

Who's watching 'Big Brother'?

Globalisation and the protection of cultural rights in present-day Africa

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Globalisation has increased contacts between people and their values, ideas and ways of life in unprecedented ways. People are traveling more frequently and more widely. Television now reaches families in the deepest rural areas of China. From Brazilian music in Tokyo to African films in Bangkok, to Shakespeare in Croatia, to books on the history of the Arab world in Moscow, to the CNN world news in Amman, people revel in the diversity of the age of globalisation.¹

Summary

The forces of globalisation operate in a contradictory, oppositional and even conflictual fashion. The results of the processes are mixed and varied. It is against this background that the author examines the influence of globalisation on the protection of cultural rights in Africa with the aid of analogies drawn from the influence of the 'Big Brother Africa' reality show on the African continent. The paper discusses the challenges posed by globalisation to cultural rights in Africa. In discussing the African human rights regime in relation to cultural rights, the author explores the role that can be played by the African Commission on Human and Peoples' Rights and civil society in preserving cultural rights. The author further highlights the interrelation between culture, globalisation and women's rights and the need to promote and protect the right to African traditional knowledge in a globalised world. The author concludes by making a call that the category of primary duty

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¹ UNDP *Human development report: Cultural liberty in today's diverse world* (2004) 85; <http://hdr.undp.org/reports/global/2004/> (accessed 28 February 2005).

bearers in the protection of human rights must be widened to include trans-national corporations, families and communities over and above the state.

1 Introduction

At the time the invitation to this seminar was first sent to me in the middle of last year, what appeared to be the whole of the African continent was caught up in the throes of the reality TV show, *Big Brother Africa (BBA)*.² Following the format of the show elsewhere around the world, 12 housemates, from 12 different countries and walks of life, were secluded in a large house in an upmarket suburb of Johannesburg, South Africa. With a hefty US\$100 000 bounty as the prize for the person who could outlast all the others in terms of their popularity with housemates and viewers, the show pandered to the voyeuristic element in humankind that has proven a great success in the new genre of reality TV. However, the show came with a twist by playing on the fact that the 12 housemates came from different parts of the continent with ostensibly differing cultures, as opposed to sibling shows elsewhere around the world in which all the participants came from the same country. Few programmes in the history of television on the continent have attracted such extensive viewership, with estimates putting the figure at 30 million.

Correspondingly, few TV shows on any topic have generated as much commentary and controversy. At least two African countries, Malawi and Namibia, attempted to ban the show, while Zimbabwe succeeded in removing it from state TV, but was unable to stop private stations from screening it. In several other countries where the show remained on screen, it provided much fodder for discussion by both conservative politicians and radical Pan-Africanists, as much for fire-breathing pastors and evangelists, as it did for academics and civil society activists.³ The show even drew in African heads of state, with Botswana's President Festus Mogae openly rooting for his country's 'representative' on the show, while eventual winner Cherise Makubale from Zambia was appointed a cultural ambassador by President Levi Mwanawasa. Uganda's Yoweri Museveni caused an uproar among politicians, evangelists and 'moral reformers' of various stripes when he not

² The author was Special Rapporteur on Globalisation and Human Rights of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, for five years (1999 to 2003), and much of the analysis in this paper is drawn from that experience. In particular, see the three reports on the subject issued over the period, namely J Oloka-Onyango & D Udagama *The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights*, preliminary report (E/CN 4/sub 2/2000/13); progress report (E/CN 4/sub 2/2001/10), and the final report E/CN 4/sub 2/2003/14.

³ See eg 'Priest prays for Ugandan eviction' *BBC News* <http://www.news.bbc.co.uk/2/hi/africa/3146931.stm> (accessed 28 February 2005).

only met the 'notorious' Gaetano Kaggwa (Uganda's BBA representative) and his on-screen South African girlfriend Abigail Plaatjes, but also offered them his helicopter for a ride back to the capital after meeting him.⁴

Why all the hullabaloo? Taken at face value, BBA was simply another show that happened to draw the attention of a great many people because it tried something novel, and pandered to humankind's most basic instincts, the desire to peek. Judging by the success of the show, there is a Peeping Tom in every one of us. Viewed more critically, however, the show provides considerable food for thought. Certainly, the show raised many questions relating to how we view the issue of culture in contemporary Africa. It also forced a consideration of the manner in which the forces of globalisation — of which television has become a most potent one — have come to affect the development and expression of 'African culture' in the twenty-first century. When translated to the African context, the notion of a 'Big Brother' — drawn from George Orwell's classic satire about the omniscient state — could be viewed as a metaphor for so many of the issues that arise within current debates about globalisation: ideas about the loss of sovereignty and identity, of the deluge of the indigenous by the foreign; of the one-sided nature of international transactions. Seen from this angle, the show provides a useful commencement point for an examination of the manner in which the contemporary forces of globalisation have impacted on the promotion and protection of cultural rights on the African continent.

For the purposes of this paper, the term 'culture' conveys at least two meanings. First, culture may be defined as the '... integrated pattern of human knowledge, belief, and behaviour ...' which is dependent upon the capacity of human society to learn and transmit knowledge about their values, ideas and beliefs to succeeding generations. In other words, culture may be taken to mean those elements that human society produces in non-materialistic terms, and transmits to posterity. A second definition of the term is more apt, namely the customary beliefs, social forms and material traits of a racial, ethnic, linguistic, religious or social group.⁵ While recognising that definitional precision is useful, at the same time it is necessary to be cautious about a dogmatic approach to the notion of culture, and particularly to be sensitive to expressions of diversity within culture. In other words, it may even be an anomaly to speak of an *African* culture, given not only the diversities across cultures, but those within, dictated by considerations of class,

⁴ Gaetano and 'Abby' had drawn the ire of most commentators because they allegedly had sex in front of the cameras.

⁵ Both definitions are derived from the Merriam-Webster *Online dictionary*, at: <http://www.m-w.com> (accessed 28 February 2005).

gender, ethnicity and even simple choice, to mention only a few. Culture should not be regarded as a closed box, but rather as an open and broad canvas.

Globalisation is a process that simultaneously brings the countries and peoples of the world closer together just as it pushes them further apart, because it is possessed of qualities that both liberate and empower, as much as it has qualities that marginalise and exclude individuals, communities and whole countries from the benefits of the global bounty.⁶ Thus, globalisation has made the flow of capital, products, ideas, people, norms and values ever more rapid. It has made this flow seemingly borderless, consequently among the most prevalent descriptions of globalisation is that it has created a 'global village'. The processes of globalisation often operate in contradictory, oppositional and even conflictual fashion. In that regard, the result of these processes has sometimes been positive, especially where it has led to the liberation of oppressed individuals and communities. For example, internet usage has enabled instantaneous and continent-wide appeals against oppressive state practices. Each one of us has used the internet to connect with sources of information that are empowering, that help us do our jobs of promoting and protecting human rights better.

At the same time, many of the images portrayed through the internet, on television or via the radio can be demeaning and disempowering, even racist, thereby impugning the development of holistic notions of an African culture or of African womanhood.⁷ In this way, it has wrecked many of what were once concentrated, deeply rooted and positive African cultural values. Leaving aside the content of Big Brother Africa, the show demonstrated how the media of television has become such a dominant and powerful force for defining what should be viewed as the province of the cultural. It also demonstrated (or rather confirmed) the nearly exclusive single lane traffic of the forces of globalisation: from the north to the south. One is hard put to think of any recent screen depiction of events in the south that have had as profound an influence on the media in the north. The problem is compounded by the fact that depictions of the situation in the south are typically designed by media houses in the north. Unfortunately, those kinds of depictions are very often coloured by factors of race, perspective and bias. Very rarely do such depictions care to sensitively and authentically portray the true image of those it is covering.⁸

⁶ See World Commission on the Social Dimension of Globalisation *A fair globalisation: Creating opportunities for all* (2004).

⁷ J Oloka-Onyango 'Globalization in the context of increased incidents of racism, racial discrimination and xenophobia' E/CN 4/Sub 2/1999/8 para.15.

⁸ A great debate broke out when Prof Henry Gates produced a series on Africa in 2000. Particularly vitriolic exchanges were made between Prof Ali Mazrui and Nobel prize-winning author Wole Soyinka.

But Big Brother Africa should also compel us to view the issue of culture as something dynamic and evolving — a point that immediately comes into tension with the idea that many of the commentators reacting to the show argued that the behaviours displayed were decidedly 'un-African'. Such a criticism is insufficient, because even if BBA was a clone of those done elsewhere, it also elicited several dynamics that differed from the shows conducted in other contexts, precisely because it was placed in an African setting. At the same time, the show demonstrated in stark relief the fact that the culture of the contemporary youth is quite distinct from that of their parents. Conversely, criticisms of the show cannot simply be dismissed as the loud cries of defensive conservatives: a marriage between the African 'Moral Majority' and neo-Rastafarians. Rather, they also reflected a genuine fear over the adoption of foreign (read 'Western') social values, and correspondingly of the threat posed to the positive attributes of African culture posed by the forces of globalisation represented by Western TV. These criticisms should also force us to inquire how the rest of the continent would consider some of the practices displayed on the show. Given that the majority of the continent's people are rural based peasants, to what extent are the cultural practices in that sphere given due cognisance and respect by the forces of globalisation?

The title of this paper is thus chosen to capture the multi-edged meanings of the term 'Big Brother' and of the show, and to explore its link to the processes of globalisation and to the notion of cultural space. First, it is to convey a sense of the manner in which the forces and processes of globalisation have come to influence the discussion about the promotion and protection of cultural rights today, whether we are speaking about language, dress, music, literature or dance. Secondly, it is to sound a caution against a dogmatic approach to the notion of culture and its contemporary expression in Africa. The caution is issued, given that so many of the BBA participants were elevated to super-hero status among the youth and even among the not so youthful of their respective countries simply from being in the show. It is also issued so that our interpretation of the notion of culture is at all times subjected to critical interrogation. In other words, we need to be awake to the question: *What is African culture?* And whose culture are we talking about anyway?

Furthermore, we need to ask how the right to culture should be understood and protected in a fashion that promotes the rich heritage of the African condition, but also enables it to meet the challenges presented by a globalised twenty-first century world that literally 'takes no prisoners'? Finally, we also need to find ways in which the right to culture — especially of those peoples and communities that are most threatened by the negative forces of globalisation — can be promoted in such a manner that it does not foster discrimination, inequal-

ity or marginalisation. In this respect, issues such as the protection of traditional knowledge (TK), the trade in cultural goods and the protection of rights such as those to food, to health and to the environment are especially critical in the African context of the debate.

2 Cultural rights, globalisation and self-determination

Debating the nexus between globalisation and the right to culture immediately brings to the fore the notion of the right to self-determination, whether in its economic or political expression.⁹ The range and impact of the forces of globalisation continue to have a profound effect on life in the twenty-first century, and as such, no area of human existence has been left untouched by this phenomenon. Globalisation is a process possessed of many attributes, and indeed, definitions given to the phenomenon are to a large extent dependent on the angle of the approach of the person seeking to define it. For example, Holm and Sorensen define globalisation as 'the intensification of economic, political, social and cultural relations across borders'.¹⁰ Sholte refers to globalisation as 'processes whereby social relations acquire relatively distanceless and borderless qualities, so that human lives are increasingly played out in the world as a single place'.¹¹ Yet another author suggests that the world today can be characterised by 'the concurrence of globalisation and marginalisation'.¹²

The processes of globalisation — privatisation, deregulation and economic liberalisation — have profound implications for the ability of states and peoples to determine their economic and political destinies; in a nutshell their rights to self-determination. The cultural influences of globalisation — whether presented in the global media or via the increase in consumerism — have profound implications for the protection and promotion of African cultures. When all these factors are taken into account, we can arrive at the conclusion that globalisation has brought tremendous benefits by way of scientific and technological progress, the enhanced dissemination and circulation of information and the increased social mobility of people. However, it has also led to significant social and cultural dislocation, particularly in the develop-

⁹ See A Orford 'Self-determination after intervention: The international community and post-conflict reconstruction' http://www.jeanmonnetprogram.org/seminar/03/Orford_Chapter_4_final.rtf (accessed 28 February 2005).

¹⁰ H Holm & G Sorensen *Whose world order? Uneven globalisation and the end of the Cold War* (1995), quoted by RJ Holton *Globalisation and the nation-state* (1998) 11.

¹¹ JA Sholte 'The globalisation of world politics' in D Baylis & S Smith *The globalization of world politics — An introduction to international relations* (1997) 14.

¹² A Aden 'No connection under this number: Africa and internet' (2000) 5 *D & C Development and Cooperation* 24; <http://www.inwent.org/E+Z/1997-2002/de500.5.htm> (accessed 31 March 2005).

ing areas of the world. Because television is an industry — albeit one deeply connected to cultural constructions of society — it is thus important to ask who owns and controls this medium. As noted in the 1999 Human Development Report:¹³

Weightless goods — with high knowledge content rather than material content — now make for some of the most dynamic sectors in today's most advanced economies. The single largest export industry for the United States is not aircraft or automobiles, it is entertainment — Hollywood films grossed more than \$30 billion worldwide in 1997.

Such 'weightless goods' as the electronic media (from music to movies to websites) have become an indispensable part of human existence in the present century. Moreover, through the tremendous amounts of capital that the captains of globalisation are able to mobilise, they also control a substantive portion of the literary and artistic worlds, which in turn have a great influence on both global and local culture. As the 1999 Human Development Report noted, 'Today's flow of culture is unbalanced, heavily weighed in one direction, from rich countries to poor.'¹⁴ It is a singular task to counter-balance this flow, and also to ensure that the rights of those most marginalised by these processes are given greater protection. And yet, the percentage of any of these industries that is owned by individuals or corporate actors from the non-industrialised part of the world is miniscule. We are consequently forced to ask not only what the agents and instrumentalities of contemporary globalisation are transmitting, but also how alternative messages and images can be transmitted. In other words, how can the instrumentalities of globalisation be converted to the positive expression of the cultural values of marginalised groups and individuals?

In seeking answers to this question, it is crucial to appreciate that the processes of globalisation are not divinely ordained, nor are its basic tenets foreclosed from negotiation. 'Globalisation is not a natural event, an inevitable global progression of consolidated economic growth and development.'¹⁵ We do not subscribe to the 'TINA syndrome', as in 'There Is No Alternative' to globalisation. Rather, it is our view that the phenomenon of globalisation is the product of human society, motivated by specific ideologies, interests and institutions. In other words, globalisation has no *a priori* or inevitable existence independent of the structures humankind has put in place. It then becomes essential to encounter and engage globalisation while taking these factors into consideration. In this way, we can identify varied outlets for negotiating and reviewing its terms and consequences. In doing so, we

¹³ UNDP *Human development report* (1999) 4.

¹⁴ As above.

¹⁵ BK Murphy 'International NGOs and the challenge of modernity' (2000) 10 *Development in Practice* 332.

must ask ourselves what the possibilities and limitations presented by globalisation are and how we can strategically and creatively engage them, especially to enhance those aspects of African culture that are positive, and to struggle against those which are not.

2.1 The human rights framework

Against the preceding background, we need to ask ourselves: Which human rights framework is relevant to the debate about those aspects of globalisation and the right to culture with which we are most concerned? Several international instruments enshrine the right to culture among their provisions, including the Universal Declaration of Human Rights (Universal Declaration). Article 27 of the Universal Declaration stipulates as follows:¹⁶

- 1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- 2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The International Covenant on Economic, Social and Cultural Rights (CESCR) elaborates on this by enjoining states to take steps necessary for the '... conservation, the development and the diffusion of science and culture'.¹⁷ Closer to home, the African Charter on Human and Peoples' Rights (African Charter) speaks of the right to culture within an omnibus provision that also refers to the rights of 'all peoples' to '... their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.¹⁸ Thus, by combining the literal meaning of the term culture with its expression within international instruments, the parameters of the discussion become more definitive. A number of other instruments refer specifically to the right, either within the context of particular categories of people, or in relation to international cooperation, education, and development.¹⁹ The United Nations Educational, Cultural and Scientific Organisation (UNESCO) is the world body designated with the task of ensuring that cultural rights are

¹⁶ <http://www.un.org/Overview/rights.html> (accessed 28 February 2005).

¹⁷ See art 15 of CESCR, http://www.unhchr.ch/html/menu3/b/a_cescr.htm/ (accessed 28 February 2005).

¹⁸ See art 22 of the African Charter, <http://www1.umn.edu/humanrts/instreet/z1af-char.htm> (accessed 28 February 2005); also reprinted in C Heyns (ed) *Human Rights Law in Africa* (2004) 134

¹⁹ Eg, see the Declaration of the Principles of International Cultural Co-operation proclaimed by the General Conference of UNESCO (4 November 1966) and the Declaration on the Right to Development (GA Resolution 41/128 of 4 December 1986).

given due recognition and respect, and in this respect it in 2001 promulgated the Universal Declaration on Cultural Diversity.²⁰

Besides recognising the individual right to culture, article 15 of CESCR provides for everyone's right to enjoy the benefits of scientific progress and its applications and to benefit from the protection of their scientific, literary or artistic works. Much of what could be described as the 'scientific world' today is brought about by the processes of globalisation. In particular, information and communications technology (ICT) is the most visible face of globalisation that we know.

The following is a framework that emphasises four key platforms upon which the discussion of the link between human rights and the processes of globalisation and its impact on the right to culture should be based:²¹

- 1 The International Bill of Human Rights, comprising the Universal Declaration and the International Covenant on Civil and Political Rights (CCPR), together with CESCR;
- 2 Regional and sub-regional initiatives and contexts that are having an increasingly important role to play in the debate on both the processes of economic liberalisation and the promotion and protection of human rights. These include the African Charter and the many instruments of the sub-regional groups (SADC, ECOWAS and the EAC) which are cropping up around the continent;
- 3 More recent instruments designed to address the situation of special groups marginalised by history or status such as those on women, indigenous peoples and minorities. The Protocol on the Rights of African Women is a prime example of this; and
- 4 The right to development — encompassed in the 1986 Declaration but further enunciated at a number of world conferences, commencing with the World Conference on Human Rights in Vienna in 1993, stemming from which has been derived the notion of the indivisibility, interconnectedness and interrelatedness of all categories of human rights.

This framework enables us to review how the processes of globalisation have had a tremendous impact on both the processual and the substantive content of the different human rights that have been elaborated over the past half-century, whether in treaties or under the rubric of customary international law. It allows us to establish how the right to

²⁰ <http://www.cesmap.it/ifrao/unescodoc.htm> (accessed 28 February 2005). The adoption of the Declaration was specifically linked to the challenges presented by the 'growing pace of globalisation'. See Report of the 166th session of the Executive Board of UNESCO, 12 March 2003, <http://unesdoc.unesco.org/images/0012/001297/129718e.pdf> (accessed 28 February 2005).

²¹ See E/CN.4/sub.2/2000/13 (n 2 above) and J Oloka-Onyango & D Udagama 'Human rights as the primary objective of international trade, investment and finance policy and practice' working paper submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/sub.2/1999/11.

culture is articulated in these instruments and the ways in which that right is best promoted and protected.

From a human rights perspective, therefore, our main concern must be with the profound consequences that globalisation has produced or enhanced and the way in which these relate to the overall promotion and protection of the right to culture in Africa. While understanding that human rights is an important tool for the liberation of individuals and peoples around the world, the project by which it has been defined is oftentimes rather narrow, and it is thus important to also problematise what can be described as the human rights project. As Makau Mutua has argued:²²

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 sacralisation of the individual and the supremacy of the jurisprudence of individual rights in organised political and social society is not a natural, 'transhistorical' 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 and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state.

How has the human rights regime come to the rescue of those who have been most adversely affected by the processes of globalisation? How have African peoples benefited from all the spectacular developments heralded by globalisation? To what extent have the processes of globalisation protected women, children, minority and indigenous peoples, and other marginalised and vulnerable communities from the ravaging despoilation of their cultures? Finally, are those institutions — whether local, national, regional or international — tasked with the function of protecting human rights equipped with the tools necessary to meet the challenges posed by the varied processes of globalisation? As we review the global communications and technological developments heralded by those who can only see the bright side of globalisation, African peoples need to explore further the negative effects that continue to threaten the existence of those cultures that are positive.

2.2 Understanding globalisation as a socio-economic and cultural force

A quick look at the statistics of economic growth and development in the world today clearly demonstrates that while one section of humanity is growing and developing — literally basking in the glow of globalisation — the other wallows in increasing despondency and despair. In other words, the processes most closely associated with globalisation

²² M Mutua *Human rights: A political and cultural critique* (2002).

are rife with contradiction.²³ For example, globalisation has broken down many of the social and cultural barriers that have traditionally stood in the way of increased harmony among the peoples of the world. The global spread of music, literature and dress styles (to mention a few), coupled with the increased use of 'global' languages like English and French, have seen people from vastly different parts of the world still find several areas of common interest. Thus, in spite of the different countries from which the Big Brother Africa contestants were drawn, they shared much more in common than what would appear on first sight to hold them apart, among those commonalities being a love for Nike shoes, Levi jeans and rap music, influences which could be described as 'benign'.²⁴

On closer scrutiny, however, one cannot fail to observe the marginalising contradictions that the processes of globalisation have cut through national cultures, particularly those of the African people. Connecting the rise of Shari'a militancy in Northern Nigeria in part to the growing influence of globalisation, Ali Mazrui has argued that '[o]ne of the repercussions of globalisation is that it both promotes enlargement of economic scale and stimulates fragmentation of ethnic and cultural scale'.²⁵ People are forced into their ethnic and cultural cocoons so as to fend off the emasculating forces of globalisation. A collapse is then quickly made between culture and tradition, the latter being the dogmatic and unwavering defence of inherited and time-honoured practices and principles regardless of what impact they have on society. In sum, having lost everything else, tradition becomes the last preserve of one's humanity. At the same time, it is important not to seek an explanation for every negative reaction in things traditional; even tradition (or the claim about its supremacy) does not exist independently of the economic, the social and the political.²⁶ Moreover, the choice of which tradition to valorise and uphold is a very

²³ Othman & Kessler argue that globalisation processes '... do not together add up to any simple, obvious, natural, irresistible good ... They may just amount to a very mixed, contingent, jumbled and mutable 'package': One whose various contents may change in intensity and even character, independently of one another, over time.' N Othman & C Kessler 'Capturing globalisation: Prospects and projects' (2000) 21 *Third World Quarterly* 1025.

²⁴ The UNDP describes these as 'global brands' in demand, especially among 'global teens' who '... inhabit a "global space", a single pop culture world, soaking up the same videos and music and providing a huge market for designer running shoes, T-shirts and jeans'. See UNDP (n 1 above) 87.

²⁵ A Mazrui 'Shari'acracy and federal models in the era of globalisation: Nigeria in comparative perspective' paper presented at the International Conference on the Restoration of Shari'a in Nigeria: Challenges and Benefits, London, 14 April 2001 3.

²⁶ This is a caution most recently articulated by Mahmood Mamdani in his book on the social and political roots of global terrorism. See M Mamdani *Good Muslim, bad Muslim: America, the Cold War, and the roots of terror* (2004).

conscious political process that often serves to reinforce patriarchy and conditions of discrimination.

In so far as the African situation is concerned, the effects of globalisation have largely been lopsided, with a greater tendency to suppress rather than to liberate or emancipate. In my view, this is because globalisation in its contemporary expression essentially represents *corporate* culture — the culture that puts profit above every other human value, and a culture concerned much more with form than it is with substance. The advertisement for the soft drink Sprite tells it all: 'Thirst is nothing; image is everything!' Corporate culture is not concerned with detail, but the bigger picture; let the world grow richer. Corporate culture is not concerned with who is benefiting from this largesse, or even how that bounty is distributed. It is in this regard, in particular, that the Big Brother Africa show raises fundamental questions about whether globalisation is a force for good or otherwise. This is a point to which we now turn.

3 The challenges of globalisation to cultural rights

The broad focus of the preceding sections of the paper allows us to narrow our lenses somewhat to the challenges presented by the processes of globalisation to the promotion and protection of cultural rights within the African context. In so doing, it is important to make the preliminary point that, in many respects, the right to culture encompasses and impacts on many related rights. For example, cultural or traditional knowledge (TK) and its exploitation or misappropriation have implications for the right to health and the right to food, not to mention the right to an adequate standard of living. The protection of the right to a healthy environment is obviously threatened by actions to exploit minerals and other natural resources, actions which have the consequence of disrupting communal life. At the same time, the connection between the land in which these resources are found and the people that live there have profound cultural, religious and spiritual implications. Threats to language will have implications for the right to freedom of expression and also for the right to education. The right to learn and use the language of one's choice is a basic human right.²⁷ In other words, the interconnectedness of cultural rights is legion. Dinah Shelton has argued that globalisation can affect cultural and linguistic rights, although the evidence seems contradictory, in that globalisation:²⁸

²⁷ See art 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, http://www.unhchr.ch/html/menu3/b/d_minor-i.htm (accessed 28 February 2005).

²⁸ D Shelton 'Protecting human rights in a globalised world' (2002) 25 *Boston College International and Comparative Law Review* 297.

... facilitates the transfer of cultural manifestations and cultural property. A study by the UN Economic and Social Council (UNESCO) indicates that commerce in cultural property tripled between 1980 and 1991 under the impulse of satellite communications, internet and video cassettes. Yet in this field, as in others, mergers and acquisitions have concentrated ownership to the detriment of local industry. The Hollywood film industry represented 70% of the European market in 1996, more than double what it was a decade earlier, and constituted 86% of the Latin America market. In the opposite direction, traditional cultures across the world are being transmitted and revived in multi-ethnic states through the movement of peoples, their languages, and their beliefs.

But it is also important to remember that there are not only inequities in the flow of cultural products, but also in the mechanisms of trade liberalisation designed to manage them. Represented in the main by the World Trade Organisation (WTO) and transnational corporations (TNCs), these institutional mechanisms of globalisation are greatly implicated in promoting the lopsided flow of goods and services, including those of a cultural nature. Thus, whereas the WTO is presented as a bureaucratic or technocratic institution devoted only to the promotion of economic objectives, it is in fact greatly influenced by the political context in which it operates.²⁹ Practices that are considered anathema in countries in the south — protectionism, government subsidies and state support to weak industries — are still widely tolerated in the north, without any remorse or guilt over this duplicity. An issue that has dogged the WTO since inception in 1995 has been the provision of agricultural subsidies by the United States and the European Union to farmers who are clearly not competitive on the world market. For example, in 2001 and 2002, American farmers received cotton subsidies of US\$4 billion for a crop worth only US\$3 billion. In spite of the commitment to development (including a pledge to substantially reduce or end subsidies to agriculture) made at the Fourth Ministerial Meeting in the Qatari capital Doha, movement in this area has been painfully slow. Although the WTO ostensibly operates on the basis of consensus, powerful states are better able to exercise their influence in determining trade policy and practice even if they are numerically fewer.³⁰ Fresh attention will have to be paid to one of the principle side effects of the processes of globalisation — the globalisation of English as the international *lingua franca*. The international communications industry that includes television, the internet, radio, film and video, have promoted English as the language of communica-

²⁹ For a critical analysis of the operations of the organisation, see BL Das *The WTO and the multilateral trading system: Past, present and future* (2003).

³⁰ Developing and underdeveloped countries have recently woken to the need to challenge developed countries at their own game. Thus, Brazil successfully challenged the United States on the issue of cotton subsidies. See 'Cotton subsidies must go' (editorial) *The New Vision* 23 June 2004; <http://newvision.co.ug/D/8/14/36775> (accessed 28 February 2005).

tion. The old saying 'a lost language is a lost culture; a lost culture is invaluable knowledge lost'³¹ is becoming a growing reality in Africa. In Kenya alone, it has been observed in a report by UNESCO that 16 out of Kenya's 42 languages are in serious risk of disappearing.³² At the end of the twentieth century, according to researchers at the Nigerian Centre for Endangered Languages, out of 6 800 languages classified as threatened, being spoken by roughly six billion people around the world, 2 400 of them (35%) are indigenous to Africa.³³ The consequences of such a development in terms of promoting and protecting the right to culture are indeed profound.

At the same time, it is important not to forget the way in which the processes and instruments of globalisation have a positive effect on culture and its expression, especially for the protection of the cultural rights of minorities and indigenous peoples. For example, the internet has been an essential tool of mobilisation and empowerment for contemporary civil society movements, whether for human rights, the protection of children or the environment. Consequently, the internet has provided an immeasurable instrument of conscientisation and concerted civil society action. The immense power of this 'globalisation from below' was apparent when civil society played a critical role in ensuring that the Third Ministerial Meeting of the WTO in Seattle in 1999 was aborted. Despite the limitations in the scope and perspectives of the global media, the fact that corporations like CNN and the BBC are able to produce news in real time (and that they sometimes cover issues relating to endangered peoples and the illicit practices of TNCs) is certainly a positive development attributable to globalisation. Such power should not be underestimated.

But in order to fully understand the implications of these developments, we need to turn to an examination of the way in which they have been played out within the African human rights context. In so doing, we need to concretely tackle the issue of the promotional, protection and enforcement roles of the African Commission on Human and Peoples' Rights (African Commission) in dealing with the phenomenon of globalisation and guardianship over the right to culture.

3.1 Revisiting the role of the African human rights regime in relation to cultural rights

African governments have devoted considerable attention to the articulation of the right to culture, and have in some instances drawn criticism for doing so. Such criticism has mainly been made over the African

³¹ See K Cheruiyot 'Our languages are dying' *One World* 24 February 2003, <http://www.globalpolicy.org/globaliz/cultural/2003/0224language.htm> (accessed 28 February 2005).

³² As above.

³³ As above.

Charter. It has also been made with regard to instruments like the more recent African Union Model Law for the Protection of Local Communities Farmers and Breeders and the Regulation of Access to Biological Resources — an instrument designed to protect and enhance Africa's biodiversity from indiscriminate corporate exploitation, and to secure farmers' rights.³⁴ The latter instrument is Africa's response to the loopholes in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) with regard to the protection of traditional knowledge and also as a counter-point to existing regimes of intellectual property rights (IPRs) protection that give priority to plant breeders' rights (PBRs) as opposed to the rights of farmers.³⁵

The criticisms that have been made are largely on account of the fact that the African Charter — perhaps more than any other international human rights instrument — attempted to grapple with the tensions introduced by the universalisation of human rights ideals, and their practical enforcement within local contexts. In other words, the African Charter straddles some of the most contentious issues in the discussion about cultural relativism — the argument that challenges the local application of ostensibly universal human rights standards.³⁶ The introduction of the single word 'peoples' into the title of the instrument both reflected and generated a considerable debate on the extent to which the rights and interests of the individual should be subjected to the welfare and cohesion of the community.³⁷ It continues to be an issue of concern.

Article 17(2) of the African Charter confers the right on every individual to freely take part in the cultural life of the community in which they live. Article 17(3) calls upon all states to promote and protect the traditional values recognised by the community. The right to cultural development is guaranteed under article 22(1) of the same Charter. A good number of the Constitutions of African states — among them

³⁴ For an analysis of the rationale and contents of the law, see JA Ekperé 'The African Union model law for the protection of the rights of local communities, farmers and breeders and the regulation of access to biological resources' in C Bellmann *et al* (eds) *Trading in knowledge: Development perspectives on TRIPS, trade and sustainability* (2003) 232-237.

³⁵ The main international organisation that protects the rights of plant breeders is the Union pour la Protection des Obtentions Végétales (UPOV), translated as the International Union for the Protection of New Varieties of Plants. The Convention was signed in Paris in 1961 and entered into force in 1968, and has been revised thrice since (in 1972, 1978 and 1991). For a comprehensive analysis, see ICTSD/UNCTAD *Intellectual property rights: Implications for development* (2003) 52-55.

³⁶ For an analysis of the arguments on cultural relativism, see DL Donoho 'Relativism in international human rights law' unpublished LLM dissertation, Harvard Law School, 1989.

³⁷ For an articulation of the arguments surrounding how the issue of culture was manifested in the Charter, see M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1996) 35 *Virginia Journal of International Law* 339.

the Ethiopian, South African and Ugandan ones — recognise the individual and the collective right to different forms of cultural expression, which can be extended to custom, language and religious practices.³⁸ In other words, the issue of cultural expression is considered to be fundamental. A more complicated issue is the way in which the right should be protected, and especially how a balance should be drawn between the protection of the right to culture and a host of other rights. In particular, there have been tensions between the protection of what is argued to be a right to culture and women's human rights — a point that we shall turn to later. For the present, it may be most appropriate to examine the issue with regard to the implementation of the right in the African situation. This necessitates a look at how the African Commission — the main institution for the promotion and protection of human rights on the continent — has approached the tensions generated by the forces of globalisation versus the protection of human rights.

3.2 The African Commission

A useful starting point for this analysis would be a recent case decided by the African Commission which involved a number of issues related to the definition of the term 'peoples' in the African Charter and to the obligation of the state within the context of globalisation. The decision in question is the case of *SERAC and Another v Nigeria*.³⁹ The case involved an examination of the situation of human rights violations in the Niger delta, and is the perfect case for a study of how the forces of globalisation impinge on the protection of human rights. It will be recalled that disputes over the exploitation of the oil resources of this region of Nigeria have been of considerable duration. They culminated with the mid-1990s execution of poet and social activist Ken Saro Wiwa of the Movement for the Survival of the Ogoni Peoples (MOSOP) by the Sani Abacha military government. The petition brought to the African Commission sought redress for the actions of the Nigerian government (and private oil companies) in exploiting and damaging the environment of the Delta. The petitioners argued that such exploitation violated a host of economic, social and cultural rights, including the right to housing, the right to food, and (most importantly for

³⁸ See K Henrard & S Smis 'Recent experiences in South Africa and Ethiopia to accommodate cultural diversity: A regained interest in the right of self-determination' (2000) 44 *Journal of African Law* 17.

³⁹ Communication 155/96. I have extensively examined this case elsewhere. See J Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 851.

present purposes) the right — enshrined in Article 21 — of all peoples to '... freely dispose of their wealth and natural resources'.⁴⁰ The African Commission largely agreed with the petitioners, making orders as to what the Nigerian government had to do in order to provide redress to the affected peoples.

The Commission's decision did not directly refer to the notion of self-determination — in part a reflection of a degree of uneasiness about the use of the term, given the volatility of issues relating to statehood and sovereignty (often interpreted as secession) in the African context.⁴¹ Indeed, a reading of the African Charter will reveal a certain degree of coyness by its drafters in using terms such as 'minorities' or 'indigenous peoples'.⁴² Neither did the Commission consider the case as primarily one involving the protection of cultural rights. However, a closer reading of the decision illustrates that, by stating that the Nigerian government violated the rights of the Niger Delta *peoples*, a critical advance was made with respect to the adoption of a more holistic approach to the notion of peoples, and by extension, to the protection of their cultural rights. By implication, the case has fairly profound implications for the application of the idea of the right to self-determination in the African context — the right which we have argued to be at the foundation of all rights, including the right to culture.⁴³ The traditional point of view considers the term 'peoples' as used in the African Charter to apply principally to states, in the same way that 'self-determination' has been applied only with regard to the principle of liberation from colonial domination, or the external dimensions of self-determination.⁴⁴ Put another way, the language of the Charter (and the initial intent of its drafters, who were African heads of state) is very much state-centred and patronising. For example, it is not by accident that attention to the issue of minorities and indigenous persons in the

⁴⁰ *SERAC & Another v Nigeria*, para 58.

⁴¹ There has only been one decision made by the African Commission on the issue of self-determination, and the petition failed. See *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). For a good examination of the various conceptions of the term 'peoples', see R Kiwanuka 'The meaning of 'people' in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80.

⁴² See NB Pityana 'The challenge of culture for human rights in Africa: The African Charter in a comparative context' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 234.

⁴³ n 42 above, 233-234.

⁴⁴ See J Oloka-Onyango 'Heretical reflections on the right to self-determination: Prospects and problems for a democratic global future in the new millennium' (1999) 15 *American University International Law Review* 151.

African context is only a recent, late-1990s development.⁴⁵ The *SERAC* decision clearly demonstrates that the Commission was not shy to read into the words of the Charter a meaning different from that traditionally ascribed to them.

In other words, if we pursue the logic of the *SERAC* decision to its rational conclusion, then minorities, indigenous persons and other categories of peoples who find no explicit mention in the African Charter, but are the subject of considerable human rights violations — especially with regard to matters of a social, economic and cultural nature — can find redress. There is no reason to believe that such methods of analysis cannot be applied to the realisation of the right to culture with respect to a host of other issues in the African context. In an extensive article on this issue, Barney Pityana (formerly a member of the African Commission) has argued that there is a need for the ‘... legitimising of all cultures as sources of rights’.⁴⁶ And he continues: ‘More importantly, rights — or understandings of them — change and vary; they are vibrant and dynamic.’ Thus, in the context of globalisation, special attention needs to be given to how best to protect those vulnerable individuals, groups and communities from the adverse consequences of globalisation. In the following section of the paper, we turn to a consideration of how globalisation has come to play a critical role in both the exploitation and the protection of indigenous peoples’ traditional knowledge and way of life.

3.3 Promoting and protecting the right to traditional knowledge

The Ogoni decision demonstrates that one of the most challenging issues in the age of globalisation is the matter of how to deal with the tensions generated by pursuing the goals of globalisation (liberalisation, privatisation and increased trade), and the protection of a host of human rights, including the right to culture. As globalisation promotes industries such as tourism, mineral extraction and forest and other natural resource exploitation, the livelihoods and cultural mores of many peoples in Africa are placed under threat. No other issue more clearly illustrates these tensions than that between globalisation and the

⁴⁵ The first time that the African Commission began to consider the issue of minorities and indigenous peoples was at a meeting organised by the United Nations High Commissioner for Human Rights. The result of the meeting was the Kidal Declaration on Indigenous Peoples and Minorities (E/CN.4/Sub.2/AC.5/2001/3) of January 2001. That Declaration recognised the complexity of the concept ‘minorities’ and ‘indigenous peoples’ as applied in the African context; it encouraged further dialogue on the subject and made several other recommendations. Soon thereafter, the African Commission established a Working Group on the Rights of Indigenous Peoples and Communities in Africa, whose final report will be reviewed at the next meeting of the Commission.

⁴⁶ See Pityana (n 42 above) 227.

protection of the right to traditional knowledge, considered a critical component of the right to cultural expression. According to Susan Hawthorne, this has been the natural progression of the capitalist system of development:⁴⁷

Export for its own sake, as a prop to uphold a global economic system which brings profit only to entrenched elites, also brings increased poverty, dispossession, dislocation and an imposed homogeneity of culture to the poor and dispossessed. With each new period new forms of exploitation are invented to maintain the access of capitalists to free resources. In the colonial era, it was land and natural resources; in the post-colonial era the focus was on cheap labour resources in agriculture and other areas of primary production such as mining and forestry. In the era of globalisation the trend is toward the exploitation of knowledge resources.

The WTO's TRIPS agreement (the instrument designed to provide regimes of protection for IPRs) is of critical concern to an understanding of how knowledge resources are affected by globalisation.⁴⁸ Although part of the regime of trade liberalisation put in place under the WTO agreements, TRIPS in fact runs in a direction entirely opposite to the professed objective of the organisation. This is because TRIPS is quite clearly an instrument of monopoly, with serious implications for the rights to health and to food.⁴⁹ However, it came within the WTO framework on account of the operation of large and influential transnational corporations and the lobbying of their governments to ensure increased protection for intellectual property rights.⁵⁰ The film, music and pharmaceutical industries were particularly influential in this regard. In this respect, TRIPS is a major instrument in the universalisation and homogenisation of products and consumption patterns.

However, in furthering the protection of this category of rights, TRIPS not only adopted developed country standards of protection and sought to apply them to the rest of the world, but it made several additional changes to the IPR regime that have had far-reaching consequences. For instance, TRIPS does not recognise traditional or intellectual knowledge. In contrast, the Convention on Biological Diversity (CBD) does, but unlike the former, it does not have mechanisms for enforcement.⁵¹ In

⁴⁷ S Hawthorne 'The politics of farming and global theft: Africa and feminism from an Australian perspective' (2003) 55 *Agenda* 95.

⁴⁸ For a broad discussion, see S Ricketson 'Intellectual property and human rights in S Bottomley & D Kinley (eds) *Commercial law and human rights* (2002) 187-213.

⁴⁹ On the general situation with respect and the protection of these rights, see P Drahos 'The rights to food, health and intellectual property in the era of "biogopolies"' in Bottomley & Kinley (n 48 above) 215-233. On the African situation, see F Mangeni 'Implementing the TRIPS agreement in Africa' in Bellman *et al* (n 34 above) 220.

⁵⁰ This point is appreciated even by scholars who are otherwise very much in support of the liberalisation of global trade. See eg J Bhagwati *In defence of globalisation* (2004).

⁵¹ The CBD entered into force in 1993, and is concerned, *inter alia*, with the 'equitable sharing of the benefits arising out of the utilisation of genetic resources'. See especially arts 8(j) & 15.

order for indigenous peoples to protect their secrets, they must place them in the public domain, amounting to a '... Catch-22 trap, which allows the unscrupulous to exploit the knowledge'.⁵²

Secondly, although the problem of *bio-piracy* (the theft of such knowledge and its patenting by multinational corporations) has been in existence for a long time, under the propulsion of the forces of globalisation, it has assumed new dimensions.⁵³ Thus, patents have been issued in respect of 'inventions' already in the public domain such as turmeric, neem, ayahuasca (yage) and basmati,⁵⁴ and in the case of Africa, with respect to the snake-bean tree in Zimbabwe⁵⁵ and the hoodia cactus from among the San peoples of the Kalahari. Although some of these patents have been successfully challenged, there is no way of knowing how many other products are similarly affected.⁵⁶ Moreover, the old adage 'prevention is better than cure' clearly applies in this instance, especially because neither developing countries nor those indigenous groups most affected by such violations have the resources to challenge those who take out such patents. There is also a clearly gendered dimension to the issue of the exploitation of traditional knowledge. Women in many African societies are the repositories of such knowledge, particularly in terms of its relationship to medicinal, food or other properties. However, when that knowledge enters the public domain, whether legitimately or not, it is doubtful that the women from whom this knowledge principally came are

⁵² A Kirby 'Traditional knowledge "in peril"' *BBC News* 19 February 2004, <http://news.bbc.co.uk/1/hi/sci/teach/3496629.stm> (accessed 28 February 2005); UNU-IAS 'The role of registers and databases in the protection of traditional knowledge: A comparative analysis' January 2004, http://www.ias.unu.edu/binaries/UNUIAS_TK-RegistersReport.pdf (accessed 28 February 2005).

⁵³ For a critical analysis of this issue, see RL Gana 'Has creativity died in the third world? Some implications of the internationalisation of intellectual property' (1995) 24 *Denver Journal of International Law and Policy* 143.

⁵⁴ For an analysis of the gaps in the protection of traditional knowledge, see D Weissbrodt & K Schoff 'Human rights approach to intellectual property rights protection: The genesis and application of Sub-Commission Resolution 2000/7' (2003) 5 *Minnesota Intellectual Property Review* 15-21, <http://mipr.umn.edu/archive/v5n1/Weissbrodt.pdf> (accessed 28 February 2005).

⁵⁵ See MM Phillips 'Bitter remedies: The search for plants that heal generates international feuding' *The Wall Street Journal* 8 June 2001, http://www.lind.org.zw/people/herbs/snake_bean.htm (accessed 28 February 2005).

⁵⁶ In respect of the hoodia, following a challenge to the patenting of the cactus without acknowledging the San's contribution by Pfizer, an agreement was reached between the San and the government, under which the agreement and some 100 000 San peoples in four countries — Angola, Botswana, Namibia and South Africa — will receive at least three more payments during the clinical testing of the drug. See G Thompson 'Bushmen squeeze money from a humble cactus' *New York Times* 1 April 2003, <http://www.williams.edu/go/native/san.htm> (accessed 28 February 2005). See also T Mangold 'Sampling the Kalahari cactus diet,' *BBC News* 30 May 2003, <http://news.bbc.co.uk/1/hi/programmes/correspondent/2947810.stm> (accessed 28 February 2005).

duly rewarded. It is necessary to turn to a broader consideration of this issue, as it is fundamental to the comprehensive understanding of the tensions involved in promoting and protecting the right to culture.

3.4 Culture, globalisation and the issue of women's human rights

A gendered analysis, i.e. a discussion of the manner in which promoting and protecting the right to culture has implications for relationships between men and women, is critical to an understanding of how the processes of globalisation impact upon the right to culture. This is because an important dimension of culture regards the formation of notions of masculinity and femininity. The widespread diffusion of communication technologies prompted by globalisation has largely enhanced ideas about gender equality and equity: 'The personal is political' is becoming a more globally accepted premise for understanding the manner in which violations of women take place at all levels of society. The application of the principle has politicised and galvanised many women, some of whom were never active before. It has also enabled many of those who were already active to develop more independent and self-defined relationships to politics.⁵⁷ Through the influence in part of the globalisation of human rights standards, cultural practices that violate human dignity and personhood have also been subjected to critical exposure, eventually leading to their curtailment and abolition. The most commonly cited is the practice of female genital mutilation (FGM), which is in clear violation of a host of human rights standards, albeit that the notion of 'culture' or 'tradition' is often invoked to justify the practice.⁵⁸ Other practices include dowry payments, levirate marriage (wife inheritance) and discriminatory regimes of inheritance. The FGM issue clearly demonstrates that the expression of culture is not value-neutral or even ungendered. Many cultures either valorise highly masculinist practices or they marginalise, demean or victimise women, children and minorities. Finding a balance between ensuring that in the midst of the challenges presented by the processes of globalisation, the promotion and protection of the right to culture is a delicate task. This is because there are additional dangers in emphasising a right to culture approach which omits consideration of the gendered nature of the societies within which such a right is being promoted or protected. At the same time it is important to be aware of the complex interface of the racial and patronising elements that have influenced the debate about such cultural practices.

African cultures and traditions as they presently exist are in the main made *for, of and by* men! Many features of customary law effectively

⁵⁷ AR Miles *Integrative feminism: Building global visions 1960s-1990s* (1996) 3.

⁵⁸ H Lewis & I Gunning 'Cleaning our own house: 'Exotic' and familiar human rights violations' (1998) 4 *Buffalo Human Rights Law Review* 123.

operate (to borrow the words of the 1995 Uganda Constitution) '... against the dignity, welfare or interests of women [and] undermine their status'.⁵⁹ Many constitutions of countries around the continent (such as Zimbabwe) incorporate contradictory provisions on the application of culture that have the effect of negating the promotion and protection of women's human rights.⁶⁰ Perhaps the case that has drawn most commentary with regard to the discriminatory application of cultural practices is the decision in *Venia Magaya v Nakayi Shonhiwa Magaya*,⁶¹ the main issue in which was whether a woman could inherit her father's estate if he died without a will. Denying that a woman could indeed inherit on account of the custom of the community from which she came, the learned judge in the case observed that '[t]he woman's status is therefore basically the same as that of any junior male in the family'.⁶² In an earlier article that covered this issue, I have stated:⁶³

Upholding discrimination against women simply on account of their sex has several implications for their enjoyment of human rights, both civil and political and economic, social and cultural. Among the reasons why the *Magaya* decision is important are issues relating to participation in both economic and political life. But even more importantly is that deeming a woman a minor means that actions such as 'chastisement', better known as domestic violence, would also be deemed acceptable means of subjecting women to the traditional 'discipline' of their husbands *cum* guardians.

Unfortunately, the *Magaya* decision is not an isolated one. Numerous jurisdictions around the continent regularly give more weight to cultural practices that support patriarchy and discrimination than they do to the rights of women. In such a context, and particularly when added to some of the ravages invoked by the varied processes of globalisation, the situation of women becomes even more precarious. There is consequently a need for concerted action to ensure that domestic legislation is reformed to guarantee that cultural practices that violate the rights of women are subjected to a rigorous test of their conformity to international human rights principles, and especially to the African Charter provisions on non-discrimination. In the age of globalisation, such action is imperative. Most importantly, how do we ensure that in

⁵⁹ Art 33(6) & 32(1); cultural objective number xxiv of the National Objectives and Directive Principles of State Policy encourages the incorporation into aspects of Ugandan life all cultures and customary values consistent with fundamental rights and freedoms and human dignity.

⁶⁰ See Pityana (n 42 above) 237-239.

⁶¹ Judgment No SC 210/98/Civil Appeal No 635/92 of the Supreme Court of Zimbabwe (unreported).

⁶² n 61 above, 10.

⁶³ J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 65.

the discussion about globalisation and its impact on human rights, we adhere to the principles of meaningful participation and inclusion in the decision-making processes that give shape and impetus to the phenomenon and recognise the diversity of views that seek an audience?⁶⁴

However, it is not only the conceptual formulation of the laws and constitutions that is a problem, but also the fact that African political, social and economic institutions continue to be dominated by men and marginalise women. For example, Africa is yet to have a female head of state. The Organization of African Unity (and its successor, the African Union) have never been headed by a woman. In a feminist analysis of the implementation of the African Charter, Murray has argued that in a comparative sense the African Commission is '... the most representative of all regional human rights bodies ...'.⁶⁵ However, the instances in which the institution has covered issues relating to the promotion and protection of women's human rights are few and far between. For example, despite the very progressive tenor of the *SERAC* decision, it elicited a marked degree of blindness to the gendered nature of virtually all the violations that took place in the Delta. And yet, throughout the history of the struggles over the resources and environment of the region, women have been critical actors in protesting the processes of environmental despoilation and in decrying the dearth of the provision of social services by way of basic education, clean and potable water and adequate health facilities. Although the Commission correctly focused on the violation done to rights in the family and to several other economic and social rights, to omit a gendered analysis from a consideration of these violations is to do only half the job.⁶⁶ The Commission needs to be aware that the differential status of men and women — even during the course of a process of human rights violations that affected the community as a whole — will more often than not result in more adverse consequences for women.

It is hoped that the African Commission will evolve to become more sensitive to issues concerning the rights of women. In some respects, positive steps have been taken. An example is the appointment of a Special Rapporteur on the Rights of Women in Africa, who is acknowledged to have made some critical improvement to the Commission's approach to the situation of women on the continent.⁶⁷ The promul-

⁶⁴ See D Gantz 'Failed efforts to initiate the "millennium round" in Seattle: Lessons for future global trade negotiations' (2000) 17 *Arizona Journal of International and Comparative Law* 351-352.

⁶⁵ R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 207.

⁶⁶ For a gendered critique of this aspect of the decision, see Oloka-Onyango (n 39 above).

⁶⁷ See AK Wing & TM Smith 'The new African Union and women's rights' (2003) 13 *Transnational Law and Contemporary Problems* 59-64.

gation of the Protocol to the African Charter on the Rights of Women in Africa is another important development, although the instrument is yet to come into force.⁶⁸ The real test of the pudding will come through the ability of African civil society actors to ensure that the lofty ideals of the Protocol are implemented in practice. There are additional problems in the fact that in the same way that it has internationalised human rights standards and thus greatly empowered women, globalisation has also led to the increased incorporation of women in the labour market. As such, many women have been liberated from the drudgery and oppression of unpaid household labour. Given that many negative cultural practices exercise an influence over women because of their economic dependence on men, the ability to be economically autonomous helps in expanding their space of operation. At the same time, the conditions under which they toil in many of the export promotion zones that have sprung up around Africa to meet the pressures of global capitalism leave a great deal to be desired. A report by the Kenya Human Rights Commission on the cut flower industry provides shocking testimony of the Dickensian conditions under which employees — the majority of whom are women — operate.⁶⁹ Although there is a clamour for the establishment of these kinds of industry — prompted in large part by schemes such as the African Growth and Opportunities Act — there is a need for considerable caution in embracing what may turn out to be a poisoned chalice. And in this respect, the role of civil society is critical.

3.5 Buttressing African civil society

The complex implications of the processes of globalisation for the realisation of the right to culture are becoming more apparent by the day. However, if institutions such as the African Commission, governments and international organisations are to pay increased attention to those implications, civil society must play a more active role. The World Bank was persuaded by concerted civil society action not to provide the financing for the construction of the Bujagali Dam in Uganda. Although the project was ultimately abandoned on account of allegations of bribery, it was a result of the coming together of grassroots environmental activists and threatened minorities in the region of the dam. The

⁶⁸ As at the end of April 2005, 10 of the 15 countries required to bring the instrument into force had ratified the Protocol.

⁶⁹ See Kenya Human Rights Commission *Beauty and agony: An advocacy research on the working conditions in the flower plantations in Kenya* (2001). See also C Majtenyi 'Thorny issue: Flower firms accused of exploiting workers' *The East African* 18 February 2002.

formula for the sharing of proceeds on the Chad-Cameroon oil project was greatly influenced by the operations of civil society and its trans-continental mobilisation, which argued that the needs and interests of the indigenous peoples affected by the project needed to be taken into account. Civil society was instrumental in both the case of the hoodia cactus, as well as in the Zimbabwean snake-bean tree dispute. In other words, civil society must play a more active role in ensuring that the processes of globalisation do not adversely affect the promotion and the protection of the right to culture.

Particular attention needs to be paid to issues such as the promotion and protection of languages, land rights, the rights of pastoralists, the protection of traditional knowledge from biopiracy, and the application of exclusionary environmental policies that affect forest dwellers and other hunter-gatherers. What becomes clear is that many African activists are rather shy of involving themselves in these issues, and in many instances it is international non-governmental organisations that carry the mantle. Consequently, there is a need for African civil society to be more proactive, and especially to become more engaged in the many discussions taking place on issues such as traditional knowledge in organisations like the WTO and the World Intellectual Property Organisation. African civil society needs to more actively engage with African governments in the articulation of progressive positions on these issues and especially in making sure that international financial institutions (the World Bank and the International Monetary Fund) are more attuned to the various dimensions of the issue.

At the same time, international bodies such as the African Commission need to review their approach to non-state actors. For example, in the *SERAC* decision, the main focus of condemnation for the commission of the violations complained of was the Nigerian government. Little attention was given to the obligations and responsibilities (in human rights terms) of the companies that were intimately involved, not only in the exploitation of the resources of the region, but in many of the human rights violations that occurred there. It is imperative that in the age of globalisation, institutions such as the African Commission are compelled to consider the human rights obligations of non-state actors such as TNCs with enhanced attention.⁷⁰ Through the combined effort of civil society and the monitoring and promotional bodies that are in existence, globalisation can be turned into a force for the progressive realisation of all human rights, but in particular, as a force for the promotion and protection of the right to culture.

⁷⁰ For an analysis of this issue, see Oloka-Onyango (n 39 above) 895-905.

4 Conclusion and recommendations

This paper has focused on only a handful of the many issues that arise in the debate over the impact of globalisation on the promotion and protection of cultural rights in the African context. What is clear is that in the era of globalisation, it is not enough to look only to the state as the primary obligor with respect to either dealing with the negative consequences of globalisation, or to the enhanced protection of the right to culture. A considerable number of actors, other than states, should equally be obliged to respect, protect and fulfil the individual or group rights to a cultural life. Among these are transnational corporations, the family and communities. There is consequently a need to develop a framework within which the responsibility for human rights violations should not only be that of the state, but also that of other actors. In this arrangement, it would be possible to bring claims of human rights violations (including violations of the right to culture) against the state as much as it would be possible to do so against other (non-state) actors. The challenge that face us as human right activists is to critically reflect on the most appropriate manner to enhance the positive and confront and eliminate the negative aspects of globalisation. Only then can we ensure that the processes of globalisation are sensitive to the goals of sustainable human development of which the promotion and protection of human rights are paramount.

Many of the processes that we know as globalisation will in all probability continue to mark the trends of human social and economic development for the near future. Needless to say, none of these processes are divine or pre-ordained; they emanate from (and are influenced by) human agency. As such, what is critical is the manner in which human society arranges itself and guarantees that these processes are made sensitive to the better protection of human rights. It is necessary to check these processes in order to ensure that they are in line with international human rights law. A great need exists to review the law to ensure that human rights are respected, protected and fulfilled in the globalisation process by all actors involved, namely the state, multi-lateral institutions, transnational corporations, families and communities.