

ASIL



THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Proceedings *of the* 89th

STRUCTURES

OF

WORLD

ORDER

Annual Meeting

April 5-8, 1995
New York, New York

**CONFLICTING CONCEPTIONS OF HUMAN RIGHTS:
RETHINKING THE POST-COLONIAL STATE**

*By Dr. Makau wa Mutua**

I believe that we have come to a crossroads in history. We must now look with a fresh eye at the conceptual and structural arrangements under which we have hitherto lived. I believe this is particularly pertinent where Africa is concerned. I say this because I believe as most of you do, at least in your subconscious even if you have not come to accept it, that all of Africa is threatened with extinction.

There is little doubt today that Africa's survival is seriously threatened by corrupt and inept political elites, unbridled militaries, ethnic rivalries and economic misery. The protracted problems of the post-colonial African state have raised anew the meaning of state legitimacy and brought forward disturbing questions about the concepts of sovereignty and statehood. The problems of the post-colonial state indicate that the juridical statehood attained with the decolonization of the colonial state has in the past four decades proven inadequate. It is becoming increasingly apparent that sovereignty and statehood are concepts that may have trapped Africa in a detrimental time capsule; they now seem to be straightjackets with time bombs ready to explode.

The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it. Unlike their European counterparts, African states and borders are distinctly artificial and are not the visible expression of historical struggles by local peoples to achieve political adjustment and balance. Colonization interrupted this historical and evolutionary process. Since then Africa has attempted, unsuccessfully, to live within the structural and conceptual confines of the post-colonial state; all too frequently the consequences have been disastrous.

The problems of the modern African state have been well rehearsed, with some analyses bordering on the apocalyptic. These have become chronic crises from which deliverance seems unlikely. As if to bear out the prophets of doom, the post-colonial state has collapsed in Liberia, Rwanda and Somalia. Others, such as Zaire, Nigeria, Sudan, Mozambique, Angola, Ethiopia and Kenya maintain a precarious balance on the political precipice. I argue that the post-colonial state, the uncritical successor of the colonial state, is doomed because it lacks basic moral and legal legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental basis for its failure. I argue that at independence, the West decolonized the colonial state, not the African peoples subject to it. In other words, the right to self-determination was exercised not by victims of colonization, but by their victimizers, the elites and institutions that control the international state system. As such, dependence continued under the post-colonial state, the instrument of narrow elites and their international backers. I concede that, although other reasons such as external economic factors and cultural disorientation, have contributed to the crisis of the African state, they cannot be divorced from the crisis of internal legitimacy. I contend that foreign imposition of artificial states and their continued entrapment within the concepts of statehood and sovereignty are sure to occasion the extinction of Africa unless those sacred cows are set aside for now to disassemble African states and reconfigure them. I propose that pre-colonial entities within the post-colonial be allowed to exercise their right to self-determination. Only this radical but necessary step can legitimize the African state and avoid its demise.

Needless to say, my surgical suggestion, that of a new cartography, will doubtless be

* Associate Director, Human Rights Program, Harvard Law School.

viewed without sympathy by a host of interested parties: elites who control the international state and financial systems; scholars stuck in traditional notions of international law; and states elsewhere—but nowhere is opposition bound to be steeper than within African states themselves and the ruling cliques who benefit from those states. Until Eritrea recently prosecuted a secessionist war against Ethiopia, prevailing state ideology in Africa treated as treasonable any discussion about border changes, separatists movements or ethnic self-determination within an independent African state. Ironically, it was African elites who sacralized the colonial state by ratifying its borders and forbidding even so much as idle speculation about the reconsideration of the issue. Even where European map-makers split one nation into two states, such as the Masai in Kenya and Tanzania, their fate was discussed as two separate and alien entities, although reality on the ground defied such fictitious separation. Even today, with overwhelming empirical evidence of the failure of the post-colonial state, African elites insist on clinging to this fictitious entity of European creation to the bitter end. Cases in point are the regimes of Siad Barre of Somalia, Samuel Doe of Liberia and Juvenal Habyarimana of Rwanda who, rather than permit independent political activity, defied popular demands, leading to the collapse of their states. A similar fate most likely awaits others: Daniel Arap Moi of Kenya, Mobutu Sese Seko of Zaire, Meles Zenawi of Ethiopia and many more.

There are several reasons for this resistance to an imagination of political life without the post-colonial state. The simple explanation is that alienated elites—who have more in common with and harbor aspirations of elites in industrialized countries than with their teeming masses of rural and urban poor—are loathe to give up their privileges, which come from the control of the state. Since the state as currently organized makes possible their privilege, it would be suicidal for them to participate in changing it, especially if thereafter their privileged positions were not secured. Even when the state is not effective—or on the brink of collapse—elites will still defend it. Arguments against dismantling the colonial state range from the chaos that would result from removing central authority to the balkanization of Africa into a million ethnic entities. While anticolonial fervor had a lot to do with pride in the post-colonial state, unless the sobering reality of its failure is appreciated and steps are taken to make a voluntary, consensual map, the partition of Africa into small inviable states is going to occur at great cost as pre-colonial entities free themselves from the wreckage of the failed state. That eventuality will come at a great cost to Africa; and it is not in the interest of the Continent. This is why I argue for an orderly re-creation of the state.

The views of those who imposed the colonial state on Africa are not dead. Some have even suggested that Europe should recolonize Africa—this reasoning assumes that it was a mistake to decolonize Africa. Such views do not recognize that Europe's involvement in Africa has brought nothing but misery. Perhaps the withdrawal of the West from Africa, though detrimental to the colonial state, may provide an opportunity for Africans to squarely face their problems for the first time in several centuries. In that re-examination of the Continent, Africa would do well to abandon the principle of *uti possidetis juris*, the device that falsely linked the decolonization of the colonial state to the liberation of African peoples. It is a straight-jacket that continues to deny freedom to millions of Africans. While its rejection plunges Africa into an uncertain future, it ensures that creative thinking at least begins to boldly explore solutions to the crisis.

It would be irresponsible to assume that the direction proposed here could not lead Africa down a more treacherous path in which power mongers and cynical ethnic chauvinists would senselessly tear society apart in pursuit of self-aggrandizement. That possibility, which would be a real setback, does exist. However, it is far more damning to sit and wait for disaster to strike, precipitating the crises that have been witnessed in Somalia, Liberia and Rwanda. Thus, an orderly formulae for re-making the Continent's political

map must be worked out soon, otherwise the post-colonial state, itself already a terrorist organization masquerading as the repository of popular will, will fragment into pieces and provide devious outsiders with more opportunities to literally pick Africa apart. Among the problems that will have to be addressed by Africans as they ponder this proposal are the criteria for determining the “self” who would possess the right to self-determination, and how the will of that “self” would be determined. This will be especially difficult because the colonial state substantially changed social relations and created new alliances and interests not in existence in the pre-colonial era. All these variables will have to be taken into account as new fora for expressing popular will, such as plebiscites and referenda, are explored as possible avenues for determining a new African political map.

It will not suffice to simply redraw Africa’s map. A human rights jurisprudence that resonates with the heart and soul of cultural Africa will have to be simultaneously attempted. The argument by current reformers that Africa needs only a liberal, democratic rule of law state to be freed from despotism is mistaken. The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralization of the individual and the supremacy of the jurisprudence of individual rights in organized political and social society is not a natural, trans-historical or universal phenomenon, applicable to all societies without regard to time and place. The ascendancy of the language of individual rights has a specific historical context in the Western world. The rise of the modern nation-state in Europe, its monopoly of violence and the instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state.

The development of the state in Africa is so radically different from its European equivalent that the traditional liberal conception of the relationship between it and the individual is of limited utility in imagining a viable regime of human rights. The failure of the post-colonial state points to the continued inability of the “unnatural” and forced state to inspire loyalty and distinct national identities. This disconnection between the people and the modern African state is not merely a function of the loss of independence or self-governance over pre-colonial political and social structures and the radical imposition of new territorial boundaries with unfamiliar citizenry. It is above all a crisis of cultural and philosophical identity: the delegitimation of values, notions and philosophies about the individual, society, politics and nature developed over centuries. Severe as these problems are, I do not think that the crisis of the African state is insoluble. My purpose here is to imagine and reconfigure a rights regime that could achieve legitimacy in Africa, especially among the majority rural populace, and become the basis for social and political reconstruction. I regard the imposed colonial state, and its successor, the post-colonial state, as moral and legal nullities, entities whose salvation partially lies in new map-making in the context of self-determination for Africa’s many nationalities, democratization, and, critically, a historical reconnection with certain pre-colonization ideals.

I understand the current human rights movement to be only a piece of the whole. Its roots in the Western liberal tradition necessarily deny its completeness, although not the universality of many of its ideal and norms. To paraphrase a famous metaphor: the gourd is only partially full; it falls on other traditions to fill it. On this premise, I want to stress the existence of African notions of human rights prior to colonization, and how those notions differed from the contemporary Eurocentric articulation of human rights. I regard the Eurocentric approach to human rights as that of the insider, the ethnocentric universalist who rejects the existence of human rights norms in other cultures. However, African notions saw man, the social being, as the bearer of both rights and duties. This formulation should be the basis for the construction of a regime of rights that hopes to achieve legitimacy in Africa. I suggest a vision that strikes a balance between duties and rights, and that restrains the runaway individualism of the West, should be attempted, because it has

roots in the African Continent and may be Africa's last hope for reversing societal collapse. I do not deny the validity of the Western liberal tradition to the human rights movement. I only inform it with an African perspective, that of the twinning of duties and rights in a society consumed by the socialization of the individual, a concept articulated by the 1981 African Charter on Human and Peoples Rights.

This view is not relativist—it does not advance or advocate the concept of apartheid in human rights or the notion that each cultural tradition has generated its own distinctive and irreconcilable concept of human rights. This is the approach of the outsider who rejects universality. I proceed from the position that although cultural relativism in human rights as an anti-imperialist device is admirable, it is a misunderstanding inspired by cultural nationalism. What its proponents see as radically distinctive, irreconcilable traditions also possess ideals that are universal.

Most critiques of cultural relativism, on the other hand, are ethnocentric and symptomatic of the moral imperialism of the West. Both extremes serve only to detain the development of universal jurisprudence of human rights. In reality, the construction and definition of human rights ideals and norms are dynamic and continuous processes. Human rights are not the monopoly or the sole prerogative of any one culture or people, although claims to that end are not in short supply. In one culture, the individual may be venerated as the primary bearer of rights, while in another individual rights may be more harmonized with the corporate body. Rather than assert the primacy of one over the other, or argue that only one cultural expression and historical experience constitutes human rights, I prefer to see each experience as a contributor to the whole. The process of the construction of universal human rights is analogous to the proverbial description of the elephant by blind men: each, on the basis of his sense of feeling, offers a differing account. Put together, all the accounts paint a complete picture. As a dynamic process, the creation of a valid conception of human rights must be universal; that is, the cultures and traditions of the world must, in effect, compare notes, negotiate positions and come to agreement over what constitutes the corpus of rights characterized as human rights. This is the basket approach.

There is a clear and urgent need to confront the nature of the post-colonial state, demystify it and address the crisis of legitimacy pressing it. It is important to realize, as this process gets under way, that the alienation of the African state is not merely a function of the loss of sovereignty over pre-colonial structures and institutions; it is also a crisis of cultural and philosophical legitimacy. The two phenomena are inextricably linked. I believe the crisis in Africa can only be addressed through a dual but simultaneous process of norm re-examination and reformulation—to reconnect the Continent to many of the pre-colonial ideals of community and social organization as well as democratization—and new map-making. A human rights corpus that is rooted in the Continent's cultural and philosophical identity is indispensable to this exercise.

DISCUSSION

Professor RICHARDSON: And with this, we await your comments. Please step to the microphone, identify yourself and your affiliation. We will, in the interest of time, accept very short comments, but primarily questions.

CHARLES STEPHENSON:* I must applaud the statement of each of you. The panel focused, as it developed, on sub-aspects of the larger set of problems that we face, from political science to human rights to particular emphases on women. It focused principally on humans because we are humans, but we are in relation to the planet and to the Continent of Africa like any other Continent. The planet, in a way, has rights too, which need to be observed. When one sees desertification, silting, salting, animals disappearing and ecosystems disappearing, the health problems that exist in each of our continents, one contemplates the range of relationships that exist between the humans and their world. Should we not remember, as we talk about human rights, the rights of the planet on which those human rights are exercised?

Professor MIKELL: I would agree with you totally. In fact, if I had had time to have explored that compact, I would have also linked it to the environmental and the ecological. In traditional cultures the link is strong. There is usually a belief that it is not possible for humans to exist and exercise duties, rights and privileges, without respecting the environmental part of it. Somehow that gets lost in the statement of human rights. Now more countries are beginning to look again at their right to exist in environments that are not tainted by the waste that comes from developmental processes which they, as groups, have not signed on to, but rather their states.

* ASIL member, Washington, DC.

Professor SAM GYANDOH:* My question is directed to Dr. Mutua: How is the unscrambling of Africa to be done, and by whom?

Dr. MUTUA: I will not duck the question although it is a difficult one. What I was trying to do was to identify first of all what the problem is and get us thinking about ways of elaborating on that problem so that we can devise solutions to it. The question you asked is, of course, the first logical step if you accept that Africa must be unscrambled. Then the question is, Who is going to do it and how will it be done? This is a very difficult part of the exercise. There is no shortage of entities within the post-colonial state that would tell you how that should be done. For example, in the case of Nigeria, it is pretty clear what entities would like to be unscrambled, and how they would like to be unscrambled. The question is really how we are to determine what entity should exercise the right to self-determination, and how we are then going to exercise that right. I think that one of the possible mechanisms is clearly through plebiscites. We have never asked the African people—for example, the Nigerians—whether they would like to stay together, or the Zaireans. We have always assumed that they wanted to stay together within that unit. This option has never been offered. I suggest that initially we use the ballot box to ask people where they would like to go. I think as a first step, we can use the traditional method which we all know about—the ballot box. In this exercise we have to try to involve as many entities as possible. We have to try to involve the OAU because this unscrambling should be done in an orderly fashion: otherwise, I can only see the collapse of the state and the wreckage of those within.

Professor CHRIS OKEKE:** I come from Nigeria. I would like to ask Dr. Makau wa Mutua to what extent he agrees that the main crisis of the post-colonial African states stem from lack of purposeful, conscientious, tolerant leadership of its people. To what extent would you agree with me that this, more than what remained as a result of the colonial emasculation of the Continent, appears to be the situation, because from the explanation he has given so far, the conclusions entirely agree with what I have been thinking. The problem is how we replace the situation of states with some other much more reliable set up and mechanisms. Should we not go from this, from what we have now, to address internally the crisis of leadership amongst our people?

Dr. MUTUA: The failure of the post-colonial state is also the failure of its leadership. It is the failure of those states to wrest loyalties from pre-colonial entities unto itself. Whatever group has achieved some political power—invariably it is dominated by one ethnic group—has always seen state power as a vehicle for the exercise of self-determination for its particular ethnic group to the exclusion of others. In other words, the process of the anti-colonial struggle was not sufficient to forge a national identity, and the post-colonial state itself has failed to forge that national identity and to destroy the distinct ethnic loyalties that still exist. It is difficult for me to see how you can in fact democratize the post-colonial state because the elites that rule it do not have a conception of a national interest. They have a conception of a personal interest, and to the extent that it is larger than a personal interest, it is an ethnic interest, not even a class interest. It is an interest that is affiliated with their relationship with their international backers. It is, of course, true, as you stated, that the problem is one of a lack of tolerance, lack of democracy, lack of the rule of law. My contention is that the political elites are incapable of introducing those ideas within the structure of the post-colonial state.

Professor RICHARDSON: I might add that one might interpret in that light the recent waves of demands, now two or three years old, in Africa, for more representative government. The

* Professor of Law, Temple University Law School.

** Professor of Law, Enugu State University of Science and Technology, Enugu, Nigeria.

phenomenon that all of us in one way or another have mentioned of shifting governmental leadership from the independence leadership to what might be called a post-independence leadership (in some countries more smoothly than others) could be argued as, in part, a referendum on leadership throughout the Continent. This is not a guarantee that the new leaders will be more representative. The referendum exists even though new leaders may stand initially on a more representative base through many of the same traditional referenda, and also on the right to vote in internationally monitored elections and referenda, which are becoming increasingly prominent in Africa. Indeed, there is a change in leadership happening willy-nilly. Whether this change will be sufficient to overcome Dr. Mutua's predictions and basic problems is another issue.

Dr. MUTUA: Even in the context of the so-called process of democratization, empirical examination of the data of most elections shows that the vote has been split along ethnic lines, without a doubt, in each and every country, except for countries emerging out of minority regimes or colonial situations. Cases in point are Nigeria and Kenya. People still vote strictly along ethnic lines. We have been unwilling to acknowledge this in the past. We must look it squarely in the face and deal with it once and for all.

PROFESSOR ADRIEN WING:* I have a practical comment. For those of you here who are interested in African issues, I am the Chair of the Southern Africa Interest Group of the Society. I surveyed the membership, and the membership of the Interest Group wants to change the focus of the group to the Africa Interest Group, and we will make an announcement about that. Any who are not dues-paying members of the Interest Group—it's just five dollars—can join easily.

PIPPA TUBMAN:** A question for Dr. Mutua: You seem to have attributed a lot of the crises of human rights in Africa to the conflicts or the incongruences between the concepts of human rights that are in today's international human rights documents, and African concepts of human rights. I wondered if you could give more details or explain more concretely what some of those African concepts of human rights might be.

Dr. MUTUA: It is impossible to do that in detail in the time available. More specifically, I think that the corpus or the doctrine of human rights itself is based upon a certain view of the relationship between the individual and the state or the individual and the community. In the Western tradition, which is the dominant tradition, you would go back to Locke, and you would then extrapolate on the basis of his vision of the contractual relationship between the individual and the state, and how the state is then supposed to treat the individual. The question is one of the space between the individual and the state. By the same token, in the African context, I think you would have to examine the relationship between the individual and the society, and the view that African societies had of the human being. As I said earlier, the main distinction that I can identify is one not of a collectivistic approach by the African. It is one of a duality between rights and obligations—twin facets of the same coin. This is not, from what I can tell, the Western viewpoint.

PROFESSOR MIKELL: I think that there have been quite recently some excellent statements of the way in which African human rights notions were embedded within cultural philosophies. I'm thinking in particular of a book by Abdullah Ahmed An-Na'im and Francis Deng on human rights in Africa, where they systematically go through different cultures looking at duties and rights.¹ The one thing I find fascinating is that there still is a problem with the position of the state: the extent to which the state is the guarantor of some of

* Professor of Law, University of Iowa School of Law.

** Student, New York University School of Law.

¹ HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (An-Na'im & Deng, eds., 1990).

these rights, or other entities below the state are supposed to be the guarantors. That allows some flexibility for the state to move away from the responsibility for assuming that role, or for the state to assert something which may clash with an international human rights principle.

Professor CRAIG JACKSON:* One of the priorities with the Lomé Agreement is about to go down the drain with the assistance of the European Union. They are going to cut much of the aid and the preferences—at least that's in the talking stage right now. I've often wondered where the priorities are—on the economic side or the political side? Should I get training as an agricultural expert, if I really want to help out?

Professor RICHARDSON: In a number of disciplines, as well as public policy, the temptation, the demand, in both methodological and theoretical terms, is to re-interpret virtually any question in terms of its relationship to maintaining economic competition. Free market economics, protecting private investment and allied subjects are like the elephant in the front yard. You may not agree with it being there, but you have to recognize its existence and probably do something about it. Therefore, from the vantage point of international human rights law, I think that human rights lawyers might have to learn a little something about trade law, and vice versa, because there are these interconnections that immediately arise. They immediately arise in terms of potential clashes between claimed economic imperatives on the one hand, and the violations of rights on the other. I tried to sketch some of these. I think the struggle in this regard is across the disciplinary spectrum.

JULIAN HA:** This question relates to my personal belief that it is through economic development that human rights and living standards are raised. I'm a little wary of your rhetoric of workers' rights. I certainly believe in those; but I think that economic development does bring about an increase in human rights. How do we realistically intend to adhere to those principles in this changing post-Cold War environment, especially with attention and, more importantly, money, being siphoned off to Latin America and Asia?

Professor RICHARDSON: That's a good question. I think there are a couple of answers. One, there is an emerging body of both policy inquiry and scholarship on the relationship between economic development and the maintenance of economic, social and cultural rights. There is a draft UN declaration on the right to development that was presented and discussed at Copenhagen. I believe that begins to address the systematic preservation of human rights in the context of economic development. If, on the other hand, you are arguing that the process of economic development as traditionally conceived, by some natural consequential process, results down the line in a context where human rights are more likely to be upheld than not, I have severe questions about that. I think, for example, that there was economic development in Chile which was not accompanied by a rise in human rights; in fact, just the opposite occurred. Other examples could be provided. That to me is a kind of an attenuated trickle-down theory. I'll finish by quoting my friend Derrick Bell, who said: "While we're thinking about amending the U.S. Constitution, I'd like an amendment to bar all future legislation that incorporates trickle-down theories, until the last trickle-down theory has actually trickled down."

THOMAS DAVID JONES***
Reporter

* Assistant Professor of Law, Thurgood Marshall School of Law, Texas.

** Student, New York University School of Law.

*** Associate Professor of Law, Southern University Law Center.