 at 120, 139.

and their government and that when a government or State fails to make good on its promise to honour its part of the contract, the ultimate price is loss of sovereignty.[194]

It follows that the non-intervention doctrine under the UN Charter Article 2 (7) does not imply that other States should sit back while fellow human beings are being brutalised by their own leaders. More specifically, the fact that African States have expressly provided that they would abide by international human rights standards implies that how African States treat their own citizens is a legitimate matter for scrutiny when and if they fail to meet the minimum standards of international human rights protection. This is because, by signing those instruments, African States have expressly agreed that international standards would apply irrespective of culture, religion or political ideologies.[195] In other words, since "African governments have explicitly stated their adherence to the Universal Declaration when they ratified the Charter...and reaffirmed that allegiance as well as recognised the validity of the Covenants"[196] on human rights, they have also impliedly accepted that international law of human rights would apply to them within the margin of appreciation (discussed under s. 5.2.3), where necessary.

In short, the doctrine of non-intervention or State sovereignty enshrined in Article 2 (7) of the UN Charter was generally intended to protect the interests of States that play by the rules of international law, including honouring their obligations and commitment to protect the interest of their citizens. Notwithstanding the inclusion of Article 2 (7) into the UN Charter, it has, in fact, been argued that— considering that when this provision was inserted into the Charter, the

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[194] Theresa Reinold, *Sovereignty and Responsibility to Protect: the Power of Norms and the Norms of Power* (New York: Routlege, 2013) at 62.
[195] James Paul, "Participatory Approach to Human Rights in Sub-Saharan Africa…," *supra* note 130 at 215.
[196] *Ibid.*

drafters saw the necessity of balancing the competing interests between international human rights standards and the fear of losing sovereignty to powerful international interests— the UN Charter, itself provides legal authority for some degree of intervention in the domestic affairs of States.[197] Otherwise the reference to the people of the United Nations' reaffirmation of their faith in fundamental human rights in the UN Charter would be redundant.[198] This is self-evident from the last part of this Article providing that "this principle shall not prejudice the application of enforcement measures under Chapter VII."[199].

As a check on sovereignty, universalism highlights the idea that a new perspective on the concept of State sovereignty has emerged with the signing of international human rights treaties. This essentially means that the traditional perspective on sovereignty is not just declining but being actively undermined by the establishment of robust human rights bodies whose legal mandates penetrate the core of the affairs of sovereign States.[200] This interpretation emanates from a recognition that when human rights bodies, including the UN Security Council, fail to take reasonable steps to avert an ongoing or imminent humanitarian catastrophe, the doctrine of non-interference must give way to the moral force of human rights protection. It is thus safe to conclude that:

> while the practical efficacy of promoting and protecting human rights is significantly aided by individual nation-States' legally recognising the doctrine, the ultimate validity of human rights is characteristically thought of as not conditional upon such recognition. The moral justification[s] of human rights...precede considerations of strict national sovereignty. An underlying aspiration of the doctrine of human rights is to provide a set of legitimate criteria to which all nation-states should adhere. Appeals to national

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[197] H. Tolley Jr., *The U.N. Commission on Human Rights* (Boulder: Westview Press, 1987) at 6-7.
[198] *Ibid.*
[199] UN Charter, Art. 2 (7).
[200] Alison Renteln, *International Human Rights: Universalism versus Relativism...," supra* note 3 at 22-3.

> sovereignty should not provide a legitimate means for nation-States to permanently opt out of their fundamental human rights-based commitments.[201]

In this sense, universalism becomes a matter of necessity, as discussed below.

5.5. Universalism as A Necessity: Consequences of Denying the Validity of Human Rights

5.5.1. Introduction

In making the case for or against universalism, regard should also be had to the consequences of denying the validity of universal human rights standards. In particular, consideration should be given to the grave consequences of taking such a stark position.

In this section, I argue that a denial of the validity of the universality of human rights standards could potentially expose the world to horrors similar to or worse than those experienced during the Second World War. This could possibly result in catastrophic humanitarian crises if not more existential threats to humanity. These threats could arise from unprecedented occurrence of international nature such as genocides, nuclear wars, ethnic cleansing, war crimes or crimes against humanity, both at domestic and international levels. I also argue that affirming the validity of cultural relativism rather than acknowledging the irreducibility of human rights to particular cultures could encourage the establishment of separate regional and even subregional human rights standards. The net result is the potential fragmentation of not just international human rights system but also the existing regional human rights institutions. Such a regionalist or separatist view of human rights is likely to draw its inspiration from petty cultural values or from the ideas and values of the ruling elites in developing countries where much of political and legal orthodoxy is based on the rule of the few with power and at the expense of the many.

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[201] Andrew Fagan, "Human Rights…," *supra* note 21.

5.5.2. Universalism as a Check on State Conduct and Legal Positivism

As previously discussed, the notion of universalism is essential, especially for regulating State behaviour not only towards other States but also in respect of how the State treats its own citizens. This way, universalism does not only check relativism, but also counters the consequences of legal positivism which justifies obedience to even the most obnoxious and iniquitous State laws. For their part, "critics of positivism maintain that the unjust laws not only lack a capacity to demand fidelity but also do not deserve the name of law because they lack internal morality."[202] For instance, because of the prevalence of the positivist idea that the only edicts meriting obedience were State legislation, statements and acts of State officials, little effort was made to help victims of the Holocaust fleeing from the brutal acts of Nazi Germany during the Second World War. Similarly, Jews who managed to escape from such brutalities in Germany and parts of Eastern Europe were not granted refuge by most of the Allied governments, such as Canada and the United States, even when such States knew that Jews and other groups (such as Roma and other minorities, like gays and lesbians, human rights activists and all those who refused to comply with the unjust laws) were being massacred in their millions.[203] Shocking as these mass killings were, the most important reason given for the Allies' failure to come to the rescue of such groups was that, the international community did not have the necessary legal and political language to even censure the horrors of Nazis and Fascists, considering that the maxim that where *there is no*

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[202] Jerome Shestack, "The Philosophic Foundations of Human Rights…," *supra* note 17 at 39.

[203] Holocaust Encyclopedia, "Law, Justice and the Holocaust" (2013), *United States Holocaust Memorial Museum*, available online at: http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887 [accessed on May 25, 2014].

law there is no crime dominated international legal discourse then. This explains why at the time, killing one' own citizens was not considered a legal offense in international law.[204]

Most scholarly accounts, thus, maintain that it was the barbaric acts of Nazi Germany and, to some extent, Fascist Italy that inspired the adoption of the UDHR, for "[t]he experience of Hitler's nationalism was generally regarded as sufficient justification for the Declaration. It needed no further philosophical argument."[205]

That it was the horrors of the 20th century that inspired the Declaration is completely demonstrated by the first-hand account of probably the most influential member of the UDHR drafting committee. According to John Humphrey:

> the catalysts to which we owe the Universal Declaration of human rights, and indeed much of the new international law of human rights and has so radically changed the theory and practice of the law of nations, was the gross violations of human rights that were committed in and by certain countries during and immediately after the Second World War. For it was these atrocities that fostered the climate of world opinion which made it possible for the San Francisco Conference to make the promotion and respect for human rights and fundamental freedoms, 'for all without distinction as to race, sex, language or religion,' one of the pillars on which the UN was erected and a stated purpose of the organisation. It was on these foundations that the international law of human rights was built.[206]

It is therefore clear that "the atrocities of the two wars provided the impetus for establishing the machinery to enforce human rights standards,"[207] affirming yet again that the developments that led to the Declaration and international human rights were a direct response to war atrocities in Europe.

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[204] Jack Donnelly, *International Human Rights, Third Ed…, supra* note 14 at 4.
[205]Clinton Curle, *Humanité: John Humphrey's Alternative Account of Human Rights…, supra* note 46 at 14.
[206]John Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Judicial Character," in B.G. Ramcharan Ed, *Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration* (The Hague: M. Nijhoff, 1979) at 21.
[207]Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra note 3 at* 17-18.

Yet, in the eyes of radical relativists, such atrocities would not trigger moral indictment of governments such as the Nazi regime, because radical relativism holds that no society is entitled to sit in judgment over others. Insofar as certain acts, such as discrimination against women and minorities, for example, are considered moral and legitimate by the State, extreme relativism would adjudge practices of such moral turpitude as not only legitimate, but also as being within the exclusive domestic affairs of States and, therefore, immune from the reach of international scrutiny on account of different cultural moralities.[208]

Nevertheless, with the growth of the international human rights regime, the promotion and protection of human rights, as a necessity, has universally been enunciated as the highest aspiration of all common people irrespective of all their differences, a common standard that must regulate the relationships between citizens and their government.[209] Yet relativists contend that proponents of universality of human rights are induced by self-indulgence and vested political interest rather than by altruism and that their idealistic insistence on international standard of human rights is misguided.[210]

Without courting the extravagance of philosophical thought, I contend that such a charge is impoverished. First, the use of the term "altruism" implies that those who advocate or promote human rights are engaging in acts of charity. Such a view appears to misrepresent the universalist contention because it is oblivious to the idea that the promotion and protection of human rights is both a legal and moral responsibility for the international community. If the world is to be a better place for every human being, then we have an obligation to protect the welfare of one another as members of the human family. Second, where there is a manifest

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[208] Shazia Qureshi, "Feminist Analysis of Human Rights Law" (2012) 19 *J. P. Stud*., 41 at 47
[209] Laurence Juma, "The Role of Human Rights in Post-Conflict Situations in Africa" (2008) 2 *M.L.J.*at 280-281.
[210] *Ibid.,* at 280. .

denial of justice or substantial abrogation of fundamental human rights, the responsibility to render justice is not a matter of privilege. We live in a world where everyone's fate is wrapped up in the fate of everyone else, an idea which begets the corollary that we fall and rise together. Such a worldview is precisely captured by the African expression which says "I am because you are and you are because I am, therefore we are,"[211] the English equivalent of which is captured by the common saying that "I am my brother's keeper; I am my sister's keeper." This necessitates that individuals whose human rights have been violated by unlawful State actions must "look and appeal to the principles and mechanics of universalism to provide them with international protection against their own national or local authorities."[212]

Given what we now know about the nature of internal politics and State behaviour, the world community would be in error to assume that States will always act to protect the best interests of their people. The examples of Nazi Germany, Fascist Italy, the pre-1994 Rwandan government and the acts of the Sudanese government in Darfur, etc., all discussed previously, prove that this presumption does not hold all the time. It follows that the protection of individuals and groups rights can no longer be entirely left to State authorities, as doing so would simply rewind the clock back to a time in history when individuals counted for virtually nothing other than as tools to achieve certain goals for the State and its ruling elites.[213]

As discussed in the context of Nazi Germany and Fascist Italy, history attests that States sometimes act selectively to determine whose human rights are to be protected. The cases of

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[211] Francis Deng, *Identity, Diversity and Constitutionalism in Africa…*, *supra* note 96 at 98.
[212] *Ibid.,* at 145.
[213] Myer S. McDougal, "Human Rights and World Public Order : The Principles of Content and Procedures for Clarifying General Community Policies" (1974) 14 *Va. J. Int'l. L.*387 at 404.

genocides in Rwanda and Darfur[214] provide a contextual evidence of this grim reality. Such selectivity often leads to gross violations of the rule of law and gives rise to criminal and political impunity, especially among the ruling elites. Such a situation is particularly acute when local justice systems are manipulated to meet the whimsical aspirations of those at the echelon of power. Furthermore, it is unarguable that failure to render justice breeds a cycle of violence as a result of revenge and counter revenge.[215] This provides a cogent reason as to why justice must be the cornerstone of a peaceful and prosperous society. It was for this reason that the post-1994 Rwanda government rejected the South African Truth and Reconciliation approach, arguing that:

> unless the "culture of impunity" was once and for all ended in Rwanda the vicious cycle of violence would never end....: only when the guilty had been punished would it be possible for the victims and the innocent to create a joint future together.[216]

Similarly, unless perpetrators of injustice are made to account for their criminal liability, the cycle of revenge as the viable means with which victims of injustice can obtain "justice" could become the order in society. In such a state of affairs, there can be no peace—a meaningful peace— without justice. To mitigate the effect of legal cultural particularism which appears to align with the idea of legal positivism, an international human rights standard is necessary. This standard could also mitigate against unnecessary regionalisation of human rights values.

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[214] Gregory H. Stanton, "Proving Genocide in Darfur: The Atrocities Documentation Projects and Resistance to its Findings," in Samuel Totten & Eric Markusen, Eds., *Genocide In Darfur: Investigating the Atrocities in the Sudan* (New York: Routledge 2006) at 184.

[215] David Bloomfield, Teresa Barnes & Luc Huyse, Eds., *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International Idea, 2003) at 19-34.

[216] *Ibid*., at 116.

5.5.3. Universalism Mitigates Regionalisation of Human Rights Standards

In addition to its ability to protect individuals against State abuses, universalism as a necessity must also be seen as a concept that could go a long way to mitigate against particularisation of human rights standards. Although there are, so far, three major regional human rights systems, namely, the European, African and Inter-American human rights systems, a further regionalisation of human rights systems within these systems is likely to undermine the international human rights system for reasons discussed below.

While there is nothing inherently ominous about having regional human rights regimes, the demand by radical relativists (discussed in Chapter 3) for the creation of separate regional human rights regimes has worrisomely increased in recent years. Such demands are worrisome because some of the objectives of such campaigns include the desire to entirely overhaul the current international human rights systems in favour of regional and subregional regimes. Such demands are often thinly disguised in a clever language. For instance, some cultural relativists, especially from Latin America and Africa, argue that there is a need to "create an alternative language concerning human rights."[217] This suggests establishing different human rights systems for non-Western societies. Such a system, they argue, would replace the myopic emphasis on Western values based on individualism, privacy, liberty and the right to private property which are, arguably, alien to non-Western societies.[218] In other words, the suggested regional and subregional human rights regimes would completely overhaul the international human rights system, by relegating the protection of human rights to regional and subregional authorities.

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[217] David Little, "A Christian Perspective on Human Rights…," *supra* note 29 at 59.
[218] *Ibid.*

It is worth noting that regional human rights regimes are not the issue. In fact, one of the advantages of regional human rights systems over international human rights system is that a regional system can, in principle, attract more popular local support, since their values would be more in keeping with the indigenous conceptions of human rights and moral norms than the international human rights standards. For this reason, "the implementation of those standards is less likely to be regarded as cultural imperialism, [as] states will be more inclined to comply with the rules which are concomitant with their political cultures."[219]

A major concern about the proliferation of human rights regimes at regional and subregional levels and further below, however, is not just how far down the lines of regions and sub-regions this would have to extend nor the fact that some would call for a new human rights system altogether. Neither is it the mere fact that relativism tends to consider any cultural practices, however obnoxious they may be, to be moral and legitimate as long as they are regarded so by the culture in which such practices take place. Rather, for those who believe in the nobility and necessity of internationalized human rights standards, there arise matters of pressing urgency.

First, in certain respects, regional human rights values may be entirely incompatible with international human rights values. For instance, an Islamic based human rights system would make it illegal for an individual born or raised as a Muslim from renouncing his or her religion, contrary to the international right provision on the right of freedom of conscience. For Islam, changing one's religion "is treated as an impermissible renunciation of God,

[219]Alison Renteln, *International Human Rights: 1Universalism versus Relativism…, supra note 3 at* 37.

deserving severe punishment."[220] Strictly speaking such a view cannot easily be reconciled with universalism, having regard to the fact that the pressing issue which precisely lies at the centre of human rights debate is the enduring discrepancy between universalism and cultural relativism.[221]

This leads me to the fundamental premise of my contention that, if human rights are those legal claims to which every human person is entitled by virtue of his or her inherent humanity, then they must be transnational in character and application. In fact the significance of the universality of human rights concept lies in States realizing that they must relinquish some of their most treasured aspects of political sovereignty and cultural autonomy as part of their express commitment to promote and protect human rights. This view comports well with the idea that since it is the nation-States which often violate individual and group rights, it is sometimes evidently ironic to designate them as champions of fundamental human rights and freedoms. Indeed, in the absence of international human rights monitoring, it is improbable that individual rights will be sufficiently safeguarded, especially where the State itself is the violator of human rights and freedoms, considering that States are reluctant to voluntarily report their own human rights abuses in the absence of an international human rights monitoring.[222]

Secondly, the argument for the regionalisation of human rights is impractical for a variety of other reasons. First, it is doubtful whether all societies can conceptualise human rights comprehensively. This is not because certain societies are incapable of developing a robust

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[220] The Hon. Michael Kirby, AC, CMG, "Law, Human Rights and Religion—of Genocide, Sexuality and Apostasy" (2009) 20 *Mac. L. Rev.* 1 at 24

[221] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 33.

[222] *Ibid*., at *37*-38.

concepts of human rights protection but because of the interests of powerful political and economic elites that are likely to take advantage of the vacuum as far as lack of an international oversight is concerned. Put differently, if the determination of human rights is left to the whims of cultural relativists, the concept of human rights itself will erode at the onslaught of extreme relativism which, according to Michael Ignatief, is the "invariable alibi for political] tyranny."[223] Second, local or indigenous human rights standards will most likely concentrate on codifying distinctive cultural features, rather than the fundamental concepts that go to the very core of human dignity and individual autonomy.[224]

In 2014, for example, the Kenyan Parliament moved to pass a law legalising polygamy based on the fact that it is a cultural practice and heritage of the Kenyan society. In so doing the government made it clear that a married man has an inalienable right to marry as many women as he so desires, even more than one at the same time, and without the express consent of his existing wife or wives.[225] It was even comically argued after the bill was passed into law that when a Kenyan man marries a woman, "she must know that another is on the way."[226] Such an entitlement clearly subordinates a woman in a relationship. It is impossible to imagine that in such circumstances, a man and a wife in an existing relationship are equal partners, contrary to Article 23 of the ICCPR which provides for the right of men and women to found a family on the basis of equality, free and full consent of the parties in the relationship. These rights are also protected in Article 18 of the Banjul Charter.

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[223] *Michael Ignatief, Human Rights as Politics and Idolatry* (New Jersey: Princeton University Press, 2011) at 74.
[224] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 54.
[225] *Respect For Marriage Act* (2014), H.R. 2523, 113th Parliament (2013-2014).
[226] The Guardian, "Kenya's Parliament Passes Bill to Allow Polygamy" (2014), available online at http://www.theguardian.com/world/2014/mar/21/kenya-parliament-passes-bill-allowing-polygamy [retrieved on May 27, 2014].

It follows that regional human rights can be certainly hijacked by local elites and cultural relativists who would want to highlight even petty cultural elements and elevate them to the level of human rights status. Again, this implies that the focus of such human rights systems is likely to be on what is distinctive as opposed to what is common and more compelling, having regard to the fundamental principles of human dignity and individual autonomy. Third, the idea of uniformity (essentialism) within a particular culture, as discussed previously, is ill-born. In fact individuals from the same cultural grouping can have stark differences in terms of their interpretation and ability to conceptualise deeper metaphysical or philosophical ideas about human rights. In other words, individuals from different cultural groups can, independently, have more values in common than they do with members of their own cultures.[227] The case for the regionalisation of human rights thus ignores cross-cultural convergence on similar or different issues.

The gist of my argument here is that given how diverse Africa is, granting States the prerogative to determine the list of what ought to be considered human rights could lead to further fragmentation along regional and sub-regional lines. Most importantly, if religion is to be considered to be the source of inspiration for human rights conception, then it is likely that neighbours who subscribe to different religions would also demand that their respective understanding of human rights be codified and applied to them separately. Some local or regional authorities would, for example, provide that freedom of conscience is a right based on collectivism. This would leave no room for individuals to denounce or change their religion at the time of their choosing. Otherwise the offence of denouncing one's religion, known in some major religions as apostasy, would call for capital punishment. The best example is that of a

[227] Alison Renteln, *International Human Rights: Universalism versus Relativism…, supra* note 3 at 54.

Sudanese woman, Meriam Yehya Ishag, who was sentenced to death and 100 lashes in May of 2014 by a Sudanese court in Khartoum for two reasons. First she was married to a Christian man from South Sudan, contrary to sharia law which prohibits Muslim women from marrying non-Muslim men. Marriage to non-Muslim men is considered as adultery and carries a death sentence in Islam. Second, the prosecutor led evidence that since Ishag was born to a Muslim father and an Orthodox Christian mother, she was, by virtue of her father's Islamic faith, born a Muslim. This means that her insistence that she was raised a Christian amounted to apostasy which is punished by death. The Prosecutor, therefore, urged the accused to recant her faith and profess that she was a Muslim, in which event she would be spared the death sentence. She adamantly refused such persuasion insisting that she was a Christian.

Figure 5.1: Meriam Yehya Ibrahim Ishag had maintained that as she was brought up as a Christian, she had not committed apostasy. Courtesy of BBC. Available online at: http://www.bbc.com/news/world-africa-27586067 [retrieved on May 28, 2014].

As a result, Ishag who was eight month pregnant was due to be hanged, following the birth of her baby in June, 2014.[228] In the face of relentless international pressure on the Sudan, Ishag was finally freed in July that same year and left the prison with her new baby girl in her arms.

At the time of this writing, Ishag had reportedly left Sudan and flew to Rome, Italy, where she and her husband held a conference with Pope Francis at the Vatican, a sign that the Sudanese government had yielded to international outcry against such cruel and unjust punishment.[229]

The fact that Ishag was sentenced to death and flogging for exercising her religious freedom and for choosing to marry a non-Muslim man is just an appalling evidence of local resistance to the application of human rights standards in certain parts of the African continent. It violates Articles 23 and 18 of the ICCPR which protects the right to found a family and freedom of conscience respectively. It is also a violation of the corresponding provisions in the Banjul Charter, specifically Articles 18 (freedom to found a family) and 8 (freedom of conscience). Seen this way, regionalisation of human rights would appear to be a complete "return to the idea of human rights [being] determined by local colour."[230] Nothing could be more tedious and ridiculous to say the least than regionalising human rights standards on such petty grounds.

One of the strong points of a universalist approach is the belief in a single cosmopolitan community whose cultural values are presented as the least common denominator for all indigenous cultures around the world. Implementing such a belief effectively rules out the

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[228] *European Parliament Resolution On Sudan—*"*The Case of Mariam Yahia Ibrahim"* **(2014/2727(RSP)),** available online at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20140717+ITEMS+DOC+XML+V0//EN&language=EN#sdocta1

[229] The Guardian, "Sudanese Woman Spared Death for Apostasy Meets Pope Francis" (2014), available online at: http://slinkingtowardretirement.com/?p=195643 [retrieved on July , 2014].

[230] Declan O' Sullivan, "Is the Declaration of Human Rights Universal…," *supra* note 70 at 33.

defects of localism or the idiosyncrasies of the 'rules of each place.'[231] Indeed the latter would be a dangerous recipe for the full realization of individual and group rights, especially for many social groups and communities in Africa. For instance, in most African States, very few States are likely to protect the human rights of groups (like gays and lesbians, for instance). Uganda and Nigeria are two infamous examples of the 38 African States in which same sex individuals and couples are not only unprotected but are severely punished for who they are.[232] Similarly, in countries like Angola, the rights of Muslims are least likely to be protected since Islam is considered to be a cult in that country.[233]

Given that some States deny portions of their populations their fundamental rights and freedoms or choose not to protect them, or deliberately seek to subjugate the groups and treat them as if they are less deserving, the only viable human rights system that can be had is one that is universal. Otherwise in an environment where every a State or society determines the list of rights it would want to protect as human rights, there can be no basis for the international system of human rights protection.[234]

This leaves universalism as a necessity as one of the key pillars of international human rights system, making the international human rights regime maximally inclusive and objective. As well, universalism can foster the weeding out of harmful cultural practices in the manner discussed in the following section.

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[231] R. Vincent, *Human Rights in International Relations…, supra* note 135 at 49.

[232] European Parliament: "Uganda and Nigeria: European Parliament Calls for Targeted Sanctions Over New Laws" (2014), *Intergroup on LGBT Rights,* available online at: http://www.lgbt-ep.eu/press- releases/uganda-and-nigeria-european-parliament-calls-for-targeted-sanctions-over-new-laws/ [retrieved on July 11, 2014].

[233] African Globe, "African State of Angola Bans Islam, All Mosques to be Destroyed" (2013), available online at http://www.africanglobe.net/africa/african-state-angola-bans-islam-mosques-destroyed [accessed on April 29, 2014].

[234] Abdullahi An-Na'im & Francis Deng, "*Human Rights in Africa: Cross Cultural* Perspectives…, *supra* note 20 at 8.

5.6. Universalism as a Limit on the Right to Culture: The Case of Harmful Cultural Practices

5.6.1. Introduction.

The tension between human rights and local cultural values is an enduring reality. Certain cultural practices like female genital mutilation (FGM), double limb amputation, capital punishment for adultery, or forced marriage, among others, are viewed through a human rights lens as affronts to human dignity.[235] Yet such values are seen as truly enduring, legitimate and completely moral by the societies in which they occur or are practised. Ironically, international human rights protect both individual and cultural rights, making the protection of the two rights or entitlements a matter of delicate balance.

The issue in this regard is the extent to which the rights to culture, as a group right, may be exercised, especially when certain cultural practices or values substantially injure the enjoyment of the rights and freedoms of certain groups and individuals or may in fact be harmful to them both physically and psychologically.

In this section, I argue that the idea of universalism as a limit on the right to culture allows for the argument that the right to culture, as enshrined in the International Bill of Human Rights, effectively precludes the protection of harmful cultural practices such as FGM. I also argue that the human rights ideals prescribed by international human rights documents impose on the international community a duty to protect when the very essence of an individual's humanity is at stake. Finally, I argue that the international human rights regime must impose on States

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[235] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655 at 723.

an obligation to take steps to eliminate harmful cultural practices that are antithetical to the dignity of the human person.

5.6.2. The Conceptual Framework of the Right to Culture

The enduring discourse on the rift between universalism and cultural relativism in international human rights is firmly premised on "the abstract conceptions of both culture and rights"[236] as "allies and enemies" at the same time. This binary pairing is provided for in the ICCPR Article 27 which states that:

> in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[237]

The protection of culture as a group right makes culture an object of robust human rights discourse. This discourse is largely animated in part by the fundamental tension between the need to constitute human rights as legal instruments to protect individual rights and the need to protect culture as a group right. This concurrent protection of both rights and culture and the need to regulate cultural practices for the purposes of protecting human dignity results in a situation that pits indigenous cultural values against international human rights standards.[238]

5.6.2.1. Culture: A Definition

Until relatively recently, culture was generally understood in anthropological circles as referring to a homogenous, integrated set of beliefs and values that permanently define a

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[236] Sally E. Merry, "Changing Rights, Changing Culture," in Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: CUP, 2002) at 31.

[237] ICCPR, Art. 27

[238] Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds., "Introduction," in Jane K. Cowan, Marie- Bénédicte Dembour & Richard A. Wilson, Eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: CUP, 2002) at 4.

distinct society.[239] This definition basically connotes an essentialist approach to culture. As discussed previously, essentialism considers cultures as sets of discrete and internally homogenous value systems whose patterns and representations are fixed over time.[240] This definition assumes that cultural values are not just fixed in that they never change over time but also that such values are accepted by every member in society (there is no internal differences).

Yet such a view appears to have dramatically been overtaken by events. The sweeping might and impacts of modern technology, liberal capitalism, migrations, colonial or neocolonial projects and tourism, and religions, among others, have increasingly redefined contemporary national frontiers and changing cultural boundaries at unprecedented rates.[241] This has resulted in a situation where no culture is entirely autonomous or sealed off from the reach of other cultures, making cultural ideas and values both transferrable and translatable. In other words, these modern means of cultural interaction have expedited the organic course of cultural exchange so that in the 21st century, cultures have been significantly and decisively influenced and penetrated by external values.[242] This suggests that societies which were previously considered sealed off from each other are now catapulted into the cosmopolitan culture and global institutionalism. In fact, it is impossible to imagine a "'primitive' tribe which has not yet heard of human rights"[243] as part of its social and cultural development.

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[239] Edward B. Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom* (London: Gordon Press, 1974) at 1.

[240]Sally E. Merry, "Changing Rights, Changing Culture…," *supra* note 236 at 32 and Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, Eds., "Introduction," in Jane K. Cowan, Marie- Bénédicte Dembour & Richard A, (Culture and Rights: Anthropological Perspectives, supra note 235 at 3.

[241] J. Cameroff & J.L. *Cameroff, Ethnography and the Historical Imagination* (Boulder: Westview, 1992) at 27.

[242]A. Appadurai, *Modernity at Large: Cultural Dimensions of* Globalization (Minneapolis: MUP, 1996) at 26-29.

[243]Jane Cowan, Marie-Benedictē Dembour & Richard Wilson, "Introduction," in Cowan, Dembour & Wilson, *supra* note 238 at 5.

What are now left of previously 'sovereign cultures' are traces of dying and atrophying breed of isolated cultural mores and practices that have less relevance to individualised societies of the 21st century. Thus any appeal to culture in a way that would have previously required framing the arguments or advancing claims in essentialized terms, by depicting culture as a homogenous whole, no longer does justice to cultures.[244] Consequently, culture is now:

> understood as a historically produced rather than static, unbound rather than bounded, contested rather than consensual, integrated within structures of power such as construction of hegemony, rooted in practices, symbols, habits, patterns of practical rationality within cultural values, categories of meanings rather than a single dichotomy between ideas and behaviour and negotiated and constructed human action rather than organic forces.[245]

Ergo, the term culture now simply refers to a total range of values, beliefs, symbols, patterns and institutional structures that are transmitted and cherished within each society. It also includes the totality of material goods that a society produces. Seen this way, culture not only covers *weltanschaung* and social ideologies but also normative behaviour that defines its perspectives in relation to rights and entitlements.[246]

Culture should also be understood as a process rather than a fixed set of practices, structures, ideas, values or beliefs of a given society.[247] This clearly shows that culture is not a set of values and beliefs that are frozen in time or written in stone. Understanding the concept of culture as a set of never-changing social norms and practices ignores the impact of modernity and globalization, both of which are/were in turn spurred by the spread of liberal capitalism,

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[244] Sally E. Merry, "Changing Rights, Changing Culture…," *supra* note 236 at 43.
[245] *Ibid.,* at 41.
[246] Roy Preiswerk, "The Place of International Relations in the Study of Human Rights" (1978) 32 *Yr. Bk. of World Affairs* at 251.
[247] Makau Mutua, "Terrorism and Human Rights: Power, Culture and Subordination" (2002) 8 Buffalo Hum. Rt. L. Rev., at 5.

technology, migration and colonial projects, among others.[248] What constitutes culture, therefore, varies from time to time. The perception of rights in the context of culture should also be seen in a similar fashion.

Precisely speaking, rights by their very nature, will cease to have meaning and relevance if they are frozen in time. The idea of right and wrong or justice and equity are so time dependent that what was right a few decades in the past may be shocking to the social conscience, thus condemned as wrong in today's terms.[249] No example is more relevant than the case of institutional slavery. This explains why any emphasis on cultural differences, as advanced by relativists, blatantly ignores the impact of time, modernity, globalization and more important, the evolving standards of moral decency.

5.6.2.2. Culture as a Fundamental Group Right: Framing the Debate on the Concept of Culture as a Right

The notion of right to culture and its place in international legal discourse as an object of legal claim is not new. For instance, the idea that every individual is entitled to follow his or her own culture "is one of the central tenets of European Romantic nationalism."[250] This idea was conceived at the 1919 Paris Conference (which established the League of Nations) following the First World War. It was understood at that conference that one of its main objectives would be the protection of religious, linguistic and cultural minorities as distinct societies.[251] The legal protection of the right to culture, however, received its strongest impetus yet in the late 1960s, after the adoption of the two human rights Covenants in 1966. Specifically, Article

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[248]J. Jackson, "Culture, Genuine and Spurious: the Politics of Indianness, the Vaupes" (1995) 22 *Am. Ethnologist*, 3 at 19.
[249]*Lesbian and Gay Equality Project v. Minister of Home Affairs* [2005] ZACC 19 at 102 (Const. Ct. of SA).
[250] Jane Cowan, Marie-Benedictē Dembour & Richard Wilson, *Culture and Rights...,supra* note 238 at 8.
[251] *Ibid.,* at 9.

27 of the ICCPR makes it clear that the protection of cultural, religious and linguistic minorities would no longer be at the sole discretion of States.

For minorities, this legal recognition provided the necessary conditions to assert themselves in fundamental ways including the promotion of their identities. This made the language of the right to culture "inseparable from the language of resistance."[252] In the face of competing local and international human rights standards or cultural relativism versus universalism, however, the enduring debate between the two schools of thought has largely been based on their abstract conceptions or on the relative merits of adopting one over the other.[253] This has long had the effect of sidelining many pressing rights issues such as women's rights and oppressive or harmful cultural practices.

As a language of resistance, the inherent contradiction between the two concepts of rights and culture is typically described as "an opposition between universalism, in the form of a transformational but European-derived conception of rights and relativism, in the form of respect for local cultural differences."[254] Yet the pairing of rights and culture in this manner basically essentializes the debate and makes it difficult for the participants in this discourse to realize that both right and culture can be great allies if they are interpreted harmoniously, having regard to the fact that the principal function of human rights is to protect the dignity of the human person. Culture and rights must not, as such, be viewed as conceptual enemies since in the international law of human rights, both concepts are "widely recognised as deserving the same protections as human rights [values]."[255] As such, recognising culture as a

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[252] Jane Cowan, Marie-Benedictē Dembour & Richard Wilson, *Culture and Rights...,supra* note 238 at 10.
[253] J. Steward, Comments on the Statement on Human Rights" (1948) 50 *Am. Anthropologist*, 351-351.
[254] Sally Engle Merry, "Changing Rights, Changing Culture…,"*supra* note 236 at 32.
[255] David N. Geller, "From Group Right to Individual Rights and Back: Nepalese Struggles Over Culture and Inequality," in Jane Cowan, Dembour Wilson, *Rights and Culture*…, *supra* note 235 at 177.

right should not be seen as implying a rejection of the application of human rights standards, nor should the universal application of human rights be seen as a subtle way of obliterating traditional values, unless a cultural practice is so repugnant as to shock the conscience of humanity.

For this reason, the juxtaposition or dichotomous pairing of rights and culture should rather be viewed in two ways.[256] First, the state of uncomfortable co-existence between individual rights and the right to culture should be viewed as a conflict between competing rights values. Second the tension between the two concepts should be framed as a conflict between two interests by designating one as a legal right and the other as a reasonable basis for limiting the right or freedom in question pursuant to Article 29 (2) of the Universal Declaration.[257] This provision states that in the free exercise of one's rights and freedoms, the enjoyment of these entitlements shall be subject to such reasonable limitations as may be determined by law "for the purpose of securing the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare."[258] Such an approach would strike a fair and reasonable balance between a fundamental group right or freedom and that of the individual.[259] This implies that whereas both right and culture should be viewed as allies, in certain contexts, the enjoyment of one right would, in such circumstances, necessarily exclude the enjoyment of the other. This balancing act is set out in the next subsection which establishes the standards of evaluation, specifically in the context the conflict between human rights and certain harmful cultural practices.

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[256]Eva Brems, "Enemies of Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19 *Hum. Rt. Qrtly* 136 at 160.
[257] *Ibid.,* at 160.
[258] UDHR, Art. 29 (2).
[259] Eva Brems, "Enemies or Allies?…," *supra* note 256 at 161.

It is my contention here that when individual human rights and the right to culture cannot be mutually accommodated, individual human rights must prevail over the right to culture in most instances, but not always. For instance, while it is prohibited in certain religions (as in the case of Ishag discussed above) that one cannot denounce his or her faith because such a freedom is curtailed by certain religious dogmas, the individual right to renounce his or her religion must trump such religious edicts. On the other hand, where an individual's right to the use of his or her land, for instance, may evidently lead to environmental contamination, the communal right to clean and healthy environment must supersede the individual's proprietary interest in the use of his or her land. This way a fair balance that tilts the scale towards the most pressing of the competing interests can be assessed on a fact-by-fact basis.

5.6.3. Human Rights Standards as Limitations on the Right to Culture

The foregoing has established that the fusion of rights and culture has made it possible for "culture to become an object of rights claims," [260] since the individual's rights to 'belong to' or enjoy a culture are enshrined not just in the ICCPR but also in other international human rights documents, such as the UN *Declaration on the Rights of Persons Belonging to Ethnic and National, Linguistic and Religious Minorities.*[261] The latter Declaration in its Article 1, for instance, mandates "States to protect the existence and the national or ethnic, cultural, religious or linguistic identity of minorities within their respective territories and shall encourage the conditions for the promotion of that identity."[262] This formulation demonstrates that "cultural features are seen as intrinsically valuable and worthy of recognition and legal

[260] Jane K. Cowan, Marie-Bénédicté Dembour & Richard A. Wilson, *Cultural and Rights…, supra* note 238 at 8.
[261] *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,* (1993) 138 UNTS 48.
[262] *Ibid.,* Art. 1.

protection."[263] As well, this includes not just the right to speak one's own language but also, among others, the right to participate in cultural activities such as religious and cultural rituals and practices that are seen as endearing to the community. However, the right to culture "has its own possibilities and limitations, both as a set of ideas and as a realm of practices."[264] While such possibilities include the right to exercise and enjoy the right to culture to the extent of that right, there are concerns as to whether certain harmful cultural practices, such as those discussed in Chapter 4, should even be considered as part of the rights that come within the meaning of the right to culture as defined in the international law of human rights.

A cultural practice may be harmful not only when it interferes with the bodily integrity of the individual but when it also substantially interferes with other fundamental human rights and freedoms. As a result, traditional customs (such as FGM, widow inheritance, double limp amputation for theft etc.) would be candidates for being harmful in this way, these customs have attracted meaningful critiques from all walks of life and diverse groups of individuals and organisations, including social democrats, feminists, gay and lesbian liberation movements, critical race theorists, and a litany of other groups with divergent social and political goals.[265]

These latter critiques are rooted in the concern that "when rights-abusive practices raise issues of great moral significance, tradition and culture are a slight defence."[266] That is to say, when the enjoyment of particular cultural practices crosses the 'red-line'—from enjoyment of the right to an abuse of that right— there is a need to ensure that rules that are made to protect

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[263] Jane Cowan, Marie-Bénédicté Dembour & Richard Wilson, *Cultural and Rights…, supra* note 238 at 8.
[264] *Ibid.,* at 12.
[265] *Ibid*., at15.
[266] Jack Donnelly, "The Relative Universality of Human Right…," *supra* note 5 at 304.

basic and fundamental human rights are enforced uniformly and firmly "regardless of the religious, linguistic or gender characteristics of the dramatis personae, with certain basic rights...considered as absolute."[267] This is important for the protection of individual rights, which if left to be defined by States and interest groups, could lead to gross violations of fundamental rights and freedoms. "The underling purpose of human rights is to allow human beings, individually and in groups that give meaning and value to their lives, to pursue their own vision of the good life."[268] As such, individuals ought to be given greater latitude in deciding and choosing what is best for themselves. After all, when human rights are violated, it is the individual, not the group, that suffers the consequences, even though particular practices which violate individual rights might still be of significance to some participants within the practising cultures.[269] Scholarship in this respect suggests that culture should be subordinate to individual rights. Diana Ayton-Shenker has rightly noted the significance of the philosophy behind the necessity for limiting the enjoyment of the right to culture. She argues that while it is true that everyone has the right to culture, including the ability to enjoy, celebrate and develop his or her own cultural identity:

> cultural rights, however, are not unlimited. The right to culture is limited at the point at which it infringes on another human right. No right can be used at the expense or destruction of another, in accordance with international law. This means that cultural rights cannot be invoked or interpreted in such a way as to justify any act leading to the denial or violation of other human rights and fundamental freedoms. As such, claiming cultural relativism as an excuse to violate or deny human rights is an abuse of the right to culture....For example, no culture today can legitimately claim a right to practise slavery....Similarly, cultural rights do not justify torture, murder, genocide, discrimination on grounds of sex, race, language or religion, or violation of any of the other universal human rights and fundamental freedoms established in international law. Any attempts to

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[267] Jane Cowan, Marie-Bénédicte Dembour & Richard Wilson, *Cultural and Rights...," supra* note 238 at 15.
[268] Jack Donnelly, "The Relative Universality of Human Rights…," *supra* note 5 at 303.
[269] Eva Brems, "Enemies of Allies...,? *Supr*a note 256 at 147.

> justify such violations on the basis of culture have no validity under international law.[270]

5.6.4. Assessing the Validity of Cultural Practices: Standards of Evaluation

Where a cultural practice appears unacceptable to an outsider but is still meaningful to all or some of its participants, human rights standards should apply its own criteria or standards of evaluation to determine whether such a practice is legitimate and permissible under international law. This proposal is based on the idea that sometimes highly valued cultural practices violate their own legal or moral standards, resulting in three moral challenges, succinctly summarised by Renteln as follows:

> first, where the act in question is contrary to the norms of society in which it occurs, it can be critical. Second, where the act violates not only the internal standard of the society but universal standards as well, it can be questioned. Third, where the act is in accordance with the society's standards, but violates the critic's own standards (an external one), criticism of an ethnocentric sort is possible.[271]

These standards can differently be described as universalist standards (which are external standards determined by the cosmopolitan moral community), personal standards (standards of the assessor's indigenous community) as well as internal standards (standards of the community in which the practice occurs).[272]

In the context of certain African cultural practices, such as FGM and other harmful practices that call into question the moral legitimacy of their underlying cultural contexts, an international human rights standard should be applied to determine whether or not such a practice complies with human rights values. This helps us determine whether or not a

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[270] Diana Ashton-Shenker, "The Challenge of the Human Rights and Cultural Diversity" (2014), available online at: http://www.un.org/rights/dpi1627e.htm [retrieved on June 29, 2014].

[271] Alison D. Renteln, *International Human Rights: Universalism Versus Relativism*…, *supra* note 3 at 78.

[272] B. Moore, Reflecting on the Causes of Human Misery and Upon Certain Proposal to Eliminate Them (London: Allan Lane, 1972) at 11, also see Declan O' Sullivan, "Is the Declaration of Human Rights Universal?...,"*supra* note 70 at 31.

particular cultural value or practice "is defensible within the basic value framework of that society, and whether the defense is a plausible response to a universalist critique."[273] This suggests that various cultural practices can be ranked in the order of their moral validity.[274] The closer to the bottom of that ranking the practice is, the more rigorous the standard of evaluation and the less likely that practice can be accommodated by international human rights law. This further suggests that international human rights can still accommodate certain cultural practices, depending on how high or low that practice ranks on the moral scale.

It follows that where a given African State defends the validity and continuation of certain cultural practices, such as FGM, which is not only physically harmful but also violates the integrity, individual autonomy and sexual self-determination of girls and women, such a practice cannot be upheld because it is obviously inconsistent with the external standard of evaluation. In other words, if a cultural practice is defended on the basis of internal standards but is inconsistent with external standards of evaluation, that practice must be considered illegitimate under international law. Where cultural practices are inherently objectionable, they must not be tolerated, no matter how anciently or how long it might have been in practice and no matter how popular they are in societies in which they occur.[275] In short, when external and internal moral standards clash irreconcilably, the external moral standard must govern.

The major deficiency for using external standards to evaluate an internal cultural practice is that "relativism is based on foundations of moral autonomy and communal self-determination, both demanding reliance on internal evaluation."[276] This dilemma can be resolved by invoking

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[273] Declan O' Sullivan, "Is the Declaration of Human Rights Universal…,?" *supra* note 70 at 30.
[274] *Ibid*., at 31.
[275] Donnelly, *International Human Rights…*, *supra* note 14 at 52.
[276] Declan O' Sullivan, "Is the Declaration of Human Rights Universal?...," *supra* note 70 at 30.

the idea that all States, having expressly declared their intentions to be bound by international human rights treaties, have practically accepted to be evaluated or assessed by external standards. Their acceptance to be bound by the International Bill of Human Rights and other international human rights instruments symbolises an express consent, as representatives of their people, to accept such evaluation methods as the most objective standards of assessment and for the purposes of protecting the human rights and dignity of their people. A State's public declaration in this manner is a limitation on how far the right to culture can be enjoyed and exercised by a people. It follows that any customary practices that brutally mutilate a girl child's body in the name of culture must be rejected in accordance with an external evaluation, since such a finding indicates that the subject practices are repugnant and should outrage our collective moral conscience.

The continuation of such practices in the 21st century as a form of resistance against international human rights standards shows that cultural values are far stronger than national or international laws. This requires the robust involvement of the international community to uproot such entrenched cultural practices. It could also mean that practicing communities see nothing intrinsically wrong with such values, partly because there may be no internal debate about the validity of the practice. Yet communities can modify their attitudes toward such practices if more awareness is created by the international community. The good news is that moral judgments are generally malleable. For this, Mill says, moral judgment is inherently dynamic in that, when an internal moral standard is exposed to critical scrutiny—whether the criteria arise spontaneously or as a result of being subjected to an external standard of evaluation—it can be set right when found to be erroneous.[277] Universal human rights

[277] John S. Mill, "On the Liberty," in M. Warnock Eds., *Utilitarianism* (London: Collins/Fontana, 1962) at 136.

standards are the most appropriate mechanisms to ensure that such practices are objectively evaluated and, when necessary, eliminated. The test also ensures that the exercise of the right to culture (to which it specifically applies) does not displace the enjoyment of fundamental individual rights and civil liberties. [278]

Yet sizable numbers of African scholars continue to view the international human rights regime as a new form of a colonialist agenda, and as a "neo-colonial discourse incorporating conceptions of paternalism and infantilization, and entitling large and powerful nations to intervene in the affairs of small and vulnerable countries."[279]

While Africa's opposition to international human rights standards—due to the nagging fear of Western infringement on sovereignty—can be legitimate in some instances, the international human rights regime must not sacrifice its core principles on account of these sentimentally charged claims. Certain aspects of human rights values are so important that no single State must be permitted to violate them in the name of culture, since there is a universal consensus that certain rights are so fundamental and so sacrosanct as to be obvious to everyone in every society and since the enjoyment of such rights cannot be subjected to any form of limitations whatsoever. For instance, the right to life, the right against torture, and the right not to be physically violated in any form or shape (unless one so meaningfully consents) are examples of inalienable rights that are not subject to negotiation with the aim of accommodating religious or cultural values unless their deprivation is justified by a fair judicial process.[280]

It follows that while the concept of universal human rights is certainly not a panacea for the myriad of global problems, they are by far the most effective methods of tackling maze of

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[278] Declan O' Sullivan, "Is the Declaration of Human Rights Universal?...," *supra* note 70 at 44.
[279] Sally E. Merry, "Changing Rights, Changing Culture…," *supra* note 236 at 35.
[280] Jack Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6 *Hum. Rt. Qrtly* 404.

global issues like women's rights, FGM or religious intolerance.[281] Relativism, on the other hand, appears to be complicit and in fact more accommodating, as far as certain cultural practices are concerned. In other words, relativism calls for tolerance of even the most obnoxious acts imaginable, as long as such acts are deemed moral and legal in societies in which they occur.[282] Put another way, it is contended that "since relativism forbids value judgments, the relativist cannot disapprove of specific cultural practices. This is because the practices regarded as reprehensible are judged according to an ethnocentric standard."[283] The relativist position must therefore be critically evaluated and, if necessary, challenged because of its tendency to acquiesce, accommodate or even approve of harmful customs including but not limited to subordination of women and discrimination against racial, social or religious minorities, unlawful deprivation of life, such as in honour killing, and torture (such as FGM). A recognition of cultural relativism on equal par with universalism will therefore critically undermine the moral legitimacy and validity of human rights standards.[284]

It follows that while the right to culture enjoys legal protection in international law, such a rights is not absolute and can be subject to lawful limitation set out by international law. For this reason, universalism does and must serve as a limitation on the right to culture.

5.7. Summing Up the Case for Universalism and Application of Human Rights Standards in Post-Colonial Africa

The discussion throughout the thesis has established that the continent of African continues to be blighted by serious human rights abuses. Many continental Africans have left Africa, particularly in the last 30 years. While poverty and the search for better opportunities

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[281] Donnelly, *International Human Rights…*, *supra* note 14 at 53.
[282] Alison D. Renteln, *International Human Rights: Universalism versus Relativism…*, *supra* note 3 at 67.
[283] Alison D. Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 *Hum. Rt. Qrtly*., at 514.
[284] *Ibid.*

elsewhere, especially in the West, continues to be the main cause for the African exodus, much of that has also to do with State-induced conditions, including mass starvation, civil wars and all sorts of violence such as the one discussed in Chapter 4 in relation to Darfur.[285] This has meant that the State's active responsibility to promote and protect human rights has been relegated to the back burner. In fact, instead of working hard to change the adverse material conditions of their people and providing an environment where Africans can work to better their lives, a number of political leaders (as discussed in Chapter 4) and influential political scholars (as discussed in Chapter 2) continue to opine that the cause of most African problems, by and large, has a lot to do with Western imperialism in and conspiracies against Africa.[286] It is for this reason that cultural relativism, in recent years, has become the preferred tool for unleashing critiques of the West. More than six decades later after the first African countries gained independence from colonial rule, neocolonialism has particularly been designated as the prime cause for undesirable conditions in Africa.[287] Such political sentimentalism, when wrapped up in an appeal to culture or cultural relativism, still resonates very well with ordinary Africans.

While I would be remiss to dismiss, in its entirety, the argument of those who plead the defence of cultural relativism, I contend here that much as the intolerable levels of human misery caused by violence and poverty on the continent is partly a result of the terrible

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[285] Kimberly Hamilton & Kate Holder, "International Migration and Foreign Policy: A Survey of the Literature" (1991) 14 *The Washington Qrtly.,* at 195-211 and Daniel Debono, "Poverty Induced Cross-Border Migration: Socio-Economic Rights and International Solidarity" (2014), available online at: file:///C:/Users/Santo/Downloads/2008_DeBono_.EDRC_Poverty_induced_migrationpdf.pdf [retrieved on July 6, 2014], at 179-187, and William B. Wood, "Forced Migration: Local Conflicts and International Dilemma" (1994), *Office of the Geographer and Global Issues*, US. Department of State, at 618-624.

[286] Shazia Qureshi, "Feminist Analysis of Human Rights Law" (2012) 19 *J. P. Stud*., 41 at 48.

[287] Joy Asongazoh Alemazung, "Post-Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic Development" (2010) 3 *The J. Afr. Stud.,* 62 at 70-79.

legacies of colonialism, slavery or the Western imperialist projects,[288] the prime culprit is in fact misrule, bad governance, incompetence, often in the forms of dictatorships and abuse of power. These are some of the practices that have turned back the clock on progress that could have been made had there been good leadership in Africa. More importantly, the contention that human rights are Western values is in fact illogical. Nevertheless, even if they were, an argument may be made that times, social and structural conditions have changed and so must the African concepts of rights and culture.

It is even baffling that African leaders have the audacity to magnify the "foreignness" of human rights, yet African legal systems have customised and constitutionalized certain practices, such as death penalty, which are quite foreign to most of Africa. From the author's own experience, capital punishment has never, for example, been part of the Dinka culture and there is insufficient evidence to prove that this type of punishment was practised pervasively, if any, in most pre-colonial African societies. Instead, pre-colonial African cultures treasured cooperation and reconciliation. This is evidenced by the concepts of *ubuntu* and *cieng* whose primacy was peace and reconciliation rather than revenge and vindictiveness.[289] Speaking of *ubuntu*, for instance, a South African judge, Sachs J. while making a case against capital punishment, in a well cited concurring opinion in *Dikoko v. Mokhatla* ,[290] argued that historically, *ubuntu*:

> was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. In present day terms it has an enduring and creative character, representing the element of human solidarity that binds together

[288] Hillary Rodham Clinton, *Hard Choices* (New York: Simon & Schuster, 2014) at 269.
[289] Francis Deng, *Identity, Diversity and Constitutionalism in Africa*…,*supra* note 96 at 98.
[290] *Dikoko v Mokhatla* 2006 6 SA 236 (CC) (minority judgment of Sachs J).

> liberty and equality to create an affirmative and mutually supportive triad of central constitutional values.[291]

Indeed, pre-colonial African societies placed a premium on reconciliation, blood compensation and peace rather than revenge.[292] This suggests that pre-colonial African justice systems favoured blood compensation over punishment and reconciliation over adversity. If there are any values that African societies should continue to uphold, then they include the fact that pre-colonial African societies had a deep sense of appreciation and due regard for human life. It essentially recognised that no human being is the author of life. Such values deserve to be accorded their rightful place in post-colonial African cultural and legal heritage. In this respect, therefore, the State should not claim to have the right to deprive individuals of their right to life, however grave the crimes committed by certain individuals might be. I hasten to add that only in the rarest of circumstances may one be deprived of his or her right to life but only as discussed in Chapter Two.[293]

The regrettable living conditions in Africa today are, therefore, perpetuated not by the lack of competent people in the rank and file of African citizens but apparently by poor choices and indeed, "lack of revolutionary spirit"[294] in African culture. The African passiveness in his or her own oppression significantly contributes to the continued patterns of human rights violations on the continent. This idea was implied in the South Africa's African National

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[291] *Dikoko v Mokhatla* , *supra* note 290., at para. 113.

[292] O. Oko Elechi, "Human Rights and the African Indigenous Justice System" (2004), *International Conference of the International Society for the Reform of Criminal Law*, University of Wisconsin, available online at: http://www.isrcl.org/Papers/2004/Elechi.pdf [retrieved on July 4, 2014].

[293] I do not intend to speculate as to which circumstances death penalty may be permissible as certain situations may warrant such a punishment. For example, a dangerous mass killer who is on the loose may lawfully be shot and killed by police in order to save more lives.

[294] I use the term "lack of revolutionary spirit" loosely to imply that Africans are complicit in the violations of their human rights. The inability of the African masses to rise up and get rid of dictators has unarguably perpetuated misery on the continent.

Congress Conference in Morogoro, Tanzania, in 1969.[295] The minutes of that conference appear to reinforce the latent sentiment that oppression persists when the victims acquiesce to their oppressor's tactics. This gives the oppressor an opportunity to consolidate his or her power at the peril of the victims' own wellbeing, largely because the victims see the structures within this oppressive environment as unproblematic. [296]

In the same way, it is my contention that blatant the violations of human rights in Africa persist because Africans are complicit in the violation of their own human rights by the political and economic elites. Until Africans understand that their destiny is in their own hands, not in the hands of those in the upper echelons of power, it is near to impossible to imagine that a time will come when democratic majority rule in Africa will come to pass. This is because the recognition, promotion and protection of human rights cannot be the sole prerogative of the political class. There is a need for all levels of the African continent "to focus particularly on the importance of public reasoning..., [which] is centrally important, both for the recognition of human rights [and] for their realization and advancement."[297]

While this chapter has been careful to limit its discussion to internationally recognised human rights norms, it highlights the contention that human rights must be understood both as legal and moral rights (moral in the sense outlined above). Such a bifurcated or dual-sided recognition of human rights underscores the importance of interpreting human rights as normative constructs that must override the defects of legal positivism. It requires the

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[295] African National Congress: "The Morogoro Conference" (1969), available online at: https://www.marxists.org/subject/africa/anc/1969/strategy-tactics.htm [retrieved on July 3, 2014].
[296] Cynthia Enloe C, *The curious feminist* (Berkley: University of California Press, 2004) at 2-3.
[297] Amartya Sen, "Human Rights and the Limits of Law" (2006) 27 *Cardazo L. Rev.,* 2913 at 2927.

incorporation of moral reading into legal texts.[298] Furthermore, victims of human rights violations in the continent of Africa must understand that human rights are not privileges to be granted by the ruling elites. They are rights owed to them by virtue of their humanity. That is why human rights must "be demanded or required rather than merely sought or requested"[299] from the political elites. If the political class does not observe them, then the people have the right to declare the State illegitimate. Only when a State observes and protects human rights may it be considered legitimate. In other words, the observance or protection of human rights "is taken to be a precondition of both the internal political legitimacy of all States and...of the standard of sovereignty right of non-intervention held by every State against all other States."[300]

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[298] Rauol Berger, "Ronald Dworkin's The Moral Reading of the Constitution: A Critique" (1997) 72 *Indiana L. J.* 1099 at 1100-1101 and Ronald Dworkin, *The Moral Reading of the Constitution* (New York: Rev. Books, 1996) at 46.

[299] Tom Campbell, "Human Rights: Moral or Legal Rights?...," *supra* note 19 at 1.

[300] *Ibid.,* at 2.

Chapter 6: Conclusion/Analysis and Recommendations

6.1. The Roots of Cultural Relativism and Universalism Debate

From the foregoing discussion, it can be offered that the conflict between universalism and cultural relativism in human rights discourse arises from at least two main contentious issues. The first issue pertains to the enduring political antagonism between Western and non-Western societies. This antagonism has a historical dimension.

Apart from the effects of colonialism on non-Western societies, the fact that history appears to favour the West and, hence, accords it the position of the dominant player on the international stage means that the motive of the West will often be questioned—even when there may be no evidence as to subversive intention on its part. This would suggest that the continued theorisation as to policy priorities or philosophical dichotomy between Western and non-Western societies may much be less about the issue of the content or interpretation of human rights than it is about political ideology. In essence, it can be argued that any alleged diametrical incompatibility of human rights conceptions between the two societies does "not necessarily stem from deep and immutable cultural variations."[1] Rather, the differences as to appropriate content and interpretation of human rights, properly understood, merely reflect an ideological opposition to Western values or is simply an aversion to all things Western on the part of the Global South. This is particularly plausible in light of the fact that most developing countries were once subjected to colonial rule by much of the West. The memories of such experiences are still fresh, considering that among other things, colonial rule involved forced submission to Western culture. It follows that even though the fetters of colonialism might be things of the past now, at least politically, the fact that human rights have been smeared with

[1] Simon C.S. Tay, "Human Rights, Culture and the Singapore Example" (1996) 41 *R.D.McGill L.J* at para. 743.

Western flavour may still provide a reasonable cause for suspicion on the part of the developing world. It is for this reason that developing countries sometimes view Western backed international projects as attempts to subjugate and subordinate them.

To scholars like Makau Mutua in particular, the West is still stuck in its past perception about non-Western societies, a perception which is thought to have largely been driven by racial and cultural superiority on the part of the West. According to Mutua, the West has not changed a thing about this perception. This is, arguably, the basis of the contention on the part of African cultural relativists that the human rights project is in fact a new manifestation of the so-called 'divine mission': the Western burden "to save the heathens" (the savages of the South) or for "commercial profiteering."[2] Such human rights "crusades" and the accompanying ideas of political democracy are viewed, from this political vantage, as ideological concepts that cleverly disguise the real domineering intent of the West. For this reason, the international human rights corpus is seen as a new form of modern institutional machinery for economic and political exploitation, a new scheme by which the West cleverly conceals its changing forms of imperialism. To radical relativists, the insistence on the part of the West to apply these concepts lock, stock and barrel is offensive.[3]

The second issue in respect of the root of the conflict between cultural relativism and universalism in human rights discourse pertains to cultural dichotomy between the West and non-Western societies. Here the term "culture "refers to a set of society's secular values

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[2]Makau Mutua, "What is TWAIL? American Society of International Law: Proceedings of the 194th Annual Meeting" (2000) online at: file:///C:/Users/Santo/Downloads/SSRN-id1533471.pdf [retrieved on May 18, 2014) at 2.

[3] Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in Africa History* (New York: State University of New York Press, 2007) at 162-181.

(beliefs, norms and philosophies) and religious orientation (teachings, taboos, divine revelations and sacred texts).[4]

Religious values and their impacts on the conception of rights are particularly significant especially in today's world of increasing religious intolerance and extremism. This is why it is important to reckon that in a world where religious extremism appears to be resurging, religious ideologies can be used to exacerbate the notion of Western domination (whether actual or apprehended) at the expense of human rights and with the intent to widen the cultural gap between the West and non-Western societies. For example, religious extremist groups such as Al-Qaeda and, more recently, ISIS (in the Middle East),[5] Boko Haram (in Nigeria)[6] and Al-Shabaab (in Somalia)[7] evidently employ religious doctrine to promote their extremist causes.[8] The influence of such religious sentiment is so strong that where there is a conflict between human rights and religious values (such as in the case of the requirement for gender segregation) the latter generally prevails.[9] Yet, the human rights concept is one of fairness, justice and equity, one which "goes beyond a mere *modus vivendi*; that is, it must be more than just a compromise between all those normative convictions that happen to exist in a given society."[10]

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[4] Ana Filipa Vrdoljak,"Introduction," in Ana Filipa Vrdoljak, Ed., *The Cultural Dimensions of Human Rights* (Oxford: OUP, 2013) at 1-9.

[5] Norani Othman, "Muslim Women and the Challenge of Islamic Fundamentalism/Extremism: An overview of Southeast Asian Muslim women's struggle for human rights and gender equality" (2006) 29 *Women's Stud. Int'l., Forum*, at 339–353.

[6] U.S. State Department, "Nigeria 2013 Human Rights Reports: Country Reports on Human Rights Practices" (2013) *U.S. Bureau of Democracy, Human Rights and Labor*, at 11-19.

[7] U.S. State Department, "Somalia 2013 Human Rights Reports: Country Reports on Human Rights Practices" (2013) *U.S. Bureau of Democracy, Human Rights and Labor*, at 2-36.

[8] Amritha Venkatraman, "Religious Basis for Islamic Terrorism: The Quran and Its Interpretation" (2007)30 *Stud., in Conf. & Ter.,* 1, at 21-27.

[9] Kenneth Roth, "World Report 2013: Events of 2012" (2013) *Human Rights Watch*, at 8, available online at: http://www.hrw.org/sites/default/files/wr2013_web.pdf [retrieved on July 6, 2014].

[10] Heiner Bielefeldt, "'Western versus 'Islamic' Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights" (2000) 28 *Pol. Theo.,* 90 at 115.

There is also a clash of values between human rights and certain cultural practices. In the context of Africa, for example, certain practices, such as female genital mutilation, have been in existence for centuries in certain communities. Such practices are so deeply rooted in a practising community's tradition that they are considered to be fundamental values that define the essence of an individual as a member of the community. Female genital mutilation is, for example, considered a mark of adulthood. It is a mark of departure between adulthood and childhood. For instance, as discussed in Chapter 4, a girl who is not 'initiated' in this way is not only considered a child for the rest of her life but is also considered ineligible for marriage and, therefore, as an outcast in the community. In societies where such values define individuals, there are reasonable grounds to believe that human rights ideas have little purchase. This is one example where human rights and cultural values can hardly be reconciled. Where this conflict arises, cultural value ultimately governs according to local standards. In this thesis I have argued for the reverse.

This thesis has delved into the debate between cultural relativism and universalism, and how the argument for the universality of human rights can be made in the context of post-colonial Africa. The debate is important, having regard to the fact that the human rights records of a number of African States have rapidly deteriorated, particularly in the last 30 years. Notwithstanding this evidence, radical African cultural relativists have been relentless in arguing that the concept of human rights in its current form is alien to Africa and is, as such, inapplicable to Africa for at least, two main reasons.

First moderate cultural relativists argue that human rights are not suitable for application to Africa unless they are modified to include the African concept of "collective rights" which, allegedly, was the dominant African perspective of human rights in pre-colonial Africa. A

related contention is that Africa was not represented at the time of drafting, deliberation and the subsequent adoption of especially the UDHR. For a number of cultural relativists in Africa, Africa cannot be held to legal standards that it did not voluntarily consent to in the first place. This argument however, is lacking in merit. First, as previously outlined in the thesis, all African countries have ratified and acceded to the International Bill of Human Rights and many other relevant international human rights instruments. By so doing, African States have expressly consented to be bound by the international human rights standards contained in those instruments. Any contention to the contrary can only amount to semantic indulgence.

Second, African States and increasing numbers of moderate African scholars argue that while the current sets of international human rights may be valid, certain rights (in this regard, civil and political rights) may not yet be relevant to Africa till such time as economic conditions are conducive enough to accommodate their promotion and protection. In this respect, ESCRs are viewed as the most meaningful set of human rights that merit protection in post-colonial Africa and should thus receive implementation priority. Again this point is impeachable because there is no evidence that concurrent implementation of CPRs and ESCRs undermines economic development. If anything, the reverse may be true.

Critically analysed, much of the opposition to international human rights standards in Africa is largely a strategy of the ruling elites who, for practical reasons, are not receptive to human rights because of the nagging fear about the capacity of human rights to empower individuals. Political dictators are particularly apprehensive that a strict observance of human rights in could potentially alter the status quo and., hence, the capacity to change power dynamics.

In my view, such fears are unfounded. "In practical terms, societies or cultures do not retain or alter their entire systems of values and institutional practices in the process."[11] Instead, the concept of human rights favours both old and new ideas in the sense that "the principle of human rights…, if implemented changes some social practices but does not destroy the social fabric which is inherently adaptable."[12] Nor can the fear of cultural assimilation by the dominant cultures justify the rejection of human rights since human rights represent global moral denominator. This implies that Western tradition is only one of the elements that "contribute to the effective development and evaluation of human rights much as other cultures have made and are still making significant contributions to our collective conception of human dignity."[13] Furthermore, as has been explored earlier, the Western conception of human rights is not as incompatible with the so-called African conception of human rights as relativists appear to portray. In fact, the pre-colonial African view of human rights embodied the protection of both individual and group interests. The example of the Dinka perspective on human rights given previously is typical of such worldview. According to the Dinka, God created all human beings and that "every human being, no matter what his or her race or religion, has sanctity and moral or spiritual value that must be respected. To wrong him or her is to wrong God and therefore to invite a curse."[14]

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[11] Francis Deng, "A Cultural Approach to Human Rights Among the Dinka," in Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa: Cross-Cultural Perspectives (*Washing D.C.: Brookings Institution, 1990) at 262.

[12] Rhoda Howard, "Group versus Individual Identity in the African Debate on Human Rights," Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washing D.C.: Brookings Institution, 1990) at 172.

[13] Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washing D.C.: Brookings Institution, 1990) at 5.

[14] Francis Deng, Identity, *Identity, Diversity and Constitutionalism in Africa* (Washington D.C.: Brookings Institution, 2008) at 147.

What is particularly important about the Dinka human rights formulation is that the protection of the rights of every individual implies the ultimate protection of "the collective interest."[15] An identical worldview and rights conception to that of the Dinka's is found among the Akan people of Ghana in West Africa.[16] Again, this goes to show that the post-colonial African resistance to the application of international human rights standards to Africa on account of their exclusive premise on individualism appears to misrepresent the reality of an African conception of human rights.

There is no gainsaying that the power of technology, global trade and immigration, among others, has practically made the world a global village. The term "global village," captures the idea that the power of electronic media and other means of globalisation have effectively removed traditional barriers that once isolated communities and countries from one another. As a result, people, ideas, information, goods and services are able to cross borders not just physically but also virtually using the internet and other means of communication and transport.[17] The same can be said about the relationship between domestic affairs in relation to international human rights. What often we do inside our borders "affects the rest of the world and our actions have worldwide implications."[18] This is why universalism must trump cultural relativism.

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[15] Francis Deng, Identity, *Identity, Diversity and Constitutionalism in Africa* (Washington…, supra note 14.
[16] Kwasi Wiredu, "An Akan Perspective on Human Rights," in Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washing D.C.: Brookings Institution, 1990) at 244.
[17] A. Wayne MacKay, "Human Rights in the Global Village: The Challenges of Privacy and National Security" (2006) 20 *Nat. J. Const. L.,* 1 at 2.
[18] *Ibid.*

6.2. The Findings and Goal of the Thesis

This work has endeavoured to establish that notwithstanding cultural, religious or political differences that may affect the way each distinct cultural, political or legal tradition perceives human rights, the current conception of human rights supports the universal application of certain core human rights values for a number of reasons. First human rights are universal moral values. Apart from the fact that human rights "attempt to express the legal significance of human being,"[19] it is self-evident that "the idea of human rights ...implies that there are certain irreducible moral values in each human being,"[20] regardless of their political, cultural or religious affiliation. This suggests that the universality of certain core values of human rights must be upheld because it protects the dignity of the human person. This further suggests that the notion of human dignity is not a Western concept, considering that it permeates all cultures, as discussed throughout this thesis.[21]

Second, negating the validity of universalism can effectively undermine the very meaning of human rights. If each society were to determine its own list of human rights, there would be no basis for the international human rights regime, since "the significance of human rights lies in their universality."[22] As such, giving legitimacy to the essentialist approach to human rights would simply cripple the entire human rights system, thereby putting the rights of individuals and groups at risk. It would, for instance, justify the cultural "subordination of women and

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[19] Jamie Cameron, "The Van Ert Methodology of Domestic Reception Using International Law in Canadian Courts" (2008) 48 *R.D. McGill L.J.* 347 para. 22.

[20] Virginia A. Leary, "The Effect of Western Perspectives on International Human Rights," in Abdullahi Ahmed An-Na'im & Francis Deng, *Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brooking Institution, 1990) at 35.

[21] Francis Deng, *Identity, Diversity and Constitutionalism in Africa…*, *supra* note 14 at 144.

[22] Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa…, supra* note 13 at 8.

minority groups, arbitrary killings, torture and trial by ordeals."[23] Furthermore, a denial of the validity of universalism has the potential to provide brutal leaders with the *carte blanche* to model the content of their conception of human rights in accordance with their political whims.

Third, universalism serves as a check on excessive appeals to political and cultural sovereignty. The traditional understanding of political sovereignty was that whatever States did within their borders was beyond the reach of other States. Yet, in recent years, the development of international human rights law has allowed the international community to have a say in what happens inside the borders of other States. This suggests that what happens within a State's borders may, in certain circumstances, be a legitimate cause for concern to other States, even to the point of creating mechanisms for enforcement of obligation owed between States.

Finally, universalism serves as a limitation on the right to culture protected by the ICCPR and other human rights instruments. The fundamental theme of the concept of the right to culture is that international law protects the right of people to develop their own culture and from undue assimilation by dominant cultures. But to the extent that the right to culture may be abused through practices such as FGM, States are urged "not to invoke any custom or tradition or religious consideration to avoid their obligations."[24] For instance, the Kigali Protocol, in particular, has affirmed Africa's commitment to the mutual protection of both individual and group rights, with the result that when individual and group rights are in conflict, a balance of

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[23]Bonny Ibhawoh, "Restraining Universalism: Africanist Perspectives on Cultural Relativism in the Human Rights Discourse," in Paul Tiyambe Zeleza & Philip McConnaughty Eds., *Human Rights: The Rule of Law and Development in African* (Pensylvania: PUP, 2004) at 21-22

[24]Jessica Almq Visit, *Human Rights, Culture and the Rule of Law* (Oxford: Hart Publishing Press, 2005) at 22.

convenience must, in most cases, tip the scale in favour of the individual, considering that it is only the individual, not the group, who suffers the consequences of human rights violations.[25]

This means that contrary to the popular contention about the nature of the international human rights regime, the current standards of international human rights are not wholly alien to African traditional values and cannot, therefore, be dismissed on account of lack of perfect compatibility with traditional African culture. To the contrary, the current global human rights standards are compatible with pre-colonial African perspectives on human rights and individual dignity. This suggests that human rights "could be defended on the basis of traditional African value systems and institutional practices."[26] It follows that, as discussed throughout the thesis, the international human rights system recognises the existence of certain harmful, if not abusive, cultural practices that are obviously inimical to the principles of human rights protection and human dignity. Once again, the fact that African traditional systems vigorous defended the concept of human dignity clearly brings the traditional African conception of individual and group rights into an amicable alignment with the modern human rights concept, as human "dignity cannot be protected in a society that is not based on rights."[27]

While this thesis does not suggest that the notion of human rights should be applied to Africa *holus bolus*, it also argues that the development of the modern human rights corpus, in and of itself, cannot be considered to be a cultural heritage of the Global North alone. Conversely, even if human rights could be considered as European or Western values on account of the

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[25] *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, AUGA, 11 July 2003, Art. 5.
[26] Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa…, supra* note 13 at 9.
[27] *Ibid.*

overwhelming participation of the Global North in their formulation and promotion, they "are by no means the eternal heritage of an original cultural endowment of Europe."[28] Such a consideration is simplistic and cannot reasonably lead to the rejection of the human rights concept whose universal validity is self-evident.[29] The ideas of justice, equality, fairness, equity etc., are examples of such universal values. Nor can any society claim that torture is part and parcel of its culture. In fact, there is nothing really outlandish about the rights enshrined in the international human rights documents that would warrant their outright rejection. What should rather be the point of discourse is how the modern conception and practice of human rights could be applied in light of cultural context and practices that are not incompatible with international human rights protection. Cultural practices that do not comply with international human right standards must be rejected.

In conclusion, it is worth emphasising that this project takes a firm position within the debate between cultural relativism and universalism in international human rights discourse. In this respect, the project has sought to establish that human rights are universal in nature and must apply cross-culturally, albeit, with some cultural modification as may be appropriate.

Nevertheless, given Africa's experience with the West and having regard especially to colonialism and other more nuanced forms of subjugation that have been visited upon Africa, universalists must approach the idea of international human rights standards more cautiously. This is important in light of the fact that a great deal of the African opposition to international human rights standards is as much about cultural incompatibility as it is about anti-Western domination. The fact that slavery and colonialism were once justified, by appeal to Western

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[28] Heiner Bielefeldt, "'Western versus 'Islamic' Human Rights Conceptions?...," *supra* note 10 at 97.
[29] Peter Baehr, *Human Rights: Universality in Practice* (New York: Palgrave, 1999) at 13-14.

cultural or racial superiority, is still too fresh in Africa. That is, the idea that merits, mental faculty or even justice was once considered a function of skin complexion, eye colour, hair texture or, more generally ancestry is strongly engraved in the minds of most citizens of the developing world and especially Africa.[30] This fact itself could account for the ongoing African opposition to the universal application of human rights standards.

While it is advisable for universalists to be cautious in their approach to human rights standards, an appeal to past injustices or culture cannot be valid excuses for allowing brutal political and economic elites to exploit their people.[31] In fact, using "africanness, Pan-Africanism or anti-imperialism as a pretext to overlook, justify and support any type of human rights violations, mass killings, injustice, corruption, megalomania and abuses has proved, and will always prove, disastrous for African rulers and African people."[32] Thus, whereas it is important that human rights should be interpreted with an eye to cultural context, certain human rights values are so significant as to be irreducible to cultural or religious interpretation or determination by political elites.

After all, the reigning culture now is the cosmopolitan culture. This is a culture defined by life in modern towns and cities teeming with people from all corners of the world. This culture has resulted in the creation of neighbourhoods that are visibly heterogeneous and, thus, undefined in terms of culture. The result is often an amalgam of cultures that simply become the modern culture, a metropolitan culture that forms the basis for "a satisfactory reconciliation between

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[30] Advice Viriri & Pascah Mungwini, "African Cosmology and the Duality of Western Hegemony: The Search for an African Identity" (2010) 3 *The J. Pan. Afri. Stud.,* 26 at 28-39

[31] Lucian W. Pye, "Democracy, Modernisation, and Nation Building," in J. Ronald Pennock, Ed. *Self-Government in Modernizing Nations* (Englewood Cliffs: Prentice-Hall Inc, 1964) at 22-24.

[32] Sylvie Aboa-Bradwell, "The African Union and the Battle for Africa's Soul in the 21st Century" (2013) *Policy Centre for African People*, at 13.

the universalistic dimensions of world culture and the parochial expressions of the local culture."[33]

In particular, not only has the face of post-colonial African population and cultures changed but the political and economic factors that prevailed in pre-colonial Africa have also changed. Africa has, in fact, inherited colonial structures such as Western model of governance and liberal capitalism as its own. People from different ethnic communities and yes, "races" have come or been brought together to form States.[34] Individuals have been uprooted from their families and natal settings in search of better opportunities in urban areas. The result is a new Africa in which a society is no longer defined in terms of family lines, clan lineage or tribal heritage but in terms of class and social status. That implies that the continued theorisation and sacralisation of the pre-colonial African concept of "collective rights" is based on an assumption that might have been relevant in the past, but not quite so with respect to the present day Africa. That is to say, African theorists are stuck in the past Africa that is starkly different than the post-colonial Africa. These theorists are simply:

> unwilling to acknowledge social change in Africa. Such change includes rising rates of landlessness that, coupled with burgeoning populations, impel permanent urbanisation and reliance on non-agricultural employment, and accompanying social-psychological aspects of modernization.[35]

This suggests that the African concept of "collective rights" under which individual rights were, arguably, subsumed in pre-colonial Africa societies can hardly find purchase in post-

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[33] Lucian W. Pye, "Democracy, Modernisation, and Nation Building," in J. Ronald Pennock, Ed. *Self-Government in Modernizing Nations, supra* note 29 at 22.
[34] *Ibid.,* at 14-15.
[35]Rhoda Howard, "Group versus Individual Identity…," *supra* note 12 at 165.

colonial Africa in which individuals, by and large, no longer define and identify themselves to the outside world as members of a particular tribes but States.[36]

For this reason, the debate between cultural relativism and universalism appears to be a moot one that only does a disservice to the cause of human rights. As has been made unequivocally clear by the *Vienna Convention*,[37] human rights are universal, equal, interdependent and interrelated. Thus, the selective approach that appears to prioritize certain sets of human rights or rank human rights in the order of their importance on political grounds only serves to undermine the significance of human rights values. This, however, is not to suggest that cultural or religious context in the course of human rights application should be ignored. This thesis rather suggests that such a contextual interpretation and application must not be inconsistent with certain core values of international human rights models that protect the dignity and worth of the individual and/or group. It further suggests that the proper approach to human rights, at least in principle, is one that is analogous to the human body. Just as a human body is a unit made up of several parts that make it whole and complete, so are human rights. Any assault on one or certain parts of the human body is an assault on the whole body. This is why one must do what is necessary to protect any part of the body in order to fully protect themselves. One cannot logically claim that his or her eyes are less important than his or her ears, since all parts of the body are equal, interdependent, and interrelated like human rights. Even inanimate parts of the body such as hair or nails are just as important.

In the same way, civil and political rights are as much important as social and economic rights are. The fundamental point here is that, a categorical approach to human rights simply

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[36] Rhoda Howard, "Group versus Individual Identity…," *supra* note 12 at 168-170.
[37] General Assembly, *Vienna Declaration and Programme of Action (1993), UNGA* A/CONF.157/23, Art. 5.

amounts to partial protection. There can be no such a thing as partial protection in the context of human rights. This does not mean that at critical times, such as during wars or natural disasters, a reasonable balance of convenience might be necessary. Nor can it be said that certain types of human rights are more important to certain cultures. It should be realised each category of human rights contains a core set of human rights norms that are observed by all cultures and therefore subject to absolute or cross-cultural application. It follows that, insofar as the fundamental goal of certain core values of human rights is to protect the dignity of the human person, any claim to limit their applicability (especially of those core rights such as the right to life, for instance) to certain cultures is impoverished and should be rejected.

In summary, the main findings and argument of this thesis are as found in Chapter 5. The thesis has argued in support of the universal application of human rights standards. First, it has argued that the quest for creating a truly universal community is partly a moral obligation. This argument is based on the presumption that human rights, by their very nature, are as much an ultimate expression of our abhorrence for injustice as are our commitment to the protection of the intrinsic value of every human person. Human rights, as such, represent humanity's higher moral order and our aspiration as members of a cosmopolitan community.

Second, the thesis has argued that human rights—insofar as their ultimate object and purpose is the protection of the fundamental rights and freedoms of the individual—are a means for protecting the dignity of the individual. Since human dignity is universal and is the ultimate measure of an individual's inner worth, it is safe to conclude that human rights cannot be defined in terms of culture, public policy priorities, religion or political ideology because humanity is independent of these or other external variables.

Third, the thesis has argued that even if it can be concluded that human rights are in fact Western values, their application are appropriate cross-culturally. Denying the validity of their application can have far reaching consequences on global peace and security. The conception of— especially certain core—human rights as universal values has the potential to minimise the chances for the repetition of the horrors of the magnitude witnessed during world wars in the 20th century, in Europe or genocides in much of the Global South. Universalism ensures that States do not have unfettered discretion in determining whose human rights should be protected and which sets of rights are to be considered human rights.[38]

Fourth, the thesis has argued that the concept of State sovereignty is not just an entitlement but is one that embodies moral responsibility on the part of every State. In this sense, universalism ensures that States observe certain minimum human rights standards especially the protection of human rights of all residents within their borders irrespective of their citizenship. Failure to comply with these minimum requirements could warrant international intervention into the domestic affairs of States, since what happens inside the borders of States may be of such nature as to be of legitimate concerns to other States.

Finally, this thesis has argued that the notion of the right to culture as set out in Article 27 of the ICCPR and other international human rights instruments effectively precludes the protection of certain harmful cultural practices such as female genital mutilation, widow inheritance or double limb amputation, among others. On the contrary, international human rights standards oblige States to modify their cultures with the goal to eliminate such harmful cultural practices. This ensures that there is a balance between the collective/group and individual rights using appropriate criteria as set out in Chapter 5.

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[38] Abdullahi Ahmed An-Na'im & Francis Deng Eds., *Human Rights in Africa…, supra* note 13 at 8.

Bibliography

A: Primary Sources:

(1) Jurisprudence

Anglo-Norwegian Fisheries, U.K. v. Norway (ICJ), [1951], ICJ Report 117.

Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (2010), Public Statement: The Office the ICC Prosecutor.

Democratic Republic of the Congo v. Belgium) (ICJ), [2002], I.C.J. Report 2002.

Dikoko v Mokhatla 2006 6 SA 236 (CC) (minority judgment of Sachs J).

DRC v. Uganda, ICJ Reports (ICJ), [2005] I.C.J. Reports 2005.

Hamid v. Canada (Ministry of Citizenship and Immigration), 2007 F.C.J. 1546.

Lesbian and Gay Equality Project v. Minister of Home Affairs [2005] ZACC 19.

Reference Re Secession of Quebec, [1998] 2 SCR 217, 161 DLR (4th) 385, 55 CRR (2d) 1.

The Prosecutor v. Omar Hassan Ahmed Al Bashir (Omar Al Bashir) [200] ICC-02/05-01/09: First Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March, 2009) & Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July, 2012).

*The Prosecutor v. William Samoei Ruto &Joshua arap Sang (*2012), ICC-01/09/-01/11-01.

Z. and Others v. the United Kingdom [200], ECHR 2001-V.

(2) Legislation

[Ugandan] *Anti-Homosexuality Act* (2014).

[Kenyan] *Respect For Marriage Act* (2014), H.R. 2523, 113th Parliament (2013-2014).

Secondary Sources:

(1) Monologues /Books

African Union, *the African Union Handbook 2014, First Edition* (Addis Ababa: African Union Commission, 2014).

An- Na'im Ahmed Abdullahi, & Deng, Francis, *Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990).

Appadurai, A., *Modernity at Large: Cultural Dimensions of* Globalization (Minneapolis: MUP, 1996).

Asch, Michael, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Differences* Vancouver: UBC Press, 1997).

Baehr, Peter, *Human Rights: Universality in Practice* (New York: Palgrave, 1999).

Bergson, Henri Audra, R. Ashley, & Bererton, Cloudesley, Transs. *The Two Sources of Morality and Religion* (Notre Dame: University of Notre Dame Press, 1977).

Bloomfield, David, Barnes, Teresa & Huyse, Luc, Eds., *Reconciliation After Violent Conflict: A Handbook (*Stockholm: International Idea, 2003).

Brown, M. Ann, *Human Rights and the Borders of Suffering: The Promotion of Human Rights in International Politics* (Manchester: MUP, 2003).

Cameroff, J. L, & Cameroff, J.L*., Ethnography and the Historical Imagination* (Boulder: Westview, 1992).

Caney, Simon & Jones, Peter Eds., *Human Rights and Global Diversity* (London: Frank Cass, 2001).

Cassese, Antonio, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP, 1995).

Chan, Sylvia, *Liberalism, Democracy and Development* (Cambridge: CUP, 2002).

Chen, Lung-Chu, *An introduction to Contemporary International Law: A Policy Oriented Perspective* (New Haven: Yale University Press, 1989).

Clinton, Rodham Hillary, *Hard Choices* (New York: Simon & Schuster, 2014)

Coady, C.A.J., *The Ethics of Armed Humanitarian Intervention* (Washington D.C.: USIP, 2002).

Cohen, Ronald, Hyden, Goran & Nagan, P. Winston., *Human Rights and Governance in Africa* (Orlando: UFP, 1991).

Cowan, K. Jane, Dembour, Marie- Bénédicte & Wilson, A. Richard, Eds., *Culture and Rights:*

Anthropological Perspectives (Cambridge: CUP, 2002).

Curle, T. Clinton, Humanité*: John Humphrey's Alternative Account of Human Rights* (Toronto: UTP, 2007).

Currie, J. Robert, *International and Transnational Criminal Law* (Toronto: Irwin, 2010).

Cryer, S. Robert, *et al, Research Methodologies in International EU and International Law* (Oxford: Hart Publishing, 2011).

Deng, Francis, *Identity, Diversity and Constitutionalism in Africa* (Washington D.C.: USIP, 2008).

Denniston, C. George, et al, Eds., *Body Integrity and the Politics of Circumcision: The Culture, Controversy and Change* (New York: Springer Press, 2006).

Donnelly, Jack, *Internationa*l *Human Rights: Dilemma in World Politics, 3rd* Ed. (Boulder: Westview, 2007).

„ „ *The Concept of Human Rights* (London: St. Martin's Press, 1985).

Earl, Mead, Edward, *An Outline of Modern History: A Syllabus with Map Studies* (Boston: Harvard Univ. Press, 1921).

Enloe, C. Cynthia, *The curious feminist* (Berkley: University of California Press, 2004).

Evans, D. Malcolm, *International Law, Second Edition* (Oxford: OUP, 2006).

„ „ *et al, The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty* (Ottawa: Int'l Devt Research Centre, 2001).

Eze, Osita, *Human Rights in Africa: Some Selected Problems* (Lagos: MacMillan Publishers, 1984).

Feinberg, Joel, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy First Ed.,* (New Jersey: Princeton University Press, 1980).

„ „ Joel, *Social Philosophy* (New Jersey: Englewood Cliffs, 1973).

Gorman, F. Robert, & Mihalkanin, S. Edward, *Historical Dictionary of Human Rights and Humanitarian Organizations: Historical Dictionaries of International Organizations,* No. 12 (London: Scarecrow Press 1997).

Graudy, Roger, *Human Rights and Islam: Foundation, Tradition and Violation* (London: SCM

Press, 1990).

Hall, Jerome, *General Principles of Criminal Law* (Indian: Bobs-Merrill, 1960).

Hernlund, Y. & Shell-Duncan, B., Eds., *Transcultural Bodies: Genital Cutting in Global Context* (New Brunswick: Rutgers University Press, 2007).

Hill, Christopher, *The world turned upside down: radical ideas during the English Revolution* (New York: The Viking Press, 1972).

Hobbes, Thomas, *The Leviathan*, Reviewed by Martinich, A. P (Peterborough: Broadview Press, 2005).

,, ,, *Leviathan,* Reviewed by Gaskin, J.C.A, (Oxford: OUP, 1998).

Howard, E. Rhoda., *Human Rights and the Search for Community*, (Boulder, Westview, 1995).

Humphrey, P. John, *Human Rights and the United Nations: A Great Adventure* (New York: Dobbs Ferry, 1984).

Ibhawoh, Bonny, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (Albany: State University of New York Press, 2007).

Ignatieff, Michael, *Human Rights: The Midlife Crisis* (New York: Rev. Books, 1999).

,, ,, *Human Rights as Politics and Idolatry* (New Jersey: Princeton University Press, 2011

Kant, Immanuel, *Foundations of the Metaphysics of Morals* (Indianapolis: Bobbs-Merrill, 1981).

Kinley, David, Sadurski, Wojciech & Walton, Walton, Eds., *Human Rights: Old Problems, New Possibilities* (Cheltenham: Edward Elgar, 2013).

Laslett, Peter, Ed., *Two Treatises of Government 2nd Edition* (Cambridge: CUP, 1967).

Lauer, W. & Rubin, B., Eds., *The Human Rights Read* (New York: New America Library, 1979).

Määttä, Paula, *The ILO Principle of Equal Pay and Its Implementation* (Tampere: Tamp. Univ. Press, 2008).

MacIntyre, C. Alasdair, *Three Rival Versions of Morality: Encyclopedia, Genealogy and Tradition* (Notre Dame: University of Notre Dame Press, 1990).

Marks, Susan & Clapham, Andrew, *International Human Rights Lexicon* (Oxford: OUP, 2005).

Mann, Michael, T*he History of Social Power: History of Power from the Beginning to AD 1760, Vol. 1* (Cambridge: CUP, 1986).

Mendes, P. Errol, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham, UK; Northampton, MA: Edward Elgar Press, 2010).

Miller, David, "Justice" in David Miller, Ed., *Blackwell Encyclopaedia of Political Thought* (Oxford: Basil, 1987).

Mokhtari, Shahdi, *After Abu Ghraib: Exploring Human Rights in America and the Middle East* (Cambridge: CUP, 2009).

Moore, B., *Reflecting on the Causes of Human Misery and Upon Certain Proposal to Eliminate Them* (London: Allan Lane, 1972).

Musa, A. Bala & Domatob, Komia, Eds., *Communication, Culture and Human Rights in Africa* (Lanham: UAP, 2011).

Nelson, Jack & Green, M. Vera, Eds., *International Human Rights: Contemporary Issues* (Stanfordville: Human Rights Groups, 1980).

Over, William Over, *Human Rights in the International Public Sphere: Civic Discourse for the 21st Century* (Stamford: Ablex Publishing Corp., 1999).

Palmer, Clare, *Animal Rights* (Aldershot: Ashgate, 2008).

Patrick, K. Saroj, The UN, *India and the New World Order* (New Delhi: Mittal Pub, 2004).

Pennock, J. Ronald, Ed. *Self-Government in Modernizing Nations* (Englewood Cliffs: Prentice-Hall Inc, 1964).

Pogges, Thomas & Moellendorf, Darrel, *Global Justice: Seminal Essays, Global Responsibilities,* Vol. 1 (St. Paul: Paragon, 2008).

Provost, René, *International Human Rights and Humanitarian Law* (Cambridge: CUP, 2002).

Ramcharan, B.G., Ed, *Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration* (The Hague: M. Nijhoff, 1979).

Randelzhofer, Albrecht & Tomuschat, Christian, Eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights (*The Hague: Martinus Nijhoff Publishers, 1999).

Rawls, John, Kelly, Erin, Ed., *Justice as Fairness: A Restatement* (London: Hvrd Univ. Press, 2001).

Reinold, Theresa, *Sovereignty and Responsibility to Protect: the Power of Norms and the Norms of Power* (New York: Routlege, 2013).

Renteln, Alison, *International Human Rights: Universalism versus Cultural Relativism, Vol.6*. (London: Sage, 1990).

Rhael, D.D. Ed., *Political Theory and the Rights of Man (*London: Macmillan, 1976).

Rousseau, Jean-Jacques Rousseau, *The Social Contract and the Discourses*, Trans. Cole, G.D.H. (London: Everyman, 1993).

Sandel, J. Michael, *Liberalism and the Limits of Justice, Second Edition* (Cambridge: CUP, 1998).

Sampson, A.W.B. Ed., *On Jurisprudence, 2nd Edition* (Oxford: OUP, 1973).

Sarislav, Trans., *Human Rights and International Relations* (Moscow: Progress Publishers, 1988).

Schwelb, E., *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights 1948-1963* (Chicago: Quadrangle, 1964).

Sieghart, Paul, *The International Law of Human Rights* (Oxford: Claredon, 1983).

Sills, D. Sills, Ed., *International Encyclopaedia of Social Sciences 3rd Ed*. (New York: Free Press, 1968).

Smagadi, Aphrodite, *Sourcebook of International Human Rights Materials* (London: BIIC Law, 2008).

Sohn, B. Louis & Buergenthal, Thomas, *International Protection of Human Rights* (Indianapolis: Bobs-Merril, 1973).

Sornarajah, M, *The International Law on Foreign Investment* (Cambridge: CUP, 1994).

Srivastava, Saroop Kamal *Human Rights in Modern World* (Jaipur: RBSA Publishers, 2010).

Stammers, Neil, *Human Rights and Social Movements* (New York: Pluto Press, 2009).

Steiner, Henry Steiner & Alston, Philip, *International Human Rights in Context, Law, Politics and Morals: Text and Materials Second* Edition (Oxford: OUP, 1996).

„ „ Henry & Alston, Philip, *International Human Rights in Context, Law, Politics and Morals: Text and Materials Second* Edition (Oxford: OUP, 2000).

Stoitchkova, Sliedregt Desislava Elies, "International Criminal Law," in Joseph, Sarah & Macbeth, Adam, Eds., *Research Handbook on International Human Rights* Law (Cheltenham: Edward Elgar Publ, 2010).

Sweet, William, Ed., *Philosophical Theory and the Universal Declaration of Human Rights* (Ottawa: UOP, 2003).

Symonides, J., Ed*., Human Rights: Conceptions and Standards* (New York: Ashgate & UNESCO, 2000).

Taha, Hagar, *The Failure to Protect Again: A Comparative Study of International and Regional Reactions Towards Humanitarian Disaster in Rwanda and* Darfur (London: Lambert, 2011).

Teson, R. Fernando, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publishers, 1988).

Thompson, W. Kenneth, Ed. *The Moral Imperatives of Human Rights: A World Survey* (Washington D.C.: University of America Press, 1980).

Tolley Jr., H., *The UN Commission on Human Rights* (Boulder: Westview Press, 1987).

Totten, Samuel Totten & Marckusen, Eric Eds., *Genocide in Darfur: Investigation the Atrocities in the Sudan* (New York: Routledge, 2006).

Traub, James, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* (New York: Douglas and McIntyre, 2006).

Twining, William, Eds., *Human Rights Southern Voices: Francis Deng, Abdullahi Ahmed An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge: CUP, 2009).

Vasak, Karel & Alston, P., Ed. *The International Dimensions of Human Rights* Vol. 1 (Westport: Greenwood Press, 1982).

Verdoljak, Ana Filipa, Ed., *The Cultural Dimensions of Human Rights* (Oxford: OUP, 2013).

Verdoodt, Albert, *Naissance et Signification de la Déclaration Universelle des Droits de* l'Homme (Louvain-Paris: Edition Nauwelaerts, 1963).

Vincent, J. R., *Human Rights & International Relations* (Cambridge: CUP, 1986).

Visit, Almq Jessica, *Human Rights, Culture & the Rule of Law* (Oxford: Hart Publ. Press 2005).

Walker, R.B. J. And Mendlovitz, Saul Eds., *Contending Sovereignties: Redefining Political Communities* (Boulder: Premier Publishers, 1990).

Walzer, Michael, *Thick and Think Morality* ((Notre Dame: University of Notre Dame Press,

1994).

Warnock, M., Eds., *Utilitarianism* (London: Collins/Fontana, 1962).

Welch, E. Claude Jr. and Ronald I. Meltzer Eds. *Human Rights and Development in Africa* (Albany, State University of NY Press, 1984).

We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government Against the Negro People (N.Y.: International Publishers, 1970).

Westra, Laura, *Human Rights: The Commons and the Collective* (Vancouver: UBC Press, 2011).

Zeleza, Tiyambe Paul & McConnaughay, J. Philip Eds., *Human Rights: The Rule of Law and Development in Africa* (Pennsylvania: University of Pennsylvania Press, 2004).

United States Institute of Peace, *Confronting Crimes Against Humanity: A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors* (Washington D.C.: USIP Press, 2008).

(2) Journal Articles

Agbakwa, C. Shedrack, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Corner Stone of African Human Rights" (2002) 5 *Yale Hum. Rt. & Devt. J.,* 177.

Ainley, Kirsten, "The International Criminal Court on Trial" (2011) 24 *Camb. Rev. Int'l Aff*, at 309.

Alemazung, Asongazoh Joy, "Post-Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic Development" (2010) 3 *The J. Afr. Stud.,* 62.
.

Alston, Philip, "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 *Harvard H.R.Y.B* 3.

Arman, de Mestral, and Fox-Decent, Evans, Rethinking the Relationship Between International and Domestic Law" (2008) 53 *McGill L.J.* 573.

Asante, S.K.B, "Nation Building and Human Rights in Emergent African Nations" (1969) 2 *Cornell I.L.J.*, 93.

Bassouni, M. Cherif, "Human Rights in the Context of Criminal Justice: Identifying international Procedural Protections and Equivalent Protections in National Constitutions" (1993) 3 *Duke J. of Comp. & Int'l L.*, 235.

Benjamin, M. Barry, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to

Prevent Human Rights Atrocities" (1992) 16 *Fordham Int'l. L. J.* 119.

Berger, Raoul, "Ronald Dworkin's The Moral Reading of the Constitution: A Critique" (1997) 72 *Indiana L. J.* 1099.

Bickley, Sellers, Lynn, "U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?" (2000) 14 *Emory Int'l L. Rev.* 213.

Bielfeldt, Heiner, ""Western" versus "Islamic" Human Rights Conceptions?: A Critique of Essentialism in the Discussion on Human Rights" (2000) 28 *Pol. Theo*., 90.

Boulware-Miller, K., "Female Circumcision: Challenges o the Practice as a Human Rights Violation" (1985) 8 *Hrvd Women's L. J.* 155.

Borchard, Edwin, "The Minimum Standard of Treatment of Aliens" (1940) 38 *Mich. L.Rev.* 445.

Brems, Eva, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse,"1997) 19 *Hum. Rt. Qrtly*, 136.

Cameron, Jamie, "The Van Ert Methodology of Domestic Reception Using International Law in Canadian Courts" (2008) 48 *R.D. McGill L.J*. 347.

Chibueze, Oraeki Remigius, "The International Criminal Court: The Bottlenecks to Individual Criminal Liability in the Rome Statute" (2010) 12 *Ann. Surv. Of Int'l & Comp. L.* 185.

Chief Prosecutor, *Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR* 1593 (2005).

Cole, David, "What to Do About Torturers" (2009) 56 *NY. Rev. Bks*.,8.

Cranston, Maurice Cranston, "Are There Any Human Rights?"(1993) 112 *Daedulus* 4.

Curry, F. Michael, "Losing Faith: Rationalizing Religion in Early Modern England" (2010) 11 *Intersections online,* 207.

Dau, Santino M, "The African Concept of "Collective Rights:" Does it Still Endure?"(2013), LL.M., *Schulich* School *of Law*, Dalhousie University, [Unpublished].

Davis, Laura Davis, "The ICC: A Straw Man in the Peace versus Justice Debate" (2013), *Africa's Mediators' Retreat—Oslo Network Forum of Mediators*.

Dennis, J. Michael & Stewart, P. Dennis & David, "Justiciability of Social and Cultural Rights: Should There be An International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?" (2004) 98 *Am. J. Int'l L*. 462.

Donnelly, Donnelly, "Cultural Relativism and Universalism of Human Rights" (1984) 6 *Hum.Rt. Qrtly.,* 401.

„ „ "The Relative Universalism of Human Rights" (2007) 29 *Hum. Rt. Qrtly*, 281.

„ „ "Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights" (1982) 76 *Am. Pol. Sc. Review* 303.

Duruigbo, Emeka, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6 *NW J. Int'l Hum. Rt.*222.

Eberechi, Ifeonu, "Armed Conflicts in Africa and Western Complicity: A Distinctive Case for African Union's Cooperation with ICC" (2009) 3 *Afr.J. Legal. Stud.,* 53.

Executive Board, American Anthropological Association, Statement on Human Rights (1947) 49 *Am. Anthologists, New Series* 4, Part I, 539.

Fischer, Hug, "Suppression of Slavery in International Law" (1950) 3 *Int'l L. Qrtly* 503.

Forde, Steven, "Natural Law, Theology, and Morality in Locke," (2001) *Am. J. Pol. Sc.,* 45,

Fox, J. Diana, "Women's Human Rights in Africa: Beyond the Debate Over the Universality or Relativity of Human Rights" (1998) 2 *Afr. Stud. Qrtly*, 3.

Frank, Thomas, "Individual Criminal Liability and Collective Civil Responsibility" (2007) 6, *Washington UN. Glob. Stud. L. Rev*. 567.

Funder, Anna, "De-Minimis Non-Curat Lex: The Clitoris, Culture and the Law" (1993) 3 *TRNATLCP* 417,

Gadffney, Paul, *Ronald Dworkin on Law as Integrity: Rights as Principles of Adjudication* (Queenston: Mellen University Press, 1996).

Gallmetzer, Reinhold and Klamberg, Mark, "Individual Responsibility For Crimes Under International Law: The UN Ad Hoc Tribunals and the International Criminal Court (2007) *Social Science and Research Network*, 60.

Gavison, Ruth, "On the Relationships Between Civil and Political, and Economic, Social and Cultural Rights" (2003) *Glob. Hum. Rt*., 23.

Glanville, Luke, "The Responsibility to Protect Beyond Borders" (2012) *Hum. Rt. L. Rev.* 32.

Glendon, Ann, Mary, "The Rule of Law in the Universal Declaration of Human Rights" (2004) 2 *NW.J. Int'l Hum. Rt*., 4.

Goodhart, Michael "The Origins and Universality in Human Rights Debate: Cultural Essentialism and the Challenge of Globalization," (2003) 25 *Hum. Rt. Qrtly* 935.

Good, Colleen, "Human Rights and Relativism" (2010) 19 *Machester J. of Phil*.27.

Gross, Leo, "The Peace of Westphalia, 1648-1948" (1948) 42 *Am. J. Int. L*. 20.

Haile, Minasse, "Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality," in (1984) 24 *Va. J. of Int'l* L 575, 591.

Hamilton, Kimberly & Holder, Kate, "International Migration and Foreign Policy: A Survey of the Literature" (1991) 14 *The Washington Qrtly.,* 195.

Hauerwas, Stanley, *The Peaceable Kingdom: A Primer in Christian Ethics* (Notre Dame: UNP, 1983).

Herskovitz, M. J., "Introduction," in Herskovitz, F., Ed., *Cultural Relativism: Perspectives in Cultural Pluralism* (New York: Random House, 1972).

Howard, E. Rhoda, "Cultural Absolutism and the Nostalgia for Community," (1993) 15 *Hum. Rt. Qrtly*., 315.

„ „ "Group versus Individual Identity in the African Debate on Human Rights," in An-Na'im Ahmed Abdullahi & Deng, M. Francis, Eds., *Human Rights in Africa: Cross Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990).

„ „ & Donnelly, Jack, Human Dignity, Human Rights and Political Regimes" (1986) 80 *Am. Pol. Sc. Rev*. 802.

„ „ "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights Evidence from Sub-Saharan Africa" (1983) 5 *Hum. Rt. Qrtly*, 467.

Huelsman, B. R., "An Anthropological View of Clitoral and Other Female Genital Mutilations," in Lowry, T. P., & Lowry, T.S., Eds., *The Clitoris* (St. Louis: Warren H. Green, 1976).

Husak, D. N., "Why There Are No Human Rights" (1984) 10 *So. Theo. & Pract.,* 125 at.128

Ibhawoh, Bonny, & Dibua, J. I., "Deconstructing *Ujamaa:* the Legacy of Julius Nyerere in the Quest for Social Economic Development in Africa" (2003) 8 *Afri J. Pol. Sc*., 59-78.

Jackson, J., "Culture, Genuine and Spurious: the Politics of Indianness, the Vaupes" (1995) 22 *Am. Ethnologist*, 3.

Juma, Laurence, "The Role of Human Rights in Post-Conflict Situations in Africa" (2008) 2 *M.L.J.,* 280.

Keith, Camp Linda & Ogundele, Ayo, "Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences On Human Rights" (2007) 29 *Hum. Rt. Qrtly*, 1065.

Kirby, The Hon. AC, CMG, Michael, The Hon., "Law, Human Rights and Religion—of Genocide, Sexuality and Apostasy" (2009) 20 *Mac. L. Rev.* 1.

Kiwanuka, N. Richard, "The Meaning of People in the African Charter on Human and Peoples' Rights" (1988) 82 *Am. J. Int'l Hum. Rt.,* 84.

Klabbers, Jane, "The Right to be Taken Seriously: Self-Determination in International Law" (2006) 28 *Hum. Rt. Qrtly,* 186.

Kronenberg, Andreas, "Where are the Barbarians?: Eurocentricism versus the Illusion of Cultural Universalism: The Answer of an Anthropologist to a Philosopher" (1984) 7 *Ult. Reality and Meaning,* 233.

Knox, H. John, "Report of the Independent Expert on the Issue of human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment" (2012), *Human Rights Council*, UNGA, A/HRC/22/43 12.

Kushalani, Yougindra, "Human Rights in Asia and Africa" (1983) 4 *HR. L.J.* 418.

Lafon, Christina, "Accountability Global Governance: Challenging the State Centric Conception of Human Rights" (2010) 3 *Ethics & Glob. Pol*., 193.

Lord, Carnes, "Human Rights Policy in a Non-Liberal World," in Marc F. Platter, Ed., *Human Rights in Our Time: Essays in Memory of Victor Baras (*Boulder: Westview, 1984).

MacKay, A. Wayne, "Human Rights in the Global Village: The Challenges of Privacy and National Security" (2006) 20 *Nat. J. Const. L.,* 1

Mamdani, Mahmoud, "The Social Basis of Constitutionalism in Africa" (1990) 28 *J. of Mod. Afr. Stud*. 359.

Marchuk, Iryna, "Confronting Blood Diamonds In Sierra Leone: The Trial of Charles Taylor" (2009) 4 *Yale J. of Int'l Aff.* 87.

Martinez, S. Jenny, "The Anti-Slavery Courts and the Dawn of International Human Rights Law" (2007) 117 *The Yale L.J.* 550.

Mason, Christine, "Exorcising Excision: Medico-Legal Issues Arising From Male and Female Surgery in Australia" (2001) 9 *J. L. Med.,*58.

Mawdsley, Christly, "An Interest in Intervention: A Moral Argument for Darfur" (2008) 10 *Afr. Stud. Qrtly.*, 95.

McCrudden, Christopher, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655.

McDougal, S., Myer. McDougal, "Human Rights and World Public Order: The Principles of Content and Procedures for Clarifying General Community Policies" (1974) 14 *Va. J. Int'l. L.*387.

Melady, Thomas & Melady, Margaret, "Myths and Realities About Idi Amin Dada's Uganda" (1979) 22 *Afr. Stud. Rev*. 127.

Messer, E. "Pluralist Approach to Human Rights" (1997) 53*, J. of Anthrop. Res*. 293.

Mestral, de Armand & Fox-Decent, Evan, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 *McGill L.J*. 573.

Mills, Kurt, "Bashir is Dividing Africa: Africa and the International Criminal Court" (2012) 34 *Hum. Rt. Qrtly*, 404.

Mitchell, Andrew D., "Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimman v. Thompson*" (2000) 24 *Mel. Univ. L. Rev.* 15

Mugo, G., Micere, "Elitist Anti-Circumcision Discourse as Mutilating and Anti-Feminist," (1997) 47 *CWRLR* 461.

Murphy, F. Cornelius, "Objections to Western Conceptions of Human Rights" (1981) 9 *Hofstra L. Rev.,* 443.

Mutua, Makau, "Change in the Human Rights Universe" (2007) 20 *Harvard.H.R.J.*at 3.

„ „ "Never Again: Questioning the Yugoslav and Rwandan Tribunals" (1997) 11 *Temp. Int'l & Comp. L. J*. 167.

„ „ "Savages, Victims and Saviours: The Metaphor of Human Rights" (2001) 42 *Harvard Int'l L. J., 201*.

„ „ Terrorism and Human Rights: Power, Culture and Subordination" (2002) 8 *Buffalo Hum. Rt. L. Rev*., 301

„ „"The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Virginia J. Int'l L.,* 339.

„ „"What is TWAIL?" (2000), Proceedings of the 194th Annual Meetings, *The America Society of International Law* 31.

Narayan, Uma, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism" (1998) 13 *Hypatia*, 1.

Nelson, G. Timothy, "Human Rights Law and BIT Protection: Areas of Convergence" (2011) 12 J. *Wrld. Invest. & Trad.,* 27.

Oba, A. Abdulmumini, "Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism?" (2008) 8 *Glob. Jur. Fontiers*, 1.

Ocran, T. Modibo, "The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping" (2002) 25 *Boston Coll. Int'l & Comp. L. Rev*. 9.

OECD, Directorate for Financial and Enterprise and Affairs, "Fair and Equitable Standard in International Investment Law" (2004), *Working Papers on International Investment,* Number 2004/3.

Ojo, Olusola, "Understanding Human Rights in Africa," in Berting, Jan, *et al*., Eds., *Human Rights in a Pluralistic World: Individuals and Collectivities* (Westport: Meckler, 1990).

Olru, O. Vincent, *The African Human Rights System: Its Laws, Practice and Institutions* (The Hague: Martinus Nijhoff Publishers, 2001).

Opie, Jose, "A Case for Including Economic, Social and Cultural Rights in the New Zealand *Bill of Rights Act* 1990)" (2012) 43 *VUWLR.*

O' Sullivan, Declan, "Is the Declaration of Human Rights Universal"? (2000) 4 *The Int'l J. Hum. Rt.* 25.

Othman, Norani, "Muslim Women and the Challenge of Islamic Fundamentalism/Extremism: An overview of Southeast Asian Muslim women's struggle for human rights and gender equality" (2006) 29 *Women's Stud. Int'l., Forum*, at 339–353.

Plattner, F. Marc, Ed., *Human Rights in Our Time: Essays in Memory of Victor Brass* (Boulder: Westview, Press, 1984).

Pollis, Adamantia & Schwab, Peter, "Human Rights: A Western Construct with Limited Applicability," quoted in Donnelly, Jack, "The Relative Universalism of Human Rights" (2007) 29 *Hum. Rt. Qrtly* 281.

Prasad, Ajnesh, "Cultural Relativism in Human Rights Discourse" (2007) 19 *Peace Rev: J. Sc. Just*. 589 at 594.

Preiswerk, Roy, "The Place of International Relations in the Study of Human Rights" (1978) 32 *Yr. Bk. of World Affairs,* 251.

Qureshi,Shazia, "Feminist Analysis of Human Rights Law" (2012) 19 *J. P. Stud*., 41.

Rich, Ronald, "The Right of Development: A Right of People?" (1985) 9 *Bulletin of the Aust.*

Soc. Leg. Phil. 120.

Roman, Ediberto, "A Race Approach to International Law (RAIL): Is There New Need for Yet Another Critique of International Law?" (2004) *U.C. Davis. L. Rev.,* online.

Schmidt, F. Paul, "Some Criticisms of Cultural Relativism" (1955) 70 *Journal of Phil*.780

Sen, Amartya, "Human Rights and the Limits of Law" (2006) 27 *Cardazo L. Rev.,* 2913.

„ „ "Elements of a Theory of Human Rights" (2004) 32 *Phil. & Pub. Aff*., 315 at 17.

Sinha, Prakash, "Human Rights: A Non-Western View Point" (1981) 19 *Archiv Fũr Rechts and Socialphisophie.* LXVII.

Sterio, Milena, "On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule" (2010) 19 *Minnesota J. Int'l. L* 137.

Steward, Julia, Comments on the Statement on Human Rights" (1948) 50 *Am. Anthropologist*, 351.

Rawls, John, "Two Concepts of Rules" (1955) 64 *The Philos.l Rev.* 1.

Renteln, D. Alison, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 *Hum. Rt. Qrtly*., 514.

Risse, Mathias, "A Right to Work? A Right to Leisure? Labour As Human Rights?" (2009) 3 *L & Eth. Hum. Rt* 1.

Roosevelt, Franklin, "Address of the President of the United States" (1941), 87 *Congressional Record Vol. 87,* Part I.

Roskos, Paula, "International Law, National Sovereignty and Local Norms: What's to Become of CEDAW in the U.S.?" (2003), *Consortium on Gender, Security and Human Rights*, Working Paper No. 103.

Serour, G.I., "Medicalization of the Female Genital Mutilation" (2013) 19, *Afr. J. Urol.,* 145.

Strauss, Marcy, "The Lessons of Abu Ghraib (2005) 66, *Ohio St. L. J.,* 1269.

Szabo, I. "Historical Foundations of Human Rights and Subsequent Developments," in Vasak,

Tay, C.S. Simon, "Human Rights, Culture and the Singapore Example" (1996) 41 *R.D.McGill L.J*., 743.

Tilley, J. John, T. John, "Cultural Relativism" (2002) 22 *Hum Rt. Qrtly* 501.

Tomeh, K, A.K., "Moral Values in a Cross-Cultural Perspective (1968) 74 *J. Soc. Psych.* 137.

Totaro, V. Martin, "Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development" (2008) 48, *Virginia J. Int'l. L.,* 719.

Tsutsui, Kiyoteru, "Human Rights and Democracy as Global Ideal" (2009) 16 *The J. Int'l Inst.* 12.

U.S. State Department, "Nigeria 2013 Human Rights Reports: Country Reports on Human Rights Practices" (2013) *U.S. Bureau of Democracy, Human Rights and Labor*, at 11-19.

„ „ "Somalia 2013 Human Rights Reports: Country Reports on Human Rights Practices" (2013) *U.S. Bureau of Democracy, Human Rights and Labor*, at 2-36.

Vargas, R. Lazos Sylvia ""Kulturkrampft [s] or "Fits of Spites"? Taking the Academic Culture War Seriously" (2005) 35 *Seton H. L. Rev*. 1309.

Venkatraman, Amritha, "Religious Basis for Islamic Terrorism: The Quran and Its Interpretation" (2007)30 Stud*., in Conf. & Ter.,* 1, at 21-27.

Viriri, Advice & Mungwini, Pascah, "African Cosmology and the Duality of Western Hegemony: The Search for an African Identity" (2010) 3 *The J. Pan. Afri. Stud.,* 26.

Wildhaber, Luzius, "The European Court of Human Rights in Action" (2004) 21, *Ritsumeikan L. Rev.* 83.

Winston, B., "Human Rights" (1984) 6 *Hum. Rt. Qrtly.,* 268.

Wiredu, Kwasi, "An Akan Perspective on Human Rights," in An-Na'im, Ahmed Abdullahi, & Deng, M. Francis, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C.: Brookings Institution, 1990).

Wood, B. William, "Forced Migration: Local Conflicts and International Dilemma" (1994), *Office of the Geographer and Global Issues*, US. Department of State, 618.

Woodiwiss, Anthony, "Human Rights and the Challenge of Cosmopolitanism" (2002) 19 *Theory, Culture and Soc.,* 139.

World Health Organisation, *et al*, "Female Genital Mutilation: Integrating the Prevention and Management of the Health Complications into the Curricula of Nursing and Midwifery" (2001), *A Teacher's Guide*.

„ „ Health Organisation, *Minority Rights Group International, Report 92/3 (1992)*.

Worsely, Allan, "Infibulation and Female Circumcision: Study of A Little-Known Custom" (1938(45 J. of *Obst. & Gyn. of the Brit. Emp.,* 686.

Wyrod, Robert, "Between Women's Rights and Men's Authority: Masculinity and Shifting Discourses of Gender Difference in Uganda" (2006) 22 *Gender and Soc*. 799,

Zechenter, E. M., "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" (1997) 53 *J. Am. Anthrop. Res*.53.

International Instruments

African Charter on Human and Peoples' Rights ("Banjul Charter"), OAU, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

African Charter on the Rights and Welfare of the Child (1990), OAUGA, CAB/LEG/24.9/49.

Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (1945) 82 UNTC 280.

Charter of the United Nations (1945) 1 UNTS XVI.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984) 1465 UNTS 85.

Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277. 78.

Declaration of Independence (1776) [U.S.] http://www.sparknotes.com/history/american/declaration/ (accessed August 13, 2014).

Declaration on the Right to Development, UNGA, December 1986, A/RES/41/128, available at: http://www.refworld.org/docid/3b00f22544.html [accessed 19 August 2014]

Declaration of the Rights of Man and the Citizen (1789).

*European Convention for the Protection of Human Rights and Fundamental Freedoms (*1950) 11 ETS 5.

Inter-American Convention on Forced Disappearance of Persons) 1994) 68, OASTS 33 ILM 1429.

International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3.

International Convention on the Elimination of All Forms of Discrimination Against Women, (1979) 1249 UNTS 13.

International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195.

International Convention on the Rights of the Child (1989) 1577 UNTS 3.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000); 1 Afr. Hum. Rts. L.J. 40 (2003).

Rome Statute of the International Criminal Court (2010) 2187 UNTS 90.

International Covenant on Civil and Political Rights: Authentic Text (1966) 999 UNTS 171.

Optional Protocol to the International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, available at: http://www.refworld.org/docid/3ae6b3624.html.

The Constitutive Act of African Union (2000), online at: available at: http://www.refworld.org/docid/4937e0142.html [accessed 19 August 2014].

The Inter-American Declaration of the Rights and Duties of Man (Bogotá, Colombia, 1948), AG/RES. 159 (XXVIII-0/98).

Vienna Declaration and Programme of Action (1993), A/CONF.157/23, available at: http://www.refworld.org/docid/3ae6b39ec.html [accessed 19 August 2014].

Vienna Convention on the Law of Treaties (1969) 1155 UNT 331.

Universal Declaration of Human Rights (1948) 217A (III).

UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic minorities (1993) 138 UNTS 48.

UN Security Council Resolution on Ivory Coast, [2010](S/RES/1962), 10 December, 2010.

.

UN Security Council Resolution on Kosovo, [199] (S/RES/1244), 10 June, 1999.

UN *Security Council Resolution on Libya* [2011], (S/RES/6498), 17 March, 2011.

UN Security Council, Resolution on Somalia, [1992] (S/RES/733), 23 January 1992.

World Summit Outcome: resolution / adopted by the General Assembly (2005) A/RES/60/1.

Online Sources:

African Commission on Human and Peoples' Rights, "African Charter on Human and Peoples' Rights," (2014), available at http://www.achpr.org/instruments/achpr/.

African Globe, "African State of Angola Bans Islam, All Mosques to be Destroyed" (2013), available online at http://www.africanglobe.net/africa/african-state-angola-bans-islam-mosques-destroyed.

African National Congress: "The Morogoro Conference" (1969), available online at: https://www.marxists.org/subject/africa/anc/1969/strategy-tactics.htm.

African Union, "Decisions and Declarations" (2009), Assembly of the African Union: 13th Ordinary Session, available online at:

http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf

African Union: ICC Non-Cooperation Thwarted but African States Should Do More to Uphold the Rights of African Victims," (2013), *International Criminal Justice Program*, available online at: http://www.npwj.org/ICC/AU-and-ICC-African-States-should-uphold-rights-African-victims.html-0

Afro News: "al-Bashir would be arrested in South Africa: Zuma," online at: http://www.afrol.com/articles/36228.

Alexander, Alexander, "Sudanese Woman Meriam Ibrahim Walks Free From Prison" (2014), *The Telegraph,* available online at:

http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/10920306/Sudanese-woman-sentenced-to-death-for-apostasy-to-be-freed.html.

Ashton-Shenker, Diana, "The Challenge of Human Rights and Cultural Diversity" (2014), United Nations: Background Notes, available online at: http://www.un.org/rights/dpi1627e.htm.

BBC: "Archbishops Criticize Nigerian and Ugandan Anti-Gay Laws" (January 2014). at: http://www.bbc.com/news/uk-25959942.

„ „ "Kenya's Ruto Formed Militia for War, ICC hears" (2013), online at: http://www.bbc.com/news/world-africa-24028714.

„ „ "Sudanese Woman Faces Death for Apostasy" (2014), available online at: http://www.bbc.com/news/world-africa-27424064.

Beny, Nyantung Laura, "Think Courts Aren't Relevant? Ask the Victims" (2014), *United to End Genocides*, available online at: http://endgenocide.org/think-courts-arent-relevant-ask-victims/.

Bingham Centre for the Rule of Law (UK), "Building Human Rights into Practice" (2012) *A Training Manual On International Human Rights*, available online at: http://www.biicl.org/files/5930_building_human_rights_into_practice_-_english.pdf.

Blanchard, Ploch Lauren, "Sudan and South Sudan: Current Policy Issues for Policy and U.S. Foreign Policy: CRS Report for Congress" (2012), *Congressional Research Service*, at 27-31, online at: 7-5700 www.crs.gov , R42774.

Botswana: "Botswana Supports the Warrant of Arrest Issued by the ICC" (2011), *Ministry of Foreign Affairs and International Cooperation*, online at: http://www.icc-cpi.int/iccdocs/asp_docs/Statement/Botswana-ST-08July11-ENG.pdf

Bouvier, A. Antoine Marco Sassòli, & Quintin, Anne, How *Does Law Protect in War: Cases, Documents and Teach Materials on Contemporary Practice in International Humanitarian Law, Vol., I, 3rd Edition (2007)*, available online at http://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf

Bryson, Donna, "Africa Marks 1960, When 1/3 Gained Independence" (2010), *Associated Press,* available online at: http://www.gmanetwork.com/news/story/191880/news/world/africa-marks-1960-when-1-3-gained

Council of Europe, "Secretary General Thorbjørn Jagland: Europe in Biggest Human Rights Crisis Since the Cold War"(2014), available online at: http://hub.coe.int/en/web/coeportal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1840811&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=0.

Debono, Daniel, "Poverty Induced Cross-Border Migration: Socio-Economic Rights an International Solidarity" (2014), available online at: file:///C:/Users/Santo/Downloads/2008_DeBono_.EDRC_Poverty_induced_migrationpdf.pdf.

Donald E. Jr., Wilkes, Donald E. Jr., "The Anti-Enlightenment and Human Rights" (2008), *Popular Media*, Paper 164. http://digitalcommons.law.uga.edu/fac_pm/164.

Du Plessis, Akande Max du, Dapo, & Jalloh, Chernor Charles, "Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC" (2010) Institute *for Security Studies*, available online: http://www.elac.ox.ac.uk/downloads/AkandeDuPlessisJallohICCPositionPaper.pdf

http://www.bbc.com/news/world-africa-24173557

Elechi, O. Oko, "Human Rights and the African Indigenous Justice System" (2004), *International Conference of the International Society for the Reform of Criminal Law* University of Wisconsin, available online at: http://www.isrcl.org/Papers/2004/Elechi.pdf.

European Parliament Resolution On Sudan—The Case of Mariam Yahia Ibrahim

(2014/2727(RSP)), available online at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef//EP//TEXT+TA+20140717+ITEMS+DOC+XML+V0//EN&language=EN#sdocta1

European Parliament, "Uganda and Nigeria: European Parliament Calls for Targeted Sanctions Over New Laws" (2014), *Intergroup on LGBT Rights,* available online at: http://www.lgbt-ep.eu/press- releases/uganda-and-nigeria-european-parliament-calls-for-targeted-sanctions-over-new-laws/.

Exploring Africa, "The Birth of the African Union" (2014), available online at: http://exploringafrica.matrix.msu.edu/students/events/africaunion.php.

Fagan, Andrew, "Human Rights" (2014), *Internet Encyclopedia of Philosophy*, University of Essex, available online at: http://www.iep.utm.edu/hum-rts/.

Flowers, Nancy, "A Short History of Human Rights" (2014), *Human Rights Here and Now:* Celebrating the Universal Declaration of Human Rights," available online at: http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm

Forde, Steven, "John Locke and Natural Law and Natural Rights Tradition" (2014), Natural Law, Natural Rights, and American Constitutionalism, available online at: http://www.nlnrac.org/earlymodern/locke.

Holocaust Encyclopedia, "Law, Justice and the Holocaust" (2013), *United States Holocaust Memorial Museum*, available online at: http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887

International Crisis Group, "South Sudan: A Civil War by Any Other Name" (2014), available online at: http://www.crisisgroup.org/~/media/Files/africa/horn-of africa/south%20sudan/217-south-sudan- a-civil-war-by-any-other-name.pdf

Kristof, Nicholas, "Dodging Bombers in the Sudan" (2012), *The New York Times*, online at: http://www.nytimes.com/2012/02/23/opinion/kristof-dodging-bombers-in-sudan.html?_r=2&hp.

Mariam, A. G., "The Toxic Ecology of African Dictatorships" (2014), *The World Post*, available online at: http://www.huffingtonpost.com/alemayehu-g-mariam/the-toxic-ecology-

of- afri_b_382115.html.

Mbeki, Thabo and Mamdani, Mahmoud, "Courts Cant' End Civil Wars" (2014), *The New York Times*, online at: http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html

Miller, David, "Responsibility to Protect" (2006), *Memo for the Workshop on Global Governance*, Princeton University, online at http://www.princeton.edu/~pcglobal/conferences/normative/papers/Session6_Miller.pdf

Onyango-Obba, Charles, *Daily Monitor*, "Why Kenya Has Presidential Debate but in Uganda, Museveni Won't Show," online: http://www.monitor.co.ug/OpEd/OpEdColumnists/CharlesOnyangoObbo/Kenya-has-presidential-debates-but-Uganda-Museveni-won-t-show/-/878504/1705304/-/a0cdxu/-/index.html.

Organisation of American States, "Member States" (2014), available online at: http://www.oas.org/en/member_states/.

Patrick, Jonathan "An Examination of the Cultural Relativity of Human Rights" (2001) 36, Associate, *Baha'i Library online:* available at: http://bahai-library.com/series/Associate.

Perrin, K.Ayodeji, "Human Rights and Cultural Relativism: The "Historical Development" Argument and Building A Universal Consensus" (2005) at 3, available online at:

http://www.academia.edu/2282438/Human_Rights_and_Cultural_Relativism_The_Historical_Development_Argument_and_Building_a_Universal_Consensus

Ramoin, E. Francis, "Why Intervention in Libya was Justified: A moral, political and operational defense for the coalition's military intervention in the 2011 Libyan uprising" (2012) at 1, available online at: http://www.e- ir.info/2012/01/25/why-intervention-in-libya-was-justified.

Roth, Kenneth, "World Report 2013: Events of 2012" (2013) Human Rights Watch, at 8, at http://www.hrw.org/sites/default/files/wr2013_web.pdf.

Shetty, Salil, "Lessons from Beyond the Grave for Central African Republic and South Sudan" (2014), *Think Africa Press,* available online at: http://thinkafricapress.com/central-african- republic/lessons-beyond-mass grave

Tharoor, Shashi, "Are Human Rights Universal?" (2000) 26 World Pol. J. *World Policy Institute*, available at http://www.worldpolicy.org/tharoor.html.

The African Commission on Human and Peoples' Rights, "Circle of Rights: Economic, Social and Cultural Rights: A Training Resource" (2014), *Human Rights Resource Centre*,

Module 28, online at:
http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm

The Guardian, "Kenya's Parliament Passes Bill to Allow Polygamy" (2014), available online at http://www.theguardian.com/world/2014/mar/21/kenya-parliament-passes-bill-allowing- polygamy.

UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), *Human Rights Library*, available online at**:**
http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html.

United Nations, "Human Development Index" (2014), United Nations Development Program, available online at: https://data.undp.org/dataset/Table-3-Inequality-adjusted-Human-Development-Inde/9jnv-7hyp .

Wrights, Clancy, "Western Human Rights in a Diverse World: Cultural Suppression or Relativism?" (2014) E-International Relations Students, available online at: http://www.e- ir.info/2014/04/25/western-human-rights-in-a-diverse-world-cultural-suppression-or-relativism/.