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A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights

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Summary

South Africa's relatively peaceful transition from apartheid to democracy would not have been possible without the prevalence of a spirit of solidarity (ubuntu), not only within South Africa but across the continent, since it is largely due to African solidarity with the struggle against apartheid that an enabling environment for negotiation could be created. Therefore, the importance of including the unique and unprecedented solidarity rights of peoples in the African Charter on Human and Peoples' Rights cannot be emphasised enough. The rights of peoples – to existence, equality, self-determination, sovereignty over natural resources, peace and security, development and a satisfactory environment – were included in the African Charter for historical and philosophical reasons rooted uniquely in the African experience. The recognition of these rights has been resisted in other parts of the world along the lines of ideological division drawn during the Cold War. Solidarity rights, founded on the philosophy of African humanism, did not fit into the Cold War jurisprudential dichotomy, which featured, at the one extreme, the Western emphasis on liberty, rights and competition and, at the other extreme, the Eastern emphasis on equality, duties and compulsion. The solidarity rights rather represented an African emphasis on fraternity, reciprocity and compassion. African humanism has been applied in practice as a viable and valuable legal philosophy,

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particularly by the Constitutional Court of South Africa. Solidarity rights in the African Charter are similarly applicable as viable and valuable legal constructs, and therefore their precise contents and consequences may and must be explored through practical enforcement.

> We face neither east nor west. We face forward.
>
> Kwame Nkrumah

1 Context: Struggle and solidarity

1.1 A South African story

When I was born, 25 years ago, I did not know that my country was at war with itself and the world. I did not know that I was being born during a state of emergency, and that my government was developing nuclear weapons and committing murder and torture in my name, in the name of my skin.[1] I did not know that compassion was a crime in my country. And I did not know that, on the very day I was born, one of my countrymen was being condemned to death. He had been convicted of murdering a poet he perceived as a traitor to the struggle against apartheid.[2] It eventually emerged that the poet, Ben Langa, had been tarred as a traitor, and consequently killed, only on the basis of misinformation planted by the apartheid security police.[3] It could not have been predicted that, less than a decade later, Pius Langa would find himself sitting as a justice of the newly-created Constitutional Court of South Africa, abolishing precisely the penalty imposed on the men who murdered his brother. Yet, in *S v Makwanyane*,[4] that is exactly what he did, for the following reasons:[5]

> The emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity has been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The state has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life.

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1 See eg Truth and Reconciliation Commission of South Africa *Final Report* (1998), particularly vol 2, http://www.justice.gov.za/trc/report/index.htm (accessed 23 September 2011).

2 *S v Payi* 14 March 1986, South African Supreme Court of Appeal Case 16/86, unreported, http://www.saflii.org/za/cases/ZASCA/1986/15.html (accessed 13 June 2011).

3 Truth and Reconciliation Commission, Amnesty Committee, Decision AC/2000/157 in Application AM 6450/97, http://www.justice.gov.za/trc/decisions/2000/ac200157.htm (accessed 16 June 2011).

4 *S v Makwanyane & Another* 1995 3 SA 391 (CC) (*Makwanyane*).

5 *Makwanyane* (n 4 above) paras 218 & 226.

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> We have all been affected, in some way or another, by the 'strife, conflict, untold suffering and injustice' of the recent past. Some communities have been ravaged much more than others. In some, there is hardly anyone who has not been a victim in some way or who has not lost a close relative in senseless violence. Some of the violence has been perpetrated through the machinery of the state, in order to ensure the perpetuation of a *status quo* that was fast running out of time. But all this was violence on human beings by human beings. Life became cheap, almost worthless.
>
> It was against a background of the loss of respect for human life and the inherent dignity which attaches to every person that a spontaneous call has arisen among sections of the community for a return to *ubuntu*.

1.2 A spirit of solidarity

Seen in context, the reference in this judgment to the ethical concept of *ubuntu* is deeply meaningful. *uBuntu* is the spirit that steadied South Africa's transition from racist repression to a constitutional democracy, by valuing reconciliation over retribution, and compassion over confrontation.[6] It is significant that the Constitutional Court abolished the death penalty only a year after the dawn of democracy, before the Truth and Reconciliation Commission could help to heal the wounds of the past, and when so many people harboured the hope that those who murdered their loved ones in the name of apartheid would face the same fate.[7]

However, there is a further, unseen and unintended significance to the Court's tribute to *ubuntu*. South Africa's transition would surely not have been possible without countless acts of courageous compassion from people across the African continent. During the darkest days of apartheid, a powerful spirit of solidarity took root, from Lusaka to Lagos, from Maputo to Mogadishu, from Dakar to Dar es Salaam. Our neighbours gave refuge to our exiled leaders, lent support to our struggle, and endured frightful reprisals at the hands of the apartheid state and its allies.[8] This solidarity was immortalised in an international pact in 1981, when the free states of Africa united in signing the African Charter on Human and Peoples' Rights (African Charter):[9]

> Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid ... and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.

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6 See eg *Dikoko v Mokhatla* 2006 6 SA 236 (CC) (minority judgment of Sachs J) para 113.

7 See D Tutu *No future without forgiveness* (2000) 13-31.

8 See M Meredith *The state of Africa: A history of fifty years of independence* (2005) 412-442.

9 African Charter, Preamble.

1.3 A right to solidarity

The African Charter came into force in October 1986, and all Africans became the bearers of unique and unprecedented rights. Significantly, the Charter recognised the right of all peoples to self-determination,[10] and with it the 'right to the assistance of the state parties to the present Charter in their liberation struggle'.[11] In this sense, the African Charter truly enshrined a right to solidarity. This is momentous because it is substantially to continental solidarity that the success of the struggle against apartheid is owed. However, as we all well know, the struggle continues, not only in South Africa but across the continent: that is, the struggle for the very existence and equality of peoples, for genuine self-determination and sovereignty over our natural resources, for peace, development, and a healthy environment. In many ways, this is the timeless struggle between 'society' and 'the state'. This struggle is far from over, and if it is to succeed, what we will require, above all, is solidarity.

It bears mention that solidarity is sustained through institutions, which serve as centres of information, communication and commonality, among peoples divided by vast distances and social differences, but united in their commitment to human dignity, liberty and equality. Twenty-five years ago, two such institutions were created. In South Africa, in May 1986, between two states of emergency, the Centre for Human Rights was founded at the University of Pretoria, and it has been at the forefront of human rights education and academic activism ever since. In October of that year, with the entry into force of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) came into being, mandated 'to promote human and peoples' rights and ensure their protection in Africa'.[12] I feel distinctly privileged, therefore, in the twenty-fifth year of my life and theirs, to celebrate 30 years of the African Charter by discussing its unique rights of solidarity, and the spirit of solidarity that underlies them, which binds us together, as Africans, in our common pursuit of sustainable peace and progress.

2 Concept: Rights of solidarity

2.1 A universal declaration of human rights

The adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948 was the first phase of a project called the Inter-

10 Art 20(1) African Charter.

11 Art 20(3) African Charter.

12 Art 30 African Charter.

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national Bill of Human Rights,[13] which would include the adoption of two binding international instruments in 1966: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). When these Covenants came into force in 1976, the project was concluded, but not yet completed. ICCPR enshrined primarily 'negative' rights (such as life, liberty and privacy), corresponding to articles 3 to 21 of the Universal Declaration, which require states to *refrain from* certain intervention.[14] ICESCR enshrined primarily 'positive' rights (such as housing, healthcare and social security), corresponding to articles 22 to 27 of the Universal Declaration, which require states to *resort to* certain intervention.[15] However, neither of the Covenants enacted the right reflected in article 28 of the Universal Declaration: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' Although article 1 common to both Covenants proclaims that '[a]ll peoples have the right of self-determination', by virtue of which they may 'freely determine their political status and freely pursue their economic, social and cultural development',[16] and may also 'freely dispose of their natural wealth and resources',[17] this right has been restricted, in its interpretation, to contexts of colonial domination.[18]

2.2 A universal declaration of the rights of peoples

When the two international covenants came into force in 1976, it was recognised by a conference of academics and activists in Algiers that 'the quest for a new international, political and economic order' was far from complete:[19]

> Aware of expressing the aspirations of our era, we met in Algiers to proclaim that all the peoples of the world have an equal right to liberty, the right to free themselves from any foreign interference and to choose their own government, the right if they are under subjection, to fight for their liberation and the right to benefit from other peoples' assistance in their struggle.

13 Resolution 217(III): International Bill of Human Rights – Part A: Universal Declaration of Human Rights, United Nations General Assembly (UNGA) 10 December 1948.

14 In art 2 of ICCPR, each state party undertakes 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'.

15 In art 2 of ICESCR, each state party undertakes 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant'.

16 Art 2(1) ICCPR; art 1(1) ICESCR.

17 Art 1(2) ICCPR; art 1(2) ICESCR.

18 FL Kirgis Jr 'The degrees of self-determination in the United Nations era' (1994) 88 *American Journal of International Law* 304-305.

19 Universal Declaration of the Rights of Peoples (Algiers Declaration), adopted 4 July 1976, http://www.chr.up.ac.za/images/files/documents/ahrdd/theme31/peoples_rights_algiers_universal_declaration_1976.pdf (accessed 16 June 2011), Preamble.

> Convinced that the effective respect for human rights necessarily implies respect for the rights of peoples, we have adopted the Universal Declaration for the Rights of Peoples.

A truly visionary document, the Algiers Declaration proclaimed for all peoples the right to existence,[20] the right to political self-determination,[21] economic rights,[22] the right to culture,[23] the right to the environment and common resources,[24] and the rights of minorities.[25] These rights were to be 'exercised in a spirit of solidarity amongst the peoples of the world and with due regard for their respective interests'.[26] The obligations arising from these rights were owed 'towards the international community as a whole',[27] and owed by 'all members of the international community'.[28]

2.3 A third generation of human rights

In a similar sense, the United Nations Educational, Scientific and Cultural Organisation (UNESCO)'s Director-General at that time, the Senegalese educator Amadou-Mahtar M'Bow, observed that ICCPR and ICESCR represented, respectively, only the first and the second generations of human rights, and that a 'third generation of human rights' still required similar recognition.[29] The three generations of human rights were correspondingly compared to the three themes of the French Revolution: *liberté*, *égalité* and *fraternité*.[30] While ICCPR concerned itself with liberty, and ICESCR concerned itself with equality, neither covenant placed any emphasis on fraternity or solidarity. Thus, in 1977, the Director of UNESCO's Division on Human Rights and Peace, Karel Vašák, presented the following thesis:[31]

> The international community is now embarking upon a third generation of human rights which may be called 'rights of solidarity'. Such rights include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind. Since these rights reflect a certain conception of

20 Arts 1-4 Algiers Declaration.

21 Arts 5-7 Algiers Declaration.

22 Arts 8-12 Algiers Declaration.

23 Arts 13-15 Algiers Declaration.

24 Arts 16-18 Algiers Declaration.

25 Arts 19-21 Algiers Declaration.

26 Art 12 Algiers Declaration; see also arts 18 & 21.

27 Art 22 Algiers Declaration.

28 Art 30 Algiers Declaration.

29 K Vašák 'A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights' (1977) 30 *The UNESCO Courier* 29.

30 P Alston 'A third generation of solidarity rights: Progressive development or obfuscation of international human rights law' (1982) 29 *Netherlands International Law Review* 307 310-311.

31 Vašák (n 29 above) 29.

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> community life, they can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public and private institutions.

In a world plagued by growing insecurity and inequality, it became clear that the full realisation of first and second generation rights 'required international co-operation through solidarity of all peoples',[32] and so the third generation immediately captured the imagination of the international human rights community. At conference after conference, and in resolution after resolution, the rights of solidarity were proclaimed and propounded, as a concept, but their contents were never clearly defined, and their practical consequences were never fully explored.[33] The envisaged 'Third Covenant' was never drafted and never tabled at the United Nations (UN), and to this day these rights remain obscure and unenforceable in the global architecture of human rights.

3 African Charter: Peoples' rights

3.1 An unprecedented development

In June 1981, at the 18th Assembly of Heads of State and Government of the Organization of African Unity (OAU) in Nairobi, the African Charter on Human and Peoples' Rights was adopted, giving the African continent the most comprehensive and progressive international human rights instrument the world has ever seen. The African Charter is the first and only binding international instrument that directly recognises the solidarity rights of peoples: to existence, equality, self-determination, sovereignty over natural resources, peace, development and environment.[34]

Although the African Charter itself does not define the concept of 'peoples', it is clear that a people is something separate from the state,[35] since 'the primary impact of [a peoples' right] is against the government of the state in question, and one of its main effects is to internationalise key aspects of the relationship between the people concerned and that state'.[36] Fatsah Ouguergouz, a judge of the African Court on Human and Peoples' Rights (African Court), has described it as a 'chameleon-like term', 'whose content is dependent on the

32 F Hassan 'Solidarity rights: Progressive evolution of international human rights law?' (1983) 1 *New York Law School Human Rights Annual* 54.

33 See P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 259.

34 Arts 19-24 African Charter.

35 R Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80.

36 J Crawford 'Some conclusions' in J Crawford (ed) *The rights of peoples* (1988) 164.

function of the right concerned'.[37] Still, the African Commission has developed certain criteria for the identification of 'peoples':[38]

> The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as 'peoples', that is, a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights.

It is important at this stage to clarify that, although the discourse on 'third generation' rights of solidarity revolved around the rights to peace, development and environment, these rights are not the only rights of solidarity. Rather, I contend that all of the rights recognised as peoples' rights in the African Charter are rights of solidarity. This is true because the existence and equality of peoples, as well as their self-determination and sovereignty over their natural resources, cannot be fully realised without compassion and co-operation across borders, not only by states but by other peoples, persons and corporations. The protection and promotion of these interests also (alongside peace, development and environment) require concerted efforts by everyone. The inherent imbalance of status and power between a people and a state is such that the vindication of peoples' rights requires solidarity among peoples across borders.

3.2 A historical and philosophical imperative

The recognition of the solidarity rights in the African Charter is rooted in two reasons unique to the African world view. One reason is historical, remembering that the African experience of human rights violations was largely of widespread and systematic violations of the rights of entire peoples rather than specific individuals, through slavery, colonialism and apartheid. In colonised Africa, 'the state' was a notion in contrast and indeed in conflict with that of 'the people', and solidarity among peoples was necessary to break the bonds of oppression. The other reason is philosophical, reflecting that, in African social theory, a person 'is not an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'.[39] On this aspect, the OAU Rapporteur on the African Charter offered an insightful account:[40]

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37 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 211.

38 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) para 151.

39 OB Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: Comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 148.

40 Rapporteur's Report (OAU Doc CM/1149 (XXXVII)) para 10, quoted in Kiwanuka (n 35 above) 82.

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> Noting that in Africa, Man is part and parcel of the group, some delegations concluded that individual rights could be explained and justified only by the rights of the community. Consequently, they wished that the Draft Charter made room for the peoples' rights and adopt[ed] a more balanced approach to economic, social and cultural rights on the one hand and civil and political rights on the other.

In its final form, the African Charter explicitly invokes these historical and philosophical imperatives in its Preamble:

> Reaffirming the pledge they solemnly made in article 2 of the [OAU] Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;
>
> Taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights;
>
> Recognising, on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights ...

3.3 A principle of solidarity

Solidarity, as a principle, has been a fundamental pillar of African international law since the adoption of the Charter of the OAU in 1963, which proclaims among its purposes to 'promote the unity and solidarity of the African states',[41] and to 'co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa'.[42] The OAU's successor, the African Union (AU), also aims to 'achieve greater unity and solidarity between the African countries and the peoples of Africa',[43] and 'to strengthen solidarity and cohesion among our peoples'.[44] Solidarity, as a principle of international law, has been best described as follows: 'Solidarity requires an understanding and acceptance by every member of the community that it consciously conceives of its own interests as being inextricable from the interests of the whole.'[45]

This conception of solidarity accords closely with the historical and philosophical rationale for recognising peoples' rights in the African Charter. It is understandable, therefore, that the principle of solidarity features so strongly in the structure of African institutional law.

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41 Art 2(1)(a) Charter of the Organization of African Unity, 25 May 1963 (OAU Charter).

42 Art 2(1)(b) OAU Charter.

43 Art 3(a) Constitutive Act of the African Union, 11 July 2000 (AU Constitutive Act).

44 Preamble AU Constitutive Act. See also Kigali Declaration, AU Ministerial Conference on Human Rights in Africa, May 2003, art 31.

45 R St J MacDonald 'Solidarity in the practice and discourse of public international law' (1996) 8 *Pace International Law Review* 290.

4 Culture: African humanism

4.1 A philosophy of solidarity

Fundamental to the notion of peoples' rights or solidarity rights is the philosophy of African humanism, which is ascertainable among most pre-colonial African societies, as a philosophy of compassion, community and solidarity.[46] I use the term 'African humanism' broadly to embrace the various social theories propounded by African anthropologists and philosophers that are united by the notion that the identity and morality of the individual are inextricably bound by her or his relationships with others in society. This is a point of consensus among most modern reformulations of traditional philosophy across the continent, including Kwame Nkrumah's Consciencism, Kenneth Kaunda's Humanism and Julius Nyerere's *Ujamaa*.[47]

In South Africa, African humanism finds its most prominent expression in the ethical concept of *ubuntu*, the meaning of which is unpacked in the Zulu proverb *umuntu ngumuntu ngabantu* (literally, a person is a person through people). In a Constitutional Court judgment relating to freedom of religion, Justice Langa discussed *ubuntu* as an African social theory, as follows:[48]

> The notion that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises 'communality and the inter-dependence of the members of a community' and that every individual is an extension of others. According to Gyekye, 'an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'. This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.

In seSotho and seTswana, the same concept is called *botho*. In Shona, it is known as *unhu*, and in Chichewa it is *umunthu*. In Kinyarwanda and Kirundi, the word *ubuntu* means humanity or human generosity, and the word *obuntu* bears a similar meaning in the Kitara dialect clus-

46 See Y Mokgoro '*Ubuntu* and the law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 1 15-17.

47 MM Makumba *An introduction to African philosophy: Past and present* (2007) 134-144.

48 *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 1 SA 474 (CC) para 53 (footnotes omitted).

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ter in East Africa. The late Nigerian anthropologist, Victor C Uchendu, described a principle of 'kinship' prevailing in West Africa:[49]

> The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging, security and social justice. In such social order duties preceded rights. The principle was clear: to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced.

The limitation of first and second generation human rights is that they demand delivery from the state, and thereby abstract all responsibility away from the individual. African humanism, fostered in tribal societies not structured as nation states, does not divorce the individual from her or his community, nor her or his responsibility to the community, through the avatar of the state. Relations within the community, and its relations with other communities, were always the collective responsibility of the community members themselves. In this respect, an illuminating exposition is provided by Murungi:[50]

> Certainly, in Africa, but not only in Africa, personhood is social. African jurisprudence is a part of African social anthropology. Social cohesion is an essential element of African jurisprudence. Areas of jurisprudence such as criminology and penology, law of inheritance, and land law, for example, focus on the preservation of and promotion of social cohesion. This cohesion is a cohesion that is tempered by justice. Justice defines a human being as a human being. Thus, injustice in Africa is not simply a matter of an individual breaking a law that is imposed on him or her by other individuals, or by a collection of individuals who act in the name of the state. It is a violation of the individual's duty to him or herself, a violation of the duty of the individual to be him or herself – the duty to be a social being.

In contrast to Western legal philosophies, *ubuntu* 'does not conceive of a social bond as one that precedes through an imagined social contract'.[51] As Cornell and Muvangua argue:[52]

> *uBuntu* is both the African principle of transcendence for the individual, and the law of the social bond. In *ubuntu* human beings are intertwined in a world of ethical relations and obligations from the time they are born. The social bond, then, is not imagined as one of separate individuals ... We come into the world obligated to others, and in turn these others are obligated to us, to the individual. Thus, it is a profound misunderstanding of *ubuntu* to confuse it with simple-minded communitarianism. It is only through the

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49 VC Uchendu *Tradition and social order*, inaugural lecture, University of Calabar, Nigeria, 11 January 1990, as cited in UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 19. See also the fascinating study on Islamic law and solidarity rights by J Morgan-Foster 'Third generation rights: What Islamic law can teach the international human rights movement' (2005) 8 *Yale Human Rights and Development Law Journal* 67.

50 J Murungi 'African jurisprudence: Hermeneutic reflections' in K Wiredu (ed) *A companion to African philosophy* (2006) 519 552-553

51 D Cornell & N Muvangua *Law in the* ubuntu *of South Africa* (2009) 10, http://isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf (accessed 16 June 2011).

52 As above. See also I Menkiti 'On the normative conception of a person' in K Wiredu (ed) *A companion to African philosophy* (2006) 326.

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> engagement and support of others that we are able to realise a true individuality and rise above our biological distinctiveness into a fully developed person whose uniqueness is inseparable from the journey to moral and ethical development.

4.2 A viable legal philosophy

Viewed with its vocabulary of rights and duties, African humanism naturally translates from a social philosophy into a legal philosophy, and as such it has increasingly been applied to concrete legal disputes by national courts across the continent. For instance, the Tanzanian Court of Appeal has held as follows in respect of constitutional interpretation:[53]

> The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and *vice versa*.

In justifying the abolition of the death penalty by the Constitutional Court of South Africa, Justice Yvonne Mokgoro explained that *ubuntu* 'envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.[54] Justice Tholakele Madala observed that it 'calls for a balancing of the interests of society against those of the individual',[55] and Justice Pius Langa described the theory as follows:[56]

> It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

This judgment was also applied by the Ugandan Constitutional Court, when it declared the sentence of banishment for the crime of witchcraft to be cruel and inhuman punishment and therefore unconstitutional:[57]

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53 *Director of Public Prosecutions v Pete* [1991] LRC (Const) 553 566b-d, cited in *Makwanyane* (n 4 above) para 224.

54 *Makwanyane* (n 4 above) para 308.

55 *Makwanyane* (n 4 above) para 250.

56 *Makwanyane* (n 4 above) para 224.

57 *Salvatori Abuki & Another v Attorney-General* [1997] UGCC 5, Constitutional Case 2 of 1997, 13 June 1997, http://www.ulii.org/ug/cases/UGCC/1997/5.html (accessed 16 June 2011).

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> Of course, the concept of '*ubuntu*', the idea that being human entails humaneness to other people, is not confined to South Africa or any particular ethnic group in Uganda. It is the whole mark of civilised societies ... It will be recalled that the word '*ubuntu*', though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda.

Botho has recently been invoked by the Lesotho High Court in the context of the law of succession, to preclude the dispossession of a widow[58] and, in South Africa, it has also been applied to the law of defamation.[59] Despite its many detractors,[60] I contend that African humanism is indeed viable as a legal philosophy, and that the rights of solidarity bear unique jurisprudential value.

4.3 A valuable legal philosophy

The African Charter is unique among international human rights instruments, not only because it includes peoples' rights, but because it includes a chapter on individual *duties*.[61] According to article 27 of the African Charter:

1 Every individual shall have duties towards his family and society, the state and other legally-recognised communities and the international community.
2 The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

With its equality of emphasis on rights and duties, African humanism represents a theory of *reciprocity*.[62] However, the notion that a person forms part of a people, in a relationship of reciprocal rights and duties, was met with apprehension and hostility by a number of states and societies from the developed world. African humanism 'stands in stark contrast to the atomistic view of the Western world, which regards individuals as locked in a constant struggle against society for the redemption of their rights'.[63] The United States and the United

58 *Mokoena v Mokoena & Others* [2007] LSHC 14, Case CIV/APN/216/2005, 16 January 2007, http://www.saflii.org/ls/cases/LSHC/2007/14.html (accessed 16 June 2011).

59 *Dikoko v Mokhatla* (n 6 above) (minority judgment of Mokgoro J) paras 68-69; *The Citizen 1978 (Pty) Ltd & Others v McBride* [2011] ZACC 11, Case CCT 23/10, 8 April 2011, http://www.saflii.org/za/cases/ZACC/2011/11.html (*McBride*) (minority judgment of Mogoeng J) para 217.

60 See eg R English '*Ubuntu*: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal on Human Rights* 641; IJ Kroeze 'Doing things with values II: The case of *ubuntu*' (2002) *Stellenbosch Law Review* 252.

61 Arts 27-29 African Charter.

62 See the minority judgment of Ngcobo J in *Bhe & Others v Khayelitsha Magistrate & Others* 2005 1 SA 580 (CC) paras 163 & 166, where he explicitly links *ubuntu* to the duties in the African Charter. See also *Makwanyane* (n 4 above) (minority judgment of Mahomed J) para 263; *McBride* (n 59 above) (minority judgment of Mogoeng J) para 218. See also N Ahiauzu '*Ubuntu* and the obligation to obey the law' (2006) 37 *Cambrian Law Review* 17.

63 Kiwanuka (n 35 above) 82.

Kingdom, for instance, were so hostile to the notion of solidarity rights that they officially withdrew from UNESCO when Director-General M'Bow refused to relent on his campaign for a third generation of human rights, on the grounds that this initiative 'would give international legitimacy to abuses of individual rights ... justified by appealing to a supposedly higher or equally valid set of collective rights'.[64] These Western fears were unfounded, however, as the solidarity rights were conceived as comprehensive rights, with both individual and collective dimensions,[65] and were not to be wielded by the state against the people, but rather by the people against the state.[66] It must be remembered, though, that this happened during the height of the Cold War, when the United Kingdom and the United States were providing arms, investment and intelligence to the apartheid regime.[67]

I mention this example because apartheid provides an instructive analogy for the unique jurisprudential value of African humanism.[68] In so many ways, apartheid is the very antithesis of *ubuntu*. While apartheid literally means 'separateness', *ubuntu* emphasises 'togetherness', interdependence and community. While apartheid criminalised compassion and solidarity, *ubuntu* is defined by them. Apartheid effectively divorced rights from duties, reserving for white people a maximum of rights and a minimum of duties, while relegating black people to the opposite fate. Apartheid did not only strive to separate white South Africans from black South Africans, but indeed to sever South Africa from its own continent, to create an enclave of Western, Christian and capitalist 'civilisation'.[69] In order to sustain itself, the apartheid regime placed itself at the frontlines of the Cold War, involving itself and its citizens directly in the proxy conflicts on the continent, from South West Africa and Angola to Mozambique.[70]

After the dawn of democracy, therefore, the project of healing the divisions in South African society was also, in a strong sense, the project of healing the ideological divisions of the Cold War. Our Constitution had to accommodate and address these divisions, and still has to do so today, as our country remains deeply divided – politi-

64 As quoted in Alston (n 30 above) 280-281.

65 K Mbaye 'Introduction' in M Bedjaoui (ed) *International law: Achievements and prospects* (1993) 1052.

66 Crawford (n 36 above) 164.

67 J Barber *Mandela's world: The international dimension of South Africa's political revolution* (2004) 9-25.

68 See generally KD Kaunda 'Humanism and apartheid' (1993) 37 *Saint Louis University Law Journal* 835 and WP Nagan 'Africa's value debate: Kaunda on apartheid and African humanism' (1993) 37 *Saint Louis University Law Journal* 871.

69 See, eg, the speech by the architect of apartheid, HF Verwoerd, in which he heralded South Africa as 'unequivocally the symbol of anti-communism in Africa [and] a bastion in Africa for Christianity and the Western world', quoted in AM Chambati 'South Africa's foreign policy and the world' (1973) 3 *Zambezia* 92.

70 See Meredith (n 8 above) 316-319.

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cally, economically and socially – embodying the frontier between the developed and developing worlds. As President Nelson Mandela predicted, 'as she battles to remake herself, South Africa will be like a microcosm of the new world striving to be born'.[71] In this context of vast disparities in development, the South African Constitutional Court has demonstrated the unique viability and value of *ubuntu* as a legal philosophy, in requiring meaningful mediation in the resolution of disputes between private landowners and homeless people dwelling on their property:[72]

> [The statute] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern ... The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised, and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

In a similar sense, the colossal project of reconciling a deeply-divided world calls for compassion and co-responsibility on the part of all peoples, persons and corporations, rather than only states. The philosophy of African humanism, through the rights of solidarity, provides the possibility to adapt human rights theory to the task. Firstly, it explodes the binary fallacy of the Cold War that there is an absolute and irreconcilable election between individualist and communitarian legal philosophies. In the realm of human rights, as the Cold War intensified, the Western states clung to ICCPR, whereas the Eastern states clung to ICESCR. While the West rallied around capitalism, an economic philosophy sustained by competition, the East rallied around communism, an economic philosophy sustained by compulsion. And while the West advocated a theory of rights, emphasising liberty at the expense of equality, the East advocated a theory of duties, emphasising equality at the expense of liberty.[73] African states were expected, and induced through fear, force and corruption, to choose between the two.

African humanism, however, presented a third choice, and it harboured the unique jurisprudential potential to reconcile the rift between West and East. The rights of solidarity represented a theory of reciprocity, a reconciliation of rights and duties, with equal emphasis on liberty and equality. African humanism is neither a libertarian

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71 NR Mandela 'Nobel lecture', Oslo, Norway, 10 December 1993, http://nobelprize.org/nobel_prizes/peace/laureates/1993/mandela-lecture.html (accessed 16 June 2011).

72 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

73 See B Tyson & AA Said 'Human rights: A forgotten victim of the Cold War' (1993) 15 *Human Rights Quarterly* 589 594-596.

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philosophy nor an egalitarian philosophy, but rather a *fraternitarian* philosophy, sustained by compassion, using fraternity or solidarity as a bridge between liberty and equality. Accordingly, in the South African Constitutional Court, Justice Albie Sachs has stated as follows:[74]

> *Ubuntu – botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically, it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. *In present day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values.*

Although the Cold War has officially ended, the glaring gap between the developed and developing worlds still remains, as an 'explosive remnant of war', to borrow a phrase from international humanitarian law.[75] The brief intervening period between the West's crusade against communism and its current crusade against independent Islam (under the title of the 'war on terror') was marked by an unprecedented recognition of the value of peoples' rights. For instance, successive versions of a Declaration on the Right of Peoples to Peace were met with consistent and considerable abstention by Western states in the UN General Assembly in 1984,[76] 1985,[77] 1986[78] and 1988,[79] but just after the close of the Cold War, in 1990, the Resolution on the Implementation of the Declaration on the Right of Peoples to Peace was adopted by consensus.[80] However, in 2002, just after the commencement of the war on terror, the Resolution on the Promotion of the Right of Peoples to Peace was opposed by 54 votes,[81] invariably those of Western states and their clients.

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74 *Dikoko v Mokhatla* (n 6 above) (minority judgment of Sachs J) para 113 (my emphasis).

75 See eg Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention) 28 November 2003.

76 Resolution 39/11: Declaration on the Right of Peoples to Peace, UNGA (by vote of 92-0-34) 1984, http://www.un.org/depts/dhl/resguide/r39.htm (accessed 16 June 2011).

77 Resolution 40/11: Right of Peoples to Peace, UNGA (by vote of 109-0-29) 1985, http://www.un.org/depts/dhl/resguide/r40.htm (accessed 16 June 2011).

78 Resolution 41/10: Right of Peoples to Peace, UNGA (by vote of 104-0-33) 1986, http://www.un.org/depts/dhl/resguide/r41.htm (accessed 16 June 2011).

79 Resolution 43/22: Right of Peoples to Peace, UNGA (by vote of 118-0-29) 1988, http://www.un.org/Depts/dhl/resguide/r43.htm (accessed 16 June 2011).

80 Resolution 45/14: Implementation of the Declaration on the Right of Peoples to Peace, UNGA (by consensus) 1990, http://www.un.org/Depts/dhl/resguide/r45.htm (accessed 16 June 2011).

81 Resolution 57/216: Promotion of the Right of Peoples to Peace, UNGA (by vote of 116-53-14) 2002, http://www.un.org/depts/dhl/resguide/r57.htm (accessed 16 June 2011).

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We see a similar pattern in respect of the right to development. In the UN General Assembly in 1986, the Declaration on the Right to Development met with a vote of opposition from the United States and abstention from eight Western and West-aligned states, including West Germany, Israel, Japan and the United Kingdom.[82] By contrast, in 1990, a Resolution on the Right to Development was adopted by consensus.[83] But in December 2001, a further Resolution on the Right to Development was greeted with four votes of opposition (by Denmark, Israel, Japan and the United States) and abstention from 44 Western states and client states.[84]

It appears unlikely, therefore, that our deeply-divided world will quickly come to sufficient consensus about the rights of solidarity to adopt a third covenant and to complete the project of the International Bill of Human Rights.

5 Conclusion: A call to compassion

We, as Africans, already have a third covenant: a legally-binding Covenant of Compassion, which recognises our rights (and corresponding responsibilities), as peoples, to existence, equality, self-determination, sovereignty over our natural resources, peace and security, development and the environment. In this article, I have tried to answer the call by President Nelson Mandela[85]

> to use our country's unique and painful experience to demonstrate, in practice, that the normal condition for human existence is democracy, justice, peace, non-racism, non-sexism, prosperity for everybody, a healthy environment and equality and solidarity among the peoples.

We must begin an inclusive conversation on the contents and consequences of our solidarity rights, and progressively demand their enjoyment and enforcement. We must also seek to enforce them in creative ways. Although the doors to the African Court on Human and Peoples' Rights may be closed to us,[86] we must begin to invoke our rights of solidarity in our national and regional courts and tribunals. Although the rights of solidarity have been invoked against states

82 Resolution 41/128: Declaration on the Right to Development, UNGA (by vote of 146-1-8) 1986, available at http://www.un.org/depts/dhl/resguide/r41.htm (accessed 16 June 2011).

83 Resolution 45/97: The Right to Development, UNGA (by consensus) 14 December 1990, http://www.un.org/Depts/dhl/resguide/r45.htm (accessed 16 June 2011).

84 Resolution 56/150: The Right to Development, UNGA (by vote of 123-4-44) 19 December 2001, http://www.un.org/depts/dhl/resguide/r56.htm (accessed 16 June 2011).

85 Mandela (n 71 above).

86 See *Yogogombaye v Senegal*, African Court on Human and Peoples' Rights, Application 001/2008, Judgment 15 December 2009.

before the African Commission,[87] we must begin to enforce them against powerful individuals and corporations as well,[88] wherein lies their unique utility. More fundamentally, we must begin to engender a culture of compassion. In our boardrooms, courtrooms and classrooms, we must infuse our public spaces with a spirit of solidarity. Only when we foster a culture of continental solidarity, can we truly begin to pursue the realisation of the rights of all our peoples.

87 See *Democratic Republic of the Congo v Burundi, Rwanda & Uganda* (2004) AHRLR 19 (ACHPR 2003); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case); *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

88 See JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2004-2005) 1 *African Journal of Legal Studies* 143-144.

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