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## **The Individual's Duties: a Case Study in International Human Rights Law**

In this paper I would like to draw attention to the fact that the idea of connecting human rights with a detailed catalog of the individual's duties is based on a well elaborated, general theory on the individual, and reflects the particular human rights conception of the Third World. This conception, together with some other characteristics of the new ideas generating a radical reorientation in the field of international human rights in the sixties and seventies, appeared for the first time in an international human rights convention in the 1981 African Charter on Human and Peoples' Rights.

The chief question that arises concerns how this new idea operates in a document discussing obligations typically towards state parties. This paper focuses on this principal problem and has the aim of pointing out the theoretical and practical difficulties arising from a detailed regulation of the individual's duties in an international human rights convention.

### *Changes in the field of international human rights*

Since the late sixties, important changes have taken place in the field of international human rights, and primarily in the United Nations human rights activities. These changes were inspired by the needs and problems of the developing countries. Having acquired their independence, these countries had to face problems of essentially an economic nature. Their goals can be characterized by three fundamental categories: economic self-determination, development and the New International Economic Order.

The social goals determined by by these problems have greatly influenced social, political and economic theories in the Third World.

In accordance with these goals, the second generation of human rights was emphasized, as against the classical human rights theories, by the new Third World conception of human rights that was taking shape at that time. All this also applies to the African continent and the African human rights conception.

At the human rights conference held in Dar-es-Salaam in 1973, some participants emphasized that there was no sense in discussing civil and political rights because these pertain to a state's domestic jurisdiction and are of only marginal importance with respect to the development of African states. The

economic, social and cultural rights were of real significance, because these rights reflect well the economic and social goals.<sup>1</sup>

As a consequence of the new conception, international human rights theories and the practice of various bodies and organizations of the United Nations began to focus on economic, social and cultural rights. This shift has a close bearing on the fact that, since the beginning of the sixties, the countries of the developing world have played an ever more important role in the organization.

The spreading of the second generation of human rights can be observed in the decade after the significant conference in Teheran in 1968.<sup>2</sup> However, this was only the first step, marking the beginning of the change, and not its completion. Subsequently, a new generation of human rights has emerged and collective rights have received new emphasis, which again reflects the peculiar human rights conception of the developing countries.

However, the diluted catalog has added a considerable load to the theoretical system of human rights, with further contradictions, and the third generation of human rights and peoples' rights has become the most chaotic and obscure area of the international human rights theory. Although an increasing number of studies are concerned with these problems, the outlines of a new, comprehensive international human rights theory have not yet been developed.<sup>3</sup>

Connecting human rights with the individual's duties constitutes one element of these new ideas, and seems to give birth to some serious problems, similarly to the conceptions of peoples' rights and of the third generation of human rights.

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<sup>1</sup> UN Doc. ST/TAO/HR/48. para.41.

<sup>2</sup> See especially paras. 12-14. and 18. of the proclamation, in: *J.A. Joyce*, Human Rights: International Documents, Vol. I, Alphen aan den Rijn 1978. pp.27-28. On the change in UN human rights activity, see *J. Donnelly*, "Recent trends in UN Human Rights activity: description and polemic", *International Organization* 35(1981) pp.633-655. See also *P. Alston*, "The alleged demise of political human rights at the UN: a reply to Donnelly" *Int.Org.* 37(1983) pp.537-546.; *D.P. Forsythe*, "Socioeconomic Human Rights: The United Nations, the United States and Beyond" *Human Rights Quarterly* 4(1982) pp.433-449.

<sup>3</sup> See for example, *K.J. Partsch*, "Recent Developments in the field of Peoples' Rights" *Human Rights Law Journal* 7(1986) pp.177-182.; *P. Alston*, "Conjuring up human rights: a proposal for quality control" *American Journal of International Law* 78(1984) pp.607-621.; *R.J. Tuzmubammedov*, "Tretyje pokolenyje prav cseloveka i prava narodov" *Szovjetszkoje Goszudarsztvo i Pravo* 1986/11. pp.106-113.; *V.A. Kartasbkin*, "Prava cseloveka" *Szovjetszkoje Goszudarsztvo i Pravo* 1987/1. 125-127.; *D.U. Vargas*, "La Troisième Génération des Droits de l'Homme" *Recueil des Cours* 184/1984-1/pp.359-375.; *J.B. Marie*, "Relations between peoples' rights and human rights" *Human Rights Law Journal* 7/1986/ pp.195-204.; *Mavi V.*, "Szolidaritási jogok vagy emberi jogok harmadik nemzedéke?" (Solidarity Rights or the Third Generation of Human Rights?) *Állam- és Jogtudomány* XXX/1-2. pp.151-173.; *S.P. Marks*, "Emerging Human Rights: A New Generation for the 1980s?" *Rutgers Law Review* 33(1981) pp.435-450.

### *The content and extent of the individual' duties in the African Charter*

In the Charter,<sup>4</sup> a separate chapter is devoted to the individual's duties (Part I, Chapter II), although it consists of only three articles (Articles 27-29). This fact indicates the independent nature and significance of the individual's duties among the elements of the theoretical conception prevailing in the drafting process.

First of all, it is generally stipulated that each individual has duties towards his family and society, the state and other legally recognized communities. This general provision is not completely unknown in international human rights instruments. Some occasional and vague references to the individual's duties were made by the drafters of the two Covenants of 1966 (paragraph 5 of the Preambles), and also in the Universal Declaration (Article 29/1/1), and in the American Convention on Human Rights (Article 32/1/1), and in the American Declaration (Article XXIX). However one can agree with Gittleman that these references, except for the American Declaration, do not indicate any independent conception of the individual's duties.<sup>5</sup>

It is noteworthy that in these instruments the duties are towards the "community". The Charter provides certain duties towards the state and other legally recognized communities as well, which seems fairly unusual.

For instance, "other legally recognized" communities may just as well mean a political party or a trade union. In this case, a particular African problem emerges. Ngom writes that in some African countries it is obligatory for the citizens to be members of the only party.<sup>6</sup> Balanda refers in this context to the trade unions.<sup>7</sup> If that is the case, the individual has duties towards these kinds of "communities", and these duties can be enforced by the state (Article 1 of the Charter).

Article 27/2/ provides that the rights of the individual are limited by the rights of others, collective security, morality, and common interest.

The latter three expressions typically appear in clawback clauses of various specified rights, and not in a general clause. With regard to the function of an international human rights convention, the appropriate and less obscure drafting solution would have been that limitations stemming from security, morality, etc. should be regulated together with specified human rights according to the character of those rights. Drafting in more concrete terms would have provided a less ambiguous basis for implementation.

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<sup>4</sup> International Legal Materials 21(1982) pp.58-68.

<sup>5</sup> R. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" Virginia Journal of International Law 22(1982) p.676.

<sup>6</sup> B.S. Ngom, *Les droits de l'homme et l'Afrique*, Paris 1984. p.69.

<sup>7</sup> M.L. Balanda, "African Charter on Human and Peoples' Rights" *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 1983/6. p.144.

After the general rules, the African convention details the individual's duties of various kinds, specifying in certain cases the social entities towards which the duty exists. The list seems to specify the previous general clause. However, it is not clear whether this is an exhaustive list, or the Charter merely gives some important examples pertaining to the individual's duties. After a closer look, this problem turns out to be of no importance, because these specified duties are formulated in almost as general a manner as the general clause.

Let us consider these detailed duties (Articles 28-29):

- towards *other individuals*: respect without discrimination; mutual respect and tolerance;
- towards *parents*: respect; their maintenance in cases of need;
- towards the *family*: respect; preservation of its harmonious development and promotion of its cohesion;
- towards the *nation*: preservation and strengthening of its solidarity; its service via physical and intellectual abilities; preservation and strengthening of its independence;
- towards the *society*: preservation and strengthening of its solidarity; promotion of its moral well-being;
- towards the *state*: to respect its security;
- towards *unspecified entities*: to work to the best of one's abilities and competence; payment of taxes; preservation and strengthening of the territorial integrity of one's country; defense of one's country; preservation and strengthening of the positive African cultural values; contribution to the best of one's abilities to the promotion and achievement of African unity.

This is the first such detailed enumeration of the individual's duties in connection with human rights to appear in an international convention. Similar lists can be discovered in other instruments, e.g. in the constitutions of various states.<sup>8</sup> Nevertheless, these regulations related to national laws and cannot lie within the scope of our closer examination. However, the generality of constitutional norms and their application cause numerous problems, some of which have to be faced in the process of the implementation of the African convention, too.

The only international human rights instrument which detailed the individual's duties before the Charter was the American Declaration. In this document, similarly to the American convention, a separate part is devoted to the individual's duties. Certain duties can be observed to appear in both

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<sup>8</sup> A survey is given on these constitutional provisions concerning also the Third World countries, in: *A. Daes*, Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, UN Doc. E/CN. 4/Sub.2/432 Rev.1. 1 July 1980. paras. 206-383., 399-437.; as to the duty provisions in African constitutions, see, in: *O. Eze*, "Prospects for International Protection of Human Rights in Africa" *The African Review* 1974. pp.82-84.; *U.O. Umoxurike*, "The Present State of Human Rights in Africa" *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 1986/6. pp.113-114.

documents (payment of taxes; defense of the country; endorsement of the parents; work to the best of the individual's abilities). However, the differences between the provisions of the American Declaration and the related ones of the African Charter are more striking than the similarities.

The American instrument enumerates a number of duties which do not feature in the African regulation, e.g. the duty of every person: to acquire at least an elementary education (Article XXXI); to vote in the popular elections in his country (Article XXXII); to hold any public office if elected (Article XXXIX); etc.

There are hardly any articles regulating the individual's duties directly towards the state which would be suitable for the direct restriction of human rights. We can observe only two duties of this kind: to obey the law and other legitimate commands (Article XXXIII) and to perform civil or military service in the event of defense of one's country or of public disaster (Article XXXIV).

It can be seen that the formulation of the individual's duties in the American Declaration is fairly concrete. A large proportion of these duties appear in a specified form, as far as possible in a declaration. This cannot be said of the African convention, although it would be important in the case of a treaty to eliminate the possibilities of voluntary interpretation in the process of application. In a functional sense, the formulation of the American Declaration actually fits an international treaty much better than the undefined and vague provisions on the individual's duties in the African Charter.

In the course of a survey of the differences between the two instruments, one characteristic of the Charter inevitably emerges: the effort to tighten the area of state obligations in respect of granted rights. This characteristic is strengthened by the generally accepted limitations on rights used in the convention.

Article 27/2/ provides that the rights individuals are limited by collective security and common interest. As indicated previously, these limiting factors are regulated in a general clause, not in clawback clauses attached to specified rights, and hence this limitation refers to all of the granted human rights.

These general categories may be invoked in connection with very different restrictions placed upon human rights. The interpretation of these categories, as of many others, is largely subject to the discretion of state parties. It will be quite difficult for the Commission established by the Charter to challenge any kind of state interpretation, perhaps apart from the most extreme cases. Questions such as what is the common interest of the given society and what qualifies as dangerous to the security of the given collectivity can hardly be decided by the Commission. Theoretically, of course, there is a limit to state interpretation, namely the principle of good faith. However, in the absence of a clear and distinct international and regional standard concerning the content of these two terms, the rule of good faith itself becomes weak as a guiding principle in this respect.

In connection with the limitations set upon human rights granted by the convention, participant states may effectively invoke certain provisions of Article

29, which are similar in nature to collective security and common interest: for example, not to compromise the security of the state; to strengthen national independence and territorial integrity. In a number of cases, it is clearly discernible towards which communities or social entities the individual's duties exist in the Charter. However, duties towards, for instance, the society or the nation are ineffective unless someone enforces them in their name. This is so even in the area of internal law. In addition, in international law the categories of nation and society themselves are completely meaningless, apart from one aspect (self-determination).<sup>9</sup>

It is the state that represents the nation and the society, even against or towards the smaller communities and individuals constituting their parts. This also applies to the family, the individual's parents and other individuals, with slight modifications. Thus, in the last resort, the duties provided by Articles 27-29 towards unspecified entities will be enforced by the state as the only representative of these entities in the international sphere.

What is important is not the bearer of the rights, but the entity which enforces these rights, that is to say the state. The fact, the form and the time of enforcement reflect the interest of the state, although these interests may often coincide with those of the bearers of the rights. Enforcement for the benefit of any abstract bearer of rights may be used, potentially, to justify limitations of some human rights granted in the African convention, the observance of which is an obligation of the state.

There are a number of duties stipulated in Articles 27-29 of the Charter which, in connection with human rights, may all serve as a basis for setting limits to granted rights. Even in the abstract, *prima facie*, the defense of independence and African cultural values can be brought up against the right to property, the requirement of security against the right to movement, the preservation of national and social solidarity against the freedom of expression, etc. One author raises the question of whether a dependence between rights and duties exists in the Charter,<sup>10</sup> because only in this case does the possibility exist for a limitation of this kind. There can only be an affirmative answer. Article 27/2/ explicitly establishes this dependence for its own provision. As concerns the specification of this article, the specified duties of Articles 28-29 are therefore also connected with rights. Even if Articles 28-29 are independent of Article 27/2/, this connection, and at the same time the possibility of limitation, may be established. Articles detailing duties constitute a part of the convention,

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<sup>9</sup> See the position of Thailand on this issue, UN Doc. E/CN. 4/Sub.2/ 432 Rev.1. para.353.; on the term "people" in the same context, see *Balanda*, loc.cit. supra n.7.; *R.H. Jackson*, "Quasi states, dual regimes and new classical theory" Int. Org. 41(1987) p.547.; the Japanese and French position in the UNESCO, 4.XC/VR.9. p.65. and 4.XC/Nr.5. p.23. cited by *S. Bastid*, "Les droits des peuples dans le plan à moyen terme (1984-1989) de l'UNESCO" in: *Le droit des peuples à disposer d'eux-mêmes. Mélanges offerts à Charles Chaumont Paris 1984.* p.18.

<sup>10</sup> *Ngom*, op.cit. supra n.6. at p.73.

in the same way as articles stipulating rights, and state parties have undertaken to give effect to all the provisions.

The state protects the rights of the individual and judges whether the individual fails or not to fulfil his duties. There are three factors which prevent one from speaking of *sui generis* regulation in the Charter, or of the individual's duties independent of rights.

1. According to paragraph 6 of the Preamble: "Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."

2. Human rights and the individual's duties refer to the same relations of social life, and in these relations they typically exist as competing factors. Thus, in most cases it is necessary to decide which of the two should be preferred.

3. One of the most important principles of treaty interpretation is the fiction of cohesion. The possible conflict described in the second point also appears on a legal level, and the problem of the connection between rights and duties arises in the Charter.

Embracing such a great area of the individual's duties, the Charter further widens the possibilities for the state to interpret the convention according to its own interest. However, a convention allowing too wide an area of interpretation cannot perform its function well, because it cannot give appropriate normative security concerning the object. Through their necessary connection with human rights, the individual's duties may be used to limit the granted rights. The question is what reasons are provided by the human rights conception of the Third World constituting the theoretical background of the Charter for this detailed regulation of the individual's duties.

### *The theoretical background*

The idea of placing emphasis on the individual's duties is based on the particular conception of the individual that has arisen in developing countries. African international lawyers and sociologists have built up a system of arguments which yields a theoretical background for regulation of the individual's duties in the Charter.

Although this conception to a certain extent consists of commonplaces, this does not mean that these suggestions do not include numerous acceptable elements. Furthermore, there can be no doubt that the authors grouping and skilfully developing these commonplaces have reached a new and original theory.

The starting point and axiom is that the position of individuals may be interpreted only in the context of the community. The personality can reach its accomplishment only in social activities.

Personality is not merely, and not primarily, an autonomous value, but also a social one, which takes shape in social life. One of the aspects of the

relationship between the individuals and the community can be described more concretely by the categories of right and duty. The individual has not only rights, but also duties towards his community. This claim is supported by the commonplace that each right has its corollary duty.<sup>11</sup> However, these tenets are not original ones. Article 29/1/ of the Universal Declaration was drafted under these principles. In the case of the American Declaration, it was partly these ideas which inspired the drafters, as expressed in its Preamble.<sup>12</sup> In fact, the African theory has gone beyond these claims, and has tried to put stress on African peculiarities. First of all, the African individual is contrasted with the isolated, abstract Western type.<sup>13</sup> This latter is described as an individual without responsibility and opposed to the community. In this way, the theory can emphasize the African peculiarities, which roughly comprise the following main elements: preindustrial, traditional communities; reciprocity; the idea of solidarity; a close relationship between the community and the individual; cooperation between individuals as the main strength of social activities.<sup>14</sup>

The principle of reciprocity penetrates into all segments of social life,<sup>15</sup> and therefore giving and getting are connected more directly than in other, somewhat more modern types of community.

Thus, all rights are directly linked with duties towards other individuals and the community, and the possibility of an individual's autonomy is fairly limited. Because of the structure of communal reproduction and the close

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<sup>11</sup> *Balanda*, op.cit. supra n.7., at pp.138-139.; *Ngom*, idem, at pp.73-74.; *A. Bassat*, "Droits de l'homme et africanité" *Penant* 1984/94./785. pp.286-287.; *B.O. Okere*, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights" *Human Rights Quarterly* 1984/2/ pp.148-149.; *I.A. Menkiti*, "Person and Community in African Traditional Thought", in: *African Philosophy* (ed. *R.A. Wright*) *Lanham* 1984. p.18.; *Iba der Tbiām*, "Human Rights in African Cultural Traditions" *Human Rights Teaching* 1982. pp.4-6.; *J. Mbiti*, "Man in African Religion" in: *Africa and the West* (eds. *I.J. Mowoe* and *R. Bjornson*) *New York* 1986. pp.55-67.

<sup>12</sup> E/CN.4/Sub.2/432 Rev.1. paras.147-189.

<sup>13</sup> *Bassat*, op.cit. supra n.11., at p.286.

<sup>14</sup> *Menkiti*, loc.cit. supra n.11., *A. Akinjogbin*, "La spécificité et la dynamique des cultures negro-africaines: La région yoruba" in: *Spécificités et convergences culturelles dans l'Afrique au sud du Sahara* UNESCO, Paris 1986. p.66.; *Tbiām*, op.cit. supra n.11., at p.8.; *Okere*, loc.cit. supra n.11.; *Balanda*, op.cit. supra n.7., at pp.138-139.; *Bassat*, idem, at pp.287-289.; *T.O. Elias*, *Customary Law in Africa* Manchester 1956. pp.145-152.; *D. Diallo*, "Profil de la culture des Fulbe" in: *Spécificités et convergences culturelles dans l'Afrique au sud du Sahara*, UNESCO, Paris 1986. p.30.; *K.M'Baye*, "Les droits de l'homme en Afrique", in: *Les dimensions internationales des droits de l'homme* (ed. *K. Vasak*) Paris 1978. p.651. The connection between rights and duties is supported by the tenets of the continent's religions, see *Mbiti*, op.cit. supra n.11., at pp.59-65.; *A.A. Said*, "Human Rights in Islamic Perspectives", in: *Human Rights: Cultural and Ideological Perspectives* (eds. *A. Pollis* and *P. Schwab*) *New York* 1979. pp.92-93.; *P.B. Clarke*, "Islam, Development and African Identity" in: *Religion, Development and African Identity* (ed. *K.H. Petersen*) *Uppsala* 1987. pp.125-143.

<sup>15</sup> *Elias*, idem, at p.152.



connection between the individual and other individuals or the whole community, the individual can be defined by these connections and by his autonomus acts.<sup>16</sup> The rights of the individual exist and are realized in these connections, which supports the principle that the performance of duties is the precondition of enjoyment of any rights. At the same time, the community takes priority over the individual. The rights of the individual appear in the context of communal activities, they are of a collective character, and the individual enjoys them by the fact of belonging to the community, not as an abstract individual, or by the fact of his human nature. These suggestions involve important consequences in the area of human rights.

There are no abstract, autonomous individuals who are substantially independent of the community, but only members of the community. With this premise, it is possible to cast doubt on rights arising purely from the human quality of the individual, because all rights can be interpreted and described in the context of communal activities. In this conception, the individual's rights, *per definitionem*, do not qualify as human rights at all, and this model threatens the very notion of human rights.

Furthermore, these premises throw open the door to relativism not only in practice, but also in theory.<sup>17</sup>

The enjoyment of human rights can be made contingent upon the social and cultural context in an absolute sense, which challenges the existence of a general standard based on the individual's human quality.

Further consequences of this conception in the area of human rights, which I have touched upon previously, are: the performance of duties qualifies as a precondition to the enjoyment of human rights; the rights of the group, community, state, religious organizations, family, etc., as collective rights, may take precedence over the individual's human rights.<sup>18</sup>

These are the axioms and main suggestions of the African conception on individuals, which serve as the theoretical background for the regulation of the individual's duties in the Charter, or some of which are directly transplanted into the convention.

However, a theory and an international human rights convention constitute different aspects of social reality, even if they have the same object.

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<sup>16</sup> A. Pollis – P. Schwab, "Human Rights: a Western Construct with Limited Applicability" in: Human Rights: Cultural and Ideological Perspectives (eds. A. Pollis and P. Schwab) New York 1979. p.10.

<sup>17</sup> Pollis – Schwab, *idem*, at pp.1-18.; Said, *op.cit.* supra n.14., at pp.86-92.; D.M. Wai "Human Rights in Sub-Saharan Africa" in: Human Rights: Cultural and Ideological Perspectives (eds. A. Pollis and P. Schwab) New York 1979. pp.115-119.; a comprehensive survey and criticism of cultural relativism: R.J. Vincent, *Human Rights and International Relations*, Cambridge 1986. pp.37-60.; J. Donnelly, "Human Rights and Human Dignity: An Analytic Critic of Non-Western Conceptions of Human Rights" *The American Political Science Review* 76(1982) pp.303-316.

<sup>18</sup> Vincent, *idem*, at p.39.

A scientific theory has other functions and purposes than those of a human rights convention. Roughly, the main function of theories is the description and explanation of reality, while an international convention aims at putting certain purposes into practice according to particular interests of state parties.

There is no doubt that all ideas have a long way to go before they reach their own realization, if they reach it at all. The human rights conception of developing countries and the underlying theories such as the conception of the individual, were first of all acknowledged and accepted at a scientific level as a synthesis of certain anthropological, ethnographical, sociological and philosophical ideas. In the following period, the conception appears at political and ideological levels in the political life of various states, undergoing assimilation to certain political goals and justifying certain political interests.

In the third phase, the theory appears in the international area, representing the aims of developing countries, being manifested in international instruments not binding to states (e.g. UNGA resolutions), constituting the basis of a new, possible consensus described in general terms. When included in an international convention binding to state parties, the theory arrives at the threshold of realization. Here, at the fourth level, it emerges how the theory operates in practice.

The point of the distinction between these areas is that each has its own peculiarities and functions, operating in the formation of social reality. Accordingly, when passing over to and playing another role in another area, the conception should be modified to a certain extent in order to meet the specific requirements and functions of this area. However, the drafters of the Charter, referring to the conception of the individual, took over the idea of the individual's duties directly from the scientific and ideological levels, practically without modification, and connected it with human rights in the area of binding international conventions.

The question that arises is whether this operation is correct with regard to the functions of an international human rights convention, or whether it generates further contradictions in the Charter.

#### *The nature of the individual's duties in international human rights conventions*

The African states regulated the individual's duties in detail in the Charter, because in their view these duties are inseparable from the position of the African individual and from African communal values. Accordingly, they wished to provide a regulation corresponding with the position of the individual in the social existence in Africa, as described by the above-outlined theory. As this conception had always stressed the individual's duties towards his

community, they regulated this aspect in the African convention.<sup>19</sup> Most of the authors considering the provisions of the Charter accept this standpoint. None of them challenges the grounds of the detailed duties regulation. Though some authors point out that the individual's duties can serve as a means of limitation of human rights and may come into conflict with them, they do not cast explicit doubt on the grounds of the regulation.<sup>20</sup> Thus Gittleman, who analyzes in detail the Charter's limitations to human rights and also Article 6 of the Charter's Preamble, does not even mention the regulation of the individual's duties as a limiting component.<sup>21</sup>

However, there is a logical slip in the reasoning of those who support the individual's duties provisions in the African convention.

Actually, the African conception merely answers the question of the reasons for the detailed regulation of the individual's duties, but not the question of the purpose thereof. If one examines the studies mentioned above, it is clear that the authors perceive the question of "why" in the sense of "what is the reason", not in the sense of "what is the purpose".

The question of "what is the purpose of the individual's duties provisions in the Charter" is not necessarily the appropriate one, of course, because it entails significant subjective elements. This question still makes it possible to go on and apply a functional approach. The adequate question can only be that of what are the actual functions of the individual's duties provisions in the Charter. Analyzing the peoples's rights provisions in the African convention, Kunig applies this approach excellently, but he does not take it into consideration in the case of the individual's duties.<sup>22</sup>

There is no reason to challenge even one of the suggestions of the African conception of the individual, because this accurately describes the African social reality and the position of individuals in it.

What is somewhat troublesome is that the drafters turned these suggestions into international human rights rules without any significant modification.

An international convention typically imposes obligations upon states towards other states. On the other side of the obligations, the beneficiaries of stipulated rights can be other states, social groups, citizens, individuals, etc. The point of the existence of human rights in international law is that these rules

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<sup>19</sup> See *M.L. Balanda* remark who member of the drafting expert committee preparing the text of the Charter, in the International Law Commission: Yearbook of International Law Commission (1984-I) p.48.

<sup>20</sup> See e.g. *Ngom*, op.cit. supra n.6., at p.74.; *Donelly*, op.cit. supra n.17., at p. 311.; *P. Kung* "The Protection of Human Rights by International Law in Africa" German Yearbook of International Law 25(1982) p.159.; *O.Ojo - A. Sesay*, "The OAU and Human Rights" Human Rights Quarterly 1986/1. p.99.

<sup>21</sup> *Gittleman*, op.cit. supra n. 5., at pp.690-709.

<sup>22</sup> See *Kunig*, op.cit. supra n. 20., at pp.156-159.

defend the individual against his own, or more rarely some other state by means of international guarantees.

These international guarantees are intended to compensate to some extent the dominance of the state over the individual. Being a subsidiary instrument, the international human rights regulation has an intended direct impact on national legislations and hence an indirect effect on the position of the individual. The principal function of the international human rights regulation is that states undertake certain obligations towards other states in favor of the individual or various social groups.<sup>23</sup>

As concerns these suggestions, the question arises as to the extent to which it makes sense to regulate the individual's duties in an international human rights convention. It has been seen that the individual's duties are enforced by the state without respect to the beneficiaries. This kind of regulation therefore includes the absurdity that in an international convention the state stipulates international guarantees in favor of itself to ensure the enforcement of some duties against the individual. This does not make any sense because the state has effective means to enforce these duties.

The individual's duties towards his family, for instance, inasmuch as these can be described in legal terms, are a matter of national laws and it is fairly pointless to guarantee the enforcement of these duties by an international convention. The whole conception of international human rights is based on the state's dominance over the individual. It does not make sense in the existing system of international human rights to stipulate *sui generis* state rights against the individual.

There is another, more theoretical counter-argument based on the notion of duty. Daes, in the most comprehensive United Nations study on the problem, accepts the definition of duty according to which duty is based on an explicit and concrete, or implicit and general, contract or undertaking, on the part of one who has a duty.<sup>24</sup>

It is quite difficult to establish what kind of consent exists on the individual's part to the condition that the state representing the individual in the international area can stipulate rights in favor of itself against the represented individual. This consent can be established in constitutional law, but not in the case of an international convention. The interrelationship between self-interest and public interest, people and state, appears in diverse ways in the national and international area. The individual's duties included in constitutions may have a well-circumscribed function, which fits the whole of the constitutional system. The functions of a constitution are different from those of an international human rights convention.

Hence the functions of international human rights conventions permit only the same conclusion as that we have reached previously: the regulation of the individual's duties in the Charter cannot be of a *sui generis* character,

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<sup>23</sup> A. Siegbart, *The International Law of Human Rights* Oxford 1984. p.20.

<sup>24</sup> E/CN.4/Sub.2/432 Rev.1. para.432.

because in this case these provisions become meaningless. The individual's duties can only be regarded as a means of limitation of human rights.

The next step is to look at the problems presented by this direct relationship.

### *The individual's duties and human rights*

The issue of the individual's duties is one of the fundamental tenets of the African conception of the individual. This duty conception has a well-defined function in the description of African social reality. However, when transplanted into another area, that of international conventions, the theory loses its original function, and acquires another role, which happens to be contrary to the general purpose of the Charter. These duty provisions may give state parties the possibilities to evade certain stipulations including rights, and we have seen previously that this limitation is their only function.

However, human rights are not absolute ones; it is necessary to restrict them in binding international instruments. There are generally accepted kinds of limitation, such as clawback clauses. Why shouldn't the Charter's duty provisions be regarded as an appropriate form of limitation of the granted human rights?

There are three factors which together make Articles 27-29 clearly dysfunctional and not a proper form of limitation:

- a) the large number of regulated duties;
- b) the undefined, vague and general nature of most of the duties;
- c) the duties are not related to particular rights, but to all the granted rights, that is to say every duty may concern every right as a restricting factor.

These characteristics of regulated duties allow state parties great freedom in interpreting the borders of the granted rights, at the same time reducing the effectivity and extent of state undertaking concerning human rights. This does not fit the functions of international human rights regulation. The dysfunctional character of the individual's duties in the African convention gives rise to further problems, which can be regarded as a manifestation of the dysfunction. Even if one accepts that there are a number of duties included in the Charter, it is not clear what the underlying relation between rights and duties is.

These duties can be regarded as preconditions of the enjoyment of human rights. This is supported by paragraph 6 of the Charter's Preamble, and by the whole African conception of the individual. Balanda writes: "The rights and liberties that the Charter intends to confer on individuals are in return for the duties that the Charter imposes upon them".<sup>25</sup> In this case, the performance of these duties gives a basis for the enjoyment of human rights, and the rights qualify as a reward for the performance of duties.

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<sup>25</sup> Balanda, *op.cit.* supra n.7., at p.139.

In this conception, however, these granted rights are not human rights in the proper sense, because they are not attached to the human quality of the individual. If the performance of the individual's duties is considered to be a precondition of the enjoyment of human rights, this means the negation of the classical human rights conception, and of the spirit of other international human rights instruments. The other approach would regard the role of the individual's duties in another perspective, not as preconditions. In this case, the restriction of human would amount to a kind of sanction for failing to perform duties. This supposes a looser connection between rights and duties than that in the possibility of the limitation of human rights would exist in a similar way.

Since African states do stipulate duties in the Charter, it is a correct presumption that certain sanctions are intended to apply if the individual does not observe his duties. The question of what sanctions may be applied if the individual violated his duties implies the whole set of problems of the individual's duties.

In the event of the violation of human rights, state parties may meet different, more or less determined procedures and sanctions in the international area. However, if the individual does not perform his duties, what are the sanctions against him?

The Charter is silent about this problem. Umozurike emphasizes: "Although individual duties are enumerated, there is no provision for enforcement against individuals. It therefore falls on states to enforce observance on individuals within their territory."<sup>26</sup>

In the final analysis, the individual's failure to perform his duties can be sanctioned only by the state through international law. At an international level, in the frame of international human rights regulation, there is no sense in stipulating sanctions against the individual on account of his failure to observe his duties. This issue belongs, on the whole, to the relation between state and individual, where the state can enforce the performance of duties without international guarantees.

Whether we conceive the relation between rights and duties in the context of a precondition or in the context of a sanction, both involve a fairly narrow approach. Both cases, as forms of limitation of human rights by the individual's duties, imply that the state can limit human rights only if the individual has violated his duties. These forms of limitation are *subsequent* and *individual*, because the previous violation is necessarily supposed. However, Article 27/2/ of the Charter makes it *expressis verbis* possible to limit human rights without any previous violation of duties. In this case, the limitation is *previous and general*.

If the detailed duties in Articles 28-29 mean specified forms of the general provision provided by Article 27/2/ they may permit a previous and general limitation of the granted rights. Otherwise, these duties give a basis only for subsequent and individual limitation.

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<sup>26</sup> Umozurike, *op.cit.* supra n.8., at p.124.

Another issue arises when we consider the dysfunctional character of the individual's duties provided by the African convention.

It is not clear whether these duties are of a legal or a moral character. Since the Second World War, international agreements have contained an increasing number of stipulations of a purely declarative nature, which are "declarations of intention" rather than undertakings of obligations. Although they are couched in legal form, they cannot be enforced because they are not applicable directly with regard to their content. Most of the individual's duties in the Charter are moral, not legal ones, and their impact on social practice is not clear at all.

In the case of international obligations imposed upon states by international conventions, these kinds of unenforceable generalities do not necessarily amount to a dysfunctional factor, but a technique of concluding treaties, and this may perform an important function. There are many questions in the international sphere which cannot be regulated by international agreements because of the conflicting interests of states. However, the formulation of these issues in general norms of a purely declarative character in content may constitute the first step towards a more applicable, specified consensus. This function does not exist in the case of the individual's duties, which are not stipulated against states.

An important characteristic of these "frame-norms" is that they leave the door completely open to diverse possibilities of interpretation. On account of their general character, they may be compatible with different interpretative attempts that are contrary to one another, and these interpretative possibilities may include the non-application of the provision. From our point of view, this is not an important problem when these obligations are imposed upon states, because the non-application of the norm may be in the interest of the state.

In the case of the individual's duties, the state has no obligations, and the application of these norms may be in its interest. Thus, the wide borders of interpretation play another role here, because a wide scope of content may be assigned to these norms by a state interested in this. This is especially true if it is considered that it is in the state's competence to decide who fails to perform his duties, when, how many times, and to what degree, and what sanction should be imposed upon him.

The vague concepts and general frame-norms as a technique of concluding treaties obviously involve a dysfunctional character when states stipulate individuals' duties as against other international legal norms. This dysfunction appears in consequence of the connection of human rights and the individual's duties and of the state's interest to apply these provisions. Those characteristics of the frame-norms that lead to the impossibility of their enforcement in one case may lead to their arbitrary application in another. In this latter case, because of the state's interest in the application, these duties of a moral character may be enforced if the State "takes them seriously" for the purpose of setting a limit to human rights. Accordingly, only in the light of their

implementation shall we be able to decide the extent to which these duties have become legal ones in their content.

### *Conclusion*

In conclusion, we can state that the connection of the individual's duties and human rights in an international human rights convention may diminish the effectivity of the convention, and make it possible for state parties to avoid the observance of certain human rights. The stipulation of the individual's duties is of a clearly dysfunctional character as concerns the purpose of an international human rights convention. This unusual solution in many respects breaks with the traditional conception of international human rights, and at the same time raises fundamental problems and contradictions that demand an answer. However, the Charter does not answer these problems, which anticipates difficulties in the process of implementation.

The idea of the individual's duties being provided by the Charter is derived from the African conception of the individual. However, any theoretical conception may be transplanted adequately into another sphere only if the regularities of this new sphere are respected. The detailed regulation of the individual's duties in an international human rights convention does not meet this requirement. With these conclusions, there is no question of imposing some kind of Western value system on the African regime. There is no doubt that, in Africa and in developing countries in general, the relationship between the community and the individual has its own peculiarities and values, which cannot be disregarded in a correct analysis. However, only certain aspects of the overall conception reflecting these peculiarities and values can appear in a proper way in other non-scientific spheres according to the regularities of these spheres, yet the entire conception is reflected in these aspects. Otherwise, one must reckon with serious contradictions.

Hence a way has to be found to transplant the theory into the frame of an international human rights convention. The particular African conception could have appeared in adequate form in the Charter through the particular structure of the stipulated human rights. The drafters could have left out a number of rights which cannot be enforced under present African circumstances, and a clear and specified system of limitations of rights could have been drawn up in the text of the convention.

An excellent opportunity was presented to include some new human rights in the Charter (e.g. the rights to food),<sup>27</sup> which would have constituted a certain answer to the African needs. In this way, the rights provided by the

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<sup>27</sup> Since then this right has appeared in the Protocol on Economic, Social and Cultural Rights to the American convention (Art.12); for the text, see *International Legal Materials* 28(1989) pp.161-170.



Charter would have shown a particular picture, according to the African values and peculiarities.

The doubts about the individual's duties that appear in an international human rights convention are justified by international human rights practice.

In international human rights conventions, we cannot encounter a detailed and general enumeration of the individual's duties linked to human rights. For instance, the American convention includes the only reference to the individual's duties through the general clause, as against the detailed list of the American Declaration. The drafters of the American convention did not consider it possible to link human rights with the individual's duties.

Though duties appear in the Universal and American Declarations, these instruments do not create obligations directly, and do not establish rights. Not waiting for immediate realization, these instruments have peculiarities other than those of international human rights conventions, and the individual's duties are not of a dysfunctional character in declarations, or other, not binding provisions. Our conclusions concerning the individual's duties in the Charter are not challenged by the fact that duty provisions can be encountered in a number of constitutions, because the issue here comes up in another context.

The constitutional principles and rules are typically applied through a great number of specified, detailed rules. This latter sphere, restricting the possibilities of interpretation, gives shape to the delicate balance between individual rights and duties. The international human rights convention, as a subsidiary means, endeavors to influence precisely this continuing process of formation of this delicate balance. Providing international guarantees, the international human rights convention takes side with the individual's principal rights, because this side may require support in consequence of the dominance of the state power over the individual. The function of the international human rights convention is thus quite distinct from that of a constitution, even in respect of human rights and duties. Accordingly, the component of the Third World human rights conception that the individual's duties call for detailed regulation in international human rights conventions does not seem correct. This does not mean the appropriate expression and reflection of the particular situation of the individual in the developing countries, but instead may lead to a considerable reduction of the effectivity of the international guarantees established to protect and promote human rights.