

## INAUGURAL ADDRESS

### Contemporary challenges to international human rights law and the role of human rights education

11 MAY 2011

Honoured guests, ladies and gentlemen

If it is accepted practice that a word of thanks comes at the **end** of an inaugural address, I happily subvert this convention by **starting** with my 'thank you's'. Although there are many **individuals** who have contributed in uniquely meaningful ways to my personal growth, and walked along with me in my career path, they may be grouped together in four categories:

- (i) first, my family and friends, in particular my parents, who are here tonight;
- (ii) second, my colleagues at the Centre for Human Rights, whose dedication and support make it a pleasure to head the Centre; and the students at the Centre, from whom I had and still have the privilege of learning so much;
- (iii) third, the University and Faculty management, in particular Prof Chris de Beer, senior Vice-Principal, the two last Deans, Prof Duard Kleyn and Christof Heyns, and the Acting Dean, Prof Anton Kok;
- (iv) lastly, colleagues in the Centre's partner faculties, and in other departments in this Faculty, particularly the Department of Legal History.

As I mention 'Legal History', I must acknowledge that for some of you my appearance at this podium has a distinct ring of '*déjà vu*'. So, let me explain why, when I have given an inaugural address once before, as Head of the Department of Legal History, I (and some of you!) are here again. (*Thank you for coming!*) UP policy requires that a head of a **particular** department only gives **one** inaugural address, even if his or her term is renewed. Given the relative infrequency of its occurrence,

the policy is less clear about the question as to whether headship of a **different department** renews this obligation. The answer to that question, following a protracted interpretive tug of war, see me present this address as Director, or Head of the Centre for Human Rights, which obtained departmental status in 2006.

This duty provides me with the privilege of sharing some thoughts with you on matters related to the Centre's objectives and activities, in this, the year in which it celebrates 25 years of existence. In its initial years, when it was founded in 1986, the Centre concentrated on promoting a human rights-based constitutional culture for a democratic South Africa. Over the next quarter century, the Centre gradually extended its focus to human rights in a broader African, and international, frame.

My address tonight explores the broader idea of human rights, and reflects on contemporary challenges to international human rights law. Under the term 'international' human rights law, I understand both the human rights treaties and other documents and related institutions and processes at the global level (under the auspices of the United Nations), and at the regional level (under the African Union).

During the **last** century, in particular after the fall of the Berlin Wall, human rights was celebrated as the 'idea of our time'.<sup>1</sup> International human rights had become the new universalised or 'worldwide secular religion',<sup>2</sup> and its acceptance by states a prerequisite for 'good governance' and international legitimacy. However, with the dawn of **this century**, critical voices have increasingly questioned whether 'human rights can survive'<sup>3</sup> and even postulated the 'end of human rights'.<sup>4</sup>

International human rights law has been problematised from different vantage points, and for various reasons.<sup>5</sup> A few of the contemporary challenges are the following:

- In the post-9/11 era, as human rights became increasingly fused with security concerns in the United States and elsewhere, legislation and executive action

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<sup>1</sup>L Henkin *The age of rights* (Columbia University Press, 1990): 'Human rights is the idea of our time, the only political-moral idea that has received universal acceptance' (p. ix).

<sup>2</sup>E Wiesel 'A tribute to human rights' in Y Danieli, E Stamatopoulou and C Dias (eds) *The Universal Declaration of Human Rights: Fifty years and beyond* (1999) at 3.

<sup>3</sup>C Gearty *Can human rights survive?* (Cambridge University Press, 2006).

<sup>4</sup>C Douzinas *The end of human rights: Critical legal thought at the turn of the century* (Hart, 2000).

<sup>5</sup>For an earlier critique of human rights more generally, see D Kennedy 'The international human rights movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101.

purporting to counterterrorism eroded principles as firmly entrenched as the prohibition of torture.

- The prominent role of China in international affairs, especially in Africa, is tied to the resurgence of a crude understanding of the principle of non-interference in the domestic affairs of states, allowing states to cloak human rights violations from international scrutiny despite their acceptance of international standards. Prominent infrastructure developments initiated by the Chinese, which may paradoxically assist in realising socio-economic rights, but may also increase the strength of their leverage.
- The major forum for human rights in the United Nations, the Human Rights Council, is no less politicised than its predecessor, the UN Commission on Human Rights, and is characterised by block voting often obscuring the merits of the matter at hand. Due to its political prominence, the **political** process of Universal Periodic Review (UPR) has gained ground at the expense of the independent monitoring activities by UN human rights treaty bodies. Although political pressure is an important element of 'mobilising shame', political processes are often not as rigorous and free of manoeuvring as the fora provided by treaty bodies.

Although each of these merits full discussion, I focus on **four** other challenges, which may, in brief terms, be formulated as follows:

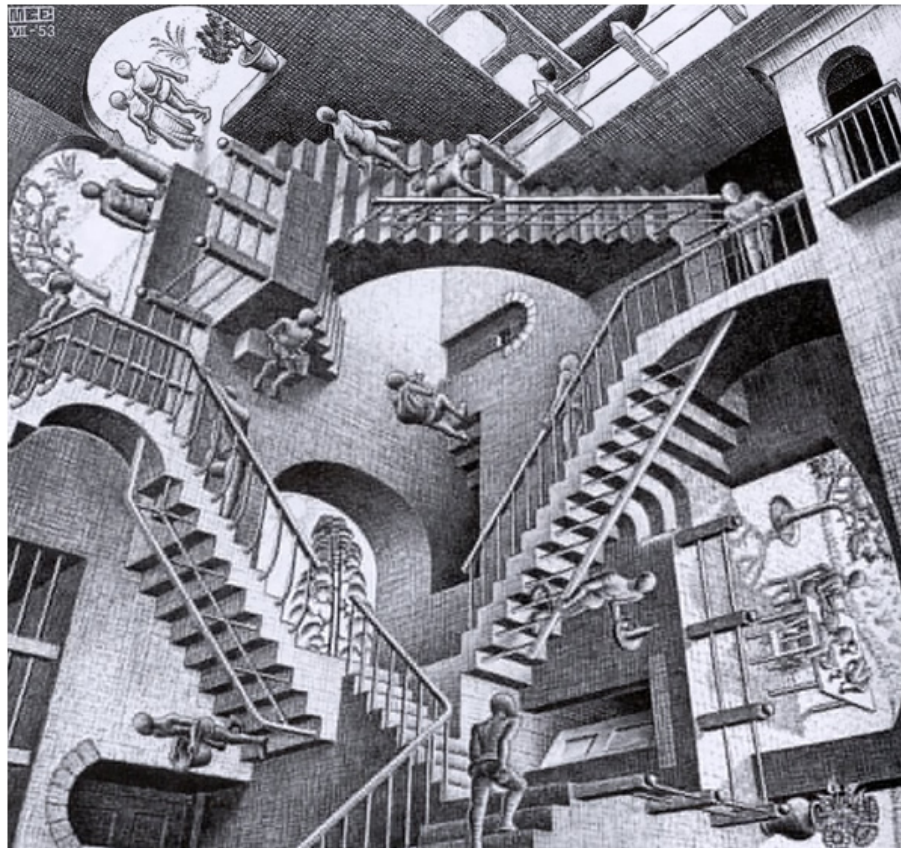
- (1) The international human rights system is a labyrinth of complexity and fragmentation, but remains substantively under-inclusive.
- (2) International human rights law has not delivered on its promises.
- (3) Due to its state-centred nature, international human rights law is trapped in the paradox of the state as both primary protector and violator of human rights.
- (4) International human rights law has inadequately engaged with the plight of the impoverished.

In dealing with these four aspects, and finally relating the discussion to human rights education, I by necessity adopt the expansive gaze of the land surveyor rather than the microscopic search the prospector in his quest for that one elusive bright diamond.

As one sets up the challenges to 'international human rights law', one should not expect the impossible. What can we expect from international human rights law? It is a complex question to answer fully, but there should be general agreement about the following: First, it complements and does not substitute national law. Ideally, it serves as a normative force coaxing and urging states on towards an internationally agreed consensus on humanity and dignity. It monitors these standards and takes effective action to ensure their observance.

To what extent is the human rights regime conceptually and practically under threat, and how is it manoeuvring its escape?

## 1 The fragmented proliferation of international human rights law



A principal rationale of international human rights is to provide a normative beacon of commonly agreed standards of humanity and dignity that all states should respect. To assist states and hold them accountable to these standards, an effective implementation system should also be in place.

Since the adoption of the Universal Declaration of Human Rights in 1948, the UN and regional organisations such as the OAU/AU adopted a wide array of human rights treaties and other documents, covering the rights of – to name but a few -- children, refugees, women, detainees, persons with disabilities, those forcibly disappeared. Soon after the Universal Declaration of Human Rights had been adopted in 1948, the UN Commission on Human Rights started the process of converting the Declaration into a single binding treaty. The eventual adoption of two Covenants testifies to the failure to adopt a single treaty, and marks the start of further norm proliferation. The UN human rights system now comprises nine core treaties,<sup>6</sup> and a *myriad* of other treaties and instruments, dealing with the rights of specific groups and issues. This global network is woven into a similarly complex normative and institutional network at the regional and -- increasingly in Africa --at the sub-regional level. Are these overlapping networks mutually reinforcing and complementary, or are they in competition with one another and do they constitute needless duplication?

For victims of human rights violations, the normative variety presents a veritable post-modern hypermarket of forum-shopping possibilities, but to states, an intricate puzzle as a yardstick for their own laws and practices.

Paradoxically, perhaps, the very expansiveness of the network of human rights treaties at the global and regional levels makes normative *omissions* all the more noticeable. Two of the most prominent issues in the last two decades or so have been the rights of persons with HIV and those affected by the epidemic and at risk of infection, and discrimination against persons on the basis of sexual orientation and gender identity. In this respect, international human rights law mirrors the discomfort of many societies and political elites to talk openly about sex, and reinforces publicly expressed or implied prejudice and homophobia. Although influential ‘soft law’ standards have been elaborated – in the form of the 1998 International Guidelines on HIV-AIDS and Human Rights and the 2007 Yogyakarta Principles on the Application

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<sup>6</sup>The Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (CMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention for the Protection of All Persons from Enforced Disappearance (CED).

of Human Rights in relation to Sexual Orientation and Gender Identity – these norms have not been converted into binding state obligations in the form of treaties. While it is correct that the 2003 African Women’s Rights Protocol refers to HIV, it does so by applying the optic of coercive measures of partner notification and not by focusing on the structural and personal factors that predispose women to vulnerability.<sup>7</sup> While existing treaties have been interpreted to cover some issues of concern,<sup>8</sup> and a number of UN and African Commission special mechanisms have contributed towards state accountability for violations on the mentioned grounds,<sup>9</sup> this was done on an *ad hoc* and inconsistent basis.

These aspects relate to the broader category of ‘sexuality rights’. It has been argued that we are witnessing the emergence of women’s rights specifically, and ‘sexuality rights’ more broadly, as a ‘fourth generation’ of rights, on the basis that the effective protection of these rights necessitates the rejection of the public/private divide.<sup>10</sup> There are also other candidates for an emerging fourth category, such as ‘information rights’. Given that the ‘three generations’ distinction has largely been replaced by a categorisation of rights linked to governments’ obligations to respect, protect and fulfil, I do not advocate a ‘fourth generation’ of HIV or sexuality rights. In my view, the proposed obligations on states fit into the existing understanding of human rights. At the same time, HIV, sexual orientation and gender identity raise particular concerns that are not adequately addressed by existing treaty law. These issues may be conceptually linked as ‘sexual or sexuality rights’, a categorisation allowing for the intersections between sexual orientation and HIV discrimination and all other forms of restrictions of sexual expression not conforming to hetero-normative reproductive models, including sex work.<sup>11</sup>

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<sup>7</sup>See arts 14(1)(d) and 14(1)(e) of the Protocol to the African Charter on the Rights of Women in Africa.

<sup>8</sup> See eg the decision of the UN Human Rights Committee, *Toonen v Australia*,

<sup>9</sup> See also the establishment by the African Commission of the Committee on HIV in 2010.

<sup>10</sup> R Coomaraswamy, ‘Reinventing International Law: Women’s Rights as Human Rights in the International Community’, Edward A Smith Lecture, Harvard Human Rights Program, 1997, accessed at <http://library.columbia.edu/urlmirror/11/ReinventingInternationalLaw.htm>.

<sup>11</sup>See I Saiz ‘Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN’ 2004 vol 7 no 2 Health and Human Rights 49 at 65.

This network of standards gave birth to with nine treaty bodies,<sup>12</sup> each of which requires states to submit reports to it periodically; and most of which allow complaints against state parties.

For states, their obligations may be confusing, and their reporting obligations, under nine different UN treaties and further regional treaties, overly burdensome. Consider that the African Charter on Human and Peoples' Rights obliges states to report every two years,<sup>13</sup> the African Charter on the Rights and Welfare of the Child, every three years,<sup>14</sup> and that the interval for periodic reports under the relevant UN treaties averages around four years. To this should be added the review processes involving state-peers, at the UN level, the Universal Periodic Review (once every four years), and in Africa, the African Peer Review Mechanism (on an ad hoc basis), and the AU Solemn Declaration on Gender Equality in Africa (annually).

Attempts to improve institutional and functional co-ordination are on-going. The creation of the UN Office of the High Commissioner for Human Rights in 1993 was a first step. The consolidation of the UN human rights treaty bodies, or at least parts of their mandate, is proceeding slowly.<sup>15</sup> Unfortunately, the interests of role players already deeply invested in the existing system have proven to be a significant obstacle. In the meantime, important adjustments have been made to the state reporting process, calling for shorter reports dealing with specific issues. Some more recent treaties contain explicit measures for collaboration.<sup>16</sup>

Due to its initial failure of conceiving of state reporting as a continuous dialogue based on previous concluding observations, the African Commission on Human and Peoples' Rights lags behind in this respect, but is now also giving greater prominence to the outcomes of examining state reports as a way of restricting the

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<sup>12</sup> Although there are numerous other human rights treaties under the UN, the eight mentioned above are the only treaties establishing human rights treaty bodies.

<sup>13</sup> Art 62 of the African Charter.

<sup>14</sup> Initial reports have to be submitted within two years of entry into force for a particular state, art 43(1)(a) of the African Children's Charter.

<sup>15</sup> See *In larger freedom*, Report of the UN Secretary General (2005) para 147: 'Harmonized guidelines on reporting to all treaty bodies should be finalized and implemented so that these bodies can function as a unified system.'

<sup>16</sup> See eg art 28(2) of CED: 'As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.'

scope of subsequent state reports.<sup>17</sup> Linked to these efforts is the idea of a UN human rights court, to replace, or supplement, the adjudicatory functions of the different UN treaty bodies.<sup>18</sup> Such an international court of human rights would provide access to a judicial remedy to all. Its decisions would bind states under international law, and not be merely recommendatory or persuasive as the findings of the treaty bodies (formally) are. It would also symbolise a 'new era' and may galvanise energies towards ensuring accountability.<sup>19</sup>

In Africa, particularly, the treaty bodies and the more political organs lack institutional cohesion. Few functioning linkages exist between the African Human Rights Commission, on the one hand, and the APRM and AU organs with a human rights aspect to their mandates, such as the Peace and Security Council, the Pan-African Parliament, and ECOSOCC, on the other. The drafting and recent adoption of the AU Human Rights Strategy is an important but flawed attempt to map the route towards improved institutional collaboration and co-ordination. While the Strategy identified one of the four main challenges to an effective continental human rights system as 'inadequate coordination and collaboration among AU and RECs organs and institutions', it does little to enhance the links that are already formally provided for or implied, but not realised in practice. Examples are: The African Commission should carry out on-site investigations on massive scale human rights violations and report to the PSC. The African Commission should be involved in the APRM, and the Commission should take APRM reports into account when examining the human rights record of states. The PAP should discuss the African Commission's activity reports and should scrutinise candidates for the Court and Commission and make recommendations to the Assembly. These kinds of issues do not feature in the Strategy. It does however emphasise that the relevant AU institutions should be viewed as together constituting the 'African Governance Architecture' (AGA), and that there should be greater coordination between the AGA and the APSA – the African Peace and Security Architecture. Unfortunately, the opportunity has been lost to entrench or at least advocate for the position of an AU Commissioner for Human Rights, to ensure consistency in co-ordination and cement the AU's political commitment to human rights.

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<sup>17</sup>Guidelines for reporting under the Protocol to the African Charter on the Rights of Women in Africa.

<sup>18</sup>See eg G Oberleitner 'Towards an International Court of Human Rights?' in M A Baderin and M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR and beyond* (Ashgate, 2010) at 359.

<sup>19</sup>Oberleitner 370.



*Normative human rights expansion is an inevitability, especially towards the new frontiers of sexuality rights. However, the need for expansion should find its fit within an institutional landscape of greater consolidation and conscious and carefully-coordinated collaboration. In summary then, my wishful thinking in response to the first posed challenge: Innovative norm-enlargement combined with relentless and drastic institutional simplification and streamlining.*

## **2 International human rights law lacks effective enforcement**



The second challenge to international human rights law is that it has not lived up to its own rhetorical promises. Under human rights treaties, a ratifying state's overarching obligation is to 'give effect to' the rights provided for in each of the treaties. What is required, is domestication or incorporation (making international law part of national law); institutionalisation and operationalisation (establishing national institutions and processes to provide for specific channels of responsibility); and internalisation (changed conduct based on the acceptance of international norms).

A discussion of this challenge is contextualised by the two-phased evolution of international human rights from 'legislation' to 'implementation'.<sup>20</sup> The first phase in this process emphasised standard setting and institution creation. Focusing on the many norms, institutions, mechanisms and procedures in place can easily detract from their real purpose, which is to achieve *respect for* and *observance of* human rights.<sup>21</sup> Over the last decade or so, the second phase has consequently seen much more concern for norm enforcement, implementation and state compliance, as international law scholars and political scientists started posing questions about the effect and impact of international human rights at the domestic level.

'Making rights real', 'the improvement of conditions on the ground', and 'realisation of human rights' became the filter of analysis, and lines of inquiry have shifted to answer whether treaties actually make a difference, and what the conditions are under which treaties are more likely to have such effects, and what factors induce or inhibit state compliance. Employing quantitative measurement, empirical techniques and statistical analyses, political scientists, in particular, have attempted to answer these questions through studies at the macro level, analysing or comparing a wide array of human rights violations in states across the globe. Debates about fact finding, data gathering and data coding entered the discourse.

In a seminal study, Hathaway concluded that there is no positive correlation between treaty ratification and the effect of treaties 'on the ground' – in fact, she finds, the inverse is true: treaty ratification is associated with worsening of the human rights situation, because international actors 'relieve pressure for real change in performance' on ratifying states.<sup>22</sup> Note that this is not the conclusion of a despondent observer who looks at the world and with a sigh remarks that human rights violations 'occur everywhere'. No, this is a much more measured and motivated critique.

Hathaway's analysis and conclusions are open to criticism. By comparing reported human rights violations pre and post ratification, her analysis overstates the

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<sup>20</sup>For this wording, see *In larger freedom*, Report of the UN Secretary General (2005).

<sup>21</sup>Preamble, Universal Declaration of Human Rights.

<sup>22</sup>OA Hathaway Do Human Rights Treaties Make a Difference? 2002 vol 112 Yale Law Journal 1935 at 2007.

importance of the treaty ratification moment.<sup>23</sup> Her analytical frame does not account for the fact that formal treaty acceptance is part of a gradual process, often preceded by signature; and sometimes preceded by and in other instances followed by a domestic compatibility study and the adoption of implementing legislation. Also, by using recorded and reported violations as a proxy for actual human rights practices, she opens her analysis to the critique that the post-ratification period may result in a more open and caring society allowing human rights violations to be revealed and reported to an extent previously unheard of.<sup>24</sup> In other words, what she observed is an increase in reported – and not actual – human rights violations. Lastly, as a macro analysis covering numerous treaties, Hathaway’s study does not distinguish between the effects of different treaties, which are distinctly different in their ‘governing consequences for a ruling elite’.<sup>25</sup> As Simmons subsequently pointed out, politically sensitive treaties may have the most far-reaching influence in politically unstable or fluid political orders, where there is the best overlap between the need for social mobilisation and the available political space to do so. In stable democracies, the need for mobilisation may be limited; and in stable autocracies the political space may be definitively closed. Due to the lack of a treaty-based and state-specific assessment in Hathaway’s and other similar studies, their conclusions are not sufficiently nuanced to acquit them of the burden of persuasion.

All these studies, including that of Simmons, postulate some causal link between treaty ratification and its effects. An attendant methodological complexity is the difficulty of isolating treaty ratification from a multitude of other factors that may have a role in the human rights situation observed on the ground. Treaty ratification may very well mark an on-going process of greater openness and may formally mark an already-growing acceptance that domestic practices need to change. Treaty ratification should then not be viewed as *constitutive* of positive developments, but as *confirming* the continuing nature of these effects. For this reason, empiricism based on the before/after dichotomy should at the very least be supplemented by micro analyses of the use of treaties in cases, arguments and policies.

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<sup>23</sup>See R Goodman and D Jinks ‘Measuring the Effects of Human Rights Treaties’ 2003 vol 14 *European Journal of International Law* 171 at 173.

<sup>24</sup>See Goodman and Jinks op cit at 175, and K Bollen, ‘Political Rights and Political Liberties in nations: An Evaluation of Human Rights Measures, 1950 to 1984’ in T B Jabine and R P Claude (eds) *Human rights and statistics: Getting the Record Straight* (2002) 200.

<sup>25</sup>B Simmons *Mobilising for Human Rights* (2009) at xx.

International human rights law and lawyers have to engage with these analyses. One approach is to scrutinise the relevant findings for methodological flaws and to question the logic supporting conclusions. In a prominent example of the contested nature of even the most basic building block of quantitative analyses, data gathering and coding, the *Human Rights Quarterly* devoted a significant part of a recent issue to the measurement of 'physical integrity rights' according to two instruments, the Political Terror Scale (PTS) and the Cingranelli and Richards Human Rights Data Project (CIRI).<sup>26</sup> A striking example of the divergence in measurement results is provided by the following: In 1991, the PTS assessed the UK as a '1', while the CIRI gave it a '4'; and in 2000 Morocco scored '3' on the PTS scale and '7' on the CIRI scale, where '8' represents the worst possible score, and '0' the absence of the types of abuses under consideration.<sup>27</sup>

Another approach is to participate in this discourse itself, as many have done, by shifting the enforcement/implementation discourse to the micro level, to focus on in-depth case studies of particular countries,<sup>28</sup> by using qualitative rather than quantitative methods and by underlining the indirect influence of international law on legal cultures and as impetus for social mobilisation.

*My lesson from the second challenge: Dismissing uncomfortable analyses ('inconvenient truths') out of hand is not a tenable option. Lawyers have to work with relevant experts or acquire the skills required to engage with the real effects of human rights (whether provided for at the international or domestic level) in the lives of real people. The effect of these insights on these norm creators and operators may, in turn, be both sobering and inspiring.*

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<sup>26</sup>See R M Wood and M Gibney 'The Political Terror Scale (PTS): A Re-introduction and a Comparison to CIRI' 2010 *Human Rights Quarterly* 367-400; and D L Cingranelli and D L Richards 'The Cingranelli and Richards (CIRI) Human Rights Data Project' 2010 *Human Rights Quarterly* 401-424.

<sup>27</sup>Wood and Gibney op cit at 381.

<sup>28</sup>See eg the studies in C Heyns and F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002).

### 3 International human rights law is trapped in the paradox of the Janus-headed state



The third challenge to international human rights law relates to its dependence on the government as primary guarantor of human rights despite the reality that the same government often is the primary violator of the rights of its own people. Too often, the notion of state sovereignty is used to trump any form of inspection – or, in circumscribed circumstances, intervention – by the international regime. The Janus-headed state has come to prominence once again in the context of the continuing popular revolutions in the Arab world. At the recent session of the African Commission, for example, the Libyan state representative deplored the UN-sanctioned intervention as an unjustifiable inroad into state sovereignty.

Protecting persons from the most serious human rights violations – those constituting genocide and crimes against humanity – brings the international peace and security apparatus into play.

In this regard, it should be recalled that the basis of the international community, the UN's very reason for being is the non-use of force by states. An ancillary principle is the non-interference by one state in the domestic affairs of another. Only the UN Security Council, acting under Chapter VII of the UN Charter, may intervene with military force in order to maintain or restore international peace and security.<sup>29</sup> Despite this possibility, the UN Security Council failed to authorise intervention in cases of grave and serious violations committed to the people of, for example, Rwanda (in 1994) and Kosovo (in 1998-1999).

The failure of the UN to act in respect of Kosovo, in the late 1990s, and NATO's willingness to do so, sparked a debate about the legality of NATO's intervention. A consensus emerged that NATO's actions were 'illegal, but legitimate'.<sup>30</sup> Clearly, this formulation not only raises issues of constructive ambiguity, but also puts the appropriateness of the existing legal regime into question. On the basis of state sovereignty reconceived as state responsibility towards nationals, the notion of the each state's individual and the international community's collective 'responsibility to protect' subsequently gained acceptance.<sup>31</sup> The responsibility to protect entails that the international community has a duty to protect populations, even against their own states, from extreme and conscious-shocking human rights violations, at the very least, genocide, war crimes and crimes against humanity. Based on the acceptance that it derives from the needs of people, and not the rights of states, state sovereignty has thus been humanised in the notion of the 'responsibility to protect'. However, questions about the 'operationalisation' of this doctrine remain, in the light of the Security Council's exclusive Chapter VII powers, and the possibility of a veto by any of the five permanent members.

Two main solutions present themselves. One option is the radical restructuring of the Security Council, including its enlargement, the abolition of veto powers, and the devolution of some of its powers to the General Assembly.<sup>32</sup> However, these on-going discussions are not likely to bear fruit in the foreseeable future.

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<sup>29</sup> Art 39 of the UN Charter.

<sup>30</sup> The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned* (2000) at 186.

<sup>31</sup> International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001), accessible at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

<sup>32</sup> See eg African Union's Ezulwini Consensus

The other option is to bring the Security Council's veto power in line with the responsibility to protect. Arguably, interpreted against this background, the use of the veto would be 'illegal' if it impedes the use of force in a situation where a state is in flagrant violation of its responsibility to protect.<sup>33</sup> Still, many questions remain, including how a dispute about the conflicting appreciation of the circumstances and the need for intervention by Security Council members would be resolved.

While these uncertainties remain within the UN Security Council, the African Union has broken new normative ground through the enactment of its 2000 Constitutive Act, and the African Commission on Human and Peoples' Rights, with the adoption of its amended Rules of Procedure in 2010.

Both the immediate memory of OAU inaction in the 1994 Rwandan genocide and the emerging conceptual articulation of the responsibility to protect informed the inclusion of article 4(h) of the AU Constitutive Act, which in essence constitutes a statutory embodiment of this concept. The omission of the requirement for Security Council authorisation, as stipulated by the UN Charter, should also be understood as a way of leaving a statutory framework in place if UN intervention is not forthcoming and a request by the AU to intervene is denied. However, thus far the AU has not invoked this provision, either of its own volition, or by way of a request for authorisation to act to the Security Council, in any of the situations of massive violations involving incumbent governments such as in Darfur or Libya.

Recent developments in Africa demonstrate that international human rights systems may have a role in these cases of serious and massive violations.

The referral by the African Commission on Human and Peoples' Rights to the African Human rights Court, in March 2011, of a case in respect of Libya speaks, substantively, to the serious threat to the lives and physical integrity of persons on a widespread scale. In its subsequent interim order, the Court ordered Libya to cease all actions endangering the lives of civilians.

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<sup>33</sup>A Peters, 'Humanity as the A and Ω of Sovereignty' 2009 European Journal of International Law 513 at 540.

The Court's decision mentions that the case has been submitted under article 5(1) of the Protocol, and finds its jurisdiction in part on this provision. However, in so far as this case constitutes a direct referral of serious or massive violations of human rights, it seems to be explicitly mandated under Rule 118(3) of the Commission's 2010 Rules of Procedure.<sup>34</sup>This Rule is an exception to the position that cases against state parties to the Protocol that have not made the optional declaration under article 34(6) should be dealt with by the Commission before they may be referred to the Court.<sup>35</sup>Rule 118(3) allows the Commission to submit situations considered by the Commission to constitute serious or massive violations, directly to the Court. This provision, with its emphasis on the extensive scale and far-reaching nature of violations, is yet another substantive expression of the responsibility to protect. Given its clear relevance in the particular circumstances, it is unclear why the Commission did not base its referral on the Libyan case squarely on this Rule.

The state has long been losing its centrality in the international community at the expense of non-state actors such as multinationals and civil society organisations, and to regional economic communities. Regional integration has eroded state sovereignty as first the European Union, and now, albeit tentatively, the African Union,<sup>36</sup>are moving to replace intergovernmental with supranational arrangements, thus shedding significantly more competences to supra-national institutions.

*Are the international community and other relevant role players twisting the neck of the Janus-headed state and thus saving international human rights law from the third charge? A turn in the tide, perhaps? The evidence is too sparse to make the case that the international community, or international human rights regime, has turned the corner in its preparedness to protect nationals against even the most excessive misuses of state power against them. Time will tell where these nascent*

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<sup>34</sup>Rule 118(3): 'The Commission may, pursuant to Rule 84(2) submit a case before the Court against a State party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under article 58 of the African Charter, has come to its attention.'

<sup>35</sup>See Rule 118(1), which refers to the 'decisions' taken by the Commission in respect of inter-state communications (under arts 48 and 49 of the Charter) and individual communications (under art 55 of the Charter).

<sup>36</sup>Through the transformation of the AU Commission into an AU Authority, which aims to 'broaden the mandate' of the Commission. Although the decision has been taken by the AU Assembly, the details are still in the process of being formulated. The real possibility remains that the 'transformation' would be largely symbolic, with an emphasis on changed nomenclature (the title 'President' and 'Vice-President' of the Authority will be used) combined with little fundamental transfer of competences to the new AU Authority.



*developments will lead, and whether the spectre of selectivity and double standards will be avoidable in this process.*

#### **4 International human rights law has neglected the poor**



HONORE (Art. 22)  
from 'Dessine-moi un droit de l'homme'  
EIP-ISBN 2-88137-000-4

At the dawn of the last century, WEB Du Bois identified 'the problem of the twentieth century' as 'the problem of the color-line' (race and racism).<sup>37</sup> The defining issue of this century, the most serious form of human rights violation, is no doubt extreme poverty. Just as humanity now disowns racialised concepts and conduct that were pervasive in a different age, it will still in this century, I venture to predict, look back in great shame at the ease of its tacit and meek acceptance of radical inequality and extreme poverty.

This part of the discussion starts with the premise that rights and their adjudication may have a socially transformative role. Accepting this contentious contention, it is argued that international human rights law has not been effective in transforming the

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<sup>37</sup>Of the dawn of freedom.

situation of those most deprived of the basic necessities of life. There is for example no general acceptance that poverty, *as such*, is a violation of human rights. Instead, under international law, two main normative routes have been explored to address the plight of the impoverished: 'socio-economic' rights and the right to development. In both respects, international law developments have been dismally inappropriate.

When socio-economic rights were provided for as part of international human rights law, they were treated differently from other ('civil and political') rights in that individuals could not complain about the violation of these rights. Despite the General Assembly's request in 1948 to the Commission on Human Rights to prepare a single covenant comprising both 'civil and political' and 'socio-economic' rights, it soon became clear that socio-economic rights would be contained in a separate document. When it was eventually adopted in 1966, the Covenant on Economic, Social and Cultural Rights provided for non-enforceable and non-justiciable rights, subject to progressive realisation. As individual complaints were not allowed, monitoring of the treaty was by way of state reports. Instead of establishing a treaty monitoring body of independent experts, monitoring of state reports was left to ECOSOC, a political body made up of 54 UN member states. An independent treaty body was only established in 1985. A similar dichotomy was put in place in the two major regional human rights systems in Europe and the Americas.

Although the African Charter included socio-economic rights alongside civil and political rights, making them equally enforceable, the list of guarantees omitted rights crucial to the poorest, such as the right to shelter or housing, food, water, basic sanitation and social security. According to the founding fathers, as they were, the minimal obligation was a conscious decision to 'spare our young states too many but important obligations'.<sup>38</sup>Note the juxtaposition of the actual omission of basic rights with the rhetorical acknowledgement of their importance.

An amendment to the UN Covenant, allowing for individual complaints, is not likely to make much difference. In a major advance, the UN in 2003 adopted an Optional Protocol to the ICESCR, allowing for the possibility of individual complaints. While

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<sup>38</sup>Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU DOC CAB/LEG/67/Draft Rapt.Rpt. (II) Rev.4, para. 13, reprinted in C Heyns (ed) *Human Rights Law in Africa 1999* (2002) 94.

this treaty addition represents an important acceptance that socio-economic rights are justiciable, our expectations – and that of the poor – should be tempered. So far, only three states have accepted this Protocol as binding, far short of the modest target of 10 ratifications to ensure its entry into force. One of the main reasons for the hesitancy by states is related to the requirement that local remedies have to be exhausted before a case may be submitted to the Committee on Economic, Social and Cultural Rights. It would be fair to state that most socio-economic rights are not justiciable in the domestic legal systems of most states. For these states, accepting justiciability at the international level would be at odds with national law, and therefore perceived as a significant inroad into national sovereignty. Ratification of the Optional Protocol is thus most likely to happen in the small number of states that already provide for justiciability of socio-economic rights at the domestic level.

Even if the Optional Protocol were to gain more widespread support and enter into force, the standard of review to be applied is that of reasonableness, and not whether the core content of a right had been violated.<sup>39</sup> This rather deferential approach flows from the long-standing contention that, according to the separations of powers, the realisation of socio-economic rights falls within the domain of the elected legislature and politically-accountable executive, and not in the hands of unelected judges. While these arguments about institutional legitimacy have been raised primarily in respect of national adjudication, their traction is increased in respect of an international treaty body, of which the members are elected by a group of states, for fixed terms, and the membership of which may not include even a single national from the state against which a finding is made.<sup>40</sup>

A further reason not to burden the Protocol with overstated expectations born from frustration is the likelihood of complaints being brought. If the experience of South Africa, a model of domestic justiciability, is anything to go by, the number of cases directed at issues related to basic necessities would be minimal. The reasons for the relative dearth of cases are complex, but some of them relate to a lack of permeation

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<sup>39</sup>Art 8(4) of the Optional Protocol to the ICESCR: ‘When examining communications under the present Protocol, the Committee shall consider the *reasonableness of the steps taken* by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a *range of possible policy measures* for the implementation of the rights set forth in the Covenant’ (emphasis added).

<sup>40</sup>See generally M Dennis and D Stewart ‘Justiciability of economic, social and cultural right: Should there be an international complaints mechanism to adjudicate the right to food, water, housing and health?’ 2004 *American Journal of International Law* 462.

of a legal culture allowing people not to conceive of their life problems as legal issues, and the largely urban focus of legal access even to public interest litigation leaving the rural poor and their difficulties as peripheral concerns. The picture is equally bleak if the number of complaints under existing treaties is considered as a better yardstick than a national jurisdiction. With the exception of complaints to the Human Rights Committee, the numbers of successful complaints are very small, ranging from 6 under CEDAW and 12 under CERD, to 439 cases under CAT and 562 cases under the ICCPR-OPI.<sup>41</sup> But even that figure means that some 12.5 cases have been submitted annually. Very few cases have been submitted against African states.

Let me be clear: I do not argue that the Optional Protocol is devoid of potential, or that the celebration and intense scrutiny of occasional examples of domestic adjudication of socio-economic rights are not warranted. I am stressing that the evolution of international human rights law has not kept the poor sufficiently in its sights, nor is it likely to do so in the near future.

The second route is the one towards a justiciable right to development. Since the African scholar Kéba M'Baye proposed this as a new normative principle,<sup>42</sup> the justiciability of the right to development has been shrouded in controversy.<sup>43</sup> This right is not accepted as binding at the global level; instead, it remains contained in a non-binding instrument, the Declaration on the Right to Development. At the regional level, Africa provides a notable exception. Not only does the African Charter explicitly provide for this right,<sup>44</sup> the African Commission has made a finding that a state (Kenya) has violated that right by excluding an indigenous community in that country (the Endorois) from the benefits of development, and by failing to effectively and inclusively consult with the community.<sup>45</sup>

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<sup>41</sup>These numbers are based on the lists of cases completed by all UN human rights treaty bodies displayed on [www.bayefsky.org](http://www.bayefsky.org). The 'successful complaints' are cases finally decided on the merits in which a violation by the state has been found.

<sup>42</sup>M'Baye *Les droits de l'homme en Afrique*.

<sup>43</sup>See eg Donnelly, J 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1984) *California West International Law Journal* 485.

<sup>44</sup>Art 22 of the African Charter.

<sup>45</sup>Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Group Rights International (on behalf of Endorois Welfare Council) v Kenya*, 27th Activity Report of the African Commission on Human and Peoples' Rights, 2009.

Similarly, little attention has been devoted to a derivative element from the right to development, linked to the duty to provide international cooperation towards the 'full realization' of Covenant rights,<sup>46</sup> namely the right to development assistance. Although many developed nations provide development assistance (aid) to developing countries, on the basis of a 40 year-old pledge to provide at least 0.7 of GDP in development assistance, development assistance has not been seen as a binding obligation.<sup>47</sup> It may be argued that many of the conceptual problems attendant upon the right to development, such as questions about who would benefit from the right, and what the right exactly entails, do not arise when it comes to the right to development assistance. In addition, there is sufficient state practice and indications of a willingness to accept this as an obligation on the part of developed states to justify the inference of an emerging rule of customary international law.<sup>48</sup> This emerging rule could serve as the basis for the elaboration of a UN treaty on development assistance.

*These two avenues will not be fundamental to a rearrangement of social hierarchies. Evidently, they should be understood as modest complements to a multitude of other attempts to improve the fate and fortune of the poor, such as their effective inclusion in matters affecting them, access to information regimes allowing for critical engagement in budgetary processes, negotiations for a fair trade regime, and the realisation of the Millennium Development Goals.*<sup>49</sup>

## **The role of human rights education**

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<sup>46</sup>Art 2(1) of the ICESCR.

<sup>47</sup> UN General Assembly Doc A/RES/75/2626 (XXV). International Development Strategy for the Second United Nations Development Decade, 24 October 1970, para 43: 'In recognition of the special importance of the role which can be fulfilled only by official development assistance, a major part of financial resource transfers to the developing countries should be provided in the form of official development assistance. Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market prices by the middle of the Decade.'

<sup>48</sup> Government of the Republic of Ireland in its White Paper on Irish Aid (2006): 'First and foremost, we give aid because it is right that we help those in greatest need. We are bound together by more than globalisation. We are bound together by a shared humanity. The fate of others is a matter of concern to us. From this shared humanity comes a responsibility to those in great need beyond the borders of our own state. For some, political and strategic motives may influence decisions on the allocation of development assistance. This is not the case for Ireland. For Ireland the provision of assistance and our cooperation with developing countries is a reflection of our responsibility to others and of our vision of a fair global society'

<sup>49</sup>None of these steps also absolve states in Africa and elsewhere to adjust their priorities in allocating available resources and to eradicate corruption and the systematic enrichment of isolated elites.

Against the background of these four challenges, which will no doubt persist, I consider a few aspects pertaining to the role of, and approach to, human rights education. From the earlier discussion, it transpires that a multidisciplinary perspective or interdisciplinary approach provides a better appreciation of the resolution of these challenges. Such an approach entails a conversation between law and other disciplines, allowing the channelling and challenging of insights, the sharing and shedding of methodologies and the development of common understandings.

- The growth and overgrowth of international human rights norms and institutions, identified thus far as the 'first challenge', is best appreciated not by comparing legal provisions in complementary treaties, but as an aspect of the geopolitical, embedded in the understandings of international relations theory. Issues such as the cost and benefits of normative development, institutional competition, and resource sharing by regimes with overlapping membership are likely to garner important insights to the international lawyer seriously concerned about norm-explosion and institutional overload.
- By its very nature, our second challenge -- the enforcement of international law by states -- speaks to the political. It is inescapable that, in assessing the effectiveness and meaning to real people of international norms and institutions, the human rights discourse should be enriched by the critical questions and techniques of political scientists. To call a human rights violation a human rights violation does not further our understanding of this stated fact and leads us into a discursive and epistemological dead-end. Important voices to listen to are those of anthropologists, who may relate personhood to principle, and those of sociologists, who may explain the absence or presence and potential of social mobilisation around human rights treaties and decisions in different societies. International relations provides a further frame to explain state conduct, which is largely dependent on an understanding of states' perceived self-interest in their relationships with other states.

- One way of minimising the role of the Janus-faced state is to re-conceive state sovereignty in the light of regional integration. In the African context, one should in this regard take into account the often fragile bonds imposed by the post-colonial nation state, and the possibilities of a radical reconfiguration of states in Africa. Thus far, the faltering OAU/African Union project has largely been in the hands of African leaders, supra-national bureaucrats and consultants. The importance of supporting participatory politics at the nation-state level has been neglected, as has the voice of African academia. The African integrationist project is doomed to failure if its advances depend on dictates from Addis Ababa. Law schools should take the initiative in contextualising national legal developments, including human rights, within the bigger picture of regional integration, and to re-frame regional integration as a practical exercise in multi- and inter-disciplinary human rights.
- Our brief discussion on international human rights law and poverty concluded that socio-economic realities and domestic inequalities cannot be divorced from the greater forces of globalisation constantly reconfiguring our world. The study of international human rights should therefore also factor in an understanding of both the political economy of a particular state and the impact of the international economic order. Let me add another discipline: In so far as poverty – and any other aspect – engages our moral responsibility, students of human rights law should also, through ethics, confront their own personal responsibility.

Simply put, ethics concerns itself with the question what it means to live a good and moral life. Do students of international human rights sufficiently ponder the following questions: In a world increasingly stratified between the affluent and the poor, how do we, as individuals, ethically respond to our position in this divide? Using the example of a person passing by a pond in which a small child is drowning, the ethicist Peter Singer argues that the person has a moral duty to save the child. His argument is based on the principle that when it is in our power to prevent something bad from happening (the child dying a preventable death), without thereby sacrificing anything of comparable moral importance (getting our clothes wet or missing an important

appointment), we ought morally to do it.<sup>50</sup> If this is accepted, he continues, there is a corresponding moral imperative to save a child, or an adult, *in another country* where a famine is raging. The remoteness, and the fact that others may be in a position similar to ours, do not detract from our own moral responsibility. Could we extrapolate this obligation to someone starving in the same town or city or country, and to the deprivation of material benefits that, while falling short of famine, constitutes serious impediments to material life-sustaining conditions, such as preventable illness? Whatever our responses to these questions, the most important- from an educational perspective - is that we question the nature and extent of our altruism. How do we understand our own best interests in a world of affluence and poverty? At the very least, our best interest should be understood less as the sustenance of a consumerist lifestyle, and more as the satisfaction that comes from assisting others.<sup>51</sup>

Despite the obviousness of these links, teaching of international human rights and the concomitant academic discourse are still predominantly legal. Our conception of law as a separate intellectual endeavour and as a sub-discipline of the social sciences, and the phenomenon of law schools or faculties, is not historically or logically inevitable. The increased international and national codification and constitutionalisation of human rights is a distinctly mid- to late-20th century phenomenon. The associated emergence of international human rights law as a distinct discipline resulted in a largely textual-analytical approach, focusing on the scope and meaning of treaties, constitutions and other legal texts. Human rights law aims to ask this (ostensibly) valid question: Was a human right violated? With reference mainly to legal texts and jurisprudence, the question is answered in respect of a particular set of circumstances. Developed in isolation from other disciplines, a de-historicised and a-contextual discourse on human rights (and law more generally) has taken root in laws schools, especially in many parts of post-colonial Africa. The dominance of legal perspectives on human rights also influenced the forms of engagement of social scientists in this field.

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<sup>50</sup> P Singer 'Famine, affluence and morality' 1972 *Philosophy and Public Affairs* 229.

<sup>51</sup>See further P Singer *The life you can save: Acting now to save world poverty* (2009).



Increasingly, over the last two decades, these approaches have come under criticism and multidisciplinary human rights programmes and interdisciplinary research gained ground.

In the last decade, the Centre has also gradually moved towards a more multidisciplinary approach in its activities and programmes. This trend is reflected in the establishment of the AIDS and Human Rights Research Unit, a collaboration with the Centre for the Study of AIDS, aimed at combining the exploration of the social and legal dimensions of HIV, and a project using qualitative research techniques to better appreciate xenophobic violence in our society.

In 2000, the academic flagship programme of the Centre, the LLM (Human Rights and Democratisation in Africa), was introduced. As its name indicates, this programme lodged the political ('democratisation') as an integral part of a human rights programme principally directed at law and lawyers. An LLM programme in trade and investment law in Africa, presented by the Centre in alternate years, and a Unit for International Development Law in Africa, established in the Centre, seek to explore the synergies between human rights and economic development. In 2008, the Centre introduced a fully-fledged Master's programme in Multidisciplinary Human Rights. This programme is open not only to lawyers who upon successful completion obtain the degree LLM, but is also open to non-lawyers, who obtain an MPhil.

In my view, the time is now ripe to open-up all Centre academic programmes – the LLM (Human Rights and Democratisation in Africa) and the LLM (International Trade and Investment Law in Africa) – to non-lawyers. The challenge is to retain the main benefits of programmes directed at law students, while adding the benefits of a multidisciplinary student body and a deeper engagement with disciplines such as anthropology, sociology, political economy, political science and international relations. A similar model as with the existing LLM/MPhil (Multidisciplinary Human Rights) should be followed, with law students finishing with an LLM and non-lawyers with an MPhil. Although the core content for all students would be the same, students with a law background will focus on a full understanding of and would acquire competence in legal techniques to ensure government accountability. In this way, the main benefits that a law-specific education brings would not be lost, but would rather

be enhanced by a more contextual and nuanced understanding of the relevant issues.

The resolution of contemporary challenges calls for critically-reflective education, questioning premises and destabilising common knowledge. At the same time, one cannot lose sight of the fact that human rights education does not take place in isolation, but is framed by the realities, particularly in Africa, of repression, denial of human rights, poverty, deprivation, and deficits in democratic governance. Human rights education is therefore, in my view, not a normatively neutral endeavour, but is an inevitable response to the context from which it grows. It should therefore aim as much at developing the competence and knowledge of students as appealing to their affective sensibilities.

The challenge is to adopt a teleological approach to human rights education without reifying the object of study into something sacrosanct, against which criticism is viewed as an act of betrayal or collusion. Perhaps the best posture to adopt is that of the critical insider, akin to the forthright and honest criticism often only possible in a close family circle or community of close friends.

Still, the goal, the end of human rights education cannot be disentangled from the utopian and transformative essence of both human rights and education. If our human rights teaching and training does not open the possibilities of a better world, and does not aim to transform institutions and societies and individual students, where should it lead us, and where does it leave us, instead?

At the same time, this post-modern age has taught us that solid-seeming truths are built on shifting sands, and better worlds may all too soon reveal the roots of their ruin. Add, therefore, to the curriculum of optimism, I suggest, a few lecture outcomes in humility and realism about where our efforts are likely to lead.

In conclusion, I let Rumi, the thirteenth century Persian poet-philosopher-teacher, describe to you a field:

Out beyond ideas of wrongdoing  
and rightdoing there is a field.

I'll meet you there.

This is not a field for combat, a place to celebrate triumphs, or for final resolution. In my narrative, it is the meeting place of those who have imagined and persevered despite the likelihood of failure and the acute awareness of the transitory nature of their efforts. May we all meet there.