

## **JOURNAL ARTICLES**

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**Jones, P. (1999). Human rights, Group rights and peoples' rights. *Human Rights Quarterly*. 21(1): 80-107.**

**AIM:** to illuminate the issues underlying two dissenting views on whether group rights can be considered human rights by describing two different approaches through which group rights have been conceptualised;

**Summary:** Responding to the question "can a right of a group be a human right?" Jones outlines two broad viewpoints on the debate:

- (1) Those who conclude that groups can have rights but that these are not human rights; human rights can only be borne by individuals [these academics include: Jack Donnelly, James Graff, Marlies Galenkamp, Jean-Bernard Marie, Johan Nordenfelt, amongst others]
  - This group is divided into two factions:
    - a. The fact that the two are different does not mean that they are antagonistic/ in conflict; some group rights are close compliments of human rights; the two are united by the same underlying values
    - b. Another faction argues that group rights are potentially threatening to individual rights; argue that chief aim of human rights principles (as a Western construct) is to protect individuals from the power of groups;
- (2) And a second group who argues that human rights can be collective and individual; they posit this argument on the basis that most of the "good" and "bads" humans experience as collectives; therefore, restricting human rights to individual units does not reflect the social reality [these analysts include: Herman Burders, Yoram Dinstein, William Felice, Koo VanderWal and Vernon Van Dyk]

Jones presents two ways of conceptualizing group rights. He argues that depending on the conception employed, one may be able to argue that some group rights are human rights or are at least analogous to human rights.

The first conception of group rights is what Jones terms the "collective" conception and stems from the definition of a group right put-forth by Joseph Raz. This mode understands a right to something as having an interest in something but where individual interest does not provide sufficient justification to generate a corresponding duty. Therefore group rights arise when the collective interest are sufficient to impose duties upon others (like a threshold level of interest). Still, the group's interests are no more than can be assigned to its individual members. Jones says that this conception can also be applied to cultural minorities who are joined by a "strong sociological identity" as the "cost and inconvenience" of protecting the minority culture cannot be justified by one individual in the minority alone. Moreover, Jones argues that in this scenario, the moral standing of the group needed to make the rights claim is equal to the moral standing of individuals in the group. Therefore the group's moral claim to respect and well being is based on the significance of claims made as individuals.

The second understanding of group rights is the "corporate" conception which views the collective as a "right bearing individual". Jones argues that the central difference between these two ways of conceptualising group rights is the unit to which moral standing is

ascribed: whereas the “collective” conception gives moral standing to the individual, the “corporate” conception gives moral standing to the group or collective.

The principle claim of Jones’ article is therefore that, if group rights are conceived as corporate rights, they cannot be represented as human rights; but if group rights are conceived as collective rights, then some group rights can be represented either as human rights or as closely akin to human rights. To this end, he argues that corporate rights cannot be human rights because these are held by corporations and not human beings. Moreover, the moral basis for claiming rights as a corporation are different from status of humanity or personhood used as moral foundation for rights claims within the “collective” conception. On the other hand, collective rights can be represented as human rights if they are rights held by individuals and if founded in claims specific to humans.

Jones presents criteria which must be satisfied in order for a collective right to be considered a human right: (1) they are contained in the same “moral family” as human rights, (2) if the right can be ascribed universally to human beings, (3) the rights claim is based on a persons moral status as a human being.

Lastly, Jones argues that there is complementary and not antagonism between collective human rights and individual human rights if interpreted with the “collective” conception since “respect and concern for the individual drive both”. On the other hand, he maintains that corporate rights can compete with rights claims of individuals.

**McDonald, M. (1991). Should communities have rights? Reflections on Liberal individualism. *Can. J. L. & Jurisprudence* 4(2): 217-238.**

**Aim:** To answer the question of whether communities should have rights under a liberal ideological perspective. (McDonald explores this question through theory rather than through an examination of empirical evidence.)

**Summary:** The author begins by posing the question, “Is the liberal position one that is inherently hostile, sympathetic or indifferent to group rights?” (p.217). McDonald outlines how liberalism centres on individuals in all three parts of its theoretical structure (political, justificatory and contextual). Still, he argues that liberalism does not necessarily have to be hostile to collective rights and does so by illustrating a spectrum of attitudes towards collective rights in the liberal democratic society, ranging from sympathetic, guarded endorsement of some group rights, moderate scepticism for the need for group rights, to full-on hostility to group rights. He says that “liberal hostility” to group rights stem from an association of collective rights with totalitarianism and arises from a misunderstanding of the purpose for collective rights towards the protection of minority communities.

McDonald then explains how some collective rights can be endorsed from the liberal perspective. He says that the notion of collective rights is largely incompatible with a classical liberal perspective in which people must consent to have their rights transferred from individual to group. This doesn’t work to protect group rights in most cases where groups are naturally forming (most often acquire membership by birth into groups sharing language, culture, history, etc.). On the other hand, the welfare liberal perspective is compatible with collective rights, in so far as it supports groups which meet the liberal

individualist paradigm. This means that the welfare liberal only extends group rights to those which support the creation of autonomous individuals.

The author concludes with more questions than answers, questioning the foundation of liberalism in which “the individual is the measure of everything” as McDonald asserts that communities are also fundamental units of value which “matter in their own right” (p.237). He concludes by saying that from the liberal perspective, there are only “tragic choices”.

**Newman, D.G. (2004). Collective interests and collective rights. *Am. J. Juris.* 49: 127-163.**

**Aim:** To explore the argument for the existence of collective moral rights by contrasting the way that these rights have been conceptualised by Joseph Raz as compared to John Finnis.

**Summary:**

Newman begins by defining an aggregate interest as: “...an interest that is describable as a function of the individual interest of the members of a collectivity.” He outlines an aggregative conception of collective rights set out by Raz (which Newman terms a “Razian collective right”):

A collective right exists when the following three conditions are met. First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty. <sup>n51</sup>

Newman argues that Raz’s conception of collective rights, based on the idea of individual interest, does not give an adequate or realistic account of a group’s interests. Alternatively, Newman provides Finnis’ conception of the common good as what he considers to be a more powerful explanation of collective interest which can be used to deepen our understanding of collective rights. In contrast to Raz’s conceptualisation of a collective right, Newman argues that the attainment of some group rights actually depend on something deeper than an individual interest in enjoyment of the right; Newman maintains that the fulfilment of some collective rights depends on support from both individual interests *and* collective interests. (A collective interest being defined by Newman as “something that makes a collectivity’s life go better” and which is more aligned with an interest in the common good (p.140))

**Jones, P. (1999). Group rights and group oppression. *Journal of Political Philosophy*, 7(4): 353-377.**

**Aim:** There persists a widely held belief in liberal political philosophy that group rights pose a threat to individuals. In this paper, Jones aims to examine whether something about the nature of group rights justifies this concern.

**Summary:** Jones contends that depending on the way that group rights are being applied and understood, different implications arise for individuals and there are different prospects for group oppression. Similar to in his article, “Human rights, Group rights and peoples’ rights,” Jones begins by distinguishing between two conceptions of group rights: the “collective” conception and the “corporate” conception. He notes a fear held by some that the provision of rights to groups can provide those groups with permission to oppress individuals. There are two dimensions to this fear: (1) danger group rights pose to people *outside* the group; and (2) the danger group rights pose to people *inside* the group. Jones reasons that the collective theory of group rights can be more hazardous to individuals outside the group than inside the group because here “numbers count”. Using the collective conception, the case for an interest grounding a right becomes stronger as more people share the interest and a collective right becomes stronger as more people enjoy that right (“numbers affect both which groups have rights and how weighty their rights are.” p.369). On the other hand, Jones contends that the collective theory is less threatening to individuals within the group (with two exceptions: (a) People have different and conflicting interests on other issues beyond the shared interest giving rise to the group right; (b) the extent of interest in the shared interest differs amongst group members).

Using the corporate conception of group rights, there is less of a threat for individuals outside the group because groups are more likely to confront other groups rather than individuals and because all groups rights are considered equally (the rights of a larger group are not considered weightier than that of a smaller group). However the corporate conception poses more of a threat for individuals within the group because the group can have rights against and over its own members (moral standing is given to the group separately from its members). Thus, Jones argues that by assigning corporate *moral* rights to an involuntary group (part of a group based on culture, history, language, etc.), it possible for the group’s exercise of rights to become oppressive to its own members. This is dangerous because the moral standing of the group can compete with the moral standing of the individual, something which is not possible using the collective conception.

**Kymlicka, W. (1996). *The good, the bad, and the intolerable: minority group rights. Dissent*, summer: 22-30.**

Kymlicka contends that the liberal criticism which argues that group rights are problematic because they subordinate individual freedom and autonomy to groups is overstated and oversimplified. He argues that, in reality, the issue of minority groups and how they should be conceptualised in liberal democracies is far more complex.

He begins by distinguishing between two broad categories of group rights: Claims of a group against the larger society (“external protections”) versus claims of a group against the individual liberty of its own members (“internal restrictions”). Although both of these are claims towards group rights, Kymlicka highlights how both have considerably different implications.

External protections are deemed “Good” group rights and are considered to be more in line with values of a liberal democracy. External protections have to do with intergroup relations, such as the protection of a vulnerable group against decisions of a larger society. Kymlicka therefore suggests that the reservation of land for indigenous peoples (as done in Canada) is

justified as it ensures that these groups are not outbid by the greater wealth of the majority outside the group.

On the other hand, internal restrictions are almost always unjust and are deemed "Bad" group rights. These are rules imposed by the group upon intra-group relations and often involve the restrictions of individual liberty in name of group solidarity. Kymlicka argues that this can result in heightened danger of internal oppression and that legally supported internal restrictions run counter to liberal ideals. Nonetheless, he maintains that bad group rights should be tolerated. At the extreme end, however, "intolerable" group rights support severe infringements upon the basic liberties of group members and are so serious that Kymlicka contends they should not be tolerated.

Kymlicka poses two Questions: (1) Are internal restrictions consistent with liberal principles? No, he says that these are illiberal and unjust; (2) should liberals impose their views on minorities that do not accept some of these principles? To answer the second question, he suggests a consistency test to conclude that it is inconsistent to have different standards for illiberal States and illiberal indigenous groups. Still, Kymlicka favours internal reform over the imposition of group rights consistent with liberal values (negotiation and possibly incentives rather than force or coercion). In terms of the intolerable (gross and systematic violations of human rights, such as genocide, torture, slavery, mass expulsion), he believes that intervention is justified.

In brief, Kymlicka argues for group-specific rights that are consistent with liberalism. Group rights which demand internal protections are often "good" as they serve to strengthen and support individual rights and are consistent with liberal values. Group rights which impose internal restrictions are "bad" and run counter to liberal ideals but are often tolerable, whereas the most severe internal restrictions are "intolerable".

**Narveson, J. (1991). Collective rights? *Canadian Journal of Law and Jurisprudence*, 4(2): 329- 345.**

**Aim:** To provide a defense for the standpoint that collective rights do not exist.

**Summary:** Narveson writes the article from, what he describes as a "radical liberal individualist" perspective. Thus, for Narveson, individual rights are trumps, individuals are the basic explanatory units of social science, all *legitimate* (author's emphasis) group rights are mere derivatives of individual rights, a group or collective only has meaning and value insofar as it is comprised of individuals, while the only rightful norms that can be collectively imposed are those aimed at protecting individuals from each other.

The author argues that collectives are not "naturally endowed" with rights as are individuals (p.330). While Narveson admits that there may be some group rights, he contends that there is no such thing as collective rights. By this, Narveson means that someone may have rights on account of membership to a group or collectivity, but says that there are problems with granting rights to the collective itself, as it implies a forced corresponding duty on individuals (either members or non-members) in order to fulfill these rights. To this end, Narveson states that "no group, no collectivity, has the (positive) 'right to exist' asserted against the outside world" (p.345). He continues to say that while a group has a right not to be interfered with, no group has a right that forces others to help maintain its existence (this

has implications for language and indigenous rights, social welfare, national health insurance, etc.).

## **THESES**

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*[I haven't experienced much success obtaining access to theses that I've identified over the net as being potentially useful. Hopefully the seminar on the 18<sup>th</sup> of August will give some insights]*

**Mushishi, C. (2002). *The role of African Traditional Religion in the promotion of human rights*. Thesis in partial fulfilment of the requirements for the Degree of Master of Arts in Religious Studies. University of Cape Town.**

**Aim:** To examine the role of African traditional religion (ATR) in promotion of human rights in Africa, generally and among the Shona people of Zimbabwe in particular.

[Mushishi's primary focus is on civil and political rights (right to life, equal treatment, individual freedom, expression and religion) and his thesis pays particular attention to how ATR relates to the rights of women and children (=collective rights).]

**Methods:** Data was collected from library resources on the Shona tribal grouping. In particular, Mushishi examined anthropological records on the Shona people, although he acknowledges that these records are likely to be outdated due to the dynamic nature of culture. The author chose to focus on Shona religion because his membership enables him to write "from an insider's perspective" and he speaks of the Shona religion as broadly representing ATR. The literature used in his thesis was restricted to Anglophone Africa and was chiefly focused on Southern Africa (partially due to linguistic limitations).

### **Background:**

ATR is largely an oral religion which increases the difficulty with which it may be researched and analysed. Unlike some other religions requiring an initiation into membership (i.e. Baptism in Christianity), a person is born into ATR and experiences rites of passage to signal different phases of his/her life. Mushishi describes the deep interconnection between religion and politics which is particularly evident in Zimbabwe where religious authorities were considerably involved in the politics of resistance during the liberation movement. He argues that this intertwining of religion and politics "is a human rights issue", as part of the role of traditional leadership is to safe-guard the rights of the community. (p.35)

Mushishi argues that although ATR has been portrayed as being oppressive to women, he argues that it "has a prominent role to play in the ethics and human rights of African people, particularly for the protection of the right to life of children and women. It actually promotes human rights in a very special way." (p.10) Whereas this is indeed an honourable intention and would be an extremely useful investigation, the thesis itself is of questionable scholarship. Mushishi argues unconvincingly using value-laden statements and often fails to substantiate his claims with rigorous evidence. Nevertheless, some of the examples he provides may be useful for our purposes while the thesis itself can support insights of how group rights can contain oppressive elements.

Mushishi says that well before the UDHR, African cultures and traditions dealt with human rights issues through traditional administration. For example, issues relating to "family

crises”, such as divorce or incest, and witchcraft are considered by the author to be human rights issues which are dealt with by ATR.

Examples explained:

Divorce: is considered a family crisis wherein the chief and extended families are involved in deciding whether or not the divorce should be allowed to proceed. Mushishi argues that this method is more protective of human rights as the proceedings are decided by people who have a concern for the couple rather than by strangers. In Shona religion, a man is allowed to divorce if she is found to be a witch, is unfaithful or if she is “barren”. The author continues to argue that ATR protects women’s rights due to the fact that a man is not allowed to divorce his wife for petty issues such as an inability to cook or a disagreement. Mushishi says that women’s rights are further protected by allowing a woman to divorce her husband if he is found to be unfaithful.

Incest: A man found to be molesting his daughter loses all of his cattle in the Shona religion. The author considers this a harsh penalty, akin to modern-day recourse for child molestation. He explains that in pre-colonial times, cattle was equivalent to a man’s wealth and was therefore considered one of the harshest penalties. In addition, because the Shona believed that incest caused drought to the entire territory, the community had to be involved in a process intended to “cleanse” them of the indecency. The child was also taken through a cleansing process which was “to get rid of the traumatic experience” (something the author considers to be similar to emotional rehabilitation).

Witchcraft: Mushishi acknowledges that primarily (if not solely) women are associated with witchcraft. He views the persecution of witches as a trade off between community and individual rights. He explains that, because the chief’s central concern is with the well-being of the community, the chief will attempt to protect community from the “wrath of social misfits”, such as witches. Mushishi says that in his actions to rid the community of witches, the chief is protecting the community’s right to life.

Polygamy: The author recognises polygamy as having both positive and negative aspects. The positive aspect being the possession of what John Mbiti calls “corporate existence”, as large polygamous families can assist each other to prevent famine and devastation from misfortune. In this manner, polygamy raises the social status of the family and improves chances of maternal and child survival.

Physical abuse: Mushishi describes how Shona traditional ethics do not allow a man to beat his wife as this act is viewed as “uncultured, unmanly and even cowardly.” (p.85) When domestic violence is identified, the man will be taken to the “dare” where he is questioned, cautioned and is recommended for marriage counselling. The author also says that Shona ethics are also reflected orally in the saying “amai havarohwe” [a mother must not be beaten in whatever circumstances]. It is believed that this action angers the ancestors, causing the man to become mentally disturbed.

Children’s rights: The author maintains that the African child receives more protection and support from the broader family of the mother than does the Western child who is often confined to a nuclear family unit. For example, Shona ethics instruct through oral tradition that every child must be treated as your own.

Other: The author provides a few other examples which he believes indicate protection of children’s and womens’ rights. For example, a girl child cannot be married without maternal



consent and men are not allowed to sell property without the approval or consultation of his wife. In addition, prominent religious leadership roles are only assigned to women (i.e. as shamans, healers, visionaries, priestesses and prophetesses, etc.)

Conclusion: Mushishi therefore concludes that the protection of children, the community, family life, and women's freedom was a primary concern in Shona ATR.

## **BOOKS**

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**Abbas, H. (2008). *Africa's long road to rights*. In H. Abbas (Ed.), *Africa's long road to rights: Reflections on the 20th anniversary of the african commission on human and peoples' rights* (pp. 1-12). Nairobi, Kenya: Fahamu.**

In spite of a lack of political will on the part of African states to hold each other accountable for human rights violations, Abbas opines that the success of the African Commission lies in the engagement of civil society.

Abbas first outlines the history of the OAU and the African charter, noting the anti-colonial context and history in which both came about as well as the subsequent use of state sovereignty principles to prevent intervention despite grave rights violations. Indeed, cultural relativist arguments were employed to resist implementation of the African Charter in its initial stages. Nevertheless, Abbas contends that the Charter which was adopted in 1981 was both “both universal in character and distinctively African in its scope and principles” (p.2). Despite the existence of a “universal” Bill of Rights, he argues that the Charter has special value because it reflects common interests of a regional bloc, because of the ability regional states to influence each other, and because of the ability to define HR norms using regionally shared values.

Although the principles of the Charter have been widely adopted by African states, the concept of non-intervention and state sovereignty remains entrenched. This statement is supported by the fact that the Commission has only had one inter-state complaint in its existence. Even so, Abbas maintains that the success of the Commission is largely due to its engagement of civil society as the Commission has not limited *who* is able to submit complaints (can be individuals, NGOs, other). Moreover, an NGO forum precedes the official opening of every Commission session with the final communiqué being read to official representatives of states and commissioners during the opening ceremony.

Abbas points to a strong civil society as key to holding state parties accountable for the continued promotion, protection and fulfilment of human rights in Africa. He advocates for popularisation of the regional human rights system and commission rulings. Abbas cautions that the African human rights system and mechanisms for enforcement are at risk of becoming ineffective if they are not put to greater use by civil society and NGOs. On this subject, Abbas states that, “the use of laws creates precedence, the use of advocacy forums generates accountability and the sustained use of mechanisms enhances their powers of enforceability” (p.6). While he acknowledges the importance of a global strategy, Abbas maintains the significance of a complementary African system which embraces and promotes the current HR regime while advancing a regionally tailored approach to human rights.



Abbas therefore supports arguments of Issa Shivji by affirming that “human rights protection and promotion is only as strong as the movement of defenders behind it” (p.8). Abbas concludes to say that “human rights are only as effective as the peoples’ movement spurring it on. Without the consistently active participation of African civil society, the ‘ghettoisation’ of the commission within the AU would have been absolute” (p.10-11).

**Abraham, K. S. (2008). The rights of indigenous people in africa. In H. Abbas (Ed.), *Africa’s long road to rights: Reflections on the 20<sup>th</sup> anniversary of the african commission on human and peoples’ rights* (pp. 12-23). Nairobi, Kenya: Fahamu.**

Abraham describes the historical context through which African states arrived to possess multiple minority ethnic groupings within their territorial boundaries. He describes the current situation wherein African governments are hesitant to acknowledge indigenous populations for fear of ethnic strife and threats to national integrity. (He gives the example of Uganda where all 56 ethnic communities in the country are recognised as “indigenous” within the Ugandan Constitution, thus the concern during a 2006 visit by the Working Group of Experts on Indigenous Populations that a focus on just a few of these communities would be in breach of a Constitutional commitment to equality and threaten territorial integrity).

Abraham argues that failing to recognise historical injustices committed against indigenous groups in the name of national interest is primarily responsible for the denial of indigenous rights. He goes further to say that the denial of indigenous rights on the basis of a “national priorities” argument is flawed. Abrahams bases his argument on the following points:

- (1) Indigenous people make a unique contribution to development and plurality of the state and would reinforce the legitimacy of national processes.
- (2) Indigenous rights are important to extend equality to these often marginalised groups which are usually not reached by the UDHR alone.
- (3) Collective rights have historically been less favoured over individual rights but are central to indigenous peoples. Article 27 of ICESCR has enabled development of group rights internationally and on the continent.

Abrahams says that indigenous peoples in Africa extend beyond place of origin to encompass “lived experience of marginalisation, discrimination, cultural difference and self-identification” (p.18). The author argues in favour of the Working Group on Indigenous Issues in Africa, that because these groups experience a form of discrimination which is felt by other state groups, it is deemed legitimate for them to call for special protection of their rights. In addition, He says that the right of indigenous peoples to self-determination is not a threat to territorial integrity as these groups do not aim to secede; rather, this right can enable recognition of these peoples and empower their involvement in public affairs. (Examples: Katanga v Zaire (1976) – the Katangese people attained a variant of self-determination which enabled inclusion of the marginalised group in state affairs while maintaining territorial integrity. This decision was reiterated in Ogoni v Nigeria decision by the African Commission).

**Musa, R. (2008). Women, equality and the african human rights system. In H. Abbas (Ed.), *Africa’s long road to rights: Reflections on the 20<sup>th</sup> anniversary of the african commission on human and peoples’ rights* (pp. 24-35). Nairobi, Kenya: Fahamu.**

**Aim:** To explore the relationship between the international and regional policy framework on women’s human rights in Africa and investigate where it has been implemented. The

article focuses in particular on the Protocol to the ACHPR on the Right of Women in Africa (the protocol), compares and contrasts it to other instruments.

**Summary:** Musa cites numerous treaties and mechanisms which reiterate a commitment to promote and protect women's rights in Africa. In spite of this, the author maintains that "African women are no better off than when they started" (p.25). The reason for this, Musa believes, is in the lack of political will on the part of African governments to implement their commitments. States which have ratified the protocol have not incorporated its provisions into national law such that it is not enforceable in domestic courts. Moreover, the placement of reservations on key provisions in the protocol undermines its capacity to protect against harmful practices.

Musa provides a brief background to the protocol, highlighting its supplementation to the African Charter. She asserts that women's rights were previously undermined within the Charter where their only reference was contained within a clause highlighting the importance of the family and tradition. Women's rights in international human rights instruments are stated with respect to violations in the public realm but that the gravest violations of women's rights often occur in the private sphere of the family. The Charters emphasis on tradition has therefore been used to justify the violation of women's rights in Africa and the combining of the two into a single clause reinforced the tension between culture and women's rights in Africa. In trying to relieve this tension, the author says that the protocol "recognises women as individual human beings rather than members of communities or families" (p.30).

The protocol essentially draws on CEDAW and BPfA (Beijing Protocol) but is tailored to the African context. Because the protocol was created after these other instruments it had the benefit of hindsight, incorporating the best aspects of existing treaties in addition to issues particularly relevant to women in Africa (i.e. the protocol includes articles relating to widow's and inheritance rights). The protocol is also important as it gives women an additional avenue for recourse in the African Court if cases are unsuccessful at national level and because groups other than the victim can bring cases in front of the court on her behalf (i.e. women's rights NGOs).

**Abbas, H. (2008). An interview with commissioner bahame tom mukirya nyanduga, special rapporteur on refugees and displaced persons in africa. refugees and displaced people in africa. In H. Abbas (Ed.), *Africa's long road to rights: Reflections on the 20<sup>th</sup> anniversary of the african commission on human and peoples' rights* (pp. 38-45). Nairobi, Kenya: Fahamu.**

The principle instrument on refugee law in Africa is the OAU Convention Governing the Specific Aspects of Refugee problems in Africa (1969). This instrument was created within the context of struggle against colonial powers and ethnic conflict. Mukirya Nyanduga therefore emphasises that this regional system was "established in response to particular problems and characteristics of Africa" while not operating as a substitute but in tandem with the international system (p.39).

The African Charter established the right to seek and receive asylum, enjoyed by any individual facing persecution and the right to return to one's own country. The rights of African refugees are also recognised in the Protocol on the Rights of Women and in the Charter on the Rights and Welfare of the Child in Africa. The African human rights system

recognises refugee law as part of human rights law. Notably, several concepts were introduced to international refugee law from the African experience e.g. voluntary repatriation).

**Mindzie, M. A. (2008). Regional protection of child rights in africa. In H. Abbas (Ed.), *Africa's long road to rights: Reflections on the 20<sup>th</sup> anniversary of the african commission on human and peoples' rights* (pp. 46-57). Nairobi, Kenya: Fahamu.**

Under article 24 of the ICESCR, children have a right to special care and protection from their family, society and the state, without discrimination. Mindzie says that children in Africa have traditionally received this protection from their families but that with the modern erosion of communities and the family unit, children are ever greater subject to human rights violations. To address the specific issue of child rights, the OAU (now African Union) developed the and adopted the African Charter on the Rights and Welfare of the Child (ACRWC-1990) and established the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) which serves as the supervising organ of the charter.

The ACRWC was adopted soon after the UN Convention on the Rights of the Child (UNCRC), an event which the author argues was justified given the many compromises made during the adoption of the UN Convention, the limited involvement of African states in the drafting of the UN Convention and its consequent inadequacy for the protection of child rights in Africa. Although the ACRWC maintained some of the principles of the UN Convention (non-discrimination, best interest of the child, life, survival and development of the child and child participation), the African version includes unique features such as:

- Stronger definition of a child
- Prohibition of children's involvement in armed conflict
- Explicit protection for IDP and refugee children
- Protection for imprisoned expectant mothers and mothers of infants or young children
- Protection for girls who become pregnant before finishing their schooling
- Call to eliminate social and cultural practices that affect the welfare, dignity and development of children (such as the use of child beggars, child marriage)
- \*Responsibilities of every child, irrespective of age and ability, towards their family and society, the state and the international community (very unique to the African context)

The Committee of Experts is intended to ensure the promotion and protection of rights in the Charter, to monitor implementation and to interpret provisions in the charter when required by AU member states; however, the Committee has only received 5 state reports and is to consider two complaints alleging violations in Uganda and Kenya. The Committee suffers from insufficient resources needed to fulfil its mandate and there is criticism that the Committee is unnecessary in addition to the Commission. The author therefore contends that the effectiveness of the Committee depends on the AU taking its role and position seriously and the linking of its activities to that of the Commission and the Court. The future power of this Committee, Mindzie believes, lies in its ability to submit cases to the African Court on violations of children's rights in order to secure legally binding outcomes.

**Okafor, O. C. (2007). *The African human rights system: Activist forces and international institutions*. Cambridge: Cambridge University Press.**

**Key terms:**

Okafor uses the expression “activist forces” (rather than “human rights defenders” in which Maria has interest) to refer to “activist judges and civil society actors (CSAs) who openly challenged and challenge aspects of dictatorial rules and continue to fight to ameliorate human rights violations...” (p.2) These individuals are described as activists for their possession of “resistance character.”

The author considers CSAs as constituting a sub-group of activists which include: self-professed human rights CSAs, activist lawyers, women’s groups, faith-based groups, trade unionists, university students, pro-democracy campaigners, radical or dissident politicians, professional groups, independent journalists, and other such actors (doesn’t mention higher education institutions or academics!).

**Summary:**

Okafor highlights the claims of several authors that IHIs (International Human Rights Institutions) are “weak and ineffective”, with the African system considered *weakest* of all. Authors whom Okafor says ‘correctly’ make these statements include: Claude Welch, Emmanuel Bello, Richard Gittleman, Gino Naldi, Obinna Okere and Makau wa Mutua. However, he argues that such arguments are overstated and are heavily focused on the ability of the African system to enforce state compliance. Okafor says that part of the view of the African system as being weak and ineffectual lies in the belief that it should serve as a “human rights panacea”. He contends this is an insufficient barometer against which to measure the success of the African System which, he argues, holds a much more important function.

The author maintains that it is insufficient to measure the success or effectiveness of the African system by its ability to hold states to comply with its rulings and recommendations. He tries to illustrate how the system can make an impact at the local level by affecting the action and thought processes of key domestic institutions of African states. This gives rise to what Okafor terms, the “ACHPR phenomenon”, whereby norms and standards of the African human rights system are used by activist forces to influence the thought and behaviour of key state intuitions to generate favourable outcomes without requiring direct “state compliance”. He shows that the ACHPR phenomenon is best achieved when local activist forces (i.e. CSA in particular) initiate a process of “trans-judicial communication” between the African human rights system (the Court, Commission, Committees) and key sub-state institutions. Through this communication, previously unavailable arguments can become available and gain momentum in domestic institutions. This, in turn, alters “conceptions of interest and self-understandings” within sub-state institutions engaged in the communication. In effect, the public discourses and attitudes of domestic institutions can be considerably influenced through correspondence with the African systems norms and activities, even if the state is not fully compliant. Thus, the African system indirectly brings about change in government conceptions of their responsibilities and the appropriateness of action (i.e. military rule, in the case of Nigeria).

Illustrative cases are provided wherein the African system has impacted on the judicial reasoning and action of domestic institutions. The most evidence comes from Nigeria as Okafor is able to detail several cases where the Charter has been invoked in Court rulings and where the Charter has been considered the highest law of the land. Okafor also points to South Africa where the influence of the African system can be found clearly in domestic case law. The author **concludes** by urging for the extension of the criteria against which the African system is evaluated to include the “ACHRP phenomenon”. On this point, he states

that, "...Even though the African system may not fare well when assessed against the dominant paradigm, [state compliance] it cannot be dismissed on that score alone as altogether irrelevant to the lives of Africans" (p.93). Okafor goes further to say that the evidence presented in his book allude to the critical importance of working at the grassroots level to understand impact of and interaction between IHIs and local agents. He argues that if we restrict our lens to the international viewpoint, discussions which theorize about IHIs are not as well informed.

**Eze, E. C. (1997). Introduction: Philosophy and the (post) colonial. In E. C. Eze (Ed.), *Post-colonial African philosophy: A critical reader* (pp. 1-21). Cambridge, Massachusetts: Blackwell Publishers Ltd.**

Eze says that we can define African philosophy as others have, to include "all intellectual and discursive productions elaborated in Africa and considered 'philosophical' by today's public" (p.2). However, he contends that such a definition fails to account for the historical, cultural and political complexities which have shaped the discipline over time (e.g. what about the contribution of non-African writers? How can we use the term "African" to describe this discipline when within Africa there are many different traditions and cultures contributing philosophic origins?) Eze therefore provides Lucius Outlaw's term "Africana" philosophy as an umbrella term which attempts to capture all which exists under the rubric of "African philosophy" but which acknowledges its historical and cultural range. For Outlaw:

"The range of the universality of the term 'Africana', in its boundaries and 'contents,' coincides with the experiences and situated practices of dispersed geographic race: that is, not a genetically homogenous group but persons and peoples who, through shared lines of descent and ancestry, share a relatively permanent geographical site of origin and development from which descendants are dispersed and, thereby, who share a relatively distinct gene pool that determines the relative frequencies of various physical characteristics, even in the Diaspora." (p.4)

Thus the term "Africana" seems to try and include theses/literature which has been written by non-Africans and that which is written on "Africans" who live outside of Africa (e.g. African-Americans).

Eze says that the book aims to focus on post-colonial African philosophy due to the fact that the "single most important factor that drives the field and the contemporary practice of African/a philosophy has to do with the brutal encounter of the African world with European modernity" (p.4) He describes the European philosophy of pre-colonial and colonial times as depicting Africans as naturally inferior, primitive, unintelligent, savage, lacking morals, social structure and culture. To illustrate these beliefs, Eze draws upon the works of Hume, Kant, Hegel and Marx. From these observations, Eze states that, "the critique of Eurocentrism has become a significant, if 'negative,' moment in the practice of African philosophy." (p.10)

**Amato, P. (1997). African philosophy and modernity. In E. C. Eze (Ed.), *Post-colonial African philosophy: A critical reader* (pp. 71-99). Cambridge, Massachusetts: Blackwell Publishers Ltd.**

**Aim:** To generate a critical discussion of the relationship between tradition and philosophy as it persists within Western philosophical discourses and to move towards a common understanding between African and non-African intellectual traditions.

**Summary:** Amato says that as a precondition to trying to draw understandings between African and Western European cultures, we should try to bring to the fore unquestioned assumptions and prejudgements. He argues that we cannot hope to engage intellectually across cultures (i.e. Western v. African) until we recognize these systemic pre-conceptions that characterise traditions of thought and “dismantle them within as well as from without” (p.72).

Amato attempts to draw out the observation that modernity as a concept has been poorly used by Western thinkers to reflect how they conceive themselves and the “other”. He contends that the hierarchy established by evolutionist thinking in Western philosophy remains entrenched. According to Amato, Western intellectual culture has defined its “Other” as the traditional and non- or pre-modern by presenting its own self-described “modern” horizon as the universal horizon to which all humanity should strive to attain. Therefore rather than accepting African philosophy as a different philosophical tradition with overlapping elements, its existence has been questioned.

In order to move towards a common understanding between African and non-African intellectual traditions, Amato posits that the distinction between Western self- and other- using a modern/traditional dichotomy must stop. He argues that maintaining such a distinction propagates what Amato calls the “myth of a universal human horizon” which subsumes the individuality of other cultural traditions. Instead, Amato believes that this story can be retold in a positive way, as a set of multiple horizons (representing different cultures and different writers) which comprise overlapping ideas on human nature that different intellectual cultures (Western, African, European, American, ect.) create through dialogue. Rather than assuming divergences, Amato says that we should hope for locations where these horizons overlap or converge through pluralistic dialogue. However, in order to reach this point, a priority for philosophy as a discipline must be the removal of social, political and economic barriers which have so far prevented African and other peoples from establishing their own horizons.

**Serequeberhan, T. (1997). The critique of eurocentrism and the practice of african philosophy. In E. C. Eze (Ed.), *Post-colonial african philosophy: A critical reader*. (pp. 140-161). Cambridge, Massachusetts: Blackwell Publishers Ltd.**

**Aim:** To answer the question: “What is the critique of Eurocentrism and how does it relate to the practice of contemporary African philosophy?”

**Summary:**

Serequeberhan states that if there is to be a joint future between the dominant Euro-American scholarship and other philosophical traditions, it is essential to begin through the elimination of “false perceptions”. (p.142) Thus, Serequeberhan sees the criticism of Eurocentrism as the “grounding task” of contemporary African philosophy (p.141). He focuses on the writings of Immanuel Kant to illustrate how to apply such a systematic “deconstructing critique” to classical philosophy texts in the Occidental tradition.

The author maintains that through colonialism, Europe established replicas of itself over the world with “an air of normality” (quoting Edward W. Said, p.144). A general philosophy which reinforced the conception of Europe as the true human existence was perpetuated by Hegel, Marx and others from the writings of Kant and Tempels. Serequeberhan says that this



is the general philosophy with which Europe still views itself but is a myth based on the notion of a single road for human progress (“the imperious notion of Occidental superiority”, p.154). He argues that this was the general philosophy which reinforced the normality of European empire and colonial conquest.

Thus an attempt must be made to overturn the European conception of humanity on which the Western philosophical tradition is grounded. Serequeberhan argues that this “critical negative project” is indispensable to contemporary African philosophy because most African philosophers and “westernized Africans” are schooled in European traditions first. This education, Serequeberhan believes, causes African philosophers to view themselves through a distorted lens. He considers that this critique must therefore be conducted in order for Africans to critically take back this shared heritage without continuing the inheritance of a “defunct intellectual horizon” and domination through a hegemony of ideas. With this, Serequeberhan concludes:

“...we must first recognize and de- structure the speculative metaphysical underpinnings of the Eurocentric constraints that have held us – and still hold us – in bondage. This in my view, is one of the most important and basic tasks of the contemporary discourse of African philosophy; its critical-negative project – the critique of Eurocentrism.” (p. 157)

## **ON UBUNTU**

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**Jansen, J.D. (2009). Knowledge in the blood: Confronting race and the Apartheid past. Stanford, California: Stanford University Press. Pp. 174-194**

Jansen notes that, “Few words evoke more social confusion in South Africa than the term *Ubuntu*” (p. 175). He describes the term as a Zulu word which roughly translates into “humanity” or “humanness” and which has been used to sell books, concerts (see photo) and workshops – essentially to market “humanity for profit”. Jansen details a brief history of *Ubuntu* which was used to mobilise support for the IFP (Inkatha Freedom Party) as well as by Desmond Tutu to advocate “against criminal behaviour and selfish individualism.” According to Jansen, *Ubuntu* has been “naively accepted” to refer to a culture of tolerance and acceptance in the new South Africa.

The author primarily speaks about an undergraduate programme curriculum entitled “*Ubuntu*” at the University of Pretoria (UP), formerly a whites only South African university. *Ubuntu* was a one-semester pre-requisite course for all undergraduate UP students in department of Education in the Faculty of Education and was convened by two academics from the Faculty of Humanities – one senior, white Afrikaaner male professor and one junior female black academic. Jansen details how, on its surface, *Ubuntu* the course seemed targeted at the sensitization of white students to other South African cultures; however, digging a little deeper, Jansen contends that the course reinforced the Apartheid paradigm which conceived the African culture as “primitive, inferior, monolithic, stable and essential in its assumptions about black people” (p.175). The problem with the course was more than could be fixed through dramatic restructuring. Jansen argues that the *Ubuntu* the course illustrates how embedded knowledge is exceedingly difficult to uncover and shift. Moreover, the course is an example of how *Ubuntu* can be used and mis-used in a manner which is un-interrogated.



**Deaf Community of Cape Town (DCCT). Meeting between Parents of Deaf Children and National and Provincial Government Education Department. Claremont Civic Centre, Main Rd. Claremont 19 June 2010. [Transcript of Indaba Programme]**

**6. Western Cape Premier: Honourable Premier Helen Zille**

*Mrs. Helen Zille:*

...“But I want to say this. It is not just a question of building schools. It’s what’s happening inside school that matters. We heard today some parents say, thank you to my caring school that has helped my child. And I say thank you to those schools as well. But we have heard from parents of Nolutando who are telling me a different story. Now I never make a judgment until I see for myself. So I will go to that school. I will do more than visit that school. I will investigate the education at the school. So it is not possible that children who are bright and capable can go to school and only come out doing hairdressing. But let me see for myself and let me investigate and get entire truth...

“But there is very strange thing. We talk a lot about *ubuntu* in this country. And I find that places where we expect it the most we see it the least. It has become a term about doing the easiest possible things and not doing right, having no accountability. But it is very good to report problems, which is not about being a spy (impipi) *Ubuntu* is about speaking up and setting things right. Not about covering things up and saving our behinds. Unfortunately, that is what *ubuntu* has come to mean in our society...

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## **DOMESTIC CASE LAW**

[some of the following cases have been found in: Viljoen, F. (1999). Application of the African Charter on Human and Peoples’ rights by the domestic courts in Africa. *Journal of African Law*, 43:1-17; the book by Okafor; and <http://www.saflii.org/za/cases/ZACC/> ]

### **Nigeria**

*Muojekwu and others v Ejikeme and others*

In this case, a group of Nnewi Igbos aimed to inherit a family’s estate because the family had no male child successor to inherit these assets. The Court of Appeal in Nigeria relied on Article 18 of the Charter (providing for the elimination of discrimination against women) to conclude that this custom of inheritance discriminated against women under the Nigerian constitution and the African Charter and could not be used by the Nnewi Igbos. Here we see how the rights of two “collectives”, when pitted against each other, were resolved using the African human rights system (right to culture and tradition of the Nnewi Igbos versus the right to non-discrimination of women).

### **South Africa**

Although South Africa ratified the African Charter in 1996, section 231 of the SA Constitution provides that international agreements bind the country only after approved by resolution

from both Houses of Parliament while international agreements only form part of South African law when enacted as domestic law by parliament. The Charter is therefore not *formally* binding in domestic courts. Nevertheless, South African courts have invoked the Charter in several instances to strengthen their final judgements. Of note, section 39(1)(a) of the Constitution instructs courts to consider international treaties like the Charter for interpretation of the Constitution while section 233 of the Constitution, “Enjoins every court to prefer any reasonable interpretation of the legislation that is consistent with international law instead of any alternative interpretation this is inconsistent with international law.”

Several cases have used articles of the Charter relating to *individual rights* and include the following:

- *State v. Makwanyane* (1995) 6 BCLR 665 (Constitutional Court) which invoked African Charter’s prohibition of arbitrary deprivation of life;
- *State v. Williams* (1995) 7 BCLR 861 and (1995) SACLR LEXIS 249 which used the African Charter to legitimize its ruling against the use of torture and cruel, inhuman, and degrading treatment or punishment when the Constitution was still in draft form;
- *State v Viljoen* wherein the High Court of Transvaal employed article 7(1) of the Charter in its decision;
- *Hoffman v. South African Airways* wherein Ngcobo J drew upon the Charter’s provisions regarding non-discrimination;
- *Samuel Kaunda and Others v. President of the Republic of South Africa and others* (2004) 10 BCLR 1009 (Constitutional Court)

South African citizens were being detained in Zimbabwe for extradition to Equatorial Guinea for the crime of being involved in a planned coup against the president of that country. The South Africans were requesting South Africa to seek diplomatic assurances from Zimbabwe that Equatorial Guinea (EG) would not subject them to the death penalty or other human rights violations, would not extradite them to EG and would release them to South Africa.

In this case, the Charter was employed to strengthen the judgements of several Constitutional Court judges involved. The majority of which concluded that while the right to diplomatic protection is included in the SA Constitution, it is not contained in the African Charter or the UDHR and therefore cannot be used by SA citizens in every case who face the death penalty in foreign countries. However, the majority ruling also felt that if the South Africans were extradited to EG, the SA government had a duty to maintain a “watching brief” over the country and prohibited HR violations by EG and Zimbabwe using the African Charter which all three countries had ratified. Ngcobo J, agreed with the majority decision but invoked articles 1,7,6 and 5 of the Charter to argue that the Charter provides the SA government “with a tool to protect the internationally recognized human rights of South African nationals. What is more, these instruments are binding under our Constitution” (Para 162). Ngcobo J went further to say that because of the state-to-state complaints mechanism available through the African Commission, this was available to South Africa who had a duty to protect its citizens from egregious human rights violations perpetrated by another state party to the Charter.

O'Regan J, a dissenter on the majority position, also employed the Charter in her statement, saying that South Africa's ratification of the Charter implies the country's commitment to protect human rights in the international arena and therefore the country's duty to seek diplomatic protection for its citizens whose human rights may be violated by another state (rights of citizens to protection against human rights violations by a third party).

South African cases employing aspects of **groups or peoples' rights**:

#### **A. Women's Rights**

*Bhe and Others v. Magistrate, Khayelitsha* (consolidated and heard with *Shibi v. Sithole*)  
These two cases were consolidated and heard before the courts as both involved the denial of inheritance rights to daughters or sisters of deceased black males. The central question was of the constitutionality of male primogeniture under South Africa's inheritance laws. Ngcobo J drew heavily on articles 27 and 29 of the Charter to draw his conclusions, particularly "the obligation to care for family members" which Ngcobo considered "a vital and fundamental value in [the] African social system." These articles which outline an individual duty to the collective family unit were used by Ngcobo to conclude that the rule of entrusting the deceased's property to the eldest child was reasonable and justifiable as it was consistent with that person's responsibilities to care for his/her younger siblings. On the other hand, he reasoned that male primogeniture was unconstitutional as it served a historical purpose but was no longer appropriate in the current context where women play an important role in the economy. Ngcobo also invoked article 18 of the Charter on gender equality to strengthen this ruling, making reference to the Nigerian case, *Muojekwu v. Ejikeme*.

*Richard Gordon Volks No v. Ethel Robinson and others* (2005) 5 BCLR 446 (Constitutional Court)

In this case a Mrs. Robinson wished to claim the rights of an unmarried surviving female partner of a deceased adult male who lived in common-law for many years. She challenged the constitutionality of laws which distinguished between married and unmarried surviving partners. Once again, Ngcobo J employed the chapter 18 of the Africa Charter to argue that the law is legitimately able to afford special protection to married people, as the Charter recognizes the importance of marriage and the family.

*State v. Godfrey Baloyi and others* (2000) 1 BCLR 86 (Constitutional Court)

In which the appellant questioned the constitutionality of a special procedure under the Prevention of Family Violence Act 133 of 1993 of South Africa, arguing that it did not assume innocence until proven guilty. In upholding the constitutionality of the special procedure, Sachs J drew from the African Charter's which "imposes a positive obligation on states to pursue policies of eliminating discrimination against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination." (Para 13) To justify the application of the Charter in his judgement, Sachs J stated "These injunctions are directly relevant to the present matter: when interpreting the Act, the Court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it." (Para 13) Sachs therefore ruled in favour of the Charters provision for collective rights (women's rights), although noting that the special procedure was likely to detract from some of the individual rights that would normally be afforded to an accused person in other kinds of criminal proceedings (i.e. the right to silence). [Sachs' ruling therefore justified a trade-off between individual rights using women's rights]

### **B. Rights of the family**

*Rahim Dawood v. Minister of Home Affairs and others* (consolidated with *Shalabi v. Minister of Home Affairs and others* and *Thomas v. Minister of Home Affairs and others*) (2000) 3 SA 936; (2000) 8 BCLR 837

The claimant argue that forcing the non-South African spouse to leave the country while waiting for an immigration permit to be processed violated their right to family life. This argument was upheld by O'Regan J who relied on article 18 of the Charter in her judgement for its recognition of the importance of marriage and which imposes "a state obligation to protect the family." (Para 29)

### **D. Group vs Individual rights**

*Islamic Unity Convention v. Independent Broadcasting Authority and others* (2002) 5 BCLR 433 (Constitutional Court)

The Court made reference to article 9 of the Charter (relating to freedom of speech) to strengthen its ruling in favour of the Islamic Unity Convention. In making its ruling, the court struck-down the Indep Broadcasting Authority's argument that the Islamic Unity Convention was promoting speech which violates the right to dignity and other rights of sections of the population. In effect, the court chose to put forth a ruling in favour of the individualistic right to freedom of speech over the opposing argument that such speech would violate the right of a group to dignity.

## **Botswana**

*Attorney General of Botswana v. Unity Dow* (1992) LRC (Const.) 623; also cited at (1994) 6 BCLR 1 (Botswana) and (1992) SACLR LEXIS 7.

Ms. Unity Dow, a citizen of Botswana who had married a US citizen, sued the government of Botswana for denying citizenship of Botswana to her children from this marriage. Ms. Dow argued that the Citizenship Act of Botswana was discriminatory and unconstitutional as it granted citizenship to children of males of Botswana who married foreign women. As the Botswana Constitution does not mention prohibition of discrimination on the basis of sex, the courts relied on human rights instruments ratified by the state to draw its conclusions. Significantly, the Court drew upon the African Charter as an interpretive tool. (The courts did so on the basis that Botswana was signatory to the Charter, even though the Charter had not been incorporated into domestic law.) The Court relied upon Article 2 of the African Charter to conclude that this Act violated the right to non-discrimination on the basis of "sex" or "gender". Ms. Dow won the case but the government appealed the ruling. The Court of Appeal of Botswana struck down the governments appeal, stating that a provision in the Act had, indeed, discriminated against women. As a result, the government amended the citizenship Act to repeal these discriminatory provisions.

*Student Representative Council, Molepolole College of Education v. Attorney General of Botswana*, Civil Appeal 13 of 1994, [1995] 3 LRC 447.

In a continuing move of the Court of Appeal to support improvements for the rights of women, the court drew on its conclusions from the Unity Dow case to declare unconstitutional regulations which forced female students to leave college upon becoming pregnant on the basis that such regulations were discriminatory against women. (Again, the court's decision stuck, in spite of the fact that discrimination on the basis of sex was not prohibited in the Botswana Constitution).

## **DRC**

*Peoples' Congress v. Zaire*. Communication No. 75/92 (1996) 3 International Human Rights Reports 136

Here Okafor contends that the African Commission exhibited “bold interpretive behaviour” in its decision to allow the Katangese People to secede from the state in extreme circumstances. The Commission ruled that under exceptional circumstances, a sub-state group (a people) who are encircled by a state party may be entitled to secede from that state.

## **Cape Verde**

While Viljoen (1999) notes that no domestic cases had made reference to the African Charter by 1999, articles 11(1) and 11(4) of the Cape Verde Constitution indicates the incorporation of the African Charter into domestic law:

- Article 11(1): “International law shall be an integral part of the Cape Verde judicial system, as long as it is in force in the international legal system...”
- Article 11(4): “International law shall take precedence over all laws and regulations below the constitutional level”.

## **Algeria**

Similar to Cape Verde, the African Charter has been incorporated into Algerian Law. Still, no domestic cases had made reference to the Charter by 1999 (Viljoen, 1999).

## **Benin**

Article 147 of the 1991 Democratic Constitution of Benin states that treaties have, “an authority superior to that of laws” once ratified. The few cases where the Constitutional Court of Benin have drawn upon the African charter before 1999 have only made reference to individual rights:

- (1) In the Constitutional Court decision DDC 03-93, the Court upheld Madame Bagri’s right to work, drawing on Article 13(2) of the African Charter (Every citizen shall have the right of equal access to the public service of his country.)
- (2) The Court’s decision (DDC 16-94 of 27 May 1994) that government action was unconstitutional drew upon Article 10 of the African Charter, finding that the Minister of Interior, Security and Territorial Administration infringed upon the right of individuals to free association in his actions relating to the refusal to register a number of developmental associations.
- (3) Another Beninois Constitutional Court decision in 1994 found certain appointments by the Communications Authority to be unconstitutional on the basis that they encroached on Article 10 of the African Charter.

## **Ghana**

Despite the fact that the Charter has not be incorporate as domestic law, one case where the domestic organs drew upon the African Charter to make its ruling but was in relation to an individual right (civil and political):

*New Patriotic Party v. Inspector-General of Police, Accra* [1993] 1 N.L.P.R. 73, suit 3/93, 30 November, 1993.

The Ghana Public Order Decree (1972) gave the Minister of the Interior the authority to prohibit holding of public meetings or processions for a specified period in a specified area. This Decree came under enquiry before the Supreme Court of Ghana who found it to be in violation of the Ghanaian Constitution but also of Article 11 of the African Charter (relating to freedom of assembly).

### **Malawi**

In another case pertaining to individual civil and political rights, deployment of the African Charter in the appellant's argument was not considered:

*Chafukwa Chichana v. The Republic* [1996] 1 LRC 1.

The appellant had been sentenced for the importation of "seditious materials". The Malawi Supreme Court of Appeal agreed with the counsel that the appellant's fundamental rights had been violated according to the Universal Declaration of Human Rights, but disagreed with the counsel's argument that the appellant's rights were also protected under the African Charter. Despite the fact that Malawi has ratified the Charter, the basis for this ruling was that the UDHR had been incorporated into domestic law (by virtue of the 1966 Malawi Constitution) whereas the Charter had not.

### **Namibia**

The Namibian Constitution has incorporated the African Charter into domestic law through Article 143 ("All existing international agreements binding on Namibia shall remain in force, unless and until the National Assembly, acting conger Article 63(2)(d) hereof, otherwise decide") and Article 144 ("Unless otherwise provided by this Constitution or act of parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia.")

*Chairperson of the Immigration Selection Board v. Frank and another* (2001) 3 CHRLD 179

In this case, a German citizen and long-time lesbian partner of a Namibian citizen who was denied permanent residence under the Namibian Immigration Control Act 7 of 1993 attempted to sue the government. The woman claimed that the legislation was discriminatory as it failed to accord her equal status with heterosexuals and violated her right to the protection of her family under article 14 of the Namibian Constitution. The Supreme Court drew heavily upon the African Charter to justify a mostly negative outcome in this case, reasoning that the lack of specific protection for homosexual relationships in the African Charter and the CCPR reinforced their decision to not to uphold these claims.

### **Tanzania**

*Ephrahim v. Pastory* [1990] LRC (Const.) 757.

This case which came before the Tanzanian High Court pitted a customary law protecting the collective interests of the clan against the rights of women to non-discrimination. The case involved an elderly woman who inherited clan land from her father and decided to sell the land to someone from outside the clan. A male clan member filed a suit against her on the basis that the Haya group's customary law did not allow female members to sell clan land. In its ruling, the Court drew upon the Bill of rights, the UDHR, CCPR, Tanzania's ratification of CEDAW and the African Charter to conclude that the customary law was discriminatory against women. In articulating his judgement, Mwalusanya, J. stated:

“...Tanzania has also ratified the African Charter on Human and Peoples’ Rights which in Article 18(3) prohibits discrimination based on account of sex... The principles enunciated in the above-named documents are a standard below which any civilized nation will be ashamed to fall. It is clear... that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories” (at 763 a-c).

*DPP v. Pete [1991] LRC (Const.) 553.*

The highest Tanzanian Court, the Court of Appeal, found that the Criminal Procedure Act of 1985 violated the right of an individual to freedom. In making its judgement, the court drew upon the preamble of the African Charter, stating that “...account must be taken of the Charter in interpreting our Bill of Rights and Duties.” (Per Nyalali, C.J., Makame and Ramadhani, J.J.A., 565 g.)

### **Zambia**

*Longwe v. Intercontinental Hotels [1993] 4 LRC (Const.) 221.*

In this case, Longwe claimed that the Intercontinental Hotel policy of refusing entrance to women unaccompanied by a male escort was discriminatory to women. The Counsel referred to international human rights documents, in addition to the African Charter. The Zambian High Court agreed with the counsel’s argument, citing the African Charter explicitly and stating in relation to international treaties:

“It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony to the willingness by that state to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this Court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or convention in my resolution of the dispute” (at 233 c.)

## **THE HUMAN RIGHTS SYSTEM**

The “African human rights system” consists of 5 treaties (African Charter on HPR, Convention on the specific aspects of the refugee problem in Africa, African Charter on the Rights and Welfare of the Child, Protocol on the Establishment of an African Court on Human and Peoples’ Rights, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa) and 3 implementation mechanisms (the African Commission on HPR, the African Court on HRP, and the African Committee of Experts on the Rights and Welfare of the Child). There are also two supporting aspects, NEPAD (New Partnership for African Development) and the APRM (African Peer Review Mechanism).

### **HUMAN RIGHTS INSTRUMENTS SPECIFIC TO COLLECTIVES (SEE PERC SITE ON VULA)**

- African Charter on Human and Peoples’ Rights
- Algiers Universal Declaration of the Rights of Peoples
- Cultural Charter for Africa



**United Nations Declaration on the Rights of Indigenous Peoples. A/RES/61/295.  
Adopted by the UN General Assembly on 2 October 2007.**

***Preamble:***

*The General Assembly...*

*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>2</sup> as well as the Vienna Declaration and Programme of Action,<sup>3</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

***Article 1***

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>4</sup> and international human rights law.

***Article 6***

Every indigenous individual has the right to a nationality.

***Article 7***

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

***Article 35***

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

***Article 40***

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

## **OTHER HUMAN RIGHTS INSTRUMENTS, DECLARATIONS (making reference to collectives but not explicitly directed at collectives)**

### **ICSECR, 1966**

#### **Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

#### **Article 8**

1. The States Parties to the present Covenant undertake to ensure:
  - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
  - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

#### **Article 25**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

### **UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Adopted by General Assembly resolution 53/144 of 9 December 1998**

*Preamble:* "The General Assembly...

"...Acknowledging the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including

in relation to mass, flagrant or systematic violations such as those resulting from apartheid, all forms of racial discrimination, colonialism, foreign domination or occupation, aggression or threats to national sovereignty, national unity or territorial integrity and from the refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources...

“Stressing that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State...

“Recognizing the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels...

#### Article 18

“1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.

2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.”

### **Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, adopted on 17 September 2004, in Pretoria, South Africa**

#### Preamble:

“**RECOGNISING** the existence of regional and international human rights standards that stress the indivisibility and interdependence and universality of all human rights. Among these are the African Charter, the African Charter on the Rights and Welfare of the Child, the Protocol of the African Charter on Human and Peoples Rights on the Rights of Women in Africa, the Universal Declaration of Human Rights, the Declaration on the Right to Development, the International Covenant on Economic, Social and Cultural Rights, and the Convention for the Elimination of All forms of Discrimination Against Women;...”

“9. The right to culture in articles 17(2) and (3), 18(1) and (2) and 61 entails among other things the following:

- Positive African values consistent with international human rights realities and standards;
- Eradication of harmful traditional practices that negatively affect human rights;
- Participation at all levels in the determination of cultural policies and in cultural and artistic activities;
- Measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;
- Recognition of and respect of the diverse cultures existing in Africa.”

#### Recommendations for states:

“States should: ...

(xi) adopt special measures for women and address the economic, social and cultural rights of vulnerable and marginalised groups, including children, indigenous peoples, displaced persons, refugees, persons living with HIV/AIDS and disabled; ”

**GRAND BAY (MAURITIUS) DECLARATION AND PLAN OF ACTION. OAU, Adopted at Grand Bay, Mauritius on 16 April 1999 during the first OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999 in Grand Bay, Mauritius;**

*Preamble:*

“Recalling the determination of the collective leadership in Africa to establish conditions which will ensure social justice and progress and thus enable African peoples to enjoy better standards of living in greater freedom and in the spirit of tolerance towards all;...”

“...Recognizing the progress ' achieved by African States in the domain of Human Rights and the significant contribution of the African Continent to the universalization of these rights;...”

“...SOLEMNLY ADOPTS THE GRAND BAY (MAURITIUS) DECLARATION AND PLAN OF ACTION...”

“1. The Ministerial Conference affirms the principle that Human Rights are universal, indivisible, interdependent and inter related and urges governments, in their policies, to give parity to economic, social and cultural rights as well as civil and political rights;”

“5. The Conference recognises that the core Values on which Human Rights are founded, particularly (a) respect for the sanctity of life and human dignity (b) tolerance of differences (c) desire for liberty, order, fairness, prosperity and stability, are shared across all cultures. In this connection, integrating positive traditional and cultural values of Africa into the Human Rights debate will be useful in ensuring their transmission to future generations.”

“6. The Conference notes that Women and Children's rights issues remain of concern to all. Therefore it welcomes the decision to elaborate a Protocol to the African Charter for the more effective protection of Women's rights and calls on the OAU to convene a meeting of Government experts to examine the instrument. It urges all African States to work assiduously towards the elimination of discrimination against women and the abolition of cultural practices which dehumanize or demean women and children...”

7. “The Conference notes that the rights of people with disability and people living with HIV AIDS, in particular women and children are not always observed and urges all African States to work towards ensuring the full respect of these rights.”

10. “The Conference recognizes that the development and energization of the civil society, the strengthening of the family unit as the basis of human society, the removal of harmful traditional practices and consultation with community leaders should all be seen as building blocs in the process of creating an environment conducive to human rights in Africa and as tools for fostering solidarity among her peoples.”

17. “The Conference recognizes the importance of promoting an African Civil Society, particularly NGOs. rooted in the realities of the Continent and calls on African governments to offer their constructive assistance with the aim of consolidating democracy and durable development.”

**AFRICAN MODEL LEGISLATION FOR THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS, AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL RESOURCES. Adopted by the OAU during 2000 in Algeria. Available at [www.grain.org](http://www.grain.org)**

*Preamble:*

“Whereas the state and its people exercise sovereign and inalienable rights over their biological resources;

“Whereas the rights of local communities over their biological resources, knowledge and technologies that represent the very nature of their livelihood systems and that have evolved over generations of human history, are of a collective nature and, therefore, are *a priori* rights which take precedence over rights based on private interests...”

“...Whereas it is the duty of the state and its people to regulate access to biological resources and to community knowledge and technologies...”

“...Whereas there is the need to promote and support traditional and indigenous technologies for in the conservation and sustainable use of biological resources and to complement them by appropriately developed modern technologies...”

**Part I: Objectives**

“...The specific objectives of this legislation shall be to:

- a) recognise, protect and support the inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies...”

**Part IV: Community Rights**

Rights covered in this section include:

16. Recognition of the Rights of Local and Indigenous Communities
17. Application of the Law on Community Rights
19. Right to Refuse Consent and Access
20. Right to Withdraw or Place Restrictions on Consent and Access
21. Right to Traditional Access, Use and Exchange
22. Right to Benefit
23. Recognition of Community Intellectual Rights

**Universal Declaration on Cultural Diversity. Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001**

*Article 4 - Human rights as guarantees of cultural diversity*

“The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”

*Article 5 - Cultural rights as an enabling environment for cultural diversity*

“Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and cultural Rights. All persons should therefore be able to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons should be entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices subject to respect for human rights and fundamental freedoms.”

## COUNTRY REPORTS

### a. AFRICAN CHARTER

#### **Republic of South Africa: First Periodic Report on the African Charter on Human and Peoples’ Rights: 2001**

##### *Harmonisation of common law and indigenous law*

54. A report on conflicts of law, namely conflict between Customary Law and Common Law, was tabled in Parliament on 29 May 2000. The Application of Customary Law Bill is ready for consideration by Parliament. A discussion paper on the alignment of customary law of succession with the Constitution was published on 8 August 2000 and the closing date for comment was 22 September 2000. Comments received are being evaluated with a view to workshopping them. A discussion paper on the alignment of the law of administration of estates (in both customary law and under the **Administration of Estates Act, 1965 (Act 66 of 1965)**) with the Constitution was published in December 2000. Comments received are being evaluated.

South Africa also reports on actions taken or being embarked upon to improve the protection of the rights of the following groups:

- Children (p.85)
- Women (p.89)
- Older persons (p.92)
- Disabled Persons (p.94)

*“Difficulties encountered in implementing the African Charter in general or any of the rights guaranteed thereunder having regard to the political, economic or social circumstances of the state... “*

(p.123) Article 7

391. “Although it is, like in other African States, difficult to align traditional courts with common law courts, the South African Law Commission has developed a discussion paper, with recommendations including the following:

- Traditional courts should continue to exist
- They should continue to be presided over by chiefs and headmen.
- The traditional element of popular participation, whereby every adult was allowed to question litigants and give his opinion on the case, should be maintained.

- To comply with section 9 of the Constitution (right to equality) the full participation of women members of the community as councilors or presiding adjudicators must be allowed.
- Traditional courts should be regarded as courts of law and given the status and respect of courts of law.
- Jurisdiction on traditional courts in respect of persons, should no longer be based on race or colour, but on matters such as residence, proximity, nature of transaction or subject matters and the law applicable.
- The application of customary law should no longer be subject to the ‘repugnancy clause’. This requirement should be replaced by one requiring consistency with the Constitution, in particular, with the values underlying the Bill of Rights.
- Matters relating to nullity, divorce and separation with regard to civil marriages should continue to be excluded from the jurisdiction of traditional courts. Such cases should be taken to a family court.
- A monetary ceiling on jurisdiction in civil matters should be improved.
- If traditional courts are to continue to exercise criminal jurisdiction, only relatively minor offences should be within their jurisdiction.
- Traditional courts need to be alerted that corporal punishment is unconstitutional and therefore illegal.
- Formal rules of procedure and evidence should not be imposed on traditional courts, as the customary procedure is generally compatible with rules of natural justice.
- Proposed paralegal clerks of traditional courts should make summaries of evidence and judgments that can subsequently be relied upon on appeal or review.”

392. “Although the above recommendations aim at aligning traditional courts and common law courts and the Constitution to a certain extent, what remains is public support thereof, especially support of traditional leaders who seem to have strong feelings on wide jurisdictional powers.”

#### Article 17

399. “The South African Law Commission has developed discussion papers on the harmonisation of common law and customary law, which for the purposes of the Charter will promote and protect morals and traditional values of a community. The discussion papers include the following:

- Customary marriages. The work of the South African Law Commission resulted in the passing of the **Recognition of Customary Marriages Act, 1998**, discussed above
- Conflicts of law. **Application of Customary Law Bill** was developed in this regard.
- Judicial powers of traditional leaders. This process is still continuing with a view to developing appropriate legislation.
- Administration of estates. This process is still continuing with a view to developing appropriate legislation.”

#### b. CSECR

HRC	1st WG UPR	11/04/2008	A/HRC/WG.6/1/ZAF/3	Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to human rights council resolution 5/1
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(p.9)

## **7. Minorities and indigenous peoples**

19. “In 2006, CERD was concerned at the situation of indigenous peoples, inter alia, the Khoi, San, Nama and Griqua communities and, in particular, hunter-gatherer, pastoralist and nomadic groups. In 2006, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people noted that in South Africa there is no accepted meaning of indigenous, although the term appears twice in the Constitution and despite the constitutional reference to Khoi and San people. He noted that the most pressing concern of all the indigenous communities is securing their land base and emphasized that forced dispossession of traditional land is the root cause of the poverty affecting the Nama and San peoples. He recommended that positive legal and judicial action be initiated. He also noted a number of incidents between the Khomani San and the local police force resulting in alleged abuses, torture and harassment. He was also concerned about (a) inadequate access to clean water; (b) work for minimal wages without tenure rights or job security; (c) sedentarization, closely associated with a collapse in nutrition and disintegration of fragile natural resources; (d) loss of land to farmers and to State-sponsored activities; (e) the lack of specific poverty reduction programmes for vulnerable indigenous communities; (f) the specific grievances of indigenous children, youth and women, who reported discrimination, violence, drug abuse, high suicide rates, prostitution, alcoholism and other phenomena associated with marginalization and poverty; (g) violence, including murders and assaults with weapons; (h) the prevalence of HIV/AIDS. The Special Rapporteur also noted that the role and status of traditional leaders vis-à-vis elected councillors has not been clearly defined.”

### **c. Economic and Social Council**

**Stavenhagen, R. (2005). Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Human rights and indigenous issues. MISSION TO SOUTH AFRICA. E/CN.4/2006/78/Add.2 15**

There are six large groups in South Africa identifying themselves as indigenous:

- Three groupings of San peoples (!Xun, Khwe and Khomani)
- Various Nama communities
- Griqua
- “Revivalist Khoisan”

The Rapporteur notes that official statistics do not reflect the presence of indigenous peoples while categories in the census are still based on the apartheid typology of race and language. For instance, the Khoe and San peoples were forced into the “Coloured” racial category under apartheid and now claim that failure to recognize them as an indigenous group will result in further marginalization.

The Rapporteur observes that while indigenous peoples are not officially recognized in South Africa, there is constitutional reference to the Khoe and San people. Article 6 (5) states that “A Pan South African Language Board established by national legislation must promote, and create conditions for, the development and use of ... the Khoi, Nama and San languages.” The Rapporteur asserts that this opens “a whole new constitutional chapter by recognizing the presence of Khoi and San people and their endangered languages.” (p.7)

The term “indigenous”, as it exists in the Constitution, is recognized as being used to “distinguish the black majority from the European and Asian settler minorities.” However, a criteria being developed by the South African government to distinguish indigenous communities includes a history or existence in South Africa before colonialization; descent from such a pre-colonial community; retention of several pre-colonial patterns and institutions; self-identification; and the insufficient or inadequate accommodation of the rights of such a community compared to other communities in South Africa.

#### *B. Land rights and related human rights issues*

With the assistance of non-governmental organizations (e.g. the South African San Institute (SASI) and the Legal Resources Centre (LRC)), the Rapporteur notes the effectiveness with which indigenous groups have used legislation designed to restore and redistribute land that was disposed under racial legislation.

The Rapporteur highlights the case of the Khomani San community of the Andriesvale area who won land claims valued over R15 million between 1999 and 2002. However, after five years the South African Human Rights Commission found that the living and social conditions of the Khomani San had not substantially improved while a number of human rights issues emerged. One factor believed to contribute to this problem had to do with the fact that the local San community allowed San people from other parts of the country to join their organization. This eventually resulted in a division within the collective between the “traditionalists” and the “modernizers”. The Commission therefore concluded that the implementation phase failed to kick off sustainable development and to protect the human rights of land claim beneficiaries.<sup>1</sup>

#### *E. Intellectual property rights*

The Rapporteur makes note of two interesting cases where indigenous populations have been successful in claiming intellectual property rights:

- (1) The San community were successful in obtaining a profit-sharing agreement that would provide them with credit and compensation for *Hoodia gordonii* (a hunger-suppressing plant that the San community had been using for centuries to suppress hunger and thirst during long hunting trips) that had been patented by the Council for Scientific and Industrial Research.
- (2) The San community has also been successful in obtaining a profit-sharing agreement with the KwaZulu-Natal government who opened a San rock-art heritage site and exhibition on San history and identity.

#### *G. The right to education, language and culture*

Under article 6 of the South African constitution, the Pan South African Language Board (PanSALB) is responsible for the protection and promotion of the language rights of Khoen and San-language speakers. In 1999 it established the Khoen and San National Language Board (KSNLB), the first legally constituted body of indigenous peoples to represent themselves on this issue. Nevertheless, the Rapporteur notes that the KSNLB has not been successful such that, “all indigenous languages in South Africa are under serious threat of extinction.” (p. 16)

#### *Conclusions*

Here the Special Rapporteur notes communication received from an organization claiming to represent the “Boerevolk”, a group of Afrikaners purporting to be the “only indigenous

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<sup>1</sup> See the African Commission on Human and Peoples’ Rights, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, 2005.

White nation in Africa.” This group claims to experience human rights violations “on every terrain of nationhood” and further demands the right of self-determination. Nevertheless, the Special Rapporteur maintains that he considers the group not to meet the criteria of “indigeneity” as established in international law. (p. 18 – 19)

## SHADOW REPORTS

CHR	62nd	03/03/2006	E/CN.4/2006/NGO/151	Written statement submitted by the International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and Other Minorities (IFPRERLOM)
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(p. 4)

### Vhangona/Vhavenda

“In South Africa there are eleven main language groups, one of them being the Vhangona (or Vhavenda). The Vhangona peoples constitute one of the native, indigenous peoples of South Africa. Currently, the Vhangona indigenous peoples are seeking a greater degree of self-determination and wish to address matters concerning the protection of sacred sites, ownership of intellectual property, native grave protection and repatriation and the role of the state and provinces in indigenous affairs. Another key issue is the return of the Venda Civil Pension Fund that has been privatized by legislation (proclamation no. 2 of 1992). The Dabakorivhuwa Patriotic Front has embarked on several strategic avenues to solve this matter justly and peacefully, including reference of this matter to the UN High Commission on Human Rights in 1998, but so far without success. The matter was also referred to the South African Human Rights Commission, but subsequently rejected on grounds that it did not constitute a violation of the right to social security.

The indigenous Vhangona people have sought and are still seeking recourse to courts, but so far efforts to resolve the matter have been thwarted. The international community should be greatly alarmed at a situation in which the indigenous Vhangona people’s right to social security is critically violated, with most of the Civil Pension beneficiaries retiring without any pension remuneration and some dying without having enjoyed the fruits of their labour. In relation to land rights, the Vhangona people have expressed discontent with the way the South African Government has handled land restitution. In particular this concerns the legislation that regulates this process versus Vhangona traditional governance and tradition land. Another issue is that of intellectual property, involving names of places, such as the name VENDA. When a system of provinces was introduced, the name Venda was abolished and is now known as Limpopo province.

The indigenous Vhangona people call upon the Commission on Human Rights to employ its relevant mandates to address the human rights situation for their people, particularly in terms of economic and social rights.”

## **AU RESOLUTIONS & RECOMMENDATIONS RE: PEOPLES' & GROUP RIGHTS**

### **ACHPR /Res.51(XXVIII)00: Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000)**

"...Recalling that at its 26th Ordinary Session held in Kigali, Rwanda, it constituted a Committee made up of 3 Commissioners to further consider the issue of Indigenous People in Africa and advise accordingly;..."

"...Having reconsidered the issue and its implications;

Resolves to:

1. Establish a working group of experts on the rights of indigenous or ethnic communities in Africa ;
2. Set up a working group constituted of 2 members of the African Commission, one of whom should be designated as convenor and 2 African experts in the field of human rights or indigenous issues;
3. Assign the following mandate to the working group:
  - a. Examine the concept of indigenous people and communities in Africa;
  - b. Study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to:
    - the right to equality (Articles 2 and 3);
    - the right to dignity (Article 5);
    - protection against domination (Article 19);
    - on self-determination (Article 20); and
    - the promotion of cultural development and identity (Article 22).
  - d. Consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities;
4. Have a funding proposal prepared with a view to raising donor funds to meet the costs of the work of the working group;
5. Submit a report at the 30th Ordinary Session of the Commission.

Done in Cotonou, Benin, 6th November 2000"

### **ACHPR /Res.65(XXXIV)03: Resolution On The Adoption Of The "Report Of The African Commission's Working Group On Indigenous Populations/Communities" (2003).**

"...**Conscious of** the situation of vulnerability in which indigenous populations/communities in Africa frequently find themselves and that in various situations they are unable to enjoy their inalienable human rights;..."

"...**Recognising** the standards in International law for the promotion and protection of the rights of minorities and indigenous peoples, including as articulated in the United Nations

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the International Labour Convention 169 on Indigenous and Tribal Peoples in Independent Countries, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child;...”

“...**Considering** the emphasis given in International law to self identification as the primary criterion for the determination of who constitutes a minority or indigenous person; and the importance of effective and meaningful participation and of non discrimination, including with regard to the right to education;...”

**27<sup>th</sup> Activity report of the African Commission on Human and Peoples’ Rights (ACHPR) submitted in accordance with Article 54 of the African Charter on Human and Peoples’ Rights.**

The Report describes the activities undertaken by the ACHPR from June to November 2009,

26. “The ACHPR considered applications by four (4) NGOs seeking Observer Status, and granted Observer Status to three (3) NGOs in accordance with the 1999 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples’ Rights, ACHPR/Res.33 (XXV) 99...”
27. “This brings the total number of NGOs with Observer Status before the ACHPR to **four hundred and five (405)**.”
28. The ACHPR decided to defer the application for Observer Status by one NGO, namely, Coalition of African Lesbians (CAL), based in South Africa, to the next Ordinary Session, pending the finalization of the ACHPR ’s consideration of the position paper on “Sexual Orientation” in Africa.”

***Activities as Special Rapporteur for Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa (IDPs)***

49. “On 29 June 2009, the Acting Chairperson addressed an urgent appeal to H.E. President Joseph Kabila of the Democratic Republic of Congo, following allegations that the government had expelled thousands of Angolan immigrants. He urged the Government of the Democratic Republic of Congo and the Republic of Angola, to engage in mutual negotiations with a view of providing a mechanism to address the property rights of migrants instead of engaging in mutual expulsion, which is prohibited under Article 12 of the African Charter.
50. In his report, the Special Rapporteur noted that conflicts in Somalia, Sudan and Democratic Republic of Congo continue to create displacement and violations of the rights of Internally Displaced Persons. He mentioned the Displacement in Darfur where more than 2 million people have continued to live in camps for the last six years. In this regard, he underscored the importance of the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, (otherwise known as the Kampala Convention), adopted at a Special Summit of the African Union, held in Kampala, Uganda, between 22 and 23 October 2009...”

***Activities as Chairperson of the Working Group on Indigenous Populations / Communities in Africa***

86. On 16 September 2009, the Chairperson of the Working Group sent an urgent appeal to the President of the United Republic of Tanzania following the evictions of the inhabitants of Liliondo village in Northern Tanzania. He urged the Government to take steps to ensure the protection of the rights of the indigenous populations in Liliondo.

***Activities as Chairperson on the Rights of Older Persons***

188. From 26 to 28 August 2009, the Chairperson organised an Expert Seminar on the Rights of Older Persons and People with Disabilities in Accra, Ghana.

189. The overall objective of the Expert Seminar was to start the process of drafting a Protocol on the Rights of Older Persons and People with Disabilities in Africa. Thus, experts were brought together from all the regions in Africa, to develop a coordinated approach and strategic arrangement in the drafting of this Protocol.

190. The Seminar achieved its purpose of initiating a draft Protocol on Older Persons, and a draft Protocol on People with Disabilities in Africa. He said that the two sets of drafts which have been forwarded to the Secretariat of the African Commission will be tabled before the latter for consideration.

**Communication 272/03: Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon. (Done in Banjul, The Gambia at the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 – 25 November 2009.)**

**Summary of the facts:**

The Communication had been initiated against the Republic of Cameroon, State Party <sup>2</sup> to the African Charter, by two Non Governmental Organisations (NGO); *The Association of the Victims of Post Electoral Violence of 1992 of the North West Region*, headquartered in Bamenda, Cameroon; and *The International Centre for the Legal Protection of Human Rights (INTERIGHTS<sup>3</sup>)*, headquartered in London, UK. The two NGOs contend that on the 23rd October 1992, in reaction to the confirmation by the Supreme Court of Cameroon of the victory of the candidate Paul Biya of the Cameroon Peoples' Democratic Party (RDPC) in the presidential elections of the 11th October 1992, the members of the Social Democratic Front (SDF), the Principal Opposition Party, attacked the symbols of the State and the militants of the Party which won the elections, in the city of Bamenda, their Party stronghold. Property belonging to RDPC militants and to other citizens are said to have been destroyed, certain victims were sprayed with petrol and subjected to serious physical attacks.

**The Complaint:**

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<sup>2</sup> Cameroon ratified the Charter on 26<sup>th</sup> June 1989

<sup>2</sup>INTERIGHTS enjoys Observer Status with the African Commission.

<sup>3</sup>The jurisprudence of the Commission is constant regarding the responsibility of States towards others, see the National Commission on Human Rights and Freedoms vs. Chad ; Com. 155/96.

The Complainants allege the violation of Articles 1, 2, 4, 7 and 14 of the African Charter by the Republic of Cameroon (*all individual rights*).

**Decision by the Commission:**

The commission decided that Article 1 of the Charter imposes an “obligation of result” upon State Parties and that Cameroon failed in this obligation. The Commission further stated an “obvious lack of diligence” on the part of the State of Cameroon, which it held in violation of Articles 2, 4, 7 and 14 of the Charter (therefore holding Cameroon responsible for acts of violence which gave rise to human rights violations in the State, regardless of who committed those acts<sup>4</sup>). Cameroon was also found in violation of Article 7

**235/2000 - Dr. Curtis Francis Doeblbler v Sudan**

**Summary of the “alleged” facts:**

During the 1980s and early 1990s, an estimated 80,000 Ethiopians entered Sudan fleeing from persecution and events disturbing public order in Ethiopia. The Complainant represented 14,000 Ethiopian refugees who fled Ethiopia prior to 1991 during the Mengistu regime and who were then subject to forced repatriation pursuant to a decision adopted by Sudan and the United Nations High Commission for Refugees (UNHCR) in September 1999. All Ethiopian refugees in Sudan were previously granted asylum by the Government of Sudan in accordance with its international obligations; however, the Complainant states that through the UN-Sudan agreement, Ethiopian refugees lost their right to work or receive any social assistance into to coerce them into forced repatriation back to Ethiopia. The Complainant stated that the 14,000 Ethiopians which he was representing do not wish to return to Ethiopia because they have a well-founded fear of persecution or because they are fleeing the war and famine in Ethiopia.

**The Complaint:**

The Complainant alleged violations of Articles 4, 5, 6, 12(3), (4) and (5) of the African Charter on Human and Peoples’ Rights (African Charter).

**Decision by the Commission:**

The Commission stated that it did not find conflict between the African Charter and the two refugees’ conventions. The Commission therefore decided to “read the provisions of all three instruments as complementing each other.” Nevertheless, the African Commission found that allegations concerning violations of Articles 3, 4, 5, 6, 7, and 12 (3), (4), and (5) of the African had “not been proved”, stating that the UN-Sudan agreement provided for voluntary repatriation, inclusive of UNHCR assistance and additional options for those who did not wish to be repatriated.

**276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya**

**Summary of the “alleged” facts:**

The complaint was filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (CORE - which submitted an *amicus curiae* brief) on behalf of the Endorois, an indigenous

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community of Kenya. The complainants argued that the Endorois community suffered violations as a result of forced displacement from their ancestral lands around the Lake Bogoria area in 1978 without consultation or adequate compensation and have since been denied access to this land. The State of Kenya argues that the removals were done in the public interest in order to create the Lake Bogoria Game Reserve. The Endorois maintain that they were recognised as *de facto* owners of the land for centuries and lived on the land undisturbed by the British Colonial powers until the forced removals of 1978. The Endorois established and maintained a sustainable way of living which was inextricably linked to their ancestral land. The Complainants state that the land around Lake Bogoria is fertile and is conducive to the production of health cattle while the Lake is central to Endorois religious and traditional practices. Plants used for traditional medicine, the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are located around Lake Bogoria. The Endorois believe that the spirits of all Endorois live on the lake such that annual festivals take place at the Lake.

The Complainants state that the Endorois were promised compensation for their land following their displacement by the Kenyan government but that these promises have not been fulfilled. In 2000, the High Court of Kenya stated that it could not address the community's claim of a collective right to property and chose only to refer to "individuals" affected. Since this case in the Kenyan High Court, the Endorois have noted the sale of their ancestral land to third parties, including concessions granted to a private company in 2002 for ruby mining which has created a road for heavy machinery which generates pollution which threatens the natural habitat on which the Endorois depend. The complainants state that the Endorois ancestral land belongs to the community and not the individual and that it is fundamental for the preservation and survival as a traditional people.

#### **Articles Alleged to Have Been Violated**

The Complainants seek a declaration that the Republic of Kenya is in violation of Articles 8, 14, 17, 21 and 22 of the African Charter. The Complainants are also seeking:

- **Restitution** of their land, with legal title and clear demarcation.
- **Compensation** to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

#### **Decision by the Commission:**

The Kenyan government argued that the Endorois were not a separate community as they shared similar characteristics to other groups in the region and therefore felt that the Endorois' claims were invalid on this basis. The Commission recognised that the term "indigenous" in the context of Africa is often contested and that there remains no single, accepted definition. Nevertheless, the Commission states that indigenous peoples often become marginalised in their own countries and are in need of special recognition for the protection of their human rights. The Commission concluded that the Endorois are an indigenous community and they fulfil the criterion of 'distinctiveness'. The Commission further stated that, "the Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights." (Para 125)

*The Commission found the State of Kenya in violation of:*

- Article 8 (right to practice religion) by forcing the Endorois from their ancestral lands and thereby interfering with the maintenance of religious practices central to their culture and religion;

- Article 14 (the right to property) by interpreting this as requirement that States who are party to the Charter have, “an obligation not only to *respect* the right to property, but also to *protect* that right” (para 143). Moreover, the Commission stated that, “any limitations on rights must be proportionate to a legitimate need and should be the least restrictive measures possible.” The Commission stated that the eviction of the Endorois from their ancestral lands and the destruction of their possessions were “disproportionate” to any public need served by the Game Reserve. (Para 166)
- Articles 17(2) and (3) (the right to culture). The Commission stated that by forcing the community to live on semi-arid lands without access to the Lakes resources which traditionally maintained the health of their livestock, the State threatened to Endorois pastoralist way of life.
- Article 21 (the right to free disposition of natural resources) by failing to provide adequate compensation or restitution of their land.
- Article 22 (the right to development). Citing Article 3 of the Declaration on the Right to Development, the Commission affirmed that the State of Kenya “bears the burden for creating conditions favourable to a people’s development.” (Para 250). The finding that the Kenyan government did not provide adequate compensation and benefits or suitable land for grazing was indicative to the Commission that the State failed to ensure that the Endorois were not left out of the development process.

**Some of the Commissions’ recommendations for the Respondent State:**

- (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities.

**African Commission on Human and Peoples’ Rights, Decision 155/96, The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights – Nigeria (27 May 2002)**

**AU COMMITTEE REPORTS**

**A. CHILD**

**B. WOMEN**

**C. WORKING GROUP ON INDIGENOUS POPULATIONS/COMMUNITIES**

**REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES. Passed by the African Commission at its 34th session in the Gambia in November 2003.**

The report highlights the fact that there is no internationally agreed definition of indigenous populations/communities. In Africa, indigenous populations/ communities may be identified as exhibiting some of the following characteristics:

- Self-identification
- Marginalization, discrimination and exclusion
- Cultural distinctiveness and culture closely tied to ancestral lands

The report states that “Unlike the human rights instruments developed by the United Nations and other regional systems like the European system, which are primarily concerned with rights of individuals, the African Charter expressly recognises and protects collective rights” (p. 72). The further inclusion of the word “peoples” in the preamble and in the name of the Charter is taken to imply that the instrument itself was designed to protect collective rights. In addition, the inclusion of both collective and individual rights means recognition of the existence of a set of rights which can only be enjoyed collectively.

**African Commission on Human and Peoples’ Rights. Report of the Regional Sensitisation Seminar on The Rights of Indigenous Populations/Communities in Central Africa: 13 – 16 September 2006, Yaoundé – Cameroon.**

*Overview of Characteristics of Indigenous populations/communities in Africa and Key Issues Facing Indigenous populations/communities in the Central African Region Presenter: Dr. Albert Barume*

Significantly, Barume highlighted that the identification of indigenous populations /communities’ is often related to a specific territory. Therefore, the concept of land rights for indigenous populations/communities’ is believed to be in conflict with modern concepts of land rights. Modern, individualized conceptions of land rights therefore contribute to the lack of land tenure security experienced by indigenous populations/communities.

*Legal Protection of Indigenous populations/communities in Central Africa Presenter: Prof. Michelo Hansungule*

Hansungule affirms that constitutional and legal protection in Africa merely pays lip-service to the issue of indigenous populations/communities’ rights. For example, Cameroon’s constitution is considered to have down played the concept by confining indigenous rights to the preamble. Hansungule states that even if the preamble is considered integral to the Constitution (per article 65), it would be very difficult to enforce by itself and might constitute an insurmountable barrier to indigenous rights claimants. While the Central African Republic mentions “vulnerable groups” and “minorities”, the Republic of Congo’s Constitution guarantees a right to culture and to the respect of cultural identity and the rights of minorities. Neither of these explicitly refers to indigenous populations or communities which has a different connotation from minority groups in Africa. Thus, Hansungule concludes that indigenous populations/communities need legal protection. Although he claims that extension of legal protection to these groups would not be a serious difficulty, the current laws do not confirm overt political commitments declared by Central African authorities. In effect, indigenous populations/communities continue to experience considerable difficulty in trying to invoke the law to protect their rights.

*The Importance of Land for Indigenous populations/communities’ Survival and Factors behind Land Dispossession Presenter: Dr. Albert Barume*  
Barume’s presentation revolved around the following points:

- The importance of land for indigenous populations/communities;
- Analysis of historical justification of indigenous populations/communities right to land;
- Major causes of land dispossession; and
- Reaction of indigenous populations/communities in the region to land dispossession;

Barume concluded the following:

- Indigenous populations/communities cannot fully enjoy their cultural rights without the protection of their ancestral lands;
- Land is the incarnation/symbol of indigenous populations/communities' cultural identity;
- Land protects indigenous populations/communities' right to life;
- Indigenous populations/communities dispossessed of their land almost always are found to be unable to preserve not only their culture but also their language;
- The fact that agriculture is the main mode of economic life in Africa has contributed to the dispossession of indigenous populations/communities' land; other factors for dispossession include:
  1. Constitutions that guarantee individual—as opposed to collective— land rights;
  2. Non-recognition of non-agricultural uses of land such as nomadic pastoralism and hunting/gathering;
  3. Activities involving conservation and creation of national parks leading to dispossession;

#### **EXAMINING CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN AFRICA. WORKSHOP TO DETERMINE THE SCOPE AND METHODOLOGY OF THE RESEARCH. 2006. YAOUNDE, CAMEROON**

Workshop participants reject the oft-cited argument by African governments that most African people can claim indigenous status on the basis that they originated from the African continent. The Workshop Rapporteur, Michelo Hansungule, therefore emphasized the need to determine major identifying characteristics of indigenous peoples in Africa in order to assist identification of indigenous groups which were to be the focus of research.

Through extensive dialogue, the following criteria were proposed by workshop participants as a guide to groups identifying themselves as indigenous peoples on the continent:

- Indigenous peoples are socially, culturally and economically distinctive.
- Their cultures and ways of life differ considerably from the dominant society and their cultures are often under threat, in some cases to the extent of extinction.
- They have a special attachment to their lands or territories. A key characteristic for most indigenous peoples is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon.
- They suffer discrimination as they are regarded as 'less developed' and 'less advanced' than other more dominant sectors of society.
- They often live in inaccessible regions, often geographically isolated and are subjected to various forms of marginalisation, both politically and socially.

- They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.
- In addition to the criteria outlined above, participants highlighted the primary importance of self-identification, whereby the people themselves acknowledge their distinct cultural identity, way of life, and seek to perpetuate and retain their identity.

#### D. ESC RIGHTS

### PROGRESS REPORT OF THE CHAIRPERSON OF THE WORKING GROUP ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 44TH Ordinary Session, Abuja, Nigeria

The Working Group on Economic Social and Cultural Rights (Working Group) was established by resolution **78.ACHPR/Res.73 (XXXVI) 04** on Economic, Social and Cultural Rights in Africa adopted at the 36th Ordinary session held from 23 November to **7 December 2004** in Dakar, Senegal. In the same resolution, the Commission adopted the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights

2. The Working Group was mandated to:

- **develop and propose to** the African Commission on Human and Peoples' Rights a draft Principles and Guidelines on Economic, Social and Cultural Rights;
- **elaborate** a draft revised guidelines pertaining to economic, social and cultural rights, for State reporting;
- **undertake**, under the supervision of the African Commission on Human and Peoples' Rights, studies and research on specific economic, social and cultural rights;
- **make** a progress report to the African Commission on Human and Peoples' Rights at each Ordinary session;

16. In ensuring real and effective equality in the enjoyment of ESCRs, States parties **must pay particular attention to groups** suffering from systemic patterns of discrimination and take steps to remove de facto and legalized discrimination where **individuals and groups** are deprived of the means or entitlements necessary for realizing economic, social and cultural rights. The draft document points out that those measures should not, as a consequence, lead to the maintenance of separate rights for different groups and should be **discontinued after their intended objectives have been achieved**.

17. It recommends that states adopt legislative and other remedies to **prohibit private persons and bodies** from discriminating against **people** in their access and enjoyment of economic, social and cultural rights.

19. The document notes that where ESCRs are not expressly included in the constitution of a State party, the courts and administrative tribunals should strive to protect the interests and values underlying these rights through an expansive interpretation of other rights, for example, the right to life, human dignity, and security of the person, equality and equity. Domestic law must be interpreted as far as possible in a way which conforms to States parties obligations under the African Charter.

## **SOUTH AFRICAN LEGISLATION**

### **SA National Health Bill (2003)**

Preamble:

An aim of the bill is to “promote a spirit of co-operation and shared responsibility among public and private health professionals and providers and other relevant sectors”