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BOOK REVIEW

Imperatives of Culture and Race for Understanding Human Rights Law:

***Human Rights: A Political and Cultural Critique* Makau Mutua**

HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE. By Makau Mutua. *University of Pennsylvania Press*, 2002. Pp. 264. \$49.95.

HENRY J. RICHARDSON III†

INTRODUCTION

It has been nearly three decades that a school of legal scholars, mostly of color in the United States, began to write that the struggle for racial justice had never been divorced from good legal theory and jurisprudence. This struggle always had encompassed the necessity of peoples of color becoming jurisprudential *producers* of the law governing the communities where they live, and not remain content to be subject to such law only as jurisprudential *consumers*. Now, sufficient freedom of scholarly spirit had been won through political struggle to define this necessity. Professor Mari Matsuda's insight—that the most effective form of public power is that delivered form of reasoning

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which produces principles so deeply internalized and beyond public debate that they just “are”¹—is irrefutable as a keystone of the foundation on which Critical Race Theory (CRT) scholars stand.

For understandable, if limiting reasons, CRT began its work within national parameters in the United States. However, its quest was, from the beginning, as equally valid and significant for the international community as it was for the North American community. Thus it was only a matter of time—a short time—before the racial justice of international law and jurisprudence came under its stringent gaze. Such extension had a long historical runway: the works of George Washington Williams, W.E.B. Du Bois, Paul Robeson, George Padmore, C.L.R. James, Rayford Logan, followed by Ralph Bunche, Clyde Ferguson, Goler Butcher, and from Africa, Mohammed Bedjaoui, T.O. Elias, F.X. Njenga, and, more recently, Shadrack Gutto. This is only a partial list of those who, for more than a century, defined the Black International Tradition. In doing so, they questioned in liberationist, informed and precise ways the racial justice of European-derived international jurisprudence and law, particularly around the right of all peoples to be free of colonialism and similar racial domination.

Now, along with others, such as Adrien Wing, Elizabeth Iglesias, Natsu Saito, Ruth Gordon, and Antony Anghie—again, only a partial list—Makau Mutua is defining the next phase of the CRT assessment of international law as the law of the international community, where two thirds of its population comprises people of color. This book is only one of Professor Mutua’s prominent efforts in this regard. It is preceded and accompanied by his formidable resume, including human rights fact-finding missions and studies into several regions of Africa, as well as institutionalized human rights leadership at Harvard University and in Africa. In addition, Mutua has not only monitored elections in South Africa and elsewhere, but has also written several articles on international rights questions as they bear on African governance, religion, and culture. Mutua presently holds the well-deserved status of notable law professor at the University at Buffalo Law School, and is the founder of its human rights program. Most recently, Mutua was a notable

1. See Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990).

participant in the current Kenyan constitution-drafting process, serving as author of its proposal for a Kenyan Truth and Reconciliation Commission.

In subjecting international human rights law to his experienced gaze, Mutua is too modest when he describes himself in his Introduction to the Book as merely “an insider-outsider” regarding the law of human rights. Though seemingly accurate as far as it goes, such description does not explain Mutua’s prominence in international human rights scholarship, nor does it illuminate his virtually unique role among CRT scholars in international law. For the latter, Mutua fully mobilizes his strong credentials to bring African—especially East African—human rights perspectives to American human rights jurisprudence through the CRT lens. In doing so, Mutua continues to be an important leader in pushing CRT scholars to explore questions of race and international law. The present book, in appraising international human rights law with a precise African-culture beam through the CRT lens, enhances his leadership and gives us a rich agenda of legal and cultural questions about protecting human rights for future guidance.

I. MUTUA’S GENERAL NARRATIVE

Following his introduction, which is revealing for its linking incidents about colonialism and religion from his African childhood to the genesis of this book, Professor Mutua unrolls his book in six rich chapters, all of which challenge in various ways western liberal human rights perspectives: “Human Rights as a Metaphor;” “Human Rights as an Ideology;” “Human Rights and the African Fingerprint;” “Human Rights, Religion, and Proselytism;” “The African State, Human Rights, and Religion;” “The Limits of Rights Discourse;” and a useful “Conclusion.” Throughout, his writing is clear, and his critiques of western assumptions and paradoxes about the prescription and implementation in other cultures of human rights law are generally fine-tuned.

His chapter on “Human Rights and the African Fingerprint” is a first-rate exploration of the cross-cultural dialectic between the notions of “rights” and “duties” in human rights law, and a valuable discussion of the major contributions, not only from the African Charter, but also from African cultures to this essential dialectic.

A major focus in this work is American axioms about human rights doctrines. As Mutua frequently demonstrates, they have contrary results among local peoples, for example in Africa, or fail to address their major human rights concerns either through the right's prescription or its implementation including through non-governmental organizations. Respectful but thorough critiques of the work of leading American human rights legal scholars are prominent here, particularly to show how their perspectives and lines of argument furnish a basis for western actions of legal and political domination through the human rights process. Mutua's Chapter 1, "Human Rights as a Metaphor," powerfully develops the argument that their work, along with other conventional western liberal human rights approaches and interpretations, continues to incorporate the old colonial metaphor of the "savior" addressing the African "savage." Such metaphor often lays the foundation for quite intrusive Western intervention into African states and marginalizes, as against Western universalization, both traditional and modern African human rights perspectives and cultures. His development of these themes, generally not touched by most legal scholars—especially those in the West—makes for bracing, controversial, and even harsh analysis.

However, Mutua is not diving into an uncritical, cultural relativism. Rather, he is trying to establish "another way"² that is more reflective of the world community's cultural diversities. This approach falls somewhere between a comparatively uncritical, western-focused, global universalism in human rights legal doctrine and decisions, which incorporates assumptions about dominance and subservience, and a cultural relativism allowing all particular governments-invoking-cultural norms to substitute their own norms, irrespective of bad consequences, to the welfare of vulnerable peoples. The latter stance has been adopted at times in the last decade by some Asian governments.

Mutua does indeed establish a 'floor' of fundamental human rights, such as equal respect, human dignity, and

2. "Middle way" carries too much distorting baggage here, including frequent American policymaking in international conflicts to invent "middle ways" or "moderate options" in overseas political transitions which exist only through American power possibly imposing them at much local cost, for questionable foreign policy objectives. For example, American policy in Haiti including and following its apparent removal of President Aristide in April 2004.

war crimes, which should be protected as essentially non-derogable. However, within this framework, Mutua aggressively confronts the age-old fundamental intersection in international human rights law: that between the prescription and authority of universal principles, rights, duties, and prohibitions, and the inevitable necessity on the ground, where the people whose rights they are live, adapt, accommodate, tailor in various ways the enforcement of these rights to local and national circumstances, in order, hopefully, to make their protection as effective as possible. In effect, Mutua is arguing, with an eye towards current arguments of cultural relativism defending local governments and authorities against global directives, that this jurisprudential intersection must be continually examined to ensure that it is free from western-dominating assumptions of the inferiority of local rights perspectives, including those arising out of traditional African cultures and other similarly situated cultures.

This intersection must be examined not only through doctrinal and jurisprudential analysis, but equally through a continuing analysis of the international human rights process in its decisions and allocations of material and normative resources on a global, especially North-South, basis.³ Here, Chapter 2, "Human Rights as an Ideology," is particularly well-aimed. All of this makes for an approach which tight-ropes the borderline between the preservation of local cultural authority, with its factors of local dominance, and possible abuses. For example, patriarchal dominance over the rights and welfare of women, and the postulate of free will linked to human dignity and autonomy, gives individuals the right to be free of physical, economic, spiritual, and even cultural abuse, such as women claiming their universal right to equal and better treatment against the enforcement of the cultural norms under which they were born and raised. Mutua meets this question by arguing well and forcefully that local cultural traditions and norms, as against assumptions of western

3. The focus on North-South relations is justified *inter alia* because of the continuing disparity between power, resources, and economic benefits that in many ways shares and describes commonalities as between and within the North-South hemispheres respectively. See generally NASSAU A. ADAMS, *THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* (1993); Raj Bhala, *Assessing the Modern Era of International Trade*, 21 *FORDHAM INT'L L.J.* 1647 (1998).

prescriptive superiority, must play a larger role in the very framing of these issues than they do now, and further, that the global human rights process must be re-tailored to ensure this larger role.

Around this illustrative issue emerges part of Mutua's continual argument throughout the book: "Stepping back from the current official human rights rhetoric would create a new basis for calculating human dignity and identifying ways and societal structures through which such dignity could be protected or enhanced. . . . It would respect cultural pluralism as a basis for finding common universality on some issues."⁴ In a valuable example, he then illustrates:

With regard to the practice labeled female genital mutilation in the West, for instance, such an approach would first excavate the social meaning and the purposes of the practice as well as its effects, and then investigate the conflicting positions over the practice in that society. Rather than being subjected to demonizing and finger-pointing, under the tutelage of outsiders and their local ilk, the contending positions would be carefully examined and compared to find ways of either modifying or discarding the practice *without making its practitioners hateful of their culture and of themselves*. The zealotry of the current rhetoric gives no room for such a considered intracultural, or intercultural dialogue and introspection.⁵

In walking this path, Mutua does not really confront—but neither have most other scholars—the basic question of growing expectations that people, including women, have a general right not to be harmed for almost any reason. I will return to this shortly.

Additionally, this argument throughout the book frequently raises the issue of destructive Western cultural intervention into African and other Southern Tier cultures. Mutua states that he is calling for "genuine cross-contamination of cultures"⁶ through the human rights process. In doing so he seems to accept that outside intervention into cultures is inevitable, and even may be desirable so long as its modalities and authorizing legal doctrines can be strictly controlled around a principle of equal respect for all cul-

4. MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 8 (2002).

5. *Id.* (emphasis added).

6. *Id.*

tures. In a sprawling, blooming, buzzing, globalized world of not a little confusion, it remains to be seen whether Mutua—and many of the rest of us legal scholars—are reposing too much faith in legal authority, even authority standing on compelling norms incorporating cross cultural commonalities (where Mutua is borrowing from Grotius), to maintain that control. Relatively uncontrolled global assessment by all cultures towards all other cultures might be irretrievably out of the box, but it remains quite pertinent in this regard that the West has the most capacity and resources to project its media and its universities into and onto the global community.

Finally, Mutua's emphasis on the importance of reconstructing the human rights process so that diverse cultures and their peoples do not descend into self-hatred is a prelude for a deeper statement about legal authority, jurisprudence, and modernism, primarily in Africa. It is the continuation of a critical inquiry about the reception of outside laws and legal procedures into Africa, especially their collisions with African customary law and traditional authority. Mutua is not alone in arguing that, in order to be effective and authoritative, any reception of outside laws must rest on an *African* melding of those principles and words with the authoritative customs and traditions of the people at that time. Elegant and codified Western legal texts will not take root without such melding taking place in both prescribing content and implementing their application on the African ground, with the melded outcomes accepted as a successor to previous authoritative local custom. This entire book richly conveys this reality in a variety of ways.

A dynamic feature of Mutua's discussion throughout his Book is his refusal to shy away from prominent but conventional dilemmas in human rights doctrine, at least from Western perspectives, but rather to show a critical path to resolving them. Thus, he comes down hard and affirmatively on the question of whether the human rights corpus implies or represents Western-style national democratic governance systems.⁷ He argues that the rejection of all semblances of cultural relativism represents an attempt to marginalize perspectives of peoples of color globally. He argues equally that the current Western trade and foreign

7. See *id.* at 39, 41, 58.

policy goals, as wrapped into the human rights process of privileging political and civil rights over the effective realization of economic, social, and cultural rights in the human rights corpus, stems from the attempted dominance of Western over Eastern states, as well as contributes to the dominance of Northern over Southern States.

Professor Mutua's final substantive chapter focuses on South Africa as a human rights state under its post-apartheid constitution. He uses this inquiry, which is quite well documented, rich in examples and well-argued, to take on the larger jurisprudential question of the limits of rights discourse *per se*, a question already somewhat prominent in CRT scholarship regarding rights-reversal in the United States against African Americans and other peoples of color. I will return shortly to ask whether this part of his analysis is somewhat misdirected.

II. The Human Right to Freedom of Religion

Professor Mutua devotes two chapters to the human right of freedom of religion, particularly as this right applies to African peoples, cultures, and states. Doubtless his childhood experiences confronting imported religion in colonial Kenya, as he sketches in the book's Introduction, are a factor in his extended treatment of these questions. However, their intrinsic importance to human rights law, particularly after 9/11, is sufficient justification.

Mutua's primary argument is that conventional Western liberal interpretations of the right to freedom of religion, with its themes of diversity and difference, hide and mask the protection of the religious establishments of Christianity and Islam, especially as these religions were introduced and established in Africa. These two religions, with their close connections to colonial economic and political processes, are thus protected as they seek to forcibly destroy diversity and difference in religious beliefs by imposing their own religious orthodoxy. They are protected as they violate the core values of diversity and difference at the heart of this right to freedom of religion. Such protection has particularly undermined indigenous African religions, by denying them recognition equal to that granted to Christianity and Islam.

Whereas the core legal issue for this right is usually framed as one of "tolerance," like it was by the UN Special

Rapporteur on Freedom of Religion or Belief, Mutua pointedly reformulates it around the “superiority”—and its protection through rights interpretations—claimed and effected, in Africa and implicitly elsewhere in the third world, of Christianity and Islam through their own operational theologies over all other religions. Thus, proselytism in Africa by Christians and Muslims constituted major human rights violations, argues Mutua, and resulted in cultural genocide by subverting and annihilating indigenous religions that were an inherent part of African customs, culture and traditional society. By imposing their imported religious and social institutions and structures, the same actions under these religions then denied Africans recognition equal to that of Europeans and Muslims. Mutua notes that many Africans today experience “identity disorientation”⁸ and “remain suspended between a dim African past and a distorted, Westernized existence. Most have been robbed of their humanity.”⁹

The power of Mutua’s argument rests not only on the clarity with which he makes it, but also on the recognition that it conveys to the informed reader, whether she agrees with his conclusions or not. Such recognition stems in part from Mutua’s bringing fresh critical eyes to accepted doctrine, rather than defining new principles. Thus, for example, Mutua agrees with the UN Special Rapporteur that religion, politics, and education intersect in many ways, with education playing a vital role in respect to the establishment of religion. Mutua, however, is demonstrating how education was used as a sword to further religious intolerance, while the Special Rapporteur is proposing that education should be used as a shield to curtail religious intolerance.¹⁰

Moreover, Mutua provides in these chapters, probably unintentionally, a powerful and concrete set of confirming

8. *Id.* at 114.

9. *Id.* at 110.

10. See *Elimination of All Forms of Religious Intolerance: Report of the U.N. Special Rapporteur*, U.N. GAOR, 58th Sess., Agenda Item 119(b), at ¶ 141, U.N. Doc. A/58/296 (2003); see also *Implementation of the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief: Report of the U.N. Special Rapporteur*, U.N. GAOR, 50th Sess., Agenda Item 112(b), at ¶ 82, U.N. Doc. A/50/440 (1995). The overall tenor and structure of these reports rest on and assume the theoretical and actual intersection of religion, politics, and education.

examples to pertinent parts of the prominent New Haven School of international jurisprudence, expounded by Professors McDougal and Lasswell in the mid-twentieth century.¹¹ Their analytical insight of the importance of ascertaining in any community, including the international community, who controls decisions about shaping principles and expectations of right and wrong—which they called the value-goal of “rectitude”¹²—finds detailed confirmation in Mutua’s arguments and examples here about decisions controlling that value in the intersections of the human rights process with Northern tier colonial politics and traditional African customs and religions. His narrative acquires more importance if we acknowledge the historically assigned task of modern human rights law: to globally influence the shaping of rectitude towards rights protection regarding the treatment of all the world’s people. In doing so, that law must also prescribe rights-protective strategies to mediate individual rights among the often competing values of rectitude, power, wealth, and human loyalty to states and cultures.

We can also note in passing that this conjunction of Mutua’s CRT perspectives with the New Haven School is yet another illustration of the utility of the latter to the emergence of CRT. That School was, and remains one of several available storehouses of interdisciplinary theory and approaches to precisely defining the community circumstances of, and decisions operating on, peoples of color.

Mutua’s main concern is that any interpretation of a human right to freedom of religion must protect Africa’s and the world’s indigenous religions, in part because these peoples’ cultures are at stake in their interchanges with the more widely organized and recognized religions. In this sense, he would divorce the *recognition* of particular religions under this human right from any modernist pre-condition for interpreting that right. He also argues that organized religions themselves, as non-state actors, have an implied duty under the International Covenant on Civil and Political Rights to protect the rights of non-believers and adherents to other religions. Here, Mutua is advancing a

11. See MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

12. See *id.* at 130-31.

new and potentially significant interpretation of this right and its correlative duties, particularly in light of 9/11.

Mutua's Book, including these chapters, was completed prior to the events of 9/11, thus denying him the opportunity to extend his interpretation of the values of diversity and difference against orthodoxy at the core of the right to the implications of those tragic events. He might well agree with the Special Rapporteur in this regard, who recently stressed that official restrictions on freedom of religion are not appropriate responses to terrorism, and that states must not use "the pretext of security in response to terrorist threats to limit"¹³ freedom of religion or belief. However, Mutua would be vigilant for tacit alliances between any particular religion and state power in a given country.

Ultimately, Mutua's arguments run into those scholars and policymakers who, citing pragmatic and rough majority-rule considerations, assert the impossibility of equally protecting *all* religions great and small. They thus bring forward, or assume, some criteria of state or community recognition of particular religions, bringing in, often without so admitting, considerations of race, dominance, modernism, and power against those religions to be denied recognition. Having shown the consequences in Africa of the abuse of such recognition, Mutua's vision of the best interpretation of the human right to freedom of religion now awaits a more horizontal projection of how, post-9/11 and under the modernistic surge of post-Cold War victor capitalism, indigenous and customary religions could effectively be protected, and how the proselytism of large religions in their orthodoxy that do get recognized might be limited.

III. DOES MUTUA'S NARRATIVE EXTEND TO CONSIDERING WHETHER THERE IS A RIGHT OF ALL PEOPLE NOT TO BE KILLED OR HURT?

It can be argued that we are now in mid-evolution of a global principle that all persons have a right not to be physically hurt by anyone, state or private person, with the possible exemptions of the most legitimate police and military action and the clearest possible individual cases of self defense. Claims and arguments around this evolving prin-

13. *Elimination of All Forms of Religious Intolerance: Report of the U.N. Special Rapporteur, supra* note 10, at ¶ 139.

ciple extend it to all vulnerable people in a particular community, such as women, children, and those otherwise discriminated against. Their fate and pain can now be more readily known in this globalized world as a closed system.

This evolution is also arguably being extended to protect all people against economic deprivation, especially by economic withholding, and against spirit injury or spirit murder, as Adrien Wing has so well discussed.¹⁴ Such an evolving principle is a deep subtext to much current human rights legal reasoning regarding what actions are permitted and their relation to human pain. Mutua's book encompasses this sub-text without quite clarifying its relation to it, especially regarding internal cultural authority and permissible pain. Of course, there are many dissenters and opponents of any such evolution, including those leaders or officials who would push their own ideologies on communities, which, if implemented, would result in separating whole groups of vulnerable people from community resources, thus leaving them in destructive situations, in the name of "good policy" or "market or resource imperatives." And there is some "fatigue" of mobilized public shame at people being killed for preventable reasons, lessening the deterrent to those potentially so liable in the future.

But pain to or death of apparent innocent or vulnerable people still brings a visible community reaction (except for that of thoroughly demonized persons), perhaps because of not only still embedded norms of decency, compassion, and dignity, but also from the proliferation of horizontally and vertically techno-enhanced ways of capturing its image and showing individual death-and-wounded stories through the media in real time to real people. This process can be argued to define the outward extension of the human right to life, first codified in the Universal Declaration of Human Rights, Article 3.¹⁵ It has always been the case that this right under international human rights law has a different, more protective content than similar official language used in domestic American discourse, for example, not being con-

14. See Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, in *GLOBAL CRITICAL RACE FEMINISM* 332, 333 (Adrien Katherine Wing ed., 2000).

15. *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) ("Everyone has the right to life, liberty and security of person.").

strained by the American abortion debate, but informing the illegality of the death penalty.

This right to life is spreading left and right, to those freeing themselves from the most deadly and stark oppression, and to those inflicting such oppression on well-known ranges of victims and targets. It raises the question of whether modern global society can exist without allowing people to hurt and kill each other, governmentally or privately, or whether modernism writ large demands such allowances of death as lubrication for its social, economic, political and legal gears. It is a question that takes us, in its affirmative, to Michael Taussig, the noted anthropologist, and his writings about modern "spaces of death."¹⁶ And in its negative, it takes us to the works of Ghandi and Martin Luther King, and to their demand that all of us have the moral courage on the national and international planes to exclude from the definition of "good policy" any need for human death and harm. Further, it is a question that we cannot be sure applies only to modern life—it may well apply in somewhat different ways to traditional cultures as well.

Thus, must a CRT lens on the human rights process—through which Professor Mutua is writing—extend its reach to consider and assess a real and effective right to life to the point of a community duty and an individual duty to prohibit human death and harm? Do those persons actually and metaphorically confined and oppressed as "savages" in his Chapter 1, under the guise of universal rights protection, possess equally the right to be free from all humanly—inflicted death and harm, and the duty to avoid inflicting any of the same on their oppressive Northern "saviors," even to prevent the latter from continuing to "save" them?

In the recent past, versions of this issue, as between colonizers and those peoples fighting, dying, and struggling to liberate themselves, were crammed into the dyad under the law of the United Nations Charter of "self defense against armed (colonial) attack."¹⁷ Thus the death of colo-

16. See Michael Taussig, *Culture of Terror—Space of Death: Roger Casement's Putumayo Report and the Explanation of Torture*, 26 COMP. STUD. IN SOC'Y & HIST. 467, 467-97 (1984).

17. Compare ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 151 (1995), with MOHAMMED BEDJAOU, LAW AND THE ALGERIAN REVOLUTION 57-58 (1961). See also TASHIM O. ELIAS, THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 156-57 (1983).

nizers to secure an end to that oppression, if it came to that, was justifiable, as it had to be.¹⁸ Now, individual stories can be readily and globally known, and the contest between the horror of each death and the goodness of the liable cause and justification is demanded to be re-balanced, even as the frequency of deaths rises in post-Cold War conflicts internal to states.

Even racial defense contexts—such as combating genocide, enslavement, pervasive oppression, or quiet white domination—are being called to limitation by claims of this expanded right to life. Bishop Desmond Tutu wrote as much in his final report of the South African Truth and Reconciliation Commission about the duties of both the African National Congress (ANC) and the South African apartheid regime to respect enemies' lives and dignity, notwithstanding the clear moral superiority enjoyed by the ANC.¹⁹ And racial oppressors are prohibited even in their subtle strategies, or "normal" modes of racial domination, by norms from deconstructions, including CRT deconstructions. For example, their using rights-reversal to produce cages of denial of benefits and justifications in the name of "good policy" causes spirit injury and spirit murder for peoples of color.

Clearly, this latter forms part of the CRT project in North America. Just as clearly, it must be part of the global CRT project for African-heritage peoples. From a perspective where Africans and African Americans concretely inform each other, it is towards these vistas that Makau Mutua takes us. Mutua lines out this journey with insightful and pungent analysis, but in this book he does not quite reach the dilemmas posed for people of color, in a post-modern global community, by claims of an expanded human right to life. He does come close in his evocations of "cultural genocide." Western dominance of the global media may well be a contributing stream of analysis to resolve these dilemmas, as may be arguments about "asymmetrical interpretations" of the right to life, compared to the basic rights norms that Mutua sees as essential to preserve. In any case, it is probable that Professor Mutua will be in the

18. See CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 1226-29 (5th ed. 2001).

19. See 1 *Truth and Reconciliation Commission of South Africa Report* ch. 1, ¶ 52 (1999).

forward echelons when these dilemmas are directly confronted.

IV. MUTUA'S CHALLENGE TO THE CONTINUING AUTHORITY OF RIGHTS DISCOURSE

We may ask whether Mutua's test of South Africa as a "human rights state," in his final substantive chapter, is an appropriate test of the continuing validity of international human rights discourse as an international legal narrative, and by implication, of the validity of rights discourse as a general and national legal narrative.

Mutua's analysis of the continuing racial oppression of the Black South African majority as probably the most rights-protective in the world, especially in the continuation of economic apartheid a decade after the epochal 1994 freedom elections and some eight years after the 1996 Constitution, is accurate, replete with cogent examples, and well-documented. Mutua argues that the notion of "rights" as a legal construction essential to protect vulnerable peoples is now highly questionable, since it is failing in post-apartheid South Africa. It is this argument that attracts our attention here. Much of Mutua's argument for the failure, and implicitly the abolition of rights discourse, rests on its shortcomings regarding economic entitlements, just allocation of economic benefits, and the right to property. The latter has long had a disputed history in the international human rights corpus, with its appearance in the Universal Declaration and its subsequent scarcity in other rights documents.²⁰

As an umbrella observation, economic rights currently define perhaps the most sensitive, tendentious, difficult, violent and sometimes deadly frontier in human rights law. Constitutive assumptions and public orders of entire communities in their current class structures, security of elites,

20. For a textually stated right to property, see *Universal Declaration of Human Rights*, *supra* note 15, at 71. By contrast, this right does not appear as a stated right in either the *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976), or the *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). See also LOUIS HENKIN ET AL., HUMAN RIGHTS 234-37 (Supp. 2003) (showing the disputed authority for the right to property); SHADRACK B. O. GUTTO, PROPERTY AND LAND REFORM: CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVES (1995) (same).

survival of common folk, and allocations of wealth and power are potentially at stake. The historical contributions of rights discourse, imperfect as it is, in facilitating liberation struggles of vulnerable peoples to arrive at that precious historical point of simply confronting this jurisprudential and community frontier, to otherwise arrive at this mountaintop and peer down into the jurisprudential valley, are large and irreplaceable. Might we not continue to need this discourse—appropriately and critically refined—to define future economic allocations under premises of justice so they may effectively be protected for vulnerable people by attracting the normative basis for implemented remedies at law? But perhaps more limited questions should be tackled first.

One such question is whether the serious doubts about rights discourse, arising from rights-reversal aimed at African Americans by white conservatives *within* the national American constitutional jurisdiction,²¹ should be carried intact to inform the analysis of the constitutive law of a national state, with a different racial equation that has recently been re-organized around comprehensive legal rights protection to shape its national future? Any such question and transference brings us back to confront the enormous historical utility to protect oppressed groups and persons provided by the notion of “rights” under law. The issue here is whether this historical utility is now so destroyed that there is nothing in legal theory left to fix, and thus the basic notion of “rights” to protect vulnerable peoples must now be abandoned. If so, then some other jurisprudential notion must be found that promises to those same peoples at least equivalently effective norms and entitlements of benefits and protection from harm, as well as a basis for community enforcement against discretionary policy shifts and unpopularity. However, those who advocate the end of rights discourse because of its failure—for example, its susceptibility to rights-reversal—have not, to date, provided its replacement.

Perhaps this lack of a replacement discourse stems from the proposition that to provide one would be to admit

21. For a discussion of rights-reversal aimed at African Americans within the national American constitutional jurisdiction, see the collected works by various authors in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 205-312 (Kimberlé Crenshaw et al. eds., 1995).

that Derrick Bell's notion of perpetual racism, and thus perpetual rights struggle,²² is basically correct. And thus that we can only hope for the good, equitable counter-poised management of an Hegelian process over time under law, of racism-struggle-equitable rights relief. This may well be sufficiently depressing for those who in their lifetimes hope for final durable conditions of liberation under law, national and international, so as to end the production of new theory. On the other hand, perhaps we should focus on an interim question, raised by this book, on the *transference* of the doubts about rights discourse from the American experience to the international/South African experience. Is such transference appropriate to judge whether rights discourse has failed and should be cast aside?

To be sure, there are common issues on both sides of this transference, even as there are large differences of value-scope, scale, national state authority, and racial demographics. Common to both is the question of whether peoples of color tend to have equal or greater capacity to invoke and claim on existing rights of economic entitlement and protection than their dominators. Particularly, whether the latter tend to have greater international support to enable them to meet the legal conditions of, for example, a constitutional/international human "right to property," and also to meet their demands for enforcement of that same right. Such situations were a common problem in post-independence Southern African constitutions vis-à-vis holdover European expatriate populations, who were supported in protecting "their property" against new African governments and national majorities by ex-metropolitan capitals. A version of this situation arguably continues to exist in present-day South Africa, as illustrated by the hard racial struggle around the drafting of the right to property in the 1996 Constitution.²³

However, rights discourse in international and then national law was absolutely crucial to destroying political apartheid, producing the 1994 elections, and having the current, though imperfect with regard to racial justice, South African state in front of us to assess. No other notion

22. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 3-10 (1987).

23. See GUTTO, *supra* note 20, at 59-67; see also SHADRACK B. O. GUTTO, HUMAN AND PEOPLES' RIGHTS FOR THE OPPRESSED 77-82 (1993).

of entitlement to freedom from oppression, as a matter of law, existed and was available to be invoked as the centerpiece of the global anti-apartheid movement for a rolling process of international community remedies, even if most remedies were flawed to some degree.

Economic apartheid in South Africa is no less an international community question, even though there are numerous white counter-claims around these issues that often lack the pre-1994 starkness needed for effective political mobilization of African-heritage and progressive people. If it cannot be made clear that the African majority has a legal and highly protected "right" to be free of economic apartheid, how will the normative and legal foundation of such freedom that will call people of justice to struggle be constructed? Further, transference here, as between states, or between national and international law, raises another issue that goes to a possible replacement discourse promising needed protection of African peoples' economic entitlements.

If the argument for the bankruptcy of rights discourse is sustained on the national level, it might be suggested that some Weberian dynamic lodged in the modern bureaucratic state regarding government licenses and disbursements would be an effective replacement regarding prescribing and protecting economic resource "entitlements" in some durable manner with available remedies. This seems inherently dubious, and given the increasingly pervasive questions about the rights-deficiencies of modern states going into the twenty-first century, a dangerous historical bet. But even if there is much merit in it, transferring this proposed rights-replacement out of the relatively cozy national command confines of the modern bureaucratic state into the more open dynamics of international organizational bureaucracy, or into states whose bureaucracies lack competence, independence from political shifts and winds, or durability and national acceptance, promises to lose any prescriptive, invoking or implementing protections for the persons posited as the beneficiaries of the sought-after "entitlements."

Here is not the place to finally resolve the questions about the continuing adequacy and acceptance of rights discourse. However, it does seem appropriate to ask whether Mutua's analysis, in his final chapter, of South Africa as a human rights state does just as logically provide a valuable

foundation for proposing needed changes in theory and practice in rights discourse to address the particular challenges—the old colonial challenges as Antony Anghie and B.S. Chimni point out²⁴—of prescribing and protecting economic rights to the same people who have struggled to “win” political rights of governance. That is, with this chapter Mutua can open a needed new jurisprudential narrative to reinvigorate rights discourse, through economic and racial justice, both nationally and under transformed international human rights law.

CONCLUSION

Professor Mutua has written a book that is critically valuable for the international human rights process, and whose insights spark much consideration for needed future inquiry. His work may help re-write the spectrum of analysis for the question of cultural relativism by insisting that we take global cultural diversity seriously in terms of equality of legal protection, and that we face up to those implications through human rights legal prescription and interpretation. This means making the legal history of those cultures part of present-day legal analysis in international human rights law. Deservedly, in light of the excellence of its reasoning and the clarity of its writing, his book has been favorably reviewed in several journals in Africa and the United States.

Perhaps the final elements underpinning the value of Professor Mutua's book are reflected in the consonance of his work with that recently of Professor Antony Anghie,²⁵ as a prominent CRT scholar, and earlier, the work of Basil Davidson, the notable scholar of African history.²⁶ Anghie is spelling out, compellingly, how the premises of nineteenth century colonialism have embedded themselves quite well in modern international law, not least to the detriment of Africa and African-heritage peoples. And Davidson, in his

24. Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, in *THE METHODS OF INTERNATIONAL LAW* 185, 191-94 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

25. See Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 *VILL. L. REV.* 887 (2000).

26. See BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* (1992).

capstone work *The Black Man's Burden*, vividly demonstrated the historical costs to Africa, including for its essential customs, cultures and traditional authority, of adopting the European state structure as the language of African liberation. Professor Mutua in this book has demanded, with first-rate scholarship, that we recognize how international human rights law must confront, and be transformed in the present, by the historical consequences which Anghie and Davidson show us.