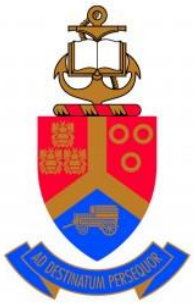

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THE PLACE OF INDIVIDUALS'DUTIES IN INTERNATIONAL HUMAN RIGHTS LAW: PERSPECTIVES FROM THE AFRICAN HUMAN RIGHTS SYSTEM

A dissertation submitted in fulfilment of the requirements for the award of the degree of Doctor Laws (LLD) in the Faculty of Law at the University of Pretoria

By Mumba Malila (Student No. 11348862)

Prepared under the supervision of Prof. Christof Heyns (University of Pretoria and Professor Benyam Mezmur (University of Western Cape)

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The place of individuals' duties in international human rights law: perspectives from the African human rights system

by

Mumba Malila

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Supervisor : Prof. Christof Heyns

Co-supervisor : Prof. Benyam Mezmur

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ABSTRACT

Some worry has been expressed in human rights circles that the human rights archetype has for some time now, disproportionately preoccupied itself with the culture of rights and claims at the expense of individuals' duties and responsibilities. A claim is made that while rights are individualistic, self-seeking, unworldly, self-indulgent and anti-social, individual duties and responsibilities are collective, social, humane, nuanced and associated with correct traditional and social behaviour and human values. The language of rights has dominated the texts of bills of rights in constitutions, and international instruments, and many view this rhetoric as unproblematic. Others, however, consider the currency of that language as overlooking, with dire consequences to human society, the concept of duty as the missing link of human dignity. There have, accordingly, been calls for a renewed focus on individual duties and responsibilities in the human rights discourse. The question is whether focussing on individual responsibility is necessary to counterbalance what is viewed by some as a bias towards rights.

Efforts to raise international consciousness of what is regarded as the limitation of a purely rights-based approach to human rights has been spearheaded by, among others, faith based organisations. These have advocated not only a more visible recognition of individual duties and responsibilities generally, but an international declaration of human responsibilities as a 'common standard for all people and all nations.' The calls being made are premised on, first, a view that a device in the form of an international declaration – a set of international rules – should be developed to change the current human rights architecture. This code of ethical obligations is necessary to guide and change individual behaviour. Second, a belief that greater emphasis should be laid on individual duty responsibility to supplement existing international human rights norms and standards, and finally, that human rights principles alone are inadequate for modern societies to regulate themselves well.

With particular reference to perspectives from the African Charter based human rights system, this project interrogates these concerns regarding duties with a view to ascertaining whether there is justification in them. Using as a reference point the concept of duties in the African Charter and to a small extent that in the African Children's Charter, which represents the older

and more established part of the African human rights system, the project concludes that although individuals' duties are important and deserve greater attention, there is no convincing case for the calls that are being made in this regard.

Key terms: African human rights system – human rights – individuals' duties – universalism – cultural relativism – African values – African Charter on Human and Peoples Rights – African Commission – African Children's Charter – homosexuality – female circumcision

DEDICATION

To the memory of my uncle, Lord Fillan Malila, who would no doubt have been happy to see this achievement. You encouraged me to get all the education you did not get. I always remember your words and have them etched in my palms.

I also dedicate this work to all the young Zambian lawyers and potential lawyers who have been inspired by my career progression and have viewed me as their role model.

To my children: Kalumba, Tasheni, Bupe and Chebo, for whom I am a living example that it is never too late to achieve your dreams.

And finally, this work is dedicated to all those who die trying.

DECLARATION OF ORIGINALITY

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Full names of student: **MUMBA MALILA**

Student number: **11348862**

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.

2. I declare that this LLD dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature of student:.....…  ……

Signature of supervisor:…….....……..

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This research project would not have been completed without the unflinching support and encouragement of many academic and personal advisors. My gratitude goes first to God almighty for giving me the strength to soldier on when the demands on my time were heavy. My appointment as Attorney General in the Government of the Republic of Zambia meant that I literally had to shelve this project for long periods of time. My elevation from Attorney General to Judge of the Supreme Court of Judicature for Zambia did not make matters any better. But for the encouragement of my supervisor, Prof. Christof Heyns, who offered timely advice and guidance, the completion of this project would have remained a pipe dream. I, therefore, extend my sincere gratitude to Prof. Heyns for all the academic advice and direction given. His critical but very constructive comments on the draft chapters of this work opened my view points to a numbers of issues and helped me structure some arguments that I make in this thesis in a more nuanced manner. In the same vein, I wish to profusely thank Prof. Benyam Mezmur of the University of Western Cape for kindly accepting to offer a 'second eye' as co-supervisor for this project. His critical and pointed comments and suggestions could only enrich this thesis. I, however, take full responsibility for all the shortcomings in this work.

Thirdly, I am indebted to my wife Maria-Theresa and my children Kalumba, Tasheni, Bupe and Chebo for being patient with me when I had to burn the midnight oil, and was unavailable at weekends when they most required my company.

LIST OF ACRONYMS

AAA	:	American Anthropological association
ACHPR	:	African Commission on Human and Peoples' Rights
ACRWC	:	African Charter on the Rights and Welfare of the Child
AU	:	African Union
BC	:	Before Christ
CAT	:	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	:	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	:	Convention on the Elimination of All Forms of Discrimination
CRC	:	Convention on the Rights of the Child
FGM	:	Female Genital Mutilation
IACtHR	:	Inter American Court of Human Rights
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic Social and Cultural Rights
ILO	:	International Labour Organisation
NGOs	:	Non-Governmental Organisations
OAU	:	Organisation of African Unity
OAS	:	Organisation of American States
UN	:	United Nations
UNESCO	:	United Nations Education Scientific and Cultural Organisation
UNHCR	:	United Nations High Commissioner for Refugees
UNHRC	:	Office of the United Nations High Commissioner for Human Rights
ECOSOC	:	Economic and Social Council

CHAPTER ONE: MAPPING THE DISCOURSE

1.1. INTRODUCTION

There appears to be concern within some sections of the human rights community that the human rights paradigm has thus far unduly preoccupied itself with the culture of rights and claims at the expense of individuals' duties and responsibilities.[1] The argument is that while the global human rights framework is now fairly well ingrained, there is no comparable individual responsibility or duty framework to complement the emphasis on rights. This is despite the recognition in various international human rights instruments, including the Universal Declaration of Human Rights (UDHR),[2] of the intrinsic link between rights and individuals' duties; that rights cannot exist without people acting responsibly towards each other. International consciousness of what is perceived as the limitation of a purely rights-based approach to human rights continues to permeate current thinking.[3]A claim is thus made that it is now time to initiate an equally important quest for the acceptance of human duties or obligations.[4] Moreover, as Besson puts it, recent years have seen a greater interest among human rights theorists for the 'supply-side' of

[1] A number of initiatives towards the promotion of greater emphasis on duties have been undertaken over the years, some as recently as 2011. These include, and are not limited to, The Trieste Declaration of Human Duties by the Council of Human Duties in 1993, the Declaration Towards a Global Ethic by the Parliament of World Religions in 1993, the Universal Declaration of Human Responsibilities of the Inter Action Council, 1997, the Declaration on Responsibilities of the Present Generations Towards Future Generations adopted by the General Conference of UNESCO in 1997, the Valencia Declaration, 1998, Recommendation 1401 of the Parliamentary Assembly of the Council of Europe on Education and Responsibilities of the Individual in 1999, the pre-draft Declaration on Social Responsibilities of the Special Rapporteur of the UN Commission on Human Rights 2003, Resolution 1845 of the Parliamentary Assembly of the Council of Europe on Fundamental Rights and Responsibilities in 2011. See also: International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law* (International Council on Human Rights Policy Geneva 1999); C R Sunstein, 'Rights and Their Critics', (1995)70 *Notre Dame Law Review* 727; M A Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York 1991).

[2] It was adopted by the UN General Assembly on 10 December 1948 in Paris, France. It is considered to be an 'authoritative interpretation of the Charter of the United Nations' and 'the common standard to which the legislation of all member states of the United Nations should aspire.' it was inspired by President FD Roosevelt's Four Freedoms' speech to the US Congress on 6 January 1941; Eleanor Roosevelt and the French diplomat Rene Cassin took roles in its drafting.

[3] See for example, Resolution 1845 of the Parliamentary Assembly of the Council of Europe on Fundamental Rights and Responsibilities in 2011. See also Arias Sanchez, Oscar, 'Some Contributions to a Universal Declaration of Human Obligations' <http://interactioncouncil.org/sites/default/files/1997%20UDHR.pdf> last accessed 6 December 2016; B Saul, 'In the Shadow of Human Rights: Human Duties and Responsibilities' (2001) 32 Columbia Human Rights Law Review 565-624; and SLT McGregor, 'Human Responsibility Movement Initiatives: A Comparative Analysis' (2013) 7 No 1 *Factis Pax* 1.

[4] See 'A Universal Declaration of Human Responsibilities': Report on the Conclusions and Recommendations by a High-level Expert Group Meeting Chaired by Helmut Schmidt 20-22 April 1997,Vienna, Austria.

human rights, i.e. for the duties correlative to human rights and their duty-bearers, and also for the moral and ethical side of responsibility. This is important as, even though human rights have justificatory priority over duties, their existence is arguably tied to their ability to generate not only feasible, but also fair, egalitarian and, more generally, justifiable duties.[5]

While rights are viewed by many as individualistic, self-seeking, unworldly, self-indulgent and anti-social, individual duties and responsibilities are viewed as collective, social, humane, nuanced and associated with what is, in their subjective view, the acceptable social behaviour and human values. While the language of rights has dominated the texts of bills of rights in constitutions, and many view this rhetoric as unproblematic, others consider the currency of that language as overlooking, with dire consequences to human society, the concept of duty as the missing link of human dignity.

Efforts to incorporate private duties or responsibilities into human rights law are not new. In fact, since the inception of the modern human rights movement, there has been activism urging the international adoption of individual duties and responsibilities in a more visible way. The *travaux préparatoire* of the UDHR indicate that the negotiators of the UDHR had considered the possibility of including duties in a detailed manner in the declaration. Ultimately, however, the idea of setting out duties in the UDHR in an elaborate way on the footing of equality with human rights was dropped largely on the premise that this would give governments justification for limiting rights. The result was that duties were relegated to the margins.[6]

In recent times there have been initiatives around two distinct but closely related ideas: first, the notion of giving greater recognition to individuals' duties (considered broadly not only as correlative to rights, but also as ethical and moral obligations), and second, the idea of introducing a universal declaration of human duties and human responsibilities.[7] Various

[5] S Besson, 'International Institutions' Human Rights and Responsibilities' <www.jura.uni-freiburg-vortra-prof-samantha-bessom-13> accessed 6 December 2016.
[6] For an overview of the drafting history of the UDHR, see J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Pennsylvania 1999).
[7] These calls started in the last twenty five or so years, but have been repeated as recently as 2001 when Miguel Alfonso Martinez was appointed as a Special Rapporteur on human responsibilities. His work culminated in a final report and a pre-draft Declaration on Human Social Responsibilities. Subsequently in 2005, the Human Rights Commission adopted a request that Martinez prepares a new version of the declaration for its re-consideration. This

movements have campaigned for the latter proposition.[8] Thus, for example, in 1997, the Inter Action Council, an organisation consisting of around thirty former heads of state and government, invited the United Nations to proclaim a Universal Declaration of Human Responsibilities as a 'common standard for all people and all nations.' Such a global instrument on duties and responsibilities of the individual would serve the role of sensitizing communities to their duties and responsibilities and helping the attainment of the broader purposes that personal duties serve in the human rights framework. This and similar efforts to have duties recognised through an international charter have, however, been thus far unsuccessful.

The conversation about the need for greater attention to be paid to the duties of the individual, like the debate on a universal declaration of duties and responsibilities corresponding to human rights, is predicated on the belief that individual duties and responsibilities complement rights. Therefore, when people shoulder their duties to each other and to the local, national, regional, and global community and act responsibly, they will create an environment where their individual and collective rights will be less likely to be violated. The formulation of individuals' duties and responsibilities in a global instrument along the lines of the UDHR, would therefore, serve the same end of giving visibility to personal duties and in the process motivate a duty conscious human society in which the enjoyment of rights would be enhanced. Other schools of thought, however, argue that there is no need to disturb the present arrangement where rights and duties co-exist in a manner where they complement each other, and that emphasising duties and responsibilities would have the adverse effect of undermining rights.[9] It is also argued by some

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revision was not supported at the subsequent 2005 UN Economic and Social Council meeting, where it was rejected by a narrow margin of two votes. See: McGregor (n 3).

[8] Since about 1983, the calls for greater recognition of duties seem to have gained ground. In 1983 the Inter Action Council was formed. It developed the Universal Declaration of Human Responsibilities. In 1997, it asked the United Nations Secretary General and all heads of state and government to support its proposal for the adoption by the United Nations General Assembly of the Declaration. The Parliament of World Congress at its meeting in 1993 adopted a declaration toward a global ethic which called for greater recognition of duties and responsibilities. In about 1993, the International Council of Human Duties was established to advocate for greater recognition of duties and responsibilities in its Carta of Human Duties: A Code of Ethics and Shared Responsibilities. In 1995 the Commission for Global Governance published a report entitled 'Our Global Neighbourhood' in which further advocacy for duties was contained. In March 2009, the Lord Chancellor and Secretary of State for Justice of the United Kingdom presented the Green Paper to the UK Parliament entitled 'Rights and Responsibilities: Developing our Constitutional Framework' which marked the launch of the debate on rights and responsibilities. More recently communitarian thinkers have advocated greater prominence being given to the place of individual duties and responsibilities.

[9] See for example, J H Knox, 'Horizontal Human Rights Law' (2008) 102 (1) *The American Journal of International Law* 1.

like organisations like Amnesty International and commentators like Ben Saul that rights are threatened if duties and responsibilities are codified at international level.[10]

1.2. STATEMENT OF THE PROBLEM

It must be pointed out from the outset that in the human rights discourse the notion of duty generally has two distinct dimensions; the first implicates the state and the other concerns the individual. In other words, in addition to general obligations applied to states parties under various international human rights instruments and under general international human rights law, individuals in their personal capacities owe certain duties to other individuals, to their communities and to the state in which they live. Many commentaries about individuals' duties have measured these duties to be arduous. Consequently some of the observations made by commentators on individuals' duties have focused on the possible use that can be made of these duties by states to efficiently trump guaranteed individual rights. Although there are some examples that are given later on in this thesis, there has been little research conducted to test this aspect, yet it is quite clear that the concept of individuals' duties is not necessarily adversative to the respect for human rights. What is clear is the need to approach the subject of individuals' duties in such a manner that the overall observation and protection of individual rights is not in any way undermined by any undue emphasis on personal duties.

The focus of this thesis is on the duties of the individual rather than the state. Therefore, reference in this thesis to duties and responsibilities, unless the context indicates otherwise, is to the duties and responsibilities of the individual. The duties or responsibilities are also referred to interchangeably as 'human duties,' 'individual duties,' individuals' duties, and 'personal' duties.

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[10]Among those that argue against listing duties in a global instrument include: Amnesty International, 'Muddying the Waters The Draft Universal Declaration of Human Responsibilities: No Complement to Human Rights', [IOR 40/02/98] London 1998) < http://www.amnesty.org/en/library/info/IOR40/002/1998> accessed, 22 September 2014; Saul (n 3); Knox (n 9); K Suter, 'The Quest for Human Responsibilities to Complement Human Rights' (2010) 26 (3) *Medicine, Conflict and Survival* 199-206.

There are two schools of thought on the subject of individuals' duties. One that posits that these duties or responsibilities in the context of rights have been neglected and/or are not well understood, and the other that argues that the present treatment of individuals' duties in the human rights framework is seamless, and does not need to be upset. Both issues raise questions of considerable research interest. Many scholars and writers sympathetic to the first school of thought recognise that the law in general abound with individual duties while recognising rights.[11] However, although many individual duties and responsibilities already exist in statutes, common law and our ethical framework, duties or responsibilities at individual level have not been given the same prominence as rights. While the law imposes many personal duties on the individual, it often does so without framing them explicitly in the language of duties or responsibility. The underlying assumption by some of those advocating for a tabulation of human duties alongside human rights is that when individuals' duties are addressed adequately in a bill of rights or other human rights instrument, there will be greater scope for enforcement of human rights. They argue that there is great benefit to be gained globally if we use human rights law to set out converse personal duties owned to government and horizontal duties owned by one private party to another. The horizontal effects doctrines aim to further the respect and protection of fundamental rights and 'refer to the binding effect of human rights provisions on private parties.'[12] Human rights are applied vertically, whereby obligations are imposed on states as the 'higher' entity to the benefit of individuals. Substantive horizontal effect enable individuals to claim violations of duties owed to them by non-state actors, whilst procedural horizontal effect would allow an individual to enforce his fundamental rights against another individual.[13] The direct horizontal application of human rights, according to Phillipson, 'lays duties directly upon a

[11]For example, F Viljoen in his *International Human Right Law in Africa* (Oxford University Press, New York 2007), points out that domestic legislation routinely imposes individual duties on individuals either explicitly or implicitly. He cites section 6 the Uganda Children's Act Chapter 50 of the laws of Uganda which casts on parents or guardians the responsibility to maintain their children as an example of an explicit imposition of duty. For implicit imposition of duties, he gives the example of laws that require payment of taxes and those criminalising certain conduct. Other examples that can be cited are the Malawian Child Care, Protection and Justice Act 2010 which creates duties and responsibilities for parents and guardians towards their children, and equally creates in section 4 duties for children to respect their parents, to serve the community etc. O C Eze, 'Des Structures possible à l'échelon regional africain pour la promotion des droit de l' homme' (1977) 22 *Revue Sénégalaise de Droit* 69-79, equally states that at the very best, duties could be seen as a program to be considered by domestic legislation.

[12] J Gajdosova and J Zehetner, 'England' in G Bruggemeier, A Colombi Ciacchi, and G. Commande (eds) *Fundamental Rights and Private Law in the European Union, vol. 1: A Comparative Overview* Cambridge University Press, Cambridge 2010) 151.

[13] P Van Dijik and GJH Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rdedn Kluwer Law International, The Hague 1988) 23.

private body to abide by its provisions and make breach of these duties directly actionable at the instance of an aggrieved party'.[14] Knox explains that, indirect horizontal effect holds states indirectly responsible for the harmful actions of non-state actors, because the state's obligation to protect human rights requires them to impose duties on individuals through the implementation of their own domestic laws.[15] Yet, the argument on duties by this school of thought has gone further than that. Those advocating a universal instrument setting out human duties and responsibilities argue for a global ethic that goes beyond mere converse duties and responsibilities to human rights. They are calling for recognition and codification of morals and ethics in the form of responsibilities that support human rights. This is paradoxical since by their very nature, morals and ethical standards are difficult to legislate or codify, let alone enforce. The implication of any attempted codification could well be the extinction of the defining qualities of morality and ethics.

The two viewpoints, namely the emphasis on human rights at the expense of individuals' duties and responsibilities and the lack of popular understanding of personal duties and responsibilities, are perceived to have combined to bring about a weakening of public safety and the decay of the moral fabric of society. In other words, the key reason given for calls for the cultivation of greater awareness, and recognition of individual duties and responsibilities towards the family, towards others and the community, is that focusing on individual responsibility is necessary. This is to counter balance what has been viewed as a bias towards rights and the injurious effects that this is bringing about in human society. These ruinous consequences include disorder, crime, breakdown in family and community life, ethnic and religious intolerance, and internal conflicts and similar vices - all attributable to the exercise of rights without individual responsibility. This perception is evident from some public statements that have been made in this regard by some political leaders and human rights commentators.[16]Second, there is a call for the recognition, in

[14] G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) *The Modern Law Review Limited* 824.
[15] J H Knox (n 9) 28.
[16]See: 'My vision for Britain' *The Observer* 10 November 2002. In presenting a view that is by no means representative of the position this researcher takes in this study, Tony Blair stated that: 'Social democrats in Britain and the US who held a liberal view of the "permissive society" divorced fairness from personal responsibility. They believed that the state had an unconditional obligation to provide welfare and security. The logic was that the individual owed nothing in return. By the early 1970s this language of rights was corroding civic duty and undermining the fight-back against crime and social decay. It led Robert Kennedy to lament of America, 'the destruction of the sense, and often the fact, of community, of human dialogue, the thousand invisible strands of

some form or other, of a universal code of ethical obligations - a body of international rules to guide individual behaviour, in other words there is a call for codification of individual responsibilities and duties into a universal declaration. The general argument regarding the need for a reconsideration of the notion of duty in the human rights framework seems to encompass at least one of the following ideas:

1. Greater emphasis should be laid on individual responsibility and duty to supplement existing international human rights norms and standards.
2. The present human rights framework, which includes duties as limitations on rights, is inadequate for modern societies to regulate themselves. There needs to be greater emphasis on duties and responsibilities of the individual.
3. An instrument in the form of an international declaration – a set of international rules – should be devised to change the current human rights architecture. This code of legal as well as ethical obligations is necessary to guide individual behaviour.

Part of the rationale for advocating a universal declaration of individuals' duties and responsibilities, at least as given by the International Human Rights Council on Human Rights Policy, is apparently premised on the observation that the peaceful and orderly world which humanity expected at the end of the Second World War and the Cold War has not in fact materialised.[17] This would appear to confirm the interrelatedness of the two otherwise distinct calls for greater recognition of individuals' duties and the development of a global instrument.

The school of thought that expresses serious misgivings about giving greater recognition to personal duties than presently exists, let alone the devising of a global instrument to articulate individual duties,[18] principally argues that those wielding political power have and can use the language of duties and responsibilities to suppress human rights. Rhoda Howard and Jack

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common experience and purpose, affection and respect, which tie men to their fellows.' See also M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York 1991) 14 and C R Sunstein, 'Rights and Their Critics' (1995) 70 *Notre Dame Law Review* 730.

[17] See the statement by T Hammarberg, 'Preface' in International Human Rights Council on Human Rights Policy *Taking Duties Seriously: Individual Duties in International Human Rights Law: A Commentary* (Versoix, Geneva 1999).

[18] See n 10.

Donnelly, for example, think that the mixing up of rights and duties in the modern state is to risk eventual complete disappearance of the rights. In their words 'all duties will be aimed towards the preservation of the state and of the interests of those who control it.'[19] Another scholar calls these duties to be 'little more than formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples.'[20]

According to this school of thought, the political elite may demand blind loyalty and gullible patriotism through using the notion of duty. In this sense, individuals' duties and obligations may be open to abuse for improper political ends. Individual duties towards the family and the community could also potentially be used to perpetuate discrimination against women and children in terms of their perceived role of maintaining the family and the community. The Soviet Union was an ignoble example of countries that catalogued individual duties whose effect was to impose a sense of loyalty amongst the citizenry and in that way pacify pro-human rights dissenting views. The 1977 Constitution of that country provided in article 59, that citizens' exercise of their rights was inseparable from the performance of their duties.[21] Under articles 60 to 69 these duties were defined. They included the requirement of citizens to work and to observe labour discipline, to protect socialist property, oppose corruption, to make thrift of the people's wealth and concern themselves with the upbringing of children.

Political misuse of the language of individual duties should not, however, prevent a constructive discussion of the complex and difficult questions regarding these duties. Reminding people that they have basic legal, moral or ethical obligations is a worthy and necessary undertaking. However one chooses to look at it, the whole debate on individuals' duties cannot be dismissed as a farce because the intent underlying these efforts is clearly to find a counterbalance to the language of human rights, so as to enhance the enjoyment of rights.

[19] R E Howard and J Donnelly (eds), *International Handbook of Human Rights* (GP, New York 1987) 25.
[20] See H Okoth-Ogendo 'Human and Peoples' Rights: What Point is Africa Trying to Make' in R Cohen, G Hyden and W Nagan, *Human Rights and Governance in Africa* (University Press of Florida, Gaviesvill FL 1993) 78.
[21] It was adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR Ninth Convocation on 7 October 1977. The official name of this Constitution, also known as the Brezhnev Constitution, is 'Constitution (Fundamental Law) of the Union of Soviet Socialist Republics.'

This research project engages the two schools of thought on individuals' duties with a view to assessing the true worth of the claims they make. The research proceeds from the uncontroverted position that first, the fundamental debate between rights on one hand and individuals' duties and responsibilities on the other is aptly justifiable, and second, that there are major centres of agreement as regards the value of duties in the human rights framework. The conclusion the research makes is that charges against what is perceived as an overemphasis on rights, and the case for an individuals' duties and responsibilities universal declaration, are exaggerated. The project dismisses charges that the perceived disproportionate emphasis on rights at the expense of duties and responsibilities is to blame for weakening public safety and the decay of the moral fabric of society. It sustains the argument that although a renewed focus on individuals' duties and responsibilities is, in a sense desirable, it should not take the form of a human duties and responsibilities universal instrument. The point made is that human rights law is already replete with a range of express, implied correlative, human rights duties, obligations and responsibilities. Any attempt to set out in another document, by whatever name called, a list of individuals' duties and responsibilities, is a needless misapplication of effort and a diversion of attention from the central cause of human rights.

With particular reference to perspectives from the African human rights system, as garnered principally from the African Charter and the African Children's Charter experiences, the study dispels the claims that the dichotomy between rights and individuals' duties and the emphasis of the former at the expense of the latter is, at least in part, responsible for what is perceived by some in human rights circles as a decline in moral responsibilities and a general regression from an age where individuals took responsibility for what they did, to one where people do not want to assume responsibility for anything at all. Not much attention has been paid to previous efforts to articulate duties in a more elaborate manner, given that the idea of combining individual rights and duties in a human rights instrument is not without precedent. This is particularly so as these calls and efforts are coming after a unique experiment with duties of the individual has already been undertaken in the African human rights system, especially in regard to the African Charter and, until 2004, its sole implementing agency, the African Commission on Human and Peoples' Rights. Good or bad, the African Charter and African Children's Charter experience would provide a perspective to the treatment of individual duties, which should assist the discourse

regarding calls for a renewed focus on individuals' duties and responsibilities. Of course the creation and imposition of duties of individuals by an international human rights instrument or a treaty for that matter did not begin with the African Charter. Many international human rights instruments that predated the African Charter and others that came after it do have provisions encapsulating duties for individuals.[22] And yet, all the other instruments have peculiar weaknesses which make then unsuitable to provide any lessons. The choice of the African Charter based human rights system as a reference point is deliberate. A scrutiny of the provisions of human rights instruments which provide for the duties of the individual shows one glaring fact. They do not treat the issue of individual duties and responsibilities with any appreciable level of depth. For example, the UDHR mentions duties only once in article 29(1), and even then, only minimally. It does not specify them.[23] Equally the twin covenants - the International Covenant on Civil and Political Rights[24] and the International Covenant on Economic Social and Cultural Rights[25]- declare in their common final part of their respective preambles that it is realised that the individual has duties to other individuals and to the community to which he belongs and is under a responsibility to strive for the promotion and observance of the rights recognised in those Covenants. Neither covenant lists these duties.

A similar situation replicates itself at the regional level. In the European region, the Council of Europe adopted the European Convention on Human Rights (the European Convention).[26] It imposed limitations on the enjoyment of rights as set out in articles 9, 10, and 11 of the Convention. Under article 10 that recognition that the exercise those freedoms carries with it duties and responsibilities. The American Declaration on the Rights and Duties of Man[27] is perhaps remarkably different. It sets out in a comprehensive manner, individuals' duties

[22] See Ch 2 & 4.
[23]It states that: 'Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.'
[24] UN General Assembly Resolution 2200A (XXI) of 16 December 1966 UN Treaty Series vol 999 171.
[25] UN General Assembly Resolution 2200A (XXI) of 16 December 1966 UN Treaty Series vol 993 3
[26] The Convention for the Protection of Human Rights and Fundamental Freedoms was drafted in 1950 signed 4 November 1950 and entered into force on 3 September 1953 213 UNTS 221 ET5.
[27] The Declaration was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogota, Colombia, in April 1948.

alongside human rights. These duties include those owed to society; to children and parents; to vote; to obey the law; to pay taxes; and to serve the community. As a matter of fact that Declaration refers to duties in five out of its six perambulatory paragraphs, and mentions individual duties in a separate chapter. In this respect, the American Declaration is comparable in many respects to the African Charter. It is, however, just what it says it is - a declaration and not a treaty like the African Charter. In any case, the present regional human rights system in the Americas is premised on the American Convention on Human Rights[28] which has, by and large, overshadowed the American Declaration. Reference to duties in the American Convention was abbreviated to its Chapter 5, headed Personal Responsibilities and takes the form of a single article stating simply that:

> [e]very person has the responsibilities to his family, his community and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

Among the many reasons for choosing the African Charter based human rights system as a point of reference in this study include the following: first, both the American Declaration and the UDHR were mere declaration with doubtful binding effect and therefore could not have the efficacy of their provisions legally tested. The UDHR was intended to provide a common standard of achievement.[29] The American Declaration is equally not legally binding although the American Commission and the American Court have subsequently accepted it as a source of legal obligations for the OAS member states.[30] The legal basis justifying the binding nature of the Declaration lies in the treaty obligations. However, not all American states including the United States agree with that conclusion.[31] Even though the Declaration was subsequently codified into a Convention on Human Rights, its binding value remains opposable to those OAS

[28] Adopted in 1969 and entered into force in 1978.
[29] The UDHR is considered to be an 'authoritative interpretation of the Charter of the United Nations' and 'the common standard to which the legislation of all the Member States of the United Nations should aspire.'
[30] See Advisory Opinion OC – 10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights, IACtHR, Series A no 10 paras 34-45
[31] See J Pasqualucci, 'The Americas' in D Moeckli, S Dhah, S Sivakumaran (eds) *International Human Rights Law* (Oxford University Press, Oxford 2010) 435.

states that have not acceded or ratified the American Convention.[32] No state can be referred to the Court or the Commission for breach of the Declaration. This makes the American Declaration a rather inappropriate reference point for lessons on individual duties. For its part, the American Convention on Human Rights does not place a strong emphasis on duties. Individual duties are reduced to a chapter of one article.[33] However, the African Charter is the first human rights instrument to articulate the concept of duty in an elaborate way.[34] To quote the former Senegalese President Léopold S. Senghor in his opening address to the meeting of African Experts in Dakar:

> Rights in Africa assume the form of rite which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities. Therefore, contrary to what has been done so far in other regions of the world, provision must be made for a system of 'duties of individual', adding harmoniously to the rights recognised in them by the society to which they belong and, by other men. I conclude: if we want to build the *homo africanus* of tomorrow, we should once again, assimilate without being assimilated'.[35]

The thinking around the novelty of the African Charter provisions on individual duties was also carried in an official document during the drafting of the African Charter as follows:

> The part dealing with duties is an innovation. Until now, international instruments referring to the duties of individuals do so in a few words and this often betrays the authors' lack of conviction. It is necessary to point out here that if individuals have rights to claim, they have also duties to perform. In traditional African societies, there is no

[32] These include the USA, Canada and some Caribbean nations.
[33] American Convention on Human Rights, Chapter V *Personal Responsibilities* art 32.
[34]Address delivered by Léopold S. Senghor, former President of the Republic of Senegal on November 28 1979 to a meeting of African Experts preparing the Draft African Charter OAU-DOC. CAB/LEG/67/5, as quoted in W Benedek 'Peoples' Rights and Individual Duties as Special Features of African Charter on Human and Peoples' Rights' in P Kunig, W Benedek and C R Mahalu (eds) *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos Verlagsgesellschaft 1985) 59 61.
[35] Address delivered by the former President of Senegal, Léopold Sedhar Senghor in Benedek (1985) 59, 61. President Senghor the late Collomb, who remarked that '[t]o live in Africa is to give up being an individual, particular, competitive, selfish, aggressive, concurrent, man is to live with others, in peace, in harmony, with the dead and living, with the natural environment and the spirits inhabiting or livening it up'.

> opposition between rights and duties or between the individual and the community. They blend harmoniously'. [36]

Furthermore, unlike the American Declaration, the African Charter is widely ratified or acceded to by all African countries. It is above all a legally binding treaty so that the motivation for compliance with it is higher than a mere declaration, thus making a case for using it to draw lessons more compelling. Additionally, the elaborated individuals' duties and responsibilities proposed in the universal draft declarations on duties and responsibilities closely mirror those in the African Charter and this, in itself, provides a good basis for comparing like to like. Third, many of the African Charter duties, like those proposed in the draft universal declarations of duties and responsibilities are generally non-binding and are unenforceable. They have been regarded as weak and ineffectual.[37] They have attracted little or no practical attention from much of the human rights community though admittedly they have been a subject of theoretical discourse. They have hardly been reported upon meaningfully in state reports submitted under article 62 of the African Charter and article 32 of the African Children's Charter nor have they, in their own right, been a subject of concrete interpretation through any communication by the African Commission or the African Court. As many of these duties are similar to those suggested in the proposed declaration, their general impact cannot be expected to be any different. Therefore, the success and failure of the whole concept of individuals' duties under the African Charter and the African Children's Charter cannot be without relevance to the present calls for greater recognition of duties and responsibilities and for a human responsibility universal framework. These facts should provide sufficient motivation to protagonists of a universal human duties and responsibilities framework to draw from the African experience. It is, therefore, regrettable that virtually all the efforts to establish an individual duties and responsibilities universal instrument have been done without careful regard to lessons that could be learnt from a system that has tried to implement duties in a unique way from inception. It would enrich the debate on the proposed universal declaration of human duties and responsibilities if consideration were given to the lessons, whether good or bad, learnt from the

[36] See memorandum of the meeting of experts for the preparation of the draft African Charter on Human and Peoples' Rights, Dakar, 1979 108.
[37] This is elaborated in Ch 3 & 6.

African human rights system, particularly as regards the normative content of the duties themselves and their formulation.[38]

The research project makes the case that the critical human rights concern of our time should not be to create an adversative or competing set of duties and responsibilities for individual; or even devise more individual duties than presently exist. It should be to find a way of ensuring that the existing personal duties in the human rights framework are used more effectively to secure greater observance and better enforcement human rights.

1.3. RESEARCH QUESTIONS

The critical questions that this project seeks to answer are first, whether there is merit in the claims that the seemingly limited attention that has been paid to individual duties is responsible for the consequences attributable to the exercise of rights without responsibility. Second, whether it is necessary to address these perceived challenges through a universal duties and responsibilities instrument. More specifically, the study will address the following questions and kindred issues:

(i) What are individual duties in the human rights discourse?

(ii) Is the language of individual duties and responsibilities necessary to the values and objectives of the human rights movement?

(iii) How would a duty-based declaration being advocated by some human rights organisations influence the content of rights in the UDHR and other international human rights instruments?

(iv) How do individuals' duties influence the universality and cultural relativism debate?

(v) Are there any useful lessons to be learnt from duties provisions in the African Charter based human rights system as regards the inclusion of individual duties in human rights instruments?

[38] For lessons see Ch 7.

1.4. RESEARCH RATIONALE/MOTIVATION

This research project is motivated by a desire to provide a theoretical basis for understanding private duties as an important component of the international human rights system. A clear understanding of the truth-value of individual duties provisions helps us avoid formulations of duties of the individual that do not give these duties any meaningful normative content. Through a historical analysis of landmark human rights documents, the study will consider the nature and function of private duties in the observance of human rights. It seeks to establish a causal relationship between the formulation of individual duties provisions of the African Charter and the African Children's Charter at the theoretical level and the record of implementation of those duties provisions at the practical level. In this regard, the study shall consider states parties' compliance with the duties provisions in the African Charter as well as in the African Children's Charter, identifying deficits, offering critiques and using this as a yardstick for evaluating merits or the lack thereof of the calls for a universal declaration of human duties.

The study is also motivated by the need to stimulate further research on the important subject of individuals' duties and responsibilities on the one hand, and their use as a tool for interpreting and enhancing human rights on the other. In this sense, the project is intended to be a contribution to a field of scholarship in which few studies of comparable depth have been undertaken and for which there is hitherto a paucity of clear interpretive guidance from supervisory organs of various human rights systems.

1.5. WORKING HYPOTHESIS

The underlying assumption in this work is that a clear conception of a right or a duty is critical to its realisation. An unclear right or duty will inevitably be difficult to define and measure and will make realisation still more difficult. Observance by states of their obligations in provisions in human rights instruments is dependent, largely, on their understanding of the provisions set out in those instruments. Calls for greater observance of duties and for an international instrument on personal duties and responsibilities require absolute clarity as to the content and meaning of the duties advocated. Anything short of this makes the effort impossible to realise.

1.6. METHODOLOGY

This study will be literature based and will employ a historical analysis. It will be informed by work previously done in the area by various experts. The project will be done mainly through desk research. It includes a review of literature and case authorities from various schools of thought by way of comparison.

The study will examine the *travaux préparatoires* of various key human rights documents at international and regional levels to consider the manner in which individuals' duties and obligations were treated so as to identify lessons that should inform the current debate on private duties and responsibilities.

1.7. LITERATURE REVIEW

The literature review for this project consists of various books and journal articles on the subject of human rights and duties, legal documents and other web based scholarly articles. Some of these resources are written by well-known scholars and experts in this field. Also to be considered, are the many articles from the African Commission's reports, state party reports submitted to the African Commission on Human and Peoples' Rights under the African Charter, other documents of the African Commission such as the Reporting Guidelines and Concluding Observations, UN/ European/Pan American human rights Convention records and other reviews of various human rights instruments. These sources enable one to make an analysis of all major international human rights treaties.

In considering whether the language of individuals; duties is necessary to the values and objectives of the human rights movement one has inevitably to understand the human rights movement itself. Many authors have given their arguments or understanding of the basic features of human rights in contemporary legal and political debate. The different understanding of rights - their derivation, pedigree, content and consequences appear in various texts, too numerous to itemise.

The International Council on Human Rights Policy in its book *Taking Duties Seriously: Individual Duties in International Human Rights Law*[39] makes a commentary describing how the Universal Declaration of Human Rights and other international human rights agreements take account of individual duties and responsibilities. The commentary shows the importance the drafters of the UDHR attached to individual duties to differentiate freedom from obligations and make clear that a balance must be struck between individual freedom and the rights of others, as well as the legitimate demands of the community and the state. The book makes the point that international human rights standards contain many important references to individual duties and responsibilities. There is no analysis, however, in this book as to the efficacy of those duties provisions both at the universal plane and at the regional level. Besides using the African conception of duties in the realm of human rights as a living example, this research will go further and consider critical conception weaknesses implicit in the calls for the universalization of duties in an international instrument.

David Kennedy, in Chapter 1 of his *The Dark Side of Virtue: Reassessing Humanitarianism*[40] develops a short list of hypotheses about the possible risks, costs and unanticipated consequences of human rights activism. He argues that we must compare whatever assessments we make of the human rights vocabulary against the costs and benefits of other emancipatory vocabularies that might be used to the same ends. He asserts that the emphasis on human rights can leave unattended the wide array of laws that do not explicitly condone violations but that certainly affect their frequency and may in fact be doing more harm than the absence of rights. This is an important cautionary observation. The views the author expresses and others are relevant to the subject of inquiry in this work. The research proceeds on the premise that it is important to calculate the possible risks and costs of the activism around greater emphasis on individual duties and a universal declaration of duties to the human rights framework.

Among the many works which describe and analyse a duty oriented rather than a rights oriented social ordering through law and cultural traditions, is that of Robert Cover's 'Obligations: A

[39] International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law* (International Council on Human Rights Policy, Geneva 1999).
[40] D Kennedy, *The Dark Side of Virtue: Reassessing Humanitarianism* (NJ Princeton University Press, Princeton, 2004).

Jewish Jurisprudence of the Social Order.'[41] He analyses a duty oriented social ordering in the legal culture of Judaism with its stress on obligations imposed by God rather than rights. The duties dealt with are imposed on individuals and are not correlative of rights. He opines that 'there is a useful counter to the centrifugal forces of the Western nation state while the ideology of mitzvoth or obligation has been equally useful as a counter to the centripetal forces that beset Judaism over the centuries.' Although the author focuses on individual duty within the culture of Judaism, his work is useful to the extent that it sheds light on a relativist view of the subject of individual duties. The author's focus is however different from that of this work in material respects.

The definition of the term duty in the human rights discourse has not been free from controversy. In attempting to define what an individual's duties are within the human rights discourse, the work of the American legal theorist, Wesley Newcomb Hohfeld, in his *Fundamental Legal Concepts as Applied in Judicial Reasoning,*[42] offers an analysis that sets a very useful starting and constant reference point to any discussion on the subject of duties, responsibility and obligations in the human rights context. In lamenting the loose way in which jurists have often used the word 'right,' Hohfeld' explains the relationship between rights and duties and the difference between rights and privileges. He argues that there cannot be a right without a duty. Duty in this sense is correlative of a right. He offers the famous analysis of rights, as clusters of (claim) rights, privileges, powers and immunities, each imposing upon others its own correlative, namely duties, no rights, liabilities and disabilities. Various theorists appear to align themselves with the Hohfeldian construction as far as a right and its functions are concerned. For example, Feinberg, proclaims that to have a right is to have a 'valid claim'[43] while J. Mackie[44] is of the view that 'a right, in the most important sense, is the conjunction of a [privilege] and a claim-right'. Many philosophers, thinkers and writers, have expressed the belief that rights and duties are interlinked. These include C. Wellman[45] who declares that 'no one ever has a right to do

[41] R Cover 'Obligations: A Jewish Jurisprudence of the Social Order' (1987) 5 *Journal of Law and Religion* 65.
[42] W N Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* (Yale University Press, New Haven 1919). For a clear summary of this work see J Waldron, *Theories of Rights* (Oxford University Press, New York 1984) 6.
[43] J Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Inquiry* 243.
[44] J Mackie 'Can there be rights-based moral theory?' in J Waldron (ed) *Theories of Rights* (Oxford University Press, Oxford 1984) 169.
[45] C Wellman, *A Theory of Rights* (Rowman & Allanheld, Totowa N J 1985) 70-71.

something: he only has a right that someone else shall do (or refrain from doing) something.' J. Raz, in his *Ethics in the Public Domain*[46], adopts a very simplified view of a duty when he states, 'a person who says to another, "I have a right to do it" is not saying that … it is not wrong to do it. He is claiming that the other has a duty not to interfere,' while Raz[47] says 'a person who says to another, "I have a right to do it" is not saying that … it is not wrong to do it. He is claiming that the other has a duty not to interfere.' Equally, Austin defined a right in terms of a duty as follow: '[a] party has a right when another or others are bound or obliged by law, to do or forbear, towards or in regard to him,'[48] O'Neill states that rights are seen as one side of a normative relationship between rights holders and obligation bearers. We normally regard supposed claims or entitlements that nobody is obliged to respect or honour as null and void.[49]Austin was driven to admit that some duties have no correlative rights, and he called these 'absolute duties'[50]. Salmond, on the other hand, maintains that every duty must have a correlative right somewhere.[51] Williams treats the dispute as verbal.[52]

One is inclined to agree with the observation made by Renteln that a view that rights and duties are correlative used to be the dominant one among philosophers. However, many rights theorists have taken wavering positions with regard to this issue.[53] Most of their arguments are premised on the four Holfeldian categories. Lyons for example, argues that one set of rights, namely, 'active rights' (the rights to do things) does not fit in the scheme of correlativity.[54]

Useful as Hohfeld's analysis is, it is not without critics. Penner criticises Hohfeld's analysis because it does not draw a distinction between rights in *personam* and rights in *rem.*[55] Equally, MacCormick[56] expresses the view that a legal right is not or need not be correlative to a duty

[46]J Raz, *Ethics in the Public Domain* (Oxford University Press, Oxford 1994) 275.
[47] Ibid.
[48] J Austin, *Lectures* in *Jurisprudence Lecture or the Philosophy of Positive Law Bk1*, R Campbell (5th edn F D Linn & Co. Jersey City 1875) 398.
[49] O O'Neill, 'The Dark Side of Human Rights' in (2005) 81(2) *International Affairs* 427.
[50] Ibid.
[51] J Austin, the Province of *Jurisprudence* Determined (John Murray 1832) 240.
[52] J W Salmond, *Jurisprudence* (11th edn Stevens and Heynes, Michigan 1913) 264-265.
[53]A L Renteln, 'The Concept of Rights' (1988) *Athropos* Bd 83 H4/6 343.
[54] D Lyons, 'The Correlativity of Rights and Duties' (1970) 4 *Nous* 48.
[55]J Penner, 'The Analysis of Rights' (1977)10 *Ratio Juris* 300-315..
[56] D N MacCormick 'Rights in Legislation' in P M S Hacker and J Raz (eds) *Law Morality and Society* (Oxford University Press, Oxford1977) 199.

held by another person. He argues that '[t]o rest an account of claim rights solely on the notion that they exist whenever a legal duty is imposed by a law intended to benefit assignable individuals ... is to treat rights as being simply the "reflex" of logically prior duties.' This researcher finds this criticism as valid. As the research will show, not all duties in the human rights discourse are correlative to rights. Furthermore, the Hohfeldian analysis works rather badly in the framework of moral rights. This point is also articulated by J. Waldron[57] when he observes that just as moral rights 'are unlikely to stand in a simple one to one relation with duties' they are just as unlikely to stand in a simple one to one relation with legal rights, immunities, privileges, claims, etc.

As far as the philosophical and deontological arguments regarding duties, responsibilities and obligations; their source and purpose are concerned, the research will benefit considerably from the views of, among others, Louis de Poissy[58] and the philosopher Aristotle,[59] as expanded by Thomas Aquinas. Social contract theorists have a peculiar view of duty and its source. The elucidation by Thomas Hobbes in his *Leviathan*[60] and later by John Locke in his *Two Treaties of Government*[61] and Jean-Jacques Rousseau's *The Social Contract*[62] is particularly useful. The research work secures the benefit of many other theorists, including Rousseau,[63]as it attempts to give an understanding of the concept of duty in the human rights framework.

John Rawls[64] explains how the logical ordering of principles of justice may answer such questions as how should society be structured, how basic rights and duties should be assigned to individuals, and how social and economic advantages should be distributed to all members of society. In his view, basic duties are natural duties since they arise from people's nature as human beings. However, these natural duties are not perfected until people form themselves into social groups, since duties are relationships.

[57] J Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press, Cambridge 1993) 212.
[58] See Louis de Poissy, *Christian Philosophy* (2nd edn O'Shea and Co, New York 1898).
[59] Aristole, *Nichomachean Ethics* (JA K Thomson, trans) (Penguin, London 1955).
[60] T Hobbes, *Leviathan* (St Pauls, London 1651).
[61] J Locke, *Two Treaties of Government* (Awnsham Churchill, London 1689).
[62] J J Rousseau, *The Social Contract*, Maurice Cranston (trans) (Penguin, Baltimore 1968).
[63] Ibid.
[64] J Rawls, *A Theory of Justice* (Harvard University Press, Cambridge Mass 1971).

When duties are explained within the broader ethical principle of deontology, the work of the philosopher Immanuel Kant is instructive.[65] The deontological or duty-based ethics that Kant propounds are concerned with what people in a society do, and not with the consequences of their actions. As an absolute deontologist, he argues that to act in the morally right way, people must act from duty. He also believes that when we do things for any other reason than out of duty, our acts are not moral acts. For an act to be a moral act we must do it for the sake of duty and that this is the only categorical imperative. The 'categorical imperative' for Kant was a recognition of the fact that reason and free will for human beings are objective capacities possessed by all human beings and consequently every individual human being or subject must be accorded the kind of respect that is demanded by being of this kind of nature.[66] This was the basis of his understanding of the dignity and worth of all human beings. Kant's ethical theory gives an account of general duties and an account of moral motivation. His metaphysics of morals, especially of the doctrine of virtue, identifies the basic division between judicial duties and ethical duties. This is a key point in any treatment of duties.

Non-absolutist deontologists believe that the consequences of an action in some instances may make the action right. The work of Ross[67] is in this connection very useful to this project. His view is that the consequences of an action such as lying may sometimes make lying the right thing to do. Frances Kamm, a modern day deontologist, makes a useful contribution to the debate when he introduces the 'principle of permissible harm' in apparent disagreement with absolute moral deontologists.[68]

Perhaps a major weakness of Kant's analysis is that he confines the 'metaphysics' of morals only to those duties that are generated by applying the principle of morality to human nature in general, and does not attempt to cover all the ethical duties that we have.

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[65] Deontology comes from the Greek word '*deon*' which means 'duty.' I. Kant, *Grounding of Metaphysics of Morals* (J W Ellington trans) (3rd edn Hachett Publishing, New York 1993) (1st published 1785).
[66] I Kant, *General Introduction to the Metaphysics of Morals* William Hastie (trans) (University of Virginia Press, 2004) 33. See also J Finnis, *Natural Law and Natural Rights* (2nd edn Oxford University Press, New York 2011). See also J J Shestack, 'The Philosophical Foundations of Human Rights' (1998) 20 *Human Rights Quarterly* 234.
[67] W D Ross, P Stratton-Lake (ed), *The Right and the Good*, (rpnt Oxford University Press, New York 2002).
[68] See F M Kamm, *Morality, Mortality Vol. II: Rights, Duties, and Status* (Oxford University Press, New York 1996); and F M Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford University Press, Oxford 2007).

A part of this project is devoted to examining the question whether 'duty', 'obligation' and 'responsibility' are the same. Dias in his *Jurisprudence*[69] reminds us that there are different notions of duty as a general concept. The terms 'duty', 'responsibility' and 'obligation' are generally treated as synonymous. However, as Brandt, in his 'The Concept of Obligation and Duty'[70] observes, the practice of using these words as synonyms obscures important differences among 'wrong', 'obligation', 'duty', and 'ought' since language does not proliferate forms without corresponding functions, and 'the philosopher who lumps these words all together is at least ignoring distinctions ordinary language makes; much worse, he may be led by his lack of discrimination into confusion and oversight of substance.' This researcher agrees with this observation because the nuances of meaning in the terms 'duty', 'responsibility' and 'obligation' shape part of the argument this study makes, namely that clarity in conception of what is meant by individual duties shapes realisation and, therefore, that a flawed conception will make realisation difficult, if not all together, impossible.

Many authors have attempted to explain the distinction between the terms 'duty', 'obligation' and 'responsibility'. These include Gardner,[71] Cane,[72] Gooding[73] and Winston.[74]According to Hart [75] duty and obligation are distinct from each other. He contrasts 'duty' and 'obligation' with each other and both with 'right' and 'ought'. A right exists without any correspondence to an obligation incurred or created, at times, whereas duty arises from position, status, role linked to a right. Like Hart, James Mish'alani[76] maintains that duties and obligations remain distinct. His analysis is, however, markedly different. He distinguishes two uses of the term 'duty'. The first term is when we say that it is someone's duty to do something at a specific time– implying that he ought to do that thing at that time. The second being the other use we make of it when we itemise someone's duties, or some of them, with no implication that he ought to discharge them all during the time in which they are truly his.

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[69]R W M Dias, *Jurisprudence* (Butterworth, London 1970).
[70] 1964) 73 (291) *Mind,* NS (July, 374.
[71] J Gardner, 'The Mark of Responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 167.
[72] P Cane, *Responsibility in Law and Morality* (Hart Publishing, Oxford 2002).
[73] R E Goodin, 'Responsibilities' (1986) 36(142) *The Philosophical Quarterly* 50.
[74] M Winson, 'An Ethics of Global Responsibility: Moral Responsibility and Duties' <http://ethicsofglobalresponsibility.blogspot.com/2008/02/moral-responsibilities-and-duties.html>accessed on 18 May 2014.
[75] H LA Hart, 'Are there any Natural Rights?' (1955) 64 (2) *The Philosophical Review* 179.
[76] J Mish'alani, "'Duty', 'Obligation' and 'Ought'" (1969) 30 *Analysis* 33.

Turning to the term 'obligation' Mish'alani, argues that the very word 'obligation' does not tolerate some verbal contexts within which 'duty' naturally fits. There is no such thing as being 'on obligation' or 'off obligation' in analogy with 'on' or 'off' duty. He observes that 'if the key to proper understanding of duties was found in their being logically bound to stations, the key to obligations must be sought in the fact that they are owed to someone.'[77] In his understanding, an obligation is generated when two parties enter into a special relationship whose nature is such that it invests one party with certain rights and commits the other to honouring them. An obligation is met or fulfilled by the successful completion of a specific undertaking and once it is met, he who was under obligation is henceforth free of it. Mish'alani argues further that whereas concerning duties of station the manner in which they are discharged is subject to evaluation according to certain standards (so that we may be concerned not only with whether a given person can perform such duties, but also how he can do so), all that matters with regard to obligations is the fact of their fulfilment or non-fulfilment.

From the various explanations given regarding the distinction between or similarities of the terms 'duty', 'obligation' and 'responsibility', particularly by Hart and Mish'alani, it seems to this researcher that while one may be inclined to agree that the distinction in meaning in the terms duty, responsibility and obligation may be real and deserving of further in depth study, at the end of the day all these terms broadly refer to burdens or obligations on the part of others to respect the rights of rights holders. The terms are used as approximate equivalents and refer roughly to the same thing. To insist on adhering to the fine distinctions between these terms only introduces further confusion to the already unclear and contentious subject in the human rights discourse.

In order to situate the notion of duties in the African human rights system as a basis for the argument that it could be a reference point when a declaration of duties and responsibilities is contemplated, the concept of human rights in Africa from pre-colonial times to the present is discussed. There is a considerable amount of literature on this subject. E. McCarthy-Anolds *et al* present a fairly elaborate historical background to the evolution of human rights in pre-colonial

[77] Ibid

and colonial Africa.[78] Works by G. Shepherd Jr. and M. Anikpo and A.A An-Na'im are equally instructive on this topic and will enrich this part of the research work.[79] Conteh classifies the history of human rights in Africa into three distinct phases: (a) the traditional society era, (b). the pan-African movement phase and (c) the phase which started with the Universal Declaration of Human Rights.[80] He, like Keba M'baye, asserts that 'traditional Africa [did] possess a coherent system of human rights, but the philosophy underlying that system differs from that which inspired [in France] the Declaration of the Rights of Man and of the Citizen.'[81] Under pan-Africanism as pursuit was for freedom and dignity by the 'black man' there was evidently not much concern for universal human rights.[82] The final phase, according to Conteh, there was reinforcement by decolonisation and merged with the human and peoples' rights demands of the African people, which continue to date.

Other writers like Nmehielle and Welch also posit that pre-colonial Africa may have emphasised individual rights that had a different note from what the Western world conceptualised, with the latter emphasising that Africans had their 'families, clan, an ethnic solidarity, in short the web of kinship which provided the frameworks within which individuals exercised their economic, political, social liberties and duties.'[83] Similar views are given by Gluckman[84] and Meek[85]. However, some scholars like Rhoda Howard do not agree that the concept of human rights existed in Africa before the colonial powers arrived.[86]

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[78] E McCarthy-Anolds *et al* (eds) *African Human Rights and the Global System* (Greenwood, Westport/Connecticut, London 1994).
[79] G Shepherd Jr and M Anikpo (eds) *Emerging Human Rights: The African Political, Economic Context* (Greenwood Press, New York 1990); and A A An-Na'im and F Deng (eds), *Human Rights in Africa: A Cross-Cultural Perspective* (The Brooking Institution, Washington DC 1990).
[80] M B Conteh, 'Human Rights Teaching in Africa: The Socio- Economic and Cultural Context' in A Eide and M Thee (eds), *Frontiers of Human Rights Education* (Columbia University Press, New York 1983) 58.
[81] K M'baye, *Les Droit de l'Homme en Afrique* (2nd edn Pedone 2002) 71.
[82] COG Amate, *Inside the OAU: Pan-Africanism in Practice* (Macmillan, London 1986)1. Henry Sylvester was the first to organise a Pan –African congress and remained in the forefront of the movement until Dubois took over after his death. He is also said to be the first to use the term Pan –Africanism.
[83] V Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff Publishers, The Hague 2001); C E Welch, 'Human Rights as a Problem in Contemporary Africa' in *Human Rights and Development in Africa* (State University of New York Press, New York 1984)11.
[84] M Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (2nd edn Manchester University Press, Manchester 1967) 231.
[85] C K Meek, *Law and Authority in a Nigerian Tribe* (Oxford University Press, London 1937).
[86] J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) *Human Rights Quarterly* 400; R. Howard, 'The full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Sahara Africa' 5 (1983) *Human Rights Quarterly* 467.

Relating his argument to the colonial period, Umozurike argues that the widest suppression and desecration of human rights could be attributed to the intervention of the Europeans and Arabs in the slave trade, which was basically the exportation of labour - child, adult male and female. Wars were waged just to capture slaves and implements of war were also supplied by the slave traders.[87] This view is shared by Nmehielle who says that colonialism relegated Africans to subservience in all fields and arrested and destroyed the internal dynamics of the evolution of African societies among other things.

The post-colonial human rights record of Africa is anything but satisfactory. African leaders took over from colonialists, amid false promises of greater observance of human rights. As Edem Kodjo[88] observed however, 'independence was not accompanied by the emergence of political powers that really respected human rights such as those inscribed in the United Nations Universal Declaration of Human Rights.' On the contrary, the continent went through the abuses and abominations in the mid-1970s, perpetrated by such dictators as Jean-Bedel Bokassa in the Central African Empire, Macias Nguema in Equatorial Guinea and Field Marshall Idi Amin Dada in Uganda. The abominations of these three leaders came to be viewed as paradigmatic of African leaders.[89]

Viljoen in his *International Human Rights Law in Africa*[90] gives a comprehensive analytical overview of human rights law in Africa. Part III of his work specifically gives a useful analysis of the African regional architecture and human rights in Africa. Those insights have enriched the arguments under the section dealing with the African human rights system. The book, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*[91] edited by Evans and Murray, has a good collection of different scholarly articles by various experts on the

[87] U Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, The Hague 1997) 16.
[88] E Kodjo,'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 272. Edem Kodjo was Secretary General of the OAU at the time of the creation of the African Charter on Human and Peoples' Rights. He also played a prominent role in drafting and promoting the Charter.
[89] See M Mutua 'The African Human Rights System: A Critical Evaluation' <http//hdr.undp.org/docs/publication_papers/MUTUA.PDF>accessed 14 July 2014.
[90] Viljoen (n11).
[91] M D Evans and R Murray, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge University Press, Cambridge 2000).

African human rights system. It covers the entire African Charter in great details and explores the effectiveness of this mechanism as a promoter and protector of human rights in the continent. It discusses the normative flaws as seen in the Charter and further discusses the effect that these flaws have on the entire rights process, and gives a very detailed view of the state reporting system under the Banjul Charter. The problems faced by the African Commission in the state reporting mechanism, owing to the failure of the states to submit their report on time, has been specially highlighted which makes us aware as to why this system has been such a dismal failure.

Although general accounts of the legislative history of the African Charter is given in a number of works including those of Nmehielle[92] the account given by Jallow in *The Law of the (Banjul) African Charter on Human and Peoples' Rights*[93] is perhaps one of the most incisive works of first reference on the African Charter as the author was part of the African Group of Experts who, in 1979, prepared the draft African Charter on Human and Peoples' Rights. It therefore, presents first-hand information on what went into the preparation of the African Charter. The author discusses the process and the issues involved in the drafting of the Charter and surveys the jurisprudence developed the African Commission on Human and Peoples' Rights over the years around all the rights guaranteed in the Charter. He also analyses the status of the Charter in municipal legal systems of Africa. He analyses the provisions of the Charter article by article from article 1 to article 23. Regrettably, he does not analyse the duties provisions in the Charter (articles 27-29).

There are many comparative studies among the regional systems for the protection of human rights, which include Africa. However none of them appears to comprehensively deals with the issue of duties in the African Charter, particularly their efficacy or the lack of it and the value as treaty provisions, in the manner that this project proposes.[94] Murray questions the validity of any comparative analysis and judgement of the African Charter with other international treaties on human rights given that the African concept of individual rights and claims are completely

[92] Nmehielle (n 83).
[93] H B Jallow, *The Law of the (Banjul) African Charter on Human and Peoples' Rights* (Trafford Publishing, Victoria Canada 2007).
[94] This also applies to writers such as B Obina Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 *Human Right Quarterly*; H Hannum (ed), *Guide to International Human Rights Practice* (4th edn University of Pennsylvania Press Philadelphia 2004).

different from that of the West.[95] This is a point that is raised when the issue of relativism and the peculiarities of some culturally sanctioned duties are considered.

As regards the notion of individual duties themselves, notable early works include two in French, namely *Les Droit de l'Homme en Afrique,* of Kéba M'baye,[96] and *La Charte Africaine des Droits de l'Homme et des Peuples Historique, Portée juridique et contribution a la protection des droits de l'homme en Afrique*, by Fatsah Ougergouz.[97] Both authors analyse in some detail the substantive provision of the Charter, but neither of them examines in detail the normative content of individual duties under the African Charter and the implication of the formulation of these duties on their enforcement. In his book, which has now been updated, expanded and published in English as *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa,*[98]Ouguergouz provides a very insightful analysis of the African Charter on Human and Peoples' Rights. He systematically and comprehensively analyses the substantive content and institutional framework of the African Charter on Human and Peoples' Rights. He methodically attempts to reveal the Charter's true spirit by illustrating its unique features, its legal contribution, and the actual and potential role it can play in the protection of human rights in Africa. He also analyses the legal scope of states parties' undertakings supporting such analysis by reference to the universal and regional human rights systems as well as to principles of general international law where appropriate. It is in Chapter 5 of the book that Ouguergouz examines the concept of the duties of the individual. He situates the listed duties in the Charter within the broader international law context. The author analyses the legal dimension of the concept in domestic law and in the principal international human rights instruments in order to assess the value of the Charter's conceptual contribution in this area. The overriding preoccupation in this section is, however, to ascertain the legal or practical effect of these duties on individual rights and freedoms. Far from making the pronouncement that the duties provisions in the charter are impossible to implement and may be particularly meaningless, superfluous and unnecessary, he concludes that, with the exception of

[95] R Murray, *The African Commission on Human and Peoples' Rights and International Law* (Cambridge University Press, Cambridge 2000).
[96] K M'baye *Les Droit de l'Homme en Afrique* (Pendone, Paris, 1992).
[97] F Ougergouz, *La Charte Africaine des Droits de l'Homme et des Peuples Historique, Portée juridique et contribution a la protection des droits de l'homme en Afrique* (Presses Universitaires des France, Paris 1991).
[98] F Ougergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, The Hague/London/ New York 2003).

the duty to work and the limitation on freedom of association, the concept of individual duty in the Charter is not in conflict with that of individual rights.

In his book, Umozurike[99] gives a very comprehensive account of the African Charter, and discusses the concept of individual duties in great details in chapter six. He also takes the rights as enlisted in the African Charter, and describes them thoroughly under two sections involving the civil and political rights, and the economic, social and cultural rights. The book analyses the effectiveness of the African Charter and also points out the normative flaws that makes this Charter fundamentally weak. Here one also get a very detailed comparative analysis of the international treaties like the UN human rights Conventions, European conventions and the inter-American Human Rights treaty regime.

Perhaps one of the deepest analyses of duties under the African Charter as a subject is by Mutua given in his article entitled 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties.'[100] The focus of that article, however, is to suggest a reconfiguration of the rights regime that could achieve legitimacy in Africa, especially among the majority rural populace, which would become a basis for social and practical reconstruction. The author argues that social political norms and structures were common to pre-colonial ethno-political entities or cultural- nations. He refers to the shared basic values as the index of the African cultural fingerprint, that is, a set of institutions and normative values governing the relationship between individuals, the society and nature. The author further argues that while in the West, the language of rights primarily developed along the trajectory of claims against the state; entitlement to the right to seek an individual remedy for a wrong, in Africa the language of duty offers a different meaning for individual / state society relations while people had rights they also before bore duties. He further argues that in the African Context, the obligations placed on the individual citizen have a basis in the past. The author, however, does not focus on enforceability of the provisions relating to duties, which this project will seek to do. This project goes further to examine the formulation and efficacy of the duties provisions and how some

[99] O Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, The Hague 1997).
[100] M Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35*Virginia Journal of International Law* 339-380.

states parties to the African Charter countries have understood these provisions and, more importantly, how this could offer guidance to those calling for a universal duties instrument.

The African Charter has been hailed as an original and innovative legal instrument. According to Murray this uniqueness is illustrated by, among other things the drafting of provisions relating to duties of the individual in considerable detail.[101] There have equally been serious criticisms about the entire African human rights protection system. Commentators have tended to focus on the weaknesses in the African system, which includes 'claw back' clauses in the African Charter, the potential abuse of the language of duties and the absence of an effective protection mandate for the African Commission on Human and Peoples' Rights.[102] Umozurike's early assessment was that the African Charter may well be a paper tiger except for effective public opinion that may be whipped up against the offender.[103] Welch for his part described the African Charter as 'the armature of human rights protection.'[104] Similarly Steiner and Alston designated the African regional human rights system as 'the newest, the least developed or effective ... the most distinctive and the most controversial'.[105] Sinkondo dismissed the African Charter as an example of 'solemn comedy' come into existence as a result of international pressure[106], while Takirambudde records the view that 'the Charter is an instrument that is deliberately left without teeth, designed to be merely stimulation.'[107] Gittleman describes the African Charter as 'woefully deficient,' particularly in regard to its treatment of the right to liberty.[108] Chidi Odinkalu suggested that 'foremost among the problems that the Commission has encountered is the very text of the African Charter itself, which like the Rules of Procedure, is opaque and

[101] R Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, Cambridge 2004).
[102] See R Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22(4) *Virginia Journal of International Law* 667.
[103] U Umozurike, 'The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights,' (1988) *African Journal of International Law* 65.
[104] C E Welch Jr, 'The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment' (1992) 14 *Human Rights Quarterly* 43.
[105] H J Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, New York 2000) 920.
[106] H M Sikondo, 'La Charte Africaine de Droit de l'Homme et des Peuple ou les aprories juridique d'une convention encombrante' (1994) *Recueil, Penant* 285.
[107] P Takirambudde, *The Individual under African Law* (University of Swaziland,Swaziland 1982) 38.
[108] R Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22(4) *Virginia Journal of International Law* 667. J B Mzizi used a similar description in regard to the enforcement machinery in 'Human Rights, Peace and the African Charter on Human and Peoples Rights' (1988) *African Legal Aid Quarterly* 37.

difficult to interpret.'[109] Mutua puts the position rather bluntly when he describes the Charter as 'a façade, a yoke that African leaders have put around our necks.'[110] Benedek for his part posits that the African Charter could aptly be described as a static document.[111]

In their relation to duties, these criticisms should inform the debate whether the duties provisions in their current formulation in the African Charter are really helpful and whether an attempt to replicate similar duties in a universal instrument is likely to enrich or impoverish the discourse on human rights.

There is considerable literature that addresses the question how duties influence the universality and cultural relativism debate in human rights. When the concept of duties is considered in the context of the universality and relativism debate, a number of questions become pertinent. Are duties universal, or are they culturally relative? If there are culturally relative duties, is it conceivable that duties could be universalised in the same way that some perceptively Western human rights norms have been universalised?

The first attribute that Ashford gives of human rights is that it must be universal, belonging to everyone through time. There can be no special rights attributable to only some.[112] Cranston also posits that a human right is by definition a universal moral right, something which all men everywhere, at all times ought to have; something which no one may be deprived of without a grave affront to justice; something which is owing to every human being.[113] In Leary's view the concept of human rights should, in theory be universal, since it is rooted in a concept of human dignity, which posits that all human beings everywhere have rights simply because they are human.[114] With similar emphasis, Tomuschat contends that to deny the universality of human rights is tantamount to saying that some rights should not belong to a specific class of human

[109] C A Odinkalu 'The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359.
[110] M Mutua 'The African Human Rights System in a Comparative Perspective' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 511.
[111] W Benedek, 'The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective' (1993) 11 *Netherlands Quarterly of Human Rights* 31.
[112] N Ashford, *Human Rights: What are they and what are they not?* (Libertarian Alliance, London 1995) 2.
[113] M W Cranston, *What are Human Rights*? (Taplinger Publishing Co, New York 1973)1.
[114] V A Leary 'Human Rights in the Asian Context: Prospects for Regional Human Rights Instruments' (1987) 2 *Connecticut journal of International Law* 319.

beings. In general, such an attitude smacks of paternalism and may well be intended, in some instances, to defend the traditional privilege of a ruling class from within a nation or of a foreign state which controls the people concerned from outside.[115]

The principle of universality is incorporated in some form or another in most documents bearing notions of human rights. It was particularly emphasised in the UDHR in 1948, and has been reiterated in numerous international human rights conventions, declarations, and resolutions such as the 1993 Vienna World Conference on Human Rights.[116] Although the notion of the universality of human rights has been recognised and popularised in international human rights law, it still provokes much debate. Anne Elizabeth Meyer correctly notes that '[f]ew scholarly topics more readily engender controversies than the question of universality of international human rights norms.'[117] According to Diana Ayton Shender, there is a long-standing dilemma: how can universal human rights exist in a culturally diverse world? Is a global culture inevitable in the international community that becomes increasingly integrated? Are the arguments about the universal character of human rights accepted worldwide, or do some parts of the world perceive many important provisions in basic human rights instruments as particular to the Western liberal tradition, and hence of limited or no application in fundamentally different states and cultures.[118]

Renteln appropriately points out that the philosophical foundations for the universality of human rights have never been thoroughly demonstrated. In the absence of a satisfactory grounding for human rights, theorists are compelled to fall back upon mere assertions as to the self-evident nature of particular human rights. He adds that such dated essentialism has no answer to diverse moral systems that object to the existence of these asserted rights.[119]

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[115]C Tomuschat, 'International Standards and Cultural Diversity' (1985) 24 *United Nations Bulletin of Human Rights* (Special Issue, Human Rights Day).

[116] The World Conference on Human Rights held in Vienna in June 1993, emphasized universality of human rights by proclaiming that 'all human rights should be available to all persons at all times without distinction'. See: Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF157/art 5. See also UN General Assembly resolution 32/130.

[117]A E Meyer, 'Book Review' (1982)14 *Human Rights Quarterly* 527.

[118] D Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity' Background Note from the UN website at <http://www.un.org/.> accessed 3 July 2015.

[119] A D Renteln, *International Human Rights: Universalism Versus Relativism* (Sage Publications, Newbury Park Calif 1990).

Cultural relativists see the UDHR as enumerating rights and freedoms that are culturally, ideologically and politically non-universal. They argue that current human rights norms possess a distinctively 'Western' or 'Judeo-Christian' bias, and hence are an 'ethnocentric' construct with limited applicability.[120] Mutua, writing on the Western origins and trappings of the UDHR states that a closer examination of the rights listed in both the UDHR and the International Covenant on Civil and Political Rights leaves no doubt that both documents are attempts to universalise civil and political rights accepted or aspired to in Western liberal democracies.[121] In their work, Pollis and Schwab criticise what they consider as a cultural and ideological ethnocentrism in the area of human rights and human dignity. Like Mutua, they view the UDHR as a document with underlying democratic and liberal values 'based on the notion of atomised individuals possessed of certain individual rights in nature.' Because of pervasiveness of the notion of the group rather than the individual in many cultures, they dismissively conclude 'the Western conception of human rights is not only inapplicable' and 'of limited validity' but even 'meaningless' to third world countries.[122] Legesse expresses a similar view when he suggests, '[d]ifferent societies formulated their conception of human rights in diverse cultural idioms' and that in the liberal democracies of the Western world 'there is a perpetual, and in our view, obsessive, concern with the dignity of the individual, his worth, personal autonomy and prosperity.'[123] Panikkar asks the question whether we extrapolate the concept of human rights, from the context of the culture and history in which it was conceived, into a globally valid notion? Could it at least become a universal symbol? Alternatively, is it only one particular way of expressing – and saving- the *humanum*?[124]

There are some attractive middle ground arguments regarding the universalism and cultural relativism discourse. One is made by Kannyo to the effect that the Western model of the state has

[120] See for example, R J Vincent, *Human Rights in International Relations* (Cambridge University Press, Cambridge 1986) 37; T Kaime, *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (PULP, Pretoria 2009) 43.
[121] M Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 606.
[122] A Pollis & P Schwab 'Human Rights: A Western Construct with Limited Applicability' in A Pollis & P Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (Praeger, New York, London 1980) 13.
[123] A Legesse, 'Human Rights in African Political Culture' in K W Thomas (ed) *The Moral Imperatives of Human Rights: A World Survey* (University Press of America, Washington DC 1980) 123 124.
[124] R Panikkar, 'Is the Notion of Rights a Western Concept?' (1982) 120 *Diogene* 75 reprnt (1984) 17 *Intercultural Issues* 82.

spread to other parts of the world so that factors giving rise to the need for constitutional guarantee, leading to the evolution of the philosophy of human rights in the West, have become equally relevant to other parts of the world.[125] What this argument means in effect is that human rights have already become universalised. Vincent argues that there exists a 'common culture of modernity' that has consumed all societies by reason of the rise of the concept of global economy.[126] Additionally, Falk states, and correctly in my view, that one important consequence of globalisation of social, political and economic life which often goes unnoticed is cultural penetration and overlapping. This is the coexistence in a given social space of several cultural traditions, as well as the more vivid interpretation of cultural experience and practice as a consequence of media and transportation technologies, travel and tourism, cross-cultural education, and logarithmic increase in human interaction of all varieties.[127]According to Zechenter, cultural relativism is viewed by many as the only alternative to the dangers of ethnocentrism.[128] For Hatch the debate on universalism and cultural relativism is probably perpetuated due to its intuitive appeal to many politicians and activists who use it to advance their own agendas, and may also be on grounds of political expediency that cultural relativism offers to government and those in power, the ideas of cultural relativism continue to expand well beyond academia.[129] Donnelly points out that if human rights are based in human nature and are applicable to all because they are human – and if human nature is universal, then human rights cannot be relative in any fundamental way.[130] Marie-Benedicte Dembour argues that each of the positions advocated by either side is untenable if considered in isolation of the other.[131] Sole reliance on universalism is likely to breed moral arrogance- because it excludes the experience of the other. The strict adherence to relativism may make moral agents indifferent to immoral situations. In her view, culture is not an excuse for abuse. She suggests that we should err

[125] E Kannyo, *Human Rights in Africa: Problems and Prospects: A Report prepared for the International League for Human Rights*, May 1980 4.
[126] Vincent (n120).
[127] R Falk, 'Cultural Foundations for the International Protection of Human Rights' in A A An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Pennsylvania1992) 46.
[128] E M Zechenter 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' (1997) 53 *Journal of Anthropological Research* 319.
[129] E Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (Columbia University Press, New York 1983).
[130] Donnelly (n 86) 400.
[131] M Dembour 'Following the Movement of a Pendulum: Between Universalism and Relativism in M Dembour *et al* (eds) *Culture and Rights: Anthropological Perspective* (Cambridge University Press, Cambridge 2001) 56.

uncomfortably between the two poles represented by universalism and relativism. She call for a formulation which does not suggest that the concept of human rights should be displaced but to call for a concept that allows local circumstance to be taken into account, to be part of the equation. This argument is particularly appealing because it implicitly recognises the danger of treating particular view of human rights as inherently superior. All cultures must be accorded respect.

There are many other equally convincing arguments such as those made by Rentln regarding cross cultural universals 'held in common by all societies [which might enable on] to validate universal moral standards[132] and An-Na'im who is critical of both the universalists' position based solely on Western liberal perspectives and distrustful militant cultural relativist positions. He argues that it is desirable to maintain a weak form of cultural relativism.[133] His argument is that despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated for a common 'culture' of universal human rights.

Howard argues that during five centuries of contact between Africa and the Western world, social changes have been introduced that increasingly undermine any social-structural or cultural uniqueness Africa might once have possessed. These aspects create human rights needs and ideals closer to the Western model than to the 'traditional' models of privileges and obligations of indigenous Africa.[134] While agreeing with Howard, this researcher does not believe that the dilution of the Africa cultures, so called for lack of a better term, is annihilating deep-rooted traditional and cultural views in many sections of African societies, which influence the concept of duty, to a level where indigenous African views and conceptions have become or will become irrelevant.

According to Johnson, classical Western liberal notions of human rights emphasises absolute individual political and civil rights while most non-Western, third world traditions, place greater

[132] A D Rentln, 'Relativism and the Search for Human Rights' (1980) *American Anthropologist* 56.
[133] A A An-Na'im, 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment' in A AAn-Naim (ed) *Human Rights in Cross Cultural Perspective: A quest for Consensus* (1991) 23.
[134] R E Howard, *Human Rights in Commonwealth Africa* (Rowman and Littlefield, Totowa 1986).

emphasis on the community as the basis of rights and duties; on economic and social rights and on the relative character of human rights.[135] Marxist/ socialist ideas highlight economic and social rights and duties absolutely grounded in collective principles.[136] Some fundamentals of the notion of human rights in the Western tradition chiefly emphasise individualism. The want of emphasis on the duties and responsibilities of the individual within the community, and the disregard of duties as correlatives of rights – have led to the argument that the concept of human rights is alien to non-Western cultures.

Kausikan argues that there is a general discontent throughout the region with a purely Western interpretation of human rights[137] Most, if not all Asian countries, reject the universalisation of human rights and claim that Asia has an inimitable set of values – the Asian values, which provide the foundation of Asia's different understanding of human rights while justifying the 'exceptional' handling of human rights by Asian governments.[138] Kausikani, writing about the peculiarity of the Asian region, describes universality of all human rights as a 'myth' and that it is "harmful if it masks the real gap that exists between Asia and Western perceptions of human rights" and that this gap will not be bridged if denied.[139]

Proponents of Asian values argue around six themes[140] three of which are relevant to the discussion about cultural duties and human rights. As regards the individual and the society, 'many East and Southeast Asians tend to look askance at the starkly individualist ethos of the West in which authority tends to be seen as oppressive and rights are an individual's trump over the state.'[141] They argue that Western human rights practices 'reflect a corrosive, hedonistic individualism that gives inadequate attention to social duties and is incompatible not only within

[135] G M Johnson, 'Human Rights in Divergent Conceptual Settings - How Do Ideas Influence Policy Choices?' in David L Cigranelli (ed) *Human Rights Theory and Measurement* (MacMillan Press, London 1988) 43.
[136] See E Kameka, *Maxism and Ethics* (Macmillan, London 1969).
[137] B Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 26.
[138] See A J Lanlois, *The Politics of Justice and Human Rights* (Cambridge University Press, Cambridge 2001) for an insightful discussion on the Asian values debate.
[139] Kausikan (n 137) 32.
[140] These are sovereignty and human rights, the demand and requirements of development, economic and social rights, individuals and society, human rights and duties finally traditional social order and human rights.
[141] Kausikan (n 137).

traditional values but with any plausible conception of human dignity and decency.'[142]A claim is made that in the African setting, the notion of individual duty and responsibility to the community is firmly ingrained in African tradition and culture, consistent with the historical traditions and values of African civilization.[143] It is believed by people like Kwame that the attitude towards one's duty to others is significantly influenced by some distinct traditional and ethical values that have defined the African way of life for many years. These values have grown independently of formal legal instruments and laws governing the conduct of members of the community.[144] He gives a description of African ethics as a humanitarian ethics that places a great deal of emphasis on human welfare. In his understanding, the concern for human welfare may be said to constitute the hub of the African axiological wheel. He argues that a morality of duty is one that requires each individual to show concern for the interests of others. To Kwame, the ethical values of compassion, solidarity, reciprocity, cooperation, interdependence and social well-being, which are counted among the principles of the communitarian morality, primarily impose duties on the individual with respect to the community and its members. All these considerations elevate the notion of duties to a status similar to that given to the notion of rights in Western ethics. In this morality, duties trump rights, not the other way round, as it is in the moral system of the Western societies.[145]

According to Pollis and Schwarb,[146]as a people, Africans emphasise groupness, sameness, and commonality. Rather than stress the survival of the fittest and control over nature, the African worldview is said to be tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility.

Today, we are faced with specific examples of cultural practices leading to a perpetuation of the debate on the twin issues of cultural relativism and universality of human rights, particularly

[142] J Donnely, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, Ithaca, New York 2003) 112.
[143] See R Gittleman, 'The Banjul Charter on Human and Peoples' Rights: A Legal Analysis' in C E Welch and R I Meltzer (eds) *Human Rights and Development in Africa* (State University of New York Press, New York 1984).
[144] G Kwame, 'African Ethics' in E N Zalfa (ed) *Stanford Encyclopaedia of Philosophy* (Stanford University, Stanford 2011).
[145] Ibid.
[146] A Pollis and P Schwab, 'Human Rights: A Western Construct with Limited Applicability' in A Pollis and P Schwab, (Praeger, New York 1979) 320.

where such practices are premised on duties. It is often taken that the morality and personality of an individual are shaped by the culture and the history of a given society. Different cultures have different moral codes. Many outside the West today still view some human rights norms being promulgated as an assault on their culture, and their cultural duties. Many societies see this as a threat on their way of life. Some strongly held cultural beliefs appear to deny the existence of human rights otherwise considered as universal. Two of the traditional and cultural norms and practices prevalent in Africa that seem to defy efforts at universalising two human rights issue are perpetuation of female circumcision and abhorrence of homosexual rights. It is logically impossible to argue that all human rights, as seen through the Western prism, have intrinsic authority over competing non-Western cultural values. This is particularly so in African societies where, as Nickel argues, people have every reason to be sceptical about the so called 'rights culture': it resembles all too closely the ideological hegemony wielded by the western powers over their colonies in the nineteenth century, a time when Europe had arrogated to itself the role of arbiter in moral standards.[147] When the debate on universality and cultural relativism of human rights is extended to duties therefore, it is arguable that some duties are defiantly culturally specific and would clearly defy universalisation.

Regarding the question how a duty-based declaration being advocated by some human rights organisations would influence the content of rights in the UDHR and other international human rights instruments one needs to understand the basic premise of the argument. Critics of the human rights paradigm, which is viewed as being preoccupied with the culture of claims and rights at the expense of duties and responsibilities, have premised their criticism on a number of assumptions. As regards rights and the effect of rights rhetoric, Sunstein[148] develops five different categories of charges against rights drawn from judicial opinions and from critics. These are (a) the rigidity of rights, (b) indeterminacy, (c) excessive individualism (d) rights versus responsibilities, and (e) confusions and misconceptions. Karl Klare in his 'Legal Theory and Democratic Reconstruction'[149] discusses the place of rights in the legal-political discourse and concludes that 'it seems obvious that the post-communist law should be founded upon an

[147] Nickel J W in J L Nelson and V M Green (eds) *International Human Rights: Contemporary Issues* (Human Rights Publishing , Stanfordville 1980) 45.
[148] Sunstein (n 1) 727.
[149] K Klare, 'Legal Theory and Democratic Reconstruction' (1991) 25 *University of British Columbia Law Review* 69.

explicit charter of human rights guarantees.' The author however, agrees that the debate in recent times has developed into a critique of rights. He summarises some of the major lines of criticism advanced by critics of rights and makes responses.

Sunstein, perhaps best captures the charges against rights at least in the United States when he states that:

> Critics charge that rights have a strident and absolutist character, and that for this reason they impoverish political discourse. Rights do not admit of compromise. They do not allow room for competing considerations. For this reason, they impair and even foreclose deliberation over complex issues not realistically soluble by simple formulas…. rights are said to be ill adopted to what we usually need, that is, a careful discussion of trade off and competing concerns. If rights are 'trumps', they are for that reason harmful to difficult process of accommodating different goals and considerations in resolving such thorny problems as abortion, the environment, and plant closings.[150]

And that:

> rights are unduly individualistic and associated with highly undesirable characteristics, including selfishness and indifference to others. Rights miss the 'dimension of sociality': they posit selfish, isolated individuals who assert what is theirs, rather than participating in communal life. Rights, it is said, neglect moral and social dimensions of important problems.[151]

There are also strong objections from writers like Glendon[152] to the manner in which human rights have been conceptualized. She argues that the present rights talk in its absoluteness promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations.[153]

[150] Sunstein, (n 1).
[151] Ibid 727.
[152] M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York 1991) 14.
[153] Ibid.

Others that bemoan what is perceived as a decline in moral responsibilities and a general regression from an age where individuals took responsibility for what they did to one where people do not want to assume responsibility for anything at all, include D.D Boaz, who states that 'people no longer ask what they can do for their country, only what their country can do for them'[154] and, as he further observes this 'flight from individual responsibility' has led people to fabricate a whole array of explanations why nothing that happens to us is our own fault . . . that the poor are not responsible for their poverty, the fat are not responsible for their overeating, and the alcoholics are not responsible for their drinking.[155]

The view that the disproportionate emphasis on rights at the expense of duties and responsibilities is, in part at least, to blame for the social ills of society and that emphasis on human rights is to blame for weakening public safety and the decay of the moral fabric of society has been espoused on behalf of Governments by some state political officials. In the United Kingdom, the Lord Chancellor and Secretary of State for Justice, in his paper to Parliament in 2007 explained this position.[156] In Australia[157] and in Belgium too, there was a clear suggestion that neglect of responsibilities had resulted in avoidable social ills in society. The Belgian government stated in the Council of Europe in 1993 that the post-communist emphasis on individual rights has undermined personal moral responsibilities and resulted in egoism and self-centeredness among young people, a rise in unethical conduct and crime, social pessimism, and an increase in drug addiction and AIDS.[158]

Another reason for the clamour for a more focussed consideration of individual duties has to do with a perception that there is failure to appreciate fully the role of duty and responsibility in society. McGregor[159] argues that the world has changed profoundly since 1948 when the UDHR

[154] A Etzoni, 'Too Many Rights and Responsibilities for the Future' in KW Hunter and TC Mack (eds) *International Rights and Responsibilities for the Future* (Praeger Publishers, Westport 1996).
[155] D D Boaz, 'Rights, Responsibilities and Community' in KW Hunter and TC Mack (eds) *International Rights and Responsibilities for the Future* (Praeger Publishers, Westport 1996) 48.
[156]'Rights and Responsibilities: Developing our Constitutional Framework' Ch 2, presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, March 2009 Cm 7577 (2009).
[157]A conservative federal government had been very vocal about promoting a new policy linking welfare entitlement to community service obligations. See Pamela Kinnear, 'The Australian Institute, Mutual Obligations: Ethical and Social Implications' as quoted in Saul (n 3) 571.
[158] Bulg.Govt, Rights and Responsibilities of Citizens in a Democratic Society, as quoted in Saul (n 157) 571.
[159] McGregor (n 3).

was signed. 'Humanity is facing the fallout of corporate-led, capitalist globalisation, the reverberation of climate change and changing demographics, world-wide health pandemics, and worrying escalation of violent reactions to conflict, including war, terrorism and structural violence.' And this should invite a rethink of individual responsibility. As Goldstone puts it, 'managing globalisation requires equitable global and regional solutions based on the precepts of both joint and individual responsibility and solidarity.'[160] Globalization of the world economy is matched by global problems, and global problems demand global solutions based on ideas, values and norms respected by all cultures and societies. Recognition of the equal and inalienable rights of all the people requires a foundation of freedom, justice and peace - but this also demands that rights and responsibilities be given equal importance to establish an ethical base so that all men and women can live peacefully together and fulfil their potential. A better social order both nationally and internationally cannot be achieved by laws, prescriptions and conventions alone, but needs a global ethic. Küng equally explains that the globalization of problems calls for a global ethic,[161] at the minimum, 'shared ethical values, basic attitudes and criteria (ethic) to which all regions, nations and interest groups can commit themselves.' In other words, there is a 'need for a common basic human ethic.'[162]

There is expressed fear amongst some experts and human rights advocates that the concept of duty towards the state may be translated into a coercive force in the hands of a dictator, which may be used to force people into giving up their rights in the name of obligation towards the state. Knox has articulated the case against greater emphasis on duties than is hitherto the case[163] this researcher associates himself with Knox in this regard. Human rights advocates, sceptical about arguments for more emphasis on individual duties, have pointed out that some regimes have used the language of 'duty' and 'obligation' to justify the silencing of dissent. People who have peacefully challenged corrupt and autocratic policies have been portrayed as promoting 'instability' and disturbing 'social order.' Discussion of personal duties and obligations can

[160] R Goldstone, *Declaration of Responsibilities and Human Duties* (UN: Human Rights, Research and Education Centre, Ottawa 1998).
[161] H Küng,'A Global Ethic and Human Responsibilities,' paper presented at the high-level expert group symposium on Human Rights and Human Responsibilities in the Age of Terrorism, 5 April 2005, Santa Clara, California<http://www.scu.edu/ethics/practicing/focusareas/global_ethics/laughlin-lectures/global-ethic-human-responsibility.ht ml> Accessed 12 January 2013.
[162] Ibid.
[163] See for example J H Knox (n 9).

indeed be abused for unacceptable political ends, and this should be opposed. Cohen, for example, argues that duties can be 'used to defend coercive state actions against both individuals and constituent groups to achieve policies rationalised as social and economic improvements.'[164] Other scholars who have opposed the concept of individual duties include Buergenthal and Haysom. They have opined that duty towards the state can easily be manipulated and turned into an authoritarian rule. Buergenthal maintains that the inclusion of duties in instruments such as the African Charter, for example, is nothing but an invitation for the imposition of the unlimited restriction on enjoyment of rights.[165]

Rhoda Howard and Jack Donnelly also think the mixing up of rights and duties in the modern state, is to risk eventual complete disappearance of the rights. In their words 'all duties will be aimed towards the preservation of the state and of the interests of those who control it.'[166] Another scholar calls these duties to be 'little more than formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples.'[167]

As regards a case for an instrument universalising individual duties, Sue McGregor and others have made useful contributions on this topic.[168] They have identified benchmarks in the global efforts to universalise, through a formal document, duties and responsibilities. This research project, however, vitally departs from the thrust of that work as it considers not only the desirability or otherwise of such an instrument, but also deliberates on why these experiments are in any case bound to be largely unsuccessful. The nature of the individual duties and responsibilities proposed in the efforts made thus far will be measured against those contained and elaborated in the African Charter. This is with a view to assessing whether the proposed duties and responsibilities framework introduces anything materially dissimilar from those in the African Charter, and whether the African experience in this connection has any relevance to the

[164] R Cohen, 'Endless Teardrops: Prolegomena to the Study of Human Rights in Africa' in R Cohen, G Hyden &W P Nagan (eds) *Human Rights and Governance in Africa*, (Gainesville University Press 1993).
[165] T Buergenthal, *International Human Rights in a Nutshell* (St Paul, Minn. 1995) 175.
[166] RE Howard and J Donnelly (eds) *International Handbook of Human Rights* (Greenwood Press, New York 1987) 25.
[167] See H Okoth-Ogendo 'Human and Peoples' Rights: What Point is Africa Trying to Make in R. Cohen et al., *Human Rights and Governance in Africa* (1993) 78-79.
[168] McGregor (n 3); Goldstone (160); International Council of Human Duties, *Carta of Human Duties: A Code of Ethics and Shared Responsibilities;* see also Report of the Commission for Global Governance entitled 'Our Global Neighbourhood'.

global movement. More specifically, it will be considered whether the duty declarations as proposed could offer any real opportunity or prospect for the universal human rights framework to redefine itself. McGregor identifies and discusses four widely documented major initiatives shaping this global movement in support of a duties and responsibilities.[169] Effectively, all of these initiatives explained that their commitment was to unpack the individual responsibilities mentioned in article 29(1) of the UDHR and enumerate the full range of duties it encompasses and more. McGregor also recognises also other initiatives, though she does not elaborate upon them in her analysis.[170] This research project goes further by focusing on six initiatives.[171]

The global movement for the codification of individuals' duties appears predicated on concerns that the human rights model presently existing at the global plane has thus far markedly engrossed itself with the culture of rights and claims at the expense of duties and responsibilities. Therefore, if duties were codified in a universal declaration their prominence, and therefore their likelihood to be observed could only be greater.[172] Gladstone, for example, observes that the belief that responsibilities can complement the rights in the UDHR is widespread.[173] Responsibilities, according to this view, need not be seen as a threat to the already entrenched rights. Those who oppose this view include Amnesty International, Knox, Saul, and Suter.[174] This researcher accepts the position that these opposing views offer a more persuasive case than that given by proponents of a universal duties and responsibilities framework.

[169] McGregor (n 3). These are: (a) the 1993 Parliament of the World's Religions initiative, (b) the 1997 Inter Action Council initiative, (c) the 1998 UNESCO-sponsored Valencia initiative, and (d) the 2003 United Nations Human Rights Commission initiative.
[170] These are the 2000 Earth Charter Initiative, the International Council of Human Duties' 1993 Carta of Human Duties, and the Commission on Global Governance's 1995 document titled Our Global Neighbourhood, the Club of Rome's 1991 Declaration of Human Responsibilities and Duties, and the UNESCO 1999 Common Framework for the Ethics of the 21st Century. Other recent initiatives that reflect a similar preoccupation for the formulation of duties and responsibilities, include the UN Millennium Declaration, the Statute of Rome, the Global Compact and the Kyoto Protocol.
[171] These are (a) the 1993 Parliament of the World's Religions' initiative, (b) the International Council of Human Duties (c) the Commission on Global Governance, (d) the 1997 Inter Action Council initiative, (e) the 1998 UNESCO-sponsored Valencia initiative, and (f) the 2003 United Nations Human Rights Commission initiative.
[172] International Council on Human Rights Policy (n 1).
[173] As cited in A Clapham, 'Globalization and Rule of Law' in (1999) 61 *Review of the International Commission of Jurists* 17.
[174] For those who argue that rights are threatened if responsibilities are codified at the global level, see n10

The communitarian approach, spearheaded by Etzoni[175] and others, postulates that a strong focus on Western notions of individualism, has led to neglect of individual responsibilities with dire consequences to social aspects of human life. It claims that a failure to accord duties equal treatment with rights is responsible for the many modern social problems. Further, that the Western notion of rights which informed the establishment of the UDHR, excluded other cultural notions of rights since it undoubtedly reflects the philosophical and cultural background of the document drafters who represented Western powers who emerged victorious from the Second World War.[176] In this connection, this approach resonates with the relativist view of human rights premised particularly on Asian values and pre modern African cultural beliefs. Both Amnesty International and Saul argue that the rationale for advocating for the declaration of human responsibility by the Inter Action Council was not logically persuasive. This researcher agrees with the view that the case for a duties or responsibilities declaration, premised on the assumption that the over emphasis on rights and the perceived neglect of duties and responsibilities have contrived to undermine the general welfare and public good, is exaggerated and definitely not borne out by the situation on the ground.

By not making duties mandatory, human responsibility declarations fail. Without a legal motivational structure, they lose the force that is needed for an approach based on duties. Accordingly, as Kuper notes, these declarations 'become a pale shadow of what is needed for a framing document to complement the UDHR.'[177] This researcher agrees with this view but not without qualification. The acknowledgement of individual obligations in relation to the rights and freedoms of all human beings need not always be translated into dreadfully demanding commands. Certain duty types are incapable of precise definition, defying any prospect of enforcement. As one writer observes, when it comes to duties which cannot be reduced into hard law, the basic general reflection is that one must be agreeable to consider earnestly what one should reasonably do, taking note of the relevant parameters of the cases involved. The necessity to ask that question (rather than proceeding on the assumption that we owe nothing to others) can be the beginning of a more comprehensive line of reasoning. The territory of human rights

[175] See A Etzoni, 'Too Many Rights and Responsibilities for the Future' in KW Hunter and TC Mack (eds) *International Rights and Responsibilities for the Future* (Praeger, Westport CT 1996) 3.
[176] M Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 605. See also Ch 5 of this dissertation.
[177] A Kuper, (ed) *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge London, 2005) 116.

belongs there. The reasoning cannot, however, end there.[178] Sen aptly puts it that obligations must not be confused with no obligations at all. Rather some obligations belong to the important category of duties that Immanuel Kant called 'imperfect obligations'.

1.8. STRUCTURE OF THE WORK

The work is divided in eight parts. The first part is the introduction, setting out the scope of the work. This part seeks to justify the need for an in depth investigation on the subject of individuals' duties and responsibilities in the human rights discourse. The motivation for the research is set out and the significance of the study explained. The part also lists the research questions, sets out the hypothesis, describes the research methodology and puts forth the layout of the work.

The second part briefly discusses the meaning of the concept of human rights, giving in the process, the historical origins and development of the theory and practice of human rights, the philosophical analysis, justification and criticism of this concept. The chapter also highlights the contemporary significance of human rights having regard to defining periods and events in the development of human rights including the *Magna Carta* (1215), the French Revolution (1789), the Holocaust (1933), American Declaration on the Rights and Duties of Man (1948), and ending with the establishment of the United Nations human rights protection system (after 1945). The place of duties and responsibilities in that human rights framework is also discussed.

The third part discusses the concept of human rights in Africa from pre-colonial times to date. In particular, the chapter examines the conditions that precipitated the establishment of the African human rights system with a view to situating the notion of individuals' duties in the African human rights system. It is perspectives on the concept of duties in the African Charter that form the reference point in the remainder of this work.

The fourth part considers the concept of personal duties generally and will explore the definitional differences between duties, obligations and responsibility. It will also consider the

[178] A Sen, 'Elements of a Theory of Human Rights' (2004) 34 *Philosophy and Public Affairs* 340.

concept of duties, particularly focusing on the universal and regional human rights instruments that address duties. Constitutions of several countries representing various regions of the world, cultures, histories and faiths will be examined. This will be done with a view to establishing whether in order for human rights to be reconstructed on a universal basis, the combination of the concept of human rights and human duties must be institutionalised at the universal plane.

The fifth part considers the concept of duties concerning universality and relativism. The influence of Western, as well as non-western, values on the notion of duties will be evaluated. The part will also examine the extent to which religion and morality shape the language of duties of the individual, and the difficulties implicit in any structuring of duties provisions under a legally binding framework.

The sixth part deals specifically with the issue of human duties under the African Charter and will examine conceptualisation issues relating to the duties provisions in the Charter. The chapter will discuss the legal implications of the concept of duties of the individual within the Charter and consider whether the normative content of individual duties provisions in the Charter have any value beyond being moral appeals and the consequences of this on the effectiveness of the African Charter. The chapter will ascertain whether these provisions are fundamentally and irrevocably flawed, and in particular, whether the failure by African states to implement the duties provisions could be owing to the incorrect verbiage and generally unclear formulation of the Charter provisions in regards to these duties.

The seventh part deals with the current debate on the notion of individuals' duties and will analyse some selected initiatives within the human responsibilities movement. It will examine the various arguments regarding the inclusion of duties in a universal document, the nature of the duties proposed and the likely consequences of having a human duties or responsibilities declaration. The African Charter duties of the individual provide a reference point in this regard.

The final part sets out the findings, conclusions and recommendations.

CHAPTER TWO: THE HUMAN RIGHTS PROTECTION SYSTEM IN PERSPECTIVE

2.1. INTRODUCTION

Today, human rights have become a powerful tool for the critique of both national and international politics and policy. Much public discourse is phrased in the rhetoric of rights, with the debate on the relation between individual rights and individual duties being no less significant.

By way of laying the necessary background to the theme of individuals' duties within the human rights discourse, the thrust of this dissertation, this chapter briefly examines ways in which human rights have been understood. It also looks at their philosophical genesis, analysis, justification, criticism as well as the antecedents to the modern human rights protection system and ultimately the ways in which these different elements have been presented in today's human rights. The chapter considers the meaning of human rights while recognising the philosophical and political history of the concept; a history which still resonates in many of the current debates touching on the growth and use of the concept of human rights. It is important to lay this philosophical background because the notion of human rights today has become synonymous with international human rights law[1] and the key human rights instruments, notably the UDHR[2] and the various covenants and conventions. Yet, any account of human rights that begins only with the UDHR is plainly incomplete, for though treaties and legislative frameworks are a very important source of human rights at the global, regional and national levels, they tell us little or nothing about the philosophical, political or moral underpinnings of these laws, and more importantly the source of their legitimacy.

An examination of the philosophical origins and the antecedents of the modern conception of human rights helps situate the place of individuals' duties in the human rights discourse today. An inquiry into the source, nature and content of human rights exposes a remarkable historic pre-eminence of rights over individuals' duties.

[1] C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford 2003) 7.
[2] The UDHR was adopted by the UN General Assembly Resolution 217 (iii) of 10 December 1948.

As this chapter is intended to provide the background for the discussion on individuals' duties, it is inescapable to appraise the key arguments about the evolution of human rights if their relevance and applicability to today's conversation on individuals' duties within the human rights discourse is to be appreciated. After all, the essence of the private duties debate today continues from the seed sown by previous generations of philosophers that attempted to explain the nature of human rights and their legal or moral source.

The chapter also inevitably highlights the modern significance of human rights having regard to defining periods and landmark events in the development of human rights, including the *Magna Carta*,[3] the French Revolution,[4] the American Declaration of Independence[5], the Holocaust[6], the UDHR and the ensuing human rights protection system.

2.2. TOWARD DEFINING THE CONCEPT OF HUMAN RIGHTS: THE PHILOSOPHICAL ANALYSIS OF THE CONCEPT

The difficulties inherent in seeking a satisfactory definition of legal terms must be emphasised. A debate still exists as to what we mean by 'human rights.' Great caution needs to be employed in trying to understand the meaning of the words 'human rights' since words do not always possess unique, 'correct' meanings, and may have emotive rather than a descriptive purpose.[7] The legal philosopher Hart, for example, argues that questions such as 'what is a state?' or 'what is a right?' are intrinsically highly ambiguous, for the same form of words may be used to demand a

[3] Also known as the *Magna Carta Libertatum*, it was originally issued in Latin in 1215. It required King John of England to proclaim certain liberties and privileges and limit his power.
[4] Also called the Revolution of 1789, it was a convenient term coined for the revolutionary movement that rocked France between 1787 and 1789 and reached its climax in 1789. The term is used to distinguish that event from the French revolutions that took place later in 1930 and 1848.
[5] This is a statement adopted by the Continental Congress on 4 July 1776, which announced that the thirteen American colonies then at war with colonial power Great Britain regarded themselves as independent states and were no longer part of the British Empire.
[6] With its origins in two Greek words *holos* (whole) and *kaustos* (burned), the word Holocaust was historically used to describe a sacrificial offering burned on an altar. Since 1945 the word has taken on a new and negative meaning: the mass extermination of some six million Jews by the German Nazi regime during the Second World War.
[7] The restricted capacity of legal language, e.g., reflecting its occasional inability to transfer messages at appropriate 'shared levels' has produced insufficient communication that characterizes a large range of legal documents. See N J Udombana, 'Arise, O Compatriots: An Analysis of Duties of the Citizen in the Nigerian Constitution' (2002) 34 *Zambia Law Journal* 29.

definition or the origin, cause or purpose, of a legal institution. He accordingly believes that definitions of legal terms are more valuable than mere definitions.[8]

Leaving aside for a moment the difficulties that go with any attempt to define terms legally, it is important to nonetheless attempt a description, however general, of the functions and properties of 'human rights'.

As intimated at the beginning of this chapter, when one talks of human rights today, one is almost certainly referring to human rights as acknowledged in international and national law as opposed to rights in a moral or philosophical sense, and yet the philosophical debate about human rights continues to elucidate (or sometimes make unintelligible) the reason we think human rights are important and how to best expand their scope. Human rights, taken in the moral and philosophical sense, also endeavour to explain duties as the corollary of human rights; that the enjoyment of rights entails a duty on the part of others to respect those rights.

It is important to appreciate from the outset that as a concept, human rights evolved through history as societies became increasingly civilised. They are a creation of a philosophical contest that has gone on for more than two thousand years within the European societies and their colonial offspring. As Heard observes, the argument has focused on a search for moral standards of political organisation and behaviour that is independent of the modern society.[9] In his view, many people have been unsatisfied with the notion that what is right or good is simply what a particular society or ruling elite feels is right or good at any given time, and this unease has led to a quest for enduring moral imperatives that bind societies as they evolve. He further argues that:

[8] Hart would for example, rephrase the question, 'what is a corporation?' by asking, 'under what types of conditions does the law ascribe liabilities to corporations?' see generally, H L A Hart, 'Definition and Theory of Jurisprudence' in H LA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford1983).
[9] A Heard, 'Human Rights in Chimeras Sheep's Clothing?' (1997)<www.sfu.ca/~aheard/intro.html>accessed 24 July 2013.

> [f]ierce debates raged among political philosophers as these issues were argued through. While a path was paved by successive thinkers that lead to contemporary human rights, a second lane was laid down at the same time by those who resisted this direction.[10]

As will be shown, the term 'human rights' is fairly new having come into popular use after the Second World War, particularly after the founding of the United Nations in 1945 and the adoption by the United Nations General Assembly of the UDHR in 1948. Much previously, Western civilisation developed the idea of 'natural rights' which were understood to be rights which were rationally a part of what it entails to be human; therefore, rights which all humans have and share, solely by virtue of their humanity. As is discussed later in this chapter, human rights are a progeny of natural rights that evolved from the concept of natural law. As will also be shown, this view is however, not without opposition from positivists who argued that rights could only draw their legitimacy from the law of a particular society and could not come from any natural or innate source.

2.2.1. What is a right?

Rights dominate today's understanding of what actions are permissible and which ones are just. It is inevitable that any attempt to understand the concept of 'human rights' should begin with a comprehension of the meaning of the word 'right' within it because a proper definition of the term 'human rights' and everything it represents will, by and large, depend on the nature of the 'right' involved. We should ask what a right is, and how a right becomes a human right. To understand the precise meaning of any assertion of a right, we need to understand more precisely how a right is constructed and what it does. In this way, it becomes easier to understand the link between rights and humanity. After all, in conceptual terms, human rights are derivative of the concept of a right. It is inescapable, therefore, to engage a philosophical analysis of the concept of a right. It must be pointed out that a right is a complex notion that has availed itself to a variety of interpretations and theories representing different values and meanings.

[10] Ibid.

In its older objective sense, the word 'right' connotes what is just or what is fair.[11] Aristotle employs *dikaion*, for instance, to indicate that a society is 'rightly ordered': that it exhibits the right configuration of human relationships. 'Right', in this objective sense can also be attributed to individuals. He explains right in a political sense as follows:

> The just in political matters is found among men who share a common life in order that their association bring them self-sufficiency and who are free and equal, either proportionally or arithmetically. Hence, in a society where this is not the case, there is nothing just in the political sense, in the relations of the various members to one another. Yet there is only one thing that bears a resemblance of what is just...For the just exists only among men whose mutual relationship is regulated by law, and law exists where injustice may occur.[12]

For Aristotle, right is possible only among men who are free and equal, for only among them there is public decision about justice (*dike*) that distinguishes between what right (*dikaion*) and what unjust (*adikaion*) is.[13]

The Roman jurist Ulpian[14] held that justice means redressing each right (*ius*). In this sense, a person's 'right' is what is due to him given his role or status.[15]For Roman jurists like Ulpian right, law and justice were inseparable and the word just referred to all three. Rights were fashioned by the law, and the law was the diction of the society's notion of justice. Law was allied principally with order, but only in the sense that justice created and sustained order. Both Ulpian and Grotius were of the view that a right consisted in enjoying what was right and justice secured a person's right by 'giving him his right.' However, even this basic beginning is not without contest. There is a difference of understanding between the natural law tradition and the modern tradition of human rights. There is insistence by scholars like Villey[16] that individual

[11] See J Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) 206.
[12]A R W Harrison, 'Aristotle's *Nicomachean Ethics*, Book V and the Law of Athens' (1957) 77 *The Journal of Hellenic Studies* 42-47.
[13] E Voegelin, 'What is a right by nature?' in G Niemeyer (ed) *Anamnesia* (University of Missouri Press, Columbia 1978).
[14] Gnaeus Domitus Annius Ulpianus (lived cir 170-288 AD) was a Roman thinker and jurist.
[15] B Tierney, *The Idea of Natural Rights* (Scholars' Press, Atlanta 1977) 16.
[16] M Villey, *The Philosophy of Law* (4th edn Dalloz, Paris 1986) vol 1.

rights, natural rights, are a modern innovation, having no counterpart in ancient or medieval jurisprudence; that all efforts to find in the Aristotelian *dikaion* or the Roman *ius*, anything like what we mean by right are misbegotten.[17] Villey argues that the just, the *dikaion, ius,* do not name a quality or faculty or power of individuals. He maintains that most rights claims are chimeric although he admits that in light of the growth of the modern state, talk of rights as protective claims against the state encroachment makes sense.[18]

The *Oxford Advanced Learner's Dictionary*[19] defines a right as 'a moral or legal claim, to have or get something, or to behave in a particular way.' This definition accords with the writer Dowrick's understanding that the term 'rights' pertains to a broader 'concept of claims i.e. wants, desires, aspirations, people have and express ... those claims which are also supported by or in accord with some objective standards (or some general theory), whether those of a code of morality or ethical theory, or those of a political system or political theory, or those of a legal system, are usually and aptly called 'rights'.[20]

The author, Donnelly distinguishes between the adjectival use of the word 'right' and its substantive when he posits that the word 'right' connotes two central moral and political senses: rectitude and entitlement. In the former sense, we speak of the correct thing to do or something being right, while in the latter sense of entitlement we speak of someone having a right to something.[21] In his words:

> [r]ectitude and entitlement both link 'right' and obligation, but in systematically different ways. Claims of rectitude (righteousness) – 'That's wrong,' 'That's not right,' 'You really ought to do that' – focus on a standard of conduct and draws attention to the duty-bearer's obligation under that standard. Rights claims, by contrast, focus on the right-

[17] Ibid.
[18] See R McInerny, 'Natural law and Human Rights' (1991) 36 *American Journal of Jurisprudence.*
[19] A S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (7th edn Oxford University Press, Oxford 2006) 1308.
[20] F E Dowrick, *Human Rights: Problems, Perspectives and Texts* (Saxon House, Westmead 1979) 8.
[21] J Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, Ithaca and London 2003)7.

holder and draw the duty-bearer's attention to the right-holder's special title to enjoy her right.[22]

It is, however, plain that not everything which is right or good is a right though the tendency is to deliberately or otherwise escalate the concept of a right by declaring benefits people believe are 'right' to be 'rights'. It is in this connection that it becomes useful to examine, albeit in non-exhaustive way, explanations of the term 'right' given by philosophers.

The American legal theorist Wesley Newcomb Hohfeld,[23] whose system for describing the form of right is widely accepted (but not without criticism) as offering the most comprehensive yet explanation of a right, makes an analytical scheme which divides rights into four distinct connotations of juridical relationships and exemplifies a number of analytical distinctions between various legal positions. These four elements are also known as the Hohfeldian incidents and are set out in eight fundamental conceptions in the way he believed all legal problems could be presented. His arrangement of the scheme was as follows:

Right	**Privilege**	**Power**	**Immunity**
No-right	**Duty**	**Disability**	**Liability**

Right	**Privilege**	**Power**	**Immunity**
Duty	**No-right**	**Liability**	**Disability**

[22] Ibid.
[23] W N Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* (Yale University Press, New Haven 1919). For a clear summary of this work see J Waldron, *Theories of Rights* (Oxford University Press, New York 1984) 6.

For Hohfeld, if party **A** has a right to something **(XY)** the ordinary notion conveyed by this is that of a claim-right. **A** has a claim against a correlative duty of another party, say, **B**; **A** has a right to **XY** and **B** has a duty to let **A** have or do **XY**. This means that **A** is legally protected from interference by **B** or against **B**'s withholding of assistance with regard to **A** having or doing **XY**. **B** who is to refrain from interfering with **A'**s right is under a correlative duty to do so. In this regard, **B**'s duty is either positive if some action on his part is required to enable **A** enjoy **XY**, or is negative if B has to refrain from enjoyment by **A** of **XY.**

In the second sense, by saying **A** has a right to **XY,** Hohfeld meant that **A** has *a liberty* as regards **XY**. This liberty does not import any corresponding duty on the part of anyone else. In this sense **A** can make no claim against **B** or any other person because no one else has a duty as regards A's enjoyment of XY.

A right in this sense, *a liberty*, may be enjoyed by all, for example, the right to take a walk or to relax in a public park. In Hohfeldian theory, a subset of liberty is *privilege*, since A may have no duty to walk or relax in the park. In any liberty no one has a duty owed to anyone to provide **XY** to anyone. In our example, no one is under a duty to allow or facilitate the walk or relaxation in the park.

The third sense in which Hohfeld explained a right is to connote *power*. If **A** has the right to **XY**, he has the power to alter the legal or moral relations. To say that **A** has a power means that he can, by his voluntary act, change the legal relations of another person, **B,** who has a correlative liability.

Hohfeld's fourth explanation of **`A** has a right to **XY'** expresses the idea that **A** has an *immunity* that **B** is unable to change. Thus a sitting President in Zambia has immunity against civil and criminal suits while holding office as President. This is a right which cannot be changed by the Director of Public Prosecutions or the courts. If **A** has immunity against **B**, it means that **B** has no power to change **A**'s legal position with respect to any entitlement covered by the immunity. Thus in our example, no one has power to commence legal proceedings against a sitting President. It means that no one has power to change the President's legal position with respect to any entitlement covered by the immunity. If the Director of Public Prosecutions has no power to

place the President under a duty to defend himself in a court of law, the President has immunity in that respect, and the Director of Public Prosecutions a disability (a correlative to immunity).

This is a very simplified presentation of the Hohfeldian framework which shows that the unity of rights is the unity of molecules of the periodic table where privilege-rights and claim-rights share the concept of duty, and range over physical objects. As the next chapter will show, this point is significant in aiding the understanding of duties. Power-rights and immunity rights share the concept of authority and range over lower order incidents. In the Hohfeldian framework:

> privilege-rights and power-rights are actively exercised and overlapping their function. Claim-rights are actively exercised and overlap in their function. Claim-rights and immunity-rights are passively enjoyed, and their functions also mesh. All of the rights that we know are built from these common elements, in ways determined by the nature of the elements themselves.[24]

Hohfeld set the four incidents in tables of 'opposites' and 'correlatives' so as to present a logical configuration of his system, adding words such as 'no-claim' to mean the opposite of a claim and a 'liability' to mean a correlative of a power. His presentation may be illustrated as follow:

Opposites

> If **X** has a Claim, then **X** lacks a No-Claim.
> If **X** has a Privilege, then **X** lacks a Duty.
> If **X** has a Power, then **X** lacks a Disability.
> If **X** has Immunity, then **X** lacks Liability.

Correlatives

In the Hohfeldian structure, in term of correlatives, the same situation could be presented thus:

> If **X** has a Claim, then some other person, **Y** has a Duty.

[24] L Wenar, 'The Nature of Rights' 2005 (33) 3 *Philosophy and Public Affairs* 223-252.

If **X** has a Power, then some other person, **Y** has a Liability.

If **X** has Immunity, then some other person, **Y** has Disability.

Each of these individual incidents (i.e. privilege, claim, power and immunity) can be a right when it arises in seclusion. Yet, they could also link together to create complex rights like a molecular structure. The following diagram may be used to illustrate such a molecular structure of the property rights that K may have over his motor vehicle:

IN RESPECT OF HIS MOTOR VEHICLE K HAS		
POWER to waive, annul or transfer his	**IMMUNITY** against others changing his	Second-Order rights over the first order rights
PRIVILEGE to use the motor vehicle	**CLAIM** against others using his motor vehicle	First order rights over the computer

Part of the 'molecular' structure of a property right[25]

This figure illustrates first order and second order rights. The former are K's legal rights which he has directly over his motor vehicle. The privilege on the first level entitles him to use his motor vehicle. The claim correlates to a duty on the part of everyone else not to use K's motor vehicle without his permission. K's second order rights are the legal rights concerning the alteration of those first order rights. K has several powers with respect to his claim – he may waive the claim (granting permission to others to enter and sit in the car, annul the claim (abandoning the motor vehicle as his property) or transfer the claim (converting the car into

[25]Acknowledgement is given to White Rose Consortium eprints Repository eprints@whiterose.ac.uk and the author Leif Wenar, 'The Nature of Rights' (2005) 33(3) *Philosophy and Public Affairs* 223-253 where an identical example of a computer is given.

someone else's property). K's immunity here is to prevent others from waiving, annulling, or transferring his claim over his car. The four incidents together constitute a significant portion of K's property right. It must be stated that all these incidents of K's property rights are qualified. K has no privilege to knock other people down with his motor vehicle, nor can he drive it on a public road if it is not licensed.

It must be pointed out that the incidents illustrated in the figure above may be associated with more incidents. As Wellman[26] says each right has a 'defining core' surrounded by 'associated elements' which may be present or absent in a particular case.

The analysis by Hohfeld does not appear to concern itself with a substantive or pragmatic enquiry into the concept of a right. His preoccupation is to offer a conceptual appreciation of the terms right and duty in practice and thus to ease a better understanding of the nature of rights. It is not the purpose of his analysis to explain what rights, duties etc., are or should be or what their moral foundation is or what is necessary for something to count as a right, duty etc. In fact, his analysis is definitional and stipulative. He does not, therefore, preoccupy himself with anything about the validation of rights. As will be evident later, alignment by theorists with Hohfeld's analysis of rights is not uncommon. His analysis has not been without criticism either.[27]

Hohfeld's analysis fittingly sets a very useful starting point and a constant reference point to any discussion on the subject of duties responsibility and liability in the human rights context. Various theorists, as is evident from scholarly literature on the question of a right and the function of rights, appear to align themselves with the Hohfeldian construction. For example Feinberg[28] proclaims that to have a right is to have a 'valid claim' while Mackie[29] is of the view

[26] C Wellman, *A Theory of Rights* (Rowman & Allanheld, Totowa 1985) 71.
[27] See for example J Penner, 'The Analysis of Rights' in (1997)10 *Ratio Juris* who criticises Hohfeld's analysis because it does not draw a distinction between rights in *personam* and rights in *rem*. See also D N MacCormick, 'Rights in Legislation' in P M S Hacker and J Raz (eds), *Law Morality and Society* (Oxford University Press, Oxford 1977)199, where he expresses the view that a legal right is not or need not be correlative to a duty held by another person. He argues that '[t]o rest an account of claim rights solely on the notion that they exist whenever a legal duty is imposed by a law intended to benefit assignable individuals ... is to treat rights as being simply the 'reflex' of logically prior duties.'
[28] J Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Inquiry* 243-257.
[29] J Mackie, 'Can there be Rights-Based Moral Theory?' in J Waldron (ed) *Theories of Rights* (Oxford University Press, Oxford 1984) 169.

that 'a right, in the most important sense, is the conjunction of a [privilege] and a claim-right.' Louden[30] believes that '[r]ights are permissions rather than requirements. Rights tell us what the bearer is at liberty to do.' In fact even Finnis who treats human rights as synonymous with natural rights concedes that rights talk provides him the vocabulary to enable him express the version of natural rights he developed. McInerny makes the conclusion that:

> [t]he treatment of rights by Finnis, far from being merely the appropriation of a grammar, amounts to a noteworthy contribution to the theory. He adopts and adapts Hohfeld's analysis of rights, according to which rights always involve a triadic relation between one person, one act-description, and immunity are deftly defined. For purposes of human rights, claim-rights and liberties are most important, and claim-rights have duties as their correlatives, while liberties have as their correlatives the absence or negation of duties. Whether or not a claim-right requires an identifiable person for whose benefit the duty has been imposed is a matter of stipulation.

Some theorists, however, emphasise duties as correlative to rights. Williams, for example, declares that 'no one ever has a right to do something: he only has a right that someone else shall do (or refrain from doing) something,'[31] while Raz says 'a person who says to another, 'I have a right to do it' is not saying that … it is not wrong to do it. He is claiming that the other has a duty not to interfere.'[32]

It is unnecessary at this stage to delve into the jurisprudential debate over whether rights are strictly correlative to duties. This discussion is a subject for extensive consideration in Chapter Four. Suffice it to point out at this stage that although rights do give rise to individuals' duties upon others, it does not follow that all duties are referable to some or other individual right. In fact, it would be preposterous to assume that every legal duty of the individual is correlative to some moral interest or legal right somewhere.

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[30] R Louden, 'Rights Infatuation and the Impoverishment of Moral Theory' (1983) 17(2) *Journal of Value Inquiry* 87.
[31] G Williams, 'The Concept of a Legal Liberty' in R Summers (ed), *Essays in Legal Philosophy* (Blackwell, Oxford 1968) 125.
[32] J Raz, *Ethics in the Public Domain* (Oxford University Press, Oxford 1994) 275.

Although useful as far as legal rights are concerned, the Hohfeldian analysis works rather badly in the framework of moral rights. As Waldron points out, just as moral rights 'are unlikely to stand in a simple one to one relation with duties' they are just as unlikely to stand in a simple one to one relation with legal rights, immunities, privileges, claims, etc.[33]

As if to confirm the difficulties that attend any attempt to define terms, thinkers and philosophers have explained the concept of rights slightly differently. The rationalist Dutch legal philosopher and diplomat Hugo Grotius in his *The Right of War and Peace* assigns different meanings to the word 'right' depending on the context in which it is used. In discussing the rights of war and whether any war can be justified, he observes that the word 'right' in this sense,

> signifies nothing more than what is just, and that, more in a negative than a positive sense; so that right is that, which is not just. Now anything is unjust which is repugnant to the nature of society, established among rational creatures.[34]

He then considers a right in a different sense relating directly to the person. Here he believes 'right' is

> a moral quality annexed to the person, justly entitling him to possess some particular privilege, or to perform some particular act. This right is annexed to the person, although it sometimes follows the things, as the vices of lands, which are called 'real rights,' in opposition to those merely 'personal.' Not because these rights are not annexed to persons, but the distinction is made, because they belong to the persons only who possess some particular thing. This moral quality when perfect, is called a 'faculty'; when imperfect, an 'aptitude'. The former answers to the 'act' and the latter to the 'power', when we speak of natural things.... This right comprehends the power that we have over ourselves, which is called liberty, and the power, that we have over others, as that of a father over his children, and of a master over his slaves. It likewise comprehends

[33]J Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press, Cambridge 1993) 212.
[34]H Grotius *The Right of War and Peace*, AC Campbell (trans MW Dunne, Washington and London 1901) as reproduced in P Hyden, *The Philosophy of Human Rights* (Paragon House, St Paul USA 2001) 48.

> property, which is either complete or imperfect; of the latter kind is the use or possession of anything without the property or power of alienating it....[35]

The third sense in which Grotius understands the connotation of the word right is that of its equivalence to law. In this respect, he argues that the word right taken in its most pervasive sense represents a rule of moral action,

> obliging us to do what is proper. We say obliging us, for the best counsels or precepts, if they lay us under no obligation to obey them, cannot come under the denomination of law or right. Now as to permission, it is no act of law, but only the silence of the law; it however prohibits anyone from impeding another in doing what the law permits. But we have said, the law obliges us to do what is proper, not simply what is just; because, under this notion, right belongs to the substance not only of justice ... but also of all other virtues. Yet from giving the name of a right to that which is proper, a more general acceptation of the word justice has been derived.[36]

Later in this chapter, the views of Grotius in relation to rights and morality will be alluded to in a little more detail.

2.2.2. Types of rights

A distinction is made between active rights and passive rights. In this regard, scholars like Lyons[37] fit into the Hohfeldian structure of rights. They believe the privilege and the power are 'active' rights that concern their holders' own actions. The claim and immunity are 'passive' rights that regulate the actions of others. An active right would exist where, for example, a student has the right to learn, while a passive right would be signified in the statement that a student has a right to be taught by a teacher. This distinction fits neatly in the Hohfeldian incidents.

[35] Ibid.
[36] Ibid.
[37] D Lyons, 'The Correlativity of Rights and Duties' (1970) 4 *Nous* 45.

A further distinction is made between positive rights and negative rights. This is particularly done by some normative theorists. A holder of a negative right is entitled to non-interference, while a holder of a positive right is entitled to provision of some goods or services. A right against being assaulted is a typical example of a negative right, while a right to social welfare is an example of a positive right. Since both negative and positive rights are passive rights, some rights are neither negative nor positive. Privileges and powers cannot be negative rights; and privileges, powers and immunities cannot be positive rights. The (privilege-) right to enter a building and the (power-) right to enter into a binding agreement are neither negative nor positive. When the nature of duties and responsibilities is discussed later in this work, the significance of this categorisation of rights will become evident.

2.2.3. The functions of rights and approaches to their justification

In order to further understand what rights are, the question is asked as to what the functions of rights are. To ask this question is in effect to inquire into the question what rights do for those who hold them. Mill in *Utilitarianism* instead gave his view as to what society should do for a right holder as follows:

> When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. . . .To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.[38]

As will become evident from the discussion that follows, Mills' approach to the justification of rights is typically consequentialist. Others like him who explain rights in this manner include Dworkin who argues that rights are 'trumps', meaning that rights are the reason for treating their holders in a specific way or allowing their holders to act in a particular manner even if some social or economic objective would be achieved by doing otherwise. In Dworkin's thesis, rights trump non-right objectives such as growing a country's gross domestic product. In Dworkin's

[38] J S Mill, *Utilitarianism* (1861) G Sher (ed) (reprt Hackett, Indianapolis 2002) 54.

analysis, rights as trumps states the essential ideal of equality upon which the modern doctrine of human rights rests. He is also of the view that one's rights might have priority over another's rights. For example, driver A facing a green traffic light has a right of way over driver B facing a red traffic light, yet the right of way of the driver of a fire fighting vehicle with blazing sirens on trumps both A and B.

2.2.4. Theories explaining the functions of rights

Two main theories over the functions of rights dominated the debate over the nature of human rights in the twentieth century.[39] These are the will theory and the interest theory. The debate between these two theories raged on unabated without a decisive winner, leading one writer to state that the debate ended in a standoff.[40] Each of these theories declares its conceptual analysis of rights and professes that such conception is closer to the ordinary understanding of what rights are and what they do for the right-holder.

Both the will theory and the interest theory posit that some Hohfeldian incidents or their combination, do not qualify as rights because they do not perform the function that rights perform. Will theorists argue that the function of a right is to afford the right-holder some control over another's duty. Accordingly, only those combinations of incidents that afford their holders some choices are properly to be viewed as rights. For the will theorists, therefore, the sole function of rights is to give to their holder that discretion over the duty of another. A motor vehicle owner, for example, has a right because he has the power to waive or not to waive the duties that others have not to touch and drive it. The owner of property has the power to waive or annul or transfer other's duty. The essential thesis of the will theory was summed up by Hart when he claimed that rights make the right-holder 'a small scale sovereign to whom the duty is owed.'[41] In the Hohfeldian framework, the will theorists stress that every right contains a Hohfeldian power over a claim. The will theory identifies as rights only those Hohfeldian incidents that bestow on their holders the discretion to change the duties of others. According to

[39]The history and present status of the debate between the will and the interest theories is well captured in M Kramer, N Simmonds, and H Steiner, *A Debate over Rights* (Oxford University Press, Oxford 1998).
[40] L W Sumner, *The Moral Foundations of Rights* (Oxford University Press, Oxford 1987) 51.
[41] H L A Hart, *Essays on Bentham* (Oxford University Press, Oxford1982) 183.

this theory, those people who possess a certain power; the capacity to exercise powers to alter the duties of others, are identified as potential holders of rights.

The will theory is, however not without limitations. Two of these shortcomings stand out, namely, first, the range of rights, which this theory recognises, is restricted. Secondly, the theory is unable to account for the rights of certain categories of persons, notably children and incompetents (for example comatose adults). These are therefore, regarded as not having rights.[42]This position of the will theory led an advocate of the interest theory to remark that:

> [m]any people would shrink from a theory, which defines 'right' in a way that commits the proponents of the theory to the view that, children, and mentally infirm people have no rights at all. Even when stripped of its ghastliness by being carefully explained, such a view tends to sound outlandish when stated.[43]

As regards the first of the two limitations, one has, for example, no legal power to waive or annul one's claim against being enslaved, or being tortured to physical or mental incapacity or to death. The will theory does not recognise that one has a legal right against being enslaved, or being tortured to incapacity or death, yet these unwaivable claims are widely regarded as some of the most important individual rights.

The interest theory on the other hand argues that the sole function of rights is to further their holder's interest. Advocates of this theory argue that the chief purpose of human rights is to protect and promote certain crucial interests and to secure those essential interests is the main basis upon which human rights may be morally justified. In this school of thought are to be found theorists such as Bentham,[44] Austin, Lyons, MacCormick, Kramer[45] and Raz.[46] The theory

[42] N MacCormic, *Legal Rights and Social Democracy* (Oxford University Press, Oxford1982) 154.
[43] Kramer (n 39) 298.
[44] British philosopher, jurist and social reformer (1748-1832).
[45] Kramer (n 39) 298.
[46] J Raz, *Ethics in the Public Domain* (Oxford University Press, Oxford1994).

maintains that rights are those incidents whose purpose is to promote the well-being of the right holders. MacCormic[47] in his words puts the position of the will theorists thus:

> The essential feature of rules that confer rights is that they have as a specific aim the protection or advancement of individual interests or goods.

A statement on human rights that fits neatly within the interest theory is that given by Henkin when he states that:

> [h]uman rights are premised on a theory that takes as its starting point the human dignity of individuals and their entitlement to have basic autonomy and freedoms respected and basic needs satisfied.[48]

A further representative view of the interest theory approach is provided by Finnis.[49] He argues that human rights are justifiable on grounds of their influential value for securing the necessary conditions of human well-being. He categorises seven fundamental interests which he calls 'basic forms of human good' as offering the basis human rights, namely; life and its capacity for development; the acquisition of knowledge as an end in itself; play as the capacity for recreation; aesthetic expression; sociability and friendship; practical reasonableness; the capacity for intelligent and reasonable thought processes; and finally religion or the capacity for spiritual experience.[50]Finnis views these as the essential fundamentals for human well-being and as such justify a claim to corresponding rights.

Unlike the will theory, the interest theory does not subscribe to the thesis that each right is always in the interest of the right holder. For this theory, the function of rights is to promote right holders' interests in a general case. As far as this theory is concerned, the emphasis should be on the right holder's interest rather than his choices. The interest theory accordingly recognises as

[47] N MacCormic, 'Rights in Legislation' in P Hacker, and J Raz (eds) *Law, Morality and Society: Essay in Honour of H L A Hart* (Oxford University Press, Oxford 1977) 192.
[48] L Henkin, 'Introduction' in L Henkin (ed) *The International Bill of Rights* (Colombia University Press, Colombia 1981).
[49] J Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford1980).
[50] Ibid.

rights, unwaivable claims such as claims against enslavement and torture. For interest theorists children and incompetent adults have interests that rights can protect. To the extent that the interest theory acknowledges that individuals may be better off having the power to make choices, it can embrace many of the rights that are core to the will theory.

One of the most significant limitation of the interest theory is that there are many rights whose purpose is not to further the interests of the right holder even in a general case. This is particularly so with rights that attach to occupational roles, for example a police officer's (power) right to arrest suspects of crimes, which is not aimed at furthering the interest of the police officer.

2.2.5. Justifying human rights

Various philosophical approaches have been used to explain why rights should be respected. The two leading approaches in this connection are the deontological and the consequentialist approaches. This researcher has, in the previous section, already alluded to aspects of each of these.

The deontological or status theories which belong to the natural rights way of thinking take, as a starting point, the view that human beings have qualities that make it crucial that certain rights should be accredited to them so that respect for these rights is fitting. Instrumental theorists on the other hand posit that respect for particular rights is a way of bringing about some optimal distribution of interests. While status theories start with the nature of the rights holder and reach straightaway at the right, instrumentalist theorists begins with the preferred consequences (the optimal benefit or maximum utility) and then works rearward to see which rights will produce those values. Quinn[51]explains a status theory of rights as follows:

> A person is constituted by his body and his mind. They are parts or aspects of him. For that reason, it is fitting that he have primary say over what may be done to them – not because such an arrangement best promotes overall human welfare, but because any

[51] W Quinn, *Morality and Action* (Cambridge University Press, Cambridge1993) 170.

> arrangement that denies him that say would be a grave indignity. In giving him this authority, morality recognises his existence as an individual with ends of his own – an independent being. Since this is what he is, he deserves this recognition.

The utilitarian theory as given by Mill as quoted at the beginning of this part, illustrates the consequentialist approach to justifying rights. For these theorists, rights are an instrument for creating an optimal supply of interests across some group.

2.2.6. Moral and legal rights compared and contrasted

An attempt to appreciate what a right is would be incomplete if no mention is made of the distinction and/ or relationship between rights and morals. Philosophers do make a distinction between legal rights and moral rights yet; there are also similarities and overlaps between the two. The distinction is important if we are to appreciate the basis and potential application of human rights and human duties.

Positivists see law as a coercive order fashioned by human communities to protect people from one another, and rights as entitlements granted by law. Morality is not an integral part of the positivist view and, according to them, there is no universal basis or criteria for law or right.[52]For positivist, legal rights are those liberties, claims or protections found within an existing legal code, or ones which the law gives. Legal rights do not come into being on their own; they are created or conferred by law. Their existence is easily ascertainable by locating the relevant legal instrument, legislation or legal principle. Legal rights come into existence at a definite time – when they are made. Because legal rights are made by human beings, humans reserve the prerogative of unmaking them. This also means that legal rights may vary from nation to nation and within the same nation at different times.

Moral rights, on the other hand, are what people do because it is the right thing to do. They are based on values and ethical principles shaped by one's upbringing or guided by one's faith or

[52]A general overview of the positivist position is given by M P Goldring, (ed) *The Nature of Law* (Random House, New York 1996) 1-6. For a more detailed elaboration, see H L A Hart, 'Legal Positivism' in P Edwards (ed) *The Encyclopedia of Philosophy* (The Macmillan Co. and The Free Press, New York1967) 418.

belief. Moral rights are justified by moral standards that are acknowledged in human society but not necessarily codified in law. They are not made by human beings, nor can they be unmade by them. Furthermore, moral rights are not limited to citizens of a particular state or nation. Moral rights, it is claimed, exist prior to and independently of their legal counterparts.

In brief then, one can say while moral rights are discovered and not created (moral realism) legal rights are created by legislation or precedent. While moral rights are inalienable in the sense that they cannot be taken away from a person without consent, legal rights are alienable; they could be taken away from a person without his will. Moral rights are universal, that is to say, they are the same no matter where one is. Legal rights are local; they change from place to place.

Legal positivists argue that the only rights that can be said to exist legitimately are legal rights – those rights which have their origin within a legal system. To this end, moral rights are not viewed as rights in the strict sense of the word – they are moral claims which may or may not eventually be assimilated within the national or international legal system.

For legal positivists such as the 19th Century philosopher Bentham,[53] there can be no such thing as human rights existing prior to, or independently from legal codification. In the positivist account, when one acts outside or contrary to formally valid legal rules, they act illegally. There is nothing in the positivist account that enables one to say an action is morally wrong.

For positivists, determining the existence of a legal right is no more difficult than situating the relevant legal statute or precedent. In contrast, the existence of a moral right is not deemed to be dependent upon the actions of jurists and legislators. If an example were required of a distinction between a moral right and a legal right, one would look no further than apartheid South Africa where the majority black people possessed a moral right to full political participation in their country's political system, yet they lacked the legal right to do so.

[53] British philosopher, jurist and social reformer (1748-1832).

In the positivists' account of the nature of law, what the law is, is always potentially different from what the law ought to be. This in turn affects their understanding of a legal right. Some thinkers and writers however, do find some common ground between law and morality.

Dworkin[54] in his rights thesis makes three important conclusions about the nature of law. In the first place, he concludes that the law is not solely made up of rules. Secondly, no line can be drawn between law and morality and thirdly that judges do not legislate. In Dworkin's view, once one accepts that law consists of other standards as well as rules, one cannot maintain a distinction between what the law is and what, morally speaking, the law ought to be. The non-rule standards which judges employ in order to determine 'what the law is' in hard cases, include principles entrenched in the community's morality. Dworkin advocates a form of legal – moral conservatism.

In the same way that rights are understood, so also should be individuals' duties. The word duty is frequently used of legal relationships. As will be discussed in the next chapter dealing with the notion of duties of the individual in detail, legal duties are defined as perfect and moral duties as imperfect because the former must be done, and have an external necessity, while the latter depends on a subjective will.

There is also a distinction between a legal duty and a moral duty or obligation. A legal duty when breached can result in a civil claim. Failure to fulfil a moral obligation, however, only makes the negligent party feel bad, but only if that party recognises that a moral duty exists. Most, if not all legal duties will also be moral duties. However, many moral obligations that the norms of civilised society would attach to an individual or institution do not constitute a legal duty.

In considering moral duties as opposed to legal duties, Kant his metaphysics of morals[55] presents a taxonomy of our duties as human beings. The basic division is between judicial duties and

[54] R M Dworkin's rights thesis emerged from a series of essays, the most important of which are collected in his book, *Taking Rights Seriously* (Harvard University Press, Cambridge MA 1978).
[55] A W Wood (ed), *The Groundwork for the Metaphysics of Morals Immanuel Kant* (Yale University Press, New Haven and London 2002).

ethical duties, which determines the division of the metaphysics of morals into the Doctrine of Virtue. Judicial duties are duties that may be coercively enforced from outside the agent, as by the civil or criminal laws, or other social pressures. Ethical duties must not be externally enforced (as to do so violates the right of the person coerced). Instead, the subject herself, through her own reason and the feelings and motives arising *a priori* from her rational capacities - the feeling of respect, conscience, moral feeling and love of other human beings, must constrain herself to follow them. Among ethical duties, the fundamental division is between duties to oneself and duties to others.

It is important to recognise that Kant's metaphysics of morals does not attempt to cover all the ethical duties that we have. This is because Kant confines the 'metaphysics of morals' only to those duties that are generated by applying the principle of morality to human nature in general.

With legally right conduct the moral aspect should also be essentially connected. It may, however, be the case that with legally right action there is no sentiment of law present; no more, that an immoral intent may accompany it. The legally right act, in so far as it is done out of regard for the law, is, at the time also moral.

2.2.7. What is 'human' in human rights?

With the difficulty identified in describing the word 'right' it is instructive to consider also the 'human' part of 'human rights'. Admittedly, this entails considering the relationship between 'human rights' and 'human nature' which in turn leads us to question the source or foundation of human rights. As has already been pointed out, there is no argument, that legal rights have their source in the law. It is easy to understand that legal rights arise from identifiable sources such as contracts in the case of contractual rights, or statutes or customs in the case of statutory or customary rights. It is, however, not immediately obvious how being human gives one rights.

Explanations have been attempted to establish a connection between humanity and human rights. One such explanation is that human needs give rise to human rights. Bay,[56] for example argues that human 'needs establish human rights.' Similarly Green[57]declares that 'a basic human need logically gives rise to a right' while Maslow[58]says 'it is legitimate and fruitful to regard instinctoid basic needs...as rights.' Donnelly however dismisses these arguments stating that '[u]nfortunately, 'human needs' is almost as obscure and controversial a notion as 'human nature.'[59] He adds that science discloses a catalogue of empirically validated needs that do not create anything like a list of human rights. Having dismissed what he terms as the 'pseudoscientific dodge of need' Donnelly[60] then concludes that:

> The source of human rights is man's moral nature, which is only loosely linked to the 'human nature' defined scientifically by ascertainable needs. The 'human nature' that grounds human rights is a *prescriptive* moral account of human possibility. The scientist's human nature says that beyond this we cannot go. The moral nature that grounds human rights says that beneath this we must not permit ourselves to fall....human rights are 'needed' not for life but for a life of dignity....we have human rights not to the requisites for health but to those things 'needed' for a life worthy of a human being.[61]

Donnelly's view on dignity as a foundational basis of human rights is not without criticism. Andrew Heard has attacked Donnelly's argument in the following passage:

> Dignity is a very elastic concept and the substance given to it is very much a moral *choice,* and a particular conception of dignity becomes paramount. But, who makes this choice and why should one conception prevail over other views of dignity? Even general rejection of outlandish assertions of dignity may not indicate agreement on a core substance. There might be widespread derision of my assertion that I can only lead a truly

[56] C Bay, 'Self-respect as a Human Right: Thoughts on the Dialectics of Wants and needs in the Struggle for Human Community' (1982) 4 *Human Rights Quarterly* 67.
[57] R H Green, 'Basic Human Rights/Needs: Some Problems of Categorical Translation and Unification' (1981) *Review of the International Commission of Jurists* 55.
[58] A Maslow, *Motivation and Personality* (C Scriber's Sons, New York 1970) xiii.
[59] Donnelly (n 21)13.
[60] Ibid.
[61] Ibid.

> dignified life if I am surrounded by 100 doting love-slaves. But a disapproval of the lack of equality in my vision of dignity does not necessarily demonstrate that equality is a universal component of dignity. While one of the most basic liberal beliefs about human dignity is that all humans are equal, social division and hierarchy play important roles in aspects of Hindu, Confucian, Muslim, and Roman Catholic views of human life. Indeed, 'dignity' is often achieved in these views by striving to fulfill one's particular vocation within an ordered set of roles. But, if human rights are meant to be universal standards, the inherent dignity that is supposed to be protected should be a common vision. Without sufficient commonality, dignity cannot suffice as the ultimate goal of human rights.[62]

Of course foundational arguments about human rights are very limited and ontological. The appeal of the argument that human beings are endowed by the Creator with inalienable rights[63] though accepted generally as persuasive cannot through logic or evidence secure the agreement of a sceptic. As Chris Brown observes:

> Virtually everything encompassed by the notion of 'human rights' is the subject of controversy.... the idea that individuals have, or should have 'rights' is itself contentious, and the idea that rights could be attached to individuals by virtue solely of their common humanity is particularly subject to penetrating criticism.[64]

Donnelly, however advises against placing more weight on this fact than it deserves, arguing that that:

> [h]uman rights ultimately rests on a social decision to act as though such things existed and then through social action directed by these rights to make real the world that they envision....like all social practices, human rights come with, and in an important sense require justifications. But those justifications appeal to 'foundations' that are ultimately a matter of agreement or assumption rather than proof. Problems of 'circularity' or

[62] Heard (n 9).
[63] Argument advanced by John Locke and which found favour with the architects of the UDHR.
[64] C Brown, 'Universal Human Rights: A Critique,' in T Dunne and N J Wheeler (eds) *Human Rights in Global Politics* (Cambridge University Press, 1999)103.

'vulnerability' are common to all moral concepts and practices, not specific to human rights.[65]

2.2.9. What then could human rights be?

What seems clear to this researcher is that human rights cannot be reduced to, or exclusively identified with, legal rights. If the legal positivists' view of rights were carried through to its logical conclusion, it would mean that the provisions of the law which sanctioned the owning of slaves, or the discrimination against women, or the practice of apartheid in South Africa, should not have been condemned from the human rights perspective because there were no legal rights involved.

It is a safer conclusion to draw that human rights are best identified as moral rights. After all, the belief in human rights as moral rights is common place throughout representative democracies today. Those who framed the American Declaration, for example, believed and maintained that the primary reason for having a government is to protect citizens in the possession of their rights, which rights are independent of, and more basic than, legal rights and therefore enjoyed the status of moral rights.

Human rights share some essential attributes of moral rights. First, the validity of their existence is not dependent upon legal recognition. The apartheid system in South Africa was founded upon blatant and open denial of fundamental human rights. Those who opposed apartheid used the UDHR as well as many other international human rights instruments to which South Africa was not a party, to advance powerful moral arguments to condemn the system in favour of human rights. Second, human rights apply to all human beings everywhere even though they may not have legal recognition by all countries. Even in countries which have not given formal legal recognition to fundamental human rights, advocates of human rights, and indeed in the whole world, insist that the rights remain valid as fundamental moral rights. These claims are supported by the universality of human rights.

[65] Donnelly (n 27).

The universality of human rights as moral rights, lends considerable moral force to human rights. Because legal rights provide far less scope for dispute as to their existence, source and validity than moral rights, it is ill advised to exclusively identify human rights with moral rights. In fact, it is better to think of human rights as both moral rights and legal rights; they originate as moral rights and their legitimacy is necessarily dependent upon the legitimacy of the concept of moral rights. Those who advance the cause of human rights aim to have these rights receive universal legal recognition. As observed by Amparo Tomas, while human rights are founded on moral principles and conceived of in terms of inherence, universality and indivisibility, they are, at core, (legal) guarantees against actions and omissions.[66]

To the question whether human rights should be seen as legal rights or moral rights, the answer should be that they are both of these. The legitimacy of human rights is inevitably tied to their status as moral rights. Their practical efficacy is however dependent on their developing into legal rights. The office of the UNHCHR has defined human rights as basic universal legal or moral guaranteed that belong to all human beings, and that protect individuals and/or groups, from actions and omissions of the state and some non-state actors that affect fundamental human dignity.[67] According to Cranston

> [a] human right by definition is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human.[68]

In attempting a definition of human rights, Donnelly[69]writes that 'human rights – *droits de l'homme, derechoshumanos, menschenrechte*, 'the rights of man' – are, literally the rights that one has because one is human.' He adds that if human rights are rights that one has simply because one is a human being, then they are held universally by all human beings.[70]

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[66] UNDP, *A Human Rights Approach to Development: Premier for Development Practitioners* (Amparo Tomas, August 2003).
[67]Ibid.
[68] M W Cranston, *What are Human Rights*? (Taplinger Publishing Co, New York 1973) 36.
[69] Donnelly (n 21) 7.
[70] Donnelly (n 21)1.

Thus, the primary element recurring right through these and other definitions of human rights is universality – human rights are inalienable and fundamental rights to all, and persons are inherently entitled to them simply by virtue of being human. Human rights may vary from moral to political, to legal claims, or it may be a combination of all the three aspects. They can in this sense be said to be basic moral and legal guarantees that people in all countries have and are logically a part of what it must mean to be human. Calling them guarantees implies that they attach to particular individuals who are entitled to invoke them and that compliance with them is mandatory rather that discretionary.

2.3. PHILOSOPHICAL FOUNDATIONS AND CRITICISM OF HUMAN RIGHTS

This part elucidates further the foundational basis of human rights and individuals' duties by examining questions about the nature, content, justification and the claims made about human rights and duties of the individual.

Pre-classic Greece was imbued in fatalism, the belief in the futility of human will, until the philosophers around the year 400 BC started to take an interest in the relationship between the secular city - state, religion, and the individual human being. Much later, Hyden was to observe that it was the religious, scientific, and political revolutions of the sixteenth and seventeenth centuries which initiated a significant shift in thinking about the nature of human beings and a just social order. He states that:

> [f]rom these cultural transformations emerged increasingly sophisticated philosophies that inspired public opinion and processes of dramatic social change during the seventeenth, eighteenth and nineteenth centuries most notably the American and French Revolutions. These events resulted in the development of democratic governments founded on the rights of man rather than the divine right of kings.[71]

[71] Hyden (n 34) 3.

2.3.1. Natural law, natural justice and natural rights

In medieval Europe several thinkers and philosophers proposed the notions of 'natural rights', that is to say, rights belonging to a person by nature and because he was a human being, not by virtue of his citizenship in a particular country or membership in a particular religious or ethnic group. The term 'human rights' was used in contrast to 'civil rights' which were rights bestowed on individuals who are part of a particular society or certain individuals of that society. Theories of natural law thus premise human rights on a 'natural' moral, religious or even biological imperative that is free of transitory human laws or civilizations. Natural law theories have featured greatly in the philosophical thoughts of thinkers such as Greek philosophers Plato[72] and Aristotle,[73] Stoics of Hellenistic and Roman periods such as the statesman Cicero,[74] and Medieval Christian philosophers such as Thomas Aquinas.[75] Other representatives of this tradition in its varying forms are Francisco Suárez,[76]Richard Hooker,[77] Thomas Hobbes,[78] Hugo Grotius,[79] Samuel von Pufendorf[80] and John Locke.[81]

The natural rights doctrine maintains that there are immutable 'higher laws' of nature (both human nature and the universe) which exist as part of the law of God. These laws constitute moral norms or prescriptions about right conduct.[82] An individual enters into society with certain basic rights and that no government can deny these rights. Human beings are endowed with reason which enables them to access and act in accordance with the universal values of natural law thereby bringing about the moral and political order required for the common good.[83]According to Harris,[84] the natural law doctrine pre-supposed a correlation between 'good' and 'what comes natural'. 'Parental affection, heterosexual love, support for the aged kin and

[72] Plato was a classical Greek philosopher and mathematician (427 BC-347 BC) and was a student of Socrates.
[73] Aristotle (384 BC- 322 BC) was a Greek philosopher and polymath. He was a student of Plato and teacher of Alexander the Great.
[74] M T Cicero (106 BC-43 BC) was a Roman philosopher, politician, lawyer and political theorist.
[75]An Italian Dominican friar and priest (1225-1274).
[76]A Spanish Jesuit priest, philosopher and theologian (1548-1617).
[77]An English Anglican priest and theologian (1554-1600).
[78] Of Malmsbury, was an English political philosopher (1588-1679).
[79]A Dutch humanist and jurist and a universal scholar and philosopher (1583-1645).
[80] A German jurist, political philosopher, economist and historian (1632-1694).
[81]Widely regarded as the father of classical liberalism, he was an English philosopher and physician (1632-1704).
[82] Hyden (n 34) 4.
[83] Ibid.
[84] J W Harris, *Legal Philosophies* (Butterworths, London 1980) 6.

comradely interdependence are natural and therefore good. That which ignores or distorts human nature is bad.'[85] These sentiments by Harris appear to support a theory of natural duties.

In summary, the classical doctrine of natural law argues that the law of nature has certain attributes which sets it apart from ordinary laws. These are:

(i) universality and immutability;

(ii) it is a higher law, that is to say, it is superior to the laws made by political authorities and, therefore, determines whether ordinary laws are morally binding on subjects and,

(iii) it is discoverable by reason.

Natural law became synonymous with natural rights, rights that spring from natural law. According to the Greek tradition of Socrates[86] and his philosophical disciples Plato[87] and Aristotle,[88] natural law is law that reflects the natural order of the universe, essentially the will of the gods who control nature. Plato's contributions to political thinking are of particular significance for his clear distinction between ideas and culture or tradition.

The growth of this tradition of natural justice into one of natural law is usually attributed to the Stoics.[89] They argued that man-made laws were imperfect aspects of an eternal and immutable law applicable to the whole cosmos. Secular law, they claimed, was valid only if it corresponded to natural law. Their position on natural law was aptly given in the often quoted summary by Cicero in the first century BC.

> True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing to its prohibition. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to

[85] Ibid.
[86] Socrates (469 BC- 399 BC) was a classical Greek Athenian philosopher and is credited as one of the founders of Western philosophy.
[87] Plato (n 72).
[88] Aristotle (n 73).
[89] The stoics belonged to a school of Hellenic philosophy founded in Athens by Zeno of Citium in about 308 BC. They believed, among other things, that God determined everything for the best and that virtue is sufficient for happiness.

> abolish it entirely. We cannot be free from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is God, over us all, for He is the author of this law, its promulgator, and its enforcing judge.[90]

The early church sought to integrate the concept of natural law into Christianity. Eventually the concept found much favour in the Christian church whose concepts of divine grace and individual redemption were rationalised on natural law thoughts. In ancient Greece, through philosophers such as Aristotle propounded the notion of natural rights, the concept was more fully developed by the Dominican jurist St. Thomas Aquinas in his *Summa Theologica*.[91] He synthesised Christian revelation with the pre-Christian doctrine of natural law. His legal theory encompasses several types of law; (i) 'Eternal law' comprising God-given rules governing all creation; (ii)'Natural law', that segment of eternal law which is discoverable through the special process of reasoning mapped out by the pagan authors – institutions of natural and deductions drawn there from; (iii) 'Divine law' which has been revealed in scripture. For several centuries Aquinas' conception held sway: there were goods or behaviors that were naturally right (or wrong) because God ordained it so. What was naturally right could be ascertained by humans by 'right reason' - thinking properly.

Although the early thinkers in the natural law tradition did not have a clearly defined notion of human rights, they did lay the necessary groundwork for thinking about the essence of being human as moral good, often formulated around the concept of justice.[92]

2.3.2. Reformation and rationalism

In the 17th century the reformation caught on and religious authority was questioned and challenged by rationalism. The theory of natural rights was recast and amplified. With the

[90] *De Republica III*, xxii, 33.
[91] T Aquinas, *Summa Theologica*, (Benziger Bros edition, 1947).
[92] Hyden n 34) 4.

growth of individualism, political philosophers sought to advance new bases of natural rights. Natural law doctrines were modified to stress the fact that individuals, because they are natural beings, have rights that cannot be violated by anyone or by any society. Thomas Hobbes[93] launched the first major criticism on the divine basis of natural rights by describing a state of nature in which God did not seem to play any role. He advanced a theory premised on a social contract of legal positivism starting from the premise that man in the state of nature, that is to say, without a state (or a 'commonwealth') is invariably in a state of war, one with the other, and therefore in fear of his life and possessions.

He further argued that natural law was how a rational human, seeking to survive and prosper in that state of nature, would act; the first principle of natural law being to seek peace, in which is self-preservation. He made a critical move from 'natural rights' to 'a natural right.' In other words, there was no longer just a list of behaviors that was naturally right or wrong; Hobbes added that there could be some claim or entitlement which was derived from nature. In his view, this natural right was one of self-preservation.

The notion of natural law which Hobbes subscribed to was that discoverable by considering humankind's natural interests. He maintained that there was no law without a commonwealth. He rejected the view that there could be some supra-state concept of justice based on man's qualities. He argued on the contrary, that in the state of nature the life of man is 'solitary, poor, nasty, brutish, and short'.[94] Indeed, the purpose of the state is to protect those rights that individuals cannot defend on their own. Unlike previous philosophers who argued that natural rights were discovered by considering the natural law, Hobbes maintained that the only way natural law could reign was for human beings to agree to form a commonwealth by submitting to the authority of a sovereign, whether an individual or a congregation of individuals. This defined the basis of the social contract theory between the governed and the governor.

[93] (1588-1679).
[94] T Hobbes, *Leviathan* (1651) Ch 13 (Yale University Press, 2010).

Further fortification of a modified view of natural rights came with Immanuel Kant's[95] writings later in the 17th century that reacted to Hobbes' work. In his view, the congregation of humans into a state-structured society resulted from a rational need for protection from each other's violence that would be found in a state of nature. However, the fundamental requirements of morality demanded that each treat another according to universal principles. Kant's political doctrine was derived from his moral philosophy, and as such he argued that a state had to be organized through the imposition of, and obedience to, laws that applied universally. Nevertheless, these laws should respect the equality, freedom, and autonomy of the citizens. In this way Kant, prescribed that basic rights were necessary for civil society. In his words:

> [a] true system of politics cannot therefore take a single step without first paying tribute to morality....The rights of man must be held sacred, however great a sacrifice the ruling power must make.[96]

The rationalist, Hugo Grotius[97] further expanded on this notion in *De jure belli et pacis,* (*The Law of War and Peace*) where he propounded the immutability of what is naturally right and wrong:

> Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. ...Thus two and two must make four, nor is it possible otherwise; nor, again, can what is really evil not be evil.[98]

Grotius argued that natural law can be regarded as independent of God. The moral authority of natural right was assured because it had divine authorship. In effect, God decided what limits should be placed on the human political activity. But the long-term difficulty for this train of political thought lay precisely in its religious foundations.

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[95] I Kant, 'Perpetual Peace,' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn Cambridge University Press, Cambridge 1991) 125.
[96] Ibid. Note, however, that Kant did not believe that the citizenry could revolt against the sovereign for a misuse of power; thus, the rights of mankind in a Kantian society would lack the ultimate in political enforcement.
[97] H Grotius, *The Law of War and Peace,* Book 1, AC Campbell trans (M W Dunne, New York and London 1901) 22.
[98] Ibid.

The celestial basis of natural rights was still followed long after Hobbes. More than a century after Hobbes' *Leviathan,*[99] John Locke in his *Two Treatises on Government* wrote a strong defense of natural rights in the late 17th century. His arguments were, however, overflowing with references to what God had predestined or given to humankind. He integrated natural law into his theories and philosophy, turning Hobbes' argument around, suggesting that if the governor went against natural law and failed to protect 'life, liberty, and property,' people could be justified to overthrow the existing state and replace it with a new one. Locke assumed that humans were by nature rational and good, and that they carried into political society the same rights they had enjoyed in earlier stages of society, foremost among them being freedom of worship, the right to a voice in their own government, and the right of property.

During the Age of Enlightenment, leading up to the American and French Revolutions at the end of the 18th Century, natural law took on a new meaning. Attention was now directed more to the rights of the individual than to objective norms. There emerged in natural law a 'theory of rights' replacing the 'theory of law' which had preceded it.

The universal principles of natural law, which formed the basis of the solemn declarations of the American and French Revolutions, were formulated as the recognition of the eternal and inviolable rights of man as a citizen.

The most important elaboration of the idea of natural rights came in North American colonies, however, where the writings of Thomas Jefferson, Samuel Adams, and Thomas Paine made of the natural rights theory a powerful justification for revolution. The classic expression of natural rights is the English Bill of Rights (1689), the American Declaration of Independence (1776), the French Declaration of the Rights of Man and the Citizen (1789) and the UN Universal Declaration of Human Rights (1948).

Later thinkers evolved the conception of natural rights, infringement of which entitled citizens to revolt. The American colonialists in 1776 justified their overthrow of British rule because the colonial government had impaired rights to 'life, liberty and the pursuit of happiness', it being

[99] Hobbes (n 94).

'self-evident' that man was endowed with such rights. The French National Assembly in 1789 made a similar appeal to 'simple and indisputable' principles, which showed that men had natural rights to 'liberty, prosperity, security and resistance to oppression'. Such rights were evident to reason, taking the nature of man as its starting point.

John Locke argued that there were natural rights, which survived the social contract, and failure to protect them was a ground on which governments could be changed. Locke had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789. The French declaration proclaimed 17 rights as 'the natural, inalienable and sacred rights of man.'

2.4. THE HISTORICAL ORIGINS AND DEVELOPMENT OF THE THEORY AND PRACTICE OF HUMAN RIGHTS

It has already been stated that human rights are a product of a long history and that although the term 'human rights' gained currency in the aftermath of the Second World War, it is an old concept and has existed under several names in Western thought for many centuries.[100] The language used was that of natural rights, or the rights of man. As earlier stated, it is in one sense thought of as a legacy of the classical natural law theory discussed above.

Yet, human rights have been convolutedly woven in the laws, customs and religions throughout the ages. Sohn[101]writes that the oldest method of protecting the rights of individuals was self-help not by the victim, but also his family, his clan, his nation and ultimately his sovereign or state. Although therefore, the historic development of the concept of human rights is often linked to the development of Western philosophical and political thought, a different viewpoint could find reference to similar principles concerning mass education, self-fulfilment, respect for others,

[100] On a discussion on non- Western conceptions of human rights such as in the African, Islamic, Chinese and Indian indigenous cultures see Donnelly (n 21).
[101] L B Sohn, 'The New International Law: Protection of Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1-10.

and the quest to contribute to others' well-being.[102]All through history, people acquired rights and responsibilities through their belonging to a group – a family, religion, class, community or state. The Hindu Vedas,[103] the Babylonian Code of Hammurabi,[104]the Bible,[105] the Quran[106] the Analects of Confucius[107] and the Inca Code[108] are some of the oldest written sources, which address people's rights, duties and responsibilities. Most societies had ingrained values and traditions such as those to be found in Biblical teachings of old – 'an eye for an eye, a tooth for a tooth and a nail for a nail' or 'do unto others as you would like them do unto you'. Societies equally had unique systems of propriety and justice as well as ways of attending to the health and welfare of their members. These codes and teachings created both rights and duties. A common thread running through all of these codes and teachings is the acclaim of certain collectively valid values and standards of behaviour which debatably inspired human rights thinking, and may be seen as the harbinger to, or dissimilar expressions of, the concept of human rights, although the bloodline is not as apparent as is, sometimes, suggested.

2.4.1. The precursors to today's human rights

A number of solemn declarations, legal documents and landmark events over the years were viewed as having asserted human rights of the individual and therefore contributed to the development of the concept of human rights, as it is known today. These include the Cyrus Cylinder, (539 BC), the political milestones such as the *Magna Carta* (1215), the Petition of Right (1628), the English Bill of Rights (1689), the United States Declaration of Independence (1776), the Constitution of the United States of America (1787) and the Bill of Rights (1791,the French Revolution in 1789 and the French Declaration of the Rights of Man and of the Citizen

[102] See A Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press, Oxford 2007).
[103] The Vedas are a large body of sacred texts whose origins are ancient India. They constitute the oldest scriptures of Hinduism.
[104] The tablet was created by the Sumerian King Hammurabi about 4000 years ago.
[105] The term 'Bible' is derived from the Greek word meaning 'Books.' It is a collection of texts regarded as sacred in Judaism and in Christianity.
[106] Literally meaning 'the recitation', this is the central religious text of Islam which Muslims believe is the verbatim of Allah (God).
[107] These are a collection of sayings and ideas attributable to the Chinese philosopher Confucius and his contemporaries. It is one of the central texts of Confucianism and still exerts significant influence on East Asian thought and values today.
[108] The Inca culture was premised on the language of the Inca, Quechua, widespread in the Andean regions of South America one of which saying *'Amasuwa, amallulla, amaqhella'* meaning do not steal, do not lie, do not be lazy, guided the Inca in their way of life.

(1789) and the United States Bill of Rights (1791). Forerunners that bear some similitude to modern human rights law can also be found in international legal doctrine and institutions, such as legal doctrines of state responsibility for injuries to aliens,[109] the abolition of the slave trade in 1815 through the Declaration on the Abolition of the Slave Trade[110] and the Mandate system established under the League of Nations. For their contribution to the promotion of governance more cognitive of the rights of individuals, some of these documents are viewed as the forerunners to several of today's human rights instruments. It is instructive, therefore, to consider some of these, albeit, in passing before turning to the philosophical arguments about the nature of human rights.

2.4.1.1. The Cyrus Cylinder (539 BC)

The standard Western account of the tradition of human rights is somewhat testing. There is a claim[111] that the world's first charter of human rights was the Cyrus Cylinder (539 B.C.), a baked clay cylinder on which was inscribed in the Akkadian language, the decrees which Cyrus the Great, the first King of Persia, made on human rights. This was after he freed the slaves of Babylon in 539 B.C., following his armies' conquest of the City of Babylon. Upon freeing the slaves, King Cyrus the Great declared that all people had the right to choose their own religion, and established racial equality.[112]

The Cyrus Cylinder has been equated with tolerance and human rights. It has been translated into all the official languages of the United Nations[113] and its provisions match the first four Articles of the Universal Declaration of Human Rights.

Some scholars[114] have, however, described any reference to the Cylinder as a charter of human rights as 'anachronistic' and 'tendentious' and have in some cases dismissed such a suggestion as

[109] See for example, *Rights of Minorities in Upper Silesia (Minority Schools)* 1928 PCIJ Series A. No. 15, 26 April 1928.
[110] It was adopted during the Peace Conference in Vienna on 8th 1815.
[111] For example, the last Shah of Iran called it 'the world's first charter of human rights.' See N MacGregor, 'The Whole World in our Hands,' in *The Guardian*, Saturday 24 July 2004.
[112] A Costa, *The History of Ancient Palestine*, (Fotress Press, Minneapolis 2003). See generally K Farrokh, *Shadows in the Desert: Ancient Persia at War* (Osprey Publishing, Oxford 2007).
[113] P G Lauren, *The Evolution of International Human Rights: Visions Seen* (2nd edn University of Pennsylvania Press, Philadelphia 2003) 11.
[114] L E Daniel, *The History of Iran*, (Greenwood Publishing Group, Westport CT 2000) 39.

a 'misunderstanding' and that 'there is nothing in the text that suggests the concept of human rights.'[115]This notwithstanding, the freeing of slaves, the declaration that all people had the right to choose their own religion, as well as the establishing of racial equality, at that time, bore, a semblance of human rights, in whatever form described.

2.4.1.2. The *Magna Carta* (1215)

Other notable early developments in the human rights area are said to have emerged from the *Magna Carta* or the 'Great Charter' as it is known. Signed at Runnymede, England in 1215 between King John of England and the rebellious Barons who were disgruntled by the taxes that were being levied by the monarch, this document, set in feudal terms, is viewed as a milestone in the development of human rights in England. It contained provisions which were to offer significant inspiration to the revolution, many centuries later, of the theories of natural law. It was debatably the most momentous early development in the historical process leading to the institution of the rule of law in England and the English-speaking world today.

This agreement was forced on King John following persistent violation of ancient laws and customs by which England had been governed. The *Magna Carta* itemized what later came to be perceived as human rights. These included the rights for a freeman not to be 'arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested...unless by lawful judgment of his peer and the law of the land.' The *Magna Carta* also set out the right of the church to be free of government interference, and protection of the citizen from excessive taxation.

The *Magna Carta*'s significance was seen in principally two respects: first, it created a contract between the king and the barons, the ruler and the ruled, thereby acting as a prediction and contribution to the theory of social contract which, as will be shown later in this chapter, was indispensable to later thinking on natural rights. Second, it contained clauses which several

[115] See for example, P Briant, *From Cyrus to Alexander: A History of the Persian Empire* (Eisenbraun, Winona Lake IN 2006) 43; L Llewellyn-Jones 'The First Persian Empire' in T Harrison, *The Great Empire of the Ancient World* (Getty Publications, Los Angeles CA 2009)104.

centuries later inspired documents such as the Petition of Rights and the Habeas Corpus Act of 1679.

Although the *Magna Carta* is widely considered as one of the most significant legal document in the development of democracy, human rights and the rule of law some writes have dismissed it as containing rights which 'were not human rights, but rather political settlements.' This is because

> human rights belong to all human beings and therefore cannot be restricted to a select group of privileged men. From a contemporary perspective, the *Margna Carta* turns out to be a rather unfortunate example of a human rights declaration. Suffice it to cite one sentence, clause 54 of the *Magna Carta* reads: 'No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.'[116]

Such reservations notwithstanding, the *Magna Carta* was a significant early landmark in the development of human rights. Its place in the history of human rights cannot be wished away.

2.4.1.3 The Petition of Rights (1628)

After the *Magna Carta*, another significant development in the development of human rights was the Petition of Rights of 1628. This was a statement of civil liberties drawn by the English Parliament and sent to King Charles I in light of growing resentment of what was perceived as poor governance and unpopular policies by the King. Parliament refused to approve financing for the external policies of the King which were viewed with resentment and disdain. The King reacted by effecting arbitrary arrests and incarceration of those who openly opposed his policies. Based on earlier laws and charters, the Petition of Rights was instigated by Sir Edward Coke. It avowed four basic principles with a human rights element, namely, (i) No taxes were to be levied without the consent of Parliament, (ii) No subject was to be imprisoned in the absence of good cause shown, (iii) No soldiers were to be quartered upon the citizenry, and (iv) Military law was not be used in time of peace.

[116] Clapham (n102) 6.

This movement was equally a significant development towards human rights, as they are known today.

2.4.1.4. The English Bill of Rights (1689)

The English Bill of Rights of 1689 is considered yet another milestone in the development of human rights in England. A result of the Glorious Revolution of 1688, the Bill was passed as an Act of Parliament[117] of England on 16 December 1689. It laid down limits on the powers of the monarch and set out the rights of Parliament and rules for freedom of speech in parliament, the requirement for regular elections to Parliament and the right to petition the monarch without fear of reprisal; it re-established the liberty of Protestants to have arms for their defence within the rule of law, and condemned James II of England for 'causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law.' Notable basic rights set out in the Act were that:

(i). there was to be no royal interference with the law. While the sovereign was to remain the fountain of justice, he or she was no longer to unilaterally establish new courts or act as judge;

(ii). there would henceforth be no royal prerogative in taxation. Parliament had henceforth to give its consent before any new taxes would take effect;

(iii). the monarch was no longer to interfere in the liberty of the people to have arms for their own defence as suitable to their class and as allowed by law;

(iv). there was no longer to be any royal interference in the election of members of Parliament;

(v). Parliament was henceforth to debate its proceedings without fear of the freedom of speech and debate being liable to impeachment or question in any court or place out of Parliament;

(vi). grants and promises of fines or forfeiture before conviction were henceforth to be void and

[117] In its short title it was described as 'An Act declaring the rights and liberties of the subject and settling the succession of the Crown.'

(vii). there would be no excessive bail or 'cruel and unusual' punishments imposed.

The Bill of Rights was later augmented by the Act of Settlement in 1701 and contributed significantly in limiting the power of the monarch and the asserting of parliamentary sovereignty, limited government and the rule of law. Some of these provisions became a standard feature in human rights instruments. This notwithstanding, critics opine that the Bill of Rights did little to advance human rights in earnest since

> [l]ike the *Magna Carta*, the *Bill of Rights* was in fact a political settlement; this time between a Parliament and the King (who had abused the rights of Protestants), in order to vindicate 'ancient rights and liberties.[118]

2.4.1.5. United States Declaration of Independence (1776)

In 1776, Thomas Jefferson wrote the American Declaration of Independence in 1776. The declaration was approved by the United States Congress on 4 July 1776. Coming more than a year after the outbreak of American Revolutionary War, the Declaration was a strong statement that the thirteen American Colonies would no longer be part of the British Empire. It declared solemnly that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights….

The Declaration carried and stressed two principal ideals: individual liberties and the right of revolution. These ideas were so endeared by Americans and spread beyond America, influencing movements in other regions, notably the French Revolution. Of note are the natural law undertones in the Declaration.

[118] Clapham (n102) 6.

2.4.1.6. The Constitution of the United States of America (1787) and Bill of Rights (1791)

In 1789 in Philadelphia, the Constitution of the United States of America was written. It is the basic law of the United States federal system of government and a milestone document of the Western world. It is the oldest known written national constitution in use and defines the principal organs of government and their jurisdiction, their relationship and the basic rights of the individual citizen.

On the 15th December 1791, the first ten amendments to the Constitution, known as the Bill of Rights, came into force. These provisions limited the power of the federal government and protected the rights of all citizens, residents and visitors. The rights protected include freedom of speech and expression, assembly, religion and the freedom to demonstrate. It also contains many of today's prohibitions which define many human rights of today such as the prohibition of unreasonable searches and seizures, cruel and unusual punishment, etc.

2.4.1.7. The French Revolution (1789-1799)

The French Revolution was a period of fundamental social and political turmoil in France. The economic crisis that was being experienced at the time, coupled with seven years of war, lead to increasing frustration on the part of the people of France at the ineptitude of King Louis XVI and the continued excessive indulgence of the aristocracy. This strong feeling of aversion coupled with the growing enlightenment ideals and inspired by the American Revolution, fueled radical resentments laying fertile ground for the launch of the Revolution in 1789 with the meeting of the Estates- General[119] in May. Later in the year, the Bastille was stormed. The King was brought to trial in December of 1792, and executed the following year. The eradication of the absolute monarchy set the stage for the institution of the first French Republic. Six weeks following the storming of the Bastille, the Declaration of the Rights of Man and of the Citizen[120] was adopted by the National Constituent Assembly as the preliminary step toward writing the French constitution.

[119] The Estate-General was made up of three estates: the clergy, the nobility and the rest of France.
[120] In French, *La Déclaration des Droits de l'Homme et du Citoyen.*

The Declaration is philosophically a momentous document. It proclaims among other things that, all citizens are to be guaranteed the rights of 'liberty, property, security, and resistance to oppression.' It also justifies law as premised on the fact that '...the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights.' Thus, the Declaration sees law as an 'expression of the general will, intended to promote this equality of rights' and to forbid 'only actions harmful to the society.' The Declaration is considered as the classic formulation of the inviolable rights of the individual. Article 4 was expressed as follows:

> Liberty consists in the power of doing whatever does not injure another. Accordingly the exercise of the natural rights of every man has no other limits than those which are necessary to secure to every other man the free exercise of the same rights; and these rights are determinable only by law.

The French Revolution was not only a critical occurrence considered in the background of Western history, but was also, perhaps the single most essential influence on British intellectual, philosophical, and political life in the nineteenth century. In its early stages it depicted itself as a victory of the forces of reason over those of superstition and privilege, and as such it was welcomed not only by English philosophical thinkers like Thomas Paine[121], who, typically, saw it as an emblematic act which betoken the return of humanity to the state of perfection from which it had fallen - but by many liberals as well, and by some who saw it, with its declared emphasis on 'Liberty, Equality, and Fraternity,' as being comparable also to the Glorious Revolution of 1688.

The French Declaration set out many of the human rights now recognised in international human rights instruments. Through this Declaration as well as the British Bill of Rights and the United States Bill of Rights, the concern with natural rights had taken the massive stride from philosophy to law.

[121]T Paine (1737-1809) was an English-American political activist, writer, political theorist and revolutionary.

It is instructive to now turn to the philosophical debates that have shaped the concept of human rights.

2.5. THE NORMATIVE FOUNDATION OF INTERNATIONAL HUMAN RIGHTS

The international human rights of today and the establishment of the United Nations have very important historical precursors. The efforts to protect humanity and defend justice are particularly exemplified in the nineteenth century by varied developments such as the wars that overthrew some hitherto strong power structures; the challenges of democratisation which included a direct assault on claims of state sovereignty, leading to more liberal political philosophies being propounded; the creation by industrialisation of new pressures for social change where old traditions were challenged; the growing appeal to conscience on behalf the welfare of others and improvements in communication which meant that more and more information of the oppressed was being disseminated.

2.5.1. Efforts to end slavery

Efforts to prohibit slave trade were made at various levels throughout the world instigated by growing opposition from persons of conscience. In the United States, an Act to Prohibit Importation of Slaves was passed in 1807.[122] This law in itself did not end slavery as such in the United States. Reduced numbers of slaves continued to be smuggled into the country until the civil war[123] and subsequently the adoption of the Thirteenth Amendment in 1865 ended all slavery in the United States of America.

Similarly, in Britain despite opposition from various sections of the society with a vested interest in those who advocated the abolition of slave trade persevered with Lord Glanville making a

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[122] Passed by the US Congress, the Act which entered into force on 1 January 1808 ended the large scale importation of slave into the US. In the eight years preceding the Act the US had imported some forty thousand new slaves from Africa. This law, therefore, signaled an end to America's official participation in one of the most heinous human rights violations in the history of the world.

[123] The American Civil War also called the War between States was a civil war in America fought from 1861 to 1865 following the declaration of several southern states (slave states) of secession from the rest of America to form what was called the 'Confederate States of America' or the 'Confederacy.' The war was instigated by contentious issue of slavery. After four years of bloody war, the Confederacy collapsed and slavery was abolished.

passionate plea in 1806 that slavery needed to be abolished because it 'was contrary to the principles of justice, humanity and sound policy.' The Bill to abolish slavery was subsequently debated, and on 25 March 1807, the Abolition of Slave Trade Act was passed as law. Notwithstanding the fact that the new law outlawed slave trade in Britain and its colonies, trafficking in slaves continued especially in the island colonies until 1811.

2.5.2. Efforts to care for the sick and wounded in war

Early recognition that there exists an obligation to care for soldiers wounded in war as well as war prisoners,[124] translated into nothing tangible until the nineteenth century when a number of developments precipitated efforts to care for war prisoners and wounded combatants. These factors included the improvements in technology, which made weapons more destructive; the increasing numbers of forcibly conscripted soldiers in the armies as opposed to those who entered the army as professionals and improved reporting of the horrors of war. Early efforts to care for the wounded included those made in the Crimean War[125] when the Grand Duchess Elena Pavlovna of Russia organised some three hundred nurses, called Sisters of Mercy to care for the wounded. Clara Barton[126] cared for fallen American soldiers in the American civil war. Florence Nightingale after her experience in caring for British soldiers in the Crimean became extremely influential in mobilising British public opinion. Jean- Henri Dunant, a businessman in Geneva, after witnessing the aftermath of horrific bloody war between French and Austrian armies in Northern Italy in 1859 founded an International relief society, the organisation that later became known as the International Committee of the Red Cross. He was instrumental in organising the Geneva International Conference. In the year 1864, a total of sixteen European countries and American states participated in a conference in Geneva, at the invitation of the Swiss Federal Council. This diplomatic conference was called for the purpose of adopting a convention for the treatment of wounded soldiers in combat. On 22 August 1864 twelve nations[127] signed the first

[124]As early as the fourth century BC the Chinese military theorist Sun Tzu wrote that an obligation to care for the wounded and prisoners of war existed.
[125]Fought between October 1853 and February 1857, this was a war in which Russia lost to an alliance between France, Britain, the Ottoman Empire and Sardina.
[126]A pioneer American teacher, patent clerk and humanitarian and was also the founder of the American Red Cross.
[127]Germany (then Grand Duchy of Baden), Kingdom of Belgium, Kingdom of Denmark, French Empire, Grand Duchy of Hesse (now Germany), Kingdom of Italy, Kingdom of Netherlands, kingdom of Portugal, Kingdom of Prussia (now Germany) Kingdom of Spain, Swiss Confederation and Kingdom of Wurttemberg (now Germany).

Geneva Convention, also known as the Red Cross Convention targeted at improving the assistance given to the sick and wounded in war zones. The principle mandate of the first Geneva Convention in 1864 was that medical workers must provide relief and for care to wounded soldiers without distinction as to nationality while ensuring neutrality.

2.5.3. Concern for the workers

In 1919, countries created the International Labour Organisation (ILO) to oversee treaties protecting workers with respect to their rights, including their health and safety. Concern over the protection of certain minority groups was raised by the League of Nations at the end of the First World War. However, this organization for international peace and cooperation, fashioned by victorious European allies, never achieved its objectives. The League stumbled principally because the United States refused to join and because the League failed to prevent Japan's invasion of China and Manchuria (1931) and Italy's attack on Ethiopia (1935). It finally died with the onset of the Second World War (1939).

2.5.4. The Holocaust

The genesis of the modern international human rights system is often traced to the post-World War II prosecution of Nazi war criminals in the Nuremberg trials and the international community's collective desire to 'prevent the recurrence of such crimes against humanity through development of new standards for the protection of human rights.'[128]The world was horrified by the extermination by Nazi Germany of over six million Jews and other minorities such as homosexuals and persons with disabilities in what was known as the 'holocaust'. Some officials from the defeated countries were tried in Nuremberg and Tokyo and punished for committing war crimes, 'crimes against peace' and 'crimes against humanity.' Revelations coming from these war crimes trials, the effects of the atomic bomb and other atrocities gave people in a number of countries a crisis of conscious and found that they could no longer ignore autocratic oppressors who jailed, tortured, maimed and killed their neighbours. Steps were thus taken to attempt to hold all countries accountable for protecting basic human rights through some

[128]L B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1.

agreed standards. Governments around the world then pledged to establish a more credible body with the principle aim of reinforcing international peace and preventing future conflict. This led to the adoption of the UDHR; also referred to as the international *Magna Carta.* This view of the origin of modern human rights is however criticised by some thinkers and writers. Samuel Moyn[129]for example, has a different view as to when human rights began to make sense to broad communities of people as the proper cause of justice. He examines the myths of the historical roots of human rights. It is, however, beyond the scope of this work to interrogate his views.

2.5.5. The United Nations Universal Declaration of Human Rights

In the aftermath of the Second World War, the UN came into being on October 24, 1945. This intergovernmental organization had as its objective the resolve of saving future generations from the devastation of international conflict. The Declaration was adopted on December 10, 1948.

The founding document of the UN, the Charter, established six primary organs, including the General Assembly, the Security Council, the International Court of Justice, and in relation to human rights, ECOSOC. The Charter empowered ECOSOC to establish 'commissions in economic and social fields and for the promotion of human rights….' One of these commissions was the UNHRC, which, under the chairmanship of Eleanor Roosevelt, saw to the conception of the UDHR.

The Declaration was drafted by representatives of all regions of the world and incorporated all legal traditions. Formally adopted by the UN on December 10, 1948, it is the most universal human rights document in existence, outlining the thirty fundamental rights that form the foundation for a democratic society.

These standards for the prevention of atrocities witnessed in the second world war were codified in four stages; the articulation of human rights concerns in the UN Charter;[130] the identification

[129] S Moyn, *The Last Utopia: Human Rights History* (Reprint edn Belknap Press, Cambridge MA 2012).
[130] UN Charter art 1 (the purpose of the United Nations is achieving international cooperation to solve economic, social, cultural and humanitarian problems and promoting human rights for all without distinction) ; art. 13 (role of

of specific rights in the UDHR;[131] the elaboration of each of the rights in the ICCPR[132] and the ICESCR;[133] and the adoption of additional conventions and declarations concerning various human rights issues, including gender and racial discrimination, children's rights, torture, and genocide.[134]

2.6. THE PLACE OF DUTIES AND RESPONSIBILITIES IN THE HUMAN RIGHTS FRAMEWORK[135]

As has already been explained in the introductory chapter, the concept of individual duties, responsibilities or obligations, has been part of the language of human rights for centuries. Philosophers such as Aristotle[136] argued that an individual should take part in 'virtuous actions' which involved participation in community and civil life through performance of duties. Being a citizen, for Aristotle, implies very specific political rights and individual duties. Other natural law theorists such as Thomas Aquinas explained that human duties alongside human rights form part of human behaviour, which has its origin in human nature. The social contract theorists equally argued that the social contract that citizens entered into to live together is predicated on agreed rules of conduct, which entail the limitation of freedoms, and duties to respect the rights of others.[137]

General Assembly is to study and make recommendations to promote international cooperation and the realization of human rights); art.55 (U.N. shall promote respect for human rights).

[131] The UDHR is considered to be an 'authoritative interpretation of the Charter of the United Nations' and 'the common standard to which the legislation of all the Member States of the United Nations should aspire,' Sohn (n 128) at 15 (citing Professor Cassin, one of the principal authors of the Declaration).

[132] The ICCPR principally embodies two sets of rights: those pertaining to the physical integrity of the person (such as the right not to be tortured, executed, or enslaved) and those pertaining to legal proceedings, legal status, and the right to hold and profess one's beliefs (such as the right to counsel, freedom of speech, and freedom of religion).

[133] The ICESCR generally protects the rights to: self-determination, work and good work conditions, social security, family, an adequate standard of living (including housing and food), health, education, and cultural life.

[134] See for example, the CRC, UN GAOR 44th Sess, UN Doc A/Res/44/25 (25 Nov 1989); CEDAW, UN GAOR 34th Sess, GA Res 34/180at 193 UN Doc A/RES/34/180 (18 Dec1979); ICERD 660 UNTS 195 (7 Mar 1966); Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (9 Dec1948).

[135] This part substantially reproduces of a section of the introduction in the research proposal.

[136] Aristole, *Nichomachean Ethics* JA K Thomson, trans (Penguin, London 1955).

[137] Examples include Thomas Hobbes, *Leviathan* (1615); John Locke, *Two Treaties of Government* (1690); J J Rousseau, *The Social Contract* (1762).

Jean-Jacque Rousseau, whose philosophy significantly influenced the French Declaration of the Rights of Man and of the Citizen,[138] argued that '[each] individual can ... have a private will contrary to and differing from the general will he has as a citizen. His private interest can speak to him quite differently from the common interest ... he might wish to enjoy the rights of the citizen without wanting to fulfil the duties of a subject, an injustice whose spread would cause ruin of the body politic.[139]

The English political philosopher, Thomas Paine whose ideas influenced both the American and French revolutions explained the position of duties when he declared that:

> A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man is also the right of another, and it becomes my duty to guarantee, as well as to possess.[140]

At the international level, duties have been recognised in various human rights instruments. To begin with, the UDHR, which is generally agreed to be the foundation of modern international human rights law, recognises duties. Those charged with the responsibility of negotiating and drafting the UDHR came close to drafting what would have been, in effect, a Universal Declaration of Human Rights and Duties. The first article of the first draft of the UDHR, prepared by Humphrey[141] stated that:

> Everyone owes a duty to his State and to the [International Society] United Nations. He must accept his just share of responsibility for the performance of such social duties and the share of such common sacrifices as may contribute to the common goal.

[138](1789). This is a fundamental document of the French Revolution and in the history of human rights. Influenced by the doctrine of the natural rights it defined individual and collective rights as universal.
[139]J J Rousseau, *The Social Contract* (Book 1, Chapter VII 1762) (1968) M Cranston trans (Penguin, Baltimore 1968).
[140]T Paine, *The Rights of Man* (1792) 28.
[141]Professor John Humphrey (1905-1995) a former McGill law professor was asked to work with a Committee of the United Nations Secretariat to help the organisation draft a statement on human rights. He provided guidance to the eighteen member Committee which produced a 400 page blue print that became the foundation of the Universal Declaration of Human Rights.

Humphrey's Article 2 posited that 'in the exercise of his rights everyone is limited by rights of others and by the just requirements of the State and the United Nations.' Cassin[142] also stated in his draft article 4 that '[i]n the exercise of his rights, everyone is limited by the rights of others.'

The basic legal and philosophical principle of the correlation of rights and duties was almost unanimously approved for inclusion in the Declaration by those who participated in the negotiation and drafting of the UDHR. Many delegates to the First Session wished to see this principle incorporated in the Declaration. The Australian delegate[143] put it plainly, when he stated that '[e]veryone of these rights has a corresponding duty.'[144] His Chinese counterpart thought that the drafting of a declaration was a matter of 'entrusting the rights of the human being at the same time demanding his acceptance of the corresponding obligations.'[145] The British delegate also thought it 'was no use [to] define personal freedoms entirely detached from the obligations of those individuals either to the State or to voluntary organisations.'[146]

Various other contributions[147] on the subject supported the conclusion that the principle of the correlation of rights and duties would find expression in the Declaration, and more importantly that the duties should be clearly spelt out in the UDHR.

The delegates from Latin America attempted to persuade the negotiators to adopt a list of duties in much the same lines as those that they were preparing to include in the American Declaration of the Rights and Duties of Man (the American Declaration).[148] For example, Guy Perez Cisneros, the Cuban delegate wondered whether a decision to accept the draft declaration

[142] René Cassin of France was part of UDHR Drafting Committee chaired by Eleanor Roosevelt.
[143]William Hodgson.
[144] See J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Pennsylvania1999) 248.
[145] CH Wu was the Chinese delegate.
[146] Lord Dukenston.
[147] For example, article 19 of the Chilean proposal stated that 'rights and duties are correlative, and [that] the duty to respect the rights of others operates at all times as a restriction upon the arbitrary exercise of rights.' The Brazilian delegate Belarmino Augustregesilio de Athayde told the Third Committee that 'it was impossible to draw up a declaration of rights without proclaiming duties implicit in the concept of freedoms which made it impossible to set up a peaceful democratic society. … Without such a provision all freedoms might lead to anarchy and tyranny.'
[148] Also known as the Pact of San Jose, the Convention was adopted by the Organisation of American States on 18 July 1948 in accordance with article 74; OAS DOC.OEA/Ser.K/XVI/1.1, Doc 65

prepared by the office of the UNHCHR as the sole basis for discussion would preclude the possibility of adding a section covering duties, which he considered highly desirable.[149]

After much debate and discussion on the actual wording of the provision in the declaration recognising the relationship between rights and duties, article 29 of the UDHR was phrased as follows:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The foregoing notwithstanding, there is recognition in the UDHR of at least three principles: (i) that individuals have inalienable human rights, (ii) that the state bears the primary responsibility to protect those rights and (iii) that individuals have duties to each other and to their society.

The *travaux préparatoire* of the UDHR suggests that the reason for the omission by the drafters of the UDHR of an elaboration of duties is that it was too obvious to bear mentioning.[150] The decision against listing duties in the UDHR was probably predicated on the fear that governments might use such duties to limit human rights in ways that are neither predictable nor acceptable. As Knox observes,

> [l]isting duties along with rights could suggest that in the case of conflict, they should simply be balanced against one another. The vertical duties owned by states to respect individuals' rights could be offset by the converse vertical duties owed by individuals to

[149] Morsink (n 144) 23.
[150] See for example, E Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001) 422. See also UN Doc A/2929, 10 GAOR Annexes, Agenda item 29, Part II (1955) annotating the role of the Human Rights Commission in helping to draft the Universal Declaration.

> states. If adopted, this approach would have hamstrung human rights law at its inception.[151]

The UDHR is not the only international human rights instrument to recognise duties. The American Declaration, which predated the UDHR by over seven months, explains the interrelationship between rights and duties in its preamble as follows:

> The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberties, duties express the dignity of that liberty.

The American Declaration also sets out a comprehensive set of individual duties alongside human rights. These include those owed to society, to children and parents, to vote, to obey the law, to pay taxes and to serve the community. These duties are of doubtful enforceability yet they have some moral symbolic value.

The twin covenants, the International Covenant on Civil and Political Rights[152] and the International Covenant on Economic Social and Cultural Rights[153] declare in the common final part of their preambles that:

> [r]ealising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

It can also not be ignored that international law has in many instances contemplated and prescribed duties for individuals. The Genocide Convention of 1948[154] which declared that 'persons committing genocide ... shall be punished, whether they are constitutionally responsible

[151] J H Knox, 'The Universal Declaration of Human Rights [and Duties]' <http: opinion juris.org/2007/11/06/the-universal-declaration-of-human-rights-and-duties> accessed on 2 February 2013.
[152] UN General Assembly Resolution 2200A (XXI) of 16 December 1966 UN Treaty Series vol 999 171.
[153] UN General Assembly Resolution 2200A (XXI) of 16 December 1966 UN Treaty Series vol 993 3.
[154] It was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260. It entered into force on 12 January 1951.

rulers, public officials or private individuals,' clearly imposes duties on individuals. In fact, the whole international criminal justice system administered by the International Criminal Court under the Rome Statute[155] recognises the individual as a subject of duties. The same can be said of domestic criminal law systems in general. In this sense, the duties imposed on individuals are aimed at realising the rights guaranteed by various laws and regulations both nationally and internationally.

The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms[156] imposes counterpart restrictive duties on individuals and other non-state actors.

At the regional level too, there is a clear recognition to varying extents of individual duties and responsibilities. For example, the present regional human rights system in the Americas is premised on the American Convention on Human Rights[157] which has, by and large, superseded the American Declaration. The reference to duties in the American Convention was abbreviated to its Chapter 5, headed 'Personal Responsibilities' and took the form of a single article reading:

> Every person has the responsibilities to his family, his community and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

In the European region, the recognition of the significance of duties was evident when the Council of Europe adopted the European Convention on Human Rights (the European Convention).[158] The European Convention recognised the need to balance rights and freedoms in the interest of collective order and harmony in society. Articles 9, 10, and 11 of the Convention states that individual human rights may be subject to limits including those

[155]The Rome Statute of the International Criminal Court is a treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome on 17 July 1988 and it entered into force in July 2002. It establishes the international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.
[156]Also known as the Valencia Declaration of Responsibilities and Human Duties, it was adopted by the UN General Assembly while celebrating the 50th Anniversary of the UDHR in 1998. A/RES/53/144, 8 March 1999.
[157]Adopted in 1969 and entered into force in 1978.
[158] The Convention for the Protection of Human Rights and Fundamental Freedoms was drafted in 1950 signed 4 November 1950 and entered into force on 3 September 1953 213 UNTS 221, ET5.

prescribed in the interests of public order, public safety and the protection of the rights of others in a democratic society.

The African Charter on Human and People's Rights[159] covers rights and duties. In articles 27, 28 and 29, the Charter sets out the duties of the individual toward his family and society, the state and other legally recognised communities and the international community. This is in addition to its proclamation in article 1 that the member states parties to the Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. Preambular paragraph 6 also explains the place of duties in the scheme of human rights when it states that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.

It is also important to stress for completeness, that some of the important landmarks in the human rights architecture never imposed or alluded to individual duties. The *Magna Carta*[160] of 1215 for example, does not refer to duties (except the many and various obligations of the King). The United Kingdom Bill of Rights 1688[161] did not refer to individual duties, nor did the 1787, US Bill of Rights.[162]

Away from the international scene, the constitutions and statutes of many countries now contain provisions relating to duties, a clear recognition of the inter-relationship between rights and duties.[163] The Soviet Union has already been identified as a despicable example of countries that catalogue individual duties. In addition to article 56 of the Constitution which declares that the exercise by citizens of their rights was inseparable from the performance of their duties,[164]

[159]Also known as the Banjul Charter it was adopted at Nairobi, Kenya on 26th June 1981 and entered into force in October 1986.
[160] (1215) also called *Magna Carta Libertatum* (Latin for the Great Chapter of Liberties). This required King John of England to proclaim certain liberties and accept that his will is not arbitrary.
[161]An Act of Parliament of England passed on 16 December 1689.
[162]The Bill of Rights is the collective name for the first ten amendments to the United States Constitution. They were introduced by James Madison to the 1st United States Congress as a series of legislative articles. They were adopted by the House of Representatives on August 21, 1789.
[163]See, for example, section 24 of the Nigerian Constitution, article 113 of the Zambian Constitution and the preamble to the Australian Capital Territory's Human Rights Act 2004.
[164]It was adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR Ninth Convocation on October 7, 1977. The official name of this Constitution, also known as the Brezhnev Constitution, is 'Constitution (Fundamental Law) of the Union of Soviet Socialist Republics'.

articles 60 to 69, defined these duties to include the requirement of citizens to work and to observe labour discipline; to protect socialist property; oppose corruption; to make thrift of the people's wealth; and to concern themselves with the upbringing of children.

In India, the 42nd Amendment[165] of the Constitution enacted in 1976 introduced Fundamental Duties of Indian Citizens. These are defined as the moral obligations of all citizens to help promote a spirit of patriotism and uphold the unity of the country. The duties are listed in Part IV – A of the Constitution. Like directive principles, they are not legally binding. They include the duty to promote a spirit of common brotherhood, protect the environment and public property, develop scientific temper, abjure violence, and strive towards excellence in all spheres of life. Equally, they obligate citizens to respect the national symbols of India and to cherish its heritage and preserve its composite culture.

In the African context specifically, many countries include in their Constitutions the concept of duties.[166] Viljoen argues that the inclusion of duties in domestic constitutions in Africa underscores the reciprocity of rights and duties, an aspect that is hailed as part of the African understanding of rights.[167] While states are much more likely to entertain the notion of individual duties, as they do not pose any threat to state sovereignty, he further argues, these duties may serve as a counter balance to civil and political rights and may even be used to undermine rights. Domestic legislation is also replete with instances where individual duties are imposed on individuals.[168]

[165]It was passed by the Indian Parliament on 2 November 1976. Originally ten in number, the Fundamental Duties were increased to eleven by the 86th Amendment in 2012 which added a duty on every parent or guardian to ensure that their child or ward is provided opportunity for education at a certain age.

[166]See C Heyns, 'Where is the voice of Africa in our Constitution?' Centre for Human Rights, Pretoria, Occasional Paper 8 <http://www.chr.up.ac.za/centre_publictions/occ_paper/occ8.htmI> accessed 11 February 2013. He cites the Constitutions of Algeria (article 60), Cape Verde (article 80(2)), Congo (article 56), Ghana (article 41), Sao Tomé e Principe (article 20), Sierra Leone (article 13(e)), Tanzania (articles 29 (5), 30 (1) and (2) and Zimbabwe (article 11).

[167] F Viljoen, *International Human Right Law in Africa* (Oxford University Press, New York 2007) 250.

[168] See for example section 6 the Uganda Children's Act Chapter 50 of the laws of Uganda which casts on parents or guardians the responsibility to maintain their children; the Cameroonian Civil Status Ordinance 81/02 of 29 June 1981 and the Napoleonic Civil Code applicable to Cameroon which impose individual duties on children; article 8 of the Mozambican law on the Promotion and Protection of Children's Rights; Law No. 54/2011 of 14 December 2011of Rwanda which imposes duties on a child to respect any human being and article 21 which enjoins a child to love his nation and section 45 of the Child Rights Act of Sierra Leone.

Yet, the efficacy of these duties provisions whether set out in domestic constitutions, subsidiary legislation or in international or regional human rights instruments, and particularly their enforceability, appears to be doubtful. A detailed discussion of the notion of duties in the international human rights framework is covered in Chapter Three.

2.7. MODERN IDEAS OF NATURAL RIGHTS AND THEIR CRITIQUE

Modern ideas of natural rights grew out of the ancient and medieval doctrines of natural law, i.e., the belief that people were creatures of nature and God. Contemporary notions of human rights draw very deeply from this natural rights tradition. In a further extension of the natural rights tradition, human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.

While there is a temptation from a reading of much literature on the subject of human rights to take for granted that the conception of human rights is incontrovertible and signifies the single way in which the concept of rights can be understood, it is clear that almost from inception the concept of human rights has been a subject of extensive criticism from diverse thinkers and writers who were profoundly troubled by this conception and therefore sought to survey either alternative conceptions of rights or a society to which the concept of rights is not after all, central. As Chris Brown[169] correctly notes that

> virtually everything encompassed by the notion of 'human rights' is the subject of controversy...the idea that individuals have, or should have, 'rights' is itself contentious, and the idea that rights could be attached to individuals by virtue solely of their common humanity is particularly subject to penetrating criticism.

The history of political philosophy of rights has been one of several centuries of debate. The child of natural rights philosophers, human rights, has come to hold a powerful place in contemporary political consciousness. However, neither preeminent belief in, nor even a

[169] Brown (n 64).

consensus of support for human rights do answer the concerns raised by the earlier thinkers - are rights really the product of a particular idea and laws of a society? Or, are human rights so inherent in humanness that their origins and foundations are indisputable?

Two kinds of critiques of rights are discernable. First, there are various forms of fundamental criticism which have been made challenging the philosophical validity of human rights as a moral concept. Here the critiques impeach the doctrines that give rights central place by endeavoring that these are unjustified. Second, the language of rights itself is attacked, with the arguments revolving around the appropriateness of productivity of expressing at least some of the normative trepidations in terms of rights.

One philosophical critique argues against the notion that everyone has human rights merely because they are human; that factors such as the government, the location of the right holder religious beliefs, culture and tradition are irrelevant in determining these rights. This critique also disagrees with the claim that human rights are innate and that the subject of human rights need not do anything to acquire rights. Hart for example, argues that 'human rights arise from no special undertaking beyond membership in the human race, that one does not have to be anything other than a human being and must neither do anything other than being born human.'[170]

The critique to this takes as a starting point the existence of documents such as the *Magna Carta* and the American Declaration of Independence and the French Declaration on the Rights of Man and the Citizen and argues that the rights proclaimed there in were induced by the citizenry. The *Magna Carta* was a result of the protest by the nobility against the King who in turn signed the *Carta* giving rights and freedoms to freemen of England. These rights were fought for and attached to social positions and ownership of property by the nobility, and they excluded such people as slaves and women. In this sense, therefore, the *Magna Carta* cannot be the foundation of the modern day human rights which are universal and innate. As far as the American Declaration of Independence goes, the critique is that the rights enshrined in that document are not universal in spite of its proclamation that 'we hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights; that

[170]H L A Hart, 'Are there any natural rights?' (1955) 65 *The Philosophical Review* 175-91.

among these are life, liberty and the pursuit of happiness…' The rights only offer protection to citizens with property and as such it cannot be a foundation for human rights.

The French Declaration of Rights of Man and the Citizen came after a revolt by the French people against the monarchy.[171] In its first article, the Declaration proclaimed that 'all men are born free" and it protects "rights to liberty, property, security and resistance to oppression.' The Declaration instantly stimulated political writers in the West and motivated at least two scornful assaults on its notion of natural rights. Jeremy Bentham's clause-by-clause critique of the Declaration, entitled *Anarchical Fallacies*, argued vehemently that there can be no natural rights, since rights are created by the law of a society:

> Right, the substantive right, is the child of law: from *real* laws come *real* rights; but from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come imaginary rights, a bastard brood of monsters, 'gorgons and chimeras dire.'[172]

Bentham also criticized the notion of inalienability of rights calling it 'nonsense upon stilts.'

> Natural rights are simple nonsense: natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts.[173]

According to Bentham, human rights are normative demands or political actions that can only be realized through legislation. He argues that laws are specific for particular nation states which stem from actions of governments and such they cannot be absolute and inalienable.

Burke also wrote a vicious attack on both the *Magna Carta* and the French Declaration's assertion of natural rights, in which he argued that rights were those benefits won within each

[171] G Jellinek, *The Declaration of the Rights of Man and the Citizen* (Henry Holt & Co New York 1901).
[172] J Bentham, 'Anarchical Fallacies: An Examination of the Declaration of Rights issues during the French Revolution', in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, New York 1987) 69.
[173] Ibid 53.

society.[174] Burkes argued that rights in the *Magna Carta* and the Declaration were liberties which did not arise from universal principles but were a legacy of hard-won battles. The rights held by the English and French were different, since they were the product of different political struggles through history. According to Burke, the idea of universality of human rights is groundless and called the Declaration of the Rights of Man 'monstrous' and 'tragicomic.'[175]

As for the rights in the 1789 Declaration of the Rights of Man are concerned, Burke argued that those rights are abstract rights and called them 'metaphysical madness' based on a misinterpretation of human nature and lacking guarantees and continuity that history, culture, society and tradition offers through the passing and testing of time.

Soon after the attacks on the French Declaration, Thomas Paine wrote a defense of the conception of natural rights and their connection to the rights of a particular society. Paine[176] made a distinction between *natural* rights and *civil* rights, but he continued to see a necessary connection:

> Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.[177]

This passage echoes another, earlier motivation for human rights from the social contract point of view of writers such as Jean-Jacques Rousseau, who argued that people agree to live in common if society protects them. In his *Les contract social*, Rousseau considers the social

[174] E Burke, (1790) *Reflections on the Revolution in France* (Penguin Classics, London 1986).
[175] Ibid.
[176] T Paine, *The Rights of Man* (Penguin Books, New York 1985) 68.
[177] Ibid.

contract as an agreement where everyone subordinated his own individual will to the general will, *la volonté génerale*. This general will of the corporate self-sets moral standards valid for its members and implies the reduction of government to merely an agent of the general will. Sovereignty belongs only to the people as a corporate body and each individual has subordinated himself to it. In the contractarian reasoning, political rights and obligations could be conceived of always in terms of a social contract. Thinkers who used the concept of social contract took a different view of the significance of 'nature'. Rousseau, for example, not only disagreed strongly with any attempt to attach religion to the foundations of political order but extricated the rights of a society from natural rights. In Rousseau's view of things, the rights in a civil society are consecrated;

> but the social order is a scared right which serves as a basis for other rights. And as it is not a natural right, it must be one founded on covenants.[178]

For Jean-Jacque Rousseau there were natural rights which nothing could take away; but, provided the social contract invested the 'general will' with all legislative power, there could be no question of positive law entrenching on rights. The general will include all wills, so that every man willed what the law stipulated – even if, on occasion, someone had to be 'forced to be free'. Natural rights arguments as such, like a natural law arguments, base their claims about what ought to be done by governments on the nature of man. A contractarian argument, as such, bases claims on what citizens did (or notionally would) agree to do. These are rival conceptions of justice. The debate in the late eighteenth century has left telling traces. Controversy continues to swirl over the question whether rights are creations of particular societies or independent of them.

However, a persistent opposition to this view builds on the criticisms of Burke and Bentham, and even from the contractarian views of Rousseau's image of civil society. In this viewpoint rights do not exist independently of human effort; they can only be created by human action. Rights are viewed as the product of a particular society and its legal system. These modern theorists have developed a notion of natural rights that does not draw its source of inspiration from a divine

[178] J J Rousseau, *The Social Contract*, Maurice Cranston (trans) (Penguin, Baltimore 1968) 50.

ordering. In its place has arisen a variety of theories that are humanist and rationalist; the 'natural' element is determined from the prerequisites of human society which are said to be rationally ascertainable. Thus there are constant criteria which can be identified for peaceful governance and the development of human society. But problems can develop for this school of thought when notions of a social contract are said to underlie the society from which rights are deduced.

In this vein, Karl Marx also left a legacy of opposition to rights that hindered socialist thinkers from accommodating rights within their theories of society. Marx denounced rights as a fabrication of bourgeois society, in which the individual was divorced from his or her society; rights were needed in capitalist states in order to provide protection from the state. In the Marxist view of society, an individual is essentially a product of society and, ideally, should not be seen in an antagonistic relationship where rights are needed.[179]

A further difficulty, with profound implications, which human rights theories have to overcome is their emergence from these Western political traditions. Not only are they a product of European natural rights, but the particular rights that are viewed as 'natural' have been profoundly shaped by the liberalism that emerged in the nineteenth and twentieth centuries. With human rights, the rhetorical framework of the natural rights tradition has come to serve as a vehicle for the values of Western liberalism.

An easy and powerful criticism is that human rights cannot be universal. As human rights are considered to be moral principles they are thought of as universally valid. However, human rights relativists argue against universalism saying there can be no universally valid moral code. Morality being a social and historic phenomenon is, therefore, socially and historically contingent. In their basic concept human rights are a Western creation, based on the European tradition that individuals are separable from their society. But one may question whether these rights can apply to collectivist or communitarian societies that view the individual as an indivisible element of the whole society. Westerners, and many others, have come to place a high

[179] See K Marx, 'On the Jewish Question' in J Waldron (ed), *Nonsense Upon Stilts*: *Benthan, Burke and Marx on Rights of Man* (St Edmundsbury Press, Suffolk 1987).

price on each individual human, but this is not a value judgment that is universal. There is substantive disagreement on the extent of, or even the need for, any protection of individuals against their society.

In addition to this problem with the concept itself, there are strong objections to the manner in which human rights have been conceptualized. Many lists of human rights read like specifications for liberal democracy. The language of rights is sometimes suggestive of individualism. Glendon puts the point thus:

> Our rights talk, in its absoluteness promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations….In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertions over reason-giving.[180]

A variety of traditional societies can be found in the world that operate harmoniously, but are not based on equality, let alone universal suffrage. A question that will recur in later discussions is whether the 'human rights' advocated today are really *civil* rights that pertain to a particular - liberal - conception of society. To a large extent, the resolution of this issue depends upon the ultimate goal of human rights. If human rights are really surrogate liberalism, then it will be next to impossible to argue their inherent authority over competing political values. In order for human rights to enjoy universal legitimacy they must have a basis that survives charges of ideological imperialism. Human rights must have a universally acceptable basis in order for there to be any substantial measure of compliance.

[180] M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York 1991) 14.

2.8. Conclusion

This chapter has traversed the long heritage of human rights, examining in the process the ways in which human rights have been understood, their philosophical origins, analysis, justification, criticism as well as the forerunners to the modern human rights protection system. An attempt has been made in this chapter to examine the philosophical, political or moral theories of the concept of human rights and the source of legitimacy of rights. It has been shown that there are various theories explaining the functional properties of rights which should assist us in analysing the concept of individual duties in the ensuing chapter. Since duties of the individual are, in some cases, to be understood as tools for interpretation of rights, and in other cases either as counterparts of rights or independent of them, the arguments on the concept of rights in this chapter will provide the necessary background and a reference point in Chapter Four which is devoted to the notion of duties.

CHAPTER THREE: THE AFRICAN HUMAN RIGHTS SYSTEM: ESTABLISHMENTAND PURPOSE

3.1. INTRODUCTION

The previous chapter gave a broad account of the concept of rights and the development of the global human rights system. This chapter zeroes in on the development of the African human rights system. When one talks of a human rights system, it is important to define the scope of the inquiry. The 'African human rights system' invariably refers to the regional system of norms and institutions for enforcing human and peoples' rights in Africa. The system is anchored in the African Charter on Human and Peoples' Rights (the African Charter). Thus, in common parlance, the term African human rights system is used to refer to the African Charter and the treaty body that is entrusted to administer it – African Commission on Human and Peoples' Rights (the African Commission). The fact, however, is that the African human rights system is made up of much more than just the African Charter and the African Commission. As explained in Chapter One,[1] the African human rights system covered by this work comprises largely the African Charter based part of the system in which the African Commission has until recently been the sole superintending organ in implementing African Charter provisions. By necessary and logical extension the African human rights system involves the role of the African Court. The Chapter also considers to a smaller extent, the African Charter on the Rights and Welfare of the Child (the African Children's Charter) based segment of the system.

The reasons for not including in this study other substantive aspects of the African human rights system such as those relating to the evolution and practices of the African Court and the interface of various human rights programmes under the auspices of the AU, are pretty obvious. First, the African Charter represents the genesis and umbilical cord of the African human rights system, followed closely by the African Children's Charter fragment of the system. Secondly, the two parts of the system have an elaborate state reporting structure and have treaty bodies invested with an interpretational mandate which does not depend on communications being tabled before

[1] See Ch 1 part 1.2.

them. Thirdly, it is within these two constituents of the system that the subject of individual duties is most prominently set out. The rest of the system, which in many ways is an appendage to the African Charter based system, is of doubtful relevance to the subject matter of individual duties nominated for this study in this project. Finally space does not allow for an unbounded inquiry into every conceivable aspect of the system involving individuals' duties. It only makes logical sense, therefore, to deal with these two 'principal' components of the African human rights system as they are sufficiently representative of the system on duties.

The chapter examines the evolutional background to the African human rights system as circumscribed in the manner indicated and the objective conditions that precipitated its formation. As the issue of individuals' duties in the African Charter, which is the focus of a detailed analysis in Chapter Six, will be a constant reference point throughout this work, this historical background is inevitable. As Sloth-Nielsen and Mezmur correctly advise, '[i]n order to understand the language of duties in the African human rights system, one needs to have an informed view of the general conception of human rights in Africa.'[2] It is, however, neither desirable nor expedient to give a similar historical account of the African Children's Charter given the basic premise that as far as individual duties are concerned the African Children's Charter also reflects the position in traditional African societies where children not only have rights, but are also liable to perform certain duties and responsibilities subject to their age and capacity.

3.2. A HISTORICAL BACKGROUND TO THE ESTABLISHMENT OF THE AFRICAN HUMAN RIGHTS SYSTEM AND BASIS OF THE DUTIES PROVISIONS IN THE AFRICAN CHARTER

In an effort to promote political, social and economic change as well as to foster unity and a sense of belonging, African countries established the Organisation of African Unity (OUA) in 1963[3]. The principal aims were to promote solidarity, peace and international cooperation and to

[2] J Sloth-Nielsen and B.D Mezmur, 'A Dutiful Child: The Implication of Article 31 of the African Children's Charter' (2008) 52 (2) *Journal of African Law* 159 164.
[3] The OAU Charter was adopted in Addis Ababa, Ethiopia, in May 1963 and entered into force in September 1963. It was replaced by the Constitutive Act of the African Union when the African Union replaced the OAU. Full text available at <www.africa-union.org> accessed 14 July 2015.

eradicate colonialism throughout the continent[4]. In 1981, the eighteenth Assembly of Heads of State and Government of the OAU[5] adopted the African Charter. It entered into force on October 21, 1986 upon ratification by a simple majority of member states of the OAU.[6]

The African human rights protection system became the latest of the three established regional human rights systems; the other two being, the European and the Inter-American systems. The defining differences between the African human rights protection system and the other two established regional human rights systems emanates from the desire on the part of the African people to preserve traditional African values as is evidenced by the special importance attached to the protection of the family, preservation of moral values and the definition of rights and duties of the individual. These considerations are set out in a legal context in the African Charter. Before considering the conception and adoption of the African Charter, it is instructive to examine the position with regard to human rights that obtained in Africa in the period before the African Charter.

3.2.1. Human rights in the pre-colonial Africa

The historical perspective of Africa, during its pre-colonial era, does not give one a very clear formal insight, mainly due to lack of information.[7] What is, however, clear is that pre-colonial Africa had more traditionally based and more customary oriented governance structures than governance by the word of formal law. Conteh prefers to classify the history of human rights in Africa into three distinct phases.[8] The first of these, he argues, was the traditional society. Here human rights existed though in a perspective not similar to that of the West. Credit should be given to the pioneering work undertaken by Coifman which revealed the flexible nature of pre-

[4] Art 2 of the OAU Charter sets out the objectives of the OAU as being the promotion of unity and solidarity of African states, the coordination and intensification of cooperation and efforts to achieve a better life for the people of Africa, defending the sovereignty, territorial integrity and independence, eradication of colonialism and the promotion of international cooperation.
[5] The meeting was held in the Kenyan capital, Nairobi in June 1981.
[6] Art 63 provides that the Charter was to enter into force three months after the reception by the Secretary General of the instrument of ratification or adherence by a simple majority of the member states of the OAU.
[7] For an elaborate historical background to the evolution of human rights in pre-colonial and colonial Africa, see E McCarthy-Anolds *et al* (eds) *African Human Rights and the Global System* (Greenwood, Westport/Connecticut London 1994); G Shepherd Jr and M Anikpo (eds) *Emerging Human Rights: The African Political, Economic Context* (Greenwood Press, New York 1990); and A A An-Na'im and F Deng (eds) *Human Rights in Africa: A Cross-Cultural Perspective* (The Brooking Institution, Washington DC 1990).
[8] M B Conteh, 'Human Rights Teaching in Africa: The Socio- Economic and Cultural Context' in A Eide and M Thee (eds) *Frontiers of Human Rights Education* (Columbia University Press, New York 1983) 58.

colonial organisation in West Africa including the coastal region stretching southwards from the Senegal River to Liberia and also evident in the Sahara and Morocco[9]. Here, he perhaps with good reason, quotes Keba M'baye, one time President of the Senegal Supreme Court, who asserted that 'traditional Africa [did] possess a coherent system of human rights, but the philosophy underlying that system differs from that which inspired [in France] the Declaration of the Rights of Man and of the Citizen.'[10] Rights in Africa, unlike their counterparts in the West, were not conceived and experienced in terms of conflict; rather in terms of group rights and responsibilities. The infiltration of Africa by foreign interests firstly in the form of slave trade, and later in the form of colonialism, violated and denied the rights enjoyed under the traditional setting. It is indisputable that the colonial period witnessed a systematic subjugation of the African people for the benefit of the colonisers leading to writers like Ayitte to believe that there was denial of human rights and an attempt at total annihilation of African customary law.[11] This led to what Conteh calls the second wave of the development of human rights through the pan-African movement. This movement was a socialist oriented African-American crusade spearheaded by people like Henry Sylvester, W.E.B. Dubois, George Padmore and others who propounded three principles under pan-Africanism, namely unity, Black Nationalism and socialism. As the purpose of the pan-African movement was the pursuit of freedom and dignity by the 'black man' there was evidently not much concern for universal human rights.[12] The final phase, according to Conteh, is that which started with the Universal Declaration of Human Rights, reinforced by decolonisation and merged with the human and peoples' rights demands of the African people, which continues to date.

According to Nmehielle, in Africa, while one may agree that the predominant socio-economic formations before colonial laws had to and did exist to govern these societies and the relations within them, pre-colonial Africa may have emphasised human rights that had a different note

[9] V B Coifman, 'West African Women: On the Edges of Jihad in the Early Days of MacWorld' in (1998) 33(2) *Listening Journal of Religion and Culture* 111.
[10] K M'baye, *Les Droit de l'Homme en Afrique* (2nd edn Pedone, Pedone 2002) 71.
[11] G Ayitte, *Africa Betrayed* (Transnational Publisher, New York 1992) 82.
[12] According to C O G Amate, (*Inside the OAU: Pan-Africanism in Practice* (Macmillan, London 1986) 1. Henry Sylvester was the first to organise a Pan–African congress and he remained in the forefront of the movement until Dubois took over after his death. He is also said to be the first to use the term Pan-Africanism

from what the Western world conceptualised.[13] It would indeed be wrong to suppose that pre-colonial Africa had no notion of individual rights and claims, particularly if we accept the general explanation by Cohen[14] of a right as follows:

> At its most basic level, a human right is a safeguarded prerogative granted because a person is alive. This means that any human being granted personhood has rights by virtue of species membership. And a right is a claim to something (by the right-holder) that can be exercised and enforced under a set of grounds or justifications without interference from others.[15]

The concept of a right as put forward by Cohen was very much in existence in the societies that exited in pre-colonial Africa. It is well known amongst scholars that pre-colonial Africa did indeed have a well-formed social, political and economic layout, and there were kingdoms that flourished from as far back as the fourth century. Welch for example, explains that Africans had their 'families, clan, an ethnic solidarity, in short the web of kinship which provided the frameworks within which individuals exercised their economic, political, social liberties and duties.'[16] The most well-known empires that ruled parts of pre-colonial Africa include the Mali and Ghana Kingdoms (Western Africa), the Zulu in Southern Africa, the Luba-Lunda Kingdom in Congo (Central Africa), while the east was ruled by the Buganda and Bunyoro empires. Gluckman remarks that the pre-colonial societies of Africa were traditional with well-placed legal systems comparable, though not identical, to those seen in Western societies.[17] Meek agrees that African society had some organised systems in place.[18] What was a crime in the Western world was also considered a crime in the pre-colonial African social world.[19] There is no

[13] V Nmehielle, *The African Human Tights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff Publishers, The Hague 2001).
[14] R Cohen, 'Endless Teardrops: Prolegomena to the Study of Human Rights in Africa' in Cohen, Goran Hyden and Winston Nagen (eds) *Human Rights and Governance in Africa* (University of Florida Press, Gainesville 1993) 3-38 3-4.
[15] Ibid.
[16] C E Welch, 'Human Rights as a Problem in Contemporary Africa' in C E Welch Jr & R I Meltzer (eds) *Human Rights and Development in Africa*, (University of New York Press, New York 1984) 217.
[17] M Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (2nd edn Manchester University Press, Manchester 1967) 231.
[18] C K Meek, *Law and Authority in a Nigerian Tribe* (Oxford University Press, London 1937).
[19]The pre-colonial societies in Africa varied from the agrarian type to fishing communities to the pastoral life style, depending on the topographic conditions, rainfall and the vegetation type. There were mainly two different types of societies in the pre-colonial era. One type consisted of a well formed government headed by a king who ruled over

suggestion in these general statements that the pre-colonial African social order was identical to that which obtained in the West. The point that is made, in the view of this researcher, is simply that there was some sort of systems in place in pre-colonial African settings for some orderly governance of society. However, some scholars like Howard do not agree that the concept of human rights existed in Africa before the colonial powers arrived. Their pessimism is informed by the communitarian values of the individual in traditional African societies. They argue that traditional African societies did not have a concept of rights, since fundamental human rights, which they believe are universal in scope and application, are inherent in one's humanity, not community.[20] According to Howard, the primary purpose of human rights everywhere is to protect the citizen against state intrusion since individuals' interests are always at risk of being undermined by political authority.[21] Together with Donnelly, Howard opines that the pre-capitalist views, as were observed in Islam, Buddhism and in pre-colonial Africa, were devoid of any basic human rights. They further observe that the concept of human rights came into existence only after the feudal era had ended. However, as intimated already, some historians and scholars dismiss the opinions put forward by Howard and Donnelly and tell us that there was indeed recognition of some individual rights in pre-modern African societies. This, of course, says nothing about enforcement of those rights which is a different issue altogether.

large areas of lands, as for example, the Akans from West Africa who had a more organised and more centralised form of governing system. The second type consisted of smaller communities that were headed by the community elders or a tribal chief/king, as were the Akamba group form east Africa. In the Akan group the community members believed that an individual had rights, and obligations/ duties to perform. The Akamba also believed that all their community members were born with equal rights, and had no differentiation based on sex and age. In fact they both believed that since an individual had inherent values, it made him a claimant to certain individual rights. In both the societies all the community members were given rights and claims (as for example, the right to life and property) which were actively protected by the head or the king. The society ran on democratic lines and in most cases the rulers were not dictators. In fact, in some societies, like the Ashanti rulers in the kingdom of Ghana, had to take a pledge against not abusing their position of power. Though the pre-colonial African society believed in slavery and much of their manual labour was done by the slaves, abuse and exploitation were not common. In fact, it has been said that the slaves were in general well treated, and in some societies a slave could buy his freedom or even progress beyond slavery by sheer talent and hard work.

[20] J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) *Human Rights Quarterly* 400; R Howard, 'The Full Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Sahara Africa' (1983) 5 *Human Rights Quarterly* 467.

[21] R E Howard, 'Communitarian and Liberalism in the Debate on Human Rights in Africa'(1992) 4 *Journal of Contemporary African Studies* 1-21.

3.2.2. Human rights in colonial Africa

In Africa, the value of human beings and the basic claim to certain rights and dignity took a setback during the slave trade and later, the colonial era.[22] The slave trade from the early sixteenth century, reached its peak during the eighteenth century. This trading in human beings for cheap labour was an aberration to human dignity of the African people. It amounted to moral degradation and gross violation of individual rights. As Umozurike aptly frames it:

> [p]erhaps the widest suppression and desecration of human rights could be attributed to the intervention of the Europeans and Arabs in the slave trade, which was the exportation of labour – child, adult male and female...Wars were waged just to capture slaves and implements of war, were supplied by the slave traders.[23]

With the end of slavery, there came the need to forcibly subjugate Africa, by the various colonial powers, to keep their hold intact. As the lucrative slave trade closed down, the colonial powers resorted to fight for power and started looking for other profit making businesses. The Dutch, the French, the Portuguese, and the British, were all at loggerheads to gain supreme control over the African mainland. Soon the African coastline was dotted with forts built by these warring colonial powers for expansion of trade and commerce and also for their defence. Treaties with various African kings were signed to get trade advantages. Soon the war for supremacy reached such heights that in 1884 the German Chancellor, Otto von Bismarck, was forced to call a conference for the various European nations[24] so as to reduce the tensions between them. This resulted in the Treaty of Berlin in 1885, which aimed at stopping any possible war between the colonial powers. However, this treaty, though it managed to lay certain basic rules, inadvertently also intensified the scope of colonial conquest. This led to random abuse and systematic enslavement of the native Africans by the white settlers. According to Umozurike, this trade in human beings and the exploitation during colonial rule plunged Africa into a rule of darkness and took the meaning of human rights to such abysmal depths that it involved decades of hard work to restore the meaning of rights and claims for an African individual. Whatever the

[22] Conteh (n 8) 58.
[23] U Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, The Hague 1997) 16.
[24] The Berlin Conference 1884-1885 marked the climax of European competition for African territory, a process that came to be commonly referred to as the scramble for Africa.

administrative philosophy of the colonial power, the aim and the result were the same - maximum exploitation of the human and material resources of the continent and appropriation of the African peoples and territories by the colonialists. Forced labour was rampant, especially in the French colonies.[25]

During the colonial rule there was also a conscious effort to destroy the legal systems that existed in Africa before the white settlers came in. The power of law making and law breaking all went into the hands of the white settlers who soon resorted to plunder, abuse and exploitation of the native people. All forms of economic, socio-cultural, political development of the native Africans were consciously stultified. Thus as Nmehielle tells us:

> colonialism was disrespectful of African traditions and values. It relegated Africans to subservience in all fields. It arrested and destroyed the internal dynamics of the evolution of African societies...it was not only founded on racism and naked exploitation, it denied and inhibited fundamental human rights, and was essentially against the promotion and protection of human rights in Africa. The consequences of colonialism can be seen in the high handedness and authoritarian nature of many African regimes, which have adopted the oppressive mechanisms of the colonial masters against their own people.[26]

Africans lost their claim to basic human rights under the abusive European colonial rule. The complicit role, in some cases, of religion in this erosion of human rights is a matter of record.[27] Although the UDHR took some preventive action against the random exploitation prevalent in Africa, the abuse of rights of the common native Africans continued even in the twentieth century. It was absolutely necessary to take some remedial actions to restore human rights and some semblance of dignity into the lives of the African people.

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[25] Umozurike (n 23) 21.
[26] Nmehielle (n 13) 29.
[27] See:SBevan,'ChristianComplicityinColonialism/Globalism'<www.secondenlightenment.org/Christian%20Complicity.pdf> accessed 22 October 2015. 'The modern missionary era was in many ways the 'religious arm' of colonialism, whether Portuguese and Spanish colonialism in the six teeth century, or British, French, Belgian or American colonialism in the nineteenth. This was not all bad – often times missionaries were heroic defenders of the rights of indigenous peoples.'

3.2.3. Human rights in post-colonial Africa

It is disconcerting that the African only took steps to introduce a systematic way of monitoring and safeguarding human and peoples' rights more than thirty years after the UDHR was adopted by the UN General Assembly on 10th December 1948.

The struggle for human rights on the continent has been long and arduous. After slavery and colonialism, there was every hope that the human rights situation on the continent would improve significantly. Ghana was the first country to become independent in 1957, and was soon followed by other countries which were inspired by the Ghanaian example and got their independence in the 1960s. Soon political power across the continent was transferred from the old colonial rulers to the indigenous leaders. However, as Nmehielle points out, these native leaders too treaded the same path as shown by the previous white rulers, and did nothing in their capacity to stop the rampant abuse of the common people.[28]

Africa saw the dictatorial nationalist one party systems of governance by post-colonial African leadership, which Muigai appropriately labelled as 'the dictators paradise.'[29] African leaders took over from colonialists, amid false promises of greater observance of human rights. However, as Edem Kodjo observed, 'independence was not accompanied by the emergence of political powers that really respected human rights such as those inscribed in the United Nations Universal Declaration of Human Rights'.[30] On the contrary, the continent went through the abuses and abominations in the mid-1970s, perpetrated by such dictators as Jean-Bedel Bokassa in the Central African Empire, Macias Nguema in Equatorial Guinea and Field Marshall Idi Amin Dada in Uganda. The abominations of these three leaders came to be viewed as

[28] Nmehielle (n 13) 29.
[29] G Muigai, 'Legal Constitutional Reforms Necessary to Facilitate Multi-Party Democracy in East Africa: The Case of Kenya' in J Oloka-Onyango, K Kibwana and C M Peter (eds) *Law and the Struggle for Democracy in East Africa*(Claripress, Nairobi 1996) 526-544 526.
[30]E Kodjo,'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 272. Edem Kodjo was Secretary General of the OAU at the time of the creation of the African Charter on Human and Peoples' Rights. He also played a prominent role in drafting and promoting the Charter.

paradigmatic of African leaders who, when 'put into perspective, were in truth only examples which dramatically demonstrated the situation of human rights on the African continent.'[31]

Although the African Charter was adopted only just over thirty years ago, the idea of formulating a regional instrument for the protection of human rights in Africa existed as far back as the 1960s.[32] It was first articulated in January 1961 at the Conference on the rule of law organised in Lagos, Nigeria, by the International Commission of Jurists, a non-governmental organisation. A declaration entitled 'The Lagos Law' was adopted.[33] It called upon African Governments to adopt an agreement (Convention) on human rights with a view of creating a court that anyone under the jurisdiction of a member State could refer to. Not surprisingly, there was no immediate follow-up on this wish. The OAU appeared more preoccupied with other pressing matters set out in its Charter – such as the liberation of the continent from colonial domination, and the dismantling of apartheid.

3.2.4. The drafting of the African Charter: the objective conditions and the steps[34]

It is probably fair to state that what contributed to the urgency for the need for an African human rights instrument was the heightened sensitisation of the international public opinion to the severe human rights abuses, which occurred in Africa in the mid-1970's, and committed by dictatorial governments, and which created a huge outrage in the international fraternity. The leadership of Africa was naturally concerned about this perception and had to do something about it. Mutua points out that, the atrocities committed by these dictators and others and the resulting international outcry forced the leadership of Africa to 'reclaim international legitimacy and salvage its image.' This prompted the OAU Summit in Monrovia, Liberia, to appoint a

[31] M Mutua 'The African Human Rights System: A Critical Evaluation' <http//hdr.undp.org/docs/publication_papers/MUTUA.PDF> accessed 14 December 2015.
[32] For a general account of the legislative history of the African Charter, see H B Jallow, *The Law of the (Banjul) African Charter on Human and Peoples' Rights* (Trafford Publishing, Victoria Canada 2007) 19-65
[33] The Lagos Law was adopted on 7 January, 1961. See M Hamalengwa *et al The International Law of Human Rights in Africa* (Babena Press, Lagos 1988). The African Conference on the Rule of Law, consisted of 194 judges, practicing lawyers and teachers of law from 23 African nations as well as 9 countries of other continents, assembled in Lagos, Nigeria, in January 1961 under the aegis of the International Commission of Jurists.
[34] For an elaborate background to the African Charter, see F Viljoen, *International Human Right Law in Africa*, (Oxford University Press, New York 2007).

committee of experts to prepare a draft of an African human rights charter.[35] Fombad observes that:

> [a]s democratisation swept through the continent, it generated expectations of a new dawn and the end of an era of corrupt, authoritarian and incompetent dictatorships that had earned the continent notoriety for political instability, civil wars, famine, disease and similar ills.[36]

Human rights had, furthermore, become a legitimate and important subject of international discourse around the same period as exemplified by the adoption of the Final Act of Helsinki and the entry into force of the two UN.[37]Following these developments, the UN began to actively support and encourage regional human rights systems. Above all, a new trend in the foreign policy of some Western states was to link economic aid to the human rights record of the recipient country. The United States under the Jimmy Carter administration is a case in point.

The following twenty years after the Lagos Law, in the 1960's and 1970's, saw the organisation of several conferences in Africa either by the UN or by non-governmental organisations to discuss the need for an African regional system to promote and protect human rights.[38] The combination of all these developments acted as a catalyst which induced the post-colonial African States to demonstrate to the international community that they were concerned not only with the situation of human rights in the restrictive context of anti-colonial human rights struggle and apartheid in South Africa, but also by the violations occurring in their own countries.

The International Commission of Jurists concentrated its efforts in Francophone Africa. It organised two meetings in Dakar in 1967 and 1978 respectively. On each of these occasions, the participants reiterated their idea of a regional human rights instrument, and this became an urgent request addressed to the OAU. In 1978, the UN, through its Commission on Human Rights,

[35] M Mutua, 'The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation'. Paper presented at the Third Afro-America-the Americas and Europe held in Strasbourg, France. June 15-19, 1992.
[36] C M Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55(1) *American Journal of Comparative Law* 2.
[37] These are the ICCPR and the ICESCR both of 1966.
[38] For a brief drafting history of the African Commission on Human Rights see BG Ramcharan, 'The *Travaux Préparatoires* of the African Commission on Human Rights' (1992)13 *Human Rights Law Journal.*

renewed its concern and called upon pan-African organisations to establish a regional Commission for Human and Peoples Rights.

Noting that the symposiums and conferences convened earlier, had ended in no strict commitments, the participants of the 1978 symposium set up a 'follow-up' Committee composed of four African personalities to follow-up the implementation of the conclusion and recommendations that they adopted. This Committee was to make many trips to African countries and to explain to Heads of State and other political authorities of such countries, that it was necessary and urgent for Africa to have a Human Rights Commission. After the visit to Dakar by the Committee, the then President of the Republic of Senegal, President L.S. Senghor, accepted to present at the next meeting of the Heads of State and Government of the OAU, a resolution for the creation of an African Commission on Human and Peoples' Rights. This resolution was established on the basis of the decision of the Conference of Heads of State and Government of the OAU in its 16th Ordinary Session.[39] At the invitation of Senegal, the Secretary General of the OAU organized a conference in Dakar from 28 November to 8 December 1979, re-grouping under the Chairmanship of Judge Keba M'baye. Twenty African experts coming from sixteen countries attended the meeting.

The Committee did a remarkable job, and in a short time, succeeded in writing up a text, taking into account the political diversity of the member states of the OAU, and focused on the principles on which rests the African traditions. The document that was written was to be submitted at the Conference of Ministers.[40] Unfortunately, the meeting did not take place due to lack of a quorum. This lack of quorum, far from being accidental, was a manifestation of the hostility of some Governments who were not able to express their position openly about their disfavour of the adoption of a human rights charter by the OAU, fearing that this might be the beginning of liberalism which they did not want to be introduced in Africa.

The first attempt of the Secretary-General of the OAU to call for the adoption of a text on human rights ended up failure. Following this first failure, the Secretary-General of the OAU then

[39] AHG/115 (XVI). The conference was held in Monrovia (Liberia) from 17 to 20 July, 1979. That decision called upon the Secretary General of the OAU to: 'Set up a Committee of top level African experts, who will be responsible to prepare a draft for the African Charter on Human and Peoples' Rights, designed mainly as a mouthpiece for the promotion and protection of human and peoples' rights'.
[40] This meeting was held in Addis Ababa on the 24 March, 1980.

decided to ask one of the countries in Africa perceived then to be very democratic and where human rights were most respected, The Gambia, to invite the OAU to hold its Ministerial Meeting in Banjul, with a view to adopting the draft Charter drawn up in Dakar by the Committee of Experts. The President of the Republic of the Gambia welcomed the idea with enthusiasm, and invitations were extended instead to the Council of Ministers of Justice of the OAU to meet in Banjul and no longer for a conference of Experts. The meeting was convened in Banjul on 9 June, 1980.

From the beginning of the deliberations of the Council of Ministers, it appeared that the representatives of certain countries suspected that the Committee of Experts chosen in Dakar had adopted an unbalance (one sided) draft project, since the Committee had not taken into account certain concerns and had also opted for capitalist ideas. The deliberations went on in an extremely tense atmosphere with the discussions suffering several setbacks. At the end of the meeting, the experts had only discussed the preamble and eleven articles. A second meeting was to be held to continue the discussions. This far the Charter's future was uncertain.

It was on the occasion of it ordinary session held in Freetown in June 1980, that the Council through its resolution[41], requested that the second session of the Ministerial Conference of Banjul do its best to complete the discussion of the draft Charter in order to submit it to the eighteenth Ordinary Session of the Conference of Heads of State and Government of the OAU, which was to be convened in Nairobi in June the following year. In order to implement the above mentioned resolution, the Secretary-General of the OAU convened a meeting in Banjul from the 7 to 19 January, 1981. The text was submitted to the Conference of Heads of State and Government of the OAU. The text was adopted during the meeting held in Nairobi, Kenya in June, 1981. A deserved homage was rendered to The Gambia for the role it played in the formative process of the African Human Rights Charter. At the end of the last session, the meeting unanimously voted for a resolution which requested that the Charter be entitled the 'Banjul Charter.' Later, Banjul was designated to seat the headquarters of the African Commission on Human and People's Rights.

[41]CM/Res.792 (XXXV) of 23/61980.

3.2.5. Why the African Charter?

The question one would legitimately ask is whether it was indeed necessary to create a legal instrument in the field of human rights given the fact that there were already human rights legal standards applicable to the African continent, namely those contained in the International Bill of Human Rights, that is, the UDHR and the two 1966 UN.[42] The creation of regional mechanism for the protection of human rights raised questions particularly to the UN on the understanding by these regional bodies of the issue of universality of human rights. Some scholars[43]assert, and quite correctly in the view of this writer, that norms developed within a regional system may to some extent go against the principle of universality. Some scholarly writers such as Cerna, however, assert that there are no regional human rights norms – there are only regional arrangements, which supervise compliance with international standards.[44] Others like Moussa Samb argue, perhaps paradoxically so, that the African regional human rights system is both universal in character and distinctively African.'[45]

The reasons that favoured the creation of a regional human rights protection system for the African region were not different from those that justified the creation of other regional human rights systems, which are considered more effective than the universal or global system. Among these are; first, that the universal human rights promotion and protection system, spearheaded by the UN, provides the lowest denominator which could be improved upon in a regional arrangement. For example, the universal system does not have a court for the enforcement of these human rights norms. Shelton argues that:

> [r]egional systems are indispensable to achieving effective compliance with international human rights; performing as they do, the necessary intermediary function between state domestic institutions that violate or fail to enforce human rights and the global system which is incapable of providing redress to individual victims of human rights violations. They have the necessary ability and flexibility to change as conditions around them

[42] The ICCPR and the ICESCR both of 1966.
[43] C Heyns, D Padilla and L Zwaak, 'A Schematic Comparison of Regional Human Rights Systems: An Update' (2006) 4 *International Journal on Human Rights* 163-171.
[44] CM Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio- Cultural Contexts' (1994)16 *Human Rights Quarterly* 740.
[45] M Samb, 'Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union' (2010) 15(1) *Annual Survey of International and Comparative Law* 61-74.

> change, yet are applied in response to regionally-specific problems; they achieve equilibrium between enforcement of global norms and regional diversity.[46]

Second, countries are likely to respond more positively to the homogeneity of a region. Governments are more likely to agree to implementation of human rights treaties if they are adopted in a regional setting, where cultural, legal and intellectual traditions are similar and where some form of peer pressure or persuasion will matter. The unanimous adoption of sub-regional economic and political groupings such as the Economic Community of West African States and the Southern African Development Community, may bear testimony to this. According to Heyns and others, people in countries from the same or similar regions tend to have 'shared interest in the protection of human interests and influence each other in a manner the international community may not be able to do.'[47] Heyns and Viljoen explain that:

> [w]hile international systems for the protection of human rights lack the benefit of enforcement which domestic systems have regional systems for the protection of human rights arguably have some advantage over the global or UN system. They can give more authentic expression to the values and historical peculiarities of the people of a particular region, resulting in more spontaneous compliance, and due to the geographical proximity of the states involved, regional systems under the right conditions, have the potential of stronger pressure being exerted against neighbours in case of violations. Peer pressure is easier to exert in a smaller circle of friends. An effective regional system can consequently supplement the global system in important ways.[48]

Heyns *et al* make an important point when they observe that regional bodies are more flexible and adaptive. Some ways of enforcement may find wide and easy acceptance in some regions while that might not be the case in the international system where the same mechanism and

[46] D Shelton 'The Promise of Regional Human Rights Systems' in B Weston and S. Marks (eds) *The Future of International Human Rights* (Transnational Publishers, Ardsley NY 1999) 353-398.
[47] C Heyns, D Padilla and L Zwaak, 'A Schematic Comparison of Regional Human Rights Systems: An Update' (2006) 4 *International Journal on Human Rights* 163.
[48] C Heyns and F Viljoen, 'Regional Protection of Human Rights in Africa: An Overview and Evaluation' in P T Zelaza and P J McConnaughay (eds) *Human Rights, The Rule of Law and Development in Africa* (University of Pennsylvania Press, Philadelphia 2004) 129.

standard is applicable irrespective of the region.[49] Hansungule makes the same point when he says that

> [r]egional systems are particularly important for the opportunity to reflect local values that cannot be reflected under the international law system in being preoccupied with values of the universe as such. The preoccupation of universal values, though important, can lead to a de-emphasis of certain peculiarities that are nonetheless basic to some societies. In a regional system states have the opportunity of recalling their values for inclusion in the system. In addition to what may be borrowed from other systems. This is why regional systems have been found necessary in Africa, Americas and Europe.[50]

The interpretive approach adopted by the African Commission on Human and Peoples' Rights of the African Charter bears eloquent testimony to this. In *Social and Economic Rights Action Centre and The Centre for Social and Economic Rights v Nigeria*,[51] the African Commission brought forth into notice the singularity or 'uniqueness' of the African situation and the 'special qualities' of the African Charter that make it necessary for the international human rights bodies to be specially perceptive to the unique needs of the African people. Thus, as the Commission noted, 'collective rights, environmental rights, economic and social rights are essential elements of human rights in Africa.' Additionally, that the various African states that are a member to the African Charter have a 'duty to respect, protect, promote, and fulfil' as well as make effective by different measures all the obligations as outlined by the African Charter.

Third, there are practical considerations that justify a regional human rights approach. It is convenient and cost effective, at least from the point of view of individuals and NGO's seeking to have human rights violations redressed, to attend to regional human rights implementation machinery than to a centrally positioned global system. For a country close to Banjul or Arusha it would certainly make sense to the individual or NGO to utilise the human rights treaty bodies close to it where possible than to have to go to say Geneva. From the level of the state, this view however is self-defeating when one considers that belonging to a regional human rights

[49] Heyns, Padilla and Zwaak (n 47) 164.
[50] M Hansungule, 'Protection of Human Rights under the Inter-American System: An Outsider's Reflection; in G Alfredson *et al* (eds) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jacob Th. Moller* (Martinus Nijhoff Publishers, The Hague 2001) 679.
[51] Communication No 155/1996 (para 68).

protection system does not exempt member states from their global obligations assumed by their membership to the UN.

Fourth, there is also the view founded on conventional wisdom that two heads are better than one, so that in addition to the universal system of human rights protection, it is better to have an additional international system, preferably at a regional level. There is no harm in duplicating the international effort at protecting human rights at regional and sub-regional levels. If anything duplicity would only work to make more thorough, the resultant protection. Mugwanya like Shelton thus observes that:

> [r]egional systems have served to fill the gaps in the global system's mechanism. They have successfully complemented the global system by impacting on and influencing domestic human rights practice in member states. Regional systems are flexible and have the ability to change, as conditions change, and sometimes quickly.[52]

The foregoing partly explains why regionalism in human rights protection has become an important, if not indispensable phenomenon in the whole human rights movement. Take the European region in the 1950s, for example, the European Convention on Human Rights established a court and launched a resounding regional human rights movement. In the American region, in 1978, the American Convention on Human Rights set up a court and incorporated into the convention system the previously created Inter-American Commission on Human Rights. Not perhaps surprisingly, therefore, in the African region, the African Charter on Human and Peoples' Rights set up the African Commission on Human and Peoples' Rights,[53] and more recently an African Court of Human and Peoples' Rights.[54] There have been significant movements towards establishing regional human rights bodies in the Middle East and North Africa[55] and for the Asia-Pacific region too.[56]

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[52] G W Mugwanya, 'Realising Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999) 10(1) *Indiana International and Comparative Law Review* 40-41.
[53] The Commission became operational in 1986, the Charter itself having been adopted in 1981.
[54] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (the Protocol) was adopted and it came into force in January 2004, thirty days after its ratification by fifteen member states of the AU.
[55] For example, the Arab Charter on Human Rights was adopted by the League of Arab States in 1994. An amended version of it entered into force on 16 March, 2004. It establishes the Arab Human Rights Committee.

The point to note is that although human rights are said to be universal they tend to be viewed in slightly different light from one region to another. There is no doubt that some aspects of the concept of human rights take on a different perspective when adopted or incorporated in the vocabulary of cultures other than the Western liberal tradition. The African Charter, though conceived as an instrument that would complement the international bill of human rights, was created as a regional legal instrument, which takes into account the peculiar history and the specificities of Africa. What were these specificities? One would ask.

The group of African experts drafting the African Charter rejected the initially proposed convention adopted at the Monrovia Seminar on the establishment of an Africa regional human rights commission[57]. The reason advanced for the rejection was that the convention proposed simply set out standards embodied in other international conventions and declarations and showed no influence of African cultural traditions and values. Two of the African values and traditions that the Charter was meant to take into account were very clearly articulated and emphasised at that time. The first of these was the existence in the whole continent of a very strong feeling of community, with the social African structures giving more importance to the group than to the individual. The second was the economic underdevelopment of the African countries.

When finally the drafters of the African Charter completed the drafting of the Charter, while drawing heavily on universal human rights instruments, emphasised the importance of incorporating an African conception of human rights into the Charter. The final document emphasised 'peoples' rights' and speaks of 'duties' and the importance of the role of the individuals in the community and the family. This is reflected in the preamble of the African Charter that refers to:

> the values of African civilisation, which should inspire and characterize [the] reflection [of the African States] on the concept of human and peoples' rights.

Preambular paragraphs 4 and 6 state respectively that:

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[56] A Durbach, C Renshaw and A Byrnes, '"A tongue but no teeth?": The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region' 31 *Sydney Law Review* 211.
[57] See Gittleman 'The Banjul Charter on Human and Peoples, Rights: A Legal Analysis,' in Welch and Meltzer (eds) (n 16).

> 4. Taking into consideration the virtue of their historical tradition and the values of civilisation which should inspire and characterize their reflection on the concept of human and peoples' rights.
>
> 6. Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone…

The Banjul Charter presented at the time the most promising regional human rights monitoring system. Chris Maina Peter made the following comment which is typical of the optimism that greeted the establishment of the African Charter.

> The adoption of the African Charter on Human and Peoples' Rights was an epoch-making event, not only to the over millions Africans but to peace loving and democratic minded people the world over. It was the crescendo of sporadic and sometimes uncoordinated attempts by different interest groups in Africa to create a legal mechanism that would guarantee fundamental rights and freedoms to the common people. For many Africans the Charter had created high expectations especially regarding the restoration of human dignity, which had been totally violated by some African leaders.[58]

It was believed by many, and quite sincerely too, that the concept of human rights, viewed through the African prism, would take on African emphasis and would be truly reflective of African values. Writing on what he thought the establishment of the African Charter meant for Africa, Kunig opined that:

> The African Charter on Human and Peoples Rights is a significant piece of law by young states. It represents the heritage of the Universal Declaration of Human Declaration and also follows the United Nations Conventions on Human Rights, but does not assert rights which are either not yet realisable or have few roots in African traditions….All in all the Charter thus demonstrates an independent approach by comparison with other regional conventions on human rights, which also reflect its provisions on the sources of law; customary law

[58] C M Peter, *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (Greenwood, New York 1990) 7.

practiced by states and general principles of law contained in their nations' legal systems are emphasized without rejecting universal international law in principle.[59]

3.4. THE UNIQUENESS OF THE AFRICAN CHARTER: NATURE OF THE RIGHTS AND DUTIES

The African Charter sought to create a regional human rights system which was intended to run on similar lines as that of the American and European human rights systems. Its uniqueness derives mainly from its cultural component and the question of African development, as embodied in the guidelines submitted to the Committee of Experts that drafted the Charter, namely that the Charter 'should reflect the African conception of human rights, [and] should take as a pattern the African philosophy of law and meet the needs of Africa.'[60]

Normatively, the African Charter is clearly an original and innovative legal instrument in comparison to the general system aimed at the international protection of human rights. It represents the claims of the African people. As Murray elucidates,

> this uniqueness is illustrated by, for example, the inclusion of civil and political rights, economic, social and cultural rights and peoples' rights in one document treating them as indivisible; and the drafting of provisions relating to the latter and to duties of the individual in considerable detail. This has led some to claim that it is the most interesting of the regional instruments.[61]

Made up of 68 articles and divided into four chapters, namely: Human and Peoples' Rights; Duties; Procedure of the Commission; and Applicable Principles, the African Charter, from a theoretical point of view, is beyond any doubt a very compulsive document. It is seen as a matchless document that safeguards the claims of the common man in Africa. It platforms

[59] P Kunig, 'The Protection of Human Rights by International Law in Africa' (1982) 25 *German Yearbook of International Law* 138, 167.
[60] See Amnesty International, *The Organisation of African Unity and Human Rights,* AI Index IOR 03/04/87 at 8.
[61] R Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, Cambridge 2004).

Africa's first effort to introduce some regularised human rights standards in a continent that had been torn by violent ethnic clashes, despotic national leaders, and rampant human rights abuses. It contains most of the very well-known human rights provisions, which are also to be found in other human rights instruments. The Charter provides for the so-called first generation human rights, i.e. the civil and political rights of the individual, namely the right to equality (article 3); the right to life and integrity (article 4); the right to dignity and the prohibition of slavery and cruel inhuman and degrading treatment or punishment (article 5); the right to liberty and security (article 6); the right to a fair trial (article 7); freedom of conscience and religion (article 8); freedom of speech and the right to receive information (article 9); freedom of association and of assembly (articles 10 and 11); freedom of movement and residence, the right to seek asylum, the prohibition of mass expulsion of non-nationals (article12), the right to participate in the government of one's country (article 13) and the right to property (article 14). The Charter also makes specific mention of the protection of the family and of women, children, the aged and the disabled.

The second category of rights provided for by the African Charter is the economic, social and cultural rights of the individual. Indeed, the African Charter guarantees the right to work under equitable and satisfactory conditions; the right of everyone to enjoy the best attainable state of physical and mental health and, finally the right to education and to take part in the cultural rights of one's community.[62] There is nothing special to say about those rights except that there is no hierarchy between them and civil and political rights. The guarantee of civil and political rights was not intended to take precedence over the guarantee of economic, social and cultural rights. This is clearly expressed in the preamble of the African Charter, which states that:

> civil and political rights cannot be dissociated from economic, social and cultural rights in their conception" and that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

[62] See art 15, 16 and 17 of the African Charter.

Indeed, the African Commission in *Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*[63] stressed the point that internationally accepted ideals of the various obligations engendered indicate that all rights – civil and political rights and social and economic rights – generate at least four levels of duties for the state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights.

The third category of rights provided for by the African Charter is that dealing with rights of solidarity. It provides for people's or group rights. These rights which could be categorized either as rights of liberty or as rights of solidarity. They are otherwise unhappily categorised as third generation human rights. These are the right of peoples to political self-determination and the right of peoples to freely dispose of their wealth and natural resources.[64] Such rights have been interpreted in a rather restricted way by the African Commission. In *Congrès du Katanga v. Zaire*,[65] a claim brought under article 20(1) of the Charter, the claimants alleged no specific breaches of other human rights apart from the claim of denial of self-determination. They sought recognition as the Katangese people who sought independence for Katanga from Zaire. The Commission ruled that self-determination may be exercised by way of independence, self-government, local government, federalism, co federalism, unitarism or any other form of relations that accords with the wishes of the people, but fully cognisant of other recognised principles such as sovereignty and territorial integrity. The Commission rejected the claim to self-determination in favour of the sovereignty and territorial integrity of Zaire.

It must be stressed that liberation and solidarity rights are not new and it is not the first time that they have been mentioned in an international binding agreement. Indeed, the Convention on the Prevention and Punishment of Genocide[66] and common article 1 of the twin UN Covenants of 1966 mention some of those rights.[67]

[63]Comm no. 155/96.
[64] This is in art 19 20 21 22 and 23 of the African Charter.
[65]Comm no 75/92.
[66] It was approved by the General Assembly of the United Nations on 9 December 1948.
[67] Art 1 of the ICCPR provides for peoples' right to self-determination and to freely dispose of their natural wealth and resources. Art 1 of the ICESCR is similarly worded.

In as far as its substantive content is concerned, perhaps the most striking and distinguishing feature of the African Charter is that it weaves a drapery which includes the three 'generations' of human rights in a single instrument namely, the civil and political rights of the individual, the economic, social and cultural rights of the individual and group and peoples' rights[68] The African Charter is the only international human rights instrument that does so.[69]

Perhaps a controversial, yet distinguishing feature of the African Charter, and which is more relevant to the present discourse, is its emphasis on the duties of the individual. The Charter devotes a whole chapter to the duties of the individual members of the African society. In three articles namely, article 27, 28 and 29 and, in no less than eleven paragraphs, the Charter sets out these duties of the individual towards his family and society, the state, other legally recognised communities and the international community.

The African Charter departed rather fundamentally from the narrow formulations of the universal and the other regional human rights instruments. It could indeed be disconcerting for any reader accustomed with the classical conception of human rights. However, a closer look at the African Charter and the enlisted rights and individuals duties within it, will show us that there are many existing ambiguities and gaps in the formulation of some of the rights and private duties. As the criticisms against the Charter in general all lend credence to the suggestion that the Charter needs reform, it is instructive to point these out before zeroing in on those criticisms targeted specifically at individual duties provisions.

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[68] Mutua (n 31). The concerns that were raised at the universal level regarding the drafting of either a single document or two separate documents to take care of civil and political rights on the one hand and economic, social and cultural rights on the other hand are well documented. The final decision of the United Nations was that it was neater and more sensible to draft two different covenants, one for each of the two categories of rights. In the same way, in the European system, there are two different agreements, each one protecting only one category of rights, the European Convention itself and the European Social Charter. In the American system too, there is the American Convention of 1969 and the Protocol of San Salvador which was adopted in 1988, each dedicated to a different category of rights. The drafters of the African Charter were not discouraged by either the concerns expressed or the precedents set at universal and regional levels regarding setting all forms of rights in one document. Another distinctive attribute of the African Charter is that it is the only regional human rights document which provides for group and peoples' rights. It is the first and only internationally binding agreement to do so. As a matter of fact, the African Charter provides for the right of peoples to their economic, social and cultural development, the right of peoples to the equal enjoyment of the common heritage of mankind, the right of peoples to international peace and security and the right of peoples to a general satisfactory environment favourable to their development

[69] The classification of human rights into categories is no longer fashionable since all human rights are universal, interrelated, indivisible and interdependent. Indeed, the Vienna Declaration and Programme of Action 1993 affirmed this position.

As regards civil and political rights three observations can be made. First, the African Charter omits certain human rights that are guaranteed by the international bill of human rights and the American and European Conventions systems. Among the rights not guaranteed by the African Charter are the right to form and join trade unions; the right to equal protection of all children whether born in or out of wedlock;[70] the right to marry with the full and free consent of the intending spouse; and the freedom to change ones religion. The Charter, of course, mentions freedoms of association and assembly and deals with the right to work under equitable and satisfactory conditions just as it deals with freedom of conscience and free practice of religion. The point is that the scope of those rights in the Charter is not as well refined as is the case in international or other regional human rights instruments. Second, unlike the American and European Conventions, the African Charter does not contain a provision on capital punishment and does not provide for the right of nationals not be expelled, or the prohibition of forced labour. Third, there is noticeable vagueness in the formulation of civil and political rights guaranteed by the African Charter. Take for example, the fair trial provisions. Many important components of the right to a fair trial are omitted. The African Charter does not provide for the right of the detainee to be informed of the reasons of his/her detention or the charges against him/her; the right to have recourse to a court to review the lawfulness of the detention; the right to a public hearing and the right to appeal the judgement to a higher court. Yet, these are crucial components of the right to a fair trial that are clearly elaborated in other human rights instruments. It may not be entirely correct to say that these rights are assumed under article 7 of the African Charter. In fact, the provisions of the African Charter specifically relating to the right to a fair trial have been found wanting for what they do not cover. In its methods of work, the African Commission decided to elaborate on the right to a fair trial as set out in article 7 of the African Charter, a confirmation that the African Charter provisions regarding the right to a fair trial are considered rather laconic.[71]

[70] The African Children's Charter appears to have in a way addressed this in articles 23(3) and 25.

[71] The African Commission gave an elaboration of its understanding of the content and scope of the standards implied in article 7 of the African Charter, in what is referred to as the 'Dakar Declaration'. The Dakar Declaration was adopted at a seminar organized by the African Commission on Human and Peoples' Rights in collaboration with the African Society of International and Comparative Law and Inter-Rights on the Right to a Fair Trial which was adopted in Dakar Senegal on 11September 1999 <www.chr.up.ac.za/images/files/documents/ahrdd/theme17/fair_trial_dakar_declaration_1999.pdf>accessed 14 November 2013.

With respect specifically to individuals' duties, if one were to take an extreme view, it is plausible to argue that some of the duties of the individual as set out in the African Charter are profoundly flawed, as they appear incapable of being given any proper and precise meaning. This makes some of the outlined duties of the individual at best vague and at worst completely unenforceable. Member states consequently face many difficulties as they try to comprehend the scope and demesnes of the outlined duties. This lack of comprehension on the part of the states is reflected in their failure to report, under article 62 of the African Charter, in a convincing manner, as to how they have implemented these provisions in practice. This also makes the portion of the reports touching on individual duties submitted by the member states under article 62, vague and bemusing, thus highlighting the fact that the African Charter may need some reform, or a more deliberately expansive interpretation by the African Commission than has hitherto been the case. As will be shown in this chapter, neither of these two options appears to be immediately open. To begin with, one is inclined to think that the prospects of reforming the African Charter are rather remote. As Murray observes, the failure or reluctance to remove the flaws that have plague this system seems to be more 'historical and procedural, rather than deliberate'[72] As for an expansive interpretation of the flawed individual duties provisions specifically by the African Commission which receives state party reports under article 62, or the African Court which has an adjudicative function over human rights and duties, chances of being afforded an opportunity to determine a dispute premised solely on any of these provisions, are distant because of a combination of factors, two of which stand out. First, states would never report conclusively on duties provisions, as their role in ensuring compliance is undefined, given the vague formulation of some of these duties which are cast on individual rather than state. In fact, while the African Commission has not had a chance to make any finding in any communication before it on the merits in relation to individual duties, domestic courts have. For instance, in the case of *d'Almeida Gaétan and Hilaire* before the Constitutional Court of Benin, it was found that two children have violated their duty *vis-à-vis* their parents by physically abusing them.[73].

[72] R Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, Cambridge 2004) 71.
[73] Republic of Bénin Constitutional Court Decision DCC 96-024, 26 April 1996 <http://www.cour-constitutionnelle-benin.org/doss_decisions/960424.pdf.>accessed 18 July 2015.

Second, the duties are directed at the individual and given that the state has no standing to petition an individual for violation of duties before the African Commission or the African Court, these provisions are bound to remain un invoked through communications either before the Commission or the Court. At best, what a state would do is to read its own obligations into the duties provisions in a Charter, a treaty which in truth are directed at individuals. This should not necessarily be so for a document with a character as significant to the ordinary individual as the African Charter. It should require no esoteric interpretation to understand it. Chapter Six discusses in detail the weaknesses of the individual duties provisions. What can be stated right away is the well as some seemingly fundamental defects, the African Charter does have some very positive provisions in its normative content. As will be explained in detail anon, the inclusion of duties itself, though it has been used as a basis for criticism of the Charter, is hailed as an important facet in the protection of human rights. The bodies that the Banjul Charter and its Protocol on the Establishment of the African Court[74]has assigned to take care of the smooth running of the human rights agenda in Africa have immense challenges making sense of some of these provisions, which challenges are, however, not insurmountable.

Arising from some of the observations that have been made in respect of the African Charter provisions, a number of criticisms have been levelled against the African Charter. These are now considered.

3.4. CRITICISM OF THE AFRICAN CHARTER GENERALLY

The African Charter as a whole has received severe criticisms from various scholars and human rights commentators. Part of this criticism stems from the manner in which the provisions relating to individuals' duties are formulated. No useful purpose will be served by going through all these criticisms. A consideration of some of the main criticisms of the African Charter becomes relevant to the extent that they lend support to the suggestion being made that there is need to entertain the possibility of reform of the African Charter.

[74] The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (the Protocol) was adopted in Addis Ababa, Ethiopia on 10 June 1998 and entered into force on 25 January 2004 accordance with article 34(3) of the Protocol thirty days after its ratification by fifteen member states of the AU.

The well- documented criticisms against the African Charter have to do with the nature of the rights, claw-back provisions and implementability of parts of the Charter itself. These criticisms are probably due to the overambitious formulation of the Charter provisions and consequently the flawed nature of the Banjul Charter itself. There are some critics who have gone so far as to ascribe a less than sincere motive for the establishment of the African human rights system as a whole. Umozurike's early assessment was that the African Charter may well be a paper tiger except for effective public opinion that may be whipped up against the offender.[75] Welch for his part described the African Charter as

> [t]he armature of human rights protection… regionally by the Banjul Charter, are far weaker than in the Western European states, and significantly weaker than in most western hemisphere countries that have ratified their respective regional conventions.[76]

Sinkondo dismissed the African Charter as follows:

> The Charter is an example of 'solemn comedy' come into existence as a result of international pressure; its real purpose would be to exonerate states from their responsibilities in the field of human rights. The focus on development, on peoples' rights and on individual duties would all serve the same goal: decrease the role of individual rights especially the responsibility of African states for the promotion of these rights. The specificity of Africa human rights law is without a scientific basis and without ethical justification.[77]

Takirambudde says:

> [t]he Charter is an instrument that is deliberately left without teeth, designed to be merely stimulation. The real intention of the governments who created it was not to join the

[75] U Umozurike, 'The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights,' (1988) *African Journal of International Law* 65.
[76] C E Welch, Jr., 'The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment' (1992) 14 *Human Rights Quarterly* 43.
[77] H M Sikondo, 'La Charte Africaine de Droit de l'Homme et des Peuple ou les aprories juridique d'une convention encombrante' (1994) *Recueil, Penant* 285.

> universal human rights movement, but rather to curve out a geographical exemption from universal standards.[78]

Other criticisms are directed at the implementing organs. Murray for example, observes, and perhaps correctly, that 'from the adoption in 1981, and coming into force in 1986 of the African Charter on Human and Peoples' Rights, this regional mechanism has been criticized for being ineffective, poorly funded, lacking impartiality, and based on ambitious and unenforceable rights.'[79] In similar fashion, Heyns notes that 'Africa has often been criticized on account of its human rights record, and the African Charter system in particular has been subjected to stringent criticism due to its apparent inability to improve the situation.'[80] Writing on the African Charter in 2000, Steiner and Alston designated the African regional human rights system as 'the newest, the least developed or effective...the most distinctive and the most controversial'.[81] Commenting on what the authors of this description of the Charter perceived of Africa's human rights instrument, Olowu wrote that:

> they must have had in their minds the picture of an ambivalent regional system, of the helplessness of the human rights standards to tame the vicious spirit of genocidaires, age long rebels and brutal dictators, as well as the unmistakable pangs of human misery, in a continent replete with manifest contradictions between human rights norms and effective human rights protection.[82]

The claw back provisions and the articulation of solidarity rights in the African Charter, have been particularly said to speak volumes about the over broad formulation of rights. Powell and Allison argue that they are perhaps the most serious flaw in the African Charter.[83] The various 'claw-back' clauses and the flawed language used in the Charter have made the human rights

[78] P Takirambudde, *The Individual under African Law* (University of Swaziland, Swaziland 1982) 38.
[79] R Murray, 'The African Charter on Human and Peoples' Rights 1987 – 2000: An Overview of its Progress and Problems' (2001) 1 *African Human Rights Law Journal* 1. See also, G Robertson, 'Crimes against Humanity: The Struggle for Global Justice' (2000) 63, cited in C Odinkalu, 'The Role of the Case and Complaints Procedures in the Reform of the African Regional Human Rights System', in (2001) 2 *African Human Rights Law Journal*, 225.
[80] C Heyns, 'The African Regional Human Rights System: In need of Reform?' (2001) 2 *African Human Rights Law Journal* 156.
[81] H J Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (OUP, New York 2000) 920.
[82] D Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (PULP, Pretoria 2009) 50.
[83] S Power and G Allison, *Realising Human Rights: Moving from Inspiration to Impact* (Macmillan Palgrave 2000) 146.

system, a game in the hands of the authoritarian rulers some of who still plague modern African states. The rights and duties enlisted in the Charter are completely dependent on the national laws or on the whims of the ruling government. An example of this is the article 10, which states, '[e]very individual shall have the right to free association provided that he abides by the law.' So the fulfilment of this right is made dependent on the existing national laws, a hindrance in the proper development of human rights in the state. However, in *Legal Resources Foundation v. Zambia*,[84] the African Commission reiterated that claw back provisions in the Charter cannot be used by a state to avoid its international obligation under the Charter. In that case, Zambia had sought to rely on the limitation provisions of the right against discrimination contained in its own republican constitution.[85] It argued that the right against discrimination was according to Zambian law restricted in certain respects and, therefore, that there was no breach of the provisions of the Charter, which clearly recognised that, the enjoyment of the rights under the Charter must be in accordance with the law. In rejecting that argument, the Commission stated that:

> The Commission has argued forcefully that no state party to the Charter should avoid its responsibilities by recourse to the limitations and 'claw-back' clauses in the Charter. It was stated following developments in other jurisdictions, that the Charter could not be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of the State Parties in terms of the Charter…

[84] Communication No. 211/98

[85] Article 23 of the Constitution contains a general protection from discrimination on grounds specified in sub-article (3) i.e. race, tribe, sex, place of origin, marital status, political opinion, colour or creed. Perhaps of significance is sub-article 4(c) and (d) of Article 23. It states that the anti-discriminatory provision shall not apply to any law that makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law and for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other person. This claw back provision in a way sanctions discrimination.

Notwithstanding this finding by the Commission, however, there is no doubt that claw- back provisions have the potential, in some cases, of negating or watering down the substantive human rights provisions in the Charter, hence the continuing criticism of claw back provisions.

The African Charter has thus been viewed in some instances as a mere instrument containing provisions of noble ideals which unfortunately are devoid of any precise definition and meaning. Gittleman has described the African Charter as 'woefully deficient,' particularly in regard to its treatment of the right to liberty.[86] Chidi Odinkalu suggested that 'foremost among the problems that the Commission has encountered is the very text of the African Charter itself, which like the Rules of Procedure, is opaque and difficult to interpret.'[87]Mutua puts the position rather bluntly when he describes the Charter as 'a façade, a yoke that African leaders have put around our necks.'[88]

Heyns is of the view that the African human rights system is faced with almost insurmountable challenges: massive violations on a continent of immense diversity, where a tradition of domestic compliance with human rights norms is still to be established. The trade and communication links that are necessary to exercise influence over member states do not exist.[89] He concluded that the African Charter should be reformed to keep abreast of the times. Clearly, the basis of that suggestion may no longer be valid. Communication links have since that criticism was made over a decade ago, generally seen many improvements. However, the general point that there is need to attend to reforming the Charter is still as valid.

Benedek posits that the African Charter could aptly be described as a static document, and a suggestion could therefore be made that the African Charter be revisited to make it more

[86] R Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1981-82) *Virginia Journal of International Law* 667, 694. J B Mzizi used a similar description in regard to the enforcement machinery in 'Human Rights, Peace and the African Charter on Human and Peoples' Rights' (1988) *African Legal Aid Quarterly* 37.
[87] C A Odinkalu 'The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *Transnational law and Contemporary Problems* 359, 406.
[88] M Mutua 'The African Human Rights System in a Comparative Perspective' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 511.
[89] C Heyns, 'The African Human Rights System: The African Charter' (2000) 108 Penn ST L Rev 679 reproduced in D L Shelton, *Regional Protection of Human Rights* (Oxford University Press, New York 2008) 108.

anthropocentric.[90] Gittleman further writes that the African Charter is 'incapable of supplying even a scintilla of extended restrain upon a government's power to create laws contrary to the spirit of the rights granted.'[91] Okere for his part has described the African Charter as 'modest in its objectives and flexible in it means.'[92] This could entail both weakness and strength of the document. On a more optimistic note, however, Okafor allays the concerns implicit in the various views over weaknesses of the African Charter when he state that:

> [w]hile most of these rather grim descriptions of the Charter are not lacking in some factual basis, the truth is that these criticisms are often more or less overstated. The glass of the African system has often been seen as half-empty rather than half full.[93]

For Kotey the African Charter represents the achievable minimum. A strong text of the Charter might not have been so generally ratified, and a weak but functioning system is preferable to no system at all.[94] This researcher takes the view that the admission that the criticisms are well anchored factually should in itself give one reason for concern that the whole African Charter may well be due for reconsideration.

3.5. CONCLUSION

With a view to situating the notion of individual's duties in the African human rights system, this chapter has discussed the concept of human rights in Africa from pre-colonial times to present. More importantly, the chapter has examined the historical background to the adoption of the African Charter, especially the conditions that precipitated the establishment of the African human rights system. It is the perspectives on the concept of individuals' duties in the African Charter that form the reference point in the remainder of this work.

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[90] W Benedek, 'The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective' (1993) 11 *Netherlands Quarterly of Human Rights*25 31.
[91] Gittleman (n 86).
[92] O Okere 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples 'Rights: A Comparative Analysis with the European and American Systems' (1984) 6 (2) *Human Rights Quarterly* 158.
[93] O C Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge University Press 2007) 80.
[94] E Kotey, 'The African Charter on Human and Peoples' Rights: An Exposition, Analysis and Critique (1985) 85 *University of Ghana Law Journal* 130 132.

The chapter has sought to explain why Africa, which had many examples to learn from, chose to make its human rights system unique, while drawing heavily on existing global and regional systems.

CHAPTER FOUR: THE NOTION OF INDIVIDUALS' DUTIES IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

4.1. INTRODUCTION

Amartya Sen makes the pertinent remark that one of several questions a theory of human rights has to address is what duties and obligations human rights give rise to.[1] In a general way, part of the preoccupation of this chapter is to address this question and kindred issues.

In the previous chapters, reference was made to the notion of duties in the international, regional and national human rights scheme. In delving further into the notion of obligations created for individuals by human rights, as well as the pedigree of those obligations, this chapter considers an expanded conception of duty and examines the fundamental features of a general scheme of duty assignment and studies the implications for individuals. The thrust of the chapter is to show that individuals' duties, obligations or responsibility in the context of human rights have an intersecting character of both a legal and a moral/ethical dimension, with compulsion to obey being available in some kinds of duty but not in others. The chapter argues that to the extent that some individual duties are grounded in ethical and moral behaviour, it is difficult to develop wholesale international human rights standards around individual duties in the same way as rights. Without playing down or dismissing calls for greater recognition of individuals' duties in the human rights sphere, the chapter puts forward one hypothesis, namely that conception shapes realisation and, therefore, a flawed conception impairs any reasonable prospects of realisation. In this respect the chapter attempts to steer both debate and action into potentially more dynamic channels, making more realistic the demands for greater recognition of duties and more likely the behaviour needed to realise them.

In magnifying the standard view of duties, the chapter endeavours to show the definitional differences between duty, obligation and responsibility before discussing the different types of duties. The philosophical basis of duties is given, considering in the process, the ethical

[1] A Sen, 'Elements of a Theory of Human Rights' (2004) 32 (4) *Philosophy and Public Affairs* 318.

foundations of individual duties and the deontological arguments around the subject of duties. The chapter examines the doctrine of logical correlativity which views rights and duties as always correlative and assesses duties as counterparts of rights, as well as tools for interpreting rights. The efficacy of duties as independent of rights will also be examined.

In order to give a balanced view of duty as an organizing concept, the treatment of duties in international and regional human rights instruments as well as in domestic legislation and constitutions of several countries representing various regions of the world, religious beliefs, cultures and historical developments will be considered. The chapter further shows the difficulty that attends formulation and inclusion of purely moral and ethical duties in mandatory and enforceable terms. It will argue that where, as in many situations in domestic settings, duties are of private concern, remedying their breach is best left to individuals to pursue and therefore that such duties should not be part of the general international human rights framework.

4.2. THE MEANING OF THE TERM 'DUTY' AND THE VARIOUS NOTIONS OF THE CONCEPT OF DUTY

A discussion of the term 'duty' which begins without a definition of the term itself tempts the same fate as the blind men in the fable who try to describe an elephant. The question what a duty is for purposes of this project cannot be an idle question to pose. How one understands duty will naturally influence one's judgment on the debate on duties. It is vitally important in this regard, therefore, to attempt, at least a description of the term 'duty'.

A literary definition of the term duty is that it is

> what one is obliged to do by morality, law, a trade, a calling, conscience, etc.; inner voice urging one to behave in a certain way; ... moral obligation;... payment demand by the government on certain goods exported or imported (customs duties), or manufactured in the country (excise duties) or death (estate duties).[2]

[2] AS Hornby, *Oxford Advanced Learners Dictionary of Current English* (Oxford University Press, Oxford 1974) 271-2.

The part of this definition which relates duty to what one is obliged to do by morality, law...,'etc., is closer to the sense in which the term 'duty' is employed in this study.

An analysis of the concept of individual duties can be quite complex and involving. It is not the purpose of this chapter, however, to highlight and ventilate all the ethical and jurisprudential arguments around the concept of duty in the human rights framework. That is far beyond the scope of this work. Only so much as is necessary to properly situate the notion of individual duties in the wider human rights structure and within calls for more focused attention on individual duties, will be considered.

As was seen in Chapter Two of this dissertation dealing with an overview of the concept of human rights, philosophers have orthodoxly drawn a distinction between two kinds of rights: 'positive' rights and 'negative' rights. The dissimilarities between these two kinds of right gyrate around the view that granting someone a right generates an obligation for others to honour that right. This distinction is much easier to appreciate when one has in mind economic, social and cultural rights on one hand, and civil and political rights on the other hand. With positive and negative rights, the nature of the obligations created is different. To recap, negative rights belong generally to a category referred to by Karel Vasak as 'the first generation rights'[3] and they include the embryonic rights of man such as the right not to be murdered or harmed, freedom of speech and expression, the right to ownership of property and the right to privacy, which are honoured by people not doing things that would infringe these rights, creating a 'negative obligation' on the part of others. Positive rights, largely but not exclusively associated with what are unhappily sometimes referred to as second generation rights,[4] on the other hand, refer to social and economic goods that people are entitled to, such as the right to receive education, health, shelter or adequate food, which are honoured by other people doing things in order to

[3] K Vasak, 'A Thirty-Year Struggle – The Efforts to Give Force of Law to the Universal Declaration of Human Rights,' (1977) *UNESCO Courier*. For a critique, see R Rich, 'The Right to Development A Right of Peoples?', in J Crawford (ed), *The Right of Peoples* (Clarendon Press, Oxford 1988) 39-43.

[4] As U Umozurike observes in *The African Charter on Human and Peoples' Rights* (Kluwer Law International, The Hague, 1997) 2, despite some controversy, the categorisation of these rights into first and second generation rights, seem fitting in the context in which it was made. It was not intend to convey any suggestion that the earlier generation fell into disuse giving way to a later generation, rather than the earlier generation was recognized first in point of time, before the later ones.

provide these entitlements, creating a 'positive obligation. Of course, some first generation rights do also entail positive obligations. In fact, the dichotomy of positive and negative obligations no longer an elegant way of categorising rights. It is much more useful to regard all rights as interdependent and indivisible and entailing a variety of obligations on the state and the individual.

In the human rights discourse, there is a general view that human rights claims set out requirements from the point of view of recipients who are entitled to, or have claims to action or forbearance by others with corresponding obligations. The obligations imposed on individuals to honour other people's positive and negative rights, borne out of various factors, are, in general, the individual duties that this work is primarily concerned with. Yet, as will be shown later in this chapter, these are not the only individual duties known in the human rights conversation.

There are different notions of duty as a general concept.[5] As far as conduct is concerned, human behaviour is controlled mainly through the imposition of duties and obligation on individuals. These duties do not only designate behaviour; they prescribe it. Conduct which fashions duties and obligations may consist in an omission, an action by itself, an action in relation to specific circumstances, or an action in relation to both circumstances and outcomes. Lord Acton, highlighting the purpose of duty in shaping conduct, laconically remarked that 'if men are not kept straight by duty, they must be by fear. The more they are kept by fear, the less they are free. The greater the strength of duty the greater the liberty.'[6]

As far as duties which envision behaviour alone are concerned, the behaviour could be in the form of an act or an omission. Such a duty may be contractually created. An example of behaviour which envisions conduct in specific circumstances is an appointment for an artist to perform at a gala night. Here the duty is created by the circumstances and peculiarly assumed by the duty holder and may be legal in character. Yet the same act could constitute both a moral and a legal duty. For instance, there is no legal duty that restrains a person from getting drunk.

[5] See generally ch 8 in R W M Dias, *Jurisprudence* (Butterworths, London 1970).
[6] Lord John Emerich Acton, *The History of Freedom*. See J D Watkins, 'Morality, Duty, Responsibility and Authentic Liberty' *Religion and Liberty* (Acton Institute 2014).

There may however be a moral duty not to get drunk. There is a legal duty, and probably a moral one too, which restrains a person from getting drunk when in charge of a vehicle.[7]

As regards duties which contemplate behaviour both in relation to specified circumstances and results, criminal law and tort, offer some useful examples. In this connection, the difference between acts and omissions should always be borne in mind. The duties set out in these two branches of law envisage specific results and are typically couched in the negative, i.e., not to produce a given result. What are disapproved are acts or omissions which produce those results. Responsibility is attached to such failure, provided it brings about a given result. If, contrary to these commands not to bring about a given a given set of results, they do conduct themselves in that manner, their conduct would be regarded as blameworthy. Many of these duties contemplate different degrees of blameworthiness. It is thus possible to categorise the severity of the duty imposed. At one end of the spectrum could be those duties that require no culpability at all, i.e., strict duties. In all such cases, the duties simply forbid the doing of certain actions or the causing of certain results. Here the question of the mental element in breaching the duty is irrelevant. One is guilty of breach of duty once the forbidden act is done or the proscribed consequence occurs. Next in the order of sternness are duties which carry a mental element. For example, where the duty requires that people should not act negligently, such duties may be conditioned by the kind of result that ensues. Where, for example, there is a duty not to inflict a particular type of harm negligently, there is also a duty prohibiting the thoughtless or deliberate infliction of it. The duty is not breached if no harm results no matter the degree of negligence exhibited.

Another point to note is that duties may apply only to a category of persons. Whether the duty is breached or not is a question determined by not only the happening of a particular kind of result but also the kind of person who causes it. Such person must be in the category recognised to have the relevant duty.

According to Ross, people mostly discharge their duties to live up to their promises as goodwill.[8] This means, many a times people perform their duties basing on advantages and disadvantages.

[7] Normally, this will be a legal duty. Traffic laws and regulations in most countries make it an offence to drink and drive.

This being the primary concept of duty, Ross expects individuals to be rational in discharging their duties in a manner that does not harm the interests of others. He is of the conviction that human rights are underpinned by this perception of duty. To remove the present day malaises, and to improve the moral and ethical standards among individuals as beneficiaries and defenders of human rights, human beings ought to discharge their duties.

What is clear even from the little thus far discussed on duties is that a duty may be a legal obligation, for example the obligation to obey traffic lights, or to pay taxes. It may also be an ethical obligation, for example, a duty not to tell lies or a duty to help others in need. Ethical obligations are assumed based on moral rules which individuals feel obliged to follow merely because it is morally right to obey them. Legal duties on the other hand, are those duties which people are compelled by law to perform with legal sanctions attending their non-performance. Ethical and legal obligations are thus quite different in character. In some instances, however, these duties may and do overlap so that an action that is ethically right is also one that is legally required.

4.2.1. Are duty, obligation and responsibility the same?

While the terms 'duty', 'responsibility' and 'obligation' are generally treated as synonymous, there are very significant difference between them. As observed by Brandt the practice of using these words as synonyms obscures important difference among 'wrong', 'obligation', 'duty', and 'ought' since language does not proliferate forms without corresponding functions, and 'the philosopher who lumps these words all together is at least ignoring distinctions ordinary language makes; much worse, he may be led by his lack of discrimination into confusion and oversight of substance.'[9] This researcher agrees with this observation. The nuances of meaning in the terms 'duty', 'responsibility' and 'obligation' are worth pointing out in this work because they shape part of the argument this study makes, namely that clarity in conception of what is

[8] W D Ross, *The Right and the Good*, Philip Stratton-Lake (ed) (Oxford University Press, New York 2002) (rpt. of original 1930 edition). Ross rejected consequentialist ethics and argued that maximizing the good is only one of the *prima facie* duties which play a role in what people should or should not do in any given circumstances.
[9] R B Brandt, 'The Concept of Obligation and Duty' (1964) 73 *Mind* NS 374-393.

meant by individual duties shapes realisation and, therefore, that a flawed conception will make realisation difficult, if not all together, impossible.

4.2.1.1. Duty and responsibility

In general, the term 'duty' refers to something that a person must do because of legal, societal, social or familial expectation. Duty suggests action which the agent merely observes or in which he or she acts in accordance with the will of another or because of a legal requirement. Gardner explains 'responsibility' as 'the value of being able to offer an account of oneself as a rational being' or 'the ability to offer justification and excuses.'[10]This is because the notion of responsibility is more extensive and more abstract and it may, in many instances, only have a subsidiary relationship to another's rights. Cane points out that it is wholly possible for there to be 'responsibility without legal liability and legal liability without responsibility.'[11]In this sense, therefore, he argues that responsibility cannot be synonymous with legal liability. For example, a person's freedoms of movement, expression and association may put other people under a duty to respect these rights, but that person is morally responsible for the exercise of those freedoms. Thus, where he goes pursuant to his freedom of movement, how he expresses himself pursuant to his freedom of speech and whom he associates with as he exercises his freedom of association are all matters implicating his moral responsibility. Responsibility signifies a conscious obligation imposed on oneself because of some concern for or connection one has with others. Unlike duties, responsibilities when understood in a normative sense connote obligations which can and are often self-assumed and which are highly discretionary. The moral agent is seen as someone who responds in a morally proper way through a decision of his own, often without there being any exterior power or sanction which would compel him to do so. A security guard has, for example, a duty to be at his workstation at designated times. While so stationed he is under a responsibility to ensure peace and security at his station This may simplistically be viewed as merely a duty to report for work and to ensure security, yet the argument should go beyond that. The security guard will have discharged his duty by reporting at his station, but will

[10] J Gardner, 'The Mark of Responsibility' (2003) 23 (2) *Oxford Journal of Legal Studies* 157-171 166.
[11] P Cane, *Responsibility in Law and Morality* (Hart Publishing, Oxford 2002) 5.

not have discharged his responsibility if he did not satisfy himself that suspicious people or objects at his station posed no security risk.

In an effort to explain the distinction between duty and responsibility and using ethical theories in his analysis, Goodin states that '[r]esponsibilities are to consequentialists' ethics what duties are to deontological ones.[12] Duties dictate actions. Responsibilities dictate results'. He explains that both duties and responsibilities are prescriptions of the general form: **A** ought to see to it that **X**, where **A** is some agent and **X** some state of affairs. However, in the case of duties, the state of affairs, **X**, is some action of **A**'s own doing, while in the case of responsibilities the **X** cause need not refer to specific actions on the part of **A**. In the case of responsibility, **A** can delegate his responsibility to another person. For Goodin, what matters for responsibilities is that a certain result or state of affairs is obtained, not who does the specific action to bring about that outcome. In this way, he splits the difference between the Kantian deontological ethical theory[13] and the consequentialist ethical theory.[14] To the former ethical theory, the view that morally right action consists of acting in accordance with duty is central, while the latter theory in ethics assume that the goal of moral action is to bring about certain outcomes in the world. What Goodin does in his conception of responsibility is to hold that agents have several varieties of moral responsibilities which require them to see to it that certain outcomes are brought about or are avoided. The emphasis on duties of the individual, he says, only arises parenthetically, not principally, in moral action descriptions. Winston appears to be in sync with Goodin.[15] He states that while the distinction between these two concepts is not always clear in the way in which we use these terms in ordinary language, responsibilities provide ground for duties. Both duties and responsibilities are kinds of moral obligations, but the notion of responsibility is more basic. Duties, he argues, are actions that are chosen because they fulfil or help to discharge a moral agent's responsibilities. Therefore, in the case of the negligent mother, we can say that she had a duty to not leave her child unattended in the car while she goes into a beauty shop. A number of actions, such as taking her child with her into the shop, or leaving the child in the care of a

[12] R Goodin, 'Responsibilities' 36 (142) *The Philosophical Quarterly* 50. The deontological and consequentialist and other theories of human rights were covered in Ch 2.
[13] This was partly covered in Chapter Two of this work.
[14] This was partly covered in Chapter Two of this work.
[15] M Winson, 'An Ethics of Global Responsibility: Moral Responsibility and Duties'< http://ethicsofglobalresponsibility.blogspot.com/2008/02/moral-responsibilities-and-duties.html> accessed on 18 May 2014.

grandparent or baby sitter, would serve to fulfil her responsibility to protect her child from harm.[16]

In spite of the foregoing forceful observations, there are many instances when the term 'duty' and 'responsibility' are used interchangeably even in written instruments with no attempt being made to show the subtle difference which Goodin and Winston point to. The fact that these terms are used interchangeably in formal passages and texts in the same documents suggests one of three things: (i) that for the two terms to be used deliberately in the same document or text, there is an appreciation of some difference in meaning between them (which difference, regrettably, is often never stated in these documents) or, (ii) that there is an extravagant use of the terms without any thought as to the implications and practical effect of the usage of the terms or, (iii) that a catch all approach is deliberately employed to ensure that no related notion is left out and used as an excuse for non-observance of the burdens or expectations implied in each of these terms.

Without confining it to the individual level, an examination of a number of international and regional instruments, both binding and non-binding, does confirm the foregoing observation. In the Declaration of Human Duties and Responsibilities[17] also known as the Valencia Declaration of Responsibilities and Human Duties, adopted by the UN General Assembly while celebrating the 50th Anniversary of the UDHR in 1998, for example, the terms 'duty' and 'responsibility' are defined in article 1 respectively as follows:

> For the purposes of this Declaration, unless the context indicates otherwise:
>
> (a) 'duty' means an ethical or moral obligation;

[16] Ibid.

[17] Adopted by the high level group chaired by Richard J Goldstone under the auspices of the City of Valencia and UNESCO organised by the Valencia Third Millennium Foundation. See A/RES/53/144, 8 March 1999.

> (b) 'responsibility' means an obligation that is legally binding under existing international law.[18]

The Valencia Declaration also uses both duty and responsibilities in its assignment of roles. In the preamble, it states that:

> Emphasising that the assumption of the *duties* and *responsibilities* implicit in human rights and fundamental freedoms rests upon all members of the global community, including States, international, regional and sub-regional inter-governmental organisations, the private and public sectors, non-governmental organisations, citizen associations, other representatives of civil society as well as all individual members of the human family...[19]

In article 2, the Declaration identifies bearers of duties and bearers of responsibilities distinctly, assigning duties only to some and responsibilities and duties to others.[20]

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[18] It was Adopted by the high level group chaired by Richard J Goldstone under the auspices of the City of Valencia and UNESCO organised by the Valencia Third Millennium Foundation. See A/RES/53/144, 8 March 1999.

[19] Italics are the researcher's own for emphasis.

[20] It states that:

> 1 Members of the global community have collective, as well as *individual duties and responsibilities,* to promote universal respect for and observance of human rights and fundamental freedoms.
> 2 States have *a duty and a responsibility* to adopt all legislative, administrative, policy and other steps necessary to ensure respect, and to enforce and proactively promote, within their territory or under their jurisdiction, human rights and fundamental freedoms in all circumstances, including situations of armed conflict.
> 3 States have *a further duty* to take appropriate action, within the framework of the principles of international law, to promote the implementation of the human rights and freedoms of all humankind in all circumstances, including situations of armed conflict.
> 4 Competent inter-governmental organisations have *a duty,* in accordance with their mandates, to promote awareness of and to respect human rights and fundamental freedoms; to monitor compliance by States and other entities with *a responsibility* to respect and enforce human rights and fundamental freedoms; to assist States in the implementation of human rights and fundamental freedoms, and to use advocacy to help enforce human rights and fundamental freedoms.
> 5 Relevant non-governmental organisations have *a duty* to respect and promote, as best they are able, awareness of human rights and fundamental freedoms; to monitor compliance by States and other entities; to assist States and inter-governmental organisations in the monitoring and implementation of human rights and fundamental freedoms; and to use advocacy to help enforce human rights and fundamental freedoms.
> 6 Public and private corporations, especially transnational corporations, have *a duty* to respect, promote and implement human rights and fundamental freedoms in all spheres of their activities.
> 7 As the holders of human rights and fundamental freedoms, all individuals, peoples and communities in the exercise of their rights and freedoms, have *the duty and responsibility* to respect those of others, and a duty to strive for the promotion and observance thereof.

Clearly, these statements in the Declaration are not very helpful since they talk in terms of both duty and responsibility being obligations. Nevertheless, and more importantly, the definition of duty and responsibility in the Declaration suggests that duty is ethical or moral while responsibility is legal. In our estimation, this appears to be somewhat of an easy fit and leaves unanswered several questions not the least of which are whether there are no moral and ethical responsibilities contemplated in the Declaration and whether there are no legal duties envisioned in the Declaration? If the Declaration is not legally binding, should it really be a medium for pronouncing and assigning legally binding obligations?

The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Freedoms, an international instrument designed for the protection of the right to defend human rights and the creation of an environment that enables human rights defenders carry out their work,[21] also provides that:

> [e]ach state has the *primary responsibility* and *duty* to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.[22]

The Declaration provides in article 14, for the state's responsibility to take legislative, judicial, administrative or other appropriate measures to promote understanding by all persons under its jurisdiction, of human rights. In article 15 it provides for state's responsibility to promote and facilitate the teaching of human rights and fundamental freedoms at all levels of education while in article 18 it imposes duties on everyone towards and within the community in which alone the free and full development of his or her personality is possible. The Declaration also speaks of

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[21] Adopted by the UN General Assembly on the eve of the 50th anniversary of the UDHR; A/RES/53/144, 9 December 1998.
[22] Italics the researcher's own for emphasis.

'roles to play' by individuals, non-governmental institutions and relevant institutions. It is unclear whether these 'roles' should be understood as duties, obligations and or responsibilities.

It will be noted that the use in this Declaration too, of the terms 'duty' and 'responsibility' seems to suggest, without any attempt to clarify, that there are in fact two distinct subjects covered by the Declaration, namely; duty and responsibility, with each one of them applying to specified subjects.

The American Declaration on the Rights and Duties of Man[23] provided a long list of individual duties covered in ten articles in Chapter 2 of the Declaration.[24] The American Convention on Human Rights[25] however, did not include duties but instead condensed into a single article in chapter 5, headed 'Personal Responsibilities', the closest suggestion to duties without calling them as such. That article reads that:

> Every person has the *responsibility* to his family, his community and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of general welfare, in a democratic society.[26]

The African Charter confines itself to the term 'duties' in both the preamble and the main text.[27] In articles 27, 28 and 29, the Charter mentions duties rather than responsibility. Of note is that article 27 which serves as a general limitation clause on the rights in the African Charter appears

[23] Adopted at Bogota on 2 May 1948 at the 9th International Conference of American States, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*: OEA/Ser.L/V/II.71 at 17 (1988). The Declaration is a non-binding instrument.
[24] These duties are to society, towards children and parents, to receive instructions, to vote, to obey the law, to serve the community and the nation, with respect to social security and welfare, to pay taxes, to work and to refrain from political activity in a foreign country.
[25] Also called the Pact of San Jose, Costa Rica, the Convention entered into force on 18 July 1978. OATS No. 36 in OAS Doc. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1 Corr.1 (1970).
[26] Art 32. Italics the researcher's own for emphasis.
[27] In the preamble the following wording is adopted: '*Considering* that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.' In articles 27, 28 and 29 the following formulation is used: 27(1) 'Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community. (2) The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest; 28 'Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'

under the heading 'duties', signifying perhaps that duties and limitations are pretty much the same.

The African Children's Charter[28] on the other hand, interestingly uses both 'duties' and 'responsibilities'. In article 20, it mentions both duty and responsibility as follows:

> 1. Parents or other persons responsible for the child shall have the *primary responsibility* for the upbringing and development of the child and shall have the *duty*:
>
> (a) to ensure that the best interests of the child are their basic concern at all times;
>
> (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
>
> (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

In article 31, the African Children's Charter creates both responsibilities and duties for the child as follows:

> Every child shall have *responsibilities* towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the *duty*:
>
> (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
>
> (b) to serve his national community by placing his physical and intellectual abilities at its service;
>
> (c) to preserve and strengthen social and national solidarity;

[28] Adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999. Reproduced in C Heyns and M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (4th edn PULP, Pretoria 2010) 77- 89.

> (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
> (e) to preserve and strengthen the independence and the integrity of his country;
> (f) to contribute to the best of his abilities at all times and at all levels, to the promotion and achievement of African Unity.[29]

The foregoing are just but a few randomly selected examples of the many texts in important formal human rights documents in which the use the terms 'duty' and 'responsibility' is clearly intentional, yet such use is made of the terms in a manner which, though suggestive of a difference in them, does or may exist between these two terms, fails in truth to show that distinction in any way. As will be shown, this confusion in terminology echoes the author's reservations that the conceptualisation of duties in the human rights discourse leaves much to be desired. The absence of clarity on the terminology employed does contribute to the overall unfortunate perception that duties of the individual deserve less attention relative to rights.

4.2.1.2. Duty and obligation

As will be shown below, the term 'obligation' has also been used to refer to a responsibility – one that a person claims or is given. In this sense, duty is something natural, and obligation is something acquired. This lends credence to the caution that was made at the outset of this chapter that 'obligation', 'duty' and 'responsibility' are often used as synonyms and when any attempt is made to explain the difference between them, the distinction is not consistently reflected in the way the terms are used. This is understandable because each one of these terms suggests some burden entailing a requirement for their holders to perform or forbear something. Using these terms as synonyms, however, poses the risk of obscuring the whole notion of duties of the individual in the human rights discourse. Moreover, as will be seen Chapter Seven dealing with the advocacy for an international duties and responsibilities declaration or charter, the use of terms whose definition is not clarified to a useful level of precision, takes away from the value

[29] Italics are the writer's own for emphasis.

of the whole discourse on individual duties. This makes it important to search outside international instruments for the meaning of these terms. Writes and commentators may be one such useful source.

Writing on the distinction in meaning between these terms, Hart readily acknowledges that:

> . . . one factor obscuring the nature of a right is the philosophical use of 'duty' and 'obligation' for all cases where there are moral reasons for saying an action ought to be done or not done. In fact 'duty', 'obligation', 'right' and 'good' come from different segments of morality, concern different types of conduct, and makes different types of moral criticism or evaluation. Most important are the points (1) that obligations may be voluntarily incurred or created, (2) that they are owed to special persons (who have rights), (3) that they do not arise out of the character of the actions which are obligatory but out of the relationship of the parties. Language roughly though not consistently confines the use of "having an obligation" to such cases.[30]

According to Hart, therefore, duty and obligation are distinct from each other.[31] He contrasts 'duty' and 'obligation' with each other and both with 'right' and 'ought'. A right exists without any correspondence to an obligation incurred or created, at times, whereas duty arises from position, status, role linked to a right. An obligation may not correspond to a right at all times. For example, **A** invites his colleague **B** for lunch. **B** accepts the invitation and confirms his attendance. **B,** however, decides not to attend the luncheon. Clearly in this case **B** has an obligation to honour his promise. B's failure to honour his promise, does not breach or violate any of **A**'s rights.

Like Hart, Mish'alani[32] maintains that duties and obligations remain distinct. His analysis is, however, markedly different. He distinguishes two uses of the term 'duty' first, as in what we make of the use of the term when we say that it is someone's duty to do something at a specific time, with the implication that he ought to do that thing at that time; and second, the other use we

[30] H L A Hart, 'Are there any Natural Rights?' (1955) 64 (2) *The Philosophical Review* 175 179.
[31] 'Legal and Moral Obligation' in A I Melden (ed), *Essays in Moral Philosophy* (University of Washington Press, Seattle 1958).
[32] Mish'alani, "'Duty', 'Obligation' and 'Ought'" in (1969) 30 (2) *Analysis* 33-40.

make of it when we itemise someone's duties, or some of them, with no implication that he ought to discharge them all during the time in which they are truly his.

In trying to justify his conclusion about the distinctness of 'duty' from 'obligation', Mish'alani posits that the duties of a person are the duties of his office or station and they are his only in so far as he occupies the station in question and only in his capacity as occupant of it. He develops the argument further by clarifying what he means by 'station', saying that this must be understood widely to cover such diverse things as a person's role (e.g. father), status (e.g. company manager), office (e.g. governor), job (e.g. teacher), calling (e.g. Minister, priest, physician), position (e.g. chief surgeon). He then carefully distinguishes the different types of 'station' stating that an office is not a calling and a job may involve neither position nor status, a common underpinning in all these being that they are all definable, at least partly, in terms of the duties they involve. To Mish'alani, a person assumes the duties of a given station in coming to occupy that station and he is not relieved of them until he relinquishes or otherwise loses it. His performing of his duties one day does not relieve him from performing them the next. In other words, a person is not required to discharge his duties all the time during which they are his. It is in this context that we talk of a person being 'on duty' and 'off duty'. He gives the example of a judge who remains a judge and continues to bear the duties of that office even though he may not be at the bench.[33]

In Mish'alani's understanding, duties are not met, as debts are met, once and for all. Duties of a station, he argues, are also called responsibilities although it may be more accurate to reserve the term 'responsibility' to those duties for the proper discharge of which one is answerable to someone else. He concludes his observations on duty by stating that duties of a station are determined by the definition of that station, and non-performance of them is dereliction; the ethics and demeanour proper to a station are determined by rules and violations of those rules constitute misbehaviour.

Turning to the term 'obligation' Mish'alani, argues that the very word 'obligation' does not tolerate some verbal contexts within which 'duty' naturally fits. There is no such thing as being

[33] Ibid 35.

'on obligation' or 'off obligation' in analogy with 'on' or 'off' duty. He observes that 'if the key to proper understanding of duties was found in their being logically bound to stations, the key to obligations must be sought in the fact that they are owed to someone.'[34]In his understanding, an obligation is generated when two parties enter into a special relationship whose nature is such that it invests one party with certain rights and commits the other to honouring them. An obligation is met or fulfilled by the successful completion of a specific undertaking and once it is met, he who was under obligation is henceforth free of it. Mish'alani argues further that whereas concerning duties of station the manner in which they are discharged is subject to evaluation according to certain standards (so that we may be concerned not only with whether a given person can perform such duties, but also how he can do so), all that matters with regard to obligations is the fact of their fulfilment or non-fulfilment.

From Hart and Mish'alani's analysis, it seems to this researcher that the term 'obligation' may have an unequivocal or ambiguous meaning depending on the context in which it is used. It would be unequivocal when it is used to refer to what one party has agreed to perform under the terms of an agreement. In this sense, the positive counterpart of obligation is the right, that is to say, what the creditor is entitled to receive from the debtor. This is the classical view of the term 'obligation' seen as 'a tie between at least two individual persons which enables one person to request something from the other'.[35] An obligation should, therefore, be perceived as including a legal tie between at least two persons and a coercive power enabling the enforcement of the obligation. Ending on a rather portentous note, Mish'alani observes, in apparent reference to social contract theorists, that:

> [o]ther philosophers, enchanted more by obligations than duties, saw in all morally satisfactory conduct a fulfilment of an unspoken promise implicit in one's original consent to live within human society. For them, to live in a society is to have consented to do so, and to have consented to do so is to have become a part to an agreement and hence to have incurred a specific obligation, to abide by certain rules.[36]

[34] Ibid 36.
[35]J Ghestin, M Billiau, G. Loiseau, *Le régime des créances et des dettes* Traité de droit civil, LGDJ 2005 n 4 3.
[36] Mish'alani (n 32).

While one may be inclined to agree with the notion that the distinction in meaning in the terms duty, responsibility and obligation may be real and deserve further in depth study, it seems that at the end of the day all these terms broadly refer to burdens or obligations on the part of others to respect the rights of rights holders. The terms are used as approximate equivalents and refer roughly to one and the same thing. To insist on adhering to the fine distinctions between these terms only introduces further confusion to an already unclear and contentious subject in the human rights discourse. When conception of the subject matter, that is to say, the guide to human action and conduct, is unclear enforcement equally suffers. In this dissertation the term duty is used in the most simplistic way as an obscuring general label to refer to responsibility, obligation and every expectation and burden imposed by morality, ethics or law on people in regard to another's rights.

4.3. PHILOSOPHICAL AND DEONTOLOGICAL ARGUMENTS REGARDING DUTIES, RESPONSIBILITIES AND OBLIGATIONS

In the human rights conversation, the concept of individual duties, responsibilities or obligations, alongside rights has been recognised for centuries, albeit with varying degrees of comprehension and elaboration. In a statement which typifies the difficulties, philosophical and otherwise, attendant to understanding the import of the term duty, Daniel Webster once remarked that:

> [a]sense of duty pursues us ever. It is omnipresent, like the Deity. If we take to ourselves the wings of the morning, and dwell in the uttermost parts of the sea, duty performed or duty violated is still with us, for our happiness or our misery. If we say, the darkness shall cover us, in the darkness as in light our obligations are yet with us.[37]

The Roman philosopher, Cicero, writing to his son, Marcus wrote:

[37](1782-1852). He was a leading American statesman and senator from Massachusetts during the period leading up to the Civil War. He was an attorney and acted as legal counsel in several matters that established important constitutional precedents. He had particularly nationalistic views which he articulated clearly and made himself famous and influential in the process.

> But, having determined to write expressly for your benefit something at the present time, much hereafter, I have thought it best to begin with what is most suitable both to your age and to my parental authority. Now, among the many important and useful subjects in philosophy that have been discussed by philosophers with precision and fullness of statement, their traditions and precepts concerning duties of life seem to have the widest scope. Indeed, no part of life, whether in public or private affairs, abroad or at home, in your personal conduct or your social relations, can be free from the claims of duty; and it is in the observance of duty that lies all the honour of life, in its neglect, all the shame. This, too, is a theme common to all philosophers. For who would dare to call himself a philosopher, if he took no cognisance of duty?[38]

The above quotations seem to recap with fidelity the spirit in which duty has been perceived in some sections of human society; that duties are generated from one's inner self and are very much a part of being human.

The discourse on what individual duties are and what their relationship with rights is has engaged the attention of legal philosophers and moral thinkers for many years. Various theorists that seek to explain the concept of rights and their purpose, no doubt have different conceptions of individual duties in the human rights discourse. Natural law theorists as well as social contract theorists have varying notions of the concept of individual duty; just as the will theorists and the interest theorists or the deontological theorist and the consequentialist theorists will harbour varying notions of the concept of duty. It is neither desirable nor expedient in this work to get into that jurisprudential debate. A brief examination of the philosophical and ethical perspective of individual duty by natural law and social contract theorists will elucidate the variances in understanding of the source and basis of duty and its assignment, and this will hopefully be illuminative of the larger scene in the philosophical realm.

[38]M T Cicero, *Ethical Writings of Cicero,* A P Peabody (trans) (Little Brown and Co, Boston 1887) Book I.

4.3.1. Duties from the natural law perspective

As discussed in Chapter Two, natural law is a concept that suggests a code, law, or set of rights and duties innate to existence and pretty separate from human fashioned legal systems. Natural law meant the law that determines what is right and wrong and that has power or is valid by nature, inherently, hence everywhere and always.[39]It was concerned with rights and duties that were derivative from the law of conscience.

Philosophical and ethical arguments of natural law have endeavoured to identify the premises of natural law.[40] This, however, has not been easy to establish since the theory of natural law is dependent on beliefs and individual ethical codes. Besides, the basic theory of natural law proposes that it is distinct from positive law, and it is not meant to be codified specifically. Unlike positive law, which regulates actions, natural law tends to guide concepts of morality. For instance, unlawful killing may be classified as illegal by positive law, but the idea that murder is morally wrong remains very much embedded in natural law.

Using a Christian perspective, Louis de Poissy argues that natural law is divided into moral obligations and moral power. Moral obligation is called duty and moral power is called right.[41] The rights and duties pertaining to individual law refer to a divine superior being, one's neighbour and to oneself. It is for this reason that natural law is divided into individual law, social law and the common law of nations. According to the natural law theory based on Christian understanding, rights and duties of man are derived simply from his nature, or arise from society, where man is no longer considered alone, but as united with fellow men in pursuit of a common end. The foundation of man's duties to himself is in the excellence and faultlessness of his nature. The Supreme Being has given man a nature of great excellence; therefore, man is bound, in order to conform to order, to respect the excellence and dignity of his nature. The supreme principle of all man's duties to himself is, to love himself but with a love that conforms to order.

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[39] K E Himma, 'Natural Law' Internet Encyclopaedia of Philosophy<http://www.iep.utm.edu> accessed 10 August 2015.
[40] See J Finnis, *Natural Law and Natural Rights* (2nd edn Oxford University Pres, New York 2011). See also J J Shestack, 'The Philosophical Foundations of Human Rights' (1998) 20 *Human Rights Quarterly* 234.
[41] See Louis de Poissy, *Christian Philosophy* (2nd edn O'Shea and Co, New York 1898).

For these natural law theorists, belief in the law of nature is the mainstay behind societal ideas of justice; if a law is called unjust, it is because it is found to be morally, rather than legally, reprehensible. Whether or not the universe is actually built with natural ideas of rights and ethics embedded in existence, the belief that this type of law exists prevents positive law from being arbitrary and allows for concepts such as justice and basic rights to influence the creation of legal systems. The elementary principle of this school of natural law is often condensed into a simple notion that people should endeavour to be good, and avoid being evil. Beyond this point, everything else including the very definitions of the terms 'good' and 'evil' is much contested.

While Socrates' disciple Plato, cannot be said to have set forth a teaching of natural law, there can be no doubt that he opposed fundamentalism and asserted much earlier in time that there is a natural right, i.e., something which is by nature just. 'The naturally just or right is the 'idea' of justice, justice itself, justice pure and simple.'[42] It is, however, the philosopher Aristotle,[43] who is classically considered the father of the idea of natural law, but his theories were significantly expanded on by later philosophers such as Aquinas. As was alluded to in Chapter Two regarding individual duties, Aristotle was insistent that an individual should take part in 'virtuous actions' which entailed participation in community and civil life through undertaking duties. Being a citizen is not, for Aristotle, simply a formal legal status, but implies very specific political rights and duties. Other theorists such as Aquinas explained that duties, alongside rights, form part of human behaviour which has its origin in human nature. It will be recalled that Grotius severed natural law from its theistic origins and made it a product of enlightened circular national thought defining natural law as a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral necessity.[44] This means, for him, that all rules were ascertained by the application of 'right reason' and did not depend on the Deity for their validity.

Many religious sects also included natural law as part of a belief system or code of ethics but typically distinguished it from positive law. In most religious philosophies, natural laws can

[42] H Grotius, *De jure ac pacis* Book 1 Chapter 1.
[43] Aristole, *Nichomachean Ethics*, JA K Thomson (trans) (Penguin, London 1955).
[44] Grotius (n 42).

always be superseded by divine laws. This is summed up in epithets such as 'do unto others as you would like them do unto you' (Christianity);[45] 'do naught to others which, if done to thee, would cause thee pain; this is the sum of duty (Hinduism);[46] 'what is hateful to you, do not to your fellow man. That is the entire law; all the rest is commentary (Judaism);[47] 'no one of you is a better believer until he desires for his brother that which he desires for himself' (Islam);[48] 'hurt not others in ways that you yourself would find hurtful' (Buddhism);[49] and 'what you do not wish for yourself do not do to others' (Confucianism).[50]

As will be shown in the next part of this chapter, some social contract theorists use natural law or natural rights to ground their philosophy. Locke and Hobbes's political philosophies are notably founded on natural rights. Natural law theories hold that human beings are subject to a moral law. Morality is fundamentally about duty; the duty each individual has to abide by the natural law. The social contract theorists equally argued that the social contract that citizens entered into to live together is predicated on agreed rules of conduct which entail the limitation of freedoms, and duties to respect the rights of others.[51]

This researcher shares the modern natural law view which does not accept the religious enthusiasm which is raised to the temper of fanatical adoration by some natural law theorists, particularly with the suggestion that duties are rules of behaviour handed down by a divine figure.

4.3.2. Duties from the social contact theorists' perspective

Social contract theorists have a peculiar view of duty and its source. In Chapter Two, allusion was made to the general view of human rights by social contract theorists. It was explained that the motivation for human rights from the point of view of social contract thinkers was that

[45] Mathew 7 verse 1.
[46] Mahabharata 5, 1517.
[47] Talmud, Shabbat 3id.
[48] 40 Hadith of an-Nawawi 13.
[49] Udana-Varga 5,1.
[50] Analects 12:2.
[51] Examples of proponents of the social contract theory include Thomas Hobbes, *Leviathan* (1615); John Locke, *Two Treaties of Government* (1690); Jean-Jacque Rousseau, *The Social Contract* (1762).

people agree to live in common if society protects them. According to them, people's moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live. In the reasoning of these theorists, political rights and obligations could be conceived of always in terms of a social contract. This theory is properly associated with modern moral and political theory and was given its first full elucidation and shield by Hobbes.[52] After Hobbes, Locke[53] and Rousseau[54] are the best-known advocates of this hugely influential theory, which has been one of the leading theories within moral and political thought throughout the history of the modern West. Rousseau not only disagreed strongly with any attempt to attach religion to the foundations of political order but disentangled the rights of a society from natural rights. In Rousseau's view of things, the rights in a civil society are sacrosanct; but the social order is a sacred right which serves as a basis for other rights. And, as it is not a natural right, it must be one founded on covenants.[55]

As discussed in Chapter Two of this thesis, the doctrine of divine kings which was commonplace in Middles Ages Europe and all the way into the eighteenth century avowed that kingly authority was derived from the higher divine authority and, therefore, could not be called into question by either parliament or the people. Rulers were seen in some cases as gods themselves or as direct descendants of gods. Thus obedience to such manifestation of authority, usually through submission to their duly designed subordinates, was seen as a basic duty.

Yet, mere obedience is not essentially an ethical act. When obedience is either enforced through coercion or is simply the result of blind and unquestioning loyalty to the law, there is no open, clever, and mindful choice involved; there is no consent. To give in to the strong is an act of caution, not an act of respect for the law. Only when submission to the authority of a society is accepted as a solicitous, deliberate choice, does acceptance of this duty become an ethical act. And, according to social contract theorists, this is where the second source of the duty to obey the laws and rules of society comes from: negotiated consent to be so bound, a consent mutually given and accepted by all members in the society, at least at a theoretical level.

[52] T Hobbes, *Leviathan* (St Pauls, London 1615).
[53] J Locke, *Two Treaties of Government* (Awnshan Churchill, London 1689).
[54] J J Rousseau, *The Social Contract* (1762), Maurice Cranston (trans) (Penguin, Baltimore 1968).
[55] Ibid.

In his *Social Contract,* Rousseau considers the social contract as an agreement where everyone subordinated his own individual will to the general will – *la volonté générale*. This general will of the corporate self, sets moral standards valid for its members and implies the reduction of government to merely an agent of the general will. Sovereignty belongs only to the people as a corporate body and each individual has subordinated himself to it.

John Locke articulated his theory of self-government and the social contract philosophically in the following terms:

> Men being, as has been said, by nature all free, equal and independent, no one can be put out of his estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater seer security against any that are not of it.... When any number of men has so consented to make one community or government, they are thereby presently incorporated, and make one body politic.[56]

This theory of self-government and the social contract became the philosophical basis that moved Western civilization from authority to agreement as the basis of the civic duty to obey society's rules. According to Locke, individuals have a duty to respect the rights of others, even in the state of nature. The source of this duty, says Locke, is natural law.[57]

In the reasoning of social contract theorists, political rights and obligations could be conceived of always in terms of a social contract. Every member of a given society is automatically bound by the social contract, since every member's consent is assumed and required. It is this universally assumed consent to a social contract that constitutes the general basis for political duty. These theorists took a different view of the significance of 'nature'.

[56] Locke (n 53).
[57] Ibid.

Rawls whose Kantian version of the social contract theory helped the theory regain philosophical momentum changed the classic conception of the social contract from the great allegory of Western political thought into an analysis of a moral or ethical process.[58] In his view, society is more or less a self-sufficient association of persons who in their relations to one another acknowledge certain rules of conduct as binding and who, for the most part, act in harmony with those rules. He explains how the logical ordering of principles of justice may answer such questions as how should society be structured, how basic rights and duties should be assigned to individuals, and how social and economic advantages should be distributed to all members of society.

He hypothesises that if people are reasonable and equal in bargaining power and absolutely impartial, they will make rules that are both reasonable and just, that is, they will make rules that burden and benefit each person equally. This becomes the ideal social contract. Rawls argues that the principles of justice which would establish the basis of an ideal society are principles which would be chosen by every individual if every individual were in an 'original position' of equality with regard to rights and duties and if all individuals were acting rationally in a mutually neutral manner. This 'original position' is a hypothetical situation in which every individual is acting behind a 'veil of ignorance' as to his or her own social position, class status, individual assets, and personal aptitudes or abilities He identifies two sources of duty as authority and mutual consent.

According to Rawls' theory, basic duties are natural duties since they arise from people's nature as human beings. However, these natural duties are not perfected until people form themselves into social groups, since duties are relationships. For example, the duty not to kill one another becomes a duty only with the formation of the social contract. Before that, it is an incipient duty. Basic or natural duties are the substantive and necessary provisions of the social contract.

In conclusion then, a social contract is that fundamental compact that consists of the rules imposing basic duties, assigning rights, and distributing the benefits of political, social, and economic cooperation, unanimously agreed to by reasonable people in a state of perfect equality

[58] J Rawls, *A Theory of Justice* (Harvard University Press, Cambridge Mass 1971).

and absolute impartiality. This contract is not the result of a historical event; it is the result of rational and legal analysis and hypothesis.

For social contract theorists, a right is one side of a relationship; one's right is the duty of another. Human rights, or natural rights, are the flip side of the natural duties of the social contract. A human right is a relationship arising from the nature of human beings that entitles an individual to certain conduct from all others. It is a contractual right flowing from the social contract that imposes upon all others the necessary and universal duty to act or refrain from acting in a certain way.

4.3.3. Duties from the deontological perspective

Duties may also be explained within the broader ethical theory principle of deontology.[59]It is not easy to identify one idea which would encompass fully all of the attributes in virtue which may warrant an ethical theory to be called a deontology. Although in its commonly shared sense a deontology is considered to be merely a theory of our duties, something most ethical theories have, philosophers mean to express more by calling a theory deontological. Deontological ethics or deontology is the normative ethical position that judges the morality of an action based on the action's adherence to a rule or rules.[60] It is sometimes described as 'duty' or 'obligation' or 'rule'- based ethics, because rules 'bind you to your duty.'[61] Deontological ethics is commonly contrasted to consequentialism[62], virtue ethics, and pragmatic ethics. In deontology the ethical system is determined by duty or laws. Kantian ethics provide a good example. Under this, the only actions that are moral are those performed out of one's duty to follow the moral law, as opposed to actions done out of desire. Religions like Christianity offer an easily comprehensible example of deontological ethics. Moral acts are those that accord with the Ten Commandments. In contrast is the moral philosophy of consequentialism. In this jargon, action is more important than the consequences.

[59] Deontology comes from the Greek word '*deon*' which means 'duty'.
[60] E N Zalta (ed) Stanford Encyclopaedia of Philosophy 'Ethics-virtue' <https://plato.stanford.edu/> accessed 15 December 2015.
[61] W N Bruce, *Consider Ethics: Theory, Readings, and Contemporary Issues* (Pearson Longman, New York 2005) 23.
[62] A Flew 'Consequentialism', *A Dictionary of Philosophy* (2nd edn St Martins, New York 1979) 73.

Crudely put then, a deontological theory denies in some way that the good or what is of value, always takes priority over the right or duty. It is an ethical theory that is best described as having a number of side limitations on how one may act. Such side constraints may be called duties or obligations. The more salient ones are negative, for example, do not steal. There are also positive ones, however, for example, help others in need. These side constraints entail that certain actions are forbidden even if performing them would have the result that a great number of people would be happier, or a greater amount of intrinsic good would be created. Some deontologists are in this respect moral absolutist in approach. They hold the belief that some actions are absolutely right or wrong irrespective of the motivation or the consequences. Others are, however, non-absolutist deontologists and believe that the consequences of an action in some instances may make the action right. Ross, who is a non-absolutist deontologists, embraces the view that the consequences of an action such as lying may sometimes make lying the right thing to do. A modern day deontologist Kamm espouses the 'principle of permissible harm' in apparent disagreement with absolute moral deontologists.[63]

The philosopher Kant is perhaps one of the most influential moral absolutist deontological theorists.[64] His theory will for purposes of this work, be taken as representative of the concept of deontology. His ethical theory is regarded as absolutist deontological for several different reasons.[65]The deontological or duty-based ethics which Kant propounds are concerned with what people in a society do, and not with the consequences of their actions. An action is considered morally good because some of the characteristics of the action itself and not because of the consequences of the action. In this sense his deontological ethics are non-consequentialist. For deontologists the universe has moral rules that should guide the conduct of people. Emphasis is placed between morality and human action. Theorists of this concept believe that at least some actions are morally obligatory regardless of their effect on human welfare.

Kant argues that to act in the morally right way, people must act from duty. Second, he argues that it is not the consequences of actions that make them right or wrong but the motives of the

[63] See M F Kamm, *Morality, Mortality Vol. II: Rights, Duties, and Status* (Oxford University Press, New York 1996), and F M Kamm, 'Toward the Essence of Non-consequentialist Constraints on Harming,' in *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford University Press, Oxford 2007).
[64] I Kant, *Grounding of Metaphysics of Morals* (1785) J W Ellington (trans) (3rd edn Hachett Publishing, New York 1993) 40-41.
[65]B Orend, *War and International Justice: A Kantian Perspective* (Wilfrid Laurier University Press, West Waterloo Ontario 2000) 19. See also E Kelly, *The Basics of Western Philosophy* (Greenwood Press 2006) 160.

person who carries out the action. He holds the view that the only absolutely good thing is a good will, and so the single determining factor of whether an action is morally right is the will, or motive of the person doing it. He believes that human beings are rational and reasonable thus have autonomy deserving of intrinsic worth. He also believes that when we do things for any other reason than out of duty, our acts are not moral acts. For an act to be a moral act we must do it for the sake of duty and that this is the only categorical imperative. The 'categorical imperative' for Kant was a recognition of the fact that reason and free will for human beings are objective capacities possessed by all human beings and consequently every individual human being or subject must be accorded the kind of respect that is demanded by being of this kind of nature.[66] This was the basis of his understanding of the dignity and worth of all human beings.

Kant's ethical theory gives an account of general duties and an account of moral motivation. In considering moral duties as opposed to legal duties, Kant made some of the most interesting yet of analyses in his metaphysics of morals. One of the principal aims of Kant's metaphysics of morals, especially of the doctrine of virtue, is to present taxonomy of our duties as human beings. The basic division is between judicial duties and ethical duties, which determines the division of the metaphysics of morals into the doctrine of virtue. Judicial duties are duties that may be coercively enforced from outside the agent, as by the civil or criminal laws, or other social pressures. Ethical duties must not be externally enforced (to do so violate the right of the person coerced). Instead, the subject herself, through her own reason and the feelings and motives arising *a priori* from her rational capacities – the feeling of respect, conscience, moral feeling and love of other human beings, must constrain herself to follow them. Among ethical duties, the fundamental division is between duties to oneself and duties to others.[67]

It is important to recognise that Kant's Metaphysics of Morals does not attempt to cover all the ethical duties that we have. This is because Kant confines the 'metaphysics of morals' only to those duties that are generated by applying the principle of morality to human nature in general.

[66] I Kant, *General Introduction to the Metaphysics of Morals* (1887) W Hastie (trans) (University of Virginia Press 2004) 33.
[67] Ibid.

Kant considers the status of human beings as autonomous moral agents. Kant sees persons alone as having dignity or intrinsic worth and, therefore, as having an absolute or unconditional value because they are capable of making rational choices. People's dignity resides in their nature as autonomous moral agents. O'Neill summarises Kant's ethics as follows:

> His [Kant's] writings on ethics are marked by an unswerving commitment to human freedom, to the dignity of man [sic!], and to view that moral obligation derives neither from God, nor from human authorities and communities, nor from the preferences or desires of human agents, but from reason.[68]

With legally right conduct the moral aspect should also be essentially connected. It may, however, be the case that with legally right action there is no sentiment of law present; no more, than an immoral intent may accompany it. The legally right act, in so far as it is done out of regard for the law, is, at the time also moral.

4.4. CATEGORIES OF DUTIES

That individuals have certain duties, by which their conduct is governed, is beyond debate. It is equally incontrovertible that such duties are owed to other individuals, entities or collectives such as the state, one's family or community. These duties can be classified in various ways depending on the purpose of the classification or the nature of the distinction being sought. As will be explained later in this chapter, the most important of these classifications are those between positive and negative duties; *prima facie* and 'all-in' duties (actual) or 'all things considered' duties; perfect and imperfect duties; subjective and objective duties; legal and moral duties; natural and acquired duties; and duties counterpart to rights and duties independent of rights. As will be apparent from the discussion following, these classifications are neither mutually exclusive nor without overlaps. It is, therefore, very difficult for one attempting to identify the distinction between various forms of duty, to confine oneself neatly to contrasting any two categories of duty without necessarily getting into consideration of a different

[68] O O' Neill, 'Kantian Ethics' in P Singer (ed) *A Companion to Ethics* (Cambridge University Press, Cambridge 1993) 175.

classification. With this general statement on duties, it is not surprising that when one speaks of 'duties' of individuals, one could be talking of different things depending on the context. The categorisations of 'duty' will become clearer as we deal with distinct subsections of this part.

4.4.1. Legal and moral duties

Duties may vary in nature. They may be legal obligations created by the law, or they may be based on, or fashioned or influenced by, religious beliefs and practices, customary or cultural values in the community one lives, or they may be based on personal ethical persuasion. The distinction between a legal duty and a moral duty or obligation is that a legal duty, when breached, can result in a civil claim. Failure to fulfil a moral obligation however only makes the negligent party feel unease or morally troubled, but only if that party recognises that a moral duty exists. Most, if not all legal duties will also be moral duties. However, many moral obligations that the norms of civilised society would attach to an individual or institution do not constitute legal duties.

4.4.2. Natural and acquired duties

Natural duties come naturally and bind all persons without any imposition by any institution or body. Each one of us discharges these duties voluntarily. For example, the duty not to harm others, not to tell lies, to respect others, not to mistreat children, to uphold truth and justice and fairness, etc. Some of these duties may also be a subject of prescription by legislation with any breach thereof being attended by certain sanctions. One sees natural duties as being symbiotic with the natural law theory.

Acquired duties are duties assumed by individuals by virtue of something they have done, or as a result of a particular relationship which they might have with others. This means, certain duties are legal, and need one to perform the acquired obligations basing on one's willingness. Failure to perform these attracts legal consequences.

Another type of acquired duties results from special relationships that individuals assume as groups often referred to as responsibilities. For example, parents discharging their duties towards their children, doctors towards their patients, and lawyers towards their clients. These duties are assumed by individuals when they accept to act in a specific role. According to the legal jurist Rawls, positive duties require us to do what is good. On the other hand, negative duties impose restrictions on doing what is bad. Helping the poor may be a positive duty, which may not have any obligation. However, not to tell lies or not to harm others is a negative duty, which imposes an obligation.

4.4.3. Perfect and imperfect duties

The view that there is a difference between perfect and imperfect duties is generally attributed to the philosopher Kant. In his *Groundwork to Metaphysics of Morals*,[69] Kant suggests that the principle of morality gives rise to a fourfold taxonomy of duties, ensuing from the intersection of two divisions; between duties to oneself and duties to others, and between perfect and imperfect duties. Perfect duties which are also referred to as 'strict or rigorous' duties are prescriptions of specific kinds of action. They are corollary to negative rights. They compel an orderly respect for certain actions and are in this sense (normally) absolute prohibitions, for example, the duty not to murder, not to lie and not to steal. These duties generally admit no exceptions. Imperfect duties (also referred to as 'laxer meritorious duties'), on the other hand, are (normally) relative urgings such as the duty to help others in need, or to take regular exercises. This kind of duty does admit of exceptions. Although they are duties one has some choice about when and how to fulfil them. Breach of a perfect duty is morally blameworthy while fulfilment of an imperfect duty is praiseworthy.[70]

The four categories of duty are thus; perfect duties to oneself, such as the duty not to commit suicide and; perfect duties to others, such as the prohibition of deceitful promises; imperfect duties to oneself, such as the prescription to cultivate one's talents; and imperfect duties to others

[69] Kant (n 66). See also P Guyer (1998-2004) Kant Immanuel in E Craig (ed) *Routledge Encyclopaedia of Philosophy*, Routledge London <http//www.rep.routledge.com/article DB047SEC11>accessed 4 June 2014
[70] Guyer (n 69).

such as the prescription of benevolence. Kant's view on the 'trumping' feature of perfect duties has attracted criticism.[71]

4.4.4. Actual and *prima facie* or all things considered duties

Legal philosophers and theorists have made a distinction between *prima facie* and actual or concrete duties. A *prima facie* duty is a duty that is binding (obligatory) other things being equal, that is to say, unless it is superseded or outdone by another duty or duties. Another way of putting it is that where there is a *prima facie* duty to do something, there is at least a fairly strong presumption in favour of doing it. An example of a *prima facie* duty is the duty to keep promises. Unless stronger moral considerations override, one ought to keep a promise made. In contrast, actual or concrete duties are those we should perform in the particular situation of choice. Whatever one's actual duty is one is morally bound to perform it. Ross, a moral realist and an intuitionist, argued in his ethical theory that there are several *prima facie duties* that individuals use to ascertain what they ought to do.[72] These include the duties of fidelity[73], of reparation[74], of gratitude[75], of non-injury,[76] of harm prevention[77], of beneficence[78], of self-improvement[79], and of justice[80].

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[71] For criticism to the Kantian thesis on perfect and imperfect duties, see B Hooker, *Ideal Code, Real World* (Clarendon Press, Oxford 2000); D Cummiskey, *Kantian Consequentialism* (Oxford University Press, Oxford 1996).

[72] W D Ross, *The Right and the Good* (reprt Oxford University Press, Oxford 2002) 21.

[73] These are duties to keep one's promises and contracts and not to engage in deception. Ross describes them as 'those resting on a promise or what may fairly be called an implicit promise, such as the implicit undertaking not to tell lies which seems to be implied in the act of entering into conversation . . . or of writing books that purport to be history and not fiction' (Ross n 72)21.

[74]This is a duty to make up for the injuries one has done to others. Ross describes this duty as 'resting on a previous wrongful act' (Ross n 72) 21.

[75]The duty of gratitude is a duty to be grateful for benefactions done to oneself and if possible to show it by benefactions in return.

[76] The duty of non-injury (also known as non-maleficence) is the duty not to harm others physically or psychologically: to avoid harming their health, security, intelligence, character, or happiness (Ross n 72) 21-22.

[77] Once again, this is the *prima facie* duty of a person to prevent harm to others from causes other than him - or herself.

[78] The duty to do good to others: to foster their health, security, wisdom, moral goodness, or happiness. This duty, says Ross, "rests upon the fact that there are other beings in the world whose condition we can make better in respect of virtue, or of intelligence, or of pleasure" (Ross n 72) 21-22.

[79] The duty of self-improvement is to act so as to promote one's own good, i.e., one's own health, security, wisdom, moral goodness, and happiness. Ross himself mentions 'virtue' or 'intelligence' in this connection (Ross n 81)21.

[80] The duty of justice requires that one act in such a way that one distributes benefits and burdens fairly. Ross himself emphasizes the negative aspect of this duty: he says that this type of duty 'rests on the fact or possibility of a distribution of pleasure or happiness (or the means thereto) that is not in accord with the merit of the persons

Ethical theories that deny the possibility of a genuine conflict of duties have a method of distinguishing between a duty all other things being equal (or *prima facie duty*) and a duty all other things considered. Such deontological theories posit that there is a possibility of conflict between duties and all other things considered. Perfect duties never conflict. Where a perfect duty conflicts with an imperfect duty, then one must fulfil the perfect duty. Where an imperfect duty conflicts with another imperfect duty, and neither conflicts with any perfect duty, one has the liberty of electing between them in agreement with his discretion.

4.5. DUTIES AS COUNTERPARTS OF RIGHTS

In many instances the relationship between rights and duties is not difficult to discern. That rights and duties are correlative is central among philosophers.[81]The doctrine of logical correlativity has been employed to explain this relationship. This interpretation theorises rights and duties as flip sides of the same coin; that rights protect people's interests, by imposing duties on other people to promote or observe those interests.[82]A person's right exists by imposing a duty upon others. For example, the right of free speech

> is understood in terms of the recognition that an individual's interest in self-expression is a sufficient ground for holding other individuals and agencies to be under duties of various sorts rather than in terms of the detail of the duties themselves.[83]

As seen earlier on in this chapter, social contract theorists would quite clearly subscribe to the view that a system of social organisation emphasises the dual nature of rights as both freedoms and duties. Society as a whole can only thrive when everyone fulfils his or her obligations to their fellow citizens. Under this view, the ability to exercise rights must first be earned by respecting them in others.[84] In fact this is the principle which found expression in Article 29 of

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concerned; in such cases there arises a duty to upset or prevent such a distribution' (Ross n 81) 21. Thus the duty of justice includes the duty, insofar as possible, to prevent an unjust distribution of benefits or burdens.

[81] A L Renteln, 'The Concept of Human Rights,' in 1988 *Anthropos, Bd.83* 343.

[82] Generally speaking, this observation follows the interest theory of rights.

[83] J Waldron, 'Enough and as Good Left for Others' (1979) *Philosophical Quarterly* 29.

[84] L Henkin, 'Religion, Religions and Human Rights' (1998) 26(2) *Journal of Religious Ethics* 229-239.

the Universal Declaration, which states, in its first clause, that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible.'

Logical correlativity provides some degree of flexibility to the formulation of international human rights standards. Correlativity is vital because it means that the framing of moral claims in terms other than rights is not necessarily awkward. The recognition of an obligation, duty or responsibility, may well suggest the presence of an implicit right; thus a moral theory couched in the language of duty can be a legitimate vehicle for the advancement of rights.[85]

Consistent with the theory that rights and duties are correlative, are the views of many philosophers such as the English political philosopher Paine.[86] Ross equally had theorised that:

1. A right of A against B implies a duty of B to A.
2. A duty of B to A implies a right of A against B

To say A has a right to X, is to say that B has a duty to insure that A can, in fact, obtain X. Furthermore, to say that C has a duty to D with respect to Y is to say that D has a right to Y *vis a vis* C.[87]

Other philosophers, thinkers and writers, in this jurisprudential debate which has raged on for centuries, have equally expressed the belief that rights and duties are interlinked. As already seen in Chapter Two, in defining a right some theorists emphasise the duty side of what they see as the rights equation. Williams, for example, posits that 'no one ever has a right to do something: he only has a right that someone else shall do (or refrain from doing) something,'[88] while Raz says 'a person who says to another, 'I have a right to do it' is not saying that … it is not wrong to do it. He is claiming that the other has a duty not to interfere.'[89] Equally, Austin defined a right in terms of a duty as follow: '[a] party has a right when another or others are bound or obliged by

[85] Renteln (n 81).
[86] T Paine, *The Rights of Man* (J S Jordan, London 1791) 28.
[87] D W Ross, *The Right and the Good* (Oxford University Press, Oxford) 1930.

[88] G Williams, 'The Concept of a Legal Liberty,' in R Summers (ed) *Essays in Legal Philosophy* (Blackwell, Oxford 1968) 125.
[89] J Raz, *Ethics in the Public Domain* (Oxford University Press, Oxford 1994) 275.

law, to do or forbear, towards or in regard to him,'[90] O'Neill states that rights are seen as one side of a normative relationship between rights holders and obligation bearers. We normally regard supposed claims or entitlements that nobody is obliged to respect or honour as null and void.[91]

It will be recalled from the discussion Chapter Two that in lamenting the loose way in which jurists have often used the word 'right', the legal philosopher Hohfeld' in his fundamental legal conceptions, explains the relationship between rights and duties and the difference between rights and privileges. He argues that there cannot be a right without a duty.[92] Duty in this sense is correlative of a right. He offers the famous analysis of rights, as clusters of (claim) rights, privileges, powers and immunities, each imposing upon others its own correlative, namely duties, no rights, liabilities and disabilities. This was covered in considerable detail in chapter 2. As is stated elsewhere in this work, those charged with the obligation of discussing and drafting the UDHR were almost leading themselves to drafting what would have been, in effect, a Universal Declaration of Human Rights and Duties. Many contributors to the drafting process appeared posed to support the general proposition that duties are the reverse side of rights and should be included in the UDHR. For example, the blueprint of the UDHR by Humphrey provided in its first article of the first draft that:

> Everyone owes a duty to his State and to the [International Society] United Nations. He must accept his just share of responsibility for the performance of such social duties and the share of such common sacrifices as may contribute to the common goal.[93]

In his article 2 of the same draft, he posited that 'in the exercise of his rights everyone is limited by rights of others and by the just requirements of the State and the United Nations.' Cassin[94]

[90] J Austin , *Lectures* on *Jurisprudence*, R Campbell (5th edn Lecture I 398.
[91] O O'Neill, 'The Dark Side of Human Rights' (2005) 2 *International Affairs* 427- 439.
[92] W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16 reprinted in N W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1919). For the definitive summary of Hohfeld, see A Carbin, 'Legal Analysis and Terminology' (1919) 29 *Yale Law Journal* 163.
[93] Professor John Humphrey (1905-1995) a former McGill law professor was asked to work with a Committee of the UN Secretariat to help the organisation draft a statement on human rights. He provided guidance to the eighteen member Committee which produced a 400 page blue print that became the foundation of the UDHR.
[94] René Cassin of France was part of UDHR Drafting Committee chaired by Eleanor Roosevelt.

also stated in his draft article 4 that '[i]n the exercise of his rights, everyone is limited by the rights of others.'

Nowhere was the basic legal and philosophical principle of the correlation of rights and duties so consistently accepted than in the negotiations for the UDHR by those who partook in it. Several delegates to the First Session desired to see the principle of correlativity incorporated in the Declaration. The Australian delegate put it plainly when he stated that '[e]veryone of these rights has a corresponding duty.'[95] His Chinese counterpart thought that the drafting of a declaration was a matter of 'entrusting the rights of the human being at the same time demanding his acceptance of the corresponding obligations.'[96] The British delegate also thought it 'was no use [to] define personal freedoms entirely detached from the obligations of those individuals either to the State or to voluntary organisations.'[97]

Various other contributions on the subject supported the conclusion that the principle of the correlation of rights and duties would find expression in the Declaration, and more importantly that duties should be clearly spelt out in the UDHR.[98]

The delegates from Latin America attempted to persuade the negotiators to adopt a list of duties in much the same lines as those that they were preparing to include in the American Declaration of the Rights and Duties of Man (the American Declaration).[99] For example, Guy Perez Cisneros, the Cuban delegate, wondered whether a decision to accept the draft declaration prepared by the Commission on Human Rights as the sole basis for discussion would preclude the possibility of adding a section covering duties which he considered highly desirable.[100]

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[95] The Australian representative was William Hodgson. See J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) 248.
[96] CH Wu was the Chinese delegate.
[97] Lord Dukenston.
[98] For example, Art 19 of the Chilean proposal stated that 'rights and duties are correlative, and [that] the duty to respect the rights of others operates at all times as a restriction upon the arbitrary exercise of rights.' The Brazilian delegate Belarmino Augustregesilio de Athayde told the Third Committee that 'it was impossible to draw up a declaration of rights without proclaiming duties implicit in the concept of freedoms which made it impossible to set up a peaceful democratic society. … Without such a provision all freedoms might lead to anarchy and tyranny.'
[99] Also known as the Pact of San Jose, the Convention was adopted by the OAS on 18 July 1948 in accordance with article 74; OAS DOC.OEA/Ser.K/XVI/1.1, Doc 65.
[100] Morsink (n 95).

From the point of view of these and many other thinkers, 'rights' and 'duties' co-exist with each other. They are two sides of the same coin serving to regulate human behaviour. Duties are therefore connected to rights.

The view of rights and duties canvassed by these thinkers and others in various forums is, in the opinion of this researcher, rather assuming. It scarcely needs proof that not all rights, whether set out in declarations of rights or not, impose duties on others. This is the argument made in the next part of this work. Leaving aside that argument for now, it is clear to see that rights connected duties are of two types: those that are counterparts of rights and those that function as restriction on rights. 'Counterpart duties' conjecture that whenever someone has 'a fundamental legal right,' someone else must be assumed to have 'a fundamental legal duty' to respect and guarantee that right.

As previously alluded to, counterpart duties can either be positive or negative; positive when they impose a duty to act in such a way as to realize somebody's right (this is often associated with economic, social and cultural rights). They are negative when they require of someone to refrain from doing something (this is often associated with social and political rights). They are thus a way of formulating or interpreting rights. It is instructive to examine how duties can help in the formulation and interpretation of rights.

4.5.1. Duties as tools for formulating and interpreting rights

Counterpart duties may be another way of expressing rights. As Udombana observes, when rights entail positive duties, it may be preferable to specify those duties: this is more concrete than proclaiming rights.[101] This is the case in provisions of most international human rights instruments where, without using the terms 'duty', 'responsibility' or 'obligation', they provide instead that 'No person shall …' rather than 'everyone has the right to….'

[101] N J Udombana, '"Arise O Compatriots": An Analysis of Duties of the Citizen in the Nigerian Constitution', (2002) 34 *Zambia Law Reports* 31.

4.5.2. Rights-restrictive duties

Rights-restrictive duties on the other hand, are cast upon rights-bearers in the exercise of their rights. Many regional and international instruments recognize this. Conspicuous examples include both the United Nations twin Covenants of 1966: the ICCPR and the ICESCR and the African Charter. These establish such a link. The former provide in their commonly worded paragraph in the Preamble that:

> Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

The African Charter proclaims in article 1 that:

> The member states of the organisation of African Unity [African Union] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

The American Declaration, in similar fashion, explains the interrelationship between rights and duties in its preamble as follows:

> The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberties, duties express the dignity of that liberty.

Another way of viewing rights restrictive duties is that they are alternative ways of formulating restrictions of rights. As Heyns suggests, they amount to nothing more and nothing less, than the presence of a limitation clause.[102] They are duties to respect a general or public interest. In their study published in 1996, Heyns and Kaguongo found that of fifty three African countries studied,

[102] C Heyns, 'Where is the voice of Africa in our Constitution?' 4 (1996) Centre for Human Rights, Pretoria, Occasional Paper 8 <http://www.chr.up.ac.za/centre_publictions/occ_paper/occ8.htmI> accessed 11 February 2013.

their constitutions contained rights that were subject to internal limitations and twenty-five constitutions contained general clauses by virtue of which limitations could be imposed, in some cases in the interest of national security, public safety, public health or morals, public order, or for the protection of the rights and freedoms of others.[103] These limitations are duties to respect the general or public interest, 'defence, public safety, public order, public morality or public health. These considerations impose a duty and are a limitation on one's enjoyment of one's rights. In exercising the freedom of expression, for example, one is minded of his responsibility to others and to the general good and therefore, is enjoined to express such right within the confines public safety, public order and public morality and always in a manner that does not offend the rights of others.

The Zambian case of *Feliya Kachasu v Attorney General*[104] is the text book kind of example of duty limiting rights. The applicant, a young girl aged between eleven and twelve years, suing through her father as next friend[105] claimed, among other things, that her suspension from school and the refusal of her application for unconditional readmission to the school constituted interference in the enjoyment her right to freedom of conscience, thought and religion guaranteed by article 19 of the Constitution of Zambia. The Applicant and her father were Jehovah's Witnesses; the applicant herself having been raised in the religion of Jehovah's Witnesses by her parents and had been taught that it was against God's law to worship idols or to sing songs of praise or hymns to anyone other than Jehovah God himself. The applicant and her father as well as many other Jehovah's Witnesses, regarded the signing of the national anthem as singing a hymn or prayer to someone other than Jehovah God. They also regarded the saluting of the national flag as worshipping an idol. As far as they were concerned, the signing of the national anthem and the saluting of the national flag were religious ceremonies or observances in which

[103] C Heyns and W Kaguongo, 'Current Developments: Constitutional Human Rights Law in Africa,' (2006) 22 *South Africa Journal of Human Rights* 673-717. The countries identified were Angola (article 52), Botswana (section 3) Burundi (article 47), Cape Verde (article 17(5)), Eritrea (article 26), Guinea (article 22), Guinea-Bissau (article 31), Kenya (section 70), Lesotho (section 4(1)), Malawi (section 44), Mauritius (section 3), Mozambique (article56(2), (3), (4)), Namibia (article 22), Nigeria (section 45(1)), Rwanda (article 43), Sao Tome & Principe (article 18), Sierra Leone (section 15), South Africa (section 36), Swaziland (section 14(3)), Tanzania (article 30), Togo (article 14), Tunisia (article 7), Uganda (article 43), Zambia (article 11) and Zimbabwe (section 11).
[104] 1967 ZR 145.
[105] Common law term used to refer to a person who represents another person who is under disability or otherwise to maintain a suit on his own behalf.

they could not actively take part in because they were in conflict with their religious views and beliefs.

In September 1966 The Education (Primary and Secondary Schools) Regulations came into force. By Regulation 25 of those Regulations, pupils attending Government and Government aided schools were required to sing the national anthem and to salute the national flag on specific occasions. Regulation 31(1) (d) empowered the head of a school to suspend from school any pupil who wilfully refused to sing the national anthem, or salute the national flag when lawfully required to do so. In October 1966, the applicant refused to sing the national anthem and was consequently suspended from school. Thereafter the applicant's father approached the school authorities and explained that the reason for the applicant's refusal to sing the national anthem was that it was against her religious conscience to do so. He then requested for his daughter to be reinstated at the school and to be excused from singing the national anthem or saluting the national flag. The request for readmission was rejected unless the applicant agreed to abide by the regulations. In the result the applicant stopped attending school.

In her notice of motion, the applicant asked the court for an order that her suspension was unlawful and that she was entitled to re-admission to the school without having to give an undertaking that she would sing the national anthem and salute the national flag. She premised her application on specific grounds which included an assertion that her suspension constituted a hindrance in the enjoyment of her freedom of conscience, inclusive of freedom of thought and religion in terms of article 19 of the Constitution which provides that:

> 19 (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this article, the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching practice or observance.

The Regulations under the Education Act which appeared to hinder the enjoyment of the right enshrined in article 19 of the Constitution of Zambia were upheld on the grounds that the

applicant had not established that the regulations in question had gone beyond what was reasonably required in the interests of public security or public order. The court was of the view that in order to ascertain national security, it was essential to have national unity. Bladgen J. held that bearing in mind the compelling consideration, particularly at that present time of national unity and national security, without which there can neither be certainty of public safety nor guarantee of individual rights and freedoms, it was a reasonable requirement that pupils in government and government aided schools should sing the national anthem and salute the national flag. This holding in effect suggested that the duty to uphold national unity and solidarity outweighed the individual's freedom of conscience and that the individual's duty to uphold these virtues overrides the individual's personal liberties. This researcher does not agree with the reasoning in this decision passed a judiciary operating in a one party era when human rights considerations were circumscribed by the political environment of the time. It is unlikely that the same question would be determined in the same way today.

A not dissimilar reasoning was employed by the European Court of Human Rights in *Jaggard and Brown v UK*[106]. In reviewing the conviction of a group of men indulging in sado-masochistic practices in private, Laskey J. of the European Court of Human Rights accepted the argument by the British government that 'the criminal law should seek to deter certain forms of behavior on public health grounds but also for broader moral reasons. In this case acts of torture, such as those in issue in this case, may be banned also on ground that they undermine the respect which human beings should confer upon each other.'

To the extent that they are geared towards the respect of the rights of others, rights restrictive duties overlap with counterpart duties.[107]

4.6. DUTIES INDEPENDENT OF RIGHTS

At a broader level, duties of the individual could be independent of rights when they are not related to or referable to any corresponding right. These are what some writers call imperfect

[106] 24 EHRR 39 (1997).
[107] See E Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, The Hague 2002) 574.

duties. But is the mere presence of a duty to be used as the test of a right? It appears that Raz suggests an impelling answer. He submits that rights are grounds of duties in others, and yet not all the interests that people have are protected by rights.[108] It is only the goods or interests that are of ample moral significance to justify the imposition of duties upon others that are protected by rights. In some cases duties exist with reference to persons, and even for their advantage, but it is clear that the correlative rights are certainly not in them. Thus, contracts in which the promisor undertakes to do something for the promisee and a third party confers no right in the latter. Criminal law also affords other examples, and here it is a much debated question where, if at all, the correlative rights are vested. Duties in criminal law are imposed with reference to, and for the benefit of, members of the society, but none of them have rights correlative to these duties. Statutory duties furnish other examples of duties without correlative rights. It rests on a particular statute whether the duties created by it are correlative to any right in the persons contemplated by the duties. Conduct is regulated by the imposition of duties. Rights may assist in achieving this end, but if it can be otherwise achieved, there is no reason why the mere fact that Y is under a duty with regard to X should confer upon X, or anyone else for that matter, a corresponding right.[109] Where duties are of a private concern, the remedies are best left to individuals to pursue in the event of their breach. It is, above all, expedient to give aggrieved persons some satisfaction, usually by way of compensation. Austin was driven to admit that some duties have no correlative rights, and he called these 'absolute duties'[110]. Salmond, on the other hand, maintains that every duty must have a correlative right somewhere.[111] Williams treats the dispute as verbal.[112]

The philosopher Hart advances a theory that there are moral rights and at least a natural right; the equal right of all men to be free.[113] With this distinction he addresses the issue of correlativity of rights and duties thus:

[108] Raz (n 89).
[109] H Kelsen, *General Theory of Law and State* (Harvard University Press, Massachusetts 1945) 85.
[110] Ibid 401-403.
[111] J W Salmond, *Jurisprudence* (1913), (7th edn Stevens and Heynes, Michigan) 240.
[112] Ibid.
[113] H L A Hart, 'Are there any Natural Rights' (1995) 64 (2) *The Philosophical Review* 175-197.

> More important for our purpose is the question whether for all moral 'duties' there are correlative moral rights, because those who have given an affirmative answer to this question have usually assumed without adequate scrutiny that to have a right is simply to be capable of benefiting by the performance of 'duty'; whereas in fact this is not a sufficient condition (and probably not a necessary condition) of having a right. Thus animals and babies who stand to benefit by our performance of our 'duty' not to ill treat them are said therefore to have a right to proper treatment. The full consequence of this reasoning is not usually followed out; most have shrunk from saying that we have rights against ourselves because we stand to benefit from our performance of 'duty' to keep ourselves alive or develop our talents. But the moral situation which arises from a promise (where the legal-sounding terminology of rights and obligations is appropriate) illustrates most clearly that the notion of having a right and that of benefit by performance of a 'duty' are not identical.[114]

Hart and others argue that while we have duties not to mistreat animals and babies, these nevertheless have no rights against us (partly because they are not moral agents).[115] Others claim that the duty to rescue others in distress has no correlative right.[116]

It is clear then that although rights do give rise to duties in some cases others, it does not follow that all duties are referable to some or other individual rights. As Renteln states the view that rights and duties are correlative used to be the dominant one among philosophers.[117] However many rights theorists have taken wavering positions with regard to this issue.[118] Most of their arguments are premised on the four Holfeldian categories. Lyons, for example, argues that one set of rights, namely, 'active rights' (the rights to do things) does not fit in the scheme of correlativity.[119] An often quoted example he gives is that involving the right to free speech. The character Alvin, speaks to a crowd from a soap box, disparaging United States military involvement in Vietnam. While he is preaching his message, he is assaulted by private citizens

[114] Hart (n 113) 180.
[115] See Lamont 1950
[116] H A Bedau, Pegusus, New York 1968
[117] Renteln, (n 81).
[118] These include Feinburg, Lyons, Martin and Nickel and McCloskey. See ch 2.
[119] D Lyons, 'The Correlativity of Rights and Duties'(1970) 4 *Nous* 48.

and removed from his platform. Lyons asks the question whether Alvin's right to free speech (or the right to address the gathering) is '…equivalent to the assertion of correlative incumbent on others.' The point Lyons makes is that in his example, Alvin's right to free speech does not correspond to any duty. The constitutional right to free speech is independent of, for example, the obligation not to assault that was breached by those who silenced Alvin.[120]In his understanding those listening to Alvin's speech may be under a duty not to attack Alvin, but are not under a duty to respect his free speech. He concludes that Alvin's constitutional right has a conceptual correlative but it is not an obligation; it is a legislative disability the assertion of which says that Congress is not empowered to enact certain laws.

The root of the argument against logical correlativity doctrine seems to be the Hohfeldian interpretation of an immunity right, the correlative of which is disability. According to Hohfeldian scholars, disabilities are associated with absence of obligations. Philosophers have also challenged the logical correlativity doctrine by asserting the existence of duties without corresponding rights. Feinberg, for instance, asserts that duties of charity which '… require us to contribute to one or another of a large number of eligible recipients, no one of which can claim our contribution from us as his due' shows the absence of a correlative right.[121] Feinberg, however, admits the correlativity proposition and stresses the respects in which rights are tied up with claims and the activity of claiming. He puts his views thus:

> To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principle. To have a claim in turn, is to have a case meriting consideration, that is to have reasons or grounds that put one in a position to engage in performative and propositional claiming.[122]

Correlativity has also been criticised by McCloskey[123] who argues that 'if a right means "a right against someone", then such explanation cannot justify the right of infants, mentally infirm and idiots or even the rights of animals and plants.' As such he suggests that a right should logically

[120] Lyons (n 119) 51.
[121] J Feinberg, 'The Nature and Value of Rights' (1970) 4 (4) *Journal of Value Inquiry* 243-275.
[122] Ibid.
[123] H J McCloskey, 'Rights' (1965) 15 *Philosophical Quarterly* 116.

mean 'a right to something' *vis-à-vis* an entitlement. McCloskey rejects the correlativity principle; the thesis that it is a conceptual feature of rights; that there are always have correlative obligations.

> My right to life is not a right against anyone. It is my right and by virtue of it, it is normally permissible for me to sustain my life in the face of obstacles. It does give rise to rights against others in the sense that others have or may come to have duties to refrain from killing me, but it is essentially a right of mine, not an infinite list of claims, hypothetical and actual, against an infinite number of actual, potential and as yet no-existent human beings. When a right is attributed, we cannot always significantly ask "who has the corresponding duties?" And, when a duty is postulated, we cannot always find someone who possesses a corresponding right.[124]

So if A has a right to something, he is entitled to that thing notwithstanding that there is no correlated duty on B to allow the doing of that thing. Likewise there are many duties without correlated rights e.g. the duty to pay income tax.

In point of fact, it would be preposterous to assume that every legal duty is correlative to some moral interest somewhere. A more accurate view about the relationship between rights and duties, in the view of this researcher, is that there is a correlation between just some of them. Even when we accept that the principle of correlation between rights and duties is correct, that does not force us into accepting the less plausible view that every right implies a duty and every duty implies a right. As has already been shown above, there are many duties regarding individuals which are not duties to those individuals. In the same vein individuals may have rights which are not rights against anyone in particular. The theory of strict correlation of rights and duties is silent in such cases.

[124] Ibid.

4.7. THE SCHEME OF DUTY ASSIGNMENT IN INTERNATIONAL HUMAN RIGHTS LAW AND IMPLICATIONS FOR THE STATE AND THE INDIVIDUAL

All human beings have human rights by virtue of being human, which rights must be respected and protected. A conformist corollary of this claim is that everyone has a duty to respect and protect the human rights of everyone else. However, in practice, in international human rights law, the burden of safeguarding individuals' human rights normally fall upon the state, that is to say the bearers of counterpart or correlative duties are essentially the state authorities. As a fairly new appendage to an international law system, the whole human rights regime is based on state responsibility; state responsibility itself, being an enduring principle of international law. International law on the other hand, has long been regarded as the exclusive province of state actors under which states are bound by those norms that are known as customary law or those that they explicitly consent to through treaties. To narrow the argument, treaties which are regarded as the primary instruments of international law, are concluded between sovereign states to regulate and govern relations between those states. States therefore, are the traditionally recognised subjects of international law. Flowing from this traditional view is the argument that at international law, individuals may be holders of rights while states are the principal, if not the exclusive, holders of duties. This notion is grounded on the premise that the state is the ultimate guardian of its population's welfare and, therefore, has the responsibility of guaranteeing human rights since it alone is capable of doing so.[125] Since the state 'possess the totality of international rights and duties recognised by international law'[126] the traditional human rights paradigm is premised on a relationship of dependence and trust on behalf of individuals towards states as the primary subjects of international law providing them with 'fundamental guarantees and standards of legal protection' against abuses of state power.[127]The human rights body is designed primarily to contain the state since it is the *raison d'etre* for the corpus[128]. The focus of international human rights law has, therefore, been on the actions of state because private actors would

[125] See also the Asian Human Rights Charter declared in Kwanju, South Korea on 17 May 1998. Article 2.7 states that the primary responsibility for the promotion of human rights rests with states.
[126] See the Advisory Opinion of the International Court of Justice in *Reparations for Injuries Suffered in the Service of the United Nations* ICJ Rep 1949 174.
[127] A Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in P Alston (ed) *Non State Actors and Human Rights* (Oxford University Press, Oxford 2005) 37-92.
[128] See H J Steiner, 'The Youth of Rights' (1991) 104 *Harvard Law Review* 917.

normally fall within the remit of domestic criminal laws rendering the international governance of their actions unnecessary.

Philosophers such as Pogge argue that the moral burden for securing human rights should fall disproportionately upon state institutions precisely because they are best placed and most able to effectively perform the task.[129] A somewhat simplistic view is given by Mutua who suggests that the state is both the guarantor and subject of human rights; it is the antithesis of human rights; the one exists to combat the other in a struggle for supremacy over society.[130] Elsewhere he submits that if the state is not contained, it will imperil and devour and imperil human freedom.[131]

Arising from the foregoing duties are generally assigned to states by international human rights instruments. Treaties in human rights law remain the best medium available for imposing binding rules with precision and detail in new areas of expansion of international law, and also for codifying or clarifying customary law as it already exists. As a general rule, a treaty cannot impose obligations or confer rights upon a third party without that party's consent.

The ICESCR has proposed a system for analysing different levels of duties imposed by any rights enshrined in the ICESCR (and potentially any other human rights, regardless of whether it is considered 'civil', 'political', 'economic', 'social', or 'cultural'). It uses the triptych of obligations to respect, protect, and fulfil. This offers a framework for understanding the different types of duties of the state. As the focus of this thesis is individual duties rather than state duties, this topic merits no more than passing reference in this work. Suffice it to state that the three-level typology of states' duties has now come to be widely accepted as a framework for analysing states' human rights obligations generally[132]. Applying this framework to states parties to numerous international human rights instruments states have the obligations to respect, protect and fulfil human rights. The state should, at the primary level, respect the resources owned by

[129] T Pogge, 'How Should Human Rights be Conceived?' (1995) 3 *Jahrbuch fur Recht und Ethik* 103-20.
[130]M Mutua, 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' 10 *Harvard Human Rights Journal* 63 67.
[131] M Mutua, 'Savages, Victims, and Saviours: The Metaphor of Human Rights' (1997) 42 *Harvard International Law Journal* 220.
[132] UN ECOSOC Sub-Committee on Prevention of Discrimination and Protection of Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right* UN Doc E/CN 4/Sub2/1987/23 (July 7 1987submitted by Asbjorn Eide).

the individual and the individual's freedom to employ those resources, to find a job of his or her choice, to make optimal use of his or her own knowledge and to take the necessary actions either alone or in association with others, to satisfy his or her own needs.

Since the state cannot be passive in its acknowledgement of these rights and freedoms, it has at a secondary level an obligation to protect those right against third parties who are likely to interfere negatively with the possible options that individuals or groups otherwise might have to satisfy their own needs. The state must offer protection from fraud, unethical behaviour in trade and contractual relations, and the marketing and environmental degradation arising from such actions as dumping of hazardous or dangerous products. This protective function of the state may in fact be said to be the most important aspect of state obligations with regard to economic, social and cultural rights, similar in significance to the role of the state as protector of civil and political rights. The obligation to protect requires states to prevent these rights from being abuses by third parties. At the tertiary level, the state has the obligation to facilitate opportunities by which the rights listed can be enjoyed or, when the other obligations are insufficiently met, to provide such opportunities and thus fulfil the rights. The obligation to fulfil requires the state to pro-actively engage in activities that ensure the realization of rights. Fulfil also requires states to take measures necessary to ensure that each person may obtain basic rights whenever they, for reasons beyond their control, are unable to realize these rights through the means at their disposal.

4.7.1. The duties of individuals in human rights protection

Although, as considered above, the prevalent approach in legal science is that the responsibility for protecting individual's fundamental rights lies in the positive obligations of the state, given their rising authority and changing functions, some private actors, notably corporations and individuals are arguably also in a position and under a duty to protect individual's fundamental rights. This cannot be true of every right in every circumstance. International human rights law recognises that there are indeed many probable duty-holders. Given that human rights secure moral standards for the treatment of all human beings, those standards should bind anyone who is capable of trespassing on those rights – whether they are governments, groups, corporations or

individual. Thus, the correlative duties involved in human rights as claim-rights are duties that do not essentially reside exclusively with the state. The violation of some human right may be perpetrated by one individual against others, such as an employer who discriminates against a racial group in hiring. Or, a duty to respect human rights may be held by a group within society, such as a religious majority's obligation to tolerate other religious practices. There may be a general duty on the community to act collectively, for example rural communities in North-Western Province of Zambia who have to ensure that pubescent male persons in the community undergo initiation in a community kraal for a designated period of time.[133]

States often have a direct duty, for example, to refrain from arbitrary detention and torture of any person within its territory. There may also be a duty that reposes in all humanity, such as the obligation to alleviate suffering among victims of natural disasters and calamities such as earth quakes typhoons and hunger. States may only be intermediary duty-holders who should try and intervene to safeguard human rights from actions by their citizens, but those citizens bear the direct duty to respect the human rights of others. This is best illustrated by the assignment of duty in the case of economic, social and cultural rights.

4.7.2. The horizontal effect doctrines

There is acknowledgment of at least a 'negative' duty of private actors not to infringe human rights or other fundamental rights in the horizontal effect doctrines.[134] The horizontal effects doctrines aim to further the respect and protection of fundamental rights and 'refer to the binding effect of human rights provisions on private parties.'[135] Although non-state actors have increasingly been powerful and influential, there have been no correlative developments of

[133] In North Western Zambia a practice called *Mukanda* is prevalent among the Lunda, Lovale and Chokwe tribes. It subjects all male children of about 12 to 14 years to be kept in a secluded initiation camp for some time to undergo initiation rites into adulthood which includes circumcision and learning life lessons.
[134] See for example, G Phillipson 'The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?' (1999) *Modern Law Review Limited* 824; A Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors?' in P Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, Oxford 2005) 37-92 and A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford 2006).
[135] J Gajdosova and J Zehetner, 'England' in G Bruggemeier, A Colombi Ciacchi, and G Commande (eds) *Fundamental Rights and Private Law in the European Union, vol. 1: A Comparative Overview* (Cambridge University Press, Cambridge 2010) 151.

human rights law allowing for human rights to be applied between two actors of the same kind operating on the same legal plane. This is called the horizontal effect of human rights. Instead human rights are applied vertically, whereby obligations are imposed on states as the 'higher' entity to the benefit of individuals. Human rights treaties allow for neither substantive nor procedural horizontal effect. Substantive horizontal effect enable individuals to claim violations of duties owed to them by non-state actors, whilst procedural horizontal effect would allow an individual to enforce his fundamental rights against another individual.[136]Knowing as we do that treaty based human rights protection mechanisms are often overseen by treaty bodies, the procedural horizontal effect doctrine would challenge the existing rule that complaints of human rights violations may only be brought before human rights monitoring bodies by individuals against states.[137]

The horizontal application of human rights can further be divided into 'direct' and 'indirect' effect. According to Phillipson the direct effect of human rights obligations 'lays duties directly upon a private body to abide by its provisions and make breach of these duties directly actionable at the instance of an aggrieved party'.[138] As Knox explains, indirect horizontal effect holds states indirectly responsible for the harmful actions of non-state actors, because the state's obligation to protect human rights[139] requires them to impose duties on individuals through the implementation of their own domestic laws.[140] This approach of ascribing duties to ensure non-violation of individuals human rights by non-state actors, and yet the state is responsible for violations is nowhere better seen than in the decision of the African Commission on Human and Peoples' Rights in the *Ogoni case*.[141]Despite finding the National Nigerian Petroleum Company (Shell Development Corporation) directly responsible for pollution, the Commission found that the Nigerian government was liable and accountable for human rights violations under the

[136] P Van Dijik, and G J H Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rdedn Kluwer Law International, The Hague 1988) 23.
[137] See for example Article 1 Optional Protocol ICCPR UN General Assembly *Optional Protocol to the International Covenant on Civil and Political Rights* 19 December 1966 UNTS (999) 171.
[138] G Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?' (1999) *Modern Law Review Limited* 826.
[139]This forms part of the tripartite typology of human rights obligations already explained above, which is widely accepted and applied by UN treaty bodies and human rights academics and requires states to respect, protect and fulfil human rights. See generally Comm ESCR, General Comment No. 12, Substantive issues arising from the implementation of the ICESCR: The right to adequate food (art.11) 12 May 1999 E/C. 12/1999/5.
[140] J Knox, 'Horizontal Human Rights Law' (2008) 102 (1) *American Journal of International Law* 28.
[141]*Social and Economic Rights Centre for Economic and Social Rights v Nigeria* Communication No. 155/96

African Charter for failing to protect the indigenous people of Ogoniland from the harmful actions of the Petroleum Company. The Commission applied indirect horizontal effect and took a 'firm and dynamic approach'[142] applying the tripartite typology of human rights to hold Nigeria responsible for its failure to fulfil its obligation to protect the rights of the people to fully 'freely dispose of their wealth and natural resources'.

4.8. TREATMENT OF INDIVIDUALS' DUTIES IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

Notwithstanding the position as discussed in the foregoing paragraphs, the creation and imposition of duties on private individuals by treaties and other equally weighty documents is not a novel or an unfamiliar phenomenon to the international community. A random sampling of international, regional and domestic human rights instruments will attest to the common recognition of individuals' duties. Some of these instruments have already been discussed in detail in Chapter Two and also alluded to earlier on in this chapter.[143] It is, therefore, unnecessary to repeat the explanations already made.[144]

It is noteworthy that the whole international criminal justice system administered by the International Criminal Court under the Rome Statute[145] recognises the individual as a subject of duties. The same can be said of domestic criminal law systems in general. In this sense the duties imposed on individuals are aimed at realising the rights guaranteed by various laws and regulations both nationally and internationally.

[142] F Coomans, 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749.
[143] See part 3.
[144] See art 29 of the UDHR and the preamble to ICCPR and the ICESCR.
[145] The Rome Statute of the International Criminal Court is a treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome on 17 July 1988 and it entered into force in July 2002. It establishes the international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

At the regional level many instruments contain duties provisions. The manner in which these provisions are couched or intended to be implemented at country level vary from region to region.[146]

4.9. INDIVIDUALS' DUTIES IN DOMESTIC CONSTITUTIONS AND LEGISLATION

As already pointed out in Chapter Two of this work, constitutions and statutes of many countries the world over, now contain provisions relating to individuals' duties, a clear acknowledgment of the significance of duties of the individual in the enjoyment of human rights. Whether this can also be interpreted as reflecting recognition of the inter-relationship between rights and personal duties remains to this researcher very much a debatable question. Much as the existence of individuals' duties in constitutions may be a manifestation of a commitment to duties of the individual that exist in states, an examination of national constitutions of most of these states will, however, show a number of factors representing the low sides of these provisions *vis-à-vis,* rights. Three of these weaknesses are notable. First, most of the provisions conferring rights far outnumber those imposing their perceived counterpart – individuals' duties.[147] Second, a troublesome feature is the non-justiciability of many of these individuals' duties which are confined to the directive principles of state policy in many countries; and third the vagueness in language or meaning typifies the formulation of duties of the individual provisions.

[146] The American Declaration on the Rights and Duties of Man talks of duties in the preamble. It also sets out a wide-ranging set of individual duties alongside human rights. The reference to duties in the American Convention was abbreviated to its Ch 5, headed Personal Responsibilities and took the form of a single article. The European Convention recognised the need to balance rights and freedoms in the interest of collective order and harmony in society. Arts 9, 10, and 11 of the Convention states that individual human rights may be subject to limits including those prescribed in the interests of public order, public safety and the protection of the rights of others in a democratic society. Arti 10 specifically states that the exercise of those freedoms carries with it duties and responsibilities. The African Charter on Human and People's Rights covers rights and duties. Art 27, 28 and 29are specifically directed at individual duties. Art III of the OAU Convention Governing Specific Aspects of Refugees in Africa imposes duties on individual refugees. The ACRWC also creates new individual duties in various articles. The African Youth Charter likewise details individual duties for youths in art 26.

[147] See H J Steiner, P Alston and R Goodman, *International Human Rights in Context* (3rd edn Oxford University Press, New York 2007) 501.

4.10. CONCLUSION

This chapter has given a description of the term duty in its many notions as well as the essential features of a general scheme of duty assignment and how the individual is implicated. It has been demonstrated that 'duty' as a concept has a variable content and cannot be strictly defined. Indeed individual duties, obligations or responsibilities in the framework of human rights have a transecting oddity of both a legal and a moral/ethical dimension, with coercion to obey being present in some kinds only of personal duty but not in others. The term 'duty' is, in some sense, an expression of something that defies precision in definition and yet, at a given time and place there is an appropriate standard by which the balance between private interest and the common good can be maintained through the observance of what are loosely termed as duties by the individual.

Furthermore, the use of the terms 'duty', 'obligation' and 'responsibility' interchangeably even in international instruments (illustrations of which have been given in this chapter) is a conspicuous example of the absence of clarity in the notion and use of individual duty in the human rights discourse. One cannot but take it that the drafters of those instruments appear to have been very conscious and guarded in language for they used the expression 'duty', 'obligation' and 'responsibility' deliberately and yet, do not give the exact sense which these terms are intended to convey. If they had intended to deprive the words of all efficacies, the texts would have said so.

There is also no doubt that domestic constitutions and legislation in various countries have combined the emphasis on individual liberties with an articulation of duties of the individual. However, the duties provisions in these constitutions and legislation often suffer the same limitations in terms of conceptual formulation as their counterparts in international human rights instruments.

There are indeed conceptual puzzles in understanding duties of the individual. This difficulty is due primarily to the challenges attendant to the identification of both the source and the value of some individual duties as well as their enforceability. It is difficult to give one convincing

account of how we come to be subject to duty. If to have a duty is to be subjected to a binding normative requirement, it should be natural to ask how it is that we could become subject to such a requirement. The question who or what binds us is as difficult as it is interesting. But even more fascinating is the question what are the grounds of duty?

One of the several viewpoints in considering individuals' duty relates to the supreme good in itself considered. Under this view, we may ask questions such as whether any one duty is greater than another. Yet another view relates to the rules by which the conduct of life may in all its portions be brought into conformity with the supreme good. Duties of the individual for which rules are laid down seem rather to have reference to the ordering of common life.

Some theorists, notably some natural law ones with a strong inclination to explaining nature by reference to the divine sovereign being, are quick to state that only God or a superior being is the source of duties of the individual. Because this superior being is deemed to exist, he has authority over us and does therefore impose duties on us. If that theory is accepted then we doubtless have a duty to obey those duties. However, a problem with this view, as Robert Frazier[148] observes, is that it has the implication that if God does not exist, then there are no duties to observe. Another problem, he points out, is that it is unclear why God has authority over us, and indeed a similar question can be asked about anyone else e.g. a person, institution, or society) that is supposed to be able to impose duties on us.[149] The whole scheme of endeavouring to portray ethical concerns in terms of duty has been criticised. One of the principal objections is that the idea of duty is so closely connected to the idea of God as a lawmaker or imposer of duties that the concept has no place in secular philosophy.[150]

It also appears apparent from the discussion on the rights and duties equation that the acknowledgement of individual obligations in relation to the rights and freedoms of all human beings need not always be translated into despicably demanding commands. Some types of duty are clearly incapable of not only being given an exact definition but also any prospect of enforcement. As one writer observes, when it comes to duties which cannot be reduced into hard

[148] R L Frazier, 'Duty' <http://kant1.chch.ox.ac.uk/rlfrazier/duty> accessed 5 August 2014.
[149] Ibid.
[150] See GEM Anscombe, 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1-9.

law, the basic general reflection is that one must be agreeable to consider earnestly what one should reasonably do, taking note of the relevant parameters of the cases involved. The necessity to ask that question (rather than proceeding on the assumption that we owe nothing to others) can be the beginning of a more comprehensive line of reasoning. The territory of human rights belongs there. The reasoning cannot, however, end there. As Sen aptly puts the point thus:

> [t]he recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgment that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non- obligational concerns may overwhelm the reason for the particular action in question, but that reason cannot be simply brushed away as being 'none of one's business.' Loosely obligations must not be confused with no obligations at all. Rather they belong as was mentioned earlier, to the important category of duties that Immanuel Kant called 'imperfect obligations'.[151]

To this extent it is difficult, if not impossible, to develop comprehensive international human rights standards around individual duties in the same way as rights, let alone create a charter of moral ethics labelled as duties, as is being advocated for. At this point a doubt occurs, and a serious doubt too, to one's mind which should more than once have exercised those who advocate a duty based social ordering as to the practicality of their demands. When the current debate on duties in the human rights framework is considered in chapter 6 of this paper, the difficulties of conceptualisation which this chapter has attempted to bring to the fore, will become apparent.

The conclusion to be made is that the efficacy of any individual duties provision in any international human rights instrument should depend upon the degree of directness with which the violation of a given proclaimed duty, obligation or responsibility brings the wrong doer into conflict with such international instrument rather than the law of the land. To refer to breach of

[151] Sen (n 1) 340.

domestic legislation any observance by the individual of a duty, obligation or responsibility, is to offer but a very inadequate and unhelpful view of the otherwise important issue of duties.

CHAPTER FIVE: UNIVERSALITY OF HUMAN RIGHTS, CULTURAL RELATIVISM AND THEIR RELEVANCE TO THE CONCEPT OF DUTIES

5.1. INTRODUCTION

In contemporary human rights philosophical and legal discourse, there is a strong claim that human rights are, by nature, universal. The point is made that inherent in the very definition of human rights, is the assumption of universality of rights themselves; that human rights embody universal ideals that apply across political, religious and cultural divides. Universalists argue that the universality of human rights is the foundation stone of international human rights law;[1] that in fact, universality informs the discourse and content of rights enshrined in basic human rights treaties. The plinth of the universalists' argument is that human rights are founded on a specific fundamental philosophical claim which holds that there exists a rationally identifiable order whose legitimacy precedes and applies to all human beings everywhere and at all times.[2]

Cultural relativism challenges the notion of universality of human rights, arguing that ethical systems develop in the context of local cultures and traditions and therefore, that universal applicability of human rights should not be assumed.[3] Cultural relativism asserts that human values, far from being universal, vary significantly according to diverse cultural standpoints. In other words, human rights are culturally relative rather than universal; that universal human

[1] For proponents of the universalist view and a rejection of the cultural relativist approach, see J Donnelly, *Universalism and Human Rights in Theory and Practice* (Cornell University Press, Ithaca and London 2003); R E Howard, 'Group Versus Individual Identity in the African Debate on Human Rights' in A A An-Na'im and Francis Deng (eds) *Cross-Cultural Perspectives* (Brookings, Washington DC 1990)159.

[2] See generally J Donnelly, 'Cultural Relativism and Universal Human Rights' in J Donnelly (ed) *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca and London 1989) 109.

[3] For an elaborate discussion of divergent and conflicting historical, cultural, traditional and intellectual arguments in human rights, see J A M Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309; J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400; M Mutua,'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties'(1995) 35 *Virginian Journal of International Law* 339; and Raimundo Pannikar, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 *Diogenes* 75.

rights norms simply do not conform to the extreme diversity of cultural and religious practices found around the world, and therefore, that universal human rights should be modified to conform to local cultural and religious norms

This chapter considers the concept of individuals' duties in the context of the universality and relativism debate. To what extent can this debate be extended to duties of the individual? Are individuals' duties universal, or are they culturally relative? If there are culturally relative duties of the individual, is it conceivable that those duties could be universalised in the same way that some perceptively Western human rights norms have been universalised?

The chapter seeks to evaluate the influence of Western as well as non-Western, particularly African and Asia, cultural values on the notion of duties of the individual in the human rights discourse. It examines the extent to which culture, tradition and morality shape the concept of duties and responsibilities of the individual. It also assesses the difficulties implicit in any structuring of individual duties provisions under legally binding international frameworks given both the nature of such duties and the divergence of cultures, and argues that some human rights norms remain difficult to realise for all because of what one can perceive as cultural duties. It should be stressed that the duties or responsibilities for individuals considered in this chapter are not confined to those duties within the scheme of human rights that are correlated to identifiable human rights. The chapter also covers cultural ethical duties.

The chapter argues that the development of liberalism in the West and the construction and universalisation of the jurisprudence of human rights based almost exclusively on Western values in apparent disregard of cultural diversity and duty conceptions outside the Western tradition is in part, responsible for what now appears to be resistance to some human rights norms. The question of applying human rights principles to particular situations invariably invites a response that implicates the content of rights and the means of making this application. As the chapter will show, many scholars and writers readily accept that a certain degree of relativity will arise when the question of defining and realising human rights relating to certain specific issues, is considered.

While the chapter supports the proposition that a cultural view to some human rights may be a more suitable milieu within which we can understand human behaviour and the concept of human dignity to resolve the apparent antinomy of rights set against culturally instigated duties, it argues that there is justification for maintaining that, by and large, human rights principles and cultural norms still need further fine-tuning as they apply to concrete situations, particularly in Africa. Communities are not static and neither is culture and tradition. There, is therefore, room to employ the flexibility necessary to facilitate the incorporation of ideas that may initially appear alien and unfamiliar to, or even violative of certain cultural practices. The overriding consideration should be to encourage present day societies to embrace the actuality of agreed international human rights such as the right to equality, to dignity and against torture and degrading treatment, the universality of which rights is commonly agreed and start from that premise in considering any cultural justifications for the perpetration or some practices or beliefs that may be at odds with some human rights. In other words, the debate should begin from a standpoint of consensus and then moving to ascertaining whether the culturally instigated exceptions would or would not diminish the consensus.

Using the African perspective, two controversial human rights issues namely, female circumcision, also known as female genital mutilation (FGM) and the rights of sexual minorities such as gays and lesbians will be used to illustrate how duty perceptions appear to undermine the realisation of what should be conventional rights and are otherwise subject of universalisation. The result of holding such perceptions is that in regard to some specific rights, the universality argument of all human rights is treated by those who harbour such views, as inapplicable.

The choice of the two human rights issues is deliberate. A discussion on universality and cultural relativity of issues like these suggests a situation of a clash of values; a conflict between some human rights principles and some traditional and cultural norms. Western values appear to be at odds with some African values in respect of both female circumcision and gay rights, albeit for different reasons. In the one, what Western values abhor as being against universal human rights, some African cultures tolerate in the name of traditional and cultural duty and responsibility. In the other, what the West accepts in the name of universal human rights, some African cultures detest and condemn on the basis of traditional and cultural duty and responsibility. This

researcher is, of course, conscious of the fact that an argument based on an 'African' conception of some human rights, risks being viewed as being in direct or subliminal support of a cultural relativism approach to human rights, premised on a belief that there is one authentic African culture which is unchanging. The writer does not subscribe to that viewpoint. It is, however, significant in a study of this nature to highlight intricate jurisprudential questions that cannot be wished away regarding cultural relativism in human rights, and how, in regard to duties of the individual, this has stubbornly continued to pose as a challenge to the enjoyment of some rights. In a way, the chapter considers how the human rights family should respond to communities that invoke cultural justifications for the practice of female genital circumcision and equally invoke cultural and traditional rationalisation for their abhorrence and rejection of the rights of sexual minorities such as gays and lesbians. A plausible response is to examine more closely the claims of culture and ask who is averring them – who is speaking for the culture of communities, and who might be resisting it. In other words, it is imperative to question who is entitled to speak on behalf of the dissenting community and to question whether the cultural rights, duties or defences are being asserted in good faith. And, in dealing specifically with the chosen two controversial issues, especially gay rights, it is beyond argument that culture may sometimes be invoked disparagingly to disguise oppression. But this researcher wants to make a different point here. The inquiry takes the best case for cultural claims; that they are asserted in good faith, and represent a consensus among the communities affected by the beliefs and practice. This is not necessarily to endorse cultural beliefs and ritual practices that violate human rights. Rather such an approach is imperative to give respectability and avoid sounding judgmental from the outset. This also helps in the understanding of the practice of FGM as a form of cultural ritual and the personal beliefs and reasoning of those who resist non-discrimination based on sexual orientation. It is only then that one could come to know these people as individuals and not mere subjects of a cultural practice or belief and the extent of their loyalty to their culture and ritual practices.

5.2. THE UNIVERSALITY AND CULTURAL RELATIVISM DEBATE: A SYNOPSIS

It is not the purport of this chapter to engage into the delicate questions about the universality of human rights, nor is its intention to reignite the jurisprudential and anthropological debate on

universality and cultural relativism. Consideration of a bare summary of the rival arguments on either side of that debate will assist in drawing the margins of the discourse that a humanitarian, social and duty oriented rather than rights oriented morality will remain relevant to the full realisation of certain human rights and to the perpetuation of the universality/cultural relativity discourse.

The universality of human rights is a much debated subject as universality is contested on many fronts. Outlooks about this issue are quite varied. There are those who believe that human rights, by nature, should be considered universal despite divergent cultural contexts. At face value, this argument should not be an awkward one to make – for, unquestionably, it is inappropriate that human rights should be reserved for some and made inaccessible to others, or enjoyed in some parts only of the world and not in others.

There are also those who believe in cultural relativism and would consequently support different conceptions of human rights based on dissimilar cultural contexts. And there are yet, those, known as multiculturalists, who consider both views and advocate a middle ground that serves to accommodate varying cultural contexts and still assert a certain degree of universality of human rights.[4] As the chapter will show, scholars like Mutua[5] do not agree with the labelling of the debate as being between relativists and universalists. Mutua particularly disapproves of the calling of one side of the debate as being that of relativists, calling this as 'a form of type-casting or human rights-name calling that has generally had the effect of stigmatising those who resist the Eurocentric formulation of human rights.' This researcher does not agree with Mutua and those who, like him, believe that the debate is not between universalism and cultural relativism. In the view taken by this writer, the debate can only be between two diametrically opposite views with any intermediate positions being assumed as versions, to varying degrees, of either of these extremes.

[4] To appreciate the multi-culturists' perspective, see M Mutua, 'African Cultural Finger Prints: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339; A Pollis and P Schwab, 'Human Rights: A Western Construct with Limited Applicability' in A Pollis and P Schwab (eds) *Human Rights and Ideological Perspectives* (Praeger, New York 1979) 116; B Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 24- 41.
[5] M Mutua, 'The Ideology of Human Rights' 36 *Virginian Journal of International Law* 588.

It is significant to note that the discussion on universality and cultural relativism goes on against the milieu of the UDHR and the Vienna Declaration[6] which restated the very principle of universality and indivisibility of all human rights.

5.2.1. Human rights as universal: the key arguments

As already alluded to in the Chapter Two which explained what human rights are, their universality is often associated with the definition of the concept of human rights itself. Ashford, for example, gives the attributes of human rights as follows:

> First, it must be universal, belonging to everyone through time. There can be no special rights attributable to only some. Second, it must be absolute. It cannot be legitimately limited by calls of public interest. Only when human rights come into conflict with each other can those rights be limited….Third, it is inalienable [by which it is meant] it is not possible to surrender that right….[7]

Cranston conceives of a human right as a right which is universal and held by all persons. He states that:

> [a] human right is by definition a universal moral right, something which all men everywhere, at all times ought to have, something which no one may be deprived without a grave affront to justice, something which is owing to every human being.[8]

Leary states what, on all accounts, sounds like the obvious when she suggests that the concept of human rights should, in theory be universal, since it is rooted in a concept of human dignity

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[6] Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF157/art 5; See also UN GA Res 32/130.
[7] N Ashford, *Human Rights: What are they and what are they not?* (Libertarian Alliance, London 1995) 2.
[8] M W Cranston, *What are Human Rights?* (Taplinger Publishing, New York 1973)1.

which posits that all human beings everywhere have rights simply because they are human.[9] With similar emphasis, Tomuschat contends that to deny the universality of human rights

> is tantamount to saying that some rights should not belong to a specific class of human beings. In general, such an attitude smacks of paternalism and may well be intended, in some instances, to defend the traditional privilege of a ruling class from within a nation or of a foreign state which controls the people concerned from outside.[10]

The principle of universality of human rights is incorporated in some form or another in most documents bearing notions of human rights. It was particularly emphasised in the UDHR in 1948, and has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights,[11] for example, noted that it is the duty of States to promote and protect all human rights and freedoms, regardless of their political, economic, and cultural systems. The Vienna Declaration and Programme of Action asserted that 'the universal nature of these rights and freedoms is beyond question.'[12]

Mainly through the work of the UN and its specialised agencies, the notion of the universality of human rights has been recognised and popularised in international human rights law. However, as Meyer observes, '[f]ew scholarly topics more readily engender controversies than the question of universality of international human rights norms.'[13] Possibly one of the trickiest of conflicts within the area of international human rights implicates the question whether assertions of universality are merely shots to exact Western values upon the rest of the world. According to

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[9] V A Leary 'Human Rights in the Asian Context: Prospects for Regional Human Rights Instruments' (1987) 2 *Connecticut Journal of International Law* 319.
[10] C Tomuschat, 'International Standards and Cultural Diversity' (1985) 24 *United Nations Bulletin of Human Rights* (Special Issue, Human Rights Day).
[11] The World Conference on Human Rights held in Vienna in June 1993, emphasised the universality of human rights by proclaiming that 'all human rights should be available to all persons at all times without distinction'. See: Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF157/art 5. See also General Assembly resolution 32/130.
[12] First operative para of Vienna Convention (n 11).
[13] A E Meyer, 'Book Review' (1982)14 *Human Rights Quarterly* 527.

Shenker[14] there is a long standing dilemma: how can universal human rights exist in a culturally diverse world? Is a global culture inevitable in the international community that becomes increasingly integrated? Are the arguments about the universal character of human rights accepted worldwide, or do some parts of the world perceive many important provisions in basic human rights instruments as particular to the Western liberal tradition, and hence of limited or no application in fundamentally different states and cultures?

It is important to pause here and observe that although it has been argued that human rights have always been universal, they were not even portrayed as universal in the West until relatively recently. It will be recalled from Chapter Two of this dissertation, that some early documents that are often cited as precursors to today's human rights as they championed older human rights ideals, such as the *Magna Carta* and the American Declaration of Independence, excluded many individuals, giving explicit rights only to targeted persons. The *Magna Carta*, the American Declaration of Independence and the French Declaration on the Rights of Man and the Citizen, have themselves been criticized as not proclaiming universal human rights; that the rights they proclaim were prompted by the citizenry. The *Magna Carta,* for example, was a consequence of the protest by the nobility against the King who in turn signed the *Magna Carta* giving rights and freedoms to freemen of England. These rights were fought for and attached to social positions and ownership of property by the nobility, and they excluded such people as slaves and women. In this sense, therefore, the *Magna Carta* did not proclaim universal human rights. This is why writers like Clapham, have dismissed documents like the *Magna Carta* as containing rights which did not have universal application and 'were not human rights, but rather political settlements' since:

> human rights belong to all human beings and, therefore, cannot be restricted to a select group of privileged men. From a contemporary perspective, the *Magna Carta* turns out to be a rather unfortunate example of a human rights declaration. Suffice it to cite one

[14] D Ayton-Shenker, 'The Challenge of human rights and cultural diversity', Background Note from the UN website <http://www.un.org/. > accessed 14 October 2015.

> sentence, clause 54 of the *Magna Carta* reads: 'No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.'[15]

In addition, before the seventeenth century, rights were given to rulers and religious figures, while the common people only had duties to their superiors.[16] The French Declaration of Rights of Man and the Citizen came after a rebellion by the French people against the monarchy.[17] Burke wrote a rancorous attack on both the *Magna Carta* and the French Declaration, arguing that rights in the *Magna Carta* and the Declaration were liberties which did not arise from universal principles, but were a legacy of hard-won battles. The rights held by the English and French were different, since they were the product of different political struggles through history. According to Burke, the idea of universality of human rights is groundless and called the Declaration of the Rights of Man 'monstrous' and 'tragicomic.'[18]

Renteln pertinently observes that the philosophical foundations for the universality of human rights have never been thoroughly demonstrated. In the absence of a satisfactory grounding for human rights, theorists are compelled to fall back upon mere assertions as to the self-evident nature of particular human rights. She adds that such dated essentialism has no answer to diverse moral systems that object to the existence of these asserted rights.[19]

The predicament implicit in the concept of universality is the tension between the universal foundation and the historical reality in which the concept of human rights has been conceptualised in Western liberal tradition.[20] Universalism is viewed by extreme cultural

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[15] A Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press, Oxford 2007) 6.
[16] J Ching, 'Human Rights: A Valid Chinese Concept?' in W Theodore de Bary and Tu Weiming (eds) *Confucianism and Human Rights* (Columbia University Press, New York 1998) 68.
[17] G Jellinek, *The Declaration of the Rights of Man and the Citizen* (Henry Holt & Co, New York 1901).
[18] E Burke, (1790) *Reflections on the Revolution in France* (Penguin, London 1986) 9.
[19] A D Renteln, *International Human Rights: Universalism Versus Relativism* (Sage Publications, Newbury Park Calif 1990).
[20] Leary (n 9) 319.

relativist as merely a form of uncritical ethnocentric Western conspiracy designed to undermine non-Western cultures.[21]

Many writers suggest that in order to communicate effectively within the universalism and cultural relativism debate, one must properly know the human rights' history and human rights' philosophical roots.[22] Before considering the main arguments of cultural relativism, it is imperative to set out the Western pedigree of human rights, for only then will the meaning and logic in the arguments on relativism become easy to appreciate.

5.2.2. The Western trappings of human rights

There can be no debate that the content of the human rights corpus of today is naturally closely related to the evolution of human rights, historically embedded, as it were, in liberal thought and democracy. Although philosophically, human rights talk has its roots in Western philosophical and political thought, an important qualification to this claim must be made in regard to the evolution and existence of human rights in non-Western liberal tradition and thought. It has been shown in Chapter Three, for example, that human rights existed in pre-modern African society. In a general way, universality of human rights is not based on any particular ideology but takes its basis on the dignity of the human person, that rights are inherent. Both Western and non-Western ideologies agree on the dignity of the human person. No arguments should, therefore, arise in regard to whether or not issues such as apartheid, genocide, rape, torture and arbitrary detention, are an affront to human rights. These issues are viewed, as they should, in the same light, namely that they fundamentally implicate human rights in a negative way, regardless of where they occur and, therefore, unquestionably involve universal human rights.

As Chapter Two of this dissertation sought to show, the development of human rights thought from the era of natural rights, to the so called Age of Enlightenment during the eighteenth

[21] M Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 548-630.
[22] See for example, C Cerna 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Context' (1994) 16 *Human Rights Quarterly* 470. Chapter Two of this dissertation covered in some detail, the historical and philosophical roots of human rights.

century, was a development akin to the Western liberal tradition. The same ideas that influenced documents such as the Declaration for Independence, with its emphasis on the ideals of individualism and freedom, can be found in the foundational ideas of human rights. The rise of the modern nation state with its domination of the means of coercion gave birth to the culture of rights to mitigate the invasive and abusive state.[23]

The contributions in the seventeenth century of Locke, one of the most influential natural law theorists of his time, and the works of eighteenth century philosophers including Montesquieu and Rousseau, gave the development of human rights thought the necessary philosophical treatment. Locke argued that individuals, who existed in a state of nature, had certain rights as human beings.[24] Chief among these are the rights to life, to liberty and to property. Individuals then entered into civil society. Upon entering civil society, each individual in conjunction with his neighbours, contractually transfer to a public authority only their individual rights to enforce the law of nature; not the rights themselves. This transfer is not absolute, but limited by the need to protect individual rights and freedoms from invasion and to secure their more effective guarantee. The state assumes thereby the obligation to protect the peoples' rights. A state which fails to secure these reserved natural rights loses its right to govern and gives rise to a responsible popular revolution. Other philosophers building on Locke's ideas added their own varied currents of thought.

All this liberal intellectual agitation had great influence on the political developments in the Western world in the late eighteenth and in the nineteenth century, particularly in the struggle against political despotism. The English Revolution of 1688 and the ensuing Bill of Rights provided a vivid example of the influence of Locke and others' intellectual thought. That example also gave rationale and impetus for the revolutionary excitement which affected other Western countries, North America and France. It is easy from that history to see the link between Western liberalism and the concept of human rights. Ching summarises the major influences on human rights as being the

[23] Mutua (n 21) 550.
[24] J Locke, *Two Treaties of Government* P Laslett (ed) (Cambridge University Press, Cambridge 1988).

> liberal moral and political philosophy, (in particular liberal English thought and the French enlightenment), international law and the American and French revolutions of the late eighteenth century. The UDHR whose main author was a Frenchman named Rene Cassin, was actually directly modelled after the values of the French Revolution, with the twenty-seven articles divided among the four pillars of; 'dignity', 'liberty,' 'equality', and 'brotherhood'.[25]

Lending his weight to the view about the Western foundations of human rights, Judge Walsh has emphasized that Europe was able to adopt a regional convention and create a relatively effective system for the protection of human rights, including a Court and a Commission, because the countries of Western Europe share a common philosophical tradition based on Aristotelian philosophy, Roman law, natural law and seventeenth century liberal theory.[26] The concept of human rights emanated from these theoretical roots, and they are not the theoretical roots of most non-Western cultures, especially in Africa, Asia and Latin America. In apparent agreement with Meyer,[27] many writers and theorists equally accept that there is an understanding among scholars that the concept of human rights is entirely Western[28]. For example, Cobbah suggests that there appears to be some unanimity that the concept of human rights as generally understood, is historically a Western concept[29], a view which he seemingly shares with Ejidike.[30] The latter goes so far as to assert that some form of agreement exists that the human rights norms, embodied in the international bill of rights, are of Western origin. They developed out of the

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[25] Ching (n16) 68.
[26] B Walsh, 'The European Court of Human Rights (1987) 2 *Connecticut Journal of International Law* 319.
[27] Meyer (n 13) 527.
[28] See Pollis & Schwab (n 4) 115; D M Wai, 'Human Rights in Sub-Sahara Africa' in Pollis and Schwab (n 4); A Legesse, 'Human Rights in African Political Culture' in K W Thompson (eds) (1980) *The Moral Imperatives of Human Rights: A World Survey* (University Press of America, Washington DC 1980) 123 124; J Donnelly, 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights,' (1982) 76 (2) *American Political Science Review* 303 -316.
[29] J A M Cobbah, 'African Values and Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309.
[30] O Ejidike, 'Universality and Relativity in the African Human Rights Discourse' (1997) 1(3) *Nottingham University Student Human Rights Law Centre Newsletter.*

unique and specific historical context of the West, which had no equivalent developments anywhere else in the world. Micheline Ishay[31] equally acknowledges that the modern conception of human rights is mostly European in origin.

With this discernable agreement that the human rights norms embodied in the international bill of rights are of Western origin, having developed out of the specific historical context of the West, the Western cultural influence on the notion of duties, especially duties as correlatives of rights should be self-evident. And yet, this assertion cannot be made without qualification. As will be shown later in this chapter, despite the Western evolution of the human rights concept, human rights are considered to be universal since core concepts like freedom, justice and solidarity are neither Western nor non-Western values; they are universal. Loyalty to these values transcends loyalty to particular cultures, ethnic groups, governments or nations.[32]

As Chapter Two of this dissertation sought to show, the development of human rights thought from the era of natural rights, to the so called Age of Enlightenment during the eighteenth century, was a development akin to the Western liberal tradition. The same ideas that influenced documents such as the Declaration for Independence, with its emphasis on the ideals of individualism and freedom, can be found in the foundational ideas of human rights. The rise of the modern nation state with its domination of the means of coercion gave birth to the culture of rights to mitigate the invasive and abusive state.[33]

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[31] M Ishaym, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, Berkely Ca 2004) 10-11.
[32] F L K Wah, 'Human Rights in Malasia: Reflections and Approaches' in Asia Coalition of Human Rights Organisations (ed) *Human Rights in Activism in Asia: Some Perspectives, Problems and Approaches* (Council of International and Public Affairs, New York 1984) 46.
[33] M Mutua, *Human Rights: A Political and Cultural Perspective* (University of Pennsylvania Press Philadelphia 2002).
[34] Locke (n 24).

human beings.[35] Chief among these are the rights to life, to liberty and to property. Individuals then entered into civil society. Upon entering civil society, each individual in conjunction with his neighbours, contractually transfer to a public authority only their individual rights to enforce the law of nature; not the rights themselves. This transfer is not absolute, but limited by the need to protect individual rights and freedoms from invasion and to secure their more effective guarantee. The state assumes thereby the obligation to protect the peoples' rights. A state which fails to secure these reserved natural rights loses its right to govern and gives rise to a responsible popular revolution. Other philosophers building on Locke's ideas added their own varied currents of thought.

All this liberal intellectual agitation had great influence on the political developments in the Western world in the late eighteenth and in the nineteenth century, particularly in the struggle against political despotism. The English Revolution of 1688 and the ensuing Bill of Rights provided a vivid example of the influence of Locke and others' intellectual thought. That example also gave rationale and impetus for the revolutionary excitement which affected other Western countries, North America and France. It is easy from that history to see the link between Western liberalism and the concept of human rights. Ching summarises the major influences on human rights as being the

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[35] Ibid.
[36] Ching (n16) 68.

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5.2.3. Human rights and cultural relativism: the key arguments

Cultural relativism, in its various forms, has become part of the human rights debate. Some scholars believe that cultural relativism is the only alternative to the dangers of ethnocentrism and moral absolutism.[38] To fully appreciate the perspective of cultural relativists, it is instructive to refer briefly to the origins of cultural relativism as a discipline.

Although cultural relativism is now recognized as a philosophical concept, its origins lie in the field of anthropology.[39] It was in 1901 that discussion on cultural relativism first began with the work of Boas.[40] He argued that all beliefs are culturally relative and should not be judged outside their own cultural realm. There can be no doubt that even as Boas propounded his principles in the realm of anthropology as way back as then, it was evident that cultural relativism could not be of one form. Teson, who equally states that cultural relativism is not a legal term, but is historically derived from anthropology and moral philosophy, acknowledges that cultural relativism can take multiple forms.[41] Good too, points out that modern cultural relativism comes in many different forms, ranging from claims which are more extreme to others which are less so.[42] Some cultural relativists claim that all beliefs and ethical systems are culturally relative, and, therefore, that there are no universal moral ideals while others argue that no one can be judged outside of their ethical system. Still others argue that we should try to be more aware of

[37] Wah (n 32).
[38] See E Hatch *Culture and Morality: The Relativity of Values in Anthropology* (Columbia University Press, New York 1983).
[39] C Good 'Human Rights Relativism' (2010) 19 *Macalester Journal of Philosophy* 34.
[40] F Boas, 'The Mind of Primitive Man' (1901) 13 *Science* 281-289.
[41] F R Teson, 'International Human Rights and Cultural Relativism' in P Hayden (ed) *The Philosophy of Human Rights* (Paragon House, St Paul 2001) 409-423.
[42] Good (n 39) 35.

the fact that, while we can criticise others, we are doing it from within our own cultural ethical framework, without a higher justification for our views. Teson talks of descriptive relativism which posits that different societies have different ideas of right and wrong.[43] Even within cultures, we have debates on the ethics of particular situations. So, clearly, we are not in universal agreement over ethics.

Metaethical relativism is another type of cultural relativism. It states that it is impossible to discover moral truth. There is no valid means of moral reasoning that could argue to be as well justified as the scientific method. The third type of relativism is called normative relativism, and holds that what a person ought to do, and what rights that person has, is culturally dependent. A discussion of these various forms of cultural relativism would clearly take us beyond the realm of the current discussion. The point, however, is that many people will readily accept that universal human rights norms do not follow the diversity of cultural and religious practices found around the world and that the theoretical soundness and intellectual rationality of universalism cannot be accepted without question. The natural rights origins of the Western human rights concept and its continued influence on human rights today, imply in some sense, that the concept denies non-Western culture in the very ultimate sense.

Cultural relativists see the UDHR as enumerating rights and freedoms which are culturally, ideologically and politically non-universal. They argue that current human rights norms possess a distinctively 'Western' or 'Judeo-Christian' bias, and hence are an 'ethnocentric' construct with limited applicability.[44] Mutua, writing on the Western origins and trappings of the UDHR states as follow:

> A closer examination of the rights listed in both the UDHR and the International Covenant on Civil and Political Rights (ICCPR) leaves no doubt that both documents – which are regarded as the two most important human rights instruments – are attempts to universalise civil and political rights accepted or aspired to in Western liberal democracies. Many articles in the Universal Declaration echo or reproduce provisions of

[43] Teson (n 41).
[44] See for example, Vincent (n 58) 37; T Kaime, *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (PULP, Pretoria 2009) 43.

> the U.S. Constitution and the jurisprudence of Western European states such as France and the United Kingdom. The UDHR prohibits 'cruel, inhuman or degrading treatment or punishment.' The U.S. Constitution prohibits the infliction of 'cruel and unusual punishments.' Other parallels include due process protections, speech rights, and privacy. During the drafting of the ICCPR and the ICESCR, both of which were opened for signature in 1966, there was some discernable influence from the newly independent states of Africa and Asia, though the ICCPR retained its distinctly Western character.[45]

Panikkar fittingly asks the question as follows:

> Can we extrapolate the concept of human rights from the context of the culture and history in which it was conceived, into a globally valid notion? Could it at least become a universal symbol? Or is it only one particular way of expressing - and saving- the *humanum*?[46]

For Panikkar, the concept of human rights is not universal because no concept as such is universal. Each culture expresses 'its experiences of reality and of the *humanum* in concepts and symbols which are proper to that tradition and are as such not universal.' He suggests that we must search for 'homeomorphic equivalents' to express the meaning of the concept from another culture. He further proposes that the notion of *dharma* in Hindu, Jaoin and Buddhist conceptions of reality may be a homeomorphic equivalent of human rights. It means law, norms of conduct, character of things, right, truth, ritual, morality, justice, righteousness, religion and destiny. Using India as the basis for reflection Panikkar proposes that most of the 'assumptions and implications [of Western human rights] are simply not given in other cultures.'[47] In their work, Pollis and Schwab criticise what they consider as a cultural and ideological ethnocentrism in the area of human rights and human dignity. Like Mutua, they view the UDHR as a document with underlying democratic and liberal values 'based on the notion of atomised individuals possessed of certain individual rights in nature.' Because of pervasiveness of the notion of the group rather

[45] Mutua (n 5) 606.
[46] R Panikkar, 'Is the Notion of Rights a Western Concept?' (1982) 120 *Diogene* reprt (1984)17 *Intercultural Issues* 82-83.
[47] Ibid 86.

than the individual in many cultures, they dismissively conclude that 'the Western conception of human rights is not only inapplicable' and 'of limited validity' but even 'meaningless' to third world countries.[48] In a similar way, Legesse argues that '[d]ifferent societies formulated their conception of human rights in diverse cultural idioms' and that in the liberal democracies of the Western world 'there is a perpetual, and in our view, obsessive, concern with the dignity of the individual, his worth, personal autonomy and prosperity.'[49]

To recap, the argument for cultural relativists is short. As human rights are considered to be moral principles, relativists argue against universalism saying there can be no universally valid moral code. Since morality is a social and historic phenomenon, it is, therefore, socially and historically contingent. In their basic concept, human rights are a Western creation, based on the European tradition that individuals are separable from their society. Cultural relativists question whether these rights can apply to collectivist or communitarian societies that view the individual as an indivisible element of the whole society. Although Westerners have come to place a high price on each individual human being, this is not a value judgment that is universal. There is, therefore, substantive disagreement on the extent of, or even the need for, any protection of individuals against their society.

5.2.4. Other arguments on the universality/cultural relativism debate

Mutua categorises universalists as either doctrinalists or constitutionalists while preferring to call multiculturalists like himself as 'cultural agnostics'. In his words:

> Cultural agnostics are generally outsiders who see the universality or convergence of some human rights norms with certain non-Western norms and as a result partially embrace the human rights corpus. Many are scholars and policy makers of multicultural heritage or orientation who, though familiar and sometimes even comfortable with the West, see cross-cultural referencing as the most critical variable in the creation of a

[48] Pollis and P Schwab (n 4) 13.
[49] A Legesse, 'Human Rights in African Political Culture' in K W Thomas (ed) *The Moral Imperatives of Human Rights: A World Survey* (University Press of America, Washington DC 1980) 123 124.

> universal corpus of human rights. They critique the existing human rights corpus as culturally exclusive in some respects and therefore view parts of it as illegitimate or, at the very least, irrelevant in non-Western societies. Some… have called for a multicultural approach to reform the human rights regime so as to make it more universal. Many proponents of the first two schools who regard themselves as universalists have labelled many cultural agnostics 'cultural relativists,' a form of type-casting or human rights-name calling that has generally had the effect of stigmatising those who resist the Eurocentric formulation of human rights….[50]

Although Mutua's suggestion may appear controversial, there are some attractive middle ground arguments regarding the universalism and cultural relativism discourse. One such argument is that the Western model of the state has spread to other parts of the world so that the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the West, have become equally relevant to other parts of the world.[51] What this argument means in effect is that human rights have already become universalised. Vincent argues that there exists a 'common culture of modernity' that has consumed all societies by reason of the rise of the concept of global economy. States, regions, cities, families and patterns of life, are all shaped by this culture. Human rights have thus become part of a world social process, the institutional expression of which is the international law of human rights. International law is seen as an inter-cultural law, and appeal to international law is evidence of the existence of universal standards of human rights.[52] It is easy to appreciate the argument that Vincent makes. The consequences of globalisation on culture make it unreasonable to argue in support of a totally unadulterated cultural position in today's word. Falk states, and correctly in the view of this researcher, that:

> …one important consequences of globalisation of social, political and economic life which often goes unnoticed is cultural penetration and overlapping, the coexistence in a

[50] Mutua (n 5).
[51] E Kannyo, *Human Rights in Africa: Problems and Prospects*, A Report prepared for the International League for Human Rights, May 1980.
[52] Vincent, *Human Rights and International Relations* (Cambridge University Press, Cambridge 1986).

> given social space of several cultural traditions, as well as the more vivid interpretation of cultural experience and practice as a consequence of media and transportation technologies, travel and tourism, cross-cultural education, and logarithmic increase in human interaction of all varieties. Such a reality posits its own distinctive and opposing social demands: respect for difference (culture; to sustain diversity), acknowledgment of sameness (international law of human rights; to establish normative authority). The emergence and the implementation of international human rights embody both the opportunities and obstacles arising from this always shifting interplay between the valuing of differences and the quest for sameness.[53]

Some universalists, Westerners and non-Westerners alike,[54] argue that the liberal conception of human rights applies and ought to apply to all states that have undergone modernisation. According to Zechenter cultural relativism is viewed by many as the only alternative to the dangers of ethnocentrism.[55] For Hatch the debate on universalism and cultural relativism is probably perpetuated due to its intuitive appeal to many politicians and activists who use it to advance their own agendas, and may also be on grounds of political expediency that cultural relativism offers to government and those in power, the ideas of cultural relativism continue to expand well beyond academia.[56]

What cultural relativism has is the potential of reversing or undermining the modern human rights law developed over the years. The world has witnessed ratification of international human rights instruments such as CEDAW and the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, with reservations on grounds that national

[53] R Falk, 'Cultural Foundations for the International Protection of Human Rights', in A A An-Na'im (eds) *Human Rights in Cross- Cultural Perspectives- A Quest for Consensus* (1992) 46.
[54] Kannyo (n 51) 4; R Howard, *Human Rights in Commonwealth Africa* (Rowman and Littlefield, New Jersey 1986).
[55] E M Zechenter, 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' (1977) 53 *Journal of Anthropological Research* 31.
[56] Hatch (n 38).

law, tradition, religion or culture are not congruent with certain treaty or convention principles, and in the process, to justify the perpetuation of those practices.[57]

An interesting argument attacks cultural relativism as a logical contradiction. Donnelly points out that if human rights are based in human nature and are applicable to all due to the fact that they are human – and if human nature is universal, then human rights cannot be relative in any fundamental way.[58] He also argues that notwithstanding the Western evolution of the concept of human rights, human rights are universal. He explains his view thus:

> Although human rights are Western in origin and thus historically particular, they are of near universal contemporary relevance. Contemporary social conditions have given the idea and practice of human rights wide applicability…. Human rights represent a distinctive set of social practices, tied to particular notions of human dignity that initially arose in the modern West in response to the social and political changes produced by modern states and modern capitalist market economies. Most non-Western cultural and political traditions, like the pre-modern West, lacked not only the practice of human rights but also the very concept…these concerns have been handled almost entirely in terms of duties that are neither derivative from nor correlative to human rights, these societies recognise that certain social guarantees are essential to realising human dignity, and have elaborate systems of human duties designed to protect human dignity. But human rights are quite foreign to their approaches.[59]

Another middle ground argument is that there exist genuine differences among cultures, and not all such differences can easily be reconciled. The universal human rights law represents an attempt to strike a proper balance between the rights of each to create its own moral and ethical

[57] For example, Algeria and Nigeria entered reservations to article 9(2) citing incompatibility with their national laws on nationality; Egypt entered reservation to article 29; Kenya equally entered reservations to articles 10(3) and 14 (2) stating that they were inconsistent with their laws.
[58] J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400.
[59] Donnelly (n 1) 50.

norms and the need for individuals to be protected against arbitrary and brutal customs and cultural practices.

Dembour, the feminist legal anthropologist, argues that each of the positions advocated by either side is untenable if considered in isolation of the other. Sole reliance on universalism is likely to breed moral arrogance - because it excludes the experience of the other. The strict adherence to relativism may make moral agents indifferent to immoral situations. In her view, culture is not an excuse for abuse. She suggests that we should 'err uncomfortably' between the two poles represented by universalism and relativism. She call for a formulation which does not suggest that the concept of human rights should be displaced but to call for a concept that allows local circumstance to be taken into account, to be part of the equation. To this researcher, this argument is particularly appealing because it implicitly recognises the danger of treating a particular view of human rights as inherently superior, in this case the Western view of categorisation of certain rights as universal. The views of different cultures deserve to be accommodated.[60]

In Rentln's view the main thrust of the argument ought to be 'whether or not it is possible to establish cross-cultural universals.' Even though there may be differences between peoples, there also exists cross cultural universals 'held in common by all societies [which might enable one] to validate universal moral standards. Separate, distinct moral systems overlap.'[61]

Although An-Na'im considers his approach as cross cultural, he is in effect critical of both the universalists' position based solely on Western liberal perspectives and distrustful of a militant cultural relativist position. He argues that it is desirable to maintain a weak form of cultural relativism. His argument is that despite their apparent peculiarities and diversity, human beings

[60] M Dembour 'Following the Movement of a Pendulum: Between Universalism and Relativism' in M Dembour *et al* (eds) *Culture and Rights: Anthropological Perspective* (Cambridge University Press, Cambridge 2001) 56.
[61] A D Rentln, 'Relativism and the Search for Human Rights' (1980) *American Anthropologist* 56.

and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated for a common 'culture' of universal human rights.[62]

Howard, for his part, argues in general terms that:

> [d]uring five centuries of contact between Africa and the Western world, social changes have been introduced that increasingly undermine any social-structural or cultural uniqueness Africa might once have possessed. These aspects create human rights needs and ideals closer to the Western model than to the 'traditional' models of privileges and obligations of indigenous Africa.[63]

While one may agree with Howard, it is difficult to believe that the dilution of the African cultures, so called for lack of a better term, is annihilating deep rooted traditional and cultural views and conceptions in many sections of African societies which impact on the concept of duty, to a level where those views and conceptions have become or will become irrelevant.

Many Africans, no doubt, have every reason to be cynical about what they view as a 'Western rights culture' for it resembles all too closely the ideological hegemony wielded by the western powers over their colonies in the nineteenth century, a time when Europe had arrogated to itself the role of arbiter in moral standards.[64] The more troubling questions, however, which should face universalists and cultural relativists alike pertain to whether all contemporary human rights as set out in international human rights instruments, given their Western biases, can be said to apply in equal measure, to people from non-Western cultures[65]. Are there no values that exist in non-Western cultures that parallel human rights principles, which principles are realisable using systems appropriate to these cultures rather than those developed in the West?

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[62] A A An-Na'im, 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment' in An-Na'im and Deng (n 1) 19.
[63] R E Howard, *Human Rights in Commonwealth Africa* (Rowman and Littlefield,Totowa 1986).
[64] J W Nickel in J L Nelson and V M Green (eds) *International Human Right :Contemporary Issues* (Human Rights Publishing, Stanfordville 1980) 45.
[65] J A M Cobbah, 'African Values and Human Rights Debate: An African Perspective (1987) 9 *Human Rights Quarterly* 309.

5.3. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND CULTURAL RELATIVISM

The UDHR, debatably the most important human rights document, has been described as the 'spiritual parent' of other human rights instruments[66] and as the 'parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the other treaties, in some sense the constitution of the entire movement … the single most invoke human rights instrument.'[67] It is viewed as 'showing signs of having achieved the status of holy writ within the human rights movement.'[68] It is thus almost easy to make a convincing case that the UDHR and many other human rights instruments that followed it and were concluded within the aegis of the UN confirm the acceptance of the universality principle in human rights. The history of the UDHR, however, shows us that this is not necessarily so. It has been contended that although the member states of the UN adopted the UDHR in the aftermath of the Second World War, without opposition by a vote of 48 to zero, that adoption in itself cannot be said to be an absolute representation of the thinking and therefore the universal acceptance by all the people of the world of the rights set out in that document. Non-Western views were essentially unrepresented. To begin with, there were eight abstentions[69] from minority socialist block after it put up an unsuccessful resistance on grounds that economic, cultural and social rights had been undermined. Additionally the triumphant Western powers who formulated the UDHR held colonies and other dependent territories at the time, largely located in Africa and Asia. These did not participate in the creation of the document. As Mutua puts it,

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[66] H J Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Year Book* 77 79.
[67] H J Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (3nd edn Clarendon Press, Oxford 1996) 120.
[68] M A Glendon, 'Knowing the Universal Declaration of Human Rights (1998) 73 *Notre Dame Law Review* 1153.
[69] Byelorussia, Czechoslovakia, Poland, Soviet Union, Ukraine, Yugoslavia, Saudi Arabia and South Africa, abstained. See A Cassese, 'The General Assembly: Historical Perspective 1945-1948' in P Alston and F Megret (eds), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, Oxford 1995) 25 31.

> on account of this exclusivity of major cultural blocks, it was presumptuous and shamelessly ethnocentric for the UDHR to refer to itself as the 'common standard of achievement for all peoples and all nations.[70]

Mutua further charges that 'the narrow club of states in the UN at the time seriously compromised normative universality of the movement's founding document.'[71] Cassese was even more direct in his criticism of the universality claim of the UDHR when he stated that the West imposed its philosophy of human rights on the rest of the world because it dominated the UN at its inception.[72] Trolley equally argues, the adoption by consensus of the UDHR did not result from nor create consensus on fundamental issues.[73] These and various other views expressed on the universality of the declaration of human rights itself is eloquent testimony that any supposed consensus, did not come naturally. In fact, during the drafting process of the UDHR, it was evident that cultural diversity, and more particularly as it related to duty in non-Western cultures, was a real issue. One year prior to the conclusion of the UDHR in 1947, the Executive Board of the American Anthropological Association (AAA) gave its Statement on Human Rights[74] in which they issued the Melville Herskovits' rejection of universality of human rights. That statement unequivocally stressed that:

> [t]he rights of man in the twentieth century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people… a situation which would lead to frustration, not realisation of the personalities of vast numbers of human beings.

This rejection by the AAA of the notion of universal human rights emphasised different peoples' rights concepts, and criticism of a universal international legal framework as ethnocentrically Western. The interface of cultural relativity and universality was again demonstrated during the drafting of the two UN Covenants of 1966 when the issue of the influence of Western

[70] M Mutua, (n 5) 605.
[71] Mutua (n 23) 554.
[72] A Cassese, 'The General Assembly: Historical Perspectives: 1945-1989' in Alston (ed) (n 69) 25 31-32.
[73] H Trolley Jr, *The UN Commission on Human Rights* (Westview, London 1987) 20.
[74] The statement was submitted to one of the commissions of the UN. See Tore Lindholm, 'Prospects for Research on Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism', in Abdullahi Ahmed An-Na'im (ed) (n 1).

philosophical thought on human rights threatened the development of human rights instruments. As will be shown anon, this reality was played out again during the second World Conference on Human Rights in 1993.

Although there has been an impressive thaw of standard setting achievements mainly proclaiming universality of human rights since the UDHR, as late as 1993, it became necessary for a UN conference on human rights to recapture the idea of universality in a manner that did not ignore cultural relativity. The repeated reaffirmation of universality and acknowledgment of diversity in the Vienna Programme of Action which emerged from the conference[75]was confirmation that despite its name, the UDHR had not been entirely accepted as setting out rights which were universal to all. The resultant document, the Vienna Declaration and Program of Action stated in article 5 that:

> [a]ll human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, to promote and protect all human rights and fundamental freedoms.

It is clear from the preceding discussion that notwithstanding numerous efforts to cast off relativists' suggestions as a misperception of human rights and dignity, or of rights and duties, the question of the 'transferability' and 'cross-cultural validity' of human rights qualifies the universality of all human rights and endures the fierce, animated, and fervent debate, with researchers making strong and varying philosophical, positions. Thus at the World Conference Regional Preparatory Meeting held in April 1993, Asian states adopted the Final Declaration (also known as the Bangkok Declaration) which stated, among other things, that Asian countries recognised:

[75]Trolley Jr (n 65) 20.

> [t]hat while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international and regional particularities and various historical and religious backgrounds.[76]

This statement boldly reaffirmed and restated the cultural relativist belief of human rights by Asian countries. It is probably in reaction to this that article 5 of the Vienna Declaration as quoted above, was formulated in the way it was. Notwithstanding this position a dispassionate view of the whole debate on universalism and cultural relativity leads one to a somewhat portentous point when answers to the following questions are sought: can it really be contended by cultural relativists that the question of Western cultural influence on international human rights norms has no application to such rights as the right to life, the right against torture, the right to equality and the right to dignity which embody universal values that transcend cultural and traditional values? Has not the modern human rights concept been made world property, so to speak, and given a world content overwhelmingly endorsed by ratification of human rights instruments by both Westerners and non-Westerners in which they are contained? What about the reliance on and use of perceptibly Western notions of human rights by non-Western societies in fighting colonialism, apartheid etc., and in championing such ideals as electoral democracy? These are some of the questions that the broad debate on universality and cultural relativism should be concerned with. They are also questions that cultural relativists must endeavour to answer when they think of some traditional practices and beliefs which are culturally sanctioned as overriding some human rights concerns. They are, above all, questions that practitioners and believers in cultural norms considered repugnant to the human rights fabric will do well to consider without unthinking esteem of the concept of universality. These questions admittedly diminish rather than enhance the relativist' arguments and yet do not extinguish the universality and cultural relativism debate. Addressing all these would be far beyond the remit of the present work.

[76] A/CONF157/ASRM/8 A/CONF157/PC/59 (7April 1993).

5.4. THE INFLUENCE OF WESTERN VALUES ON THE CONCEPT OF DUTIES

With the Western pedigrees of human rights as discussed above, it is inevitable that the language found in the human rights dialogue is culturally specific to the West. According to Johnson, classical Western liberal notions of human rights emphasises absolute individual political and civil rights while most non-Western, third world traditions, place greater emphasis on the community as the basis of rights and duties; on economic and social rights and on the relative character of human rights.[77] Marxist/ socialist ideas highlight economic and social rights and duties absolutely grounded in collective principles.[78]

Some fundamentals of the notion of human rights in the Western tradition chiefly emphasise individualism. The want of emphasis on the duties and responsibilities of the individual within the community, and the disregard of duties as correlatives of rights – have led to the argument that the concept of human rights is alien to non-Western cultures. And in reference specifically to Western cultures, some scholars[79] have pointed out that we live in an 'age of rights.' That is, people attach priority to their individual rights within a narrow-minded, individualistic worldview and de-emphasise duties. Such self-cantered individualism focuses on the rights of individuals, forgetting to consider that rights can be effective only in relation to corresponding duties.[80] This contrasts sharply with the position obtaining in non-Western societies such as those of Latin America. Although not explicit in Anglo-American documents, the idea of responsibility has been a familiar part of the traditions of many countries. Drawn from continental and Latin American rights documents and classical, biblical and socialist thought, the first two drafts of the Rights Declaration included duty language. As Sanchez noted in April 1997:

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[77] G M Johnson 'Human Rights in Divergent Conceptual Settings – How Do Ideas Influence Policy Choices?', in D L Cigranelli (eds) *Human Rights Theory and Measurement* (MacMillan Press, London 1988) 43.
[78] See E Kameka, *Maxism and Ethics* (Macmillan, London 1969).
[79] See N J Finkel & F M Moghaddam (eds), *The Phycology of Rights and Duties: Empirical Contributions and Normative Commentaries* (American Psychology Association, Washington DC 2005).
[80] S Passini, 'Individual Responsibilities and Moral Inclusion in an Age of Rights' (2011) 17(3) *Culture Psychology* 281-296.

> [M]any societies have traditionally conceived of human relations in terms of obligations rather than rights. This is true, in general terms, for instance for much of eastern thought. While traditionally in the West the concept of freedom and individuality have been emphasised, in the East the notions of responsibility and community have prevailed. The fact that a Universal Declaration of Human Rights was drafted instead of a universal declaration of human duties undoubtedly reflects the philosophical and cultural background of the document's drafters who, as is known, represented the Western powers who emerged victorious from the Second World War.[81]

Avineri and de Shalit[82] write that we live in an era when individual rights have come to have priority over duties, but especially in the United States of America. Associated with the increasingly important role of individual rights in American society is seen to be a decline in community life.

No example gives a better motivation for continued discussions of the weakened belief in individual public duties in the Western world than the notorious case of Kitty Genovese,[83] though it took place over half a century ago. She was a young bar manager who was attacked as she was heading home in the early morning hours of March 13, 1964. The attack took place in a middle-class neighbourhood of New York City. She screamed to attract the attention of the people in the neighbourhood, and each time she did that the knife-wielding assailant was scared away. Her screams for help, disturbed some neighbours who turned on their lights and checked through their windows what the disturbance was about. Regrettably none of the neighbours cared to offer her any help. Realising that none of the neighbours was coming to the assistance of Kitty, the assailant returned again to continue with the attack. A subsequent report by the police showed that not less than thirty people in the neighbourhood actually heard the screams of the

[81]O A Sanchez, 'Some Contributions to the Universal Declaration of Human Obligations' <http://www.interactioncouncil.org> accessed 16 July 2015.
[82] S Avineri & A de-Shalit, (eds) *Communitarism and Individualism* (Oxford University Press, Oxford 1992).
[83] K Cook, *Kitty Genovese: The Murder, the Bystanders, the Crime that Changed America* (Courier Westford, New York 2014).

young lady, and yet none of them came forward to offer help. The police arrived at the crime scene, over an hour later and found the victim lifeless in a pool of blood.

Although what befell Kitty Genovese could happen anywhere else, that tragedy inspired much social science research in the West dedicated to the issue of bystander involvement to help in times of distress. It serves to highlight the seemingly absence of the power of duty in the façade of a spread of a culture of rights.

There can be no doubt that various rights were involved here. The neighbours attitude and restraint could well be interpreted as an exercise of their right not to intervene and to live their lives independent of, and free from others. Yet, it can also be interpreted as a case of neglect of duty, if we concentrate on the duties of citizens to assist others, especially in times of suffering. As regards the victim herself, two interpretations of her predicament are possible. First, one could argue that she had a right to receive timely help from both ordinary citizens in that neighbourhood and the police. This right was violated. Second, one can focus on her duty and argue that the victim had a duty to lookout for herself and avoid getting into 'unsafe positions'. However, whichever way one choses to look at this tragedy, one cannot help but accept the conclusion that the attitude and behaviour of bystanders in this case revealed an overwhelming emphasis on rights and neglect of duties, at least as traditionally understood in terms of duties to others.

The story of Kitty Genovese in many ways confirms the perception of rights conceptualisation in the West, are evocative of individualism. Glendon puts the point thus:

> Our rights talk, in its absoluteness promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations….In its insularity, it shuts out

potentially important aids to the process of self-correcting learning. All of these traits promote mere assertions over reason-giving.[84]

5.5. THE INFLUENCE OF NON-WESTERN VALUES ON THE NOTION OF DUTY

Donnelly posits that human rights were unknown to traditional non-Western societies because before the creation of capitalist market economies and modern nation states, the problems that human rights seek to address and the particular violations of human dignity that they seek to mitigate 'either did not exist or were not widely perceived to be central social problems.'[85] As human rights developed in response to offensive state systems, so the argument goes, it could not have also evolved in societies that did not develop such a system. Whether protective systems were developed by those societies cannot be rights based and ought not to be confused with a rights based system. Since pre-industrial societies did not have seat belts for the simple reason that they did not have cars, human rights were alien to them since the need for them was also non-existent.[86]

To Donnelly and Howard, the existence of human rights was not possible in traditional societies and the concept was alien to certain pre- capitalist traditions like Islam, pre-colonial Africa and Buddhism. They could not therefore be expected to make any credible normative contribution to the human rights discourse.

5.5.1. The Asian values duty based concept and its influence on human rights

In recent years reports of some governments urging for an Asian concept of human rights, based on cultural factor, have been heard.[87] Yet, the region designated as Asia is vast and has diverse cultures. From Japan to Burma, with its Confucianist, Buddhist, Islamic, and Hindu traditions

[84] M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York 1991) 14.
[85] Donnelly (n 2) 64.
[86] Ibid.
[87] China, Malaysia, and Singapore mainly espouse this view. See: Y Ghai, 'Human Rights and Governance: The Asia Debate,' in Center for Asian and Pacific Affairs, occasional papers (*Australian Year Book of International Law* 1994).

and the different political, social and economic circumstances of people in the region, there are variable sets of beliefs and values, and there is no uniformity in their outlook about human rights and duties. What is clear, nonetheless, is that there is a general discontent throughout the region with a purely Western interpretation of human rights[88] Most if not all Asian countries, reject the universalisation of human rights. Many claim that Asia has an inimitable set of values - the Asian values,[89] which provides the foundation of Asia's different understanding of human rights and which also justify the 'exceptional' handling of human rights by Asian governments. Kausikani,[90] writing about the peculiarity of the Asian region, describes universality of all human rights as a 'myth' and that it is 'harmful if it masks the real gap that exists between Asia and Western perceptions of human rights' and that this gap will not be bridged if denied.[91]

In fact this position was clearly evinced during the drafting process of the UDHR. It will be recalled that when the United Nations Commission was created in 1946, it had the sole agenda of drafting the UDHR. During the two year drafting process, the drafting committee and the UNESCO Philosophy Committee invited and entertained contributions from great thinkers from all of the world's philosophical and political associations. Interesting submissions were made. It was in this process that the ideas of both human rights and duties were first discussed on a global level.[92] A clear difference in views on the concept of duty between the West and non-Western nations was evident. What was also clear at that stage was that the issue of cultural relativism was very much a part of the initial consideration of the content of the UDHR. Eastern thinkers noticed that the language of 'human rights' was a relatively modern European development. Yet, this did not mean that the source of human rights were not present in their traditions. Preferring his explanation for this position in regard to China, the Confucian philosopher Chu-Shu Lo, stated that:

[88] B Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 26.
[89] See A J Lanlois, *The Politics of Justice and Human Rights* (Cambridge University Press, Cambridge 2001) for an insightful discussion on the Asian values debate.
[90] Kausikan (n 88).
[91] Ibid 32.
[92] For the Committee's report, the questionnaire and collected responses, see Jacque Maritain, *Human Rights: Comments and Interpretations* (Wingate, London 1949).

> [t]he problem of human rights was seldom discussed by Chinese thinkers of the past, at least in the same way as it was in the West. There was no open declaration of rights in China, either by individual thinkers or by political constitutions, until this conception was introduced from the west… [However], the idea of human rights developed very early in China.[93]

The Muslim philosopher and poet, Kabir, argued that the most important consideration for a charter of human rights is that it be universal. The 'fundamental flaw in the Western conception of human rights [is that in] practice it often applied only to Europeans and sometimes to only some among Europeans.'[94]

The concept of balancing rights on one hand and duties and responsibilities on the other was strongly emphasised by most Asian and some European respondents. Political scientist Puntambekar wrote that Hindu thinkers propounded a code which included five social freedoms (freedom from violence, freedom from want, freedom from exploitation, freedom from violation and dishonour and freedom from early death and disease).[95]

Gandhi urged the committee to remember that respect for rights ultimately depends on attitudes and habits having more to do with duty than entitlement. He submitted that:

> I learned from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of man and woman and correlate every right to some

[93] Chu-Shu Lo, 'Human Rights in the Chines Tradition' in UNESCO (ed), *Human Rights Comments and Interpretations* (Columbia University Press, New York 1949).
[94] M A Glendon, *A World Made New* (Random House 2001) 74.
[95] SV Puntambekar, 'The Hindu Concept of Human Rights' in UNESCO (ed), *Human Rights* (Allan Wintage Publishers, London 1948) 191.

> corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.[96]

This statement by Gandhi was perhaps overbroad. It is reminiscent of systems of social organisation that give equal priority to both the community and the individual and thus tend to emphasise the dual nature of rights as both freedoms and duties. Under this view, which Henkin[97] and others propound, the ability to exercise rights must first be earned by respecting them in others. This seems to be the principle enshrined in article 29 of the UDHR, which states, in its first clause, that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible.' As will be demonstrated in the next chapter, what the calls for greater recognition of individuals' duties do not imply is that enjoyment of human rights should be legally contingent on the exercise of one's duties and responsibilities. However, with more prominence being given to duties and responsibilities of the individual, it may be that they can carry more resonance in a way which does not necessarily link them to the adjudication of particular rights.

Proponents of Asian values argue around six themes,[98] three of which are immediately relevant to the discussion about cultural duties and human rights. As regards the individual and the society, 'many East and Southeast Asians tend to look askance at the starkly individualist ethos of the West in which authority tends to be seen as oppressive and rights are an individual's trump over the state.'[99] They argue that Western human rights practices 'reflect a corrosive, hedonistic individualism that gives inadequate attention to social duties and is incompatible not only within traditional values but with any plausible conception of human dignity and decency.'[100] The various cultures in Asia seem to uphold the importance of community. When a balance has to be

[96] M M K Ghandhi, letter addressed to the Director General of UNESCO 25 May 1947 in UNESCO, *Paths to Peace: India's Voices in UNESCO* (UNESCO, New Delhi 2009).
[97] L Henkin,'The Human Rights' in L Henkin *et al*, *Human Rights* (Foundation Press, New York 1999).
[98] These are sovereignty and human rights, the demand and requirements of development, economic and social rights, individuals and society, human rights and duties finally traditional social order and human rights. It's the last three that appear to be directly relevant here.
[99] Kausikan (n 88).
[100] Donnely (n 2) 112.

struck between individual and community interests, those of the community come first. Cultures, therefore, developed around this concern. This aspect of Asian cultures contrasts sharply with the Western emphasis of individual rights. Hussein writes that

> [a]ny emphasis on individual human rights, apart from the rights of the community in which this individual lives, is sheer nonsense. In real history, human rights for the community comes first, and human rights for any individual are conditioned by a healthy social environment and appropriate social institutions.[101]

Asian societies, as pointed out already, are traditionally structured around duties, not rights. Any rights held by individuals, families, or the communities are principally dependent on the discharge of duties.

5.5.2. The African values duty based concept and its influence on human rights

Writing with specific reference to Africa, Conteh[102], suggests that the history of human rights in Africa is best described in three phases. He argues that human rights were present in the first phase of traditional society, although in a context quite unlike that of the West. Keba M'baya, asserts that 'traditional Africa does possess a coherent system of human rights, but the philosophy underlying that system differs from that which inspired[in France] the Declaration of the Rights of Man and of the Citizen. The traditional African system of human rights not only affirmed the rights to life, freedom of expression and association and religious liberty, but also the obligation to provide for those without the means of sustenance. Traer claims that rights were derived from duties.[103]

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[101] A M Hussein 'The Impact of Western Hergemonic Policies upon the Rights of the People in West Asia and North Africa', paper read at JUST International Conference, 'Rethinking Human Rights' at Kuala Lampur, 1994 quoted in Cooper, 'Perkin's Post-Tianamen Foreign Policy' 69

[102] 'Human Rights Teaching in Africa: The Socio-Economic and Cultural Context' in *Frontiers of Human Rights Education* Asbjorn Eide and Marek bThee (eds) (Columbia University Press, New York 1983).

[103] R Traer, 'Religion and Human Rights: Africans' in *Faith in Human Rights: Support in Religious Traditions for a Global Struggle* (Georgetown University Press, Washington DC 1991).

According to Pollis and Schwarb if non-Western cultures do not possess the Western conception of human rights, do they have other approaches to the enhancement of human dignity? They suggest, and this writer agrees with their suggestion with some qualifications, that a cultural view may be a more useful framework within which we can understand human behaviour and concept of human dignity.[104] In Africa generally, the attitude towards one's duty to others is significantly influenced by some distinct traditional and ethical values that have defined the African way of life for many years. These values have grown independently of formal legal instruments and laws governing the conduct of members of the community. Gyekye gives a seemingly exaggerated though substantially accurate description of African ethics as a humanitarian ethics, that places a great deal of emphasis on human welfare.[105] In his understanding, the concern for human welfare may be said to constitute 'the hub of the African axiological wheel.' He argues that a morality of duty is one that requires each individual to show concern for the interests of others. To Gyekye, the ethical values of compassion, solidarity, reciprocity, cooperation, interdependence and social well-being, which are counted among the principles of the communitarian morality, primarily impose duties on the individual with respect to the community and its members. All these considerations elevate the notion of duties to a status similar to that given to the notion of rights in Western ethics. In this morality duties trump rights, not the other way round, as it is in the moral system of the Western societies.[106]

It is difficult to agree entirely with Gyekye's argument in this regard. Autonomous individuals' duties are non-binding, ethical obligations, not capable of effective implementation. Limiting private duties to the ethical level defuses the risk of misuse, so that no one, not even the state can rely on the non-performance of duties to trump individual rights. The attitude to, or performance of, individual duties is induced by a consensus of needs rather than rights. In other words, people fulfil and ought to fulfil duties to others not because of the rights of these others, but because of their needs and welfare. They undertake supererogatory acts – acts beyond the call of duty.

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[104] Pollis and Schwab (n 28) 317.
[105] K Gyekye, 'African Ethics', *The Stanford Encyclopaedia of Philosophy* (Fall edn Stanford University, Stanford 2011) in E N Zalta (ed) URL <https://plato.stanford.edu/archives/fall2011/entries/african-ethics/> accessed 13 August 2015.
[106] Ibid.

A claim is made that in the African setting, the notion of individual duty and responsibility to the community is firmly ingrained in African tradition and culture, consistent with the historical traditions and values of African civilisation.[107] African morality, which is viewed as humanitarian, social and duty oriented rather than rights oriented, does not make a distinction between moral duty and supererogatory duty, that is to say duty that is beyond the call of duty. In light of our common humanity it would not be appropriate – in fact it would demean our humanity – to place limits on our moral duties or responsibilities. According to Pollis and Schwarb, as a people, Africans emphasise *ubuntu*, groupness, sameness, and commonality. Rather than stress the survival of the fittest and control over nature, the African worldview is said to be tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility.[108]

What were normative and mere supererogatory duties were captured and formalised in the African Charter provisions in articles 27 to 29. Given that the rights and preferences of the members of a given community condition the individuals in it, every individual in the community must respect some elements of the moral and social order adopted by the community. The positive and useful input to the progression of the community might also include the active participation by one in the cultural activities and festivities of the community and playing one's role in it. This could translate into protecting cultural values from external influences and attenuation. The family unit is crucial in all this. African culture has long recognised the family as the natural unit and basis of society and custodian of morals. Individuals have accordingly been held to have duties towards their families to assist the family live up to its status. These include the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect one's parents at all times and to maintain them in times of need. Again, what were an individual's informal duties in this connection recognised way before the African Charter was conceived, were captured and incorporated in the African Charter. Thus article 27(1) confirms this position.

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[107] See R Gittleman, 'The Banjul Charter on Human and Peoples' Rights: A Legal Analysis' in C E Welch and R I Meltzer (eds) *Human Rights and Development in Africa* (Albany State University Press, New York 1984) 152.
[108] Pollis and Schwab (n 28) 320.

Africans define family to include the extended family. Being a recognized entity, the extended family unit, like family units in nearly all societies, assigns each family member a social role that permits the family to operate as a reproductive, economic, and socialisation unit. The duty and responsibility to offer societal and psychological help to those in need comes as a matter of course. In traditional African society, reciprocity of generosity is expected. It is assumed that acts of generosity among kinsfolk will be reciprocated in the short or long run. Sometimes obligations of one generation can be carried over into the next generation. For Africans, therefore, entitlements and obligations form the very basis of the kinship system. Child care and care for the aged are, from the African perspective, a Western problem. In African societies child care is a communal affair. The aged and the infirm are guaranteed help and support from the entire community. The problems associated with old age, infirmity, widowhood and being orphaned are generally the concern of all members of the extended family.[109] These roles of affinity, however, are defined and treated differently in Western families. The behaviour of kin towards one another is different in African from than that which obtains in the West. The differences one finds in responsibility towards different kin people, usually revolves around whether the particular society is matrilineal or patrilineal. Furthermore in many African societies, there is no distinction between a father and an uncle, mother and aunt, or a brother and a cousin. As Nelson Mandela noted:

> [i]n African culture, the sons and daughters of one's aunts or uncles are considered brothers and sisters, not cousins. We do not make the same distinction among relatives practiced by whites. We have no half-brother or half-sister. My mother's sister is my mother; my uncle's son is my brother; my brother's child is my son, my daughter.[110]

Thus, duty and responsibility is said to be a much wider notion for African families than Western families given their extended nature. It is claimed that this offers a network of security, but it also imposes the burden of obligations. However, as will be shown later in this chapter, this and

[109] See L Marasinghe, 'Traditional Conceptions of Human Rights in Africa' in C E Welch and R I Meltzer (eds) *Human Rights and Development in Africa* (Albany State University Press, New York 1984) 34.
[110] N Mandela, *Long Walk to Freedom* (Nolwazi Educational Publishers, Braamfotein 1994) 10.

similar claims could be an oversimplification of the issue. A view premised on African culture and social institutions which presuppose a distinctive tradition is increasingly more difficult to justify. Considerable doubt has been cast on many accounts of authentic African society and culture, so that assertions that some forms of human rights have no place in Africa because of conditions unique to the continent, can quite readily be rebutted. However, the relativist argument cannot be dismissed out rightly given that it is incontestable that differences have always existed between notional Western and non-Western cultures.

5.6. AFRICAN TRADITIONS, CULTURAL DUTIES AND RESPONSIBILITY

Today, we are faced with specific examples of cultural practices leading to a perpetuation of the debate on the twin issues of cultural relativism and universality of human rights, particularly where such practices are premised on perceived culturally based duties. It is often taken that the morality and personality of an individual are shaped by the culture and the history of a given society. Different cultures have different moral codes. What is considered right within one culture may be utterly abhorrent within another. Many people outside the West today still view some human rights norms being promulgated as an assault on their culture, and their cultural duties. They see this as a threat on their way of life. Many Islamic cultures, for instance, prescribe subservient roles for females, often denying them basic civil rights. Mauritania is an African country example where chattel slavery continues as an accepted institution within its society premised on their customs and beliefs.

Some strongly held cultural beliefs appear to deny the existence of human rights conventionally considered as universal. Cultural relativists have criticised some universalist norms for being inadequately sensitive to dissimilarities in beliefs, culture, race, gender, et cetera. A much closer examination of the nature of these claims is essential in order to assess the impact on human rights and individual duties from these politics of difference.The chapter now considers some of the traditional and cultural norms and practices that seem to defy efforts at universalising two human rights issue: female circumcision and the rights of sexual minorities such gays and lesbians.

Female circumcision or female genital cutting, also known as female genital mutilation (FGM) is a long held tradition in many places across Africa, Asia, and the Middle East. Female circumcision or female genital cutting are more direct terms that do not sound judgmental in the way the term FGM does. This latter term is more scientifically precise though it carries hastily implies negativity before an explanation is offered. In this dissertation the terms are used interchangeably. Gay rights on the other hand are an emerging kind of rights largely viewed by societies opposed to them as exotic, and not belonging in the non-Western traditions and cultures.

5.6.1. Female circumcision and the cultural duty to practice and maintain it

Female circumcision refers to the partial or total removal of the external female genitalia for non-medical reasons. This traditional, ritualistic practice comprises the actual cutting of female genitals, either totally or partially, and the removal of sexual organs.[111] It involves a procedure which is dreadfully painful, since it is traditionally carried out without anaesthetic. Women can, as a result, suffer from complications such as infections, urinary and reproductive problems and septicaemia. It goes against the sensibilities of even the most liberal of people, with strong features of what those who support the practice view as Western ethnocentrism often surrounding the issue. Globally, reasons for undertaking FGM are highly varied. Custom and tradition are perhaps the most often cited reasons for the engaging in the practice of FGM.[112] Other reasons and justification for the prevalence of FGM are socio-cultural, hygienic, religious and psychological in nature. Communities that support the procedure particularly claim that there are significant social and cultural benefits resulting from circumcision. Culturally FGM is also considered as proof of femininity and a demonstration of a woman's resilience and bravery.

[111] There are basically three types of practices, namely (i) clitoridectomy, i.e., the partial or total amputation of the clitoris, which is the female sexual organ; (ii) excision, the amputation of both the clitoris and the inner lips; (iii) infibulations, that is, the removal of the clitoris, some or all of the labia minora and incisions in the labia majora to create raw surfaces. These raw surfaces are either stitched together or kept in contact until the skin heals as a hood covering the urethra and most of the vagina.

[112] Amnesty International, *What is Female Genital Mutilation?* (Amnesty International, New York 2005).

The practice is profoundly entrenched, geographically common and widespread in Africa. It is, however, unknown in certain African countries. It is concentrated in a swathe of countries from the Atlantic coast to the horn of Africa.[113]

From the perspective of societies that practice FGM in Africa, various benefits are said to result from FGM which justify its practice and perpetuation. Within a forceful notion of African culture these benefits are premised on patriarchal authority associated with adulthood, marriageability and sexual control and the protection of the sexuality of adolescent girls which are all considered essential to cultural survival and continuity of community values. In turn, the preservation of cultural identity and the promotion of social and ultimately, political cohesion are considered as legitimate objectives which FGM furthers. Female circumcision, it is claimed, reduces uncertainty surrounding paternity by discouraging or preventing women's sexual activity outside marriage.[114]

In many African cultures, there is a distinct time when childhood ends and adulthood begins. This, by custom, occurs at puberty or marriage. In some communities FGM is regarded as an important part of the initiation rite, with those who do not undergo it being considered unmarriageable.[115] The late Jomo Kenyatta, first president of Kenya and a Kikuyu tribesman, wrote that no proper Kikuyu would ever dream of marrying a girl who had not been circumcised.[116] It is with such sentiments in mind that communities that practice it view FGM as a right and an obligation for young women and adolescent girls which enables them to full social integration by avoiding the tag of being unclean, promiscuous and immature which they would

[113] Statistics (Sourced from UNICEF global databases, 2014, based on DHS, MICS and other representative surveys) show that the prevalence in Ethiopia is between 51- 80%, Nigeria 10-25%, Ghana less than 10% and Tanzania 10-25%, Egypt and Sudan above 80%. The practice is insignificant in Southern Africa and not practiced at all in Southern Sudan, and some Arabic speaking countries of Northern Africa, with the exception of Egypt.
[114] A girl's virginity goes to the honour of the family and may be essential to the family's ability to arrange her marriage and receive the bride price.
[115] In Cote d'Ivoire for example, a Yocouba girl who has not been circumcised is not marriageable according to their custom. See: C W Dugger, 'African Ritual Pain: Genital Cutting,' *New York Times*, 5 October 1996 A1 & A6.
[116] J Kenyatta, *Facing Mount Kenya* (Secker and Warburg, London 1953).

carry if they are uncircumcised.[117] FGM in such communities tends to be so normative that it is so greatly acknowledged and praised by the senior members of the community that young women and girls are content to be a part of a cultural ritual which is believed to bring about respect for them and their acceptance in the society. Considerable social pressure is, therefore, brought to bear on families who resist conforming to the tradition of FGM. The desire to conform to peer norms drives young women and girls to undergo circumcision. Parents and adult members in these communities feel duty bound to ensure that they bring up their girl children in a manner consistent with their time long cultural practices. They embrace it as a duty as well as a right to belong to, to contribute and to participate in one's community, as full members. Those within communities who opposed this cultural practice are often times ineffective in the face of stiff cultural pressure. Universalists human rights advocacy normally represent an external challenge to the norms of the FGM practicing communities and has its limitations in helping eradicate the practice. What is ironic is that in FGM practicing communities it is women who are the main perpetrators, and possibly the strongest supporters, who are also the 'victims' of the practice. They of course regard themselves are beneficiaries rather than victims of the practice.

UNICEF piloted a study regarding the social conditions surrounding FGM and concluded that, 'where FGM is a social convention, the social pressure to conform to value systems of that society is a strong motivation to perpetuate the practice.' FGM is seen as a 'necessary part of raising a girl properly, and a way to prepare her for adulthood and marriage.' Snubbing the practice diminishes the matrimonial prospects of a girl and brings dishonour to the young woman and her family. In some communities such as Islamic ones, 'the practice is often motivated by beliefs about what is considered proper sexual behaviour, linking procedures to premarital virginity and marital fidelity'. It is 'associated with cultural ideals of femininity and modesty, virginity and marital fidelity which include the notion that girls are clean and beautiful by

[117] JC McKinley Jr., 'At a Ceremony in Kenya, a Brother and Sister Painfully Enter Adulthood' *New York Times* 5 October 1996 A6.

removing body parts that are considered male or unclean.'[118] The UN General Assembly pertinently pointed out that:

> It is now widely acknowledged that female genital mutilation functions as a self-enforcing social convention or social norm. In societies where it is practiced it is a socially upheld behavioural rule. Families and individuals uphold the practice because they believe that their group or society expects them to do so. Abandonment of the practice requires a process of social change that results in new expectations on families.[119]

In discussing FGM in Africa mention has inevitably to be made of the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol)[120] which is viewed as the most important human rights instrument in combating FGM in Africa. Article 5(b) of that Protocol provides that member states shall ensure 'prohibition through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.' A UNICEF report, however, shows that of the fifty four countries in Africa, only twenty four had, at the time of the report in 2013, legislated or decreed against FGM.[121] Even where legislation is in place, enforcement is often times a challenge. This statistic clearly demonstrates that international disdain and condemnation of the practice has not forced many communities which engage in FGM to abandon this deeply rooted tradition and custom. An earlier UNICEF report had correctly acknowledged that 'traditional practice of female genital mutilation/cutting has

[118] United Nations, World Health Organization 'Fact Sheet: Female Genital Mutilation' <http://www.who.int/mediacentre/factsheets/fs241/en/index.html.) >accessed 18 September 2015.
[119] General Assembly of the UN 2009.
[120] It was adopted by the Assembly of the African Union in Maputo, Mozambique on 11 July 2003. It came into effect in November 2005 after the minimum 15 of the 35 African Union member countries ratified it. For an insightful discussion on the Protocol and its place in the rights of women in Africa, see F Viljoen, 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16(7) *Washington and Lee Journal of Civil Rights and Social Justice* 11.
[121] UNICEF, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* (UNICEF, New York 2013).

proved remarkably persistent, despite nearly a century of attempts to eliminate it'.[122] Yet, FGM is incredibly contentious. Two major conflicting views continue to preoccupy the discussion on FGM. The human rights perspective holds that the practice of FGM violates human rights and should be discarded. This is the spirit behind the Maputo Protocol. The cultural self-determination perspective insists on the contrary view that female circumcision represents an important cultural rite of passage and should in the name of cultural rights be allowed to flourish. Human rights movements have readily condemned the practice and demonised people who engage in or support it. Unlike male circumcision, it is regarded as an awful practice. It puts girls and women in the unjust position of having to jeopardise their human rights, especially the right to health and bodily integrity. There are also suggestions that circumcised women find sexual intercourse painful and, most importantly, unenjoyable.[123] There have, therefore, been tenacious calls worldwide to end FGM on grounds that it is a violation of the human rights of women and girls. What are these human rights?

5.6.1.1. Rights violated by female circumcision

From the human rights standpoint, FGM directly violates the right to life which is protected in all relevant international human rights instruments.[124] Given that most of circumcisions in Africa are performed in insanitary conditions with unsuitable instruments, the practice constitutes a serious risk to the lives of women and girls who undergo it. Sanderson suggests that some girls die following mutilation.[125] Research on female circumcision has documented numerous deaths which have resulted from the practice.[126] According to Iweulmor and Veney, about fifteen per

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[122] UNICEF, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* (UNICEF, New York, 2003).
[123] T A Baasher 'Psychological Aspects of Female Circumcision, Traditional Practices Affecting the Health of Women and Children, Report of a Seminar 10-15 February 1979, WHO Technical Publications 2 WHO, Alexandria Egypt 1979.
[124] Art 3 of the UDHR; art 6 of ICCPR; art 4 of the African Charter; art 4 of the American Convention; and art 2 of the European Convention.
[125] L Sanderson, *Against the Mutilation of Women* (Ithaca Press, Cornell 1981).
[126] S McClean, and S E Graham 'Female Circumcision, Excision and Infibulation: the Facts and Proposals for Change 1985 47 *Minority Rights Group Report* (London) 5; O Koso-Thomas, *The Circumcision of Women: A Strategy for Eradication* (Zed Books, London 1987) 25. Reliable figures as to the exact numbers of deaths are hard to obtain. This is because family members are reluctant to take their daughters to hospital should medical complications arise from

cent of all circumcised females die of bleeding or infections, while other reports estimate that out of one thousand females who undergo genital mutilation seventy women die as a result.[127]

The prohibition against torture, cruel and inhuman treatment is widely acknowledged as a pre-emptory norm in international law which admits no derogations.[128] FGM entails the deliberate and calculated infliction of pain and suffering on those who undergo it. In the overwhelming majority of cases, it is performed without anaesthetic. It thus inflicts much pain on the girls and young women who are forced or otherwise submit to undergo it. In some cases young girls faint on several occasions during the ritual. Shock, acute urinary retention, severe scarring, infections, hypersensitivity, complications during childbirth as well as an array of sexual complications may arise as a result of any form of circumcision. In addition, the practices of infibulation (the sewing together of the labia majora so as to make intercourse impossible) and clitoridectomies (the excision of the clitoris), are a suppression of a woman's sexuality, a destruction of her capacity to experience sexual pleasure and a limitation on her personal liberty.[129] FGM is in this sense a form of cruel, inhuman and degrading treatment.

FGM also violates the right to health as protected in many human rights instruments.[130] The circumcision of women, commonly performed in unhygienic conditions with unsuitable instruments by operators with no medical or anatomical knowledge, is gravely injurious to their physical health. Circumcisions have resulted in tetanus, severe haemorrhaging, acute infection, septicaemia, fractured bones, infertility, severe complications during childbirth, dyspareunia (continual severe pain during intercourse) and haematocolpos (the retention of menstrual blood).

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circumcision. Operators and parents alike fear that they might be prosecuted or suffer serious consequences should the authorities discover that their child died due to circumcision. For this reason there is a conspiracy of silence on circumcision-related deaths. This means that should death result from even a small percentage of these cases the ritual would amount to a massive violation of the right to life.

[127] J Iweulmor and C Veney, 'Preserving a Woman's Genitalia: An Analysis of Female Circumcision/Female Genital Mutilation in Africa' (2005) 12 *Penn State McNair Journal* 36.

[128] Art 5 UDHR; art 7 ICCPR; art 5 African Charter and art 2 CAT.

[129] For a discussion of the short and long term complications of FGM see Amnesty International, *What is Female Genital Mutilation?* (Amnesty International, New York, 2005); F Althaus, 'Female Circumcision: Rite of Passage or Violation of Rights? (1997) 23(3) *International Family Planning Perspectives* 130-133.

[130] Art 25 UDHR; art ICCPR; and art 16 African Charter.

To expose a woman to such severe and wide-ranging health risks violates her right to health as protected by many human rights instruments.

There is also implicated in FGM the right against discrimination. FGM is a form of discrimination against women and, therefore, violates both articles 2 and 18 of the African Charter. Although men in certain cultures do undergo circumcision, the form and the consequences of female circumcision are qualitatively different. FGM has such adverse physical and psychological consequences for women that it seriously undermines their capacity to attain social equality. Diminished desire for sex and pain during sexual intercourse are common consequences of FGM. There are numerous documented cases of prolonged terror, anxiety, fear of intercourse and intimacy, feelings of betrayal at the hands of one's family and deep-rooted developmental problems attributable to the effects of female circumcision.[131] This is discrimination against women as it places them at a social and psychological disadvantage in relation to men and violates their rights to equality, to dignity and integrity as protected in various international and regional human rights instruments.

FGM likewise violates a woman's right to family. The family, which is afforded a particular status within African culture, and is recognised in article 18 of the African Charter as the natural unit of society, is either weakened or destroyed by female circumcision. Women who have been rendered infertile or for whom childbirth is extremely difficult as a result of female circumcision cannot fulfil their important reproductive role. In addition women are given special protection within the family context by article 18(3) of the African Charter. Female circumcision erodes the family unit because a growing number of women are fleeing their homes in order to escape circumcision. The story of a Nigerian woman who escaped deportation from the United States illustrates the risk to family life that female genital mutilation poses. The case of *Re Lydia Omowunmi Oluloro*[132] raised, in a profound way, the question of female circumcision as a human rights issue. A Nigerian woman, Lydia Oluloro, facing deportation for illegal stay in the United States, told a court hearing her deportation proceedings that if she and her two daughters returned to Nigeria, her daughters aged 5 and 6 years (who were American citizens) would be

[131] See Sanderson (n 125).
[132] A72 147 491, United States Court of Appeals for the Nineth Circuit, Portland, Oregon.

forced to undergo female circumcision. The court suspended her deportation on the basis that female circumcision violated a woman's human rights, and called the practice as a 'cruel, painful and dangerous procedure.'[133]

There are also other rights under the African Children's Charter that are violated by female circumcision. Because it is usually performed on girls under the age of eighteen, FGM violates not only their rights as women but also as children. The guiding principle of the African Children's Charter is that action taken by either the authorities or a child's parents should always be in the best interests of the child. While parents do have specific rights to be respected in African culture, as noted also in article 29(1) of the African Charter, they also have the right and the duty to provide direction in the guidance and upbringing of their children. This right and duty are limited to the extent that the parent's conduct should be in the child's best interests. FGM performed on very young girls, effectively denies those children the choice to retain the capacity to experience sexual pleasure. This is particularly oppressive because the girls involved will be denied the opportunity to make an informed decision as to what they are forfeiting.

5.6.1.2. Duty-based rejection of human rights arguments on female circumcision by African cultural relativists

Cultural relativists defend the practice of female circumcision in Africa. Their justification of the practice is premised on their right to take part in and enjoy their culture. This right is widely recognised. The UDHR provides in article 27 that '[e]veryone has the right freely to participate in the cultural life of the community'. The Declaration of Principles of International Cultural Co-operation posits that '[e]ach culture has a dignity and value which must be respected and preserved'.[134] The African Charter for its part provides in article 17 that every individual may freely take part in the cultural life of his community and that the promotion and protection of

[133]In *Re Lydia Omowunmi Oluloro,* A72 147 491, United States Court of Appeals for the Nineth Circuit, Portland, Oregon. See also the story of the Togolese girl Fauziya Kassindja who feared female genital mutilation and fled from her family in Togo to the United States where she sought and was granted asylum. See Celia W Dugger, 'Asylum from Mutilation' *New York Times* 16 June 2006.

[134] Art 1 of the Declaration adopted by the General Conference of UNESCO at its fourteenth session on 4 Nov 1966<www.portal.unesco.org> accessed 13 December 2016.

morals and traditional values recognised by the community shall be the duty of the state. In rejecting the human rights based arguments against female circumcision, cultural relativists cite these articles and argue that communities that practice FGM have a right to adhere to their way of life because the traditional ritual practice of female circumcision is a form of socialisation into a cultural value, a connection to family, community members and previous generations. Advocates of female circumcision justify FGM within this broad claim to cultural and traditional rights in this large sense. According to these defenders of the practice, the understanding that female circumcision is cruel or amounts to persecution is a Western perspective unacceptable to Africans, and is an affront to the right of Africans to practice their culture. Ifeyinwa Iweribor, for example, writes that:

> There has in recent times been a hue and cry about the practice of genital surgery on women in Africa. The prevailing perspective in America has been absolute condemnation. What is bothersome is not so much that people have a negative opinion of the practice, but that the issue is misrepresented as a form of child abuse or too of gender oppression. The language and tone of the outcry in most cases reflects a total lack of respect for the culture of other peoples. Even more bothersome is the false portrayal: the falsification of statistics and a successful demonization of the practitioners.[135]

The argument is that the Western view of FGM fails to account of African cultural values or traditions, and in the same vein disregards the African conception of human cultural rights and the duty of those who perform it or subject themselves to it. The complaints raised by cultural relativists in regard to female circumcision is that the distinctiveness of the communities engaged in the practice is improperly ignored; that their difference is disregarded or disrespected by universalists and that they are denied the opportunity to assert their distinct status in the cultural and human rights space. Virtually all their complaints often give rise to arguments for the preservation of cultural values through separation from the human rights community or exemption from generally applicable standards. As has been pointed out already, the objective of cultural rights is to guarantee that people and communities have access to culture and can

[135] Ifeyinwa Iweriebor, 'Brief Reflections on Clitorodectomy' (1996) 3 (2) *African Update: Female Circumcision in Africa.* <www.web.ccsu.edu> accessed 17 December 2015.

participate freely in the culture of their choice whereby they can maintain a community custom and a preservation of peoples' cultural identity.[136] The ritual of FGM helps the transition of young girls from childhood to adulthood while equipping them with the necessary skills for marriage and child birth. Rahman contends that the progression from childhood to womanhood contributes to the maintenance of customs and traditions if young women are related through cultural ritual such as female circumcision to the lifestyle and roles played by other women.[137]

An anthropological general duty based justification for female circumcision is that it is beneficial to both men and women, and their families are better off with it than without it. Because they are circumcised, women are incapable of having sexual pleasure and are, therefore, less likely to be promiscuous. The result is that there are fewer unwanted pregnancies among unmarried women in communities with circumcised women, and equally less cases of HIV and AIDS. To circumcised women, sex is regarded as only a duty, and their non-enjoyment of it is unimportant in any case. Therefore, these women are less likely to be unfaithful to their husbands and children. This in turn makes husbands happy. As has already been mentioned, men in certain communities in Africa and as the late former Kenyan President[138] observed do prefer circumcised women and regard the uncircumcised ones as unclean and immature.[139] Castledine make the point that those working to eradicate FGM should acknowledge the risk of alienation faced by women and girls who choose to reject the tradition on account of 'imperialist imposition'.[140] The need to feel accepted is a basic human need and what place should it be to estrange a human being from their own culture or society on the basis of adhering to morally acceptable norms?[14] One gets the impression from apologists of FGM that their general idea is not necessarily to condone practices or rituals that violate human rights; the idea is that veneration for the traditions and practices of a culture should to be at the vanguard of debate. The

[136] Amnesty International, *The Campaign to Eradicate Female Genital Mutilation: A role for Amnesty* (Amnesty International, London, 1997).
[137] A Rahman, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Rainbow Organisation Zed Books, London 2000).
[138] Kenyatta (n 116).
[139] J C McKinley Jr, 'At a Ceremony in Kenya, a Brother and Sister Painfully Enter Adulthood,' *New York Times* 5 October 1996 A6.
[140] J Castledine 'Female Genital Mutilation: An Issue of Cultural Relativism or Human Rights?' Mount Holyoke College <https://www.mtholyoke.edu/acad/intrel/jc.htm.> accessed 17 December 2015.

notion that no culture is superior to another becomes pertinent when opposition to a cultural practice is made, particularly from outside the practicing community. In this way suspicion of subjugation of a culture are aroused and this is deprecated by cultural relativists. Opposition coming from within the community practicing FGM is one thing. It is quite another if such condemnation comes from outside.

Even using the conception of human rights as laid down in the African Charter as the standard against which to evaluate female circumcision, those who advocate perpetuation of the cultural practice argue that the condemnation of circumcision is founded in 'Western' value systems or a universalist approaches to international human rights law which are inapplicable to Africa because African societies emphasise community rather self and the individual. As was discussed in Chapter Three, the rights of individuals in Africa are treated not as isolated claims which are ordinarily asserted against group interests because culturally and traditionally the group protects the individual. FGM being a rite of passage is a collective experience which is performed, not to harm the girls involved but, as suggested by Ifeyinwa Iweriebor, for the 'noblest of reasons'.[141]

Taking the human rights angle from the view point of the African Charter, advocates of FGM could also make an arguable case on other fronts. First, it is a plausible claim to make that the African woman in those societies where circumcision is practiced, is obliged to undergo circumcision because of the duties which complement the rights guaranteed under the African Charter. Since the drafters of the African Charter put forward a distinctive notion of human rights in which civil and political rights were seen to be balanced by individuals' duties of social solidarity, it should follow that the duties to the society should claim primacy over individual right. An argument could thus be fashioned that the individual woman's right to refuse to be circumcised is outweighed by the special duties to her family, her culture and the community at large to ensure that the culture and tradition of the community is maintained. In so doing it should be borne in mind that these Charter based duties only restate the position that existed before the African Charter was formulated.

[141] Ifeyinwa Iweriebor (n 135).

Another possible argument from the parent/child angle is that parents have duties to their children. Children too have reciprocal duties to their parents. The content of those duties is best discovered by reference to the social duties contained in the African Charter. These include the duty to maintain relations aimed at promoting mutual respect and tolerance; to preserve the harmonious development of the family and to work for the cohesion of, and respect for, the family. Additionally there is the duty to preserve and strengthen social solidarity. There can be no harmonious development and cohesion of the family if community and family values are broken through the introduction of norms that contravene or are at odds with traditional customs and culture.

Similarly, the duty to strengthen African cultural values can possibly be interpreted to justify female circumcision. The wording of article 29(7) of the African Charter is instructive because it places a duty on individuals only to strengthen positive African cultural values and by implication, therefore, not to promote negative African cultural values. Most of those who practice FGM no doubt regard it as a positive cultural practice. For those who employ a human rights perspective as discussed earlier, female circumcision is a negative practice and communities that practice it should be encouraged to abandon it. This introduces an even more contentious issue: who determines what cultural practice is positive and which one is negative? Furthermore, a people's right to cultural development, as contained in article 22 of the African Charter, shall occur with regard to freedom and the equal enjoyment of the common heritage of humanity. Arguably part of the common heritage of a cultural community in Africa is the ritual practices and beliefs that may include FGM.

It could also be contended that parents have the right to subject their daughters to circumcision in the same way as they may subject their children to any form of medical treatment. It is generally accepted that a parent may give consent for a medical operation notwithstanding either a child's refusal or inability to consent due to age or incapacity. In this sense, therefore, the parent has a duty to decide whether or not the child should undergo female genital surgery.

Perhaps an even more difficult problem in regard to the FGM/human rights conversation relates to the extent to which an individual should be permitted to violate his own rights. Women who

voluntarily decide to undergo circumcision pose real difficulties for those who maintain that female circumcision is oppressive and entails very serious health risks. The question of people's control over their own bodies lies at the heart of this dilemma. Is it justifiable to allow a woman to violate her own rights in this regard? What considerations should prevail in deciding whether a person should be permitted to subject their bodies to certain substances or forms of treatment? Why should a woman who chooses to undergo circumcision be treated any differently from one who chooses to smoke, or one who enters a boxing contest or one who has twelve children? There are risks involved in all these activities. The answers to these questions involve a careful balancing of an individual's rights to freedom, privacy and autonomy with the potentially harmful social or moral results which may arise from granting an individual the freedom to treat their bodies as they choose.

As regards the arguments premised on diminished or deprivation of sexual pleasure, cultural relativist would no doubt point out that the supposition that women across the world have the same sexual desires and beliefs irrespective of their cultural background is plainly absurd. Not all cultures define men and women in terms of their sexuality and nor do they believe their own sexual gratification is vital. This global feminism, as well meaning as it is, strikes true of yet another example of patronising Western imperialism.[142] Multiculturalists would also argue that it is contrary to the human rights of a girl and women to discourage or prevent them from being circumcised with clean safe surgery if they consent.

These arguments and potential arguments are quite far-reaching in terms of their influence on any human rights system. The idea of human rights abuses includes, not just what states do to their own citizens, but also what individual do to other individuals. A states' systemic inability to protect some of its citizens from the actions of others risks weakening the power of core human rights protection. There is need for a continued conversation around the language of duties in regard to such practices as FGM and to devise more enforceable individual obligations. The fact is that communities and groups engaged in practices such as FGM, which are objectionable from the human rights viewpoint, invoke of the language of human rights means that they are not averse to the concept of human rights and the to the naked truth that some human rights such as

[142] Katherine Dettwyler found that women interviewed found it absurd that she could even ask them whether or not they felt pleasure during intercourse.

the right to life, to dignity and against cruel inhuman or degrading punishment, ate non-negotiable whether within or outside the universalists' camp. By making rights-based arguments, the advocates of FGM submit themselves into a common dialogue and, at least in theory, to the dominant community and its legal structures. Their rhetoric and approach, in the view of this researcher, is a sufficient manifestation of a wish, not so much to stay out of the human rights dialogue, but to be accommodated and to respected by those who advocate universality of all rights. This is an important starting consideration in the engagement of cultural relativists in the debate regarding FGM.

5.6.2. Homosexuality and the 'cultural duty' to suppress it

All cultures have their own value judgments about homosexuality and generally regarding appropriate and inappropriate sexuality.[143] Some cultures sanction same sex love and sexuality while others object to such activities wholly or in part.[144] Revulsion against homosexuality is primeval, deep, and in its way probably genuine. There is still widespread rejection in some communities, especially non-Western ones that gay rights are human rights or, at least, some reluctance to accept them as rights. Deeply entrenched homophobic attitudes, coupled with lack of, or inadequate legal protection against discrimination on grounds of sexual orientation, has exposed many lesbians, gay, bisexual and transgender persons (LGBT) to multiple violations of human rights. As will be shown, those who abhor homosexuality in all its manifestations ask the question why society, whose stability is traditionally gender based, should heed calls to accommodate sexual minorities.

Foundational UN documents appear to provide some light as to whether gay rights are indeed human rights although not in explicit terms. The Charter of the UN encourages 'respect for human rights and fundamental freedoms for all without distinction.' Equally the UDHR states in article 2 that everyone is entitled to all the human rights and freedoms set forth in that document

[143] Homosexuality is a type of sexual orientation describing people who are romantically and physically attracted to people of the same sex. Females who are attracted to other females are lesbian; males who are attracted to other males are often known as gay. The term gay is sometimes also used to describe homosexual individuals of either gender.
[144] S O Murray, *Homosexuality* (University of Chicago, Chicago 2000).

without distinction of any kind. The basic premise is that all people, regardless of their sexual orientation should be able to enjoy their human rights.

Since 1967, the Western world has witnessed the decriminalisation in many countries of sodomy between consenting adults in private.[145] Various examples can be given to illustrate the growing legal attitude towards sexual orientation. In *Toonen v Australia*[146] it was held by the Human Rights Committee that Tasmanian law prohibiting homosexual was a violation of the individual's right to privacy under the ICCPR. In *Lawrence v Texas*[147] the court found sodomy laws in the United States to be unconstitutional on the basis that criminalising the consensual act of sodomy violates citizens' liberty rights under the due process. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[148] the South African Constitutional Court was requested to determine whether criminalising homosexual acts violated constitutional rights. The Court decided that criminalisation of sodomy in private between consenting men limited the rights of equality for homosexuals because it forbade one of the ways in which they express their sexual orientation in direct violation of human rights guaranteed by article 19 of the ICCPR.

What is, however, beyond dispute is that since the 1970s much of the world has become more tolerant of same sex sexuality between consenting partners of legal age.[149] The Pew Research Centre's 2013 Global Attitude Survey made very interesting findings according to which there was:

> broad acceptance of homosexuality in North America, the European Union, and much of Latin America, but equally widespread rejection in predominantly Muslim nations and in

[145] See for example *National Coalition for Gays and Lesbians Equality v Minister of Justice* (1998) (12) BCLR 1517 (cc) at para 45-52 (South Africa) (where a comprehensive list of countries that have already decriminalised sodomy is given. They include the UK, Ireland, Australia, Canada and New Zealand. See also *Lawrence v Texas* 539 US 558, 578-79 (2003).
[146] HRC n 488/1992 10 UN Doc CCPR/C/50/D/1992 (April 4 1994).
[147]539 US 558, 578-79 (2003).
[148](1998) (12) BCLR 1517 (cc) para 45-52.
[149] See: S Faison, 'Door to Tolerance Opens Pathways as Gay Life is Emerging in China' *The New York Times* 2 September 1997.

> Africa as well as in parts of Asia and Russia…. Acceptance of homosexuality is particularly widespread in countries where religion is less central in people's lives…[150]

The UN Office of the High Commissioner on Human Rights (OHCHR) on 15 December, 2011, released its maiden report on the human rights of LGBT.[151] That report details universal indicators of discrimination against LGBT persons based on their sexual orientation. It noted that violence against these people has a history of hate motivating factors such as discrimination in work, health care, education, detention and torture.

The UN Secretary General gave a clear indication of the thinking of the UN on gay rights when he stated, in relation to the rights of sexual minorities that 'let there be no confusion. Where there is tension between cultural attitudes and universal human rights, rights must carry the day.'[152] The OHCHR, a couple of months later, firmly stated that 'laws criminalising homosexuality pose a serious threat to fundamental rights of lesbians, gays, bisexuals and transgender individual.'[153]

The predominant argument in the homosexuality debate has not been consistent. It has been moving from the privacy argument to one on equality and non-discrimination. Initially advocates of the rights of LGBT persons argued for the protection sexual acts of these people by law, and to decriminalise such associations. However, since that victory has been won in most of the

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[150] Pew Research Centre, *The Global Divide on Homosexuality* 4 June 2014.

[151] United Nations Office for the High Commissioner of Human Rights (2011), *Discriminatory Laws, Practices and Acts of Violence Against Individuals Based on their Sexual Orientation* (UN, Geneva) <www2.ohchr.org/English/bodies/hrcouncil/doc/19session/A.HRC.19.42_Englis.pdf> accessed 14 November 2014.

He stated this in his 2010 Human Rights Day Speech. See the speech published in the joint UN Programme on HIV/AIDS (UNAIDS) and the World Health Organisation collaboratively published brochure entitled *The UN speaks out: tackling discrimination on grounds of sexual orientation and gender identity–Ban* <www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTBrochure.aspxon>accessed 30 December 2014.

[153] Navi Pillay the joint UN Programme on HIV/AIDS (UNAIDS) and the World Health Organisation collaboratively published brochure entitled *The UN speaks out: tackling discrimination on grounds of sexual orientation and gender identity –Ban* <www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTBrochure.aspxon> accessed 30 December 2014.

Western world the campaign has made a greater shift to demanding equality and non-discrimination. The core issue is the expansion of equality in all areas of social life such as adoption, marriage, religion and education. In homophobic environments such as we have in many parts of Africa, the issue of the rights of LGBT is still very much a question of identity. To demand to be protected against harassment, violence and discrimination on the basis of sexual orientation, or indeed to advocate to have laws which are discriminatory on the basis of sexual orientation changed, entails a degree of open acknowledgement of one's sexual preferences. Regardless of how they feel, not too many people in many parts of Africa have the courage to do so. Indeed to openly declare that one is a homosexual in Africa is to take a big risk. For those seeking to take up elective political office it is political to openly suicide espouse support for the rights of sexual minorities.

5.6.2.1. Rights violated by culturally sanctioned abhorrence of gayism and lesbianism

Because of the deeply embedded homophobic attitudes, homosexuals suffer multiple violations of their human rights. Discrimination based on sexual orientation violates a number of their rights including infliction of torture, rape and other forms of cruel and inhuman and degrading treatment, arbitrary detention on grounds of identity or sexual beliefs, restriction of freedom of association and denial of basic rights to due process.[154] The right against discrimination extends to discrimination in the labour market and social amenities such as hospitals and schools. Other rights implicated include the right to dignity, the right to health, the right to enter into consensual marriage, and the right to privacy. It is in view of the incessant acts of violence, discrimination and other human rights abuses that the African Commission on Human and Peoples' Rights recently adopted the Resolution on the Protection Against Violence and other Human Rights

[154] An example of this kind of treatment is provided by the Egyptian case of *Queen Boat 52.* Egyptian security forces arrested, detained and subsequently tortured 52 gay men. The story is narrated by one of the detainees Hassa Menyawi in an article, Hassan El Menyawi, 'Activism from the closet: Gay Rights Strategizing in Egypt' in (2006)7 *Melbourne Journal of International Law* 28. In an article entitled 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyarta Principles' (2008) 8 *Human Rights Law Review* 209-210, the Rapporteur for the development of the Yogyakarta Principles Michael O'Flaherty narrates the story of arranged multiple rape of a Zimbabwean lesbian in an effort to 'cure her'.

Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity,[155]condemning increasing incidences of violence and other human rights violations including murder, rape assault, arbitrary imprisonment and other forms of persecution against people on the basis of their sexual orientation. The resolution called upon member states to end these acts of violence.

Homophobic outbursts against homosexuals in which they are debased and liked to animals, clearly is not consistent with their right to dignity. Mistreatment by society and sometimes their own families are common among homosexuals. Personal autonomy is central to the right to dignity and yet laws and practices in many countries do prevent homosexuals from acting in accordance with their preferred sexual orientation. These incriminate their right to dignity.

Sexual minorities often have their right to privacy violated. What they do behind closed doors is often a matter of curiosity by law enforcement officers. Often, private premises of suspected homosexuals are raided in an attempt to obtain evidence. It often happens that in many countries where homosexuality is criminalised, the law allows law enforcement officers to invade the privacy of suspected homosexuals because the criminalised acts cannot be proved without witnesses. Article 347 of the Cameroonian Penal Code,[156] for example, does allow such intrusion. As was made clear in *Toonen v Australia*,[157] it is not unusual for law enforcement officers to be allowed to interfere with the privacy of suspect.

The right of adults to enter into consensual marriage is enshrined in international human rights standards. Article 16 of the UDHR provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. It is argued that prohibition in many countries of civil marriages between individuals of the same sex is an issue which affects negatively the fundamental human right to equality and non-discrimination of gays and lesbians. The denial of equal civic recognition of same sex marriage prevents many people

[155] Resolution 275 was adopted at the Commission's 55th Ordinary Session held in from 28 April to 12 May 2014 in Luanda, Angola.
[156] Art 347 of the Penal Code of Cameroon.
[157] Hum Rt Comm n 488/1992 10 UN Doc CCPR/ C/50/D/1992 (Apr 4 1994).

affected from accessing a range of other rights such as those pertaining to social security and housing.

5.6.3.2. Assumed African cultural duty and the question of homosexuality

Notwithstanding all that has been said in the foregoing part about the developments regarding the growing acceptance of homosexuality and gay rights as human rights, the practice of homosexuality is still widely regarded by many African culturists as inconsistent with African culture and the values that underpin the African way of life. It is indisputable that many people in Africa have deep-rooted aversion and disgust for homosexuality. Such people believe that allowing same sex relationships is culturally, morally and spiritually unacceptable. Some families even believe that homosexuality is a result of occult activity and others that it is a disability.[158] It is seen by many, including political and religious leaders in Africa, as a sign of Western sexual corruption and immorality. It is accordingly brandished as an alien import of sick habits, as unnatural, against the will of God and the need for reproduction.[159] Homosexuals are consequently regarded by some people in African communities as mentally sick people[160]who need either religious exorcism or confinement in a mental sanatorium. A despicable example of the stereotype battery of prejudices with which many societies in Africa view homosexuality is that of a magistrate in Zambia who was trying a man for sodomy. On 16 May 1998, in Kabwe, Zambia, Emmanuel Sikombe was indicted for the offence of having 'attempted to have carnal knowledge of Mukamba Mokoma against the order of nature.' The indictment, which clearly confused terminologies from two different sections of the Zambian Penal Code,[161] stated that he 'did an act of gross indecency without consent with another male person by putting Mukamba

[158] R J Macauley,'Africa and Homosexuality' *A Global Witness Magazine* <http://www.thewitness.org/agw/index.html> accessed 12 March 2015.
[159] C Dunton and Mai Palberg, 'Human Rights and Homosexuality in Southern Africa' 1996 2 *Current African Issues* 29 32.
[160] See F Njenga, 'The Concept of Mental Disorder: An African Perspective' in World Psychiatric Association, *World Psychiatry* 2007 Oct 6 (3) 166-167; Prophet Emmanuel Makandiwa of the United Family International Church described the gay community in Zimbabwe as 'mentally deranged people whom God has surrendered to their malfunctioning minds' see *New Zimbabwe* 31 March 2014.
[161] Chapter 87 of the laws of Zambia.

Mokoma's penis in his mouth.'[162] However, the most remarkable item in the trial record is the statement of the trial Magistrate[163] who, in a general way, anthologised the judicial system's prejudices about homosexual conduct, be it consensual or non-consensual, as a threat to manhood; to health; to morality; and to biology:

> I am aware that accused is a first offender and he deserves leniency. However, the accused's behaviour is alien to the African custom. I fail to understand him to be honest. He claims to be married person. I wonder how he could opt to act the way he did. There are so many prostitutes if the problem was that he needs to relieve himself of the sexual draught he was passing through because of the absence of his wife. Surely the mouth is not the same as a vagina. God gave specific functions to each organ he gave us. The mouth is for eating etc., and the vagina is for both sex and urinating. The accused couldn't change God's desire. For behaving in the way he did, he implied God made a mistake in his distribution of functions. We are living in an HIV AIDS era and this behaviour couldn't be condoned by this court. If the accused is HIV positive naturally, the complainant has become one.[164] Accused in my view if he is a sick man and he has done this to many boys he is a sexual serial killer. There has been secretion of fluids. He is merely bankrupt and devoid of human good human behaviour. A deterrent sentence is appropriate.[165]

There exists in most parts of Africa a culture of silence with respect to questions of sexuality of any kind which are not often debated openly and frankly. Political and cultural leaders have consistently denied the existence of homosexuality in their communities[166]. Writers like Lamb in a way have contributed to strengthening this position. In 1982 he commented that 'it is curious

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[162] All citations are from the case file and trial transcript obtained by IGLHRC from the Subordinate Court of the First Class for the Kabwe District in *The People v Emmanuel Sikombe* (Cause No. IB/535 of 1998). The transcript appears to have been poorly typed; errors in the citations are in the original court record.
[163] Magistrate F B M Ngosa.
[164] No evidence to this effect had been introduced in the trial court.
[165] See n 162.
[166] AVERT,'How many gay people are there?'< http://www.avert.org/gay-people.html>accessed 24 May 2014.

by Western standards that homosexuality in Africa is virtually unknown… Africa's tradition is rigidly heterosexual.'[167] This was of course a misstatement of the reality on the ground as will be demonstrated shortly. Even where there is admission that homosexuality is practiced, there is so much denial and homophobia and an inclination to blame the West. There is a general claim that homosexuality is not an African value but a norm exported from Western culture. As late as 1987, for example, a Nigerian publication insisted that homosexuality is alien to Africa and is 'still largely a Euro-American perversion which has not yet any foothold in Africa, describing it as 'grossly repulsive, un-African and most unlikely.'[168]

There appears to be what has been called by some human rights advocates as state sponsored homophobia, grounded by both the criminalisation of same sex relationships and emotively charged homophobic statements given by political and other leaders. Former Tanzanian President Julius Nyerere, for example, is on record as having stated that homosexuality is a phenomenon alien to Africa and that in Africa there is no ground for homosexuals and lesbians to be defended against discrimination.[169] In Zambia, Senior Chieftainess Chinyama of the Lovale people of North Western Zambia has said gayisim was a taboo and has no meaning in Zambian society.[170] She did not even want the issue of gays and lesbians to be discussed in public because, according to her, it was a shame on African values[171]. Former Kenyan President, Daniel Arap Moi, made perhaps an unbelievable claim that 'words like lesbianism and homosexuality do not exist in African languages.'[172] He was of course to make that general statement. *Yan dauda* is a Hausa term in the Northern part of Nigeria that describes effeminate men who are considered to be wives to men. Among the Langi people of Northern Uganda the term '*mudoko-dako'* is used to designate effeminate males.

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[167] D Lamb, *The Africans*, (Random House, New York 1982) 37.
[168] E Apolo, *Lago Na Waa I swear* (Heritage Books, Lagos 1982) 44.
[169] *The Guardian* (London 3 November 1993 12, (Nyerere's comments were made in the course of an interview with Hubert Fichte, but were omitted in the published version. See C Dunton and Mai Palberg, 'Human Rights and Homosexuality in Southern Africa' in *Current African Issues* (1996) 29 (2nd edn) (Nordiska Afrikaninstitutet 32.
[170] AVERT (n 166).
[171] Ibid.
[172] *Mail & Guardian* (Johannesburg) 29 September 1995.

In Zambia, former President Kenneth Kaunda has also said homosexuality should not be tolerated in Zambia because it is against biblical teachings. He described homosexuality as unchristian and a wicked vice which should be handled very carefully and fought effectively.[173] During his presidency, Sam Nujoma of Namibia made the following statements about homosexuality:

> Most of ardent supports of this perverts [sic!] are Europeans who imagine themselves to be the bulwark of civilization and enlightenment… we made sacrifices for the liberation of this country and we are not going to allow individuals with alien practices such as homosexuality to destroy the social fabric of our society. We are convinced that homosexuality is not a natural and objective form of moral history but a hideous deviation of decrepit and inhuman sordid behaviour… Homosexuality deserves a severe contempt and disdain for the Namibian people and should be uprooted totally as a practice.[174]

In Zimbabwe, President Robert Mugabe has described homosexuality as 'inhuman.'[175] In 1996 he prevented a gay and lesbian organisation from participating in an international book fair in Harare stating that:

> I find it extremely outrageous and repugnant to my human conscience that such repulsive organisations like those of homosexuals, who offend both against the laws of nature and

[173] *Times of Zambia* 21 October 2010 'Former President Kaunda Says No to Homosexuality.' <http://www.zambia.co.zm/article8282> accessed 22 September 2015.

[174] Human Rights Watch and the International Gay and Lesbians Human Rights Commission, *More than a Name: State Sponsored Homophobia and its Consequences in Southern Africa* (2003)<www.iglhrc.org/cgi-bin/low/article/publications/reports and publications/573.htm/2003/safrica> accessed on 22 September 2015

[175] See *The Herald newspaper*, March 13, 2015. He said this on Thursday 12 March 2014 at a hotel in Harare to commemorate International Women's Day. See also the *New Zimbabwe News*, 18 April, 2014, where Mugabe is reported to have said that Europeans must keep their inhuman homosexual practices within their territories and not try to impose them on Africa.

> the morals and religious beliefs espoused by our society, should have any advocate in our midst and even elsewhere in the world.[176]

Similar views were strongly carried by Ugandan President, Yoweri Museveni, at the occasion of signing the Anti-Homosexuality Bill into law.[177] His other concern seemed to be the public exhibition of fondness by lovers. Across Africa sexual relationships have been enforced by certain cultural taboos. For example in most of Africa, including Uganda of which Museveni was speaking specifically, overt display of affection is culturally frowned on. Sexuality related habits are governed by the majority culture of a specific location. Diffidence is the dominant issue in African sexuality in the public space. Museveni expressed his view thus:

> It seems the topic of homosexuality was provoked by the arrogant and careless Western groups that are fond of coming to our schools and recruiting young children into homosexuality and lesbianism, just as they carelessly handle other issues concerning Africa…. Homosexuality exhibiting themselves: Africans are flabbergasted by exhibitionism of sexual acts – whether heterosexual or otherwise and for good reason. Why do you exhibit your sexual conduct? Are you short of opportunity for privacy – where you can kiss, fondle (*kukirigiita, kwagaaga*) etc.?... I am not able to understand the logic of Western culture. We Africans always keep our opinions to ourselves and never seek to impose our point of view on others…

Many critics of sexual minority rights in Africa make claims of same sex relationships being a foreign imposition. They do so without any anthropological or empirical evidence to substantiate such claims. Strangely, the view that homosexuality is alien to Africa continues to be peddled by the elite and sometimes the leadership in Africa. During his visit to Kenya in 2015, American President Barack Obama addressed the issue of legal discrimination against LGBT at a meeting with President Kenyatta of that country. He remarked that 'when you start treating people differently not because of any harm they are doing to anybody, but because they are different,

[176] Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation* (Amesty International, London 1997) 38.
[177] This was on 24 February 2014. See *The Daily Monitor* (Uganda), Monday 24 February 2014.

that is the path whereby freedom begins to erode'. President Kenyatta in response retorted that 'there are things that we must admit we do not share [with the United States]. Our culture, our societies don't accept'.[178]

These views on homosexuality are paradigmatic of the general perception of gays and lesbians in many African societies. What cannot be denied, however, is the fact that there have always been African men who are sexually attracted to other men, and women who are attracted to other women since time immemorial. Work by Appiah and Gates has spoken to olden African communities which had elements of homosexuality.[179] Murray and Roscoe equally provide evidence of the existence of homosexuality in traditional Africa society.[180]According to Tamale[181] African history is replete with examples of both erotic and non-erotic same sex relationships. She cites, as an example of the existence of homosexuality in Africa, the ancient cave painting of the San people near Guruve in Zimbabwe, which depicts two men engaged in some form of ritual sex. She also gives the pre-colonial times case of the '*mudoko-dako'* or effeminate males among the *Langi* of Northern Uganda, who were treated as women and could marry men, as another instance of the existence of homosexuality in olden times Africa. According to Tamale, in the Buganda traditional Kingdom of Uganda, the Kabaka (King) Mwanga II, who ruled in the latter half of the nineteenth century, was gay.[182]

[178] Bisi Alimi *The Guardian*<www.amp.guardian.com>accessed 15 January 2017.
[179] K A Appiah and H L Gates Jr (eds), *The Encyclopaedia of African and American Experience* (Basic Civitas Books, New York 1999).
[180]S O Murray and W Roscoe (eds), *Boy-Wives and Female Husbands: Studies in African Homosexuality* (Palgrave, New York 1998) cite examples of the existence of homosexuality in traditional Africa including (i) in Central Africa, Zande people: In this culture, men slept with and married boys, even when the men had female wives. The boys were called 'boy wives,' (ii) in Southern Ethiopia, Maale people: In this culture, men crossed genders, wearing female clothes, performing female work, and having sex with men. (iii) In Angola, Ovimbundu people: In this culture, there were gays and lesbians. Women there made and used dildos. (iv) In South-eastern Africa and, (v) in Tanzania/Zimbabwe border, Nyakakyusa: In this culture, adolescent boys had sex.
[181] S Tamale, 'Homosexuality is not unAfrica<American.aljazeera.com/opinions/2014/4/homosexuality-africanmuseveniugandanigeriaethiopia.html> accessed 1 March 2014.
[182] Ibid.

Many communities in Africa have made homosexuality a taboo and do not appear open to deal squarely with the growing demands of gays and lesbians for people to acknowledge and respect their human rights to equality, privacy and non-discrimination; their need to be recognised and protected under the law. It is claimed by those opposed to recognition of sexual minority rights that evidence of the existence of homosexuality amongst Africans as a sexual practice expresses quite different beliefs, causes and meanings and social priorities from those in the Euro-American homosexual identity and agenda. Although the physical acts might be similar, the social construction of meanings around them is profoundly different. It is never intended to in any way whatsoever take a form matching the homosexual cultures of gays in the West - a lifestyle and culture. It is homosexuality out of a situation and cannot justifiably be used to support tolerance of the practice no more than men having sex in prison can be used to suggest that these men are gays. Men who sodomised men had no intention to take men over women, or marry men and live with them in anything resembling a marital union. Such practices occurred usually at an adolescent phase which was opportunistic and quickly and urgently converted as females became available. In these rare, transitory instances culture did not encourage it. This can be paralleled with a situation where a practicing Christian commits adultery contrary to biblical prohibition. The practice of adultery does not invalidate the religious position.

The issue of rejection of homosexual rights in most parts of Africa echoes the contradiction that regardless of the fact that many African countries have subscribed to numerous treaties and protocols that are stringently against discrimination, prejudices and negative stereotypes continue to imbed the African value system and patterns of behaviour particularly when it comes to the treatment of sexual minorities such as LGBT. A strong feeling of a cultural duty not to allow homosexuality is evident. The African Commission in the SERAC case stated that:

> The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes on the African Commission an important task. International law and human rights must be responsive to African circumstances.[183]

[183] *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (Communication no 155/96

This position, though taken during the consideration of issues far divorced from gay rights, appears to have a general application. As some statements already alluded to show, many public officials and opinion-makers in Africa have allowed and taken part in the explicit expression of homophobic prejudice, even when legitimate and respectable, in a manner that would be unacceptable for any sexual minority right holders and human rights advocates. One could also cite the rejection in 2010 by the African Commission of the application by the Coalition of African Lesbians (CAL), a network of nineteen organisations working to transform Africa into a continent where lesbians and bisexual women and gender non-conforming people enjoy the full range of human rights. The application was made at the Commission's 43rd Ordinary Session in May 2008. Although it complied with all the documentary and formal requirements, it was only two years later in October 2010 that a formal response rejecting the application was given. The relevant part of the letter from the Commission's secretariat read as follows that:

> The African Commission on Human and Peoples' Rights decided after a vote, not to grant observer status to the Coalition for African Lesbians (CAL) South Africa whose application had been pending before it the reason being that the activities of the said organisation do not promote and protect any of the rights enshrined in the Charter.

This decision coming from the continents premier human rights body dealt a severe blow to the movement on the promotion and protection of the rights of sexual minorities on the continent. It did not inspire any hope for the recognition of the rights of people with sexual preferences considered to off the main stream sexuality. The correctness of the decision itself remained highly doubtful. Supporters of same sex sexuality did not take the decision lying down. They mounted a vigorous campaign to have a review of that decision, in keeping in a sense, with the fighting spirit of Archbishop Desmond Tutu, one of the most prominent Africans to speak up for the LGBT community. At a UN event he declared that he will not worship a 'homophobic god' and that he would rather go to hell than a 'homophobic heaven.'[184] Five years later, following the submission of a new application by CAL the African Commission granted observer status to

[184] Nobel laureate Archbishop Desmond Tutu speaking at the launch of the UN's 'Free and Equal' campaign in Cape Town, South Africa in July 2013<www.advocate.com.politics2013/07/26 >accessed 5 January 2017.

CAL.[185] In the discussion preceding the grant of observer status to CAL, the Commission's Vice Chairperson described LGBT communities as a 'virus coming from the West.'[186] The grant of observer status by the ACHPR to CAL led to what Killander termed as 'the most serious attack' on the ACHPR's independence in its almost thirty years of existence.[187] He wrote that:

> [a]s was to be expected, the AU political organs did not respond favourably. Homophobia is ingrained in the political rhetoric of many African leaders, including President Mugabe of Zimbabwe who was the AU Chairperson in 2015. In its decision on the 38th Activity Report of the Commission in July the Executive Council
>
> > [r]equest[ed] the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard REQUESTS the ACHPR to review its criteria for granting observer status to the organisation called CAL in line with those African values.[188]

These are indeed worrisome developments from the human rights perspective. Rather than make progress on the recognition of the entitlement of sexual minorities to the full array of human rights, the continent may be set to retrogress. The contradictions that have animated the conversation on sexual minority rights in Africa is, to say the least, disappointing and regrettable. Many African people have no thought of the political goals and aspirations of those advocating recognition of homosexual rights because homosexuality is regarded by many as a taboo topic which they usually try to ignore on the basis that it assaults their cultural beliefs. For many in Africa, revulsion of gay rights and homosexuality generally is not about equal rights. It is not even about Africans forcing their views on someone else. It is about what they view as the legitimacy of African peoples and people of African heritage to hold a differing point of view

[185] Observer status was granted to CAL at the 56th Session of the ACHPR on 25 April 2015.
[186] See statement of Pan African ILGA on CAL's observer status at ACHPR<http:www.ilga.org.> accessed 5 January 2017.
[187] M Killander, 'Human Rights Developments in African Union During 2015' (2016) 16 (2) *African Human Rights Law Journal* 532-553 535.
[188] Ibid 537.

about the normalcy and tolerability of homosexuality; thereby denying the mainstream of Africans the freedom to practice and advance their cultures as well as to oppose cultural norms, beliefs and practices which they do not agree with or find socially acceptable.

Another issue that has persisted in pushing for the recognition, respect and protection of the rights of sexual minorities in Africa is that of reproduction. Sex is supported by many cultural systems in African because of its central purpose of perpetuating humanity. It is on this basis that those totally opposed to same sex marriage sometimes premise their objection and antipathy to any suggestion to grant gays and lesbians other rights such as marriage and adoption. They argue that male and male are designed not to create life, so why should they be allowed right to adopt children? The argument is that nature has deliberately deselected homosexuals from the possibility of having children, but has selected male-female relationship for a higher purpose. According to some proponents of this view, the male and female beings are no mishap of nature. In addition to male-female stabilising of humanity, there is the important human function of propagating the human race. African cultural thought proceeds from the premise that self-preservation is the most powerful force in nature and the mechanism of self-preservation is through continuation of our genetic legacy via male-female sex. They argue that homosexuality cannot sustain life; it cannot perpetuate life or humanity. The relationship is set up to, not only create new life, but to create stable productive humans who carry on the traditions or those things which best define a people. Molefi Kete Asante[189]sums up the African position when he asserts that:

> the overall African philosophy is that life and the reproduction of life sit at the core of human society. Men and women have children who ritualise their parents and ancestors. In the process of building community, African culture has no place, no category and no concept that can accommodate homosexuality as a way of life because it does not fit with the view that humans should reproduce in order to be remembered for eternity.

He further states that:

[189]M K Asante, *Encyclopaedia of African Religion* (Sage Publications, Thousand Oaks CA 2009).

> [n]othing is more important than the cycle of life from the unborn to the ancestors; anything that breaks that cycle, such as homosexuality as a way of life, threatens the very core of African society and philosophy.

Senior Chieftainess Chinyama of the Lovale people North Western Zambia in on record as having asked the question 'what is the purpose of being a homosexual when, you cannot have children through it?'[190]

Yet this kind of view does not really explain the phenomenon clearly shown by history, which is that many people in African are born with sexual preferences that are off the mainstream sexuality and to deny them rights on that basis is inhuman.

It is evident from the discussion given thus far that the debate on homosexuality in Africa is viewed as being driven by Western interests, not African interests. To sum up the argument, one can say that the significant concern for those who reject homosexual rights in Africa is that homosexuality is occasioning untold injury to the African cultural way of life through the disruption of elementary social and cultural institutions such as African sex and family norms; that this in turn is having an injurious effect on African communities. Consequently, the value fights between the pro-homosexual rights lobby and those that oppose homosexuality in the name of human rights is a battle to shape the minds of society, and ultimately the moral climate of the future of Africa.

For the time being, the practice of homosexuality has in many parts of the African continent invited the cultural duty-based justification to either reject the rights envisioned altogether, or fight and resist them robustly. The notion of duty to one's family and responsibility to one's community has often times been invoked to override claims that gay rights deserve recognition and respect within the sphere of universal human rights. However, the debate about African culture and homosexuality, particularly the argument that gay rights have no place in African culture, presuppose a discrete tradition for all Africans; one which common imagination almost continually situates in the assumed authentic purity of the pre-colonial past. Naturally this

[190] AVERT (n 160).

argument draws much of its force from cultural relativism. The point the argument misses, however, is that contemporary African culture is a melting pot of both the old traditions and new elements of life style. It is now a complex mix of the old and the new so that the case of the much flaunted African culture is now more difficult to argue. The argument that Falk makes and to which reference has already been made[191] becomes very relevant. Globalisation has brought about cultural penetration and overlapping; the coexistence in a given social space of several cultural traditions, as well as the more vivid interpretation of cultural experience and practice.[192]

5.7. CONCLUSION

The Western origins of human rights as they are known today is indisputable, and so is the profound and continuing influence of Western values on the notion of rights and duties. For people still influenced by non-Western cultures such as the Asian and the African cultures, this could be a problem with weighty consequences. As the chapter has shown, the rhetorical framework of the Western liberal tradition appears to some people in African societies at least, to serve as a vehicle for inculcation of values of the Western world in other regions of the world. This chapter has demonstrated that when duties are spoken of in the context of rights, whether as correlatives of rights or as individuals' duties unconnected to rights, much of the value of duty and responsibility of the individual, premised on culture and tradition, is ignored. It is suggested that part of this neglect of duty is attributable to the seemingly ethnocentric posture that the whole human rights discourse has assumed over the years. The natural consequence of this is that some human rights norms have continued to have difficulties offering a universally acceptable basis in order for there to be any substantial level of compliance in some societies outside the West. This is a challenge for all as it requires deliberate psychological realignment. Unless the reality of cultural diversity in its delicate profile is properly appreciated and internalised, the existence of the full corpus of international human rights law and standards will do little to stop the practice of contesting some human rights on the basis of tradition and cultural duty and responsibility.

[191] See Part 5.2.4 of this chapter,
[192] Falk (n 59).

This chapter has also shown that cultural relativism cautions us on the hazards of assuming that people's preferences are based on any rational standards. As different cultures have different moral codes, what may be adjudged good in one culture, may be completely abhorrent in another. This being the case, it is logically impossible to argue that all human rights, as seen through the Western prism, have intrinsic authority over competing non-Western cultural values. This is particularly so in African societies. As Nickel argues Africans have every reason to be sceptical about the so called 'rights culture': it resembles all too closely the ideological hegemony wielded by Western powers over their colonies in the nineteenth century, a time when Europe had arrogated to itself the role of arbiter in moral standards.[193]

When the debate on universality and cultural relativism of human rights is extended to duties therefore, it is arguable that some duties are defiantly culturally specific and would clearly defy universalisation.

This chapter has established that the international disdain and condemnation of FGM premised as it were, on human rights concerns, has not forced communities involved in the practice in Africa and elsewhere to abandon this deeply entrenched cultural and traditional practice. Neither has the human rights furthering of rights based on sexual orientation made African culturists to lessen their abhorrence of homosexuality and the pro-sexual minority rights. On the cultural side, many Africans still embrace internalised value systems of what they perceive as African society with a distinct culture which human rights advocates must always recognise and respect. African cultural duties, largely unwritten but now also recognised by the African Charter, require that every individual participates in, and contribute to, the promotion and protection of cultural values and traditions of the community in which they live. Individuals also have a duty to the family and to the community to maintain relations aimed at promoting mutual respect and tolerance, to preserve the harmonious development of the family and to strengthen social cohesion. A view that is commonly held among some traditionalists and cultural enthusiasts in Africa is that one would be failing in these duties if they abandoned the traditional practice of female circumcision, or if they embraced homosexuality as a way of life.

[193] J W Nickelin, J L Nelson and V M Green (eds) *International Human Rights: Contemporary Issues* (Human Rights Publishing , Stanfordville 1980) 45.

The argument that female circumcision is not a positive cultural practice as it violates human rights brings into sharp focus the very warning that cultural relativism makes. Not a positive cultural practice by whose standards? To employ a standard which is diagonally opposed to that employed by the practitioners to label a practice as negative, is arguably an overly judgmental approach as it introduces the aspect of superiority of cultures which raises even more human rights questions. While remaining very sympathetic to the middle ground arguments between universalism and cultural relativism such as the argument proposed by Vincent[194] that a common culture of modernity has consumed all human society by reason of the rise of the concept of the global economy, or that by Falk[195] that there has been significant cultural penetration and overlapping co-existence of cultural traditions leading to sameness, it is still difficult to resist, to some degree at least, the view that for human rights to command loyalty and legitimacy, they must have a foundation that survives concerns of ideological imperialism. Seductive as the arguments on cross-cultural universals and that universal human rights law represents, an attempt to strike a balance of the different cultures may avert the risk of elevating the Western culture to a higher pedestal on no rational and objective basis than one that would offend the equality of cultures and the equal dignity of the human person. Nonetheless, however one may chooses to view the issue of cultural relativism in the human rights discourse, it is difficult to resist concluding with the observation that Bennette[196] makes, that culture does not work as a package deal. Society in many parts of Africa for example, has become multicultural. People adept at operating within two or more normative systems: they pick and choose what suits the needs of the moment[197]. Unquestionably, some human rights may seemingly be discordant with some African traditional and cultural practices. Yet human rights can, and ought to, reform people and communities critically, based on basic tenets of human dignity and the equality of every person which transcend culture. In the view taken by this researcher, although the varied cultural contexts may be a cause for the different conceptualisation of some species of human rights such as those implicating female circumcision and LGBT, and non-Western traditions may differ with

[194] Vincent (n 58).
[195] Falk (n 59).
[196] T W Bennett, 'Human Rights and the African Cultural Tradition' (1993) 22 *Transformation* 30- 40.
[197] Gluckman 1958; Van Doorne, 1981

Western views even to the point of incompatibility, it is nonetheless possible to reconcile these views. This, it is contended, should define the way forward in this debate. Specific issues such as female genital mutilation and the general improvement of the rights and status of women and girl children, and indeed those of sexual minorities, may be addressed under human rights concerns without impeaching cultural and traditional norms and beliefs, or implying in any way that an entire cultural heritage is to be overthrown. Programmatic and thus gradual change is more likely to succeed in this endeavour.

CHAPTER SIX: A CRITICAL ANALYSIS OF THE CONCEPT OF INDIVIDUALS' DUTIES IN THE AFRICAN HUMAN RIGHTS SYSTEM

6.1. INTRODUCTION

This chapter examines the concept of duties of the individual in the African human rights system which is anchored in the African Charter on Human and Peoples' Rights (the African Charter).[1] The main focus of the chapter is on conceptualisation issues and the various problems created by the apparently flawed nature of some provisions of the African Charter, particularly as they relate to duties and responsibilities of the individual. It needs to be pointed out that although the focus of this chapter is on individuals' duties in the African Charter there are substantively analogous duties imposed on the African child by article 31 of the African Charter on the Rights and Welfare of the Child (the African Children's Charter).[2] The individual duties provisions in the two Charters are similarly structured. To the extent that the African Children's Charter is part of the African human rights system, state practice in regard to the African Children's Charter as evidenced by state reports, will also be considered.

The chapter proceeds from the premise that the element of individuals' duty underlies the concept of rights in Africa and that individual's duties as set out in the African Charter and the African Children's Charter serve a significant role in the realisation and enjoyment of rights. It will be argued that some of the provisions on private duties in the African human rights system, important as they are, suffer fundamental inherent flaws in terms of the normative content arising from their formulation. Therefore, as much as the concept of individual duty itself is laudable, the provisions in which they are set out do not offer much practical value to the enlisted duties.

The tendency when dealing with the provisions relating to human duties under the African Charter and the African Children's Charter has been to either take the concept of individuals' duty wholesale and massage it in global praise, or to offer critical condemnation of all private duties as if they were homogeneous, or in the majority of cases, to read meaning, which is not

[1] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5,21 I.L.M. 58 (1982), entered into force 21 October 1986.
[2] OAU Doc CAB/LEG/24 9/49 (1990). It entered into force on 29 November 1999.

apparent, into the individuals' duties provisions. The chapter departs from this approach. It adopts an article by article method in scrutinising the African Charter and African Children's Charter duties of the individual. Building on the classification of individuals' duties made in Chapter Three of this dissertation, the characterisation and analysis of specific individuals' duties under the African Charter is intended to show that not all private duties have the same efficacy and should not, therefore, be treated as if they were homogenous. While some individuals' duties have legally binding value, others are merely supererogatory moral obligations, devoid of legal effect. While some have a content which can be ascertained, others are imprecise. More importantly perhaps, while some raise genuinely human rights concerns others do not quite do so. The argument is made that these factors along with the somewhat incorrect verbiage and generally vague formulation of some of these duties provisions, account for the apparent failure by some states, as will be demonstrated, to implement those provisions and report on them in a detailed, meaningful and consistent manner when they render their reports under article 62 of the African Charter and article 43 of the African Children's Charter. The same argument extends to the African Children's Charter. The chapter argues that given the significance of the African Charter, its provisions should be clear and understanding them should not depend on expert interpretation of the hidden or assumed meaning of its provisions. It is hoped that in this process this work will contribute to the argument that has been made by some scholars and writers in support of a case for reconsideration and reformulation of the African Charter.

6.2. THE SIGNIFICANCE AND CLASSIFICATION OF DUTIES IN THE AFRICAN CHARTER

6.2.1. Significance of individuals' duties under the African Charter

Modern human rights law accepts the theory that an individual has certain duties towards his family and the state. As explained in Chapter Two, the concept of human rights came forth in history from a revolt against an arbitrary state showing high-handedness and perpetual interference in areas pertaining to individual matters and choice. However, it is now universally acknowledged that states are not the only perpetrators of human rights abuses. Not only is the state expected to avoid imposing itself on the rights of an individual, it is also expected to see to it that all individuals and other no-state entities do the same, failing which that individual or

other non-state entities would be made accountable. In virtually all states there are numerous duties imposed upon an individual, such as the duty to abstain from killing another citizen; the duty against invading other people's privacy; the duty to respect other people's property by not doing anything inconsistent with the owner's ownership; and others. There are a matching set of rights to the stated duties. They include the right to live, and right to protection of privacy, and the right to property. Violation of these duties is seen in most states to be akin to criminal offences, and therefore, the individual who fails to observe the duties can be prosecuted by the state. There are also certain 'special duties' like familial duties, armed forces duty, or those related to public health, and other public issues which have no corresponding individual human rights and rather come under the purview of individual and community rights.

It is clear from the history of the African Charter as captured in Chapter Three that the authors of the African Charter believed in the notion that without individuals' duties, none of the rights had any meaning since human rights and human duties do translate into each other. A scrutiny of the African Charter provisions shows that rights and duties of the individual are almost inseparable. However, the question why the duty/rights concept was crept into the African Charter so visibly has continued to raise considerable debate among scholars and writers. Notwithstanding the justificatory explanations considered in Chapter Three which motivated the drafting of the African Charter in general and the establishment of the whole human rights system in African, the real reasons for the inclusion of duties of the individual in so elaborate a manner in the African Charter continue to be a source of much divergent viewpoints. Some scholars and writers argue that duties reflect the position in traditional societies where individuals not only have rights, but are also subjected to accomplish certain duties. As the African Charter was intended to reflect a home-grown notion of human rights ingrained in African sociology, the customary traditions and values of African societies which respond to the needs of African communities, it was inevitable that duties reflective of those traditions and values be included in the seed African human rights instrument. There is a strong argument that by including duties the drafters of the Charter wanted to preserve African communal values. Bello is among those who espouse this view.[3] To them in the pre-modern time Africa, the individual was part of the community or group and his rights were inseparable from his duties. Kodjo shares Bello's notion

[3] E G Bello The African Charter on Human and Peoples' Rights (Martinus Nijhoff, Dordrecht 1987) 33.

that living in Africa means sacrificing individual rights in preference to membership of a group right, which entails assuming certain duties towards the group.[4] Accordingly, to some commentators, the element of duty underlies the concept of rights in African communities. El-Obaid and Appigyei-Atua explain that the community helps the individual to exercise his or her rights, and the individual, in turn, ensures a contribution to general community development.[5] Mutua observes that the duty/rights conception in the African Charter could offer a new basis for individual identification with compatriots, the community and the state. It could instil 'a national consciousness and act as the glue' to bond individuals and different nations within the modern state and at the same time impose limitations on the conduct of government and its officials. He holds the view that the stimulus and purpose duty in pre-colonial societies was to strengthen community ties and social cohesion thus creating a shared fate and common destiny which the impersonal modern state has been unable to nurture. 'It has failed to shift loyalties from the lineage and community to the modern state, with its mixture of different nations'.[6] From this explanation, individual's duties could be read as intended to create the bonds of the pre-colonial era among individuals and between individuals and states. Another view, however, emphasises the notion of private duties as corresponding with rights. According to Quasigah[7] the complementarity of rights and duties seems to have some prominent emphasis in African traditional society and this brings to the fore the Hohfeldian analysis of rights and duties as co-relatives. In his view, the African Charter generally emphasises the Hohfeldian concept of rights as corollary of duties and the interrelatedness of human rights in society. In this regard, one sees Quasigah's view point as being identical to that of M'baye and Ndiaye who propounded their thesis thus:

> In Africa, the individual, completely taken over by the archetype of the totem, the common ancestor or the protective genius, merges into the group…In traditional Africa, rights are inseparable from the idea of duty. They take the form of a rite which must be

[4] Kodjo E. 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 261, 276.
[5] E A El-Obaid and K Appigyei-Atua, 'Human Rights in Africa – A New Perspective on Linking the Past to the Present (1996) 41 *McGill Law Journal* 845-846.
[6] M Mutua 'The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Rights and Duties' (1995) 35 *Virginia Journal of International Law* 339-380 368.
[7] K Quashigah, 'Scope of Individual Duties in the African Charter' in M Ssenyonjo (ed) *The African Regional Human Rights System:30 years after the adoption of the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, Leiden 2011) 119-134.

obeyed because it commands like a 'categorical imperative.' In this, they tie in, through their spiritualism, with the philosophy of Kant.[8]

Theoretically, these arguments are very attractive. It is, however, difficult to agree entirely with those postulations given the worries that are associated with the individual duties provisions as will be shown later in the part dealing with the classification, and analysis of those duties provisions in the African Charter. Quasigah, nonetheless, makes the pertinent point that under Chapter II of the African Charter, although the primary duty holder is the individual, it is not beyond conjecture to argue that the state becomes the secondary duty carrier in that respect.[9] This argument will be considered in detail in part 6.2.1.5 dealing with duties as counterparts of rights.

The notion of individual duty in the African Charter is also seen as entrenching positive African cultural and traditional values which existed in pre-colonial Africa, and which complement rights. Glélé-Ahanhanzo believes that the inclusion of individual duties in the African Charter was intended circumvent the entrenchment of individualism in the manner it has in the West, with irresponsibility and egoism coming as natural consequences. These in turn would undermine efforts aimed at economic development.[10] It was for these reasons that, in contrast to other human rights instruments, international and regional, the African Charter broke new grounds by elaborating duties more fully than other international and regional instruments.

And yet, it is beyond dispute that the ideas of individual duty and responsibility have also been at the forefront of much of socialist philosophy which emphasised collectivism and co-operative action; and the fulfilment of duties to each other and the wider community sitting side by side with enjoyment of rights, public order and wellbeing. Many cultures outside the West and world religions have given eminence to the need to balance individual and community interest and to the essential nature of individual responsibility. In Chapter Five it was shown how notions of duties to the community are at the frontline in many Asian societal anthropological thought.

[8] K M'baye and Ndiaye, 'The Organisation of African Unity' in K Vasak (ed) *The International Dimension of Human Rights* (Greenwood Press, Westport Conn 1982) 583.
[9] Quashigah (n 3) 124.
[10] M Glélé-Ahanhanzo, 'La Charte Africaine des Droit de l'Homme et des Peuples' in *Etudes Offertes a C A Coillard* (Pendone, Paris 1984) 525.

Whereas the classical Western liberal notion of human rights underscores outright individual civil and political rights, most non-Western, Third World traditions place greater emphasis on the community basis of rights and duties, on economic and social rights and on the relative character of human rights. Marxist/socialist ideas highlight economic and social rights and duties absolutely grounded in collectivist principles.[11] Fulfilment of duties to the community in general and to certain individuals in particular such as family members, is considered a natural part of one's membership of a society, and the avenue to self-realisation and dignity within the community. Coming out of the york of colonialism, many African countries were preoccupied with the need for economic development and were careful not to emulate practices that would shift that focus. As Degni-Segui noted one of the first steps on the way out of that situation was to stimulate the allegiance of citizens to the State and the civic spirit.[12] Huaraka argued that individual duties could act as a significant catalyst in the nation building of many African States. Duties could help to strengthen the tenuous fibres of statehood and nurture the sense of patriotism, and thus support the passage from a society based on clans and ethnic groups to a nation-State.[13] It would appear that given the preoccupation of many African countries following their emergence from colonialism, there is some merit in the assertion that African socialism, which blended aspects of the Marxist communism of the Eastern bloc countries and African traditional values could have been a motivating factor in the conception and inclusion of elaborate duties provisions in the African Charter.

6.2.2. Classification of duties in the African Charter

Quashigah breaks down the duties of the individual in articles 27 to 29 of the African Charter.[14] Identified with regard to whom they are owed, these duties can be grouped into five clusters as follows: (a) duties to the family; (b) duties to the society; (c) duties to the state; (d) duties to other legally recognised communities; and (e) duties to the international community.

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[11]Glen M Johnson 'Human Rights in Divergent Conceptual Settings - How Do Ideas Influence Policy Choices?,' in D L Cingranelli (ed), *Human Rights Theory and Measurement*, (MacMillan Press,London 1988) 43.
[1212] R Degni-Segui, L'apport de la Charte africaine des droit de l'homme et des peuples au droit international de l'homme' (1991) *Revue Africaine de Droit International et Comparé* 699-741.
[13] T Huaraka 'Les Fondements des droits de l'homme en Afrique' in A Lapeyre *et al* (eds) *Les dimensions universelles des droits de l'homme Les dimensions spirituelles et intellectuelles des droits de l'homme* (Bruylant, Bruxelles1990) 248.
[14] Quashigah (n 3).

The actual duties of the individual in the African Charter are fifteen in number. These are (i) the duty to exercises one's rights and freedoms with due regard to the rights of others, collective security, morality and common interest; (ii) the duty not to discriminate; (iii) the duty to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; (iv) the duty to preserve the harmonious development, cohesion and respect of the family; (v) duty to respect parents at all times; (iv) duty to maintain parents in case of need; (vii) duty to serve the national community by placing one's physical and intellectual abilities at its service; (viii) duty not to compromise the security of the State; (ix) duty to preserve and strengthen social and national solidarity, particularly when the latter is threatened; (x) duty to preserve and strengthen the national independence and the territorial integrity of the country; (xi) duty to contribute to the defence of the nation in accordance with the law; (xii) duty to work to the best of one's abilities and competence; (xiii) duty to pay taxes imposed by law in the interest of the society; (xiv) duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society; and (xv) duty to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity. The list, on the other hand, of individual duties enumerated in article 31 of the African Children's Charter is comparatively shorter. The duties are set out in five paragraphs. There are, as a matter of fact, seven duties in all. These are: (i) to work for the cohesion of the family; (ii) to respect parents, superiors and elders at all times; (iii) to assist parents, superiors and elders in case of need; (iv) to serve one's national community by placing one's physical and intellectual abilities at its service;(v) to preserve and strengthen social and national solidarity; (vi) to preserve and strengthen African cultural values in one's relations with other members of society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of one's country; and (vii) to contribute to the best of one's abilities, at all times and at all levels to the promotion and achievement of African unity. Before analysing these individuals' duties, it is important to attempt their classification as this gives one a clear indication that these duties are intrinsically of different pedigrees, with some being legal and others being moral, cultural or ethical. Yet, others are rights connected while still others are standalone duties.

In Chapter Three of this work various classifications of duty at a general level were given. As has just been pointed out, the individual duties enlisted in the African Charter are owed to other individuals, entities or collectives such as the state, one's family or the community. These duties can be classified in various ways depending on the purpose of the classification or the nature of the distinction being sought. More importantly, a classification of these duties assists us to dispel the typical way that duties in the African human rights system have been treated. They are often times treated as if they were a standardised set of responsibilities or obligations, which have the same value, same effect and the same fate, yet nothing, can be further from the truth.

Perhaps the most important classification of these duties, as pointed out in Chapter Three, is between positive and negative duties; *prima facie* and 'all-in' duties (actual) or 'all things considered' duties; perfect and imperfect duties; subjective and objective duties; legal and moral duties; natural and acquired duties; and duties counterpart to rights and duties independent of rights. There is no spick and span line separating these duties one from the other. In dealing with one category of duty, therefore, it is difficult for one to confine oneself neatly to that that category without necessarily straying into another. With this cautionary note it should not come as a surprise that when one speaks of 'duties' of individuals, one could be talking of different things depending on the context. What is implied in 'duty' will become clearer as we deal with the categories of duty generally and relate them to the African Charter duties.

6.2.1.1. Positive and negative duties

Positive and negative duties envisage specific results and are typically couched in a fashion that is intended to produce or not to produce a given result. According to the legal jurist Rawls, positive duties require us to do what is good. On the other hand, negative duties impose restrictions on doing what is bad or refraining from acting.[15] Helping the poor may be a positive duty, which may not have any obligation attaching to it. However, not to tell lies or not to harm others is a negative duty, which imposes an obligation.

[15] J Rawls, *A Theory of Justice* (Harvard University Press, Cambridge Mass 1971).

As regards the individual's duties in the African Charter there are some which envision action and others forbearance, while others entail both of these. What is evident is that most of the duties in the African Charter are positive in the sense that the individual is enjoined to do something. These include the duty to maintain parents in times of need; to pay taxes; to serve the national community; to work to the best of one's ability and competence; and to work for African unity. The same can be said of the African Children's Charter duties to assist parents, superiors and elders in case of need and to serve one's national community by placing one's physical and intellectual abilities at its service. The negative duties in the African Charter include the duty not to discriminate and the duty not to compromise the security of the state. The same extends to the African Children's Charter. Arguably, neutral duties could entail either doing something or doing nothing. They include the duty to have a general regard for the rights of others; the duty of mutual respect and tolerance; the duty to preserve the harmonious development, cohesion and respect for the family; the duty to strengthen and preserve national solidarity; the duty to strengthen and preserve national independence and territorial integrity and the duty to preserve and strengthen positive African cultural values. Some of these duties are provided for under domestic legislation. Examples were given in Chapter Four of this dissertation.

From this classification alone, it is clear that it is possible for one to be guilty of breaching African Charter duties by doing nothing.

6.2.1.2. Legal and moral duties

Not all duties of the individual as set out in articles 27 to 29 of the African Charter and article 31 of the African Children's Charter are legal obligations. Some are based on, or fashioned or influenced by traditional, customary or cultural values in the community one lives, or they may be based on personal ethical persuasion. The distinction between a legal duty and a moral duty or obligation is that a legal duty, when breached, may result in legal sanctions. Failure to fulfil a moral obligation, however, only makes the defaulting party feel unease or morally troubled, but only if that party recognises that a moral duty exists. Most, if not all legal duties will also be

moral duties. However, many moral obligations that the norms of civilised society would attach to an individual or institution do not constitute legal duties.

Coming to the duties set out in the African Charter, can it be said that these are moral or legal in character? The answer is clearly that some are legal and others are moral. The duties that are *ex facie* legal are not necessarily all positive duties. These include the duty (i) to exercises one's rights and freedoms with due regard to the rights of others; (ii) not to discriminate; (iii) to maintain parents in case of need; (iv) not to compromise the security of the State; (v) to contribute to the defence of the nation in accordance with the law; and (vi) to pay taxes imposed by law in the interest of the society. These six duties are amenable to legal enforcement, but only after certain steps are undertaken by the state.What must be stated at once is that for reasons that will be made clear shortly, all legal duties in the African Charter as they are listed presently, are understandably incapable of enforcement. It is in fact a misnomer to call them legal duties. They can never be legally enforced as they are set out, without more, for at least five possible reasons. These are considered later.

Extending the same question of the legality or otherwise of the child's duties under the African Children's Charter will probably give us a different answer. It is debatable whether any of the child's duties are intended to be carry and legal force and therefore enforceable against a non-complying child. Numerous questions would arise, not least of which would be related to the legal capacity of the child to assume legal liability. The conditional nature of the obligations created by the Charter duties, is another point worth considering. The initial view one forms is that the African Children's Charter duties are a list of moral and cultural directives intended to mould the African child into a customary values compliant individual.

6.2.1.3. Natural and acquired duties

In Chapter Three it was argued that natural duties come naturally and bind all persons without any imposition by any institution or body. Each one of us discharges these duties voluntarily. For example, the duty not to harm others, not to tell lies, to respect others, not to mistreat children, and the duty to uphold truth and justice and fairness. Some of these duties may also be a subject

of prescription by legislation with their being attended by certain sanctions. One sees natural duties as being symbiotic with the natural law theory.

Acquired duties are duties assumed by individuals by virtue of something they have done, or because of a particular relationship which they might have with others. This means, certain duties are legal, and need one to perform the acquired obligations basing on one's willingness. Failure to perform these attracts legal consequences.

Another type of acquired duties results from special relationships that individuals assume as groups. These are often referred to as responsibilities. For example, parents discharging their duties towards their children, doctors towards their patients, and lawyers towards their clients. These duties are assumed by individuals when they accept to act in a specific role.

Bringing this classification home to individual duties in the African Charter and the African Children's Charter, one notices immediately that there are a number of natural duties which the African Charter and the African Children's Charter speak to. Many of the familial duties appear to be natural duties in the first place. The duty of mutual tolerance and respect for others and for the family, appear to most people to arise naturally. Should the prized form of familial care, love, and a relationship based on culturally inclined qualities of rectitude and gratitude be viewed to flourish only in a context of rights? Even when filial responsibility is legislated in the area of domestic criminal and civil law does this really help the cause of human rights? More importantly, when one respects others, whether family or community members, does one really feel a sense of obligation or compulsion, or does that come naturally? One is inclined to think the latter is the case, so that whether or not a duty to respect is reduced into legal cryptogram, people still feels obliged by their own ethical conscience to obey their inner dictate to respect others. Given their express mention in the African Charter and the African Children's Charter, how is the individual to whom they are directed expected to carry them into effect? Because of the difficulty inherent in defining clearly the parameters of such duties, it is difficult even at state level to prescribe any penalty for non-compliance. In any case, attempting to enforce a duty to respect, because one feels that their right to be respected or to be tolerated appears to have been breached, is positively at odds with normal expectation in an African environment.

6.2.1.4. Actual and *prima facie* or all things considered duties

The distinction between *prima facie* and actual or concrete duties as seen in Chapter Two of this dissertation comes alive when duties in the African Charter and the African Children's Charter are considered. A *prima facie* duty is a duty that is binding (obligatory) other things being equal, that is to say, unless it is superseded or outdone by another duty or duties. A usual example of a *prima facie* duty is the duty to keep promises. Unless stronger moral considerations override, one ought to keep their promise made. In contrast, actual or concrete duties are those people should perform in a particular situation of choice. Whatever one's actual duty is, one is morally bound to perform it. Ross argues in his ethical theory that there are several *prima facie* duties that individuals use to ascertain what they ought to do.[16] These include the duties of fidelity[17], of reparation[18], of gratitude[19], of non-injury,[20] of harm prevention[21], of beneficence[22], of self-improvement[23], and of justice[24].

Concerning African Charter and the African Children's Charter duties of the individual, several duties can be identified as *prima facie* duties. These would include the following: the duty to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; the duty to preserve the harmonious development, cohesion and respect of the family;

[16] W D Ross, *The Right and the Good* (Reprt Oxford University Press, Oxford 2002).

[17] These are duties to keep one's promises and contracts and not to engage in deception. Ross describes them as 'those resting on a promise or what may fairly be called an implicit promise, such as the implicit undertaking not to tell lies which seems to be implied in the act of entering into conversation . . . or of writing books that purport to be history and not fiction' (Ross n 10).

[18]This is a duty to make up for the injuries one has done to others. Ross describes this duty as 'resting on a previous wrongful act' (Ross n 10).

[19]The duty of gratitude is a duty to be grateful for benefactions done to oneself and if possible to show it by benefactions in return.

[20]The duty of non-injury (also known as non-maleficence) is the duty not to harm others physically or psychologically: to avoid harming their health, security, intelligence, character, or happiness.

[21]Once again, this is *the prima facie* duty of a person to prevent harm to others from causes other than him- or herself.

[22]The duty to do good to others: to foster their health, security, wisdom, moral goodness, or happiness. This duty, says Ross, 'rests upon the fact that there are other beings in the world whose condition we can make better in respect of virtue, or of intelligence, or of pleasure' (Ross n 10).

[23]The duty of self-improvement is to act so as to promote one's own good, i.e., one's own health, security, wisdom, moral goodness, and happiness. Ross himself mentions 'virtue' or 'intelligence' in this connection.

[24]The duty of justice requires that one act in such a way that one distributes benefits and burdens fairly. Ross himself emphasises the negative aspect of this duty: he says that this type of duty 'rests on the fact or possibility of a distribution of pleasure or happiness (or the means thereto) that is not in accord with the merit of the persons concerned; in such cases there arises a duty to upset or prevent such a distribution'. Thus the duty of justice includes the duty, insofar as possible, to prevent an unjust distribution of benefits or burdens.

the duty to respect parents at all times and the duty to maintain parents in case of need. Actual duties in the African Charter would cover such duties as non-discrimination, paying taxes and contributing to the defence of the nation.

6.2.1.5. Duties as counterparts of rights or independent of rights

In Chapter Four it was shown how, in many instances rights and duties are viewed as correlative among philosophers.[25] This interpretation theorises rights and duties of the individual as flip sides of the same coin; that rights are protected by imposing duties on others to promote or observe those others' interests.[26] Earlier on in this chapter the position given by Keba M'baye and Quasigah on correlativity as they relate to individual duties under the African Charter was also discussed. They imported the concept of correlativity as propounded by Hohfeld to the provisions of individuals' duties in the African Charter. Indeed some duties of the individual in the human rights framework can be counterparts of rights and may be used as tools for formulating and interpreting rights. In this regard such rights-restrictive duties are as important if not more so than rights themselves. It was also debated in that chapter that some duties are totally independent of rights. Whatever the case, however, the relationship between rights and duties is not difficult to discern. A perusal of the duties of the individual in the African Charter and the African Children's Charter shows that a number of them are not rights related. For example, the duty to defend one's country or to work to the best of one's ability, are duties without counterpart rights. It is also arguable whether familial duties such as the duty for one to respect and provide for one's needy parents arise from a right vested in such parents.

6.3. INTERPLAY BETWEEN STATES' DUTIES AND INDIVIDUALS' DUTIES IN THE AFRICAN CHARTER

The states parties to the African Charter have the primary obligation to ensure that the provisions of the African Charter are given effect. Article 1 of the African Charter proclaims in bold terms

[25] A L Renteln, 'The Concept of Human Rights,' in (1988) *Anthropos, Bd.83* 343-364.
[26] Generally speaking, this observation follows the interest theory of rights. See Ch 2 part 2.2.4.

that the states parties shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effective to them. A similar obligation is cast on states parties to the African Children's Charter under article 1 of that Charter.

In addition to this general provision in these Charters there are specific provisions which prescribe duties for the state in areas where the individual equally has duties. Under article 17(3), the African Charter, for example, '[t]he promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.' This duty, as will be shown, is also cast on the individual.

It appears that individual rights as contained in the African Charter are in a way an implication of the duties that lie ahead for the member states. Thus the right to equality implies that the state will have to respect the right, and if necessary take steps to make the right effective. However, there are certain duties that we see in article 17 as given above, where the African Charter very categorically outlines the duties of a state in regards to its people. As in article 17, the state will have to promote and ensure that the rights are respected and are also well known amongst the common man. The state will have to pass legislation and institute administrative and other measures that will help promote and safeguard the rights set out in the African Charter.

While an individual has certain duties under articles 27-29 and the African child under article 31, towards fellow citizens; towards the community as a whole and also towards the state, the state is equally enjoined to perform certain duties towards its citizens. Article 18(1) and (2) of the Charter underscores the importance of the family as a basic unit of society. It also places obligations on the state, not only to protect the family and take care of its physical and moral health, but also to assist family members in fulfilling their duties. This includes children. Under article 18(2), the state must assist the family which is the custodian of morals and traditional values recognised by the community. In terms of article 29 (1) of the African Charter the individual is bound to preserve the harmonious development of the family and to work for the cohesion and respect of the family. A similar duty is cast on the African child by article 31. A combined reading of these articles does raise vexing questions of their own. What is the nature of

the assistance that the state is bound to give to the individual as a member of the family to enable that individual perform his/her duties toward the family under the Charter?

The African Charter does not clarify as to what the 'moral and traditional values recognised by the community', which it talks of in article 18(2), are, nor does the Children's Charter. Even the preamble paragraphs 4 of the African Charter talks about taking into consideration the virtue of the historical tradition and the values of civilisation which should inspire and characterise the reflection of the African States on the concept of human and peoples' rights. It, however, does not clarify the meaning to be attached to these terms. This ambiguous nature of the individuals' duties coupled with the lack of clarity on their overlap and interplay with the duties of the state, has created many controversies. Is the performance of the individual's duties, for example, contingent on the state's assistance to the individual as a member of the family? Which traditions should the state uphold? Should it be the pre-modern, pre-colonial traditional values of Africa, or the colonial customs that, after centuries of domination by European powers, have somehow seeped into the culture and traditions of Africa? Here the drafters of the Banjul Charter did not appear to have been bothered by the fact that the culture and tradition of any nation, community or society is transient, and changes with time and influence. So reference to any fixed culture or tradition, and the duty to uphold it all times, is not humanly possible and is bound to create undue debate and confusion.

Mutua observes that some campaigners argue that the African Charter supports the discriminatory treatment of women on the basis of gender in marriage, in property ownership, and in inheritance on them unconscionable labour and reproductive burdens.[27] The insistence of the African Charter on tradition and culture is seen by some scholars as bracing up gender bias. It has been opined that by enlisting these particular duties, the Charter has turned itself into a protector of African culture that in spirit is unchanging and perennial. In this case it would mean that the Charter buffers itself against any positive changes and reforms in the tradition and culture. It could be further translated into the fact that the African Charter is thus supportive of the old traditions and customs that are oppressive against women and girls. These and other

[27] M Mutua, cited in S Power and G Allison, *Realising Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan, New York 2000) 147.

misperceptions arise owing to the fact the African Charter fails to explain clearly as to what traditions and culture it wants its states parties to uphold.

However, a closer look at the African history and socio-political culture that had existed during the pre-colonial times will reveal that in respect to the African context, this inclusion of individual duties and rights is in keeping with the African tradition and culture. Pre-colonial Africans had believed that an individual had certain intrinsic values and therefore had claim to certain basic rights. However, along with these natural rights they also believed in the concept of duties, where an individual must necessarily perform certain duties towards the family and community as a whole in keeping with the African tradition. The Charter does not follow the concept of individualism in human rights system, as we see in Western inspired human rights treaties.

While article 18(3) imposes an obligation on the state to eliminate every form of discrimination against women as well as ensure the protection of the rights of women and children as stipulated in international declarations and conventions, under article 28 the individual has a duty to respect and consider his fellow beings without discrimination. It seems on the face of it that the duties envisioned in the two provisions amount to practically the same thing. A state's obligation under article 18(3) if properly performed would necessarily entail enforcement of the provision of article 28 without the latter provision either existing or being invoked specifically.

Article 18(4) of the African Charter provides that the disabled and the aged shall have the right to a special measure of protection in keeping with the physical or moral condition. This no doubt is a right claimable against the state. The extent, to which this duty interfaces with the individual's duty under article 29 (1) to maintain one's parents in case of need which duty is analogous to that in article 31(b) of the African Children's Charter, requires some reflection, especially given the extended nature of individuals' duty to members of the community beyond the family unit.

The African Charter recognises economic, social and cultural of the individual. Indeed, the Charter guarantees the right to work under equitable conditions, the right of everyone to enjoy the best attainable state of physical and mental health, and the right to education. The aged and

disabled have the right to special of protection.[28] All these are rights which the state, not the individual, is bound to guarantee. And, as already pointed out in Chapter Three, there is no hierarchy between these rights and their civil and political counterparts. This is clearly expressed in the preamble of the African Charter under which civil and political rights cannot be dissociated from economic, social and cultural rights in their conception and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Clearly then the state is the primary carrier of obligations under the African Charter. A major issue that one is inclined to raise is whether the individual would be obliged to observe his duties under the African Charter where the state fails in the first place to discharge its obligations under the African Charter. For example, to what extent would the individual be expected to perform his duty to work to the best of his ability and competence, and to pay taxes; or the duty to serve the national community and to deploying his physical and intellectual abilities, when he is unemployed because there are no jobs owing to the state's failure to honour its Charter obligations through the creation of an enabling environment? To what extent is an individual expected to observe the duty not to compromise the security of the state, if he is ignorant of the politics at play and the international relations necessary for him to make informed decisions because he cannot access education due to flawed government policies? Should an individual feel obliged to discharge familial duties to his parents when the state fails in the first place to provide the basic rights that such parents would be entitled to under the Charter, such as the right to work under equitable conditions, or the right to the best attainable state of physical and health.

All these arguments, of course apply mutatis mutandis to the African Children's Charter and tha African child.

The state's duties are in any case very general in nature and do not seem to be binding. They appear to be only advisory in nature. Article 25 of the African Charter will show this lack of force, in the directions given to the states as to what their duties are. It provides that:

[28] See arts 15 16 17 and 18 of the African Charter. See also the Draft Protocol on the Rights of Persons with Disabilities in Africa Draft II, 14 March 2014 updated from the draft I following meeting of the Working Group on Older Persons and Persons with Disabilities held in Banjul the Gambia, 24 February to 2 March 2014 <www.achpr.org/news/2014/04/d121>accessed on 23 September 2015). The Draft Protocol does not create any new duties for individuals directly. The list of duties set out is directed at states parties.

> State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

The state may take it to be only a moral obligation to follow the African Charter as a whole, and in fact, many African states are doing this by paying lip service to the enlisted rights and duties, and continuing with rampant human rights abuses or the blatant disregard of their obligations under the African Charter.

6.4. ANALYSIS OF THE INCORPORATION OF DUTIES OF THE INDIVIDUAL IN THE AFRICAN CHARTER

The creation and imposition of duties on individuals by an international human rights instrument, or a treaty for that matter, did not begin with the African Charter, nor is it the only human rights instrument in Africa that imposes duties on individuals. The African Children's Charter and the African Youth Charter[29] both create duties for children and young persons towards their parents and families, to respect parents at all times and to maintain them in case of need. As was shown in detail in Chapter Four of this dissertation, some international human rights instruments that predated the African Charter and others that came after it, do have provisions encapsulating duties for individuals.[30] Article 29 of the UDHR shows clearly the desire to prescribe conduct for both states and individuals.[31] Equally the twin covenants – the ICCPR[32] and the ICESCR[33]– declare in their common final part of their preambles that it is realised that individuals have duties to other individuals and to the community to which they belong, and are under a

[29] The Africa Youth Charter was adopted by the AU Assembly in July 2006. As of 12 April 2016 29 states had ratified; 40 had signed and 6 had neither ratified nor signed. <http//www.africa-youth.org.>accessed 7 January 2017.
[30] See Ch 2 & 4.
[31] It states that: 'Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.'
[32] UN General Assembly Resolution 2200A (XXI) of 16 December 1966 UN Treaty Series vol 999 171.
[33] UN General Assembly Resolution 2200A (XXI) of 16 December 1966 UN Treaty Series vol 993 3.

responsibility to strive for the promotion and observance of the rights recognised in those Covenants. Likewise, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms[34] imposes, in article 18 (2), counterpart restrictive duties on individuals and other non-state actors.[35]

A scrutiny of the provisions of these instruments, however, shows one glaring fact. They are long on rights and very short on duties. For example, the UDHR mentions duties only once in article 29(1), and even then, only minimally. It does not specify them. A similar situation replicates itself at the regional level. The exception here is the American Declaration on the Rights and Duties of Man,[36] which sets out a wide-ranging set of individual duties alongside human rights. These encompass those owed to society; to children and parents; to vote; to obey the law; to pay taxes; and to serve the community. In this respect, the American Declaration is comparable in many respects to the African Charter. It is, however, just what it says, a declaration and not a treaty like the African Charter. In any case the present regional human rights system in the Americas is anchored in the American Convention on Human Rights[37] which has, by and large, superseded the American Declaration. Reference to duties in the American Convention was abridged to its Chapter 5, headed 'Personal Responsibilities' and took the form of a single article stating simply that:

> [e]very person has the responsibilities to his family, his community and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

In Chapter One, an explanation was given as to why, despite the American Declaration of Human Rights setting out an elaboration of individual duties, it is not an appropriate source of

[34] Also known as the Valencia Declaration of Responsibilities and Human Duties, it was adopted by the UN General Assembly while celebrating the 50th Anniversary of the UDHR in 1998. A/RES/53/144, 8 March 1999.
[35] The African Children's Charter was adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999. See C Heyns and M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (5th edn PULP, Pretoria 2013).
[36] The Declaration was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogota, Colombia, in April 1948.
[37] Adopted in 1969 and entered into force in 1978.

lessons in the human duties and responsibilities experiment and why the focus of this study is on the African human rights system and not on any other system.[38]

In the European region, the recognition of the significance of duties was evident when the Council of Europe adopted the European Convention on Human Rights (the European Convention)[39] through the balancing of rights and freedoms in the interest of collective order and harmony in society, by the imposition of limitations on the enjoyment of rights as set out in articles 9, 10, and 11 of the Convention. It is, however, only in article 10 that recognition that the exercise those freedoms carries with it duties and responsibilities.

An article by article analysis of the individuals' duties provisions in the African Charter reveals gaps and ambiguities and raises legitimate questions that cannot be easily wished away as we attempt to make practical sense of the African Charter in the vindication of individual rights and freedoms. It must be appreciated in the first place that the individuals' duties as enlisted in articles 27-29 of the African Charter could help to recreate the relationship that existed in pre-colonial Africa between two individuals and between an individual and the communitarian authorities. This, as has been explained in Chapter Three is, after all, what the framers of the African Charter had sought to bring about. It, in this sense, tries to create an individual who takes responsibilities; has some duties to perform towards his family, the community and the state; a willing member of the society who conforms to its rules. It is now opportune to analyse the Charter duties provisions individually.

6.4.1. Duties to the family, the international community and other legally recognised communities

Article 27 of the African Charter proclaims individual duties in its two sub articles. Sub article (1) speaks very broadly about the individuals' duties towards his family, the international community and other legally recognised communities as follows: '[e]very individual shall have duties towards his family and society, the State and other legally recognised communities and the

[38] See Ch 1 part 1.3.
[39] The Convention for the Protection of Human Rights and Fundamental Freedoms was drafted in 1950 signed 4 November 1950 and entered into force on 3 September 1953. 213 UNTS 221 ET5.

international community.' A similarly worded provision appears in article 31 of the African Children's Charter which states that '[e]very child shall have responsibilities towards his family and society, the state and other legally recognised communities and the international community.'

At a glance these provision appears to be a general statement made to remind the citizens of their moral obligations towards their family, country/ nation. There is no specification as to what exact actions or forbearance the individual or the child must undertake or refrain from, or what is expected of the individual or the child in performing this duty. Not without serious misgivings, it is easy to figure out duties one would have to one's family, but probably not so for society, the state and other legally recognised community. It would appear though that article 27 of the African Charter and article 31 of the African Children's Charter try to instil a sense of respect for international laws and moral values. Umozurike tells us that this duty towards the international community as a whole 'could also play down extreme nationalism and national jingoism.'[40]

People may well be uncertain as to the entity the duty is owed to; what family? Is it the nucleus or the extended family? What is a legally recognised community in this context? There is also an associated difficulty in trying to effectuate the duty. How would anyone be held accountable for failure to observe the duty created by article 27(1) of the African Charter or article 31 of the African Children's Charter?

Article 27(2) says '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. What this article appears to intend to do is to impose a direct duty on the individual. It places a limitation on the exercise of rights by an individual for the protection of the rights of others, and in the interest of collective security, morality and the security of others. Here the individual is probably being enjoined to reflect on how the exercise of his rights might adversely affect the rights of others or the community at large. The duty envisioned here is premised on the assumption that the full development of individual's rights is only possible where individuals care about how their actions would impact others. Thus, one will have to exercise his rights with a certain

[40] U Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, The Hague 1997) 74.

amount of responsibility. In this regard, one would say the African Charter rejects selfish individualism and asks the citizen to take into account their neighbours and other community members as they exercise their rights.

Regarding article 27(2) of the African Charter Heyns and Killander point out that as the article comes under the heading on duties, it should be understood that duties in the Charter are essentially limitations of rights. Indeed article 27(2) has the status of a general limitation clause.[41] It places a limitation on the exercise of rights by individuals for the protection of the rights of others, and in the interests of collective security, morality and interests of others. It in this sense strikes a balance between rights and duties. This reflects the normal position that obtains everywhere: no rights are absolute. A troublesome aspect of all this is that it legitimises claw-back provisions and reinforces the criticisms regarding claw-back provisions of the African Charter as discussed in Chapter Three. What is meant by 'collective morality' and 'common interest' in article 27(2) is potentially contentious. With the silence of the African Charter as to what exactly are the prescribed moral values and common interests, article 27(2) could be open to different and conflicting interpretation although its general purpose may be common ground. In some communications[42] brought before it, the African Commission on Human and Peoples' Rights reiterated that article 27(2) *constitutes the only legitimate reasons for limitations to the rights and freedoms protected by the African Charter*[43]. This was reiterated by the African Court in its recent decision in *Mtikila v Tanzania*[44]where the Court clarified the limitation envisioned in article 27(2). It observed that:

> jurisprudence regarding the restrictions on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued. Once the complainant has established that there is a prima facie violation of a right, the respondent state may argue

[41]C Heyns and M Killander, 'The African Regional Human Rights System' in F Gomez Isa and K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (University of Deusto, Bilbao 2006) 520.
[42]*Constitutional Rights Project, Civil Liberties Project and Another v Nigeria* (Communication Nos. 140/94, 141/95) 13th Activity Report 1999-2000; AHRLR 200; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 and *Interights and Others v Mauritania* (Communication No. 242 of 2001) 17th Activity Report, 2003-2004; (2004) AHRLR 87.
[43] Italicised for emphasis.
[44] Applications n 009/2011 and n 011/2011.

that the right has been legitimately restricted by 'law', by providing evidence that the restriction serves one of the purposes set out in article 27(2) of the Charter.

After referring to the Consolidated Communications between *Media Rights Agenda and others v Nigeria*[45] and *Gareth Anver Prince v South Africa*[46], the Court quoted a statement by the African Commission that the *'only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2) of the Charter'.*[47] The approach taken by the Commission has been that after it has evaluated whether the limitation involved is effected through a law of general application it employs the proportionality test, in terms of which it weighs the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. This was evident in *Legal Resources Foundation v Zambia*[48] where the Commission observed, in regard to limitation of rights, that such limitation is not to be used to subvert rights already enjoyed and cannot be justified solely on the basis of popular will.[49] The legitimate interest must be 'proportionate with and absolutely necessary for the advantages which are to be obtained. Granted that individual duties in their African conception do not generally correspond to specific rights, it would be an interesting inquiry for a different occasion to consider whether the argument regarding limitation or derogations of rights on the basis set out by the Commission would be applicable to cases where the rights derogated from are strictly speaking beneficent or supererogatory.

It is axiomatic that the limitation on individual rights envisioned in article 27(2) is so significant that it is recognised by many states parties to the African Charter. Consequently, many African countries do reflect a duty provision similar to that in the African Charter under article 27(2). The Constitution of Ghana, for example, enjoins 'every citizen' a negative, implied duty 'to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons'. Article 63 of the Algerian Constitution stipulates that [a]ll the rights which a person enjoys shall be exercised in a manner which is respectful of the rights conferred by the Constitution on others, in particular by the right to

[45]No 105/93, 128/94, 130/94, 152/96 (Consolidated Communications) Fourteenth Activity Report (2000-2001).
[46] Communication No 255/2002, Eighteenth Activity Report (July 2004 –December 2004).
[47] Italicised for emphasis.
[48](2001) AHRLR 84, Communication 211/98 decided at the 29th ordinary session, April-May 2001, 14th Annual Activity Report.
[49] Paras 65-70.

honour, to the intimacy and the protection of the family, of youth and childhood'.[50] The Ugandan Constitution too, provides for duties in article 17 including the duty to have regard to the rights and freedoms of others.[51] Under section 24 of the Nigerian Constitution duties incumbent on citizens include those of respecting the dignity of citizens and the rights and legitimate interests of others and living in unity and harmony and in the spirit of common brotherhood.[52]In addition to constitutional provisions, subsidiary legislation in many countries is replete with instances where duties are imposed on individuals.[53]

However, although many African countries do have duties provisions in their constitutions[54] which may in some respects mirror those set out in article 27(2) of the African Charter, these duties are regarded as a purely domestic affair between the state and the individual, making the African Charter and its provisions, rather far removed from them. The state here is clearly identifiably the beneficiary of the majority of those duties which are legal in content. Once a state has made provision of duty similar to those of article 27(2) of the Charter, the individual's obligations henceforth become one of observing the national laws and no reference will be made to the African Charter provisions either by the individual or by the state.

[50] The Constitution of Algeria of 1989 as amended in 1996 and in 2008.
[51] Adopted on 8 October 1995, this is Uganda's fourth constitution since independence in 1962.
[52]These examples of African constitutions represent neither an exhaustive nor definitive survey but merely a sample of the prevalent thought regarding duties on the African continent.
[53]For example, in the Republic of Mozambique individual duties are enshrined in arts 6, 53, 96 and 106 of the Constitution, which provide for the defence and promotion of human rights, equality before the law and the construction of a society based on social justice where individual freedoms may be temporarily suspended in accordance with the law. Individuals have supplementary obligations towards the community as provided for in art 69 of the Constitution which penalizes any action undermining national unity, and art 73 whereby individuals have the duty to take part in the process of broadening and strengthening democracy. Under art 84 every Mozambican national has the duty to take part in defence of the independence, sovereignty and territorial integrity of the country. Art 17 of the Constitution Djibouti defines the obligations of citizens towards the national community: "The defence of the Nation and territorial integrity of the Republic is a moral duty of all Djiboutians". Similarly, treason, spying, transmitting information to the enemy as well as all infringements committed against the State security are repressed by the Criminal Code.
[54] For example, art 17 of the Uganda constitution includes the duty to defend Uganda and render national service when necessary and cooperate with lawful agencies in the maintenance of law and order; pay taxes; register for electoral and other lawful purposes; combat corruption and misuse of wastage of public property and create and protect a clean and healthy environment. Furthermore, under art 17(2) it is the duty of all able bodied citizens to undergo military training for the defence of the constitution and the protection of the territorial integrity of Uganda whenever called upon to do so. Under the Nigerian constitution sect 24 of the Nigerian Constitution duties incumbent on citizens including defending Nigeria and rendering such national service as may be required; respecting the dignity of citizens and the rights and legitimate interests of others and living in unity and harmony and in the spirit of common brotherhood; making positive and useful contributions to the advancement, progress and well-being of the community and paying taxes promptly. Art 113 of the Zambian Constitution[54] lists duties of the citizen which include the duty of loyalty to the country; to foster unity and live in harmony with others; to promote democracy and the rule of law; to vote; to pay taxes; and to provide defence and military service when called upon.

6.4.2. Duties of respect; non- discrimination; mutual respect and tolerance.

Under article 28 of the African Charter

> [e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Apart from the reference to non-discrimination, which is capable of enforcement by way of a constitutional and or legislative provision, as is in fact the case in many African countries,[55] this article has a very general note that does not suggest or import any legal obligation. It uses a very commonplace tone that suggests pleasant neighbourliness, without proposing solidarity in strong terms. It does not hint that it is one's general duty to help others. It translates into more or less a soft general code of conduct, devoid of legal effect, thus making it impossible for States' parties to the African Charter to prosecute an individual who fails to perform this duty. The individuals' duties under this article are largely ethical obligations which, as Glélé-Ahanhanzo notes, are of a non-binding nature and belong to a moral code of conduct, not capable of effective implementation.[56] They are clearly those that would, in Ross' ethical theory, be termed as *prima facie* duties of beneficence and maleficence, totally devoid of enforcement.[57]

6.4.3. Duties to preserve the harmonious development, cohesion and respect for the family and to respect parents at all times, to maintain them in case of need.

According to article 29(1) of the Banjul Charter an individual has a duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need. It bears mentioning that the African Children's Charter imposes an identical duty on the child, subject to his age, ability and such limitations as are contained in the Charter. The weaknesses of the provisions in the African Charter logically apply as well to the African Children's Charter.

[55] For example art 27(5) of the Kenyan Constitution, art 20 of the Constitution of Malawi Ch 4 and article 21 of the Ugandan Constitution.
[56] M Glélé-Ahanhanzo, 'La Charte Africaine des Droits de l'Homme et des Peuples' in *Etudes Offertes à C A Colliard* (Pedone, Paris 1984) 527.
[57] Ross (n 10).

There are two distinct duties outlined here: one towards the family and the other towards the parents. While it is arguable that the duty towards parents implies a reciprocal right on the part of the parents to be accorded respect and maintenance from the individual, it is doubtful that one can talk of any meaningful right of the family as an entity to anything. It is easy to appreciate the significance of the duty to one's parents in the African context. Owing to the poor economic conditions that most African states find themselves in, they cannot run along the lines of the Western welfare states. Therefore, the elderly, the needy and the poor should be taken care of. Their own families shoulder the first line of responsibility in this regard. This duty, which has its roots in the pre-colonial social order when one lived under strong communitarian rules (when abandoning parents or, for that matter, any elderly community members, was completely unthinkable), has become a complete necessity today, even though that old social order does not exist anymore. These old rules where a family is held sacred is an age-old tradition and cannot be dispensed with so easily even under significant influence of Western individualism and liberal human rights laws.

According to article 18 of the African Charter, and interestingly article 18 of the African Charter on the Rights and Welfare of the Child, the family forms the 'natural unit and basis of society' and, since the family by tradition forms the natural unit of society, the individual is likely to observe this duty without any need for outside enforcement. However, as already pointed out in regard to the general duty set out in article 27, the African Charter does not clarify the scope and nature of the duties to be observed by an individual towards his family, nor does it clarify and define what was meant by the word 'family' and neither does the African Charter on the Rights and Welfare of the Child. The terms could indeed refer to just a couple and their children as in modern nucleus families, or the traditional form of African families, which are large and extended. Is this duty limited to support of parents only, or does it include grandparents, uncles, aunts, brothers and sisters? Again, one is inclined to conclude that the duty to the family is part of what Ross calls a *prima facie* duty of beneficence, that is to say the duty to do good to others: to foster their health, security, wisdom, moral goodness, or happiness which 'rests upon the fact

that there are other beings in the world whose condition we can make better in respect of virtue, or of intelligence, or of pleasure.'[58]

There appears to be a great deal of merit in the reasoning that Hansungule employs to come to the conclusion he does that the duties of the individual in the African traditional and cultural set up are generally not enforceable. They are mere moral and supererogatory directives which fall short of being legal claims. He gives the example of a person who does not look after his grandmother. While, such a person cannot be taken to court for his failure, it is believed that 'his ancestors would laugh at him, that is to say, that he would not live long.'[59]According to Hansungule, one way in which duties should be considered is through reliance on one another. He posits that:

> [a] young man needs the assistance of his uncle to pay his bride price when marrying which will not be forthcoming if he did not respect him, help him in his endeavours or was regarded by the community to be truant or disrespecting. The question of locus standing for these duties does not arise because they have their own method of enforcement in culture. Other duties however can be legally enforced. For example, the duty to pay tax has clear legal implications. Similarly, the duty to contribute to the defence of one's country may include military service, which can be provided for in national legislation.[60]

Ouguergouz observes that the duty of individuals to parents and their children is normally sanctioned by domestic criminal and civil law.[61]This point is also alluded to by Viljoen when he cites section 6 the Uganda Children's Act Chapter 50 of the laws of Uganda which casts on parents or guardians the responsibility to maintain their children, as an example of an explicit

[58] Ross (n 10).
[59] M Hansungule, 'The African Charter on Human and Peoples' Rights: A Critical Review' (2008) 8 *African Yearbook of International Law* 265-331, 294.
[60] Ibid.
[61] F Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff, 2003) 416.

imposition of duties on individuals.[62] For implicit imposition of duties on the individual, he gives the example of laws that require payment of taxes and those criminalizing certain conduct.

One could go further and cite the Ethiopian Constitution and its Criminal Code which contain duties of the individual in the manner similar to that found in the African Charter. Seychelles too, has individuals' duties imposed by its Constitution and other subsidiary laws such as the Civil Code of Seychelles Act[63] Malawi has the Child Care, Protection and Justice Act 2010 which creates duties and responsibilities for parents and guardians toward their children, and equally creates duties and responsibility for children towards their parents.[64] In Nigeria and South Africa the Child Rights Act, 2003 and the Children's Act 38 of 2005, respectively, do create individual duties.

What article 29(1) of the African Charter in effect does is to give ambiguous directions to the individual to preserve harmonious development and cohesion and respect of the family. The point is that enforcement mechanisms are usually not specified, nor is what would trigger calls for enforcement of these statutes clear. If the reason for having familial support duties is to strengthen the family, it is more likely that bringing criminal charges or other legal action within domestic legislation which give effect to the duty provisions in the African Charter would create disharmony in the family rather than unity. Indeed the elderly person needing the support of their adult children would almost surely be loath to seek enforcement of their rights if it meant putting their children in the criminal justice system.

6.4.4. Duty to serve national community and deploying physical and intellectual abilities

Article 29(2) requires the individual '[t]o serve his national community by placing his physical and intellectual abilities at its service.' The same duty is replicated in article 31(b) of the African Children's Charter. The objective of this duty may arguably be that of stemming the 'brain drain' that has been occurring in Africa in alarmingly large numbers. It still is, however, unclear from this provision the extent to which the individual duty it creates can be solicited to stem the

[62] Viljoen (n 40).
[63] Art 205 of the Civil Code of Seychelles Act 1/01/1975, laws of Seychelles 1996 provides that: the child shall be bound to maintain their father and mother or other ascendants who are in need. Article 2006 of the same law extends this duty to other relatives.
[64] Sec 4 of the Act.

process of brain drain from Africa. Trained professionals in Africa find it more worthwhile to go and work in foreign states with better economies and therefore offering better prospects of personal economic advancement, even though it means their own country suffering from the lack of professional man power. Medical personnel trained in Africa have been cited as an example of migrant professionals. According to the Centre for Global Development, for example, there were 883 Zambian health professional emigrants in the year 2006 notwithstanding the dire need for these professionals locally.[65]

Article 29(2) of the African Charter has been attacked as dangerous, as it could justify obstacles to freedom of movement of nationals.[66]Can a country legislate against professionals emigrating on the basis that it is enforcing the duty under article 29(2) of the African Charter? Any such law or policy is likely to infringe the freedom of movement under article 12 (2) of the African Charter. The bottom line however, is that the full import of the duty imposed on the individual by article 29(2) of the African Charter and indeed article 31(b) of the African Children's Charter are far from clear.

6.4.5. Duty not to compromise national security

In article 29(3) it is the duty of the African individual '[n]ot to compromise the security of the State whose national or resident he is.' While the African Charter talks of 'compromising of the security of the State,' it does not enlighten us as to what actions can be taken as breach of a states' security. An authoritarian state may translate this duty and force its citizens to give up their freedom of expression or the freedom of political association, under the guise of protecting state security. Since the rights and duties are very closely inter-related in the Banjul Charter and cannot, in some instances, be easily divorced from each other, a manipulative state may indeed construe these unclear duties, to force individuals to give up their basic rights. The Zambian situation in the one party state era of President Kenneth Kaunda presents a reprehensible example of a complete crack down on human rights and fundamental freedoms all in the name of

[65] Centre for Global Development 'A new database of health professional emigration from Africa Working Paper 95, sourced <http:/www.cgdev.org/content/publications/detail/9267> accessed 5 July 2012.
[66] W Benedek 'People's Rights and Individual's Duties as Special Factors of Human Rights by International Law: The Emerging African System', (1955) *Nomis Ver lagsgesellschaft* 59 at 89.

the of preserving national security, solidarity, patriotism and unity. If the African Charter existed then and Zambia had been a member, it is not inconceivable that the individual duties provisions could arguably have been pointed to as additional justification for the violations. The complicit role of the Zambian judiciary at that time, was all too obvious. The timidity of the courts to espouse human rights causes was frighteningly evident. Hiding under such notions as *salus populi suprema lex* (the safety of the nation is the supreme law), national solidarity and unity, the country witnessed how the courts in such cases as *Feliya Kachasu v Attorney General,*[67] *Patel v Attorney General,*[68] *Nkumbula v Attorney General,*[69] and *Nkumbula & Kapwepwe v UNIP,*[70] were so readily inclined to hold in favour of the state on human rights questions on grounds that the need to preserve national security, national unity, solidarity and patriotism, outweighed individual's rights and in fact called on the individual to exercise his/her duty to ensure that these national aspirations were attained. The decision in *Re Buitendag* perhaps exemplifies a text book kind of judicial sympathy to the Executive at the expense of individual liberties. Among other things the court in that case held that 'the President has been given powers by Parliament to detain persons *who are not even thought to have committed any offence* or to have engaged in activities prejudicial to security or public order but who, perhaps because of their association or for some other reason, the President believes it would be dangerous not to detain. . . .'[71] For that reason, the court could do nothing about it.

6.4.6. Duty to preserve and strengthen social and national solidarity and to preserve and strengthen national independence and territorial integrity and to contribute to its defence

Article 29 (4) and (5) require of an individual to serve his country and nation by working towards its unity, solidarity and maintaining its independence. Thus, these articles have been written keeping in mind the years of captivity, slavery and human rights abuses that the people of Africa suffered at the hands of the European colonial powers. These duties are used as armour against future foreign occupation. The duty to promote African unity has been described as 'an especially critical role given arbitrary balkanisation by colonial powers and the ethnic animosity

[67] (1968) ZR145.
[68] (1968) ZR 99.
[69] (1972) ZR 204.
[70] (1978) 378.
[71] (1974) ZR 156. Italic the writer's own for emphasis.

fostered within and between states.'[72] It is doubtful whether these aspirations are any longer of any relevance given the developments in international relations.

Under article 29(4) the individual is enjoined to '[t]o preserve and strengthen social and national solidarity, particularly when the latter is threatened.' There is a similar duty cast on the African child under the African Children's Charter. It would appear that here, the duty outlined is simply one that existed, albeit in a slightly different form, amongst the community members of a pre-colonial social organisation. It asks the individual to work towards building national unity. Many post-colonial states which have failed to instil this feeling of solidarity have encountered difficulties.[73] So like the state, the individual too, bears the responsibility of keeping the community and state together. Chege[74] observes that the maintenance of social and national solidarity is of utmost importance in present day Africa, where many modern states have collapsed and failed.

The meaning of article 29(4) is rather vague and in reality, makes almost no sense. The duty as given in that article will in most cases, flummox states which will find it difficult to implement and enforce it in a legal sense. There is also another danger as the Zambian examples shows, which lurks and may appear if the state is in the hands of a dictator. Perhaps a better way to frame it would have been to say that it is the duty of all individuals 'to protect and strengthen social and national solidarity' and for the next part to then state that 'this duty is all the more exigent when there is an imminent threat to the nation and society.' Many African countries reflect a similar duty in their constitutions. Under article 17 of the Ugandan Constitution there is a duty on every individual to defend Uganda and render national service when necessary and cooperate with lawful agencies in the maintenance of law and order, while under article 17(2) it is the duty of all able bodied citizens to undergo military training for the defence of the constitution and the protection of the territorial integrity of Uganda whenever called upon to do so. Under the Nigerian constitution, section 24 there are duties incumbent on citizens include defending Nigeria and rendering such national service as may be required. Article 113 of the

[72]Mutua (n 4).
[73]One would argue that countries like Somalia, Liberia, Mozambique, Seira Leone, Congo DRC and Rwanda, are examples of countries that may not have handled the issue of national solidarity well.
[74] M Chege, 'Between Africa's Extremes' (1995) 6 *Journal of Democracy* 44 45.

Zambian Constitution lists duties of the citizen, which include the duty to provide defence and military service when called upon.[75]

6.4.7. Duty to work to the best of one's ability and competence, and to pay taxes

Under article 29(6) of the African Charter, it is the duty of the individual to work to the best of his ability and competence, and to pay taxes imposed by law in the interest of the society. From the classification of duties as discussed earlier in this chapter, it is clear that this provision combines two positive duties: to work and to pay taxes. Yet these duties presuppose that the individual has work to do in the first place. How one would be expected to satisfy this duty if one is unemployed is a question that may well not have been in the minds of the framers of the African Charter.

It is clear that none of the provisions under article 29, except for the ones related to duties towards the family and paying of taxes, import any legal implications. Their common place tones, lack of specific clarifications and a general air of being akin to the realm of an ethical or a moral code of conduct, makes it very difficult for the state to translate them into specific normative provisions and makes it even harder to implement them as duties of the individual which are legally binding.

6.4.8. Duty to preserve and strengthen positive African cultural values

Article 29(7) enjoins the individual '[t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society.' A similar duty exists for the African child under the Children's Charter. This duty is, to say the least, of very doubtful significance. This is so in light of the absence of pointers or indicators of what may amount to 'positive African cultural values.' To speak of preserving positive aspects of African culture in a continent that is such an elaborate cultural mosaic as Africa, may be absurd because the African Charter does not define what it means by 'moral well-being of society' or 'positive African cultural values.' African cultural values are many and not all of

[75] Constitution of 1991 as amended in 1996. The Zambian Constitution was amended fundamentally through Act No 2 of 2016 but that amendment did not affect the Bill of Rights which requires a referendum.

them are be positive. The practice of female circumcision, which has been present in the African tradition for centuries, remains a controversial cultural value. The African Charter remains silent on such and similar traditional practices which are, from a human rights perspective, arguably not 'positive'. This is a question that had to be addressed some years later under the Protocol to the African Charter relative to women's rights in Africa. Udombana however, argues that one possible interpretation of the term 'positive African values' is that the African Charter favours African rights to the extent that they do not collide with universal principles.[76] If this reasoning is accepted, it remains to reason what are the 'positive' cultural values which the African Charter talks about, but fails to clarify.

A combined reading of article 29(7) and article 18(2) which makes the family the custodian of morals and traditional values recognised by the community, only compounds the ambiguity. Some scholars point out these duties are a little ambiguous in nature and the state may misinterpret them in a manner that promotes a patriarchal social order that was prevalent during the pre-colonial times, leading to gender bias. The African Charter does overtly condone these age-old acts of bias against women when it says the family is the 'the custodian of morals and traditional values recognized by the community.' Ouguergouz deplores the Charter provision in this regard as not adequately protective of women and could be used to abuse women's rights.[77] However this argument is countered by the fact that article 18(3), provides for the protection of women against any bias and directs the state to work for 'the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.' In this regard, it can be argued that the African Charter has contradictory provisions. It can equally be argued that the Charter leaves no scope for misinterpretation of any sort. Mutua, for example, sees the criticism premised on the African Charter's seemingly toleration of bias against women as exaggerated, because a progressive and liberal interpretation of the African Charter should leave no room for discrimination of women.[78] According to Mutua, the Charter should be read with regard to traditional values that enhance the

[76] N J Udombana, 'Between Promise and Performance: Revisiting States Obligations under the African Charter' (2004) 40 *Stanford Journal of International Law* 105 at 111.
[77] F Ouguergouz *La Charte Africaine des Droits de l'Homme et des Peuples Historique, Portée juridique et contribution à la protection des droits de l'homme en Afrique* (Presses Universitaires des France, Paris 1993) 252.
[78] M Mutua, 'The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Rights and Duties (1995) 35 *Virginia Journal of International Law* 339-380.

dignity of the individual and emphasise the dignity of motherhood and the importance of the female as the central link in the reproductive chain.[79] Mutua's argument yet again strengthens the point that was made at the beginning of this chapter, namely that comprehension of a document of the stature of the African Charter should not depend on the mood of those tasked to interpret it; its provisions should be plain clear and simple. If one has recourse to the preamble paragraph of the Charter which takes into consideration 'the virtues of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights' one's anxieties as to the correct or better interpretation of articles 29(7) and 18(2) are compounded.

6.4.9. Duty to contribute to the promotion and achievement of African unity

Article 29(8) enjoins the individual to contribute to the best of his abilities at all times and at all levels to the promotion and achievement of African unity. Given the historical basis of the concept of African unity, woven in pan-Africanism, it is highly doubtful whether African unity is an ideal with the same appeal as before. The duty created by article 29(8) is nonetheless not clearly defined. It does not state how the individual shall make that contribution, nor does it suggest the consequences for failure to observe it.

6.5. CRITICISM OF THE INDIVIDUALS' DUTIES PROVISIONS IN THE AFRICAN CHARTER

The criticisms against the African Charter as a whole were considered in Chapter Three which dealt with the historical background and the nature of the rights set out in the African Charter. Some of those criticisms do in fact apply to the provisions relating to the duties of the individual. As regards criticisms directed specifically at duties provisions, Sloth-Nielsen and Mezmur[80]observe that 'a more general charge against the imposition of duties on the individual is that they would override individual rights.' And this is precisely the point made by Cohen who is skeptical about the wisdom in subjugating rights to duties because:

[79] Ibid.
[80] J Sloth-Nielsen and B D Mezmur, 'A Dutiful Child: The Implication of Article 31 of the African Children's Charter' (2008) 52 (2) *Journal of African Law* 159-189.

> [i]f the state has a collective right and obligation to develop the society, economy, and polity (article 29), then as an instrument it can be used to defend coercive state actions against both individuals and constituent groups to achieve policies rationalised as social and economic improvements.[81]

Howard and Donnelly also think that to mix rights and duties in a human rights document in the modern state, is to risk eventual complete disappearance of the rights. In their words 'all duties will be aimed towards the preservation of the state and of the interests of those who control it.'[82] Another scholar calls these duties to be 'little more than formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples.'[83] There is expressed general fear amongst experts that the concept of individuals' duties towards the state may be translated into a coercive force in the hands of a dictator, which may be used to force people into giving up their rights in the name of obligation towards the state. On this basis the concept of individuals' duties has been vehemently opposed by scholars like Buergenthal and Haysom. They have opined that duty towards the state can be easily manipulated and turned into authoritarian rule. Buergenthal maintains that the inclusion of duties in the African Charter is nothing but an invitation for the imposition of the unlimited restriction on enjoyment of rights.[84] Heysom's fear is that the concept of duties in the Charter could be used to suppress the rights guaranteed in the Charter. He considers the interpretation of a duty towards the community as meaning a duty towards the state and lends itself to an autocratic style of government.[85] Although those fears have not been confirmed by specific instances in the history of human rights abuses in Africa, and to date remains a theoretical perception of the misuse of individual duties, the example of the Zambian situation under one party rule given earlier in this work comes fairly close to confirming these fears as legitimate. One point that ought to be made though, is that although the duties posture in the African Charter has been a subject of criticism

[81] R Cohen, 'Endless Teardrops: Prolegomena to the study of Human Rights in Africa' in R Cohen, G Hyden & W P Nagan (eds) *Human Rights and Governance in Africa* (Gainesville University Press, 1993).
[82] R E Howard and J Donnelly (eds) *International Handbook of Human Rights* (Greenwood Press, New York 1987) 25.
[83] See H Okoth-Ogendo 'Human and Peoples' Rights: What point is Africa Trying to Make' in R Cohen *et at, Human Rights and Governance in Africa* (1993) 78-79.
[84] T Buergenthal, I*nternational Human Rights in a Nutshell* (Mest Publishing, Minnesota 1995) 175.
[85] N R L Hysom 'African Charter: Inspirational Document or False Start?' Paper presented at the Bill of Rights Conference, Victoria Falls, Zimbabwe, 14 December 1994 6 as quoted in M Mutua, Human Rights: A Political and Cultural Critique (University of Pennsylvania Press, Pennsylvania 2008) 198.

with some critics being concerned that it would be a basis for state parties to the African Charter to perpetrate human rights violations, many of these duties, as seen in the classification of duties, are not in the nature that could be tied to particular rights which a state would in turn use as a tool for violation of rights. This researcher does not agree with these views as they tend to conflate the duties owned by an individual to the state, and those owned by an individual to other individuals. Furthermore the submission does not take into account the fact that some of those duties are rights related while others are not. While the fears may hold true in respect of the former, they may not necessarily do so in regard to the latter.

Besides the traditional points of criticism of the African Charter, there are other basic points of discomfort that may be raised. First, the Charter is a treaty creating a legal relationship between states parties to it yet, it imposes obligations on the individual. The special importance of the law of treaties in international law scarcely needs emphasis. A treaty remains the best medium available for imposing binding rules and obligations with relative precision and detail in new areas of expansion for international law and, of course, for codifying or clarifying customary law as it already exists. Consequently, the law on treaties, like that of privity of contract, provides that only parties to the treaty are bound by its provisions, This is captured in article 26 of the Vienna Convention on the Law of Treaties[86] which declares that every treaty in force is binding upon the parties to it and must be performed in good faith. Generally, a treaty cannot impose obligations or confer rights upon a third party without that party's consent. Here then lies the first problem of ever attempting to hold the individual legally bound by the African Charter as a whole, and the provisions on duties of the individual in particular.

Second, a state cannot bring an individual violator of the provisions of the Charter to the African Commission or the African Court. The whole system was structured with state violations of the Charter rights in mind. As one reads the civil, political, economic, social and cultural rights provided for in the African Charter, and simultaneously goes through the duties imposed on the individual and on the state, one cannot but raise the question how these duties can be imposed on individuals who are neither party to the Charter, nor can in any way be brought either before the African Commission or the African Court for violation of those duties provisions. While there is

[86] 1969. The Vienna Convention came into force on 27 January 1981. See text in I Bownlie, *Basic Documents in International Law* (3rd edn Clarendon Press, Oxford 1983) 349.

indeed provision for the state and other non-state institutions like NGOs to officially file a complaint with the African Commission if they feel that there has been a breach of conduct by a member state in regard to any of the rights and duties enlisted in the African Charter, there is no provision for similar complaints toward individuals who fail to perform their duties. This is eloquent testimony that the Charter is premised on the traditional view that at international law, individuals may be holders of rights while states are the principal, if not the exclusive, holders of duties. This notion is grounded on the premise that the state is the ultimate guardian of its population's welfare and, therefore, has the responsibility of guaranteeing human rights since it alone is capable of doing so. It falls upon the state to instil a sense of duty within its citizens, and not necessarily punish each wrongdoing by an individual.

The duties in the African Charter, even those that are not merely supererogatory or beneficent such as the duty to pay taxes and to defend the territorial integrity and security of the state, still lack legal efficacy for as long as they only remain in the African Charter. They have to be domesticated to have the necessary impact on the individual.

Third, as the preceding part has sought to show, it is unclear what most of these individual duties require of the individual to do, or not to do, to conform to them. Their formulation is generally vague. Fourth, there are no sanctions prescribed or contemplated under the African Charter for individuals violating their duties. It would be absurd to treat a violation of a domestic law that mirrors or replicates an individual duty provision in the African Charter or the African Children's Charter, as a violation of the Charter duty.

It is, however, plausible to explain the individual duties in the African Charter as dependent on some positive action on the part of the state to enact legislation and/or take other measures to ensure that the individuals' duties are carried into effect. Many African states, as has been consistently referred to, in fact reflect in their constitutions or indeed in subsidiary legislation, the notion of individual duty in some cases to the same extent as entailed in the African Charter. As alluded to in Chapter Three, a survey by Heyns and Kaguogo,[87] shows that many

[87] C Heyns and W Kaguongo, 'Current Developments: Constitutional Human Rights Law in Africa' (2006) 22 *South Africa Journal of Human Rights* 673-717.

constitutions of African countries include provisions on duties.[88] In fact, Heyns and Kaguongo found that the notion of duties was at the time of their review, present in forty African constitutions.[89] If approached from the perspective that the duties provisions in the African Charter are only capable of being given meaning and effect after a state has passed domestic legislation, the whole picture changes. Moreover, this is where one would situate Quasigah's point alluded to in part 6.2.1 of this chapter, that the state becomes the secondary duty carrier in respect of African Charter duties of the individual. Nevertheless, one is inclined to accept that proposition to some extent and no more. The state is, in truth, both the primary and secondary duty bearer under the African Charter and the African Children's Charter. It has a direct and important obligation to undertake legislative and other measures to ensure that the import of the Charter duties is brought home to the individual. Once the state is implicated in the manner suggested, that is to say, legislating or making provisions of the duties reflected in the African Charter and the Children's Charter in its constitution or subsidiary legislation, the state carries, as it were, the first responsibility to act through passing enabling legislation or taking the measures necessary. Once this is done, the African Charter is no longer of immediate moment to the individual in as far as his/her duties are concerned. The Charter duties will, therefore remain, for all purposes and intents, on paper only if the state does not pass legislation. As far as the individual to whom the duties are directed is concerned, those duties will probably not be worth the paper they are written on. Moreover, once the state through domestic legislation imposes equivalent duties on the individual, such duties no longer remain Charter based duties – they will be duties sanctioned by the enabling legislation in specific states, so that it henceforth becomes idle to insist that an individual is observing duties because of the African Charter provisions on duties and not local legislation. Even then, only a handful of duties suggested by the African Charter for the individual are capable of being a subject of implementing domestic legislation. Many of these duties do elude even the very notion of regulation. Those that can be a subject of legislation and regulation are both positive and negative and include the duty to have regard for the general rights of others; the duty against discrimination; the duty to maintain parents in times

[88] See C Heyns, 'Where is the voice of Africa in our Constitution?' Centre for Human Rights, Pretoria, Occasional Paper 8 <http://www.chr.up.ac.za/centre_publictions/occ_paper/occ8.htmI> accessed 11 February 2013. He cites the Constitutions of Algeria (art 60), Cape Verde (art 80(2)), Congo (art 56), Ghana (art 41), Sao Tomé e Principe (art 20), Sierra Leone (art 13(e)), Tanzania (art 29 (5), 30 (1) and (2) and Zimbabwe (art11).

[89] See C Heyns and W Kaguongo, 'Constitutional Human Rights Law in Africa' (2002) 22 *South African Journal of Human Rights* 673-717.

of need; the duty not to compromise the security of the state; and the duty to pay taxes. In fact, although these duties are a feature of many African constitutions and domestic legislation today, there is never any suggestion that they are African Charter based, or African Charter instigated, or African Charter likened duties. Once these are set out in local constitutions or laws, they are treated purely as a domestic affair and are not referable in any way to the African Charter. In a way the Africa Charter and the African Children's Charter provide only a blueprint or model law on individuals' duties and responsibilities for states parties to use.

As for those duties whose gamut is a matter of surmise or conjecture because of either their flawed formulation or their normative content, is it is difficult to think of a piece of legislation that would define or prescribe their standard. For example, the duty of mutual respect and tolerance or cohesion of a family or the duty to strengthening positive African cultural values, all appear inherently difficult to determine and define in terms of their normative content or import.

The criticisms levelled against the notion of duties in the African Charter are sometimes perceived as overstated. Proceeding from the premise that the duties provisions are a rather unique dimension of the Charter in entrenching positive African cultural and traditional values that existed in pre-colonial Africa, and which complement rights, arguments have been made that any apparent weaknesses of the Charter provisions whether generally or on duties specifically, are not fatal. Okoth-Ogenda charges that it is not always correct to speak against the duties enlisted in the African Charter because in most cases 'the state is the villain against which human rights law is the effective law' and it is towards this villainous state only that 'individuals should not be called upon to discharge any duties.'[90] The despotic rule of some dictators or misguided political leaders who misuse old traditions and channel them into justifying their oppressive/suppressive measures against the various individual rights should not be the reason for uniformly denouncing the entire set of rights and duties under the Banjul Charter. Pityana argues that, far from duties creating an environment for a gratuitous invasion of rights they should be understood as reinforcing rights.[91]To claim that the African system is weak is one

[90] Okoth-Ogenda (n 74)
[91] N B Pityana, 'The Challenge of Culture for Human rights in Africa: The African Charter in a Comparative Context' in M D Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (Cambridge University Press, Cambridge 2002) 219-245.

thing. It is quite another to dismiss it as completely unworkable. To do so, as Odinkalu puts it, would be 'ill informed, ignorant or both.'[92] Elsewhere, Odinkalu posits that any dismissive view of the African Charter system can even justifiably be said to be clouded by a taint of afro-pessimism.[93] On balance, however, the weaknesses of the African Charter provisions, especially on duties of the individual, are well acknowledged and it would be totally unjustified to pretend that this is an issue of little consequence. The difficulties wrought about by the absence of clarity on the normative content of individuals' duties or arising from their vague formulation is nowhere given more eloquent testimony than through state reports.

6.6. STATE REPORTING ON INDIVIDUALS' DUTIES UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

To keep a tab on the activities of the member states in implementing the provisions of the Africa Charter, states are invited in terms of article 62 to report on the measures they have adopted and the progress made in achieving the objectives of the Charter, as well as to indicate any factors and difficulties they may be encountering in effecting the provisions of the Charter. The obligation to report attaches every two years. The reporting state must indicate the legislative and other measures taken to implement the rights and duties in the Charter. The task of receiving and reviewing the reports was strictly not initially entrusted to the African Commission as article 62 does not state for whom the report is intended and what action will be taken upon it. However, at its twenty-fourth ordinary Assembly, the Heads of State and Government of the OAU decided to entrust consideration of state reports to the African Commission and authorised it to draw up general guideline for states parties on the form and content of these reports. The African Commission, at its fourth assembly meeting in Cairo, Egypt, set out basic guidelines for the submission of state periodic reports.

The state reporting mechanism acts to serve both the promotional and the protective mandates of the Commission as set out in the Charter. It serves as promotional tool in the sense that it helps to open up a channel of positive dialogue amongst the Commission and member states. It thus helps

[92]C A Odinkalu, 'Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment (1988) 8 *Transnational Law and Contemporary Problems* 359,402.
[93]C A Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis?' Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights (2001) 23 *Human Rights Quarterly* 327.

the states and the Commission to exchange various rights related information, and the various problems faced, and it also assists the member states to comprehend as to what measures are to be used to get the best desired results. It is protective because it allows the Commission to take stock of the situation of human rights within a state and give feedback as to whether the state needs to make improvements on the present situation. It thus, also keeps the state aware of its duties and obligations, and allows it to keep a check as to whether its citizens are fully enjoying their rights or not. As Badawi, a former Commissioner of the African Commission, aptly puts it 'the reporting procedure is the backbone of the mission of the Commission. Through it the Commission would be able to monitor the implementation of the Charter and engage states in a process of dynamic implementation.'[94]

The original, more extensive guidelines consisted of seven parts, each dealing with the different specific rights and duties within the Charter.[95] As per these basic guidelines the states is to send general initial reports, which are to be followed by periodic reports that are more detailed in nature. In terms of those reporting guidelines 'the reports should show not only the achievements made on the statute book but should also lucidly reveal the extent of implementation in terms of how far the rights and fundamental freedoms of the Charter are being fulfilled and how far the duties are being successfully carried out.'[96] Part IV of the guidelines, which is relevant to the present exercise, is headed 'General guidelines regarding the form and content of the reports to be submitted on specific duties under the Charter.' The guidelines require states to report on specific individuals' duties in the Charter and are couched as follows:

> Article 27
>
> 5. Every individual shall have duties towards other people, society, family and the international community. The personal rights shall be enjoyed subject to the rights and fundamental freedoms of others. Personal and private rights shall not be selfishly insisted upon at the expense of family, society, state, other legally recognised communities' and international community's interests. Individual rights are to be enjoyed with due regard to

[94] El-Sheikh Badawi, 'The African Commission on Human and peoples' Rights: Prospects and Problems' in 1989 7(3) *Netherlands Quarterly of Human Rights* 272 281.
[95] See C Heyns (ed) *Human Rights Law in Africa vol 4 1999* (Kluwer Law International) (2002) 176-194.
[96] Para 1.

the rights of others, collective security, morality and common interest. Activities in curbing personal and private interests for the benefit of the interests protected by the article [sic!].

Article 28

6. Everyone shall abstain from discrimination against fellow human beings and shall maintain relations conducive to promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

7. Every individual shall observe the duties enunciated in the article. A full report on each of the duties should be provided.

Initial Report

8. On each of these duties the reporting state should furnish the principal statutes and administrative regulations and, where applicable, courts' decisions establishing the atmosphere for enforcement and effectuation of these duties.

Periodic Reports

9. Some of these valuable traditional duties might have been treated lightly in some African countries because of the overwhelming Western influence in the past colonial days; it might therefore become necessary to establish programmes for carrying out these duties. The Commission would expect periodic reports on the progress on these programmes.

On examination of the state reports submitted to the African Commission thus far, one notices that the initial reports were mostly lacking in content and did not comply with the existing guidelines as set by the Commission. Many initial reports did not report on duties provisions as per the above guidelines. Others were generally brief and without relevant details on individuals' duties. Still others hardly ever reported convincingly on the duties provisions. This pattern is

now changing, thanks to the promotional efforts of the Commission. Reports are more and more appearing to adhere to the reporting guideline. Lately reports have tended to be generally detailed and in some cases unduly prolix and cumbersome. There are, however, some countries that have continued to be averse to the whole state reporting process, or for some other reasons have never submitted a single report over the years.[97] Some states, on seeing the detailed and seemingly complicated requirements in the reporting procedure, were genuinely deterred from following them, but in the majority cases it was the members' apathy and a general air of indifference and disinterest in the whole procedure that made the state reporting procedure less of a success. Realising that the reporting guidelines were probably contributing to the apathy by states in submitting the reports, the African Commission came up with amended and simplified reporting guidelines which focus on eleven areas and related questions.[98]

The above amended guidelines are relatively simpler and easier to follow. What states are required to do in practice is to report on each of the rights and duties, article by article indicating the measures they are taking or have taken in implementing those rights and duties. As far as

[97]As of 25 January seven countries are listed as having never submitted a single report to the Commission. These are: Comoros with 15 Equatorial Guinea with 15 overdue reports, Eritrea with 9 overdue reports, Guinea Bissau with 15 overdue reports, Sao Tome and Principe with 15 overdue reports, Somalia 15 overdue reports and the newly created state of South Sudan. < www.achpr.org> accessed 18 January 2017.

[98]The new guidelines require that:

1. The first report to be submitted must consist of a short summary of the historical background of the state, the type of government present at the time of the report submission, its judiciary system and the relationship between various departments within the government.
2. The first report must also give necessary details on the constitution, the criminal code within the state and the various procedures attached to it. It must also enlist all the judgements that have become a milestone in the human rights arena.
3. The report must give the human rights mechanisms in practice, and also present the procedures taken to incorporate them within the state systems.
4. The report must give in details the mechanism adopted by the member state to make effective the a). Civil and political rights b). Economic, social and cultural rights and c). People or group rights.
5. The state must present details on the steps it has taken to ameliorate the conditions of the a). Women b). Children and c). Disabled.
6. There must be information as what the state has done to safeguard the family and also what work has been done to promote or encourage the formation of stable families.
7. The state also must provide information as to what measures it has taken to ensure that its citizens are performing their individual duties.
8. The report should contain all information on the problems faced from the social, economic and political quarters while trying to implement the measures for up keeping the rights, duties and obligations outlined in the charter.
9. On the Right to Education under Article 25, the state must give an account of all measures taken to fulfil its obligations as per this right.
10. The state must all give information as to how it is using the charter to its benefit, to ensure good and honorary relationships with various foreign nations.
11. Other information in relation to promotion, and implementation of the African charter.

duties of the individual specifically are concerned, it is not surprising that states report on how they understand their obligation arising out of duties not targeted at them.

An appraisal of the initial reports as well as subsequent reports of states from all parts of the continent representing different legal systems, languages, religions and cultures, confirms the notorious fact that as regards individual duties directed at the individual and children in the African Charter and the African Children's Charter, there is a general degree of misunderstanding as to what states parties obligations really are. The failure by states in some cases to report at all on individual duties, or to report meaningfully and consistently on these duties, afflicts all regions of the continent. Given the specific focus of this project, it would be inappropriate to veer off the thrust of this dissertation to review of all state reports submitted to the African Commission to ascertain the treatment in those reports of the provisions on individuals' duties in the African Charter. Consideration of just some countries from each of the geographical regions of Africa, namely Northern, Western, Central, Eastern and Southern parts, transcending different legal systems and languages on the continent, will elucidate the existence of the problem of misapprehension.

In West Africa, four Anglophone countries showed a similar approach to their treatment of duties provisions. The story is not any different with the Francophone countries in that region. Nigeria's first periodic report covering the period 1990-1992 was considered by the African Commission at its eleventh ordinary session.[99] It was largely not in conformity with the reporting guidelines. Not unexpectedly there was nothing reported about implementation of the individual duties provisions of the African Charter. In the subsequent report, Nigeria reported in a rather laconic manner on the duties of the individual under part seven of the 109 page report. It stated simply that:

> under section 24 of the 1999 Nigerian Constitution, it shall be the duty of every citizen to (a) abide by the Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge, and legitimate authorities; (b) help enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required; (c) respect the dignity of other citizens and rights and

[99] Tunis, Tunisia 2-9 March 1992.

> legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood; (d) make positive and useful contributions the advancement, progress and well-being of the community where he resides; (e) render assistance to appropriate and lawful agencies in the maintenance of law and order; and (f) declare his income honestly to appropriate and lawful agencies and pay his taxes promptly.[100]

At the twelfth ordinary session of the African Commission the initial state report of The Gambia was presented and considered.[101] It covered the period 1986-1992. It reported on most provisions of the Charter stating quite candidly that it did not have specific legislation dealing with articles 16 to 22 of the African Charter. The country then reported on the remaining articles of the African Charter, save the ones dealing with duties of the individual. The report ends it narration of the country's implementation efforts of the provisions of the African Charter at article 26, omitting altogether articles 27, 28 and 29 dealing with the duties of the individual. The same omission was made when the Gambia presented its first periodic report covering the period 1992-1994.[102]

Ghana submitted its initial report covering the period 1990-1992 in September 1992. The report was considered at the fourteenth ordinary session of the African Commission.[103] That report was only six pages long and contained a summary of ten laws relevant to the protection and promotion of human rights in Ghana, dealing with children, women, labour, education, political parties and the judicial system. It also had a summary of the 1992 Constitution of the Republic of Ghana. It made no mention of the provisions relating to duties of the individual in the African Charter and how Ghana may have been implementing them. The Commission's concluding observations on that report are not reading available to enable one assess whether the African Commission had expressed concern with this omission.[104] One would have hoped that if there was any slip in following the guidelines strictly during the initial report preparation process, such omission would be corrected at the time of the preparation of the next periodic report. However,

[100] To its credit, Nigeria domesticated the African Charter as Cap. 10 LFN 1990 or Cap. A9 LFN 2004.
[101] 6th Activity Report.
[102] The report was presented at the 16th Ordinary Session of the Commission held in Banjul, The Gambia, from 25 October 1994 to 3rd November 1994.
[103] Held between 1 and 10 December 1993 in Addis Ababa Ethiopia.
[104] Although the report state report is available on the Commission's website the concluding observations are not. See< www.achpr.org >accessed 17January 2017.

this was not to be. Ghana's second periodic report equally made no reference to the African Charter provisions respecting the duties of the individual.[105] What is perhaps worrisome is that in its concluding observation on the report, the Commission expressed satisfaction with the report.[106]

Liberia presented its twenty seven pages state report to the African Commission at the Commission's fifty-fifth ordinary session.[107] There was no reference whatsoever in that report to the individuals' duties as set out in articles 27 to 29 of the African Charter. In its concluding observations and recommendations adopted after the report was considered the African Commission described the report as not conforming to the reporting guidelines.[108] Surprisingly the absence of any statement on duties in the report was not recorded as among the principal matters of concern to the Commission in the implementation of the African Charter by Liberia. It will be noted that the report by Liberia was considered fairly recently. This confirms in a way that the problem of miscomprehension of the states parties' obligations is not a historic one.

In the Central African region, the Republic of Congo submitted its first periodic report covering the period 1982-2000 in February 2000.[109] The report comprised ten chapters as follows: (i) profile of the Republic of Congo; (ii) the legal system, system of government and relations between institutions; (iii) main domestic legislation on the promotion and protection of human rights and peoples (iv) main texts related to regional and international human rights to which the Republic of Congo is a party; (iv) actions taken by the Congo to ensure the effective enjoyment of rights protected by the Charter; (v) efforts by the Government to improve conditions for women, children and people with disabilities; (vi) measures taken to protect the family and promote cohesion; (vii) efforts in the right to education on human rights; (viii) difficulties encountered in the implementation of the Charter, given the political, economic and social situation; (iv) compliance by Congo with the Charter in the conduct of international relations;

[105] It was submitted to the African Commission at its 29th Ordinary Session held in Libya between 23April and 7 May 2001.
[106] 14th Activity Report.
[107] Held from 28 April to 12 May 2014, in Luanda Angola.
[108] Adopted at its 17th Extra ordinary session in Banjul 19-28 Feb 2015.
[109] It was considered by the Commission at its 29th Ordinary Session held Libya between the 23rd April and the 7th may 2001.

and (x) conclusion. There was nothing whatsoever reported about implementation of articles 27 to 29 of the African Charter relating to individual duties.

The Republic of Cameroon's initial report covered the period 1989 to 2000. It was considered by the African Commission at its thirty first ordinary session.[110] In that report the state explained the legislative and other measures the country was undertaking to give effect to the provisions of the African Charter. With regard to articles 27 the state reported in paragraph 515 that

> the specific obligation devolving upon everyone in Cameroon are implied in the preamble of the Constitution which states that every person shall share in the burden of public expenditure according to his financial resources.did not elaborate in any meaningful way on the individuals.

It also made some vague narration of some other laws such as those relating to payment of taxes.

In the East African region too, the issue of proper reporting on the individual duties provisions of the African Charter eluded some states. Uganda's initial report covering the period 1986-2000 was submitted in April 2000. It was considered by the African Commission at its twenty seventh ordinary session in Algiers, Algeria. It was a twelve paged report which devoted no space to dealing with individual duties.[111] The Republic's subsequent report, the fourth periodic one, covered article by article the measures that Uganda had put in place in implementing the rights set out in the African Charter. Interestingly all the articles of the African Charter up to article 26 were covered in the report with varying degrees of detail and perhaps not to the same level of conviction. Articles 27, 28 and 29 on individual duties were regrettably not reported upon. In its concluding observations Adopted at Banjul, November 2011there is inopportunely no expression of concern by the commission about the absence of reference to articles 27, 28 and 29. There is no recommendation on this issue either.[112]

[110] Held in Pretoria South Africa from 2 – 16 may 2002.
[111] See 13thActivity Report.
[112] It was presented at the 49th Ordinary Session of the African Commission held in Banjul the Gambia between 28April -12 May 2011
held in Banjul, the Gambia from 28 April to 12 May 2011.

Instances of failure to report on the duties provisions in the African Charter are available in the Southern African region too. Swaziland submitted its first periodic report under article 62 of the African Charter in May 2000.[113] It was a very brief report consisting only of nine pages. It made only scanty reference to many of the provisions of the African Charter and, not unexpectedly, omitted altogether to report on implementation of the duties provisions. Likewise Botswana's first periodic report described measures taken to realise the rights and duties in the African Charter up to article 26 only and said nothing about those pertaining to individual duties.[114] Lesotho in its first periodic report covering the period 1991-2000[115] perhaps made the point about misapprehension of the states' obligation in respect of articles 27, 28 and 29 of the African Charter quite candidly. After reporting on all the other provisions of the Charter and leaving out articles 27, 28 and 29 without any explanation, it stated that:

> We would appreciate guidance of the African Commission on Human and Peoples' Rights on the above three articles as we do not seem to comprehend exactly what is required of us.

Lesotho's question is typical of the concern that pervades many African states parties to the Charter when they prepare reports under article 62. Many of these states, however, lack the courage and candidness that Lesotho manifested.

In its initial report submitted to the African Commission Libya made the following claim in regard to articles 27-29 of the Charter:

> In general, all the duties contained in articles 27, 28 and 29 are provided for by Libyan legislations in force. They are currently in force and people are committed to them since they are respected by every Libyan citizen. Social solidarity is the basis of national unity;

[113] The Report was submitted to the African Commission at its 27th Ordinary Session held in Algiers between 27April and 11 May 2000.
[114] It was presented at the 46th Ordinary Session of the African Commission held in Banjul the Gambia between 11-25 November 2009
[115] Considered by the African Commission on Human and Peoples' Rights at its 31st Ordinary Session held between 2-16 May 2002 in Pretoria, South Africa.

> the family is the nucleus of the community and is founded on religion, nationality and patriotism.[116]

When Libya submitted its second periodic report, it decided to omit reporting on the individual duties provisions altogether.[117] The report covered African Charter articles up to article 18, and did not explain its omission to explain measures taken in regard to articles 27 to 29 of the African Charter.

Egypt's initial report covered the period 1984-1992 was considered by the African Commission at its eleventh ordinary session.[118] It made no reference whatsoever to the measures Egypt was taking to implement the provisions of articles 27 to 29 of the African Charter relating to individual duties.

Some states that have attempted to report on the duties provisions, have without exception pointed at their domestic laws which impose a set of duties for their people similar to those created by the African Charter. Ethiopia in its first to fourth periodic report made extensive reference to it Constitution and its Criminal Code to show how the Charter duties of the individual were minored domestically.[119] Seychelles too in its second periodic report[120] covering the period 1994-2004, quoted the existence of duties imposed by it Constitution and other subsidiary laws such as the Civil Code of Seychelles Act, 1/01/1975 laws of Seychelles 1996, as compliance with the requirements of articles 27, 28 and 29 of the African Charter.[121] In its periodic report, Malawi reported in detail on how it was effecting implementation of the duties provisions in the African Charter. It pointed to among other provisions, section 20 of its Constitution which proscribes discrimination, and constitutional provisions on the right of people

[116] Report covered the period 1986-1991 and was considered at the 9th ordinary session of the African Commission held between 18-25 March 1991, Lagos Nigeria.
[117] The report covered the period 1990-1992 and was considered by the African Commission at its 27th ordinary session held in Algiers, Algeria from 27 April to 11 may 2000.
[118] It was held in Tunis, Tunisia between 2-9 March 1992.
[119] It was presented at the 46th Ordinary Session of the African Commission held in the Gambia between 11 -25 November 2009
[120] The Report was submitted to the African Commission at its 39th Ordinary Session held in Banjul between 11 -25 May 2006
[121] Art 205 of the Civil Code of Seychelles Act 1/01/1975, laws of Seychelles 1996 provide that: the child shall be bound to maintain their father and mother or other ascendants that are in need. Article 2006 of the same law extends this duty to other relatives.

to use their own language. More importantly it quoted its Child Care, Protection and Justice Act 2010 which creates duties and responsibilities for parents and guardians toward their children, and equally creates duties and responsibility for children towards their parents. Those duties resemble materially the duties of the individual under article 27, 28 and 29 of the African Charter.[122]

The Republic of Mozambique submitted its second and combined report for the period 1999-2010 in terms of article 62 of the African Charter.[123] In reporting on individuals' duties and what legislative and other measures Mozambique had put in place to carry into effect those duties, the report in paragraphs 370 to 377, sets out an elaborate explanation the sum total of which is that there are laws in Mozambique intended to ensure that the individual relates to other persons, to the community and to the state in a manner that furthers the individual duties set out in the African Charter. The report refers to articles 55 and 56 of the Constitution of the Republic of Mozambique which allude to the family as the basis of society. That is to say that the fundamental principles for developing social relations based on respect for the dignity of the human person derived from the family. It goes on to state that in keeping with the duty of the state to guarantee individual freedoms and respect for the rights of others as well as ensuring collective security, the Mozambique State recently approved Law No 10/2004 of 25 August (the Family Law). The law aims at harmonizing the country's social and cultural situation with the Constitution and other international legal instruments, thereby doing away with provisions which accord unequal treatment insofar as family relations and respect for Mozambican identity are concerned. Equally Djibouti in its initial and periodic report to the African Commission explains the measures being undertaken with regard to individual duties by pointing to various articles of the Constitution and domestic legislation. More pointedly perhaps, the report states that rules on public security, protection of privacy, public decency and daily administrative measures taken

[122] Section 4 of the Act states that children shall: "
(a) Respect the parents, guardians, superiors and elders at all times and depending on the age of the child assist them in case of need;
(b) Serve the community by placing his her physical and intellectual abilities at its service;
(c) Preserve and strengthen social and national unity and character of Malawi;
(d) Uphold the positive values of the community; and
(e) Contribute towards the child's own development into a useful member of the society,
But due regard shall be paid to the age and ability of the child and to such limitations as are contained in the Act."

[123] Report was considered by the Commission during its 55th Ordinary Session, which was held in Luanda, Angola, from 28 April to 12 May 2014.

and implemented by the Police ensure that individuals fulfil their duties. In light of increasing delinquency rates and the lack of civic sense among young people in particular, and in order to instil in them the values of citizenship, an education programme on building a culture of peace is being implemented from basic to secondary education. The rights of the family, the basic unit of the society, are by existing laws and in particular the Family Code. The Personal Status Act promotes the family in its cultural specificities, protects the unit and ensures harmony within. It also sets forth the obligations of parents towards their children as well as the duties of the latter in respect of their parents. Article 17 of the Constitution defines the obligations of citizens towards the national community.

For much the same reasons states are encountering similar difficulties when they render reports under article 43 of the African Children's Charter

The general picture that emerges from this brief review of the reports submitted under article 62 of the African Charter is that a considerable number of states parties to the Charter do not report on how articles 27, 28 and 29 of the African Charter are being implemented in their countries. This is hardly surprising given the combination of factors in regard to individuals' duties which have been discussed in this chapter. Either states are unclear as to what their obligations are in regard to duties provisions that are targeted at the individual, or they understand their obligation as being that of creating within their domestic jurisdiction a parallel set of duties of the individual, mirroring those in the African Charter. On a proper reading of articles 27, 28 and 29 there can be no misgivings that these provisions purport to create duties for the individual. They say so in unambiguous terms. The states parties are of course enjoined to tale legislative and other measures to give effect to those duties. However, to construe or interpret the African Charter as imposing a duty on the states parties to replicate those duties in their domestic law, is to ascribe absurdity to the Charter. If it was indeed the intention of the framers of the Charter, in the fullness of their wisdom, to impose through articles 27, 28 and 29 of the Charter, duties on the part of the states parties to the Charter to replicate the Charter duties in their domestic legislation, the Charter should have stated so in clear language such as: 'states parties to this Charter shall take legislative and other measures to ensure that individuals in their jurisdiction have the following duties….' or something like 'states parties shall replicate the individual duties

set out in this Charter in their domestic legislation and ensure that they are enforced.' It seems, in all probability, that the intention of the framers of the Charter may well have been to cast a duty on states rather than individuals. In this regard, one would agree entirely with Eze when he states that at the very best, duties could be seen as a program to be considered by domestic legislation.[124]

The same problem regarding duties in the African Charter appears to afflict the interpretation of duties in another part of the African human rights system: the African Children's Charter.[125] This Charter like the African Charter imposes individual duties and responsibilities on the African child in article 31 as follows:

> Every child shall have responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:
>
> (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
>
> (b) to serve his national community by placing his physical and intellectual abilities at its service;
>
> (c) to preserve and strengthen social and national solidarity;
>
> (d) to preserve and strengthen African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of his country;
>
> (e) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

There is no doubt that these responsibilities are imposed on the African child, not on the state which is a party to the African Children's Charter. They are, no doubt, normatively similar in many respects with those imposed on the African individual under the African Charter. Furthermore, considering that the African Charter applies equally to the African child as to the African adult, it is a matter for debate whether there would be any legitimate point in attempting

[124]O C Eze Des Structures possible à l'échelon régional africain pour la promotion des droit Del' homme (1977) 22 *Revue Sénégalaise de Droit* 69-79.
[125] OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 1999.

to enforce both sets of duties on the same person if they happen to be a child in Africa. It would be unintelligible to insist that a child who is in breach, for example, of his duty under article 31(a) of the African Children's Charter for failing to work for the cohesion of the family and to respect his parents, would also be guilty of breaching article 29(1) of the Banjul Charter which enjoins him to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, and to maintain them in case of need. These issues are, however, moot. The point is that the normative content of the child's responsibilities under the African Children's Charter and of an individual under the African Charter are materially the same and there is no plausible reason that can be assigned to suggest any distinction in their interpretation. Subject to the age and the ability of the child, the arguments, including the criticisms against individual duties under the African Charter can be extended hook, line and sinker, to the responsibilities of the child as set out in article 31 of the African Children's Charter.[126]

It is also noteworthy that the African Children's Charter seeks to create obligations for children, some of whom are without legal capacity to assume legal obligations. As these responsibilities belong to the child, not the state, it follows that it is the child, not the state, which is intended and obliged to carry out the responsibilities set out in the article. How then do states parties ensure compliance by children with article 31 of the African Children's Charter? This can only be revealed by what the states parties themselves say they do in their reports to the treaty implementing body, the African Committee of Experts on the Rights and Welfare of the Child (the Committee). The Committee has adopted guidelines for reports of states parties to the African Children's Charter on measures they have undertaken to give effect to the provisions of the African Children's Charter.[127] Under Part X of the guidelines relating to responsibilities of the child it is provided as follows:

> 23. Under this section, States Parties are requested to provide relevant information, including the principal practices, legislative, judicial, administrative and other specific measures in force; factors and difficulties encountered and progress achieved in

[126] As for reasons justifying a separate treaty dedicated to the protection of children's rights in Africa, see B D Mezmur, 'The African Committee of Experts on the Rights and Welfare of the Child: An Update' 2006 (6) 2 *African Human Rights Law Journal* 549-571 549.
[127] Cmttee/ACRWC/2ll Rev2.

implementing the relevant provisions of article 32 of the Children's Charter. The Child's duty:

(a) towards the parents, the family and the community; (Article 31)

(b) towards the superiors;(article 21)

(c) towards the State and the Continent (Article 31)

State practice decipherable from state reports submitted under the African Children's Charter[128] shows that virtually all states understand their responsibility in ensuring compliance with article 31 of the African Children's Charter as being that of solely replicating the individuals' responsibilities as set out in the African Children's Charter, in their own constitutions and domestic legislation. A sampling of the initial reports submitted to the Committee under article 43 of the African Children's Charter by states from each of the five regions of African namely, Northern, Western, Central, Eastern and Southern and representing various language groups of the AU, namely English, French, Arabic and Portuguese, confirms this position. Guinea in its initial report, for example, in explaining how it has implemented the individual children's responsibilities as set out in article 31 of the African Children's Charter, cites article 7 of its Children's Code as being devoted to the fundamental duties of the child.[129] Malawi, in indicating what it has done to implement article 31 of the Children's Charter states at page 48 of its report as follows:

> 159. In keeping with the obligations of Malawi under the ACRWC, which provides for responsibilities of the child [Child Care, Protection and Justice Act] CCPJ has made provision for the duties and responsibilities of the child to respect the parents, superiors and elders at all times and depending on the age of the child assist them in case of need; serve the community….[130]

[128] Available at <http://www.africa-union.org/state-reports> accessed on 30 November 2016.
[129] Initial Report of the Republic of Guinea on the Implementation of the African Charter on the Rights and Welfare of the Child, December 2011.
[130] Initial Report of the Republic of Malawi submitted in December 2014.

Zimbabwe made a not so useful submission when it reported under article 31 relating to the responsibilities of the Child and how those provisions have been implemented. It stated in its report as follows:

> PART X: RESPONSIBILITIES OF THE CHILD
> The child has the obligation to:
>
> - be responsible
> - be law abiding citizen who are prepared to preserve and strengthen the values of their communities and the country at large
> - be respectful and obedient to their elders
> - help with household chores
> - go to school

This kind of reporting clearly show complete disregard of the reporting guidelines or at best indifference to the rules of the game, so to speak.

Eritrea refers to articles 22(3) and 25 of its Constitution which obliges children to respect their parents and to sustain them in old age and to the civic duties of all citizens as indicating how it has implemented article 31 of the African Children's Charter.[131] Lesotho mentions section 21 of its Children's Protection and Welfare Act which states that children have the duty and responsibility to respect parents, elders and guardians and to support them, as being the way in which the provisions of article 31 is being implemented.[132] The Republics of Cameroon,[133] Algeria,[134] Mozambique,[135] Rwanda,[136] Sierra Leone[137] and Tanzania[138] all identify either

[131] Consolidated First, Second, Third and Fourth Reports of the Republic of Eritrea submitted in May 2015
[132] Initial Report of Lesotho for the period 1999-2013.
[133] In its Initial Report the Republic points to the Civil Status Ordinance 81/02 of 29 June 1981 and the Napoleonic Civil Code applicable to Cameroon as affirming some of the child's duties.
[134] The Initial Report of the Peoples' Democratic Republic of Algeria says nothing about how it is implementing the provisions of art 31 of the Children's Charter.
[135] The Initial Report of Mozambique combining the First, Second and Third Periodic Reports 2000-2012 submitted in 2013 cites art 8 of the law on the Promotion and Protection of Children's Rights which conforms with the provisions of art 31 of the Children's Rights Charter.
[136] The Second and Third Periodic Report of the Republic of Rwanda (2006-2013) submitted in February 2014 mentions Law No. 54/2011 of 14 December 2011 imposes duties on a child to respect any human being, especially his/her parents and guardians and art 21 which enjoins a child to love his nation and art 22 which imposes a duty on the child to undertake basic education.

constitutional provisions or subsidiary domestic legislation or both, as being methods by which they are carrying into implementation the responsibilities of the African child as set out in article 31 of the African Children's Charter.

From this brief appraisal of the reports on implementation of children's duties and responsibilities under the African Children's Charter, it is beyond argument that the understanding of states parties of their obligation under article 31 of the African Children's Charter is that they are to replicate the provisions of that article in their domestic settings. Domestication of the African child's duties under article 31 of the African Children's Charter is indeed a broad obligation of the state under article 1 of the Children's Charter which enjoins states parties to recognise the rights and duties enshrined in the African Children's Charter and to undertake steps to give effect to the provisions of the African Children's Charter. However, domestication *per se* does not entail satisfaction of the children's responsibilities as set out in article 31. It is submitted that article 31 does not envisage domestication as a means of the African child's carrying out its responsibilities under the provision of that article. It has already been argued that the duties in article 31 are directed at individual children. The individual child ought to do something to carry them into effect. The state party, in the understanding of this researcher, ought to show what it has done or is doing to ensure that the African child lives up to his/her obligations under the African Children's Charter. As is the case with the duties in the African Charter, to have these duties of the individual set out in a treaty to which only states are parties is somewhat misplaced.

When the duties in the African Children's Charter are replicated in domestic legislation, it simply means that the individual, in theory at least, has two sets of duties; one under the African Children's Charter and the other under domestic legislation and, one could add, another under the African Charter too. What is more is that the individual child will truly feel bound and beholden to obey the duties in the domestic legislation since these appear both proximate and

[137] The Government of Sierra Leone in its Initial Report covering the period 2002-2014 states that section 45 of the Child Rights Act reflects the responsibilities set out in art 31 of the African Children's Charter.
[138] The Initial Report of the Government of the United Republic of Tanzania submitted in 2006 indicated that it had not as at the time of reporting put in place any legislation domesticating art 31 of the African Children's Charter. The Republic cited instead the 1996 Child Development Policy which recognised the responsibilities of children and complemented customary/ traditional implicated in the upbringing of a child.

compelling. Where the same duty appears in domestic legislation and in the African Charter or the African Children's Charter anyone observing such a duty is more likely to point to domestic legislation as the source of the duty rather than either Charter. There appears to be no convincing reason why the duties of the individual under the African Charter and the African Children's Charter should be so directly focussed at individuals when they are incapable of implementation by the treaty bodies established under those Charters against the responsibility holders. One is left to wonder as to why the drafters of the Charters did not opt for the neater root of imposing the obligation of creating the duties of the individual on the states parties and thereafter overseeing the implementation of those duties by the states. As it now is, while states report in detail about how the rights in the Charters are implemented and do in many cases offer statistics and the difficulties they encounter in ensuring the enjoyment of rights, they are unable to report with the same level of depth on enforcement of individual duties as they do with rights.

6.7. CONCLUSION

It is obvious from what has been considered in this chapter that there are certain sterling qualities that the African human rights system possesses. Perhaps the most innovative feature of the system is the inclusion of the rights and individual duties under the same human rights documents, and making them complementary to each other. The African Charter in its aims and objectives very clearly states that without certain duties of the individual towards the state, the community and family, individual rights will become completely hollow. The basic belief that rights cannot function in a vacuum, created by the absence of social and political duties of the individual, makes the African Charter very unique and different from any other international human rights treaties. Yet, the African Charter is also special in the sense that it managed to move away from the normal narrow formulations of rights in international and regional human rights treaties and created an expansive scope, intended to be justiciable before the treaty body. These rights cover all the 'three generation rights'.

A review of the concept of rights and individual duties as outlined in the African human rights system, however, reveals beyond doubt that there are both conception and formulation issue about them which should cause concern. The verbiage in many parts of both the African Charter and the African Children's Charter appears significantly flawed and quite incomprehensible. The

overlap of state and individual duties is equally a concern that cannot ignored. An example is article 18 of the African Charter which makes it a duty for the state to 'assist the family which is the custodian of morals and traditional values recognised by the community.' The African Charter equally imposes a duty on the African individual under article 29 to promote and protect positive aspects of African culture and morals. Yet, nowhere does the Charter clarify as to what these specified moral and traditional values that the state has to assist the family protect are. This makes it almost impossible for states parties to the African Charter to decipher the unsaid part, and create measures to be able to fulfil this particular duty. The absence of clarity, especially when the African Charter outlines duties to be performed by both the state and the individual, may lead to a misconception that provisions on duties impose only a non-binding form of obligation.

The insistence by both the African Charter and the African Children's Charter on observing and preserving African tradition and culture is capable of sending mixed signals as to its real intention, at face value. In Chapter Four dealing with universalism and cultural relativism, an attempt was made to show that taken to extremes, the insistence of African culture and traditions can cause serious disharmony to universality of human rights, and may be used to perpetuate values that may denigrate human dignity. It could also cause undue contradictions between some rights. More importantly, the mistaken claim that certain things are African and other are not, may well be based on an essentialist assumption that African is a homogeneous entity and that African culture and tradition are static. The reality, however, is that Africa is such an elaborate mosaic of traditions and cultures which are forever changing. Thus, the pleonasm of the Charter with respect to rights and duties, may give the wrong impression of sanctioning some violations of rights.

Most of the African Charter and African Children's Charter duties directed at the individual are of a general nature and seem to be more of a moral oration with an advisory tone than intended to have legal consequences. There are no clear definitions of the terms used, nor are there any clarifications on what some of the enlisted duties expect the individual and the state to do. This again is capable of spelling confusion for the state as to what it should do when the duties are directed not at the state itself, but at an individual.

One is inclined to agree with Mutua that a valid criticism of the language of duties should focus on their precise meaning, content, conditions of compliance and application. In this sense, more needs to be done in terms of clarifying the status of the duties in the African Charter, as well as establishing their moral and legal dimensions and implications for enforcement.[139] The shortcomings in the language employed in the African human rights systems Charter are seen throughout the African Charter and the African Children's Charter in the parts dealing with rights and duties, and are consistently present in the parts that deal with the mandate and functioning of the African Commission. In the view that this researcher takes, such clarification as is suggested by Mutua should not be left to the African Commission and the African Court as this is bound to render comprehension of the Charter dependent on expert interpretation. This would make the system of human rights too complicated for the ordinary African individual who may wish to read the Charter, understand it and pursue available channels of redress of any violations he perceives. The clarification of the African Charter should entail the bold step of restating the whole Charter and its provisions in a manner that does not disrupt the human rights corpus that has thus far been developed. Reforming the African Charter with a view to clarifying awkward provisions such as those identified in this chapter, is at the expense of sounding like a devil's advocate, the best option to strengthen the human rights protection system.

[139] M Mutua 'The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation' (1993) 5 *Legal Affairs* 7.

CHAPTER SEVEN: UNPACKING THE DEBATE ON UNIVERSALISATION OF DUTIES AND RESPONSIBILITIES

7.1. INTRODUCTION

This chapter considers the debate on the possible universalisation of individuals' duties and responsibilities through a global instrument and examines the various initiatives undertaken in this regard. The questions considered in this chapter are whether these exertions are necessary and what their overall impact could be in the human rights discourse. The chapter ascertains whether an antithetical set of individuals' duties and responsibilities set out in a global declaration or instrument would help the cause of human rights, or whether such a declaration would plainly be counterproductive to the efforts aimed at enhancing greater observance and enforcement of human rights. Using perspectives from the African human rights system as described in Chapter One of this dissertation[140], the chapter attempts to identify duties and responsibilities of individuals that are arguably not amenable to universalisation through an international declaration or instrument as well as those that may lend themselves to international standardisation. An argument is made on the legal efficacy of those individuals' duties that can be codified. In so doing, it is hoped that the chapter will offer a different viewpoint and thus contribute to the attempts aimed at making more realistic the demands for greater recognition of individuals' duties.

The thrust of the argument made in this chapter is that the present efforts to codify individuals' duties and responsibilities in an international declaration or instrument are an improbable feat to accomplish. This is principally due to the normative vagueness or incompleteness of the concept of individuals' duties and responsibilities, given also the level of development and acceptance of the present human rights paradigm, the cultural context of some human duties and responsibilities and taking into account the justificatory arguments for the human responsibilities declaration or instrument. The difficulties in defining human duties and responsibilities precisely as well as identifying clearly the actions needed to realise them, significantly militate against the

[140] See Ch 1 prt 1.2.

prospects of realisation of a truly meaningful global human duties and responsibilities declaration or instrument.

7.2. BACKGROUND TO THE MOVEMENT TOWARDS A DUTIES AND RESPONSIBILITIES CHARTER

Since the adoption of the UN Charter[141] in 1945 the world has witnessed an impressive increase in global human rights protection and promotion activities, particularly within the aegis of the UN. The number of international human rights treaties and normative instruments since the adoption of the UDHR[142] seven decades ago has grown rapidly as has the variety of human rights issues they cover. Rights in general have been so expansively defined for so many people and groups that they cover virtually all categories of people and activities. The rights of ethnic minorities; women; children; sexual minorities; the elderly; prisoners; persons with disabilities; workers, indigenous peoples and populations, etc., are all covered under special interest groups, while sexual reproductive rights; the right to a clean environment, among others, represent rights that have been more recently elaborated upon. And yet, the list of the so called emerging rights is seemingly without end. The right to egalitarian democracy; the right to parity; the right to participation; the right to guarantees in democracy; the right to a continuous and sufficient supply of electricity, etc., are being conceived and refined for possible addition to the already wide array of human rights.[143] It is a matter for debate, however, whether these 'emerging' rights represent an entirely new genre of rights or are merely a recognition or reinterpretation of existing rights.

The commitment to the increasing range of human rights shown by members of the UN family is also reflected in the overwhelming ratification of human rights instruments. The question to ask is whether this emphasis on rights has any adversative effect. Is the preoccupation with rights

[141]It was signed at San Francisco, United States on 26 June 1945 by 50 of the 51 original member countries. It entered into force on 24 October 1945.
[142]The UDHR was adopted by the UN General Assembly on 10 December 1948 (A/RES/3/217A).
[143]See a text called 'The Universal Declaration of Emerging Human Rights' (UDEHR) written by the Human Rights Institute of Catalonia, Spain (IHRC). The IHRC was created over two decades ago. The UDEHR is an instrument of the international civil society, addressed to state actors and other institutions for the crystallization of human rights in the new millennium<www.guystanding.com/files..../charter_Charter_of_emerging_human_rights.pdf>accessed on 21 July 2014.

creating a society that is more respectful of rights or one that is less so? One is bound to receive divergent and highly subjective answers to this question. And this, in a general way, is reflective of the nature of the whole debate on individual duties and responsibilities in the human rights framework.

While there is a well-established global human rights framework, there is no comparable individual responsibility or duty framework to complement the emphasis on rights. This is despite the recognition in various international human rights instruments, including the UDHR, of the intrinsic link between rights and human duties; that rights cannot exist without people acting responsibly towards each other. What is clear is that rights have dwarfed the duties of the individual, leading to charges by some commentators such as Suter[144] that article 29(1) of the UDHR which sets out individuals' duties, was 'overshadowed by the preceding rights' and so very little attention was paid to individual responsibilities in comparison with the rights set out in the same document. A claim is thus made that it is time now to initiate an equally important quest for the acceptance of human duties or obligations.[145]And as Besson puts it, recent years have seen a greater interest among human rights theorists for the 'supply-side' of human rights, i.e. for the duties correlative to human rights and their duty-bearers, and for the moral and ethical side of responsibility.[146] This is important as, even though human rights have justificatory priority over duties, their existence is arguably tied to their ability to generate not only feasible, but also fair, egalitarian and, more generally, justifiable duties.[147]

As already pointed out in previous chapters, efforts to integrate private duties or responsibilities into human rights law are not new.[148] In the last twenty five or so years, however, there have been initiatives around the idea of, not only giving greater recognition to human duties, (considered broadly not only as correlative to rights, but also as ethical and moral obligations),

[144] K Suter, 'The Quest for Human Responsibilities to Complement Human Rights' (2010) 26(3) *Medicine Conflict and Survival* 201.
[145] See 'A Universal Declaration of Human Responsibilities' Report on the Conclusions and Recommendations by a High-level Expert Group Meeting Chaired by Helmut Schmidt 20-22 April 1997 Vienna, Austria.
[146] S Besson <www.jura.uni-freiburg-vortra-prof-samantha-bessom-13>accessed 13 August 2015.
[147] Ibid.
[148] See Ch 1 & 4.

but also introducing a universal declaration of human duties and human responsibilities.[149] The conversation about a universal declaration of human duties and responsibilities corresponding to human rights is founded on a belief that individual duties and responsibilities complement rights, and therefore, that when people bear their duties to each other and to the local, national, regional, and global community and act responsibly, they will create an environment where their individual and collective rights will be less likely to be violated. Another school of thought, however, argues that rights are threatened if duties and responsibilities are codified at international level.[150]

This chapter examines some of the prominent initiatives and efforts in the direction of creating a universal declaration of human duties and responsibilities. The candour and devotion of most of those who have been engaged in this exertion and have undertaken advocacy campaigns in the area are well documented.[151] The energies thus far expended in this enterprise cannot be downplayed or dismissed easily, and yet those efforts do not appear to have met with much success. Why this is so cannot, therefore, be an idle question.

McGregor and others have made useful contributions on this topic.[152] They have identified benchmarks in the global efforts to universalise, through a formal document, individuals' duties

[149] S L T McGregor, 'Human Responsibility Movement Initiatives: A Comparative Analysis' (2013) 7(1) *Factis Pax* 1-26 23 <http://www.infactispax.org/journal>.

[150]Critics of a declaration universalising duties and responsibilities include: Amnesty International, 'Muddying the Waters The Draft Universal Declaration of Human Responsibilities: No Complement to Human Rights', [IOR 40/02/98]. London: 1998) <http://www.amnesty.org/en/library/info/IOR40/002/1998>accessed 22 September 2014); B Saul, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' 2001 32 *Columbia Human Rights Law Review* 565- 624: J H Knox, 'Horizontal Human Rights Law', (2008) 1 *The American Journal of International Law* 1- 47.

[151] In 1983 the Inter Action Council was formed. It developed the Universal Declaration of Human Responsibilities. In 1997 and requested the UN Secretary General and all heads of state and government to support its proposal for the adoption by the UN General Assembly of the Declaration. The Parliament of World Congress at its meeting in 1993 adopted a declaration toward a global ethic which called for greater recognition of duties and responsibilities. In about 1993, the International Council of Human Duties was established to advocate for greater recognition of duties and responsibilities in its Carta of Human Duties: A Code of Ethics and Shared Responsibilities. In 1995 the Commission for Global Governance published a report entitled 'Our Global Neighbourhood' in which further advocacy for duties was contained. In March 2009, the Lord Chancellor and Secretary of State for Justice of the United Kingdom presented the Green Paper to the UK Parliament entitled 'Rights and Responsibilities: Developing our Constitutional Framework' which marked the launch of the debate on rights and responsibilities. More recently communitarian thinkers have advocated greater prominence being given to the place of individual duties and responsibilities.

[152] McGregor (n 10) 23; R Goldstone, *Declaration of Responsibilities and Human Duties* (UN Human Rights Research and Education Centre, Ottawa 1998) <http://globalization.icaap.org/content/v2.2/declare.html> accessed

and responsibilities. This chapter, however, fundamentally departs from the thrust of that work as it considers not only the desirability or otherwise of such a declaration or instrument but also deliberates on why these experiments are, in any case, bound to be largely unsuccessful. The nature of the individual duties and responsibilities proposed in the efforts made thus far will be measured against those contained and elaborated in the African Charter[153] with a view to assessing whether the proposed individual duties and responsibilities frameworks introduce anything materially dissimilar from those in the African Charter, and whether the African experience in this connection has any relevance to this global movement. More specifically, it will be considered whether the duty declarations as proposed could offer any real opportunity or prospect for the universal human rights framework to redefine itself.

As was demonstrated elsewhere in this work, individual duties and responsibilities have been recognised from the earliest times.[154] They were a feature in the social contract theory,[155] and even among leading liberal democratic thinkers such as Milland [156] and Rousseau.[157] The importance of personal duty and responsibility is recognised in the free-market philosophy as well. Adam Smith, arguably in recognition of individual responsibility, for example, wrote that 'subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities.'[158] More recently, communitarian thinkers such as Etzioni have advocated greater inclusion and prominence of individual duties and responsibilities in our society.[159] Individual responsibility is considered a civic virtue which has been obscured through the years, but which should be revisited in moral, social, communal and/or legal terms. It is seen to be necessary to foster the character traits on which a productive, but also a rights respecting and tolerant society are based. In the communitarians' view, we

January 12 2013; International Council of Human Duties, *Carta* of Human Duties: A Code of Ethics and Shared Responsibilities; Report of the Commission for Global Governance entitled 'Our Global Neighborhood'.

[153] See Ch 6 on an elaboration of individual duties in the African Charter.

[154]Ch 2.

[155]See for example T Hobbes, *Leviathan* (St Pauls, London 1651); J Locke, *Two Treatises of Government* (Awnsham Churchill, London 1690); Jean-Jacques Rousseau, *The Social Contract* (1762) M Cranston (trans) (Baltimore, Penguin 1968).

[156] J S Mill *On Liberty* (2nd edn John W Parker & Sons, London 1859) 24.

[157] J J Rousseau, *The Social Contract* Maurice Cranston (trans) (Penguin, Baltimore (1968).

[158] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* Bk V, Ch 2, (1776) II (I).

[159] A Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (Crown Publishers Inc, New York 1993); M A Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press, New York 1991).

should attend both to rights and responsibilities, and give responsibilities the status they deserve. Ideas of individual duty and responsibility have also been at the forefront of much of socialist philosophy. This has emphasised collectivism and co-operative action; and the fulfilment of duties to each other and the wider community sitting side by side with enjoyment of rights, public order and wellbeing.

Many global cultures and world religions have given prominence to the need to balance individual and community interest and to the essential nature of individual responsibility. For example, notions of duties to the community are at the vanguard in many of African and Asian societal philosophical thought as considered in Chapter Five of this work. Whereas the classical Western liberal notion of human rights emphasises absolute individual political and civil rights, most non-Western, Third World traditions place greater emphasis on the community basis of rights and duties, on economic and social rights and on the relative character of human rights. Marxist/socialist ideas highlight economic and social rights and duties absolutely grounded in collectivist principles.[160] Fulfilment of duties to the community in general and to certain individuals in particular such as family members, is considered a natural part of one's membership of a society, and the avenue to self-realisation and dignity within the community.

The omission of an elaboration of duties in the UDHR was justified partly on the basis that the relationship of personal duties to rights was too obvious to bear mentioning.[161] That decision was also probably predicated on the fear that governments might use such duties to limit human rights in ways that are neither predictable nor acceptable. As Knox observes,

> listing duties along with rights could suggest that in the case of conflict, they should simply be balanced against one another. The vertical duties owned by states to respect individuals' rights could be offset by the converse vertical duties owed by individuals to states. If adopted, this approach would have hamstrung human rights law at its inception.[162]

[160]G M Johnson 'Human Rights in Divergent Conceptual Settings - How Do Ideas Influence Policy Choices?' in D L Cingranelli (ed), *Human Rights Theory and Measurement*, (MacMillan Press, London 1988) 43.
[161]See for example E Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001) 422.
[162]J Knox (n 11).

In addition to existing in the UDHR, duties were also included in the twin covenants - the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights,[163] the Genocide Convention of 1948[164], the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.[165] In fact the whole international criminal justice system administered by the International Criminal Court under the Rome Statute[166] recognises the individual as a subject of duties. At the regional level too, there is a clear recognition to varying extents of individual duties and responsibilities.[167] The same can be said of domestic criminal law systems in general. In this sense the duties imposed on individuals are aimed at realising the rights guaranteed by various laws and regulations both nationally and internationally. With this position already obtaining why should there be calls for greater recognition of human duties and responsibilities?

7.3. WHY THE CALL FOR GREATER RECOGNITION OF DUTIES AND RESPONSIBILITIES OF THE INDIVIDUAL GENERALLY?

Although many human duties and responsibilities already exist in domestic statutes, in international human rights instruments, in the common law and in our ethical framework, it is beyond debate that individual duties and responsibilities[168] have not been given as much prominence as rights. While it is accepted that the law in general abounds with many duties of the individual while conferring rights[169] it often does so without framing them explicitly in the

[163] In the common final part of their respective preambles.
[164]It was adopted by the UN General Assembly on 9 Dec 1948 as General Assembly Resolution 260. It entered into force on 12 Jan 1951.
[165]Also known as the Valencia Declaration of Responsibilities and Human Duties, it was adopted by the UN General Assembly while celebrating the 50th Anniversary of the UDHR in 1998. A/RES/53/144, 8 Mar 1999.
[166]The Rome Statute of the International Criminal Court is a treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome on 17 July 1988 and it entered into force in July 2002. It establishes the international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.
[167] See Ch 2 & 4.
[168] It was stated in Ch 4 that although the terms 'duty', 'responsibility' and 'obligation' are not identical, they broadly refer to similar expectation on the part of rights holders for others to respect, uphold and fulfil their rights. They refer loosely to a set of actions or restraints expected of people in respecting others' rights.
[169] For example, F Viljoen, *International Human Right Law in Africa*, (Oxford University Press, New York 2007) states that domestic legislation routinely impose individual duties on individuals either explicitly or implicitly and cites examples.

language of duties or responsibilities. Members of a community are all subject to criminal and regulatory law, which prohibits or requires certain actions. These laws collectively express the way in which society chooses to order the conduct it wishes either to encourage or prohibit. This imposes duties on the individual. In ordinary speech, some rights may be expressed as duties, and vice versa. For example, it could be said that adult citizens of a country have the right to vote or a duty to vote or the right to work or the duty to work, or the right to protect one's country or the duty to do so. And yet, as discussed in Chapter Two of this dissertation, rights and duties are not simply overlapping or parallel, nor are they necessarily correlative.

The human rights paradigm has been criticised for its preoccupation with the culture of claims and rights, which obsession has been perceived by some as having resulted in a neglect of individual duties and responsibilities with dire social consequences.[170] What recent calls for a more advised recognition of duties of the individual do not do, is to imply that enjoyment of the rights set out in international human rights instruments should be legally contingent on the exercise of individual responsibilities. However, these calls suggest that with greater prominence being given to duties and responsibilities, it may be that duties can assume greater resonance in a way which does not necessarily link them to the adjudication of particular rights.

A number of reasons have been advanced for the clamour for a more duty-based social ordering than has hitherto been the case. Four of these stand out more prominently. First, is the reason premised solely on some charges that are made on the nature of rights and what they do, or can do for rights holders? Sunstein, in discussing categories of charges against rights in the context of the human rights debate in the United States, perhaps captures and summarises the views of those who believe that the present conceptualisation of rights and their effect require a rethink. These observations, which are of relevance to the global rights/duties debate, reverberate in the clamour for greater respect of human duty and responsibility.[171]

[170] See for example, A Etzoni, 'Too Many Rights and Responsibilities for the Future' in K W Hunter and TC Mack (eds) *International Rights and Responsibilities for the Future* (1996) 3; Cass R Sunstein, 'Rights and Their Critics', (1995) 70 *Notre Dame Law Review* 727; B Saul, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' (2001) 32 *Columbia Human Rights Law Review* 565-624; and K Suter, 'The Quest for Human Responsibilities to Complement Human Rights' (2010) 26(3) *Medicine, Conflict an Survival* 199.
[171] See for example Sunstein (n 31) 730.

Another voice has also lamented what is seen as the corrosive effect of this blinkered focus on rights and self-fulfilment. Borst wrote of the United States as follows:

> A nation which had set up a near-perfect and flexible government is now finding common sense more endangered than the snail darter. Lawyers have hamstrung society with nit-picking minutiae. . . . This lack of common sense has led inevitably to a rights revolution, where only selfishness and personal interest seem to reign supreme.[172]

There are also strong objections to the manner in which human rights have been conceptualised. Many catalogues of human rights read like specifications for liberal democracy with the language employed being akin to the individualism of the West. Glendon puts the point thus:

> Our rights talk, in its absoluteness promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations….In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertions over reason-giving.[173]

While rights are viewed as individualistic, egocentric, unworldly, hedonistic and anti-social, duties and responsibilities are seen as collective, social, humane, nuanced and associated with socially correct and acceptable human values. While the language of rights has dominated the texts of bill of rights in constitutions, and many view this rhetoric as unproblematic, the currency of that language according to some, has overlook with dire consequences to human society, the concept of duty and responsibility as the missing link to human dignity. In his own words, Sunstein argues that:

> rights are unduly individualistic and associated with highly undesirable characteristics, including selfishness and indifference to others. Rights miss the 'dimension of sociality':

[172]W A Borst, *Liberalism: Fatal Consequences* (Vital Issues Pr, Lafayette, Loisiana 1988).
[173] Glendon (n 20) 14.

> they posit selfish, isolated individuals who assert what is theirs, rather than participating in communal life. Rights, it is said, neglect moral and social dimensions of important problems.[174]

This school of thought bemoans what is perceived as a decline in moral responsibilities and a general regression from an age where individuals took responsibility for what they did to one where people do not want to assume responsibility for anything at all. 'People no longer ask what they can do for their country, only what their country can do for them.'[175]This 'flight from individual responsibility'[176]has led people, to use the words of Boaz, to fabricate a whole range of accounts as to why 'nothing that happens to us is our own fault . . . that the poor are not responsible for their poverty, the fat are not responsible for their overeating, and the alcoholics are not responsible for their drinking.'[177]

Secondly, a view is also held by some that the disproportionate emphasis on rights at the expense of duties and responsibilities is, in part at least, to blame for the social ills of society; that emphasis on human rights is to blame for weakening public safety and the decay of the moral fabric of society. Accordingly, a renewed focus on individuals' duties and responsibilities is inescapable. In the United Kingdom, the Lord Chancellor and Secretary of State for Justice, in his paper to Parliament in 2007 explained the position thus:

> . . . social and economic change has altered public attitudes. It has encouraged the rise of a less deferential, more consumerist public. In this more atomised society people appear more inclined to think of themselves and one another as customers rather than citizens. People are more independent, more empowered. But these developments can pose problems too, especially when viewed in the context of liberal democracy and the way people look upon rights. To an extent, rights have become commoditised. This is demonstrated by those who assert their rights in a selfish way without regard to the rights of others . . . . Responsibilities have often been a poor cousin to rights in our national

[174] Sunstein (n 31) 730.
[175] Etzoni (n 20) 3.
[176] D D Boaz, 'Rights, Responsibilities and Community' in K W Hunter and T C Mack (eds) (1996) 3 *International Rights and Responsibilities for the Future* 48.
[177] Ibid.

> discourse, and yet they are deeply woven into our social and moral fabric. Although we have a latent understanding and acceptance of our duties to one another and to the state, they have not been given the same prominence in our constitutional architecture. This is despite the fact that many duties and responsibilities already exist in statute, common law and our ethical framework, and despite the fact that the text and case law of the European Convention require a balance to be struck between the two. 'Liberty means responsibility', wrote George Bernard Shaw, 'that is why most men dread it.'[178]

The human responsibility critique of human rights is not confined to the United States and the United Kingdom alone. It evidently permeated popular thinking during the drafting of the African Charter[179] as discussed in Chapter Three of this dissertation.

In Australia and in Belgium too, there was a clear suggestion that neglect of individual responsibilities had resulted in avoidable social ills in society.[180] The Belgian government stated in the Council of Europe in 1993 that the post-communist emphasis on individual rights has undermined personal moral responsibilities and resulted in egoism and self-centeredness among young people, a rise in unethical conduct and crime, social pessimism, and an increase in drug addiction and AIDS.[181]

A third reason for the clamour for a more focussed consideration of human duties has to do with a perception that there is failure to appreciate fully the role of individual duty and responsibility in society. This line of thinking posits that individual duties or responsibilities in the context of rights are not well understood. It is claimed that because of a lack of popular understanding coupled with technological, demographic, economic, social and cultural changes that are

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[178] 'Rights and Responsibilities: Developing our Constitutional Framework' Ch 2, presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, March 2009 Cm 7577 (2009).
[179] Memorandum of the Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples' Rights (Dakar 1979) 108.
[180] A conservative federal government had been very vocal about promoting a new policy linking welfare entitlement to community service obligations. See Pamela Kinnear, The Australian Institute, Mutual Obligations: Ethical and Social Implications 9 (2000) as quoted in Saul (n 10) 571. For Belgium see Bulg.Govt, Rights and Responsibilities of Citizens in a Democratic Society, as quoted in Saul (n 10) 571.
[181] Bulg.Govt, Rights and Responsibilities of Citizens in a Democratic Society, as quoted in B Saul, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' 2001 32 *Columbia Human Rights Law Review* 565- 624 571.

occurring, there is need for a rethink of the human rights discourse in which the articulation of responsibilities is bound to offer security. McGregor argues that the world has changed profoundly since 1948 when the UDHR was signed. 'Humanity is facing the fallout of corporate-led, capitalist globalisation, the reverberation of climate change and changing demographics, world-wide health pandemics, and worrying escalation of violent reactions to conflict, including war, terrorism and structural violence.'[182] And this should invite a rethink of individual responsibility. As Goldstone puts it, managing globalisation requires equitable global and regional solutions based on the precepts of both joint and individual responsibility and solidarity.[183] Globalisation of the world economy is matched by global problems, and global problems demand global solutions based on ideas, values and norms respected by all cultures and societies. Recognition of the equal and inalienable rights of all the people requires a foundation of freedom, justice and peace - but this also demands that rights and responsibilities be given equal importance to establish an ethical base so that all men and women can live peacefully together and fulfil their potential. A better social order both nationally and internationally cannot be achieved by laws, prescriptions and conventions alone, but needs a global ethic. Human aspirations for progress can only be realised by agreed values and standards applying to all people and institutions at all times.[184] Küng equally explains that the globalisation of problems calls for a global ethic, at the minimum, 'shared ethical values, basic attitudes and criteria (ethic) to which all regions, nations and interest groups can commit themselves.' In other words, there is a 'need for a common basic human ethic.'[185]

No doubt, the underlying assumption by some of those advocating for a tabulation of human duties and responsibilities alongside human rights is that when duties are addressed adequately in a bill of rights or other human rights instrument there will be greater scope for enforcement of human rights. They argue that there is great benefit to be gained globally if we use human rights

[182] McGregor (n 10) 23.
[183] Goldstone (n 13).
[184] Inter Action Council, A Universal Declaration of Human Responsibilities: Report on the Conclusions and Recommendations (1977) <http//www.asiawide.or.JP/IAC/UDHR/EngDecl l.htm> accessed 7 August 2014
[185] H Küng, 'A Global Ethic and Human Responsibilities' paper presented at the high-level expert group symposium on Human Rights and Human Responsibilities in the Age of Terrorism, 5 April 2005, Santa Clara, California.<http://www.scu.edu/ethics/practicing/focusareas/global_ethics/laughlin-lectures/global-ethic-human-responsibility.ht ml> accessed 12 January 2014.

law to set out converse duties owned to government and horizontal duties by the one private party to another.

While there are all these views in favour of greater recognition of individuals' duties and responsibilities, there are also fairly strong views against placing undue emphasis on these duties and responsibilities. All these views require a proper assessment in considering a case for duties and responsibilities declaration. Perhaps the observation made by Sloth-Nielsen and Mezmur in regard to charges against duties under the African Charter holds true of duties and responsibilities at other levels too. They state that 'a more general charge against the imposition of duties on the individual is that they would override individual rights.'[186] And this is precisely the point made by Cohen who is sceptical about the wisdom in subjugating rights to duties because:

> [i]f the state has a collective right and obligation to develop the society, economy, and polity (article 29), then as an instrument it can be used to defend coercive state actions against both individuals and constituent groups to achieve policies rationalised as social and economic improvements.[187]

On this basis the concept of individual duties has been vehemently opposed by some Western scholars like Buergenthal. They have opined that duty towards the state can be easily manipulated and turned into an authoritarian rule. Buergenthal maintains that the inclusion of duties in the African Charter, for example, is nothing but an invitation for the imposition of the unlimited restriction on enjoyment of rights.[188]

Rhoda Howard and Jack Donnelly also think that mixing of rights and duties in the modern state, is to risk eventual complete disappearance of the rights. In their words 'all duties will be aimed

[186] J Sloth-Nielsen and B D Mezmur, 'A Dutiful Child: The Implication of Article 31 of the African Children's Charter', 52 (2) (2008) *Journal of African Law* 159-189 167.
[187] R Cohen, 'Endless Teardrops: Prolegomena to the Study of Human Rights in Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human Rights and Governance in Africa* (University Press, Gainesville 1993).
[188] T Buergenthal, *International Human Rights in a Nutshell* (St Paul, Minn 1995) 175.

towards the preservation of the state and of the interests of those who control it.'[189] Another scholar calls these duties to be 'little more than formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples.'[190]

Political misuse of the language of individual duties should not, however, prevent a constructive discussion of the complex questions that arise in the rights/duty discourse. Reminding people that they have basic ethical obligations is a worthy and necessary undertaking. However one chooses to look at it, the whole debate on human duties cannot be dismissed as a farce because the intent underlying the efforts to universalising duties is clearly to find a counterbalance to the language of human rights. It is also obvious that the calls for a more prominent articulation of individual duties have not been confined to the domestic plane alone. Advocacy for similar greater recognition of duties at the global level too, has been active.

7.4. A CASE FOR AN INSTRUMENT UNIVERSALISING DUTIES AND RESPONSIBILITIES

In its thirty articles, the UDHR mentions duties only once in article 29(1**)**, even then only marginally. This coupled with the fact that the two international covenants on human rights of 1966 are likewise long on rights and short on duties, would appear to somewhat confirm the view that the UDHR is indeed just what its name says - a declaration of rights. This situation also grounds, wrongly in the view of this researcher, a perception that universally, there is a deficit in the treatment of duties.

Various initiatives around the world have thus emerged to marshal and coordinate efforts towards a global, intercultural and interreligious dialogue about a potential universal declaration of human duties and responsibilities. McGregor[191]identifies and discusses four widely documented major initiatives shaping this global movement in support of a duties and responsibilities. These are: (a) the 1993 Parliament of the World's Religions initiative, (b) the 1997 Inter Action Council initiative, (c) the 1998 UNESCO-sponsored Valencia initiative, and

[189] RE Howard and J Donnelly (eds), *International Handbook of Human Rights* (Greenwood Press, New York 1987) 25.
[190] H Okoth-Ogendo 'Human and Peoples' Rights: What Point is Africa Trying to Make in R Cohen *et al*, *Human Rights and Governance in Africa* (1993) 78-79 7.
[191] McGregor (n 10) 23.

(d) the 2003 United Nations Human Rights Commission initiative. Effectively all of these initiatives explained that their commitment was to unpack the responsibilities mentioned in Article 29(1) of the 1948 Universal Declaration of Human Rights and enumerate the full range of duties it encompasses and more. Other initiatives she recognises though she does not elaborate upon them in her analysis are: the 2000 Earth Charter Initiative; the International Council of Human Duties' 1993 Carta of Human Duties; the Commission on Global Governance's 1995 document titled Our Global Neighbourhood; the Club of Rome's 1991 Declaration of Human Responsibilities and Duties, and the UNESCO 1999 Common Framework for the Ethics of the 21st Century. Other recent initiatives that reflect a similar preoccupation for the formulation of duties and responsibilities include the United Nations Millennium Declaration and its goals; the 2030 Agenda for Sustainable Development and its goals;[192] the Statute of Rome; the Global Compact; and the Kyoto Protocol. For the present purpose, however, the following six initiatives are examined and considered namely, (a) the 1993 Parliament of the World's Religions' initiative, (b) the International Council of Human Duties (c) the Commission on Global Governance, (d) the 1997 Inter Action Council initiative, (e) the 1998 UNESCO-sponsored Valencia initiative, and (f) the 2003 United Nations Human Rights Commission initiative. The choice of these initiatives for this study is deliberate. They tend to be more general in their approach than, for example, efforts that culminated in the Earth Charter or the Kyoto Protocol which are more focused on the environment. It is hoped that examining these efforts will give the discussion a fairly broad view of the human duties and responsibilities movements and thus provide a sound basis for a general assessment of these efforts.

The global movement for the codification of individuals' duties, predicated as it seems, on concerns that the human rights model presently existing at the global plane has thus far markedly engrossed itself with the culture of rights and claims at the expense of duties and responsibilities,[193] is focused on conceptualising what might constitute a declaration of human

[192] See para 54 of UN Resolution A/RES/70/1 of 25 September 2015.
[193]Since about 1983, the calls for greater recognition of duties seem to have gained ground. In 1983 the Inter Action Council was formed. It developed the Universal Declaration of Human Responsibilities and in 1987 it asked the UN Secretary General and all heads of state and government to support its proposal for the adoption by the UN General Assembly of the Declaration. The Parliament of World Congress at its meeting in 1993 adopted a declaration toward a global ethic which called for greater recognition of duties and responsibilities. In about 1993, the International Council of Human Duties was established to advocate for greater recognition of duties and responsibilities in its Carta of Human Duties: A Code of Ethics and Shared Responsibilities. In 1995 the Commission for Global

responsibilities that would lend support to the argument that responsibilities complement rights.[194] Gladstone, for example, observes that the belief that responsibilities can complement the rights in the UDHR is widespread.[195] Responsibilities, according to this view, need not be seen as a threat to the already entrenched rights. This notion is, however, opposed.[196]What is clear, nonetheless, is that the idea of an international instrument of duties and responsibilities has received international attention from serious circles of persons including politicians and elder statesmen, faith leaders and religious organisations, scientists, educators and artists, philosophers and Nobel Laureates.[197] Given the various documents that have been drafted to this effect, the personalities involved and the amount of time that has been expended on discussing the possibility of universalising human responsibilities, one is less inclined to treat these declarations as mere hypothetical abstracts. Suter observes that the current human responsibility initiatives have evolved distinctly, with little synchronisation. He envisions a future time when more and more people would identify with the movement and encourage others to follow.[198] This involvement will entail intercultural dialogue enriched by 'a sense of human responsibility.'[199] Saul observes that the philosophical foundation of the human responsibility movement traverses the Western political left and right, reflecting a shared and frequently rhetorical view about the need to reverse a perceived decline in community and its incumbent obligations.[200]

Those involved in this effort anticipate that a universal declaration of human duties and responsibilities will engender and instil responsible behaviour toward the different cultures of humankind. By upsetting the overall approach thus far which defines human rights of individuals

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Governance published a report entitled "Our Global Neighborhood" in which further advocacy for duties was contained. In March 2009, the Lord Chancellor and Secretary of State for Justice of the United Kingdom presented the Green Paper to the UK Parliament entitled "Rights and Responsibilities: Developing our Constitutional Framework" which marked the launch of the debate on rights and responsibilities. More recently communitarian thinking have advocated greater prominence being given to the place of individual duties and responsibilities.

[194] International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law* (Versoix, Switzerland 1999).

[195]As cited in A Clapham, 'Globalization and Rule of Law' (1999) 61 *Review of the International Commission of Jurists*17-33.

[196]Notable among those who argue that rights are threatened if responsibilities are codified at the global level include Amnesty International, John H Knox B Saul and K Suter. See n 11.

[197]Kostakidis-Lianos, Lara and George Williams, 'Bills of Responsibilities', (2005) 30 (2) *The Alternative Law Journal* 58-62.

[198] Suter (n 5) 205.

[199] Ibid.

[200] Saul (n 11).

and makes states primarily responsible for the fulfilment of those rights, the advocates of a universalised duty and responsibility instrument have a common and unswerving message, namely: (i) human rights principles alone are inadequate for modern societies to regulate themselves well; (ii) a device in the form of an international declaration – a set of international rules – should be devised to change the current human rights architecture. This code of ethical obligations is necessary to guide individual behaviour; (iii) greater emphasis should be laid on individual responsibility to supplement existing international human rights norms and standards if we are to avert a social catastrophe waiting to happen as a result of the neglect of individuals' duties and responsibilities.

The human responsibility initiatives echo a shared belief that the world is experiencing a decline in community and moral responsibilities toward each other.[201] In order to correct this situation campaigners of human duties and responsibilities either advocate for converse duties, that is to say responsibilities owed by individuals to society, or for correlative duties, that is to say responsibility of individuals to respect the rights of other individuals. Protagonists of a global human duties and responsibility framework appear to share a general view of converse duties, namely duties that humans have to society at large, other species and the planet. To that end, Arias suggests that a code of 'human duties or obligations' should comprise at least four dimensions: obligations between persons and between nations and obligations toward planet earth and toward ourselves.[202] A further attribute of the human duties and responsibilities advocated is that they are universal ethical manifestos rather than enforceable legal norms; in essence, as Saul puts it, a global ethic.[203]

In her work on the subject of global efforts in the universalisation of duties, McGregor[204] is of the view that the designers of these initiatives tend to reflect some combination of five dimensions in human duty and responsibility initiatives, namely, (a) communitarian versus faith-based rights critiques, (b) converse versus correlative duties, (c) an *ethic* versus *ethics* approach (d) legal versus ethical responsibilities, and (e) a transcultural understandings of the concepts of

[201] Saul (n 11).
[202] O Arias Sanchez, 'Some Contributions to a Universal Declaration of Human Obligations' <http://interactioncouncil.org/sites/default/files/1997%20UDHR.pdf> accessed 12 January 2013.
[203] Saul (n 11).
[204] McGregor (n 10).

duty, obligation and responsibility. In the view of this researcher, this is an immensely significant classification of the global duties and responsibilities advocacy efforts in their manifestation. It is easy to identify each of the efforts aimed at articulating duties into a universal instrument with one or other of these critiques. This, however, is beyond the scope of the present study. What is within this study is a general appraisal of the trajectory that the movement on the formulation of a declaration of individuals' duties has so far taken and why the efforts seem not to meet with much success.

The advocacy for a universal declaration of duties or responsibilities was also apparently motivated, in part at least, by the disappointing truth that the non-violent and organised world which mankind expected at the end of the Second World War and the Cold War has not in fact come to pass. Hammarberg articulated this view when he claimed that:

> [t] he more orderly and peaceful world that was to follow the end of the cold war has not materialised. Instead, uncertainty seems to predominate – conflict has spread within some countries, in others political and economic systems have failed or collapsed, and modern developments associated with technology and rapidly changing the world.[205]

According to the United Kingdom Ministry of Justice, globalisation has enlarged the effects of the economic cycle, with unpredictable consequences.[206] Traditional family structures are being transformed; there are new cultural tensions between the quest for individual fulfilment and a desire for social discipline; and climate change is threatening the future of the planet. However, there is no consensus on how this should all be tackled. Many of these changes create new forms of vulnerability and many who thought themselves secure may suddenly find they are not. No one can predict precisely the consequences of such complex transformations. In such times,

[205]T Hammarberg, 'Preface' in International Human Rights Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law: A Commentary* (Versoix, Switzerland 1999).
[206] UK Ministry of Justice, 'Rights and Responsibilities: developing our constitutional framework' presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, March 2009 Ch 1.

constitutional protections for fundamental rights and freedoms and the articulation of responsibilities offer security to those who can feel intensely vulnerable.[207]

The communitarian approach[208] postulates that a strong focus on Western notions of individualism has led to neglect of individual responsibilities with dire consequences to social aspects of human life.[209] It claims that a failure to accord duties equal treatment with rights is responsible for the many modern social problems. Furthermore, that the Western notion of rights, which informed the establishment of the UDHR, excluded other cultural notions of rights since it undoubtedly reflects the philosophical and cultural background of the document drafters who represented Western powers that emerged victorious from the Second World War.[210] In this connection, this approach resonates with the relativist view of human rights premised particularly on Asian and pre modern African cultural beliefs as discussed in Chapter Five of this thesis. As will be shown later in this chapter, this view may not be entirely reflective of the position as it obtains in practice.

7.5. ADVOCACY FOR A GLOBAL ETHIC AND DUTIES AND RESPONSIBILITIES FRAMEWORK

As has been pointed out already, individuals and organisations have advocated for the definition of a 'global ethnic' or a general framework of 'human responsibilities' that will describe the range of duties to which all human beings ought to be subject.[211] Spiritual leaders have been a consistent source of calls for a new global ethic. Their faith-based approach attempts to create a global ethical standard informed by ethical principles entrenched in the mixture of world religions. They have a special interest in this issue since religious teachings are commonly

[207] UK Ministry of Justice, 'Rights and Responsibilities: developing our constitutional framework' presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, March 2009 Ch 1.
[208] Etzoni (n 20).
[209] Ibid.
[210] M Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law*605. See also Ch 5 of this dissertation.
[211] See International Council on Human Rights Policy (67) 1.

concerned with what is right and what is wrong, and many attach particular importance to guidelines or codes of good behaviour that emphasise individual duties. It was explained in the preceding part why only six of the many human duties and responsibilities initiatives are considered in this work. The six of the many global human responsibilities codification efforts are now considered in detail in the subsection following.

7.5.1. The Parliament of the World's Religions

7.5.1.1. Background and purpose

The Council for a Parliament of the World's Religions officially dates from 1893. It was established to nurture and promote interreligious harmony, rather than unity among the world's religious and spiritual communities and foster their engagement with the world and its guiding institutions in order to achieve a just, peaceful and sustainable world. Its vision is of a just, peaceful and sustainable world in which, among other things, religious and spiritual communities live in harmony and contribute to a better world from their riches of wisdom and compassion and people everywhere come to know and care for their neighbours using an approach that respects, and is enriched by, the particularities of each tradition.[212]

At the Parliament of the World's Religions[213] meeting in Chicago in 1993 to commemorate the centenary of its first meeting in 1893, a declaration entitled 'The Declaration Toward a Global Ethic[214] was adopted.[215]The declaration explains that a global ethic refers to 'a fundamental consensus on binding values, irrevocable standards, and personal attitudes instead of a global ideology or a single unified religion... and certainly not the domination of one religion over all

[212] See World's Parliament of Religions, Berkley Centre for Religion, Peace and World Affairs <www.parliamentofreligions.org> accessed 13 December 2015.
[213]The World's Parliament of Religions was held in Chicago during the 1983 World's Fair, bringing representatives of faith groups which were previously unknown to the western world and giving world-wide recognition to peace and harmony cultivated by inter-religious fellowship and cooperation.
[214]H Küng, 'Declaration Toward a Global Ethic' <http://www.parliamentofreligions.org/_includes/FCKcontent/File/TowardsAGlobalEthic.pdf> accessed 9 February 2015.
[215]The declaration was signed by more than 200 leaders from over 40 different faith traditions and spiritual communities. The major religions that were represented include Buddhism, Christianity, Islam, Hinduism and Judaism.

others.'[216] That document underscored the point that action in favour of rights and freedoms presumes a consciousness of responsibility and duty. The Declaration identified general ethical principles that include treating others humanely as we would wish them to treat us. The Declaration further stated that:

> On the basis of personal experiences and the burdensome history of our planet we have learned: that a better global order cannot be created or enforced by laws, prescriptions and conventions alone; that the realisation of peace, justice, and the protection of earth depends on the insight and readiness of men and women to act justly; that action in favour of rights and freedoms presumes a consciousness of responsibility and duty, and that therefore both the minds and hearts of women and men must be addressed; that rights without morality cannot long endure, and that there will be no better global order without a global ethic.

The declaration recognises four critical affirmations that represent shared general ethical principles vital to a global ethic. These are called 'irrevocable directives' and 'irrevocable, unconditional ethical norms.' They are (a) a commitment to a culture of non-violence and respect for life (humans, other species); (b) a commitment to a culture of solidarity and a just economic order; (c) a commitment to a culture of tolerance [respect] and a life of truthfulness; and, (d) a commitment to a culture of equal rights and partnership between men and women.[217]

These four broad, ancient guidelines underpin the overriding principle that 'self-determination and self-realisation are thoroughly legitimate so long as they are not separated from human self-responsibility and global responsibility, that is, from responsibility for fellow humans and for the planet Earth.'[218] Gomez-Ibanez, one of the drafters of the Declaration, was later to explain that:

> After it was written, a few persons criticised the ethic for being 'too religious'. Nevertheless, we did not want to produce a merely secular declaration, something that

[216] Küng (n 75).
[217] Ibid.
[218] Ibid.

> would have been more appropriate for the world of jurisprudence, laws, and rights. The United Nation's Universal Declaration of Human Rights, for example, is such a document. The global ethic is not about rights. It is about responsibilities. The values, standards, and attitudes expressed in the ethic are not intended to be negotiable or be the subject of legislation or litigation. They are statements intended to resonate in the hearts of individuals.[219]

Throughout its text the declaration carries universal ideals of being genuinely humane, serving humanity, serving the truth, transforming consciousness, changing the hearts of people, and treating everything humanely to the intent that a sense of responsibility is kept alive, natured and passed on to generations to come. Küng reports that the Global Ethic Project is an on-going process that has made tremendous progress. It has since been signed by thousands of leaders and individuals from around the world.[220] He stresses that 'the search for a global ethic will find its expression in both human rights and human responsibilities.'[221]

7.5.1.2. Specific human duties and responsibilities advocated in the Declaration Toward a Global Ethic?

The Declaration is based on the golden rule – 'do not do to others what you would not like others do unto you.' The rules attendant to the golden rule, accordingly applied; 'though shall not kill' is reflected in irrevocable directive 1 – a commitment to a culture of non-violence and respect for life; 'though shall not steal' or 'act with justice and fairness' is mirrored in irrevocable directive 2 – a commitment to a culture of solidarity and a just economic order; 'though shall not lie' or 'speak and act truthfully' is echoed in irreversible directive 3 – a commitment to a culture of tolerance and a life of truthfulness; 'though shall not commit adultery' or respect and love for one another, is set out in irrevocable directive 4 – a commitment to equal rights and partnership between men and women.

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[219] Daniel Gomez-Ibanez, 'Moving towards a Global Ethic,' paper presented to the Fifth National Conference on Ethics in America, Long Beach, California, March 1994.
[220] H Küng (n 46).
[221] Ibid.

There can be little doubt that the responsibilities envisaged in the Declaration are of a moral and ethical kind, which could, in some cases be translated into legally binding duties under domestic legislation. These responsibilities require careful refinement if they are to be properly understood for purposes of implementation by those to whom they are directed.

7.5.2. The International Council of Human Duties

7.5.2.1. Background and purpose

An international non-governmental and non-profit making organisation, the International Council of Human Duties, was established in about 1993 to push an agenda of encouraging the adoption by the UN of a Universal Declaration of Human Duties with comparable status to the UDHR and the recognition of a Human Duties Day. It was created following an idea of Nobel Prize laureates, Roger Sperry and Rita Levi Montalcini. The expression of a desire by Levi Montalcini on the occasion of the *Laureat ad Honorem* conferred on her by the University of Trieste in 1991 to formulate a Carta of Human Duties as a necessary counterpart of the UDHR, came to pass when in 1993 the International Council of Human Duties was founded. From then on, many scientists, scholars, Nobel Prize winners and others worked together to support the dissemination of the message of the Carta of Human Duties. In 1997, this group obtained the special status of non-governmental organisation with special consultative status with ECOSOC.

The International Council of Human Duties took the position that whereas the UDHR represented one of the greatest advances of the twentieth century it failed to address human duties and responsibilities as necessary counterparts of those rights.[222] Recognition of and respect for human rights demands the acceptance of specific duties in order to assure an adequate quality of life for all people and the maintenance of a sustainable environment for future generations.[223]

[222] International Council on Human Rights Policy (n 67).
[223] See the Preamble to the Declaration.

7.5.2.2. Specific human duties and responsibilities advocated in the *Carta* of Human Duties: A Code of Ethics and Shared Responsibilities

In its Carta of Human Duties: A Code of Ethics and Shared Responsibilities, the Council listed twelve duties of every human being.[224] These are the duty to; respect human dignity, as well as ethnic cultural and religious diversity; the duty to work against racial injustice and all forms of discrimination of women and the abuse and exploitation of children; to protect nature from pollution and abuse; to work for improvement in the quality of life of the aged and the disabled; to respect human life and condemn the sale of human beings or parts of living human body; to support efforts to improve the life of people suffering from hunger, misery, disease or unemployment; to promote effective voluntary family planning in order to regulate world population growth; to support actions for an equitable distribution of world resources; to avoid energy wastes and work for the reduction in the use of fossil fuels etc.; to protect nature from pollution; conserve natural resources and the restoration of degraded environments; to respect and preserve genetic diversity of living organisms etc.; to eliminate the causes of environmental destruction; to work for the maintenance of world peace, condemn war, terrorism and all other hostile activities by calling for decreased military spending etc.

It is evident that the duties suggested in the *Carta* of Duties already exist in other human rights instruments as correlatives to rights or as standalone duties. There is, therefore, no value added to the overall discourse on duties of the individual by this effort. The significance of this document in the general assessment of the concept of individuals' duties and responsibilities in this discussion lies in this very weakness of the *Carta* of Duties to support the argument that the efforts deployed in the advocacy for a duties and responsibilities declaration may, after all, be wasted.

[224]The Trieste Declaration of Human Duties: A Code of Ethics for shared responsibilities <www.botany.utexas.edu/facstaff//facpages/mbrown/.../trieste.htm> accessed 12 December 2014.

7.5.3. The Commission on Global Governance

7.5.3.1. Background and purpose

The Commission on Global Governance is yet another body that called for a global ethic. The Commission, initiated by former West German Chancellor Willy Brandt, succeeded several international initiatives that dealt with issues of development, disarmament and the environment.[225] This body was established in 1992

> ... in the belief that international developments had created a unique opportunity for strengthening global co-operation to meet the challenge of securing peace, achieving sustainable development, and universalising democracy.

The Commission, like the Parliament of the World's Religions, wished to complement human rights standards. It felt that documents like the UDHR needed to be supplemented for two reasons, namely; first, that as conceived at that time, rights were almost entirely defined in terms of the relationship between people and governments. The Commission believed that it was then important to begin to think of rights in broader terms by recognising that governments are only one source of threats to human rights and, at the same time, that more and more often, government action alone would not be sufficient to protect many human rights. This means that all citizens, as individuals and as members of different private groups and associations, should accept the obligation to recognise and help protect the rights of others. Second, that rights needed to be joined with responsibilities. The tendency to emphasise rights while forgetting responsibilities had deleterious consequences. Over the long run, rights could only be preserved if they were exercised responsibly and with due respect for the reciprocal rights of other people.

In 1995, it published a report entitled 'Our Global Neighbourhood' which spoke of uniting in support of a global ethic of common rights, shared global responsibility, calling on the

[225] The commission was initiated by former West German Chancellor Willy Brandt, who a decade earlier had chaired the Independent Commission on International Development Issues. In January 1990, he met with the members of that Commission and individuals who had served on the Independent Commission on Disarmament and Security Issues (the Palme Commission), the World Commission on Environment and Development (the Brundtland Commission), and the South Commission(chaired by Julius Nyerere). This meeting led eventually to the establishment in 1993 of the Commission on Global Governance chaired by Ingvar Carlsson (former Prime Minister of Sweden) and Shridath Ramphal (former Commonwealth Secretary-General).

international community for the purpose of uniting in support of a global ethic of common rights, and shared global responsibilities. In the view of the Commission, such an ethic – reinforcing the fundamental rights that are already part of the fabric of international norms – would provide the moral foundations for constructing a more effective system of global governance.

In the Commission's Report, a more relevant reference to duties and responsibilities is set out in chapter two entitled 'Values for a Global Neighbourhood.' This initiative proceeded from the premise that the commitment to care for others, to the highest quality of behaviour among human beings, is for many cultures embodied in the metaphor of being a 'good neighbour.' It acknowledges that the UN Charter, the UDHR, the two covenants on civil and political rights and on economic, social, and cultural rights, regional human rights charters and other instruments, provide an important starting point for a global ethic, but they need to be supplemented. This supplementation should occur from two fronts. To begin with, it is important to realise that the present conception of human rights defines rights almost entirely in terms of the relationship between people and governments. The Commission's view was that it was now important to begin to think of rights in broader terms by recognising that governments are only one source of threats to human rights and, at the same time, that more and more often, government action alone will not be sufficient to protect many human rights. This means that all citizens, as individuals and as members of different private groups and associations, should accept the obligation to recognise and help protect the rights of others.

Second, rights need to be joined with responsibilities. The tendency to emphasise rights while forgetting responsibilities has, according the Commission, deleterious consequences.[226] Over the long run, rights can only be preserved if they are exercised responsibly and with due respect for the reciprocal rights of others. It was on this basis that the Commission urged the international community to unite in support of a global ethic of common rights and shared responsibilities. In the view of the Commission, such an ethic - reinforcing the fundamental rights that were already part of the fabric of international norms - would provide the moral foundation for constructing a more effective system of global governance. It should encompass the rights of all people to: a

[226] See for example, A R Chapman, 'Reintegrating Rights and Responsibilities: Towards a New Human Rights Paradigm' in (K W Hunter & T C Mack (eds) *International Rights and Responsibility for the Future* (1996) 3. See also the Report of the Commission on Global Governance entitled 'Our Global Neighbourhood' (1995).

secure life, equitable treatment, an opportunity to earn a fair living and provide for their own welfare, the definition and preservation of their differences through peaceful means, participation in governance at all levels, free and fair petition for redress of gross injustices, equal access to information, and equal access to the global commons.

7.5.3.2. Specific individual responsibilities proposed in the report 'Our Global Neighbourhood'

The Commission on Global Governance proposed a list of duties, stating that individuals have a responsibility to: contribute to the common good; consider the impact of their actions on the security and welfare of others; promote equity, including gender equity; protect the interests of future generations by pursuing sustainable development and safeguarding the global commons; preserve humanity's cultural and intellectual heritage; be active participants in governance; and work to eliminate corruption.

This list of rights and responsibilities constitutes the minimum basis for progress in building a more civil global society. In the final analysis, each individual and institution will have to decide exactly what is required to live up to these responsibilities. The Commission hopes that over time, these principles could be embodied in a more binding international document - a global Charter of Civil Society - that could provide a basis for all to agree on rules that should govern the global neighbourhood.

To this researcher, it is obvious that most of the duties suggested here introduce concepts that are vague in terms of meaning or as to their scope. Safeguarding the global commons and preserving cultural and intellectual heritage are concepts that are intrinsically less amenable to precise definition.

7.5.4 The Inter Action Council

7.5.4.1. Background and purpose

The Inter Action Council published its 'Universal Declaration of Human Responsibilities' in 1997. The organisation was itself formed way back in 1983. It originally comprised some thirty former heads of government or state from all continents and different political orientations formed at the initiative of Takeo Fukuda (former Prime Minister of Japan) and Helmut Schmidt (former Chancellor of the Federal Republic of Germany).[227] This group believed that a world in which everyone demands rights but does not accept responsibilities will be unequal and even dangerous and dissonant. Their enduring goal is to balance human rights with human responsibilities. Following its formation, members of this movement began to explore the possibility of establishing a common ethical standard. Consequent to its meetings with several groups, the Inter Action Council was stimulated that some ethical standards traversed all political and religious beliefs.[228] It was drafted by Hans Küng and a group of experts.[229]Chairperson Helmut Schmidt explained that:

> [t]he initiative to draft a Universal Declaration of Human Responsibilities is not only a way of balancing freedom with responsibility, but also a means of reconciling ideologies and political views that were deemed antagonistic in the past. The basic premise, then, should be that humans deserve the greatest possible amount of freedom, but also should develop their sense of responsibility to its fullest in order to correctly administer their freedom.[230]

In September 1997, the Inter Action Council wrote to all heads of state and government, and to the UN Secretary-General, asking them to support adoption by the UN General Assembly of a draft Universal Declaration of Human Responsibilities that the Inter Action Council had prepared. Their intention was to have it adopted by the UN General Assembly in 1998, the year of the 50th anniversary of the UDHR. In its letter, the group wrote that:

[227]See for current and past members http://www.interactioncouncil.org/associate-members.
[228]See generally, Malcolm Fraser, 'A Declaration on Human Responsibilities?' http://www.interactioncouncil.org
[229]Y Kim, *A Common Framework for the Ethics of the 21st Century* (UNESCO Division of Philosophy and Ethics Paris 1999) <http://unesdoc.unesco.org/images/0011/001176/117622Eo.pdf> accessed 13 January 2014).
[230]A Universal Declaration of Human Responsibilities: Report on the Conclusions and Recommendations by a High-Level Expert Group Meeting, chaired by Helmut Schmidt (1997).

> [A]t a time when people talk about the danger of a clash between civilisations, it is urgently desirable to make people understand that not only do humans deserve the greatest possible degree of freedom, but they should also develop their sense of responsibility to its fullest in order to correctly use their freedom. The proposed Universal Declaration of Human Responsibilities is not a replacement of the Universal Declaration of Human Rights but is designed to supplement it.

As Saul notes, the initial intent to have the Universal Declaration of Human Responsibilities adopted by the UN was modified to merely have it discussed within the UN.[231] The draft declaration was indeed discussed in the UNESCO and the UN Human Rights Commission, with a view to potential adoption by the UN General Assembly. It did not, however, receive sufficient state support to pass the necessary threshold to proceed to a formal vote. Since then, it has never been sponsored to the UN by a member country, although 'a number of governments have indicated willingness to sponsor [it] in the UN if a major Western government is involved, but this willingness has not been forthcoming.'[232]

The draft had 19 articles and was explicitly proposed as a supplement to the UDHR. The Chairperson of further explained that:

> Our conviction is that, as we are approaching the 50th anniversary of the Universal Declaration of Human Rights 1948), it is now time to talk about human responsibilities. In a world transformed by globalisation, common ethical standards as a basis for living together have become an imperative, not only for individual behaviour but also for corporations, political authorities and nations. The challenges posed by globalisation require an effort quite comparable to that of 1948. The Universal Declaration of Human Rights reflects the philosophical and cultural background of its western drafters. But all over the world, it is necessary to balance the notions of freedom and of responsibility. At

[231] Saul (n 11); see also Martinez, Miguel Alfonso 'Promotion and Protection of Human Rights: Human Rights and Human Responsibilities' (E/CN.4/2002/107) <http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2002.107.En?Opendocument>accessed 12 January 2013.
[232] Saul (n 11).

a time when people talk about the danger of a clash between civilisations, it is urgently desirable to make people understand that not only do humans deserve the greatest possible degree of freedom, but they should also develop their sense of responsibility to its fullest in order to correctly use their freedom. The proposed Universal Declaration of Human Responsibilities is not a replacement of the Universal Declaration of Human Rights but is designed to supplement it.

7.5.4.2. Specific individual responsibilities proposed in the Universal Declaration of Human Responsibilities

The Declaration's 19 articles were divided into six main topics namely: (a) fundamental principles of humanity (4 articles); (b) non-violence and respect for life (3 articles); (c) justice and solidarity (4 articles); truthfulness and tolerance (4 articles); and, mutual respect and partnership (3 articles). These are the responsibility: (i) to treat all people in a humane way, (ii) not to lend support to any form of inhuman behaviour; all people have a responsibility to strive for the dignity and self-esteem of others, (iii) to promote good and to avoid evil in all things, (iv) to accept responsibility to each and all, to families and communities, to races, nations, and religions in a spirit of solidarity; not to do to others what one would not wish to be done to oneself, (v) to respect life; not to injure, to torture or kill another human person, (vi) to act in a peaceful, non-violent way, (vii) to protect the air, water and soil of the earth for the sake of present inhabitants and future generations, (viii) given the necessary tools, to make serious efforts to overcome poverty, malnutrition, ignorance and inequalities, (ix) to promote sustainable development all over the world in order to assure dignity, freedom, security and justice for all people, (x) to develop talents through diligent endeavour; to lend support to the needy, the disadvantaged, the disabled and the victims of discrimination, (xi) to use all property and wealth in accordance with justice and for the advancement of the human race, (xii) to speak and act truthfully; not to tell lies; to respect the right to privacy and to personal and professional confidentiality, (xiii) in special cases, to abide by professional and other codes of ethics but subject to general standards such as those of truthfulness and fairness, (xiv) to use freedom of the media to inform the public and to criticize institutions of society and governmental actions, (xv) to report accurately and truthfully and avoid sensational reporting, (xvi) to show respect to one

another and understanding in their partnership and not to subject other persons to sexual exploitation or dependence. Sexual partners have the responsibility to care for each other's well-being, (xvii) to recognise marriage in all its cultural and religious varieties, as requiring love, loyalty and forgiveness, (xviii) to sensible family planning on the part of every couple and (xix) not to exploit or abuse children.

As with many human rights instruments, the final article says that no one can take any one of the responsibilities out of context and use it as an excuse to violate other responsibilities in the Declaration, and that every single person, group, organization and government is responsible for making the Declaration work. Later, its founding author stated that the initial attempt was unsuccessful due to opposition by human rights advocates. This notwithstanding, the notion that rights and responsibilities are mutually reinforcing has found greater acceptance.[233]

As is the case with the other efforts, some of the duties structured by the Inter Action Council are rather vague and, quite frankly, unattainable. As an aside, it is noteworthy that, although the UN did not adopt the 1997 Inter Action Council's request for a declaration about responsible human beings, the latter's declaration prompted the UN to complete and approve a different declaration dealing with the right and responsibility of people to be able to promote and protect human rights.[234] Its short title is the Declaration on Human Rights Defenders. Although deliberations on this declaration began in 1984, it was not released until December 1998, timed to coincide with the 50th celebration of the UDHR. The declaration reframes the issue, arguing that human rights organizations have a responsibility to defend and promote human rights.[235]

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[233] Helmut Schmidt, 'Keynote Speech: Present State of the World'<http://interactioncouncil.org/keynote-speech-present-state-world-0> accessed 12 January 2013.

[234] United Nations, 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (A/RES/53/144)< http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En>accessed 12 January 2013; United Nations Office of the High Commissioner for Human Rights. 2007. Special Rapporteur on the Situation of Human Rights Defenders. http://www2.ohchr.org/english/issues/defenders/declaration.htm Accessed May 18, 2011.)

[235] JAnthony, (2007)Universal Declaration of Responsibilities of Human Intercourse *Laetus in Praesens*<http://www.laetusinpraesens.org/docs00s/respon.php > accessed January 12, 2013

7.5.5. UNESCO Sponsored Valencia Declaration (1998)

7.5.5.1. Background and purpose

The Universal Declaration of Human Duties and Responsibilities (DHDR) was commissioned by UNESCO, and eventually was coined 'the Valencia Declaration.' This 1998 initiative was developed and adopted by a high-level group chaired by Richard Goldstone[236] under the auspices of UNESCO in the City of Valencia, Spain. As evidence of the seriousness attached to this declaration, more than 100 nations were involved in its drafting. As did the Inter Action Council, the advocates of this Declaration also arranged for the release of this declaration to coincide with the fiftieth celebration of the UDHR, and to commemorate the arrival of the new millennium. They presented the declaration to UNESCO in April 1999.[237] In November 2008, Goldstone was quoted as saying the document never went anywhere.[238]

A year later, in November 2009, the Helsinki España-Human Dimension NGO (based in Madrid, Spain) held a conference in New York with a focus on celebrating the 10th anniversary of the Valencia Declaration.[239] International sessions were held, intent on resubmitting the declaration to the UN in 2010 as an international reference document. The high-level working group in Valencia tendered a comprehensive text consisting of a preamble, twelve chapters and forty articles. The text spells out in great detail the duties and responsibilities of different players in different sectors of the international community.[240] The drafters of the declaration believe that people have an abiding responsibility to promote and protect the human family by recognizing the contributions of all cultures, traditions and civilizations. Individuals have responsibilities and duties towards their communities for the security of all humankind.

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[236]R Goldstone, (1998a) 'Declaration of Responsibilities and Human Duties' Ottawa ON: Human Rights Research and Education Centre <http://globalization.icaap.org/content/v2.2/declare.html> accessed January 12 2013; Goldstone (n 13).

[237]Y Kim 'Philosophy and the Prospects for a Universal Ethics' in Max Stackhouse and Peter Paris (eds), *God and Globalization* (Trinity Press International, Harrisburg PA 2000).

[238]C Ireland, 'Rights Champion Goldstone Speaks' *Harvard Gazette Online* 13 November 2008 <http://news.harvard.edu/gazette/story/2008/11/rights-champion-goldstone-speaks/ >accessed 12 June 2014.

[239]Helsinki-España Human Dimension 2010 A Euro-American Project 2008-2000 Madrid, Spain<http://www.humandimension.net/useruploads/files/euro-american_project.pdf >accessed January 12, 2013.)

[240]Kim (n 98).

The Valencia Declaration defines a duty as 'an ethical or moral obligation and responsibility' and responsibility as 'an obligation that is legally binding under existing international law.'[241] Viewed against the difficulties implicit in the definition and use distinctly and exclusively of the terms 'duty,' responsibility' and 'obligation' as discussed in Chapter Four of this work, the definition in the Valencia Declaration is clearly of limited significance. It should be understood to apply in the context of the Declaration itself. It may be inapplicable in other situations where the distinction between obligation, duty and responsibility is so blurred as to make it unintelligible to attempt to define it.

The titles of the twelve chapters purposely mirror the rights housed in the UDHR, proposing to make explicit the duties and responsibilities that are implicit in the UDHR. It does not contain any responsibilities converse to people having the right to be recognised as a person before the law (UDHR article 6) nor to being able to claim, move around or change nationalities (UDHR articles 13 and 15). Otherwise, there is fairly strong congruency between the two declarations.

It states in its preamble that so many years after the adoption of the UDHR, and subsequent to the adoption of other human rights instruments, disregard and gross violations of human rights and fundamental freedoms continue to outrage the conscience of humankind. It emphasised that the assumption of the duties and responsibilities implicit in human rights and fundamental freedoms rests upon all members of the global community, including States, international, regional and sub-regional inter-governmental organisations, the private and public sectors, non-governmental organisations, citizen associations, other representatives of civil society as well as all individual members of the human family. After the adoption of the text of the Declaration of Human Duties and Responsibilities, Chairman, Justice Goldstone, was requested to present it to the Director-General of UNESCO. The Declaration imposes duties and obligations on members of the global community and individuals. It defined the global community widely as:

> States - including their governments, legislatures and judicial institutions -, international, regional and sub-regional intergovernmental organisations, non-governmental organisations, public and private sector corporations, including transnational

[241] Goldstone (n 13) 29.

corporations, other entities of civil society, peoples, communities and individuals taken as a collective.

7.5.5.2. Specific duties and responsibilities in the Valencia Declaration

Most of the articles of the forty one chapters of the Declaration impose duties and responsibilities on states and entities other than individuals. It is important to turn to some of the provisions that impose duties on individuals specifically, for these are the primary concern of this discourse.

In article 2(7) the Declaration states that as the holders of human rights and fundamental freedoms, all individuals, peoples and communities have, in the exercise of their rights and freedoms, the duty and responsibility to respect those of others, and a duty to strive for the promotion and observance thereof. In article 3(3) individuals and non-state actors have a duty and a responsibility to respect life. They also have a duty to take reasonable steps to help others whose lives are threatened, or who are in extreme distress or need. Article 5 (4) imposes a duty and responsibility on states and non-state actors (who include individuals) to cease the development, improvement, production, procurement, proliferation, and use of all chemical and biological weapons and other weapons of mass destruction, and shall destroy all such weapons under strict international controls. Furthermore under article 5(9) individuals and non-State actors have a duty and a responsibility to cease any participation or involvement in the illegal trade of conventional weapons, and shall strictly comply with national and international laws regulating the development, production, possession, procurement, stockpiling, trade and use of conventional weapons. Article 7 (1) talks of a duty and a responsibility on the part of parties to an armed conflict to respect international humanitarian law unconditionally and in all circumstances, whether in the course of an international or an internal armed conflict. In particular, government forces and insurgents, military or paramilitary forces, have an obligation to refrain from committing (a) acts of genocide; (b) crimes against humanity and (c) war crimes. Furthermore parties to an armed conflict have a duty and a responsibility to authorise humanitarian relief for persons in need, and to grant humanitarian relief organisations access to affected areas and to ensure the safety of their personnel. Article 12 (7) creates a duty for individual researchers and scientists at all times to conduct their research in accordance with

strict ethical practices and to inform the public of any unethical or potentially dangerous research of which they become aware.

In article 14 (4) individuals and non-state actors have a duty and responsibility not to condone, support or participate in any manner in the commission of crime, and where appropriate, have a duty and responsibility to co-operate with and assist governments or international criminal tribunals in the prevention, investigation, or prosecution of crime. Under article 16 (4) individuals have a duty to participate in public affairs. Under article 17 (2), the media and journalists have a duty to report honestly and accurately and to avoid incitement of racial, ethnic or religious violence or hatred. Article 23 (2) imposes on individuals and non-state actors have a duty and a responsibility not to condone, support or in any manner participate in practices of slavery or slavery-like practices while under article 24 (2) individuals and non-state actors a duty and a responsibility not to condone, support or participate in any manner in the commission of acts of torture, cruel and inhumane and degrading treatment or punishment. Article 25(2) states that individuals and non-state actors have a duty and a responsibility not to condone, support or participate in any manner in the commission of enforced disappearances. Article 33 (3) states that parents, or as the case may be, legal guardians have the primary responsibility for the care, well-being and healthy upbringing of their children and have a duty and a responsibility to promote the full and harmonious development of their children. Article 37(5) Academic institutions, teachers and academics have a duty to promote and develop human rights education and awareness, as well as education designed to promote and develop a democratic and peaceful culture based on respect for racial, religious, ethnic and cultural diversity. In part 7.6 (below) of this chapter some similarities between African Charter duties and those contemplated by the Valencia Declaration are discusses in an effort to show that there may well have been something to learn about duties and responsibilities from the African human rights system.

Article 41 is the non-derogation clause and effectively states that nothing in the declaration shall be interpreted in a manner that impairs or restricts the rights set out in the UDHR and other international and regional human rights instruments, nor shall any derogation from or restriction of any human right or fundamental freedom existing in any international human rights instrument or domestic law be admitted on the pretext that the present draft declaration does not recognise such rights or that it recognises them to a lesser extent.

What is striking about all these duties and responsibilities is that they introduce virtually nothing new to the human rights debate. All the duties and responsibilities worth their name already exist in the present human rights framework or in international law generally. For example, the development and proliferation and use of all chemical and biological weapons is already proscribe and controlled through multilateral treaties using bodies such as the UN, the International Atomic Energy Agency. The duty to respect humanitarian law is the subject of an expanded body of law, including the Geneva Conventions of 1949 and their Additional Protocols, while the Genocide Convention of 1948 and a plethora of other international human rights treaties proscribe acts of genocide. Likewise the duty not to commit international crime or engage in slavery-like practices is already clearly outlawed by existing human rights treaties. Other duties are mere theoretical abstracts incapable of precise definition. Duties such as that of taking reasonable steps to help others whose lives are threatened, or who are in extreme distress, and that of developing a democratic and peaceful culture based on respect for racial, religious, ethnic and cultural diversity, fall in this latter classification.

7.5.6. United Nations Human Rights Commission Declaration (2003)

7.5.6.1. Background and purpose

In the last few years of its existence before it was replaced the Human Rights Council in 2006, the UN Human Rights Commission (UNHRC) gave increased attention to the role of individual duties and human rights. The Commission asked its Sub-Commission on the Promotion and Protection of Human Rights to consider the topic of human rights and human responsibilities. To that end, in 2001, Miguel Alfonso Martinez was appointed as Special Rapporteur. His work culminated in a final report and a pre-draft Declaration on Human Social Responsibilities. At its last full meeting in 2005, the Human Rights Commission adopted a request that Martinez prepare a new version of the declaration for its re-consideration. But, this revision was not supported at the subsequent 2005 UN Economic and Social Council meeting (ECOSOC), where it was rejected by a narrow margin of two votes. Among the countries that voted against the pre-draft declaration were Canada, the United States, the European Union and Japan (Northern countries) as well as Brazil, Costa Rico, Mexico and Turkey (Southern countries). Some sense of their

respective positions on the pre-draft declaration is available at a 2005 United Nations report.[242] The Human Rights Council, constituted in 2006, has not yet considered the declaration.[243] Knox reports that the declaration continues to receive support from several countries, however, and 'it seems likely that its proponents will continue to pursue the adoption of its principles in one form or another.'[244]

The United Nations Declaration of Human Social Responsibilities is premised on principles of social ethics and morality. Martinez refers to 'the need to find a solid balance between the rights of the individual and his/her social duties or responsibilities.'[245]

7.5.6.2. Specific duties and responsibilities provisions in the Declaration of Human Social Responsibilities

The declaration has 29 articles. Three of these relate to governments' role.[246] Under them, governments are charged with creating the international social order within which responsibilities can be enacted; with ensuring the development of Southern countries, and with not supporting initiatives that contravene the responsibilities set out in the Declaration. No article relates specifically to the obligations of corporations, except for an inferred reference in article 20 - do not abuse economic power. Specific mention is made of the media's responsibility[247] and of the supra-responsibility of those involved in human rights work (two articles). There are seven generic articles, with two referring to the inability to opt out of being responsible and to not being able to have rights without responsibilities. Notions such as globalization, the common good and families as democratic units are mentioned in these articles. The remaining 17 articles are directed to every person. People are tasked to take actions that ensure that rights can be

[242]United Nations, 2005a A Compilation of the Essential Aspects of Replies Received on the Pre-draft Declaration of Human Social Responsibilities (E/CN.4/2005/99)http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/106/60/PDF/G0510660.pdf?OpenElement Accessed January 12, 2013.
[243] Knox (n 11).
[244] Ibid.
[245]A M Martinez, *Promotion and Protection of Human Rights: Human Rights and Responsibilities* (E/CN.4/2003/10 2003United Nations <http//www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbil)/E.CN.4.2003.105.En?Opendocment> accessed 14 January 2014.
[246] Arts 7 8 & 10.
[247] Art 17 provides that 'every person linked to the mass media has the duty to provide information with due objectivity and discretion based on sound reasoning, the verified truth of the information given and absolute fidelity to what is said by the source consulted about it'.

respected. They are charged to take their own initiatives and to cooperate with state authorities as each promotes, brings into effect and protects human rights. Individuals are said to have a duty to make sure a principled human rights process is followed. All are charged with the responsibility of creating international peace, supporting the common good, protecting against terrorism, and being friendly and brotherly with others. They are tasked with intergenerational ecological sustainability; with respecting religious doctrines and with being politically involved in their community. People have a duty to be responsible with their economic power (to ensure human solidarity and progress) and to protect and contribute to the vulnerable in society. People are to strive for a conflict free, harmonious coexistence and to foster and protect their cultural heritage. They are supposed to find gainful employment (to work as permitted by their abilities) and to strive to reach their full potential. Finally, people have a duty to respect their partner and to provide for, and meet the basic needs of, their family, as the basic democratic unit in society.

Besides referring to duties and responsibilities that already exist in other international instruments, the declaration, like the others of its kind already considered, introduces hard to define concepts such as the 'common good', being 'friendly and brotherly' with others, etc.

7.6. THE RELEVANCE OF THE AFRICAN DUTIES EXPERIENCE TO THE GLOBAL MOVEMENT ON DUTIES

It was shown in Chapters Three and Six that the uniqueness of the African human rights system lies, to a certain extent, in its recognition and elaboration of the individuals' duties in the continent's key human rights documents in a manner unprecedented before. As Edem Kodjo puts it, in terms of individual duties, the African Charter is the only instrument that strives to enumerate them distinctly.[248]

The African Charter has existed for over three decades now. The regional treaty body created to oversee implementation of the Charter, the African Commission on Human and Peoples' Rights, has been interpreting the Charter provisions since July 1986. The African Commission was recently joined in this regard by the African Court. There is also the African Committee of

[248] E Kodjo, 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 271.

Experts on the Rights and Welfare of the Child in Africa whose mandate is to superintend the implementation of the African Children's Charter. Both Charters contain an extensive elaboration of duties and responsibilities of the individual. In Chapter Six, the individual duties in the African Charter were identified to be fifteen in all, namely; (i) the duty to exercises one's rights and freedoms with due regard to the rights of others, collective security, morality and common interest; (ii) the duty not to discriminate; (iii) the duty to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; (iv) the duty to preserve the harmonious development, cohesion and respect of the family; (v) duty to respect parents at all times; (iv) duty to maintain parents in case of need; (vii) duty to serve the national community by placing one's physical and intellectual abilities at its service; (viii) duty not to compromise the security of the State; (ix) duty to preserve and strengthen social and national solidarity, particularly when the latter is threatened; (x) duty to preserve and strengthen the national independence and the territorial integrity of the country; (xi) duty to contribute to the defence of the nation in accordance with the law; (xii) duty to work to the best of one's abilities and competence; (xiii) duty to pay taxes imposed by law in the interest of the society; (xiv) duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society; and (xv) duty to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity. Those in the African Children's Charter[249] as set out in article 31 and are held by the African child towards the family and society, the state, other legally recognised communities and the international community. These duties are to: (a) work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need; to serve his national community by placing his physical and intellectual abilities at its service; (b) preserve and strengthen social and national solidarity; (c) preserve and strengthen African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of his country and (d) contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

[249] OAU Doc CAB/LEG/24.9/49 (1990), entered into force November 1999.

The general weaknesses as regards the normative content of these duties were identified and discussed in Chapter Six of this work. While, as was alluded to already,[250]the individual duties provisions have been hailed as innovative, they have also been severely criticised.[251] There are serious misgivings that these duties provisions translate into anything of much practical value. A perusal of the individual duties and responsibilities proposed in the draft declarations reveals significant similarities in terms of their nature and their formulation. The International Council of Human Duties in its Carta of Human Duties: A Code of Ethics and Shared Responsibilities, lists twelve duties of every human being to include the duty to respect human dignity, as well as ethnic cultural and religious diversity; to work against racial injustice and all forms of discrimination against women and the abuse and exploitation of children; to protect nature from pollution and abuse, to work for improvement in the quality of life of the aged and the disabled; to respect human life and condemn the sale of human beings or parts of living human body; to support efforts to improve the life of people suffering from hunger, misery, disease or unemployment; to promote effective voluntary family planning in order to regulate world population growth; to support actions for an equitable distribution of world resources; to avoid energy wastes and work for the reduction in the use of fossil fuels etc.; to protect nature from pollution conserve natural resources and the restoration of degraded environments; to respect and preserve genetic diversity of living organisms etc.; to eliminate the causes of environmental destruction; to work for the maintenance of world peace, condemn war, terrorism and all other hostile activities by calling for decreased military spending etc.

The Commission on Global Governance, also proposed a list of individual responsibilities including those of contributing to the common good; considering the impact of individuals' actions on the security and welfare of others; promoting equity, including gender equity; protecting the interests of future generations by pursuing sustainable development and safeguarding the global commons; preserving humanity's cultural and intellectual heritage; being active participants in governance; and working to eliminate corruption.

[250] Ch 3 & 6.
[251] See Ch 6.

The Inter Action Council in its Universal Declaration of Human Responsibilities proposed individual responsibilities which include injunctions to treat all people humanely, to promote good and avoid evil, and to effectuate the Golden Rule (do unto others as you would have done to you), to respect life and intergenerational and ecological protection, to behave with integrity, honesty and fairness and to lend support to the disadvantaged. Truthfulness and tolerance, embrace the principles of privacy, confidentiality, honesty, and a respect for diversity. These duties are to all people, politicians, businessmen, scientists, professionals, media, and to all religions. In addition, the Inter Action draft places special duties on the media (to report accurately and fairly), on those wielding economic and political power (which ought not to be an instrument of domination), on religious leaders (who should foster tolerance and mutual respect), and on professionals such as doctors, lawyers and civil servants who are all subject to ethical standards. Also, the draft lists the duties on marriage partners towards each other and to their children.

The Valencia Declaration itemises various individual duties and responsibilities including the duty and responsibility to respect those of others, and a duty to strive for the promotion and observance thereof; a duty and a responsibility to respect life; to take reasonable steps to help others whose lives are threatened, or who are in extreme distress or need; to cease the development, improvement, production, procurement, proliferation, and use of all chemical and biological weapons and other weapons of mass destruction; to cease any participation or involvement in the illegal trade of conventional weapons, and to strictly comply with national and international laws regulating the development, production, possession, procurement, stockpiling, trade and use of conventional weapons; to respect international humanitarian law unconditionally; to refrain from committing (a) acts of genocide; (b) crimes against humanity and (c) war crimes; to (for researchers and scientists) at all times to conduct their research in accordance with strict ethical practices and to inform the public of any unethical or potentially dangerous research of which they become aware; not to condone, support or participate in any manner in the commission of crime, and where appropriate, have a duty and responsibility to co-operate with and assist governments or international criminal tribunals in the prevention, investigation, or prosecution of crime; to participate in public affairs; to (in the case of the media and journalists) to report honestly and accurately and to avoid incitement of racial, ethnic or

religious violence or hatred; not to condone, support or participate in any manner in the commission of acts of torture, cruel and inhumane and degrading treatment or punishment or enforced disappearances; to (for parents or legal guardians) to care for and ensure the well-being and healthy upbringing of their children and to promote the full and harmonious development of their children. Academic institutions, teachers and academics are enjoined to promote and develop human rights education and awareness, as well as education designed to promote and develop a democratic and peaceful culture based on respect for racial, religious, ethnic and cultural diversity.

United Nations Declaration of Human Social Responsibilities equally imposes duties on individuals including the responsibilities to take actions that ensure that rights are respected; to cooperate with State authorities as each promotes, brings into effect and protects human rights; to ensure international peace, support the common good, against terrorism, and being friendly and brotherly with others; ensuring intergenerational ecological sustainability; respecting religious doctrines and with being politically involved in their community; to protect and contribute to the vulnerable in society; to strive for a conflict free, harmonious coexistence and to foster and protect their cultural heritage; to find gainful employment and to strive to reach their full potential; to respect their partner and to provide for, and meet the basic needs of, their family, as the basic democratic unit in society.[252]

Viewed in the backdrop of the general purpose of individuals' duties and responsibilities in the African Charter and the African Children's Charter on one hand and those in the draft declarations on the other, two observations must be made. First, some of the duties covered in the draft declarations are not covered in the African Charter and the African Children's Charter. These include the responsibility of condemning the sale of human beings or parts of living human body; promoting effective voluntary family planning in order to regulate world population growth; avoiding energy wastes and working for the reduction in the use of fossil fuels; respecting and preserving genetic diversity of living organisms; ensuring intergenerational ecological sustainability; condemning war, terrorism and all other hostile activities by calling for decreased military spending. Second, some duties of the individual specified in the African

[252] Martinez (n 106).

Charter and the African Children's Charter have found no mention or reference whatsoever in any of the declarations. These include what one may call 'the Africa specific duties' such as the duties under article 29(7) of the African Charter and in article 31(c) of the African Children's Charter for the individual '[t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society' and the duty set out in article 29(8) of the African Charter requiring the individual to contribute to the best of his abilities at all times and at all levels to the promotion and achievement of African unity. Other duties in the African Charter which do not find expression in the draft declarations are those set out in article 29 (4) and (5) and 31 (b) and (d) of the African Children's Charter requiring an individual to serve his country and nation by working towards its unity, solidarity and maintaining its independence and 'to preserve and strengthen social and national solidarity, particularly when the latter is threatened.'

Even where the same duties are mentioned in the African Charter and the African Children's Charter in any of the draft declarations, the language used is not necessarily identical. In some instances, however, the wording and the normative content of the duty is essentially the same. On balance the formulation of duties in the draft declarations and those in the African Charter and the African Children's Charter have close similarities. The criticisms that go to the formulation of the duties under the African human rights system are by and large, valid in regard to the duties and responsibilities under the draft declarations too. This, however, should be subject to the caveat that the two Charters in Africa are treaties intended to be legally binding while the draft declarations are mere declarations intended to have non-binding effect though they are intended to have ethical and moral persuasion. A few illustrations will put this into perspective. The African Charter provides in article 27 for the 'the duty to exercises one's rights and freedoms with due regard to the rights of others, collective security, morality and common interest.' A similar duty is replicated in some of the declarations subject of this study, notably that by the Commission on Global Governance and the United Nations Declaration of Human Social Responsibilities. Treating other people humanely and helping people in need are some of the responsibilities that commonly run through the draft declarations. These, and many other articles in the draft declarations, have a very general note; a commonplace tone that suggests

pleasant neighbourliness, and no more. They translate into more or less a general code of conduct, devoid of any effect whatsoever, thus making it improbable for people at a very personal level to feel incentivised or otherwise motivated to observe them. Furthermore, most of these individuals' duties and responsibilities are clearly those that would, in Ross' ethical theory as discussed in Chapter Four, be termed as *prima facie* duties of beneficence and malfeasance[253] and intended to be discharged purely out of goodwill.[254]

Of course, some responsibilities in the draft declarations, like some in the African Charter and the African Children's Charter are not merely supererogatory or beneficent. They are capable of realisation through enforcement if that were desired, by taking additional steps. These include the responsibility to non-discrimination, not to torture or assist in the commission of crimes, to support one's children and to pay taxes imposed by law in the interest of the society. But these duties, as is the case with those in the African Charter and the African Children's Charter, will require additional steps to be taken to ensure their realisation, namely first, domestication and second, enforcement. By themselves, they amount to nothing more than statements of lofty ideals or wish lists.

Some of the responsibilities set out in the draft declarations do not portray a clear message as to what they require of the individual to do, or not to do, to conform to them. For example, in its Carta of Human Duties: A Code of Ethics and Shared Responsibilities, the duties to work for improvement in the quality of life of the aged and the disabled; to condemn the sale of human beings or parts of living human body; to support efforts to improve the life of people suffering from hunger, misery, disease or unemployment; to support actions for an equitable distribution of world resources, do not have much to impel an individual to heed their call. There is no motivation whatsoever that an ordinary individual crashed by the heavy burdens of personal economic survival will treat with any urgency, priority or even significance, the undefined actions for an equitable distribution of world resources, nor will the individual feel moved to rise to condemn the sale of human beings or parts of living human body. It is impossible to measure peoples' likely response to any such declaration which does not in any case call on states to enact

[253] P Stratton-Lake (ed), W D Ross, *The Right and the Good* (OUP, New York 2002 rpt of original 1930 edition).
[254] Ross rejected consequentialist ethics and argued that maximizing the good is only one of the *prima facie* duties which play a role in what people should or should not do in any given circumstances.

legislation to parallel those of the proposed declaration. As for those duties whose extent is a matter of conjecture because of either their imperfect formulation or their undefined normative content, is it is difficult to imagine how individuals would be expected to behave in order to implement them in the absence of some objective standards. For example, the duty of mutual respect and tolerance or cohesion of a family, all appear inherently difficult to determine or define their content or import. The difficulties brought about by the absence of clarity on the normative content of duties, or arising from their vague formulation, are nowhere given more eloquent testimony than in the African human rights system. Besides the reporting on individual duties by states, which is in any case inconsistent and often unconvincing these individual duties provisions have remained largely untested under the system's procedures for redressing violations of human rights.

Granted that the individuals' duties and responsibilities proposed in the draft declarations on responsibilities in many instances closely mirror those in the African human rights system, at least in their conception and formulation, this researcher takes the view that the success and failure of the whole concept of individual duty under the African human rights system is not without relevance to the present calls for a human duties and responsibilities universal framework. What has been conspicuously missing from the discourse on a universal declaration of human duties and responsibilities is consideration of the lessons to be learnt from the African human rights system. A question could be asked as to what these lessons are. One could identify at least three such lessons. First, as demonstrated in Chapter Six, most of the African Charter and the African Children's Charter duties of the individual, like those proposed in the draft declarations, appear in practice to be not only non-binding but also practically unimplementable. The experience in Africa is that some of the individual duties in both Charters should not in truth raise human rights concerns. They do not belong in the province of human rights. They are therefore not amenable to regulation using human rights standards, nor can they be subject of successful enforcement if translated into binding laws at the domestic plain. The subject matter of many of these duties does not lend itself neatly to treaty regulation. And yet, in the Africa, regional human rights instruments and policy documents have made an audacious attempt to brand many individual duties and responsibilities as human rights issues. A case in point is the

inclusion in the African Charter and the African Children's Charter of filial duties and responsibilities. Both the African Charter and the African Children's Charter, as well as the African Youth Charter[255] all create filial duties for children towards their parents and families, to respect parents at all times and to maintain them in case of need. The matter does not end there. These provisions are expected to be implemented through legislative or other measures taken to give effect to them.[256] Furthermore, the AU Policy Framework specifically calls on states to '[e]nact legislation requiring adult children to provide support for their parents.'[257] Yet clearly, filial duties and responsibilities do not belong to the realm of human rights law and, therefore, their inclusion in African human rights instrument is a textbook kind of anacronism. Filial responsibility is a purely cultural rather than a human rights matter and should be treated as such. The tendency to adopt an over-inflated view of rights entails that even some treasured form of familial care, love, and a relationship based on culturally inclined virtues of rectitude and gratitude should be viewed to flourish only in a context of rights. Human rights standards and human rights regulation do not have a fitting place to compel people to be kind, to be loving and to patriotic or indeed to truthful, honest and tolerant. Many of the responsibilities suggested in the draft declarations, like most of the individual duties in the African Charter, such as filial responsibilities as set out in article 27, do not create individual duties related to human rights. They at best generate moral obligations not exactly belonging to the realm of human rights law. The obligations which the individual duties provisions talk to, are all about beliefs, values and needs and do not require to be masqueraded as human rights issues.

Even where an instrument like the African Charter obliges states parties to pass domestic legislation imposing duties and responsibilities of this nature on individuals, enforcement of such laws poses a serious challenge. Filial laws such as those imposing responsibility on adult individuals to take care of their aged and needy parents are bound to cause more familial strife and resentment towards elderly parents and the needy. To initiate criminal proceedings or other legal processes against individuals within the provisions in domestic legislation which give effect

[255] The Africa Youth Charter was adopted by the AU Assembly in July 2006 and had by August 2008 received 7 ratifications of the 15 required to enter into force.
[256] Art 1 of the African Charter provides that 'the member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effective to them.'
[257] AU Policy Framework para 4.1(h).

to the individual duties provisions in the African human rights system, is capable of creating disharmony in the family rather than unity. And here the experience from the African human rights system is relevant. That experience is in two parts. First, a review of the state reports submitted to the African Commission does not reveal any record by a state part of convictions for duty related breaches of domestic law on individual duties. The explanation can be either that there is full compliance or that Second. The converse argument can be made about the proposed duties in the draft declarations.

Second, by not seeking to make individuals duties elaborated in legally binding format, the human responsibility experiment is bound to fail. It has already been shown in the preceding part that many of the duties and responsibilities advocated are in fact incapable of being translated into anything that can be enforced using objective standards that have a near universal acceptance as is the case with most human rights. An immediate reaction to the forecast on the fate of a human responsibility declaration by the protagonists of such a declaration would probably be that the proposed declaration on individual duties and responsibilities is meant to remain what it is, i.e. a declaration, which by nature is devoid of binding force. Any such response would however benefit from the proclaimed intention of some of those who worked on draft declarations who viewed the declaration as emulating the UDHR as nearly as possible. The setting out of rights in the non-binding UDHR was followed by an elaboration of human rights identified in the Declaration in treaties that are binding on states parties. This means that it is envisaged that eventually there will be developed an extensive body of human duties and responsibilities frameworks along the same lines as the development of human rights. Without a legal motivational structure, the declarations and the duties and responsibilities they propose lose the force that is needed for an approach based on individual duties. Accordingly, as Kuper notes, these declarations 'become a pale shadow of what is needed for a framing document to complement the UDHR.'[258] As shown in the earlier discussion in this Chapter, the nature of many of the proposed individual obligations in the draft declarations on human duties are incapable of being subsequently incorporated into binding treaties on individual duties, if the desire of those advocating for a duties declaration is to treat individual duties in the same way as rights were treated after the adoption of the UDHR.

[258]A Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge London, 2005) 116.

And this is one of the lesson that could be learnt from the African human rights system. It is neither desirable nor expedient to legislate benovolence, rectitude, love and loyalty. Is it possible to legislate for people to love and care for others? Can a government truly legislate loyalty and love? Considering that the family forms the natural unit of society, the individual is likely to observe this duty without any need for outside enforcement; without the compulsion of the law. Indeed there appears to be a *cul-de-sac* in being grateful, caring, loyal, helpful, and deferential to one's elderly and needy parents out of duty.

This researcher agrees with this view but not without qualification. The acknowledgement of individual obligations in relation to the rights and freedoms of all human beings need not always be translated into dreadfully demanding commands. They have attracted little or no practical attention from much of the human rights community. Undoubtedly the surest way to measure state compliance with the obligations they assume under treaties is to assess state practice in regard to the obligations assumed. In the case of states parties to the African Charter and the African Children's Charter this has revealed, as Chapter Six shows, a general failure to report upon them in any meaningful, consistent and convincing manner. This is attributable, to a considerable degree, to the vagueness of the obligations assumed and the imprecise formulation of those duties, thus leaving room for varying interpretation. Second is the basic fact that the Africa Charter and the African Children's Charter are not the right territory for inscription of individuals' duties for reasons articulated in Chapter Six of this work. Key among then is that the individual who is the primary target of the instrument is not privy to it. It is therefore difficult to find a moral or legal right to hold any commitment in the instrument against a non-conforming individual. Third, although many African countries do have individual duties provisions in their constitutions[259] and other laws which may in some respects mirror those set out in article 27(2)

[259] For example, art 17 of the Uganda constitution includes the duty to defend Uganda and render national service when necessary and cooperate with lawful agencies in the maintenance of law and order; pay taxes; register for electoral and other lawful purposes; combat corruption and misuse of wastage of public property and create and protect a clean and healthy environment. Furthermore, under art 17(2) it is the duty of all able bodied citizens to undergo military training for the defence of the constitution and the protection of the territorial integrity of Uganda whenever called upon to do so. Under the Nigerian constitution section 24 of the Nigerian Constitution duties incumbent on citizens including defending Nigeria and rendering such national service as may be required; respecting the dignity of citizens and the rights and legitimate interests of others and living in unity and harmony and in the spirit of common brotherhood; making positive and useful contributions to the advancement, progress and well-being of the community and paying taxes promptly. Article 113 of the Zambian Constitution[259] lists duties of the citizen which include the duty of loyalty to the country; to foster unity and live in harmony with others; to

of the African Charter and article 31 of the African Children's Charter, those duties are regarded as a purely domestic affair between the state and the individual, making the African Charter and the African Children's Charter and their provisions, rather far removed from the individual. The state here is clearly identifiably the obligation holder in regard to those duties. Once a state has made provision of duties in its laws similar to those of article 27(2) of the Charter and article 31 of the African Children's Charter, the individual's obligation henceforth becomes one of observing the national laws, not the Charter articles and no reference will be made to the African Charter provisions either by the individual or by the state.

However, although many African countries do have duties provisions in their constitutions[260] which may in some respects mirror those set out in article 27(2) of the African Charter and article 31 of the African Children's Charter, these duties are regarded as a purely domestic affair between the state and the individual, making the African Charter and the African Children's Charter and their provisions, rather far removed from the individual. The state here is clearly identifiably the obligation holder in regard to those duties. Once a state has made provision of duties in its laws similar to those of article 27(2) of the Charter and article 31 of the African Children's Charter, the individual's obligations henceforth become one of observing the national laws and no reference will be made to the African Charter provisions either by the individual or by the state.

This truism should merit special attention by protagonists of a universal human duties and responsibilities framework. Furthermore, the individual duties provisions have not been a subject

promote democracy and the rule of law; to vote; to pay taxes; and to provide defence and military service when called upon.

[260] For example, article 17 of the Uganda constitution includes the duty to defend Uganda and render national service when necessary and cooperate with lawful agencies in the maintenance of law and order; pay taxes; register for electoral and other lawful purposes; combat corruption and misuse of wastage of public property and create and protect a clean and healthy environment. Furthermore, under article 17(2) it is the duty of all able bodied citizens to undergo military training for the defence of the constitution and the protection of the territorial integrity of Uganda whenever called upon to do so. Under the Nigerian constitution section 24 of the Nigerian Constitution duties incumbent on citizens including defending Nigeria and rendering such national service as may be required; respecting the dignity of citizens and the rights and legitimate interests of others and living in unity and harmony and in the spirit of common brotherhood; making positive and useful contributions to the advancement, progress and well-being of the community and paying taxes promptly. Article 113 of the Zambian Constitution[260] lists duties of the citizen which include the duty of loyalty to the country; to foster unity and live in harmony with others; to promote democracy and the rule of law; to vote; to pay taxes; and to provide defence and military service when called upon.

of concrete interpretation by the African Commission or the African Court, and this is not a coincidence. An opportunity for the African Commission to pronounce itself on the individuals' duties in article 27 and 29 of the Charter unfortunately did not materialise as the Commission found that the communication in *Ilesanmi v Nigeria*[261] was inadmissible for failure to exhaust domestic remedies. There, the complainant, who was a consultant with a certain project in Nigeria, exposed smuggling activities of several companies, individuals and officials of the Customs and Excise department, the Police and various other officials, to the President of Nigeria and the Inspector General of Police. According to the complainant, the smuggling resulted in economic deprivation of Nigeria. His wife was assassinated as a result of his action to expose the smuggling syndicate and he was abducted and imprisoned and held under inhuman conditions. He brought a complaint before the Commission alleging violation of various articles of the Charter including articles 27 and 29. It would have been useful to learn from the Complainant in what respect Nigeria had violated the duties of the individual under article 27 and 29 of the African Charter. It would have been even more beneficial to know the thinking of the African Commission on the matter. To the best of this researcher's knowledge no other communication had been determined by either the Commission or the African Court in which a complainant alleged violation by a state of the articles relating to individual's duties under the Charter.

The provisions and norms on individual duties in the African Charter have been regarded by some as weak and ineffectual.[262] And if that view regarding individual duties in a treaty such as the African Charter which was intended to have binding effect is true, as it appears to the author to be, the situation of responsibilities in a non-binding declaration such as the proposed ones subject of this study, can only be worse. It is, to this researcher, regrettable but not surprising that none of the human responsibilities efforts considered in this work appears to have taken the elaboration of duties in the African human rights instruments such as the African Charter and the African Children's Charter as being of relevance to their exertions. To this researcher, it makes little sense to drawn up an instrument on individual duties and responsibilities whose deficiencies, both normative and structural are so profoundly obvious, without considering

[261] Comm no 268/03, 18th Annual Activity Report.
[262] See Ch 3 & 6.

lessons, useful or not so useful, that could be learnt from similar, but not identical efforts in the African human rights system. The drawing up of a declaration on responsibilities without reference whatsoever to not dissimilar concrete experiments, is tantamount to duplicating the weaknesses of the African human rights system with limited clarity and vision. The likely result is that the world risks being persuaded by those advocating for such a declaration, to accept a declaration of responsibilities that promise little and delivers nothing.

7.7. A CRITICAL ANALYSIS OF THE PROPOSALS FOR A HUMAN DUTIES AND RESPONSIBILITIES UNIVERSAL INSTRUMENT

Given the various documents that have been drafted on the issue of human duties and responsibilities, the personalities involved, and the amount of time that has been expended in discussing this topic, one is less inclined to treat these statements and declarations as mere hypothetical abstracts. However, some people working for human rights protection have greeted with understandable scepticism the proposal that we need a global agreement on individual duties and responsibilities.[263] The human responsibility movement appears open to legitimate criticism on a numbers of fronts some of which are as follows.

7.7.1. Incorrect justificatory arguments for the declaration

All the six initiatives examined in this study regarding the formulation of a human duties and responsibility universal instrument share some critical features. First, they all claim, to some degree, that modern societies cannot regulate themselves well on the basis of human rights principles alone. Therefore, the chief reason given for calls for a greater awareness, and recognition of individual duties and responsibilities towards the family, towards others and the community, is that focusing on individual duty and responsibility is necessary to counter balance what has been viewed as a bias towards rights and the injurious effects that this is bringing about in human society. These ruinous consequences include disorder, crime, breakdown in family and community life, ethnic and religious intolerance, wars, similar vices - all attributable to the exercise of rights without responsibility.

[263]See n 11.

Second, they call for the recognition in some form of a universal code of ethical obligations - a body of international rules to guide individual behaviour. On this ground, all the six initiatives considered here argue that an international agreement on human duties and responsibilities is required to supplement existing international human rights standards. Their assumption is that existing human rights standards do not adequately address the question of individual duties and responsibilities.

Third they portray a shared perception that an anomalous situation has arisen which calls for immediate corrective action. The language being used to describe the prevailing situation reveals deep nostalgia and simmering moral panic.[264] The communitarian Etzioni, for example, worries that 'the disorder on our street' and the 'sense that people just do not care about their neighbours as much as they once did' are caused by 'the decline of community, civility, and order'[265] The Parliament of the World' Religions for its part, depicted the situation as both ubiquitous and pressing, stating that the world is in agony, and that agony is so pervasive and urgent that 'we are compelled to name its manifestation so that the depth of this pain may be made clear. Peace eludes us – the planet is being destroyed – neighbours live in fear – women and men are estranged from each other – children die!'[266]

According to the International Council of Human Duties, 'crucial problems concerning humankind at the dawn of the 21st century urge the adoption of a different way of thinking and a different value system.'[267] Therefore, 'a new global consciousness and human solidarity is imperative in the 21st century as we move beyond the consideration of rights to the more inclusive concept of duties for the protection of each other and the earth.'[268]

[264] Saul (n 11).
[265] Boaz (n 37).
[266] See the Introduction to the Declaration Towards a Global Ethic, of the Parliament of World Religions, 4th September 1993, Chicago, USA.
[267] See the Introduction to the Trieste Declaration of Human Duties: A Code of Ethics of Shared Responsibilities
[268] This is according to the letter addressed to Marshall W. Nirenberg by Rita Levi Montalcini, President of the Executive Board of the International Council of Human Duties dated 13 December 1995. <www.profiles.nlm.nih.gov/JJ/B/B/S/M/_/jjbbsm.pdf> accessed 1 October 2015.

The Commission on Global Governance likewise shares a perception that there is real need for the world to take some collective corrective action since '[t]he tendency to emphasise rights while forgetting responsibilities has deleterious consequences. Over the long run, rights can only be preserved if they are exercised responsibly and with due respect for the reciprocal rights of others.' In similar fashion the Inter Action Council, claimed that an 'exclusive insistence on rights can lead to endless disputes and conflicts.' And 'the neglect of human responsibility can lead to lawlessness and chaos.' Unless humanity emphasised human responsibility it will not be possible to move from the 'freedom of indifference to the freedom of involvement."[269] In the Final Report of the Special Rapporteur, Miguel Alfonso Martinez, on the study request by the Human Rights Commission[270] it was observed that it was undeniable that the topic of human responsibilities had only deserved 'the scantiest attention in the work of United Nations bodies specialising in human rights.' He was encouraged that with the decision to recommend to the Council that it authorises this study, the Commission appears to be emerging from 'its long lethargy and beginning to understand that this lacuna is inadmissible and must be eradicated.' The Special Rapporteur expressed his hope that this study would not be only the first (nor the last) of the step in the right direction.[271] He also claimed that the idea that there can be rights without ethical duties or responsibilities, or rights not based on equity and human solidarity, constitutes a patent breach of logic, as well as a social irresponsibility. The proof is the thousands of millions of human beings in world who today suffer from all sorts of deprivation, and the generalised crisis in the economy, the environment and governance that visibly marks today's world should serve as a clear warning to all.[272]

In the United Kingdom in 2002, for example, Prime Minister Tony Blair was keen to stress that individual duty and responsibility could be the antidote to what he saw as the excessive individualism of earlier social policy. In his words:

> Social democrats in Britain and the US who held a liberal view of the 'permissive society' divorced fairness from personal responsibility. They believed that the state had

[269] See for example, Introductory Comment to A Universal Declaration of Human Responsibilities, published by the Inter Action Council, 1 September 1997 1.
[270] Final Report of the Special Rapporteur on Human Rights and Human Responsibilities, E/CN.4/2003/105.
[271] Para 28.
[272] Para 42.

> an unconditional obligation to provide welfare and security. The logic was that the individual owed nothing in return. By the early 1970s, this language of rights was corroding civic duty and undermining the fight-back against crime and social decay. It led Robert Kennedy to lament of America, 'the destruction of the sense, and often the fact, of community, of human dialogue, the thousand invisible strands of common experience and purpose, affection and respect, which tie men to their fellows.[273]

Two notable critiques of the view regarding the effects of human rights and the supposed neglect of responsibilities and the clamour for a duty and responsibility international instrument, are given by Amnesty International[274] and Saul respectively.[275] Both of these critics confine their critique to the draft declaration of Human Responsibilities by the Inter Action Council. The narrowing of their critique to one declaration is understandable as that particular declaration captured international attention more than any other did. The draft was discussed by both UNESCO and the UN Human Rights Commission, with a view to possible adoption by the UN General Assembly. Furthermore, the declaration invariably became a motivation for other initiatives and for collaboration between the different human responsibilities initiatives. Martinez, the UN Special Rapporteur on the Study on Human Social Responsibilities, for example, cited the Inter Action Council declaration as his inspiration.[276]An additional reason one may suggest for that confined criticism is that some of the initiatives came after the critiques were done and could not therefore have been the subject of consideration by those two at the time. That declaration was passed in 1997. Many other initiatives, notably the Valencia Declaration and the Declaration on Human Social Responsibilities, followed that declaration in the order of time.

Both Amnesty International and Saul argue that the rationale for advocating for the declaration of human responsibility by the Inter Action Council was not logically persuasive. This researcher agrees with the view that the case for a duties or responsibilities declaration, premised on the assumption that the over emphasis on rights and the perceived neglect of duties and

[273]'My Vision for Britain' *The Observer* 10 November 2002.
[274]Amnesty International (n 11).
[275] Saul (n 11).
[276] Martinez (n 106).

responsibilities have contrived to undermine the general welfare and public good, is exaggerated and definitely not borne out of the situation on the ground. A probing and disinterested analysis of all the human responsibility initiatives, especially the six considered in this study, confirms that Amnesty International and Saul's criticisms of the Inter Action Council's declaration apply just as well to all the other efforts as they do to that one declaration, which they targeted. It is fathomable why some human rights movements are likely to react negatively to the calls for a human responsibility international instrument. The suggestion that human rights are fashioned by unbridled and unacceptable individualism and selfishness, leading to too much freedom, which produces conflict and endless disputes, is clearly exaggerated and logically difficult to justify. It seems to fly in the face of human experience of the whole human rights movement. One can argue that to the contrary, what is viewed here as the direct consequences of the insistence on rights, are the very concerns that human rights have, since the UDHR, sought to address, and that over the years, it is through the insistence on human rights that, by and large, efforts to address matters such as genocide, apartheid, crimes against humanity, torture, discrimination against women, care for refugees, protection of children etc., have been recognised. The human rights movement takes its lead from the UDHR and subsequent UN and regional human rights standards that, in many important respects, recognise the need to balance rights and freedoms with duties and responsibilities for the individual. Further, active engagement in the community and its concerns – particularly the concerns of its most vulnerable members like children, the elderly and the disabled – are the hallmarks of local human rights organisations.

The justificatory arguments for a universal human responsibilities framework have quite evidently been exaggerated. One is inclined to conclude in agreement with Saul that:

> …there is no perceptible moral chaos arising from any endemic abuse of human rights that would warrant an international instrument devoted to human duties. It is indeed important that the views and perspectives of the human responsibilities movements are listened to and contested. Concepts of duty, responsibility and obligation have lurked for a long time in the shadow of human rights, without receiving scholarly attention and critical exposition that they deserve. There is certainly value in enhancing a sense of

responsibility felt by governments and corporations towards respecting and promoting rights.[277]

The foregoing observation by Saul effectively dispels the justificatory arguments made by proponents of the duties and responsibilities declaration movement concerning all the six initiatives under consideration in this Chapter. If the prognosis is wrong, as appears to be the case here, it follows that the prescription too will be wrong.

7.7.2. Potential for abuse of duties and responsibilities set out in the six proposed declarations

Another plausible ground of criticism of all the six human duties and responsibilities experiments concerns the potential that an international declaration carry for abuse of duties and responsibilities. A review of all the six initiatives reveals that not enough safeguard to forestall possible abuse were contemplated. The mere fact that some of these proposed declarations contain a proclamation that the duties and responsibilities set out in them do not imply that human rights could be whittled down or overlooked in the name of observing the duties and responsibilities they catalogue, is not of itself a guarantee that the potential for abuse is eliminated.

Scepticism about the value of a human responsibility global framework may also be grounded on the following two factors. First, historically the notion of human duties, as Chapter Two of this dissertation showed, has proved open to abuse and manipulation. History shows that before the seventeenth century, society placed as much emphasis on individual duties as on rights. The struggle for human rights was invariably a struggle against burdens of duty and obligation, to kings, to the Church, to God and to feudal lords[278]Feudal lords claimed *les droits du seigneur*, kings claimed divine rights; the Church disputed these with even higher rights received from the Supreme Being; and God, of course, has always been sovereign in his unlimited rights and

[277] Saul (n 11) 616.
[278]See, The *Magna Carta* (1215); The English Petition of Rights (1628); and the English Bill of Rights (1689).

domains. Such was the state of affairs not only in Western Europe but also in much of the world where theism reigned.[279] The dialectic was thus between the rights of the rulers and the duties of the subjects. Loyalty, allegiance and obedience were enforced from their subjects, who were duty bound by morality or law to fulfil numerous, often onerous, social obligations.[280]

Beginning with the seventeenth century, the subjects or former subjects of the lords, kings, Church and God began to assert their own rights – those claims that they demanded the law to protect. Rights therefore, even such fundamental rights as that to life, freedom from forced labour, and security, depended on the law for protection, and hence the developments that were recounted in Chapter Two of this thesis. Without the proper laws of the land to safeguard these rights, they would remain only a fiction.[281]

The prevalent and oppressive history of duties by the owners of rights at that time should warn us against overstressing the idea of duty and responsibility in contemporary society. Bauer posits that people who peacefully challenge corrupt or autocratic politics are depicted as endorsing 'instability' and are often quietened in the name of 'social order'.[282] Notions of individual duty may be transformed by political authorities into demands for blind and uncritical patriotism. Furthermore, individual duties towards the family or the community can be promoted in ways that maintain power relationships that are unequal and based on duress.[283] The crucial question remains: what safeguards can be put in place to minimize or eliminate the risk of abuse of duties and responsibilities? It would appear to this writer that the only safeguards against the potential abuse of the duties and responsibilities of the individual would lie in strengthen nominate human rights. This inevitably takes away from the very purpose for having a duties and responsibilities instrument. Pointing to non-derogation statements such as article 14 of the Valencia Declaration or article 19 of the Inter Action Council's Universal Declaration of Human Responsibilities to the effect that the declaration is to be interpreted in a manner that does not impair the rights

[279] See J Ching, 'Human Rights: A Valid Chinese Concept?' Paper presented on a panel convened by the Religious Consultation on Population, Reproductive Health and Ethics at the NGO Forum of the United Nation's World Summit on Social Development, March, 1995.
[280] Saul (n 11) 616.
[281] Ching (n 146).
[282] J Bauer, Report on United Nations Commission on Human Rights 55th Session<http://www.hri-ca/uninfo/unchr99/report4.shtml#human> accessed 27 June 27 2015.
[283] Ibid.

recognized by the UDHR, or that the duties and responsibilities set out in the declaration are not to be taken out of context or be used as an excuse for violating rights, is not helpful either. States have violated with impunity many clearer human rights provisions. A statement in a non-binding declaration to observe duties and responsibilities, many of which are impossible to define precisely, would never serve as a disincentive to a state bent on taking actions that amount to a violation of human rights. Declarations that the duties will not be used to violate rights are not worth the paper they are written on.

7.7.3. Is there need to augment or balance rights through an individual duties and responsibilities declaration?

Virtually all the efforts at universalising a responsibilities framework are premised in part on the need to augment human rights and to balance rights and responsibilities. A view is held therefore, that the proposed universal declaration of duties and responsibilities will serve as an augmenting and balancing document. This contention however raises many questions in the view of this researcher. First, is augmentation and balancing of rights and responsibilities through a global instrument on individual responsibility, by whatever name called, really necessary? Second, is the proposed framework the best mechanism to bring about such augmentation and balance? Third, is the timing of the perceived balancing and augmentation right? Fourth, is enforcement of individuals' duties and responsibilities possible? In a nutshell, is an international declaration on duties and responsibilities efficacious? The first three questions are answered in the negative for reasons which shall become apparent anon. Consideration of the question on enforcement is deferred to part 7.7.6 of this chapter.

As has been stated in earlier Chapters of this dissertation,[284] the notion of individuals' duties in the human rights framework is as old as the human rights movement itself. In fact, the notion of personal duties predates the modern international human rights framework. This point has been made in Chapters 1, 2 and 3 of this work. It bears emphasis that the current international human rights framework already has a wide range of express, implied, correlative and standalone duties

[284]Ch 1, 2 & 3.

in their provisions beginning with the UDHR itself. A case for augmenting or balancing rights through individual duties and responsibilities is, in these circumstances, hard to justify.

In many human rights instruments, states often have a direct duty, for example, to refrain from arbitrary detention and torture of any person within their territory. States may only be intermediary duty-holders who should try and intervene to safeguard human rights from actions by their citizens, but those citizens bear the direct duty to respect the human rights of others. CAT[285] for example, imposes duties in an indirect ways on individuals not to commit acts of torture. The immediate responsibility bearers are the states parties to the treaty. They commit themselves to take effective legislative, administrative, judicial or other measures to prevent acts of torture in their jurisdictions and to criminalise torture. Likewise, under CERD[286]and under CEDAW[287] states have committed themselves to put in place measures that would eliminate discrimination. What states do in effect is to pass laws and other policy statements that proscribe discrimination, thus ultimately imposing duties on individuals. In fact, the international criminal justice system administered by the International Criminal Court under the Rome Statute[288] recognises the individual as a subject of duties. The same can be said of domestic criminal law systems in general. In this sense, the duties imposed on individuals are aimed at realising the rights guaranteed by various laws and regulations both nationally and internationally.

As evidenced by their own preambles and introductory narratives, all the six draft declarations under consideration in this Chapter seem to ignore the richness of individual duty and responsibility provisions in existing international human rights standards which already set out restriction that governments may legitimately impose on the exercise of individual rights to protect society and the rights of others. Responsibilities provisions, in whatever form, directed at the state should be welcome reminders to many states that have paid lip service to rights as set

[285]UN, *Treaty Series*, vol. 1465. The Convention was adopted by the UN General Assembly on 10 December 1984 (res. 39/46) and entered into force on 26 June 1987
[286]UN, *Treaty Series*, vol. 660, No. I-9464. It was adopted by the UN General Assembly res. 2106 A (XX) 21 December 1965 and entered into force on 4 January 1969
[287]UN, *Treaty Series*, vol. 1249, No. I-20378. It was adopted for signature and ratification by the UN General Assembly res. 34/180 of 18 December 1979 and entered into force on 3 September 1981
[288] The Rome Statute of the International Criminal Court is a treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome on 17 July 1988 and it entered into force in July 2002. It establishes the international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

out in the UDHR and many subsequent human rights instruments. However, this need not take the form of a declaration. There appears to be no need to reinvent the wheel. Perhaps what should preoccupy the discourse on duties and responsibilities in human rights should now be how best to ensure effective implementation, observance and enforcement by states of the obligations they have assumed to observe human rights. Equally, the question of respect and enforcement of the obligations of and private actors such as corporates, under international human rights law, deserve far greater attention than designing a duties and responsibility international declaration for individuals. The efforts that have been invested in deliberating a universal human responsibility framework would probably have paid more dividends if they had been invested in, for example, considering how we can make fulfilling obligations arising from economic social and cultural rights more realisable.

7.7.4. Dissimilar normative content of duties and responsibilities and the difficulties of universalisation

All the draft declarations considered and the efforts made in this regard speak of responsibility in the regulation of human conduct and yet, human behaviour is regulated by many factors, including law, moral standards, conscience, custom and tradition. These cannot be a matter exclusively of legal regulation, nor can they all lend themselves to the same regime of regulation or guidance. The underlying claim is that a better human social order at all levels cannot be achieved by laws, prescriptions and conventions alone. What is required is a global ethic. The basic manifestations of the ethical life are the sense of social and personal responsibility and the awareness of guilt that this implies. Yet, the extent of the confusion as to whether what is required through the proposed universal declarations on individual duties and responsibilities is a legally binding normative framework or merely one that sounds only in ethics and morality, is considerable. Küng differentiates between ethical responsibilities and legal responsibilities, with the former being identified as being the essence of any declaration on human responsibilities. He

maintains that ethical responsibilities apply to the wider sense of conscience, love and humanity, and are directly grounded in the dignity of the human person.[289]

The International Council of Human Rights Policy argues that a legal duty is imposed by an external authority and an ethical duty is strongest when it is felt personally by the individual, who is self-motivated to accept the duty.[290] The Council equally maintains that there is an overlap between laws and ethics. It claims that there are three types of duties, primarily legal in nature but each with ethical obligations: (a) a duty on state authorities to respect and protect citizens' human rights, (b) a duty to exercise one's own rights responsibly, and (c) a duty towards others and the community. It is the latter duty, with additional moral undertones, that concerns protagonists of the human responsibility movement. Küng affirms that 'human beings have original responsibilities, which are already given with their personhood and are not grounded in any [legal] rights.'[291] This view contrasts sharply with that underpinning some of the efforts considered in this chapter. The Valencia Declaration, however, defines a duty as 'an ethical or moral obligation' and responsibility as 'an obligation that is legally binding under existing international law.'[292]

It is worth pointing out that those calling for a duty based social ordering appear not to be fully anxious about the fact that some of the duties and responsibilities they are advocating for are intrinsically less subject to universalisation than ones which are rights based. In Chapter Four it was shown that duties take various forms. Some duties are natural while others are acquired. Natural duties come naturally and bind all persons without any imposition by any institution, body or instrument. Each one of us discharges these duties voluntarily. For example, the duty not to harm others, not to tell lies, to respect others, not to mistreat children, to uphold truth and justice and fairness, etc. These do not need to be a subject of a global declaration. Some of these

[289] H Küng 'Don't be afraid of ethics! Why we need to talk of Responsibilities as well as Rights,' In H Küng and H Schmidt (eds) *Global Ethic and Global Responsibilities – Two Declarations* (SMC University Press, Suz 1998) 104-122.
[290] International Council on Human Rights Policy (n 67).
[291] Küng (n 150).
[292] R Goldstone (n 13) 29.

duties may also be a subject of prescription by legislation with any breach being attended by certain sanctions. These too, do not require inclusion in a universal instrument.

Acquired duties are duties assumed by individuals by virtue of something they have done, or as a result of a particular relationship that they might have with others. This means, certain duties are legal, and need one to perform the acquired obligations basing on one's willingness. Failure to perform these duties attracts legal consequences. They may also result from special relationships that individuals assume as groups. For example, parents discharging their duties towards their children, doctors towards their patients, and lawyers towards their clients. These duties are assumed by individuals when they accept to act in a specific role. Helping the poor; not to tell lies or not to harm others; duties to respect others, duties towards the elderly, the community and to God and his creation, seem to be relative and particular, and certainly bound to a given context, and will invariably be a product of social, cultural, political or religious history. Here cultural relativism as discussed in Chapter Five is of relevance. And yet, what is being advocated for is a document that supposedly transcends cultural and religious divides.

According to Ross,[293] whose ethical theory was dealt with in Chapter Four, there are several *prima facie* duties that people can use to determine what, concretely, they ought to do. It will be recalled that a *prima facie* duty is a duty that is binding (obligatory) other things being equal, that is, unless it is overridden or trumped by another duty or duties. In other words, where there is a *prima facie* duty to do something, there is at least a fairly strong presumption in favour of doing it. An example of a prima facie duty is the duty of fidelity - the duty to keep promises and not to engage in deception. Unless stronger moral considerations override, one ought to keep a promise made. Other examples of *prima facie* duties include; a duty of reparation, that is to say, a duty to make up for the injuries one has done to others; the duty of gratitude - to be grateful for benefactions done to oneself and if possible to show it by benefactions in return; a duty of non-injury (also known as non-malfeasance), that is to say the duty not to harm others physically or psychologically, to avoid harming their health, security, intelligence, character, or happiness and

[293]W D Ross, *The Right and the Good* Philip Stratton-Lake (ed) (Oxford University Press, New York 2002) rpt of original 1930 edition).

could possibly extend to a duty to prevent injury to others.[294] Beneficence, i.e., the duty to do good to others: to foster their health, security, wisdom, moral goodness, or happiness and the duty of self-Improvement, to act so as to promote one's own good, i.e., one's own health, security, wisdom, moral goodness, and happiness; as well as the duty of justice which requires that one acts in such a way that one distributes benefits and burdens fairly, are other examples of prima *facie duties*.

By contrast with *prima facie* duties, someone's actual or concrete duty is the duty they should perform in a particular situation. Whatever one's actual duty is, one is morally bound to perform it. Every prima facie duty is general but has exceptions. No single general duty is applicable in every situation that calls for moral choice. In the simpler cases, prima facie duties directly guide people to choose their actual or concrete duty, what they should do in the particular situation.

It appears from a perusal of the draft declarations on human responsibilities considered in this project that several of the *prima facie* duties listed above (or principles somewhat like them) have been proposed for inclusion in those declarations. The point is that *prima facie* duties by themselves are often not enough to determine what an individual should do. One has to consider which *prima facie* duties have priority in the situation that one faces, and which ones do not. In this regard, moral intuition comes into play. Moral intuition tells one when one *prima facie* duty, which at first seems to apply, does not apply because another overrides it. In other words, moral insight directs people when they have exceptions to specific guidelines. This type of moral intuition requires sensitivity to the morally significant aspects of the situation in which the chooser is situated.

The simple theory explained above leaves unanswered the basic question about where these moral intuitions come from. People's abilities to have correct moral perceptions depend upon a number of factors: their moral upbringing, the cultural environment that they grow up in, the moral habits we have formed, their faith-based beliefs, etc.

[294] The addition was made by Thiroux in J Thiroux *Ethics: Theory and Practice* (Prentice-Hall, Upper Saddle River NJ 2001) 65.

One is led to the conclusion that the draft declarations considered in this work do not appear to adequately take into account the fact that local systems of morality, and one can add, faith based beliefs, effectively regulate human behaviour without requiring the centralised interference of codified global ethics. This should highlight the need to define precisely what is considered as lacking; is it the absence of conscience; or the absence of ethics or absence of responsibility? One is inclined to argue that contrary to the view popular in the human responsibilities movement that a declaration of responsibilities is intended to be a balancing document, it cannot serve any such purpose for it is intrinsically ill-suited to do so because it is effectively a declaration of ethics.

7.7.5. The risk of weakening universally recognised human rights

The six draft declarations examined in this chapter all tend to weaken recognised human rights. This happens in at least three ways. Firstly, in their own way, they attempt to restate some rights as set out in the UDHR and other instruments. However, in attempting to restate some rights in the UDHR in terms of responsibilities the draft declarations introduce vague and ill-defined notions, which only create confusion and uncertainty, as will be shown. Secondly, the draft declarations undermine the UDHR by describing some rights in a weaker and less precise language than the UDHR and other human rights instruments. Third they tend to leave out important elements of the human rights guarantees in the UDHR and other instruments. The sum of all these deficiencies is that none of these draft declarations appear to build on the historical, practical and emblematic importance of the UDHR and, therefore, they in truth are bound to contribute little, if anything, to the provisions of existing declarations, world conference documents and international treaties. In short the draft declarations make no meaningful contribution to the human rights corpus. For example, the UDHR enshrines the right of everyone not to be discriminated against on grounds such as race, colour, sex, language, political or other opinion, national or social origin; property, birth or other status. This has been elaborated upon further in other international human rights instruments such as ICCPR, CERD, and in regional instruments such as the African Charter on Human and Peoples' Rights, the European Convention on Human Rights and the American Convention on Human Rights. It has also been a subject of interpretation by quasi-judicial treaty bodies. What is required is to move this agenda

of clarifying the right forward. Yet, the draft declarations being proposed seek to begin redefining that right which now arguably has reached near perfect clarity. The Parliament of the World's Religions' Declaration Toward a Global Ethic in its four critical affirmations that represent shared general ethical principles vital to a global ethic, include a commitment to a culture of non-violence and respect for life (humans, other species) and a commitment to a culture of equal rights and partnership between men and women.[295] The Universal Declaration of Human Responsibilities by the Inter Action Council weakens the right against discrimination by only saying that everyone should 'treat all people in a humane way' regardless of personal attributes. The International Council of Human Duties, for its part, talks of the duty 'to work against racial injustice and all discrimination of women, and the abuse and exploitation of children.' Thus the general right not to be discriminated against as envisioned in the UDHR is somewhat watered down.

Other rights expressed in a somewhat weak fashion in the draft declarations include the right to marry and what it entails. Article 16 of the UDHR provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. In the draft declarations, expressed in terms of responsibilities, this right loses much of the richness, specificity and detail of the UDHR. For example, the Parliament of the World's Religions Declaration Toward a Global Ethic in its 'irrevocable directives' and 'irrevocable, unconditional ethical norms' speaks of a commitment to a culture of equal rights and partnership between men and women, and a commitment to a culture of tolerance and a life of truthfulness – though shall not commit adultery or respect and love one another. The draft Universal Declaration of Human Duties says marriage 'requires love, loyalty and forgiveness and should aim at guaranteeing security and mutual support.' The Declaration on Human Social Responsibilities provides for the duty for one to respect their partner and to provide for, and meet the basic needs of their family. None of the draft declarations that refer to the right to marry reiterates the full rights relating to marriage as set out in article 16 of the UDHR.

[295] Human Duty No 2 in the report Our Global Neighbourhood. See part 7.5.3

The draft declarations had each intended to set out a fairly strong congruency between their provisions and those in the UDHR. The International Council of Human Duties intended, as was already pointed out, to pursue the adoption by the world of a declaration with comparable status to the UDHR. The listed twelve duties of every human being which it sets out, are however, not altogether referable or related to the rights set out in the thirty articles of the UDHR. The same rings true when one peruses the documents drafted by the Parliament of the World's Religions, the Commission for Global Governance and the Inter Action Council. The titles of the twelve chapters of the Valencia Declaration deliberately mirror the rights contained in the UDHR, and propose to make explicit the duties and responsibilities that are implicit in the UDHR. However, that declaration, like all the others studied in this project, does not contain some responsibilities immediately implicit in the rights set out in the UDHR. For example it does not set out any responsibilities pursuant to people having the right to be a person before the law (UDHR Article 6), nor to being able to claim, move around or change nationalities (UDHR articles 13 and 15).

The draft declarations also appear to weaken the inalienable economic and social rights as set out in the UDHR and elaborated in other instruments and conference declarations, such as the right to adequate health care and food. The Declaration Toward a Global Ethic talks in terms of a commitment to a culture of solidarity and a just economic order. The Commission on Global Governance proposes a duty to contribute to the common good, to protect the interests of future generations by pursuing sustainable development and safeguarding the global commons. The draft Universal Declaration of Human Responsibilities only provides that all people have a responsibility to make 'serious efforts to overcome poverty, malnutrition, ignorance and inequality' if they are 'given necessary tools.' The vague concepts of 'commitment to a just economic order', 'serious efforts' or 'necessary tools' weaken the guarantees in the UDHR.

The Parliament of the World's Religions in its Declaration Toward a Global Ethic says nothing about family planning. It does, however, speak of a commitment to a culture of equal rights and partnership between men and women. The International Council of Human Duties introduced the duty to 'promote effective voluntary family planning in order to regulate world population growth.' The Inter Action Council brought up the concept of 'sensible' family planning in its

draft declaration. All these provide no guide to rights to family and reproductive and sexual health.

The draft declarations introduce some undefined, highly subjective and plainly vague concepts such as 'acting truthfully', 'inhumane behaviour' and the responsibility not to 'injure' people, without explaining whether they are the same or different from the concepts of torture and cruel, inhuman or degrading treatment or punishment in article 5 of the UDHR.

Although some of these draft declarations affirm that nothing in those declarations shall be interpreted as impairing or restricting the rights contained in the UDHR this does not explain why some rights set out in the UDHR are specifically mentioned while others are abridged, differently expressed or left out altogether. In the researcher's submission, omission and rewording of rights in the UDHR brings confusion rather than clarity and goes contrary to the declared desire of the architects of these declarations to have congruency between the proposed declarations and the UDHR.

7.7.6. The critical question of enforcement

One key issue about the proposed declaration of human duties and responsibilities responsibilities is the question of enforcement of the duties and responsibilities proposed. In discussing the issue of enforcement one cannot, but recall the purpose of the proposed declaration as given by Gomez-Ibanez in regard to the Declaration Toward a Global Ethic. He explained that the values, standards, and attitudes expressed in the ethic are not intended to be negotiable or be the subject of legislation or litigation. They are statements intended to resonate in the hearts of individuals[296], meaning in effect that they are not intended to be justiciable, and therefore, enforcement of these duties and responsibilities is not intended and is largely irrelevant. McGregor however, points out that such a view draws an opposing reaction.[297] The counter argument proffered within the human responsibility movement is that duties are requirements, not moral aspirations. Therefore, by not making duties mandatory, human

[296] Daniel Gomez-Ibanez, 'Moving towards a Global Ethic', paper presented to the Fifth National Conference on Ethics in America, Long Beach California March 1994.
[297] McGregor (n 10).

responsibility declarations fail. Without a legal motivational structure, they lose the force that is needed for an approach based on duties.[298] Accordingly, as Kuper notes, these declarations 'become a pale shadow of what is needed for a framing document to complement the UDHR.'[299] This researcher agrees with this view but not without qualification. The acknowledgement of individual obligations in relation to the rights and freedoms of all human beings need not always be translated into dreadfully demanding commands. As was discussed in Chapter Four, some types of duty are incapable of precise definition and would defy any prospect of enforcement. As one writer observes, when it comes to duties which cannot be reduced into hard law, the basic general reflection is that one must be agreeable to consider earnestly what one should reasonably do, taking note of the relevant parameters of the cases involved. The necessity to ask that question (rather than proceeding on the assumption that we owe nothing to others) can be the beginning of a more comprehensive line of reasoning. The territory of human rights belongs there. The reasoning cannot, however, end there.[300] Sen aptly puts loosely obligations must not be confused with no obligations at all. Rather some obligations belong to the important category of duties that Immanuel Kant called 'imperfect obligations'. And yet, it is important to consider the real value of such a global document of ethics, if people are already guided by other ethics as for example, religious ethics. After all there can be no doubt that the essential framework within which the proposed declaration on human duties and responsibilities could be realised is international law.

To this researcher, the issue of enforcement may be looked at from two angles; first, the possible enforcement of the provisions of the draft declarations themselves. Here, the question is whether the provisions of such a document may be enforced at all. One is careful in this connection not to equate the draft declarations on duties and responsibilities with the UDHR. Though the proposed declaration of human responsibilities, like its counterpart the UDHR, are both mere declarations and, therefore, not legally binding as they merely set a standard of achievement, the latter document was conceived of as a seed document that gave rise to more elaborate human rights instruments such as the two Covenants of 1966, which created their own treaty monitoring and

[298]A Kuper, 'Reconstructing Global Governance' in D Held and A McGrew (eds), *Globalization Theory*, (Polity Press , Cambridge 2007) 225-239.
[299]A Kuper, (ed) *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge, London 2005) 116.
[300] A Sen, 'Elements of a Theory of Human Rights'(2004) 34 *Philosophy and Public Affairs* 340.

enforcing bodies. Save for what has been alluded to in regard to the efforts of the Inter Action Council, there has been no definite suggestion that the duties and responsibilities proposed to be set out in a human duties and responsibilities declaration would serve to lay ground for a further elaboration of duties. One, therefore, is curious to ascertain whether the duties and responsibilities proposed could be enforceable in themselves.

Second, there is enforceability from the perspective that such duties and responsibilities as are set out in the declaration would help to the greater realisation of the rights set out in the UDHR and other instruments and thereby contribute in this sense to enforcement of human rights. A perusal of preamble paragraphs and the proclamation paragraph of the UDHR leaves one in no doubt as to the intention to have human rights enforceable. The latter reads as follows:

> *Proclaims* this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, *shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance,* both among the peoples of Member States themselves and among peoples of territories under their jurisdiction.[301]

The UDHR envisaged that additional steps would be taken progressively, nationally and internationally, to secure the effective recognition and observance of those rights. None of the proposed declarations on human duties and responsibilities appears to be gradualist in outlook, nor do any of them contemplate any enforcement. In other words, unlike the UDHR which contemplated a gradual realisation of the rights it set forth, no such intention is disenable from the draft declarations. The question then is how meaningful are the proposed duties and responsibilities if they are without any means of enforcement?

In Chapter Three it was shown that when we talk of rights connected duties, two types come to mind; those that are counterparts of rights and those that function as restrictions on rights.

[301] Italics supplied for emphasis.

'Counterpart duties' conjecture that whenever someone has 'a fundamental legal right,' someone else must be assumed to have 'a fundamental legal duty' to respect and guarantee that right. It was shown in Chapter Four that counterpart duties may be another way of expressing rights[302].

Rights-restrictive duties are cast upon rights-bearers in the exercise of their rights. Many regional and international instruments recognize this. Conspicuous examples include both the UN twin Covenants of 1966 — the ICCPR and the ICESC and the African Charter on Human and Peoples' Rights. These establish such a link. Another way of viewing rights restrictive duties is that they are alternative ways of formulating restrictions of rights.

Many of the duties proposed in the draft declarations on duties and responsibilities considered do not appear to fall under any of these categories of duties. While some duties in the proposed draft declarations may be counterpart of rights or may assist define and interpret some rights, many others do not serve as restrictions on rights, neither are they an alternative way of formulating rights, nor means of interpretation of rights. One would have to stretch the actual meaning of some of these duties and responsibilities to bring them within the ambit of one of the identified functions of duties in human rights. Examples of these include the duties in the Declaration Toward a Global Ethic premised on 'a fundamental consensus on binding values, irrevocable standards, and personal attitudes' and the responsibilities to contribute to the common good and safeguarding the global commons as prescribed in International Council of Human Duties' Carta of Human Duties. They also include those set out in the Inter Action Council's Universal Declaration of Human Responsibilities requiring truthfulness and tolerance, promotion of good and avoidance of evil, and also the responsibilities to take reasonable steps to help others whose lives are threatened or who are in extreme distress or need as prescribed in the Valencia Declaration.

Like many duties provisions in the African Charter, several of the provisions in the proposed declarations are very general. The moral exhortations to everyone in the world to live good lives

[302] N J Udombana, "'Arise, O Compatriots": An Analysis of Duties of the Citizen in the Nigerian Constitution' (2002) 34 *Zambia Law Journal* 31.

by being honest and not stealing,[303] to be truthful; to be faithful; to respect one another; to promote good over evil; to help the needy; and not do to others what you do not wish them to do to you[304] do not introduce anything new, for these duties of beneficence are already a part of human kind. The duty to respect other; to supporting the common good, respecting religious doctrines, support actions for an equitable distribution of world resources, support efforts to improve the life of people suffering from hunger, misery, disease or unemployment pose challenges of their own when it becomes necessary to identify their normative content.

With the foregoing explanation it is problematic to develop comprehensive international human rights standards around individual duties in the same way as rights, let alone generate a charter of moral ethics branded as duties or responsibilities, as is being advocated for. In the opinion of this researcher the efficacy of any individual duties or responsibilities declaration or charter should depend upon the degree of directness with which the violation of a given proclaimed duty, obligation or responsibility brings the wrong doer into a system of accountability. Where a document proclaims duties and responsibilities whose non-observance attracts no sanction now or in future, those duties and responsibilities are not worth the paper they are written on. To leave only to one's conscience any observance of a duty, obligation or responsibility, is to offer but a very inadequate and unhelpful view of the otherwise important issue of duties.

The present human responsibilities movement in which, as has been seen in this chapter, religious groups have played a pivotal role, strives to portray ethical concerns in terms of responsibilities, can also be criticised on the basis that the idea of duties and responsibilities is so closely connected to the idea of God as a lawmaker or imposer of duties and responsibilities that the concept has no place in secular philosophy.[305]

[303]See Irrevocable Directive (c) a commitment to a culture of tolerance and a life of truthfulness in the Declaration Towards a Global Ethic by Word's Parliament of Religions.

[304]The Declaration Towards a Global Ethic by Word's Parliament of Religions is based on the golden rule –'do not do unto others what you would not like other do unto you.' The Commission for Global Governance also states in its Carta of Duties under duty no 5 as supporting efforts to improve the life of people suffering from hunger, misery, disease or unemployment. The Universal Declaration of Human Responsibilities speaks of 'truthfulness and tolerance'.

[305] See G E M Anscombe 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1-9.

Many questions are bound to arise regarding a universal human duties and responsibilities declaration were one to be adopted. Could it really occupy the same position as the UDHR? Would it serve as a basis for the elaboration of human duties and responsibilities in the future as did the UDHR? Would it be, for example, a pillar of the international bill of duties and responsibilities? What would be the role of the Human Rights Council in all this? These questions would give rise to fairly speculative answers and are clearly beyond the scope of this work.

7.8. CONCLUSION

Human rights law is already replete with a range of express, implied correlative, regional emergent human rights duties, obligations and responsibilities. Reference by the draft declarations to rights which have been expansively set out in the UDHR and other international human rights instruments in a more thought-out formulation and have in many cases been tested by treaty monitoring bodies, can only fairly be described as a needless misapplication of effort. This is particularly so as these endeavours are coming after a unique experiment with duties has been undertaken in the African human rights system. Good or bad, the African experience would provide a perspective to the treatment of duties.

The terminological ambiguity and regressive substance of various articles of the draft declarations would seriously weaken existing human rights. Rather than investing in pursuing an unessential and potentially destructive human duties and responsibility treaty, it will serve the whole human right movement well if governments are not detracted from focussing on more pressing human rights issues, to considering the question of a universal instrument of ethics. The critical concern of our time, in the opinion of this researcher, should not be to create an adversative or competing set of duties and responsibilities; rather it should be to ensure that the existing duties in the human rights framework are used to secure greater observance and better enforcement human rights

CHAPTER EIGHT: GENERAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

8.1. INTRODUCTION

This research project was a response to the calls for a reconsideration of the human rights discourse which appears to place a high premium on the language of rights and relatively less emphasis on duties and responsibilities of the individual. The research proceeded on the assumption that the fundamental debate between human rights and individuals' duties and responsibilities is justifiable. It carried the hypothesis that formulation of rights and individuals' responsibilities shapes their realisation. It sought to validate or dispel the claims that the dichotomy between human rights and duties of the individual and the emphasis of the former at the expense of the latter is, at least in part, responsible for many of the social ills of human society. It also sought to show why the elaboration of private duties in bills of rights at the domestic level has challenges of its own, and why a standalone international convention or charter of duties and responsibilities of the individual, as has been advocated for in recent times, is not a viable option.

8.2. EXECUTING THE OBJECTIVES OF THE STUDY

The crucial questions that this project sought to answer are first, whether through the giving of more prominence to individuals' duties and responsibilities it is necessary or even possible to reconstruct the human rights movement to address the challenges that have been linked to the seemingly limited attention thus far paid to duties of the individual. Second, whether any such reconstruction should take the form of human duties institutionalised at the international level. To determine the main issues posed, a number of sub questions had to be answered through the various chapters of this dissertation. These are:

(i) Whether the language of individuals' duties is crucial to the values and objectives of the human rights movement.

(ii) As far as arguments of universality and cultural relativism are concerned, whether duties of the individual could be used as useful receptacles for different values systems and norms?

(iii) How an individual duty based declaration being advocated for by some human rights organisations would upset the content of rights in the UDHR and other international human rights instruments?

(iv) In what framework could rights and duties of the individual be reconciled – as regards other individuals, the state and the international community?

(v) Whether there is any assurance that an additional human rights instrument in the form of an international covenant, convention or declaration of duties and responsibilities of the individual, as is being advocated for, would enhance or undermine the gains made thus far in the human rights area?

(vi) Whether there were any useful lessons to be learnt from the African human rights system as regards the inclusion of individuals' duties in human rights instruments?

The research work was divided into eight parts. Chapter One dealt with introductory issues, setting out the scope of the work. It justified the need for an in depth investigation on the subject of personal duties and responsibilities in the human rights discourse. The motivation for the research was also set out and the significance of the study explained. The part also listed the research questions, the hypothesis and the research methodology.

Chapter Two provided a general understanding of the concept of human rights. It examined ways in which human rights have been understood, their philosophical genesis, analysis, justification, criticism as well as the antecedents to the modern human rights protection system and ultimately the ways in which these different elements have been presented in today's human rights discourse.

By way of providing the necessary background to the concept of individuals' duties, Chapter Three traversed the background detail to the African human rights system. It considered the historical development of the system and the objective conditions that precipitated its formation. As the issue of duties of the individual in the African Charter was a constant reference point throughout this work and was the focus of a detailed analysis in Chapter Six, this historical background was inevitable.

Chapter Four examined the notion of duties of the individual generally and explored the definitional differences between duties, obligations and responsibility as they relate to the individual. It also considered the concept of duties, particularly focusing on universal and regional human rights instruments that contain duties for individuals. Constitutions of several countries representing various regions of the world, cultures, histories and faiths were alluded to in an attempt to establishing whether, in order for human rights to be reconstructed on a universal basis, the combination of the concept of human rights and human duties must be institutionalised at the universal plane.

Chapter Five considered the unavoidable debate on universalism and cultural relativism. The starting point was that in dealing with international human rights it is important to be conscious of general as well as culturally specific value influences. In recent times, as human rights become more important in international politics, and human rights instruments become more numerous, there has been a parallel debate about the legitimacy of the entire concept of human rights if individuals' duties and responsibilities are ignored.

The Sixth Chapter dealt specifically with the subject of duties of the individual under the African Charter and examined conceptualisation issues relating to private duties provisions in the Charter. The chapter sought to show that the normative content of individuals' duties' provisions in the Charter portray duties of the individual as more of moral and ethical obligations rather than as legally binding ones. The chapter also showed that many of these provisions are profoundly vague, and that the failure by African states to implement the individuals' duties provisions of the Charter as is evidenced from the periodic reports submitted under article 62 of the Charter, could be owing to the imprecise verbiage and generally vague formulation of the Charter in regards to these duties.

Building upon findings and assumption in previous chapters, Chapter Seven analysed the debate on the notion of the proposed human duties and responsibilities under various initiatives aimed at popularising and universalising duties and responsibilities in a global document. It examined the arguments that have precipitated the human responsibilities movement and sought to show that efforts in that direction may well be a misplaced investment.

This chapter provides the conclusion, giving a summary of the project and making recommendations.

8.3. FINDINGS AND CONCLUSIONS

A number of findings and conclusions flow from the various chapters of this dissertation. Related specifically to the research questions posed at the outset of this study, these finding and conclusions are as follows:

8.3.1. On the language of individuals' duties and responsibilities

From the various chapters of this dissertation, the question whether the language of individuals' duties is crucial to the values and objectives of the human rights movement should solicit a positive response. It was established in Chapter Two that human right are a set of values; a set of tools or a vision of the global justice movement whose foundation is the notion that every person should live in equality, dignity and freedom. These and other basic human rights ideals like universality, non-discrimination, indivisibility and equitability, that animated the human rights movement developed in earnest in the aftermath of the Second World War and the atrocities of the holocaust and are reflected in the UDHR. As was also highlighted in Chapter Two, the forerunner of the human rights discourse was the concept of natural rights, which was part of the medieval natural law tradition that gained prominence during the age of enlightenment with such political philosophers as Locke, whose ideas greatly influenced the American and the French Revolutions. As the introductory chapter of the thesis showed, it was from that foundation that the modern human rights movement emerged over the second half of the twentieth century, probably as a reaction to aberrations such as slavery, genocide, war crimes and torture, in an effort to appreciate human susceptibility as a precondition for a possible just society.

It was also shown that in defining human rights, some theorists and thinkers emphasise the private duty side of what they see as the rights equation. Examples include Williams[1] who

[1] G Williams, 'The Concept of a Legal Liberty', in R Summers (ed), *Essays in Legal Philosophy* (Blackwell, Oxford 1968) 125.

postulates that 'no one ever has a right to do something: he only has a right that someone else shall do (or refrain from doing) something,' and Raz[2] who says 'a person who says to another, 'I have a right to do it' is not saying that … it is not wrong to do it. He is claiming that the other has a duty not to interfere.' Equally, both Austin and O'Neill define a right in terms of a duty. For Austin '[a] party has a right when another or others are bound or obliged by law, to do or forbear, towards or in regard to him,'[3] O'Neill states that rights are seen as one side of a normative relationship between rights holders and obligation bearers. We normally regard supposed claims or entitlements that nobody is obliged to respect or honour as null and void.[4]

For the legal philosopher Hohfeld there cannot be a right without a duty.[5] He famously analyses rights, as clusters of (claim), privileges, powers and immunities, each imposing upon others its own correlative, namely duties, no rights, liabilities and disabilities. Social contract theorists also subscribe to the view that a system of social organisation emphasises the dual nature of rights as both freedoms and individual duties. Society as a whole can only thrive when everyone fulfils his or her obligations to their fellow citizens. Under this view, the ability to exercise rights must first be earned by respecting them in others,[6] a value which found expression in article 29 of the UDHR, which states that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible.'

Consistent with the theory that rights and duties of the individual are correlative, are the views of many thinkers such as the English political philosopher Paine[7] and the theorist Ross[8]. The logical correlativity principle has however been criticised.[9]

[2] J Raz, *Ethics in the Public Domain* (Oxford University Press, Oxford 1994) 275.
[3] J Austin, R Campbell (ed) *Lectures in Jurisprudence Lecture Or the Philosophy of Positive Law* I (5th edn F D Linn and Co, Jersey City 1875) 398.
[4] O O'Neill, 'The Dark Side of Human Rights' in (2005) 81(2) *International Affairs* 427.
[5] W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.
[6] L Henkin, 'Religion, Religions and Human Rights' (1998) 26 (2) *Journal of Religious Ethics* 229-239.
[7] T Paine, *The Rights of Man* (1792) (Penguin Books, New York 1985) 28.
[8] D W Ross, *The Right and the Good* (Oxford University Press, Oxford 1930).
[9] See for example, J Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Inquiry* 243-275; H.J. McCloskey, 'Rights' (1965) 15 *Philosophical Quarterly* 116.

The study also established that duties of the individual are significant in the realisation of human rights. As counterparts to rights, these duties may be used as tools for formulating, restricting and interpreting rights. In this regard rights-restrictive duties are as important, if not more so, as rights themselves. When rights entail positive individual duties, it may be preferable to specify those duties than proclaiming rights. This is the case with provisions of many constitutions and domestic legislation where, without using the terms 'duty', 'responsibility' or 'obligation', they provide instead that 'No person shall…' rather than 'everyone has the right to something.

Individual duties also serve an important role in limiting rights. Rights without restrictions would lead to chaos and anarchy. Rights-restrictive duties are, therefore, imposed on rights-bearers in the exercise of their rights so that other people's rights are not violated in the process. This is recognised in virtually all major international and regional human rights instruments such as the UN twin Covenants of 1966 — the ICCPR and the ICESCR and also the African Charter.[10] The former provide in their commonly worded paragraph in the preamble that:

> Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

Renteln states that the view that rights and duties are correlative used to be a dominant one among philosophers.[11] However many rights theorists[12] have taken wavering positions with regard to this issue. As was explained in Chapter Four of this dissertation, there are duties, also referred to by Kant in his *Groundwork to Metaphysics of Morals*,[13] as imperfect duties, (known also as 'laxer meritorious duties'). These are relative urgings such as the duty to help others in need, or to take regular exercises; duties one has some a choice about regarding when and how to

[10] Art 1 provides that '[t]he member states of the Organisation of African Unity [African Union] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.' The American Declaration, in similar fashion explains the interrelationship between rights and duties in its preamble as follows: 'The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberties, duties express the dignity of that liberty'.
[11] A L Renteln, 'The Concept of Rights' (1988) *Athropos* 343-364.
[12] These include Feinburg, Lyons, Martin, Nickel, and MaCloskey: see Ch 2.
[13] I Kant, *Groundwork of Metaphysics of Morals*, in *The Moral Law*, H J Parton(ed), (rept Harper Collins, London 1964).

fulfil them.[14] They are independent of rights in the sense that they are not related to any corresponding rights. Raz takes the matter further and submits that although rights are grounds of duties in others, not all the interests that people have are protected by rights.[15] It is only the goods or interests that are of ample moral significance to justify the imposition of duties upon others that are protected by rights.

However, one looks at individual duties and whatever arguments one may have regarding their efficacy, one thing is clear: duties of the individual are necessary for the proper functioning of the whole system of human rights. This has been made apparent from what has been covered in this dissertation, particularly in Chapters Two and Four. The language of duties is, therefore, crucial to the values and objectives of the human rights movement.

8.3.2. On universality and relativism and the question of individuals' duties

As to the question whether, in light of the arguments of universality and cultural relativism, duties can be used as useful receptacles for different values systems and norms, Chapter Five made it plain that the Anglo-Saxon pedigree of human rights as they are known today is irrefutable, and so is the deep and enduring influence of Western values on the notion of rights and duties. For people still influenced by non-Western cultures such as those under Asian values and African cultures, this could be a problem with substantial concerns. Different cultures have different moral codes and, therefore, what may be considered good or right in one culture may be considered entirely repulsive in another. The human rights rhetorical framework of the Western liberal tradition is still regarded by some, especially non-Westerners, as a vehicle for indoctrination of values of the Western world in other regions of the world. As Chapter Four has attempted to demonstrate, when duties of the individual are spoken of in the context of rights, whether as correlatives of rights or as duties unconnected to rights, much of the value of individual duty and responsibility, premised on culture and tradition, is ignored. It is suggested that part of this neglect of duty is attributable to the ethnocentric deportment that the whole human rights discourse has assumed over the years. The natural consequence of this is that

[14] G Paul (1998-2004) Kant Immanuel in E Craig (ed) *Routledge Encyclopedia of Philosophy* (Routledge, London <http//www.rep.routledge.com/article DB047SEC11> accessed 4 June 2014.
[15] J Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 167.

universal acceptance of some human rights has dodged the world. This is a challenge for all as it requires thoughtful psychological readjustment. Unless the reality of cultural diversity to its fullest extent is internalised and admitted, the existence of the full corpus of international human rights law and standards will do little to stop the practice of contesting some human rights on the basis of tradition and culture.

It is, therefore, difficult to rationally argue that all human rights, as seen through the Western prism, have intrinsic authority over competing non-Western cultural values. This is particularly so in African societies. As Nickel has correctly observed, Africans have every reason to be sceptical about the so called 'rights culture': it resembles all too closely the ideological hegemony wielded by the Western powers over their colonies in the nineteenth century; a time when Europe had arrogated to itself the role of arbiter in moral standards.[16]

Still on the cultural front, many Africans still embrace internalised value systems of African society. African cultural duties, largely unwritten but now also recognised by the African Charter, require that every individual participates in, and contribute to, the promotion and protection of cultural values and traditions. People have a duty to the family and to the community to maintain relations aimed at promoting mutual respect and tolerance; to preserve the harmonious development of the family and to strengthen social cohesion. The African Charter's determination regarding observing and preserving African tradition and culture is capable of sending mixed signals as to the real intention, at face value, of the Charter. As was demonstrated in Chapter Five, taken to extremes, this insistence on African culture and traditions can cause serious disharmony to universality of human rights, and may be used to propagate values that may malign human dignity. It could also cause undue contradictions between some human rights. In this regard the two controversial topics of female circumcision and homosexual rights were used to reinforce the argument. It was confirmed that the international contempt for female genital mutilation, and even the existence of regional and international treaty provisions against the practice, have not forced communities involved in it in Africa and elsewhere to abandon this deeply entrenched cultural and traditional practice in respect of which the

[16] J W Nickel in J L Nelson and V M Green (eds), *International Human Rights :Contemporary Issues* (Human Rights Publishing, Stanfordville 1980) 45.

practitioners feel a sense of cultural duty to perpetuate. Nor has the furthering of the gay movement and homosexual rights made some African culturists to lessen their abhorrence of homosexuality and what is perceived by them as the pro-gay agenda. Such cultural relativists consider it duty for all in their communities to do positively what is necessary to stop what they view as a Western cultural invasion. A view that is arguable, as Chapter Five highlighted, is that one would be failing to live up to the dictates of duties in the African Charter if they abandoned the traditional practice of female circumcision, or if they embraced or tolerated sexual minority rights in all their delicate profiles.

The argument made by universalists that female circumcision is not a positive cultural practice as it violates human rights, is based on a universal standard that is diagonally opposed to the cultural standards used by the proponents and practitioners of FGM. This, to the culturists, introduces the aspect of subordination of cultures by what are perceived to be universal standards and raises even more human rights questions. It also brings into sharp focus the very warning that cultural relativism makes which is that there is a danger in assuming that people's cultural preferences are based on any rational standards such as those that may be articulated in specific treaties. It is in this sense difficult to resist, to some degree at least, the view that for human rights to command loyalty and legitimacy, they must have a foundation that survives concerns of ideological imperialism.

There is, in the view of this researcher, a need to move away from strong universalism and strong cultural relativism. It is for this reason that this study advocated for moderate universalism, and with the caveat already given, remains very sympathetic to the middle ground arguments between universalism and cultural relativism such as those proposed by Vincent that a common culture of modernity has consumed all human society by reason of the rise of the concept of the global economy[17], or that by Falk that there has been significant cultural penetration and overlapping coexistence of cultural traditions leading to sameness.[18] The guiding principle should be that ideas on the dignity and rights of the individual must form a type of

[17] R J Vincent, *Human Rights and International Relations* (Cambridge University Press, Cambridge 1986).
[18] R Falk, 'Cultural Foundations for the International Protection of Human Rights' in A A An-Na'im (eds) *Human Rights in Cross-Cultural Perspectives – A Quest for Consensus* (University of Pennsylvania Press, Pennsylvania 1991).

communicative interface which enables the dialogue between cultural relativism and universalism. An attempt must be made to strike a balance on the differences in cultures so that it does not appear that Western thinking, which as has been argued in Chapter Five, influences many treaty based human rights and, by substitution Western culture, is elevated to a higher moral pedestal on no rational and objective basis than one that ironically offends the equality of cultures and the equal dignity of the human person.

Viewed from a disinterested perspective, therefore, one is inclined to accept the view put forward by Burnette that culture does not work as a package deal.[19] Society in many parts of Africa has become multicultural. People are now easily operating within two or more normative systems: they pick and choose what suits the needs of the moment. Indisputably, some human rights are dissonant with some African traditional and cultural practices. Yet, human rights can, and ought to, reform people and communities critically, based on basic tenets of human dignity and the equality of every person which transcend culture.

In the view taken by this researcher, although the varied cultural contexts may be a cause for the different conceptualisation of some species of human rights such as those implicated in female circumcision and minority sexuality, and non-Western traditions may differ with western views even to the point of incompatibility, it is nonetheless possible to reconcile these views. The best basis is to appreciate that there is a remarkable cross-cultural consensus on many values that human rights seek to protect, especially when those values are expressed in relatively general terms such as dignity, freedom, justice, solidarity, life, social order, the family, protection from arbitrarily rule, prohibition of inhuman and degrading treatment, the guarantee of a place in a life of the community and access to an equitable share of the means of subsistence. These are moral aspirations in virtually all cultures. As loyalty to these values transcends loyalty to particular cultures, ethnic groups, governments or nations, literally no one will want to abrogate them on the basis of culture. In any case, the mistaken claim that certain things are African and other are not, may well be based on an essentialist assumption that Africa is a homogeneous entity and that African culture and tradition are static. The reality, however, is that Africa is such an elaborate mosaic of traditions and cultures which are forever changing. Thus, the pleonasm of

[19] T W Bennett, 'Human Rights and the African Cultural Tradition' (1993) 22 *Transformation* 30- 40.

the African Charter with respect to rights and individual duties, may give the wrong impression of sanctioning some violations of rights. Specific issues such as female genital mutilation and the general improvement of the rights and status of women and girl children, and indeed those of sexual minorities, may be addressed under human rights concerns without impeaching cultural and traditional norms and beliefs, or implying in any way that an entire cultural heritage is to be overthrown. Programmatic and thus gradual change is more likely to succeed. This, in the view of this researcher, should inform the way forward in this conversation.

Amidst the on-going dispute over the different interpretation of rights and individuals' duties based on arguments of universality and cultural relativism, and having in mind an approach which better protects the normative kernel of the rights of the individual, duties of the individual cannot be used as useful receptacles for different values systems and norms. In fact, as the discussion on duty in regard to both female genital mutilation and gay rights has shown, culturally based duties and human rights make bad bedfellows.

8.3.3. On a duty and responsibility inspired universal declaration upsetting the human rights framework

Chapter Seven made findings which respond to the issue regarding how a duty-based declaration being advocated for by some human rights organisations would upset the content of rights in the UDHR and other international human rights instruments. It was shown in that chapter that the basis upon which the advocacy for a universal declaration of human responsibilities is predicated is not logically convincing. The chapter established that the energies being spent on articulating a case for a universal instrument on duties and responsibilities of the individual are plainly misapplied and that such a discourse has the overall effect of impoverishing the human rights framework. An adversative set of individual duties and responsibilities framed in a global instrument would, to this researcher, be destructive to the efforts aimed at improving greater observance and enforcement of human rights. As the explanations given for the calls for such an instrument are not rationally resound, it follows that the case for a universal instrument itself as put forward by its protagonists, is equally unconvincing.

More importantly, perhaps an individual duty and responsibility based declaration being advocated by some human rights organizations would upset the content of rights in the UDHR and other international human rights instruments in at least five ways: first, as it has been shown in this study, the present international human rights framework, starting with the UDHR, already has an extensive array of express, implied, correlative and standalone duties in their provisions which set out restriction that governments may legitimately impose on the exercise of individual rights to protect society and the rights of others. Many human rights treaties confirm this position both at global and regional levels. Nearly all the duties and responsibilities of the individual set out in all the six draft declaration, subject of focus in Chapter Seven, are already set out in these treaties and convention. The draft declarations being advocated seem to ignore this richness in terms of duties in existing international human rights standards. Although there is need to remind states and individuals of their obligations to ensure observance by individuals of these duties and responsibilities, this need not take the form of a declaration of personal responsibilities. The critical concern of our time, in the estimation of this researcher, should not be to create an adversative or competing set of duties and responsibilities. This would be to introduce new standards. As Mutua observes, international action should move from setting setting standards to implementation of existing standards.[20] The proposed declaration is, in these circumstances, an unnecessary duplication of existing provisions. What should preoccupy the discourse on individual duties in human rights should be how best to ensure effective implementation of these duties; to secure greater observance and better enforcement of human rights.

Second, it has also been argued in this dissertation that those calling for an individual duty based social ordering appear not to be fully concerned about the fact that some of the individual duties and responsibilities being proposed in the declaration on duties and responsibilities are ethical in content and therefore inherently less subject to universalisation than ones which are rights based. Duties that come naturally and are discharged voluntarily are a case in point. These include the duty not to harm others; not to tell lies; to respect others; not to mistreat children; to respect parents and the elderly; to uphold truth, justice and fairness. Some of these duties involve treasured forms of familial care, love, loyalty, personal conviction and a relationship based on

[20] M Mutua, 'Critical Setting in Human Rights: Critique and Prognosis' (2007) 29 Human Rights Quarterly 548-630 548.

culturally inclined virtues of rectitude and gratitude and yet, by treating them as duties and responsibilities for inclusion in the proposed charter on duties and responsibilities it is implied that they can only flourish in a context of rights. This researcher does not believe that such duties belong to the realm of human rights law and, therefore, that their inclusion in any proposed declaration intended to enhance human right would be anacronistic. They need not be a subject of a global declaration. Furthermore, local systems of morality, and one can add, faith based beliefs, effectively regulate human behaviour without requiring the centralised interference of codified global ethics. Some other individual duties may also be a subject of prescription through domestic legislation with any breach thereof being attended by certain sanctions. These include the duty of non-discrimination and the duty to care for and treat children in a particular way. These too, do not require inclusion in a universal instrument.

Third, it has also been exposed that the six draft declarations examined in Chapter Seven all in their own way tend to weaken recognised human rights on at least three levels, namely (a) when they attempt to restate some rights as set out in the UDHR and other instruments and in the process introduce vague and ill-defined notions which only generate misperception; (b) when they describe some rights in a weaker and less precise language than the UDHR and other human rights instruments; and (c) when they leave out important elements of the human rights guarantees in the UDHR and other instruments. The net result is that not only do the draft declarations fail to build on the historical, practical and symbolic importance of the UDHR they make no valuable contribution to the existing corpus of human rights or to their interpretation.

Fourth, as the proposed declaration of human duties and responsibilities is projected to be realised within the framework of international law, the question of enforcement of the declaration cannot be irrelevant. And this brings to the fore the real value of such a global document of ethics, if people are already guided by other ethics as for example, religious ethics as well as moral and cultural ethics. It is both difficult and unnecessary to develop comprehensive international human rights standards around individual duties and responsibilities based on ethical values in the same way as rights.

Fifth, the difficulties in defining duties and responsibilities precisely as well as identifying clearly the behaviour needed to realise them, as Chapter Seven has shown, ominously diminish the prospects of having a truly meaningful global human duties and responsibilities instrument. The normative ambiguity or imperfection of the concept of individual duties and responsibilities, taken in light of the extent to which many of the human rights standards have been accepted, make the current attempts to codify duties and responsibilities of the individual in an international instrument an implausible feat.

It follows that an additional human rights instrument in the form of a covenant, convention or declaration, as is being advocated for by bodies in the human responsibility movement that emphasises individuals' duties and responsibilities, carries the risk of undermine the gains made thus far in the human rights area. Given all the foregoing factors, therefore, it seems that the present framework where correlative duties as well as standalone ones are set out in human rights instruments in the manner seen in this work, remains more apposite for the reconciliation of rights and duties. What is required is to bring forth a culture of compliance with these individual duties by strengthening international as well as domestic institutions such as committees, tribunals and courts charged with the responsibility of overseeing human rights implementation. The case of the African human rights system shows us that there is a real need to make the responsibility and duties provisions, less abstract and vague. They should be structured in a manner that offers clarity to those to whom they are directed. Furthermore, it should be clear from their formulation what the consequences of non-compliance will be.

8.3.4. On what can be learnt from the African human rights system regarding duties

A review of the concept of human rights and duties of the individual as outlined in the African Charter reveals beyond doubt that there are both conception and formulation issue about them which should cause concern. The verbiage in parts of the African Charter dealing with individual duties is pointedly imperfect and in many instances quite incomprehensible. They have consequently been viewed by some commentators as weak and ineffective.[21] The African Charter duties of the individual have had little or no practical appeal. A review of state party

[21] See Ch 3 & Ch 6..

reports submitted to the African Commission of Human and Peoples Rights in terms of article 62 of the African Charter as well as those submitted to the African Committee of Experts on the Rights of the Child in terms of article of the African Children's Charter reveal that provisions on individual duties have hardly been reported upon with any measure of consistency, clarity and conviction. This is hardly surprising. The lack of common comprehension as to what states are expected to do with duties directed at the individual is illustrated in the failure by many African counties to report meaningful and convincingly on how the individual duties provisions in articles 27 to 29 of the African Charter and those in article 31 of the African Children's Charter have been implemented domestically. Replicating the two Charters individuals' duties in domestic legislation takes care of the state's obligation under those Charters but does not amount to fulfilment by the individual of his Charter duties. To mirror the Charters' individuals' duties in domestic legislation does not obliterate in the least sense, the fact that the Charters are not the proper home for those duties. Individuals' duties provisions in the two Charters have also not been a subject of concrete interpretation by the African Commission or the African Court. As discussed in Chapter Seven, a rare opportunity which arose in *Ilesanmi v Nigeria*[22] for the African Commission to pronounce itself fully through a communication on alleged breaches of articles 27 and 29 of the African Charter was regrettably lost when the communication was declared inadmissible for failure to exhaust domestic remedies. The African Court, for its part has thus far not been called upon to adjudicate a dispute based on alleged violation of the duties provisions of the African Charter. The reasons are not far to seek. The duties are directed at the individual and it is inconceivable that a communication can be brought against an individual by the State or any other entity for that matter alleging failure by such individual to comply with Charter provisions. It is plausible that such an individual may be dragged before a domestic court to answer allegations of breach of, not Charter prescribed duties, but identical duties set out in domestic legislation. In such an eventuality, the African Charter is largely irrelevant.

An objection could be raised to this observation that the proposed declaration on duties and responsibilities is not intended to be legally binding. Such an argument clearly loses focus of the principal motivation for the declaration on duties and responsibilities. Its proponents, as shown in Chapter Seven, desire it to occupy a special position equivalent to the UDHR. That position

[22] Communication no 268/03.

entails that it is to serve as a source document later to be used to elaborate human duties and responsibilities in the same way as the UDHR was used as a parent document to the ICCPR and the ICESCR. There is also a worry regarding the interface of individual duties and states duties in the same document. In regard to the African Charter, for example, if one looks at article 18, it a duty for the state to 'assist the family which is the custodian of morals and traditional values recognised by the community.' Similar duties to children, the aged, the needy and others are set out in the draft declarations on responsibilities. The absence of clarity, especially where the African Charter outlines duties to be performed by both the state and the individual, may lead to a misconception that the provisions on individual's duties only impose a non-binding form of obligation. The African Charter itself requires reform in significant respects when it comes to these provisions. As was pointed out in Chapter Seven, many of the duties proposed in the draft declarations, like those in the African Charter, are largely incapable of enforcement because of their vague formulation.

The elaboration of duties in African human rights instruments such as the African Charter and the African Children's is surely relevant to the efforts of the protagonists of a declaration on individuals' duties and responsibilities. In the view of this researcher, the African human rights system should have provided some lessons to advocates of a universal duties and responsibilities declaration. Some of these lessons are covered in Chapter Seven of this dissertation. One such lessons is that duties directed at the individual, particularly when they are reduced into a treaty, do not in truth add much to the practical realisation of human rights. To this researcher, it makes little sense to drawn up an instrument on individual responsibilities whose deficiencies, both normative and structural are so palpably evident, without considering lessons, useful or not so useful, that could be learnt from similar, but not identical efforts in the African human rights system. The drawing up of a declaration on responsibilities without reference whatsoever to not dissimilar concrete experiments, is tantamount to duplicating the weaknesses of the African human rights system with limited clarity and vision. The likely result is that the world risks being persuaded by those advocating for such a declaration, to accept a declaration of individuals' duties and responsibilities that promises little and delivers nothing.

Perhaps the single most significant lesson that one learns from the implementation of the concept of duties in the African human rights system is that the concept of duties, elaborated in detail in what is intended to be a binding treaty with an implementing body, has thus far not worked to the expectations of those who advocated it and its refection in the African human rights system. Individual duties and responsibilities are more likely to be even less useful in a mere declaration. The question is whether any useful purpose can be served by the proposed declaration.

8.4. FINAL RECOMMENDATIONS AND QUESTIONS FOR FURTHER RESEARCH

This research project has covered an area which has attracted relatively little in-depth research interest, and yet it brings to the fore many questions which should call for further research and investigation. There is need for additional research in some areas related to those considered by this work that have been largely neglected. These include the following:

(i) An audit of human rights supporting duties

The importance of duties in the interpretation, limitation and subsequently in the greater enjoyment of rights is well acknowledged. The challenges that beset the respect and observance of human rights are real and require to be addressed. Strengthening the observance of duties and responsibilities is one clear way of creating scope for enhanced respect for and observance of human rights. The more people observe their human rights correlative duties, the greater is the likelihood of enhancing the enjoyment of human rights. And yet, there appears to be a dearth of research work on differentiating people's duties for purposes of recommending different treatment for these duties. There is need to identify individual duties and responsibilities that are directly related to human rights as a first step. Once duties counterpart to rights are identified, and set apart from imperfect duties and duties of beneficence, then an in-depth study should be done on the how these can be structured to give them both the visibility and the effectiveness that they require to enable them meaningfully support human rights. In what medium are these individual duties likely to be most effective? It is important to consider, particularly the question whether all these duties can be made enforceable through domestic jurisdictions. Would national courts be better positioned to implement international human rights related duties? How can individual duties inferable from international treaties to which individuals are not party, such as those in the African Charter be enforced?

(ii) Co-existence of universalism and cultural relativism

One of the most pertinent issues of the past seventy years since the UDHR has been the debate on the universalism and cultural relativism in human rights. The situation sharpens a longstanding dilemma. How can universalism and cultural relativism in human rights co-exist in a culturally diverse world? As globalisation takes hold and the international community becomes more and more integrated, the relevance of cultural relativism comes to the fore, and yet, its existence cannot be wished away. How can cultural relativism be appreciated. Given some deep-rooted cultural practices and beliefs, is a global culture desirable or even possible?

To what extent should cultural practices be subordinate to acclaimed human rights such as those of sexual minorities, which rights are contested by hard-nosed culturists as being culturally aligned to the West? How does one reconcile culturally sanctioned practices deeply founded in what is perceived by their practitioners, as traditional and cultural duty to ensure a harmonious and orderly society, such as child work or child labour, obedience and submission of women to their husbands and the subordination of women's voices in reproductive health rights? In other words, how can the supposed cultural practices and the duties they entail, be reconciled with universal human rights? These are some of the issues, concerns and questions underlying the debate over universalism and cultural relativism which require to be addressed.

(iii) Sexual orientation and gender identity

Across the African continent many people continue to face widespread and severe forms of discrimination based on their sexual orientation and/or gender identity. These range from violation of their right to life, hate induced violence, to being tortured, ill-treated, and detained solely based on homophobic prejudices against people whose sexual preferences may be at odds with the social norms and expectations of some local communities. Can cultural practices and beliefs be eradicated solely by legislating against them or by provisions in treaties? If this has thus far proved not to be entirely effective, what more can the human rights movement do to address these issues.

8.5. CONCLUSION

This work has shown that human rights should be reformed rather than maintained in its current form and that there are appropriate grounds upon which the human rights paradigm should be

reconstructed. A human duties and responsibilities Charter would, however, make no useful contribution to the need to reform. Adherence by states to provisions of human rights instruments and the implementation of those provisions is dependent, to a large extent, on their understanding of the provisions set out in those instruments. Clarity in the obligations as formulated in any instrument on human rights, duties and responsibility, forms the bedrock of the implementation of those provisions. Unclear provisions will be impossible to implement effectively. The African Charter is a case in point. The real question is whether all individual duties are capable of precise formulation and enforcement. The working hypothesis adopted in this study that conception shapes realisation and therefore a flawed conception makes realisation difficult if not impossible, has thus been proved through the various chapters that gave the universal perspective through the proposed declarations of responsibilities and the African perspective illustrated by the individuals' duties provisions in the African Charter.

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