

intricately with other individuals and the community in a variety of ways, blurs the separate identity of the individual from society, and leads to a more communal and collective structure of life.' Do you agree?

4. Note that Article 2(3) of the ICCPR requires states to provide all persons whose rights have been violated with 'an effective remedy', and to develop particularly the possibilities of 'judicial remedy'. Do rights imply a preference for or even require individual (judicial or other) remedies against the state, whereas a regime of individual duties is less likely to provide such remedies?

COMMENT ON DUTY PROVISIONS OF NATIONAL CONSTITUTIONS

In modern constitutions, as in human rights treaties, provisions conferring rights on individuals far outnumber those imposing duties. There appear below English translations of articles in a number of state constitutions that, as of recent dates, expressed such duties. Presented here in isolation from the context of the constitutions and political societies in which they take meaning, these articles serve merely to illustrate the range of such duties. Within their national contexts, they may be understood or interpreted to impose slight or significant duties, which moreover may be viewed merely as hortatory or may be subject to enforcement by civil or criminal actions brought by the state or by nonstate parties.

Belarus

Article 53: Everyone shall respect the dignity, rights, liberties, and legitimate interests of others.

Article 55: It shall be the duty of everyone to protect the environment.

Cambodia

Article 47: Parents shall have the duty to take care of and educate their children to become good citizens. Children shall have the duty to take good care of their elderly mother and father according to Khmer traditions.

China

Article 42: (3) Work is the glorious duty of every able-bodied citizen. All working people in state enterprises and in urban and rural economic collectives should perform their tasks with an attitude consonant with their status as masters of the country. . . .

Article 49: (2) Both husband and wife have the duty to practice family planning. (3) Parents have the duty to rear and educate their minor children, and children who have come of age have the duty to support and assist their parents.

Article 54: It is the duty of citizens of the People's Republic of China to safeguard the security, honour, and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.

India

Article 51A: It shall be the duty of every citizen of India . . . (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; . . . (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; . . . (g) to protect and improve the natural environment . . . and to have compassion for living creatures. . . .

Iraq

Article 10: Social solidarity is the first foundation for the Society. Its essence is that every citizen accomplishes his duty in full, and that the Society guarantees the citizen's rights and liberties in full.

Article 32: (2) Work is an honor and a sacred duty for every able citizen, and is indispensable by the necessity to participate in building the society, protecting it, and realizing its evolution and prosperity.

Italy

Article 4: The Republic recognizes the right of all citizens to work and promotes such conditions as will make this right effective. (2) Every citizen shall undertake, according to his possibilities and his own choice, an activity or a function contributing to the material and moral progress of society.

Poland

Article 86: Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such responsibility shall be specified by statute.

Portugal

Article 49: (1) All citizens who are over 18 years old have the right to vote. . . . (2) The exercise of the right to vote is personal and constitutes a civic duty.

Article 58: (1) Everyone has the right to work. (2) The duty to work is inseparable from the right to work. . . . (3) It is the duty of the State, by implementing plans for economic and social policy, to safeguard the right to work. . . .

Article 78: (1) Everyone has the right to cultural enjoyment and creation, and

the duty to preserve, defend, and increase the cultural heritage. [Subsequent provisions in Article 78 spell out the state's duties.]

Saudi Arabia

Article 12: The consolidation of national unity is a duty, and the state will prevent anything that may lead to disunity, sedition and separation.

Spain

Article 45: (1) Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.

Thailand

Article 68: Every person shall have a duty to exercise his or her right to vote at an election. The person who fails to attend an election for voting without notifying the appropriate cause of such failure shall lose his or her right to vote as provided by law.

Uganda

Article 39: The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen . . . (c) to foster national unity and live in harmony with others; (d) to engage in gainful employment for the good of himself, the family, the common good and to contribute to the national development; . . . (f) to contribute to the well-being of the community where the citizen lives; (g) to protect and safeguard the environment; and (h) to promote democracy and the rule of law.

QUESTIONS

1. Which if any of the preceding provisions are inconsistent with, or indeed threaten, the basic human rights declared by the leading international instruments? Which if any do you view as implicitly incorporated in those instruments?

2. How do you understand, and would you support for your own country's constitution, the provisions relating to work, to environment, and to voting?

A UNIVERSAL DECLARATION OF HUMAN RESPONSIBILITIES

Proposed by InterAction Council, 1997

in Hans Küng and Schmidt (eds.), *A Global Ethic and Global Responsibilities* (1998), at 6

[The InterAction Council consists of about 25 former heads of state and government who have been addressing long-term global issues. The members (who endorsed the proposed Declaration) included Helmut Schmidt (Germany), Lord Callaghan of Cardiff (UK), Jimmy Carter (United States), and other former heads of state from such countries as Australia, Brazil, Costa Rica, Cyprus, Israel, Japan, Lebanon, Singapore, Thailand, and Zambia. The Council submitted the proposed Declaration to the UN Secretary General for consideration for its proclamation by the UN General Assembly as a 'common standard for all peoples and all nations'.

The introductory text to the Declaration notes that 'traditionally we have spoken of human rights, and indeed the world has gone a long way in their international recognition and protection since the Universal Declaration of Human Rights . . . [I]t is time now to initiate an equally important quest for the acceptance of human duties or obligations'. The concept of human obligations 'serves to balance the notions of freedom and responsibility; while rights relate more to freedom, obligations are associated with responsibility'. The two are 'interdependent'. Since the enlightenment, the West has been associated with rights and individualism. In the East, 'the notions of responsibility and community have prevailed'.

Without a proper balance, unrestricted freedom is as dangerous as imposed social responsibility. Great social injustices have resulted from extreme economic freedom and capitalist greed, while at the same time cruel oppression of people's basic liberties has been justified in the name of society's interests or communist ideals.

Excerpts from the Declaration follow.]

...

Article 1

Every person, regardless of gender, ethnic origin, social status, political opinion, language, age, nationality, or religion, has a responsibility to treat all people in a humane way.

...

Article 3

No person, no group or organization, no state, no army or police stands above good and evil; all are subject to ethical standards. Everyone has a responsibility to promote good and to avoid evil in all things.

Article 4

All people, endowed with reason and conscience, must accept a responsibility to

each and all, to families and communities, to races, nations, and religions in a spirit of solidarity: What you do not wish to be done to yourself, do not do to others.

Article 5

Every person has a responsibility to **respect life**. No one has the right to injure, to torture or to kill another human person. This does not exclude the right of justified self-defense of individuals or communities.

...

Article 7

Every person is infinitely precious and must be protected unconditionally. The animals and the natural environment also demand protection. All people have a responsibility to protect the air, water and soil of the earth for the sake of present inhabitants and future generations.

Article 8

Every person has a responsibility to behave with integrity, honesty and fairness. No person or group should rob or arbitrarily deprive any other person or group of their property.

Article 9

All people, given the necessary tools, have a responsibility to make serious efforts to overcome poverty, malnutrition, ignorance, and inequality. They should promote sustainable development all over the world in order to assure dignity, freedom, security and justice for all people.

Article 10

All people have a responsibility to develop their talents through diligent endeavor; they should have equal access to education and to meaningful work. Everyone should lend support to the needy, the disadvantaged, the disabled and to the victims of discrimination.

Article 11

All property and wealth must be used responsibly in accordance with justice and for the advancement of the human race. Economic and political power must not be handled as an instrument of domination, but in the service of economic justice and of the social order.

...

Article 14

The freedom of the media to inform the public and to criticize institutions of society and governmental actions, which is essential for a just society, must be used with responsibility and discretion. Freedom of the media carries a special responsibility for accurate and truthful reporting. Sensational reporting that degrades the human person or dignity must at all times be avoided.

Article 15

While religious freedom must be guaranteed, the representatives of religions have a special responsibility to avoid expressions of prejudice and acts of discrimination toward those of different beliefs. They should not incite or legitimize hatred, fanaticism and religious wars, but should foster tolerance and mutual respect between all people.

Article 16

All men and all women have a responsibility to show respect to one another and understanding in their partnership. No one should subject another person to sexual exploitation or dependence. Rather, sexual partners should accept the responsibility of caring for each other's well-being.

Article 17

In all its cultural and religious varieties, marriage requires love, loyalty and forgiveness and should aim at guaranteeing security and mutual support.

Article 18

Sensible family planning is the responsibility of every couple. The relationship between parents and children should reflect mutual love, respect, appreciation and concern. No parents or other adults should exploit, abuse or maltreat children.

Article 19

Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the responsibilities, rights and freedom set forth in this Declaration and in the Universal Declaration of Human Rights of 1948.

QUESTIONS

1. Which if any of the duties in the proposed Declaration cause you concern from the perspective of weakening or even contradicting basic human rights norms? Could the UDHR and the proposed Declaration comfortably co-exist?

2. Implicit in the Declaration are objections to a universal declaration cast dominantly in the language of rights. Could those objections be met by reformulation of some of the rights? Or do the objections challenge the very language, the intrinsic properties, of rights?

COMMENT ON COMPARISONS BETWEEN RIGHTS AND DUTIES IN THE AFRICAN CHARTER AND IN OTHER HUMAN RIGHTS INSTRUMENTS

The newest, the least developed or effective (in relation to the European and Inter-American regimes), the most distinctive and the most controversial of the three established regional human rights regimes involves African states. In 1981 the Assembly of Heads of States and Government of the Organization of African Unity adopted the African Charter on Human and Peoples' Rights. It entered into force in 1986. As of March 2000, 53 African states were parties.

The present discussion of the Charter emphasizes the distinctive attention that the African system gives to duties as well as rights. (The American Declaration on the Rights and Duties of Man, p. 869, *infra*, includes ten articles on individual duties. The American Convention on Human Rights does not give special attention to duties.) This distinctive emphasis is obvious on the face of the African Charter, even before one considers any elaboration or application of the provisions on duties by the African Commission. You should now become familiar with the provisions of the Charter set forth in the Annex on Documents. Other aspects of the Charter, and of the role of the Commission created by it, are discussed at pp. 920–937 *infra*.

The Charter's Preamble itself suggests some of the striking differences from other human rights instruments, universal and regional. Its key theme is regional cultural distinctiveness, as when it refers to '[t]aking into consideration the virtues of [African states'] historical tradition and the values of African civilization'.

Rights

Consider first Chapter 1 of Part I, dealing with 'human and peoples' rights'.

1. Compare the important opening provisions (Articles 1 and 2) of the Charter on the obligations of states with the analogous provisions in Article 2 of the ICCPR.

2. Several of the rights are expressed in ways that differ in wording from equivalent provisions in other instruments but that amount in the large to a similar conception. See, for example, Article 4.

3. Many rights are expressed in significantly different ways from the equivalent provisions in, say, the ICCPR. Compare, for example, Article 7 of the Charter on criminal procedure with Articles 14 and 15 of the ICCPR; and Article 13 of the Charter on political participation with Article 25 of the ICCPR. Note the respects in which Article 25 is more specific.

4. The protection of the property right in Article 14 recalls Article 17 of the UDHR but finds no equivalent in the ICCPR. The European Convention as first drafted included no such provision, but its First Protocol extends protection to the property right.

5. Some provisions state familiar norms, but illustrate them or make them specific in ways that recall Africa's experience with the Western slave trade and

with colonization. They bear out the phrase in the Preamble quoted above. See, for example, Articles 5, 19 and 20. Other provisions refer to abuses in Africa's own post-colonial history, such as Article 12(5) that recalls Uganda's expulsion of its citizens of Asian descent.

6. A number of provisions draw attention to the attempts of the states to reconcile humane treatment of individuals with their interests in territorial integrity and security. See for example, Article 23(2).

7. Compare the characteristic limitations on rights in the Charter with those in the ICCPR. See, for example, Articles 18(3) and 22(2) of the ICCPR. Compare with them Article 6 of the Charter, assuring the right to liberty 'except for reasons and conditions previously laid down by law'; Article 8 providing that freedom of conscience and religion are 'subject to law and order'; and Article 10 declaring the right to free association 'provided that [the individual] abides by the law'. See also Articles 11 and 12(2).

8. Note that the Charter has no provision for derogation of rights in situations of national emergency, equivalent to Article 4 of the ICCPR.

9. The Charter includes economic-social rights as in Articles 15 and 16, but does not qualify these rights with respect to their progressive realization and with respect to resource constraints to which the rights are subject, as does Article 1 of the International Covenant on Economic, Social and Cultural Rights.

10. The Charter includes several collective or peoples' rights, sometimes referred to as 'third-generation' human rights, in provisions like those in Articles 23 and 24 dealing with peoples' rights 'to national and international peace and security' and 'to a generally satisfactory environment favourable to their development.' The Charter's title itself signals the importance of this feature.

Duties

Consider now the distinctive Chapter 2 of Part I, on 'duties'. As prior materials in this chapter stress, references to 'duties' are not alien to human rights instruments: Article 29 of the UDHR, the preamble to the ICCPR, indeed the preamble to the UN Charter itself.

Nonetheless, the Charter is the first human rights treaty to include an enumeration of, to give forceful attention to, individuals' duties. In this respect, it goes well beyond the conventional notion that duties may be correlative to rights, such as the obvious duties of states that are correlative (corresponding) to individual rights—for example, states' duties not to torture or to provide a structure for voting in political elections. The Charter also goes beyond correlative duties of individuals that many human rights instruments explicitly or implicitly impose—for example, an individual's right to bodily security imposes a duty on other individuals not to invade that right. The Charter differs by defining duties that are not simply the 'other side' of individual rights, and that run from individuals to the state as well as to other groups and individuals. Hence the Charter directly raises the issues of universalism and cultural relativism that are addressed in Part B of this chapter and in Chapter 6.

Depending on their interpretation and their possible application within the

African human rights regime, the duties declared in the Charter could constitute part of the deep structure of the society contemplated by that instrument. For example, they could determine in basic ways the relationships between the individual on the one hand, and society and state on the other. They could resolve in specific ways the tension between the individual and the collective. They could contradict some provisions in the Charter's preceding elaboration of rights.

Note some of the vital phrases in Articles 27-29. Article 27 refers to duties towards one's 'family and society, the State and other legally recognized communities and the international community'. Rights are to be exercised with 'due regard to the rights of others, collective security, morality and common interest'.

The language of Article 29 is striking. Note such phrases as the 'harmonious development of the family', 'cohesion and respect', 'serve the national community', 'not to compromise the security of the state', 'strengthen social and national solidarity', 'strengthen positive African cultural values in [one's] relations with other members of the society', and 'contribute to the best of [one's] abilities . . . to the promotion and achievement of African unity'.

This theme of solidarity appears also in the African Charter's definitions of rights. Article 10(2) protects individuals against being compelled 'to join an association', but '[s]ubject to the obligation of solidarity provided for in Article 29'. Article 25 provides that states must 'promote and ensure through teaching, education and publication' respect for the rights declared and to assure that such rights 'as well as corresponding obligations and duties are understood'.

That is, depending on their interpretation and application, duties and ideals of solidarity may impinge in clear and serious ways on the Charter's definitions of rights themselves. Moreover, the Charter imposes individual duties not only on the state but also on different groups or communities within (or perhaps transcending) that state.

Consider some of the problems raised by these provisions about individual duties:

1. Sometimes what appear to be conventional terms of reference may bear plural meanings that affect the nature of the duty. For example, what definition applies to the word 'family' in Article 27—the nuclear or extended family? In the African context, one might think of the extended family. Nonetheless, the only specific reference to family relationships in the three articles on duties deals with parents and children (Article 29(1)).

Or how are we to understand 'society' in Article 27—as referring to the nation state, or to prevailing social and cultural structures within the state? It is striking that the article does not mention or seem to include ethnic groups, for they are frequently not 'legally' recognized.

2. As in the other two articles on duties, the requirements put on the individual by Article 28 raise the question of whether, and by whom, these duties are to be enforced. Who or what institution is to give meaning and application to them, or even provide general guidance for their performance? To the present, the African Commission has taken no steps toward interpretation or general elaboration of the provisions on duties. The question remains open whether the three articles are to constitute in some sense 'binding' and enforceable obligations.

3. The duties are of such breadth and so ambiguous in their connotations that a regime of serious enforcement without some degree of prior elaboration is difficult to imagine. Consider, for example, Article 28's provision that non-discrimination is not simply a duty of the state, but individuals also must not discriminate against other individuals. The article does not list any forbidden grounds for discrimination. Nor does it on its face distinguish between discrimination in the so-called private and public spheres—that is, discrimination in personal social relationships, and in employment or housing.

4. Article 29 raises a host of such issues, none more salient than the question whether it imposes on individuals a duty to uphold extant, traditional structures ranging from the family to the government. The critical terms seem to be 'harmonious', 'cohesion', 'community', 'security', 'social and national solidarity', 'territorial integrity', 'positive African cultural values', 'moral well-being of society', and last but not least, 'African unity'. How are these injunctions to be reconciled with the rights earlier declared?

Consider the following analysis of duties and their relationships both to rights and to African tradition and culture.

MAKAU MUTUA, THE BANJUL CHARTER AND THE AFRICAN CULTURAL FINGERPRINT: AN EVALUATION OF THE LANGUAGE OF DUTIES

35 Va. J. Int. L. 339 (1995), at 344

... In the West, the language of rights primarily developed along the trajectory of claims against the state; entitlements which imply the right to seek an individual remedy for a wrong. The African language of duty, however, offers a different meaning for individual/state-society relations: while people had rights, they also bore duties. The resolution of a claim was not necessarily directed at satisfying or remedying an individual wrong. It was an opportunity for society to contemplate the complex web of individual and community duties and rights to seek a balance between the competing claims of the individual and society.

The principles and ideals common to all these conceptions are, according to the author's own observations of various African societies, respect for, and protection of, the individual and individuality within the family and the greater socio-political unit; deference to age because a long life is generally wise and knowledgeable; commitment and responsibility to other individuals, family, and community; solidarity with fellow human beings, especially in times of need; tolerance for difference in political views and personal ability; reciprocity in labor issues and for generosity; and consultation in matters of governance. As aptly put by Cohen, many African cultures value the group—one should never die alone, live alone, remain outside social networks unless one is a pariah, insane, or the carrier of a feared contagious disease. Corporate kinship in which individuals are responsible for the behavior of their group members is a widespread tradition. But in addition, the individual person and his or her dignity and autonomy are carefully protected

in African traditions, as are individual rights to land, individual competition for public office, and personal success.

...

This conception, that of the individual as a moral being endowed with rights but also bounded by duties, proactively uniting his needs with the needs of others, was the quintessence of the formulation of rights in pre-colonial societies. It radically differs from the liberal conception of the individual as the state's primary antagonist. Moreover, it provides those concerned with the universal conception of human rights with a basis for imagining another dialectic: the harmonization of duties and rights...

While it is true that no culture is static, and that normative cultural values are forever evolving, it is naive to think that a worldview can be eroded in a matter of decades, even centuries. Why should the concession be made that the individualist rights perspective is 'superior' to more community-oriented notions? As Cobbah has noted, 'in the same way that people in other cultures are brought up to assert their independence from their community, the average African's worldview is one that places the individual within his community'.

...

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

...

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

real. Political elites as well as the common citizenry, each in equal measure, bear the primary responsibility for avoiding societal collapse and its devastating consequences.

The African Charter provides an example of an indirect duty in article 27(2), which states that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'...

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

...

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

...It is now generally accepted that one of the strikes against the pre-colonial regime was its strict separation of gender roles and, in many cases, the limitation on, or exclusion of, women from political participation. The discriminatory treatment of women on the basis of gender in marriage, property ownership, and inheritance, and the disproportionately heavy labor and reproduction burdens were violations of their rights.

However, these are not the practices that the Charter condones when it requires states to assist families as the 'custodians of morals and traditional values'. Such an interpretation would be a cynical misreading of the Charter. The reference is to those traditional values which enhanced the dignity of the individual and emphasized the dignity of motherhood and the importance of the female as the central link in the reproductive chain; women were highly valued as equals in the process of the regeneration of life. The Charter guarantees, unambiguously and without equivocation, the equal rights of women in its gender equality provision

by requiring states to 'eliminate every discrimination against women' and to protect women's rights in international human rights instruments. Read in conjunction with other provisions, the Charter leaves no room for discriminatory treatment against women.

...

...[C]ritics who question the value of including duties in the Charter point only to the theoretical danger that states might capitalize on the duty concept to violate other guaranteed rights. The fear is frequently expressed that emphasis on duties may lead to the 'trumping' of individual rights if the two are in opposition. ...

...

This Article is not intended to dismiss concerns about the potential for the misuse of the duty/rights conception by political elites to achieve narrow, personal ends. However, any notions are subject to abuse by power-hungry elites. There is no basis for concluding that the duty/rights conception is unique in this respect. While it is true that the pre-colonial context in which the conception originally worked was small in scale and relatively uncomplicated, the argument made here is not about magnitudes. Instead, the ideals that can be distilled from the past are the central thrust of this argument. Is it possible to introduce in the modern African state grassroots democracy, deepening it in neighborhood communities and villages in the tradition of the pre-colonial council of elders? Can the family reclaim its status as the basic organizational political unit in this re-democratization process? Is it possible to create a state of laws—where elected officials are bound by checks and balances—as in the days of the old where chiefs were held accountable, at times through destooling? Can the state and the family devise a 'social security' system in which the burden of caring for the aged and the needy can be shared? Is it possible to require individuals to take responsibility for their actions in matters relating to sexuality, community security, and self-help projects in the construction of community schools and health centers, utilizing concepts such as harambee, the Kenyan slogan for pulling together? ... These are the typical questions that the new formulation of human rights must ask in the context of recreating the African state to legitimize human rights on the continent.

... Part of the reason for the failure of the post-colonial state to respect human rights lies in the seemingly alien character of that corpus. The African Charter's duty/rights conception is an excellent point of departure in the reconstruction of a new ethos and the restoration of confidence in the continent's cultural identity. It reintroduces values that Africa needs most at this time: commitment, solidarity, respect, and responsibility. Moreover, it also represents a recognition of another reality. Individual rights are collective in their dimension. 'Their recognition, their mode of exercise and their means of protection' is a collective process requiring the intervention of other individuals, groups, and communities. The past, as the Africans of the old used to say, is part of the living. It ought to be used to construct a better tomorrow.

QUESTIONS

1. Does Mutua's article (a) explain and seek to justify in terms of African history and culture the relevant provisions of the Charter, or (b) seek to reconcile those provisions with the human rights movement, or (c) both? Do you believe that he succeeds in the second task? Does he suggest that the West and Africa should in some respects go their separate ways, or that Africa has indeed much to teach the West about the directions of its own rights-oriented thought?

2. Does the Charter protect an advocate of radical reform who seeks significant changes in her state with respect to gender relationships or the character of the family? How, for example, would you reconcile the provisions of Article 29 with Article 18, to the effect that the state should 'ensure the elimination of every discrimination against women'? How would you state your argument for the supremacy of Article 18? Are you persuaded by Mutua's argument?

3. What effect might Articles 27–29 have on the Charter's provisions for speech and association, which are the very conditions of effective political participation? Are Mutua's views here helpful?

4. 'Whatever the African Charter says, African states like all states are subject to the universal human rights system of the UDHR and the two basic Covenants. If there is a conflict, if this regional regime requires or permits state conduct that universal norms prohibit, those norms must prevail. Else the "universal" human rights movement collapses into regional anarchy'. Comment.

NOTE

As prior readings underscore, rights as a fundamental language of law, politics and morals grew within and are associated with the Western liberal tradition. This is not, however, to say that the claims, interests, values and ideals expressed through rights language in the basic human rights instruments are exclusive to the Western liberal tradition. Many of them, as we have seen, may be expressed through other languages as well—for example, the language of duty and responsibility.

To place the basic instruments in historical context, and as background for the discussion of cultural relativism in Section B, it will be helpful to have in mind some notions about liberal political thought and the liberal state. The following Comment sketches basic characteristics.

COMMENT ON SOME CHARACTERISTICS OF THE LIBERAL POLITICAL TRADITION

Observers from different regions and cultures can agree that the human rights movement, with respect to its language of rights and the civil and political rights that it declares, stems principally from the liberal tradition of Western thought.

ADDITIONAL READING

On theories of rights see the following collections: M. Ishay (ed.), *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (1997); J. Waldron (ed.), *Theories of Rights* (1984); C. Nino (ed.), *Rights* (1992); D. Boaz (ed.), *The Libertarian Reader* (1997). In relation to duties see: D. Selbourne, *The Principle of Duty* (1994); and F. Van Hoof, 'A Universal Declaration of Human Responsibilities: Far-Sighted or Flawed', in M. Bulterman, A. Hendriks, and J. Smith (eds.), *To Baehr in Our Minds* (1998), at 55.

On liberalism see: H. Laski, *The Rise of Liberalism* (1936); G. De Ruggiero, *The History of European Liberalism* (1927); N. Rosenblum (ed.), *Liberalism and the Moral Life* (1989); M. Sandel (ed.), *Liberalism and its Critics* (1984); C. Taylor, 'What's Wrong with Negative Liberty', in A. Ryan (ed.), *The Idea of Freedom* (1979), at 175. More generally see R. Rorty, *Contingency, Irony, and Solidarity* (1989); R. Unger, *Democracy Realized* (1998); A. Gewirth, *The Community of Rights* (1998); and C. Nino, *The Ethics of Human Rights* (1991).

B. UNIVERSALISM AND CULTURAL RELATIVISM

COMMENT ON THE UNIVERSALIST-RELATIVIST DEBATE

The question of the 'universal' or 'relative' character of the rights declared in the major instruments of the human rights movement has been a source of debate and contention from the movement's start. These alternative understandings of the character of human rights have been cast in different but related ways—for example, 'absolute' rights (compare 'universal') as opposed to 'contingent' rights (compare 'relative'), or imperialism in imposing rights (compare 'universal') as opposed to self-determination of peoples (compare 'relative'). The contest between these positions took on renewed vigor as the human rights movement slowly developed, and in important respects weakened, earlier understandings of the scope of national sovereignty and of domestic jurisdiction that had enjoyed greater strength. Indeed, significant links have developed over the decades between some of the claims associated with cultural relativism and claims of sovereign autonomy for a state to follow its own path.

Put simply, the partisans of universality claim that international human rights like rights to equal protection, physical security, free speech, freedom of religion and free association are and must be the same everywhere. This claim applies at least as to the rights' general content, for advocates of the position that rights are universal must concede that many basic rights (such as the right to a fair criminal trial) allow for culturally influenced forms of implementation or realization (i.e., states are not required to use the Anglo-American jury to assure a fair trial; states need not follow any one particular voting system to meet the requirement of a government that represents the will of the people).

Advocates of cultural relativism claim that (most, some) rights and rules about morality are encoded in and thus depend on cultural context, the term 'culture'

often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures. Hence notions of right (and wrong) and moral rules based on them necessarily differ throughout the world because the cultures in which they take root and inhere themselves differ. This relativist position can then be understood simply to assert as an empirical matter that the world contains an impressive diversity in views about right and wrong that is linked to the diverse underlying cultures.

But the strong relativist position goes beyond arguing that there is—as a matter of fact, empirically—an impressive diversity. It attaches an important consequence to this diversity: that no transcendent or transcultural ideas of right can be found or agreed on, and hence that no culture or state (whether or not in the guise of enforcing international human rights) is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with it. In this strong form, cultural relativism necessarily contradicts a basic premise of the human rights movement.

On their face, human rights instruments (which in their treaty form mean to impose legal obligations, to convert moral rules into legal rules) are surely on the 'universalist' side of this debate. The landmark instrument is the *Universal Declaration of Human Rights*, parts of which have clearly become customary international law. The two Covenants, with numerous states parties from all the world's regions, also speak in universal terms: 'everyone' has the right to liberty, 'all persons' are entitled to equal protection, 'no one' shall be subjected to torture, 'everyone' has the right to an adequate standard of living. Neither in the definitions of rights nor in the limitation clauses (such as limitations of rights because of public order or policy or public health) does the text of these basic instruments make any explicit concession to cultural variation. (The regional instruments examined in Chapter 10, and particularly the aspects of the African Charter on Human and Peoples' Rights examined at p. 354, *supra*, do express an important degree of cultural variation.)

To the relativist, these instruments and their pretension to universality may suggest primarily the arrogance or 'cultural imperialism' of the West, given the West's traditional urge—expressed for example in political ideology (liberalism) and in religious faith (Christianity)—to view its own forms and beliefs as universal, and to attempt to universalize them. Moreover, the push to universalization of norms is said by some relativists to destroy diversity of cultures and hence to amount to another path toward cultural homogenization in the modern world. But the debate between these two positions follows no simple route. It is open to a range of views and strategies that the materials in this Section B explore at a general and theoretical level—and that the case studies in Chapter 6 further probe.

During the Cold War, such debates (sometimes no more than highly politicized accusations, routine polemics) were dominantly between the Communist world (and its sympathizers) and the Western democracies. The Western democracies charged the Communist world with violating many basic rights, particularly those of a civil and political character. That world replied both by charging the West with violations of the more important economic and social rights, and by asserting that

the political and ideological structures of Communist states pointed toward a different understanding of rights.

That debate died more-or-less together with the Soviet Union, though some of its themes survive in different form. Today the universal-relative debate takes place primarily in a North-South (or West-East) framework between developed and less developed countries, or in a religious (West-Islam) framework. It also includes nonstate actors such as indigenous peoples.

NOTE

The three introductory readings come out of the rich anthropological literature on culture and cultural relativism. Anthropologists have long had to wrestle with these issues, in the context of their ethnographic writings about diverse cultures whose practices and values depart radically from the West. Often those practices would be subject to serious moral criticism from the perspectives of Western thought. The anthropological writings have sought primarily to describe, explain, and understand the alien culture, within the framework of one or another theoretical perspective or methodology. They have not historically sought to pass judgement on the practices involved, to condemn or praise even as they describe.

Thus the role of the anthropologist has traditionally been very different from that of the human rights investigator who monitors and reports and the human rights advocate who works to arrest the described violations. To be sure, investigators and advocates may also seek to understand and to describe the cultural contexts in which they are working. But those working with the large international human rights organizations characteristically combine their description with moral and legal assessment of a given state's conduct against international human rights standards. They will in appropriate cases condemn the state's conduct and urge the state or others to take corrective or coercive measures. Their work is inherently judgmental, normatively based. They seek to vindicate and advance the human rights movement.

As noted in the readings, the traditional anthropologists' approach to these questions has come under recurrent challenge. Questions have been raised about the appropriate stance of the anthropologist toward practices and values that are offensive from a Western viewpoint. Ought she to be critical of them, or on the contrary be tolerant and accepting, or simply be distant and neutral while in the role of observer and explainer. If critical, under what standards would she criticize?

Most of the anthropological debate on such issues developed before the international human rights movement became prominent in the 1970s, and makes no reference to that movement. The Statement on Human Rights, p. 372, *infra*, is an exception to this observation. Moreover, bear in mind in the following readings that the human rights movement addresses primarily states—and primarily individuals' rights against the state—whereas ethnographic writings involve primarily peoples or tribes or societies, which may be nonstate (often sub-state) entities or which in any event are objects of study distinct from the political organization and political acts of the state itself.

ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY

(1983), at 8

... Herskovits wrote that cultural relativism developed because of

the problem of finding valid cross-cultural norms. In every case where criteria to evaluate the ways of different peoples have been proposed, in no matter what aspect of culture, the question has at once posed itself: 'Whose standards?' ... [T]he need for a cultural relativistic point of view has become apparent because of the realization that there is no way to play this game of making judgments across cultures except with loaded dice.

Ethical relativism is generally conceived as standing at the opposite pole from absolutism, which is the position that there is a set of moral principles that are universally valid as standards of judgment. One absolutist ethical theory is the traditional Christian view that right and wrong are God-given, and that all people may be judged according to Christian values. A wide range of purely secular ethical theories have also developed ...

It is the *content* of moral principles, not their existence, that is variable among human beings. It seems that all societies have some form of moral system, for people everywhere evaluate the actions of kinsmen, neighbors, and acquaintances as virtuous, estimable, praiseworthy, and honorable, or as unworthy, shameful, and despicable. These evaluations take objective form as sanctions, such as open praise or rebuke; and in extreme cases, violence and execution. The ubiquity of the moral evaluation of behavior apparently is a feature which sets humanity apart from other organisms. ...

Chapter 4. The Call for Tolerance

... By and large ethical relativists have been anthropologists and not philosophers, and it is chiefly in the anthropological literature that we find arguments in its favor. Two people in particular have stood out as its proponents in the United States, Melville Herskovits and Ruth Benedict, both of whom were students of Boas. Almost without exception, the philosophers are disapproving, for usually they mention ethical relativism only to criticize it while in the course of arguing some other ethical theory.

At least two very different versions of ethical relativism have been advanced by anthropologists, and these need to be distinguished since they have their own faults and virtues. The first is sometimes classified (erroneously, as we shall see) as a form of skepticism, and I will call it the Boasian version of ethical relativism. ... Skepticism in ethics is the view that nothing is really either right or wrong, or that there are no moral principles with a reasonable claim to legitimacy. It has been suggested that the Boasian position differs from this on one main point: Boasian relativism implies that principles of right and wrong do have some validity, but a very limited one, for they are legitimate only for the members of the society in

which they are found. The values of the American middle class are valid for middle-class Americans, but not for the Trobriand Islanders, and vice versa.

Philosophers have presented a wide range of arguments against Boasian ethical relativism. . . . According to this argument, Boasian relativism is in essence a moral theory that gives a central place to one particular value. . . . It contains a more or less implicit value judgment in its call for tolerance: it asserts that we *ought* to respect other ways of life. . . . Herskovits wrote: 'The very core of cultural relativism is the social discipline that comes of respect for differences—of mutual respect. Emphasis on the worth of many ways of life, not one, is an affirmation of the values in each culture.

. . . The call for tolerance was an appeal to the liberal philosophy regarding human rights and self-determinism. It expressed the principle that others ought to be able to conduct their affairs as they see fit, which includes living their lives according to the cultural values and beliefs of their society. Put simply, what was at issue was human freedom.

The call for tolerance (or for the freedom of foreign peoples to live as they choose) was a matter of immediate, practical importance in light of the pattern of Western expansion. As Western Europeans established colonies and assumed power over more and more of the globe, they typically wanted both to Christianize and civilize the indigenous peoples. Christian rituals were fostered or imposed, and 'pagan' practices were prohibited, sometimes with force. The practice of plural marriage was condemned as a barbaric custom, and Western standards of modesty were enforced in an attempt to improve morals by covering the body. In the Southwest of North America, Indians who traditionally had lived in scattered encampments were made to settle in proper villages like 'civilized' people. The treatment of non-Western societies by the expanding nations of the West is a very large blot on our history, and had the Boasian call for tolerance—and for the freedom of others to define 'civilization' for themselves—been heard two or three centuries earlier, this blot might not loom so large today.

. . . To develop a moral theory around the principle of tolerance raises the need to justify that principle: what reasons or grounds can be given to make the case that cultural differences ought to be respected? . . . The relativists make the error of deriving an 'ought' statement from an 'is' statement. To say that values vary from culture to culture is to describe (accurately or not) an empirical state of affairs in the real world, whereas the call for tolerance is a value judgment of what ought to be, and it is logically impossible to derive the one from the other. The fact of moral diversity no more compels our approval of other ways of life than the existence of cancer compels us to value ill-health.

Let us assume that we do find a set of values shared by all cultures. Would the relativist want to claim that these moral principles are legitimate ones for the world to embrace? What if the universal standard we discover is that all people are intolerant of other cultures—which is not very far-fetched? Clearly the ethical relativists would not throw aside their value of tolerance, but they would be forced to recognize that it is an error to think that the presence or absence of universal

values among human cultures is a suitable base on which to build a moral philosophy.

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Chapter 5. The Limits of Tolerance

The Boasian version of ethical relativism is subject to even harsher criticism . . . in its commitment to the status quo. The approval it enjoins seems to be absolute, leaving no room for judgment . . .

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The moral principle of tolerance that is proposed by Boasian relativism carries the obligation that one cannot be indifferent toward other ways of life—it obligates us to approve what others do. So if missionaries or government officials were to interfere in Yanomamo affairs for the purpose of reducing violence, the relativist would be obligated to oppose these moves in word if not action. Similarly, by the strict logic of relativism, Chagnon was wrong to insist that the mother feed her emaciated child. The Boasian relativist is placed in the morally awkward position of endorsing the infant's starvation, the rape of abducted women, the massacre of whole villages . . .

Chapter 6. A Growing Disaffection

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We can now understand why ethical relativism has fallen on such hard times in spite of the resurgence of pessimism during the 1960s and later. First, it has been the experience of most anthropologists that non-Western peoples (and especially Third World nations) want change, at least to some extent; second, it is clear that they are often disadvantaged if it does not come; third, anthropologists by and large have altered their thinking about the relativity of material interests and improvement: most today consider these to be general values that can be applied throughout the world.

Not only has relativism fallen on hard times, it has become the subject of angry criticism, much of it from the Third World, which tends to conceive anthropologists as conservative in their attitudes toward change and therefore as promoting the subservience of the underdeveloped nations. . . .

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Whatever the cause, according to the radical critique, relativism has played directly into the hands of the oppressors throughout the world by its tacit support of the status quo. The relativists have not recognized that the exotic cultures to which they grant equal validity are poverty-stricken, powerless, and oppressed. William Willis comments that the relativist 'avoids the distress and misery' of foreign peoples who are 'cringing and cursing at the aggressive cruelty' of the Western nations (p. 126). This avoidance of the matter of oppression 'helps explain the lack of outrage that has prevailed in anthropology until recent years'. Willis writes: 'Since relativism is applied only to 'aboriginal' customs, it advises colored peoples to preserve those customs that contributed to initial defeat and subsequent exploitation Hence, relativism defines the good life for colored peoples differently than for white people, and the good colored man is the man of