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# **Human Rights in Foreign Policy and Practice: The South African Case Considered**

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**South African Institute of International Affairs**

*African perspectives. Global insights.*

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## **ABSTRACT**

This paper argues that human rights have come to be widely understood as occupying a legitimate place in foreign policy. However, less clear are exactly how this is to be put into practice and the nature of states' responsibilities in this respect. This paper opens with a look at the questions posed by Peter Baehr, an authority on the relationship between human rights and foreign policy, such as whether countries should attempt to promote human rights through foreign policy and how they can achieve this goal. The international legal human rights framework is outlined as the foundation for this engagement between human rights and foreign policy. The various documents of relevance here — such as the Universal Declaration of Human Rights — provide particularly powerful tools for states to use in promoting human rights internationally. The key challenge to a successful human rights-oriented foreign policy comes from the concept of state sovereignty. Article 2(7) of the UN Charter provides the basis for arguing in favour of non-interference in the domestic jurisdiction of any state, and it is used by countries when responding to charges that they have violated human rights. The paper also presents arguments against this interpretation, noting that Article 1(3) of the UN Charter recognises the promotion of human rights and does not see this as interfering in the domestic jurisdiction of another state. Having examined the theoretical framework, the paper looks at perceptions of South Africa's foreign policy, in particular the way in which the country is viewed as having opted out of human rights activism. It then offers some pointers on the appropriate connection between foreign policy and human rights. Key in this respect are the employment of human rights standards and the need to move beyond notions of the inviolability of sovereignty.

## **ABOUT THE AUTHOR**

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## ABBREVIATIONS AND ACRONYMS

AU	African Union
CRIA	Council on Religion and International Affairs
DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council
ICC	International Criminal Court
ISS	Institute for Security Studies
NGOs	non-governmental organisations
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UNCHR	UN Centre for Human Rights
ZANU-PF	Zimbabwe African National Union-Patriotic Front

## INTRODUCTION

The Universal Declaration of Human Rights (UDHR), adopted by the UN in 1948, quickly became the international standard for human rights and one of the seminal documents underpinning international human rights law. But human rights were long considered to be at odds with the *realpolitik* of international affairs, especially by proponents of realist thought. In 1979 Hans J. Morgenthau, often considered the father of the discipline of international relations, famously dismissed the notion of international law — and thus by extension the notion of a binding role for human rights — having relevance to foreign policy: ‘A professor of law at Harvard at the beginning of the century said that, with the exception perhaps of theology, there is nothing about which so much nonsense has been written as international law.’<sup>1</sup>

Today, although there is continued debate around the subject, the notion of human rights playing a role in foreign policy is no longer considered so outlandish. In an article in *Foreign Affairs* in 1993, the year before he became South Africa’s first democratically elected president, Nelson Mandela wrote that ‘[h]uman rights will be the light that guides our foreign affairs’.<sup>2</sup>

Internationally, so the theory would hold, countries would generally align their international human rights obligations to their respective foreign policies. For example, the Netherlands is a country that is generally recognised as an energetic proponent of human rights in its foreign policy. In 2007 the Dutch Ministry of Foreign Affairs captured its approach in a document entitled *Towards a Dignified Existence: A Human Rights Strategy for Foreign Policy*.<sup>3</sup> The Dutch minister of foreign affairs, Maxime Verhagen, in his foreword concludes that because human rights currently appear to be subject to erosion, Dutch policy would attempt to chart a different course:<sup>4</sup>

It is exactly now that we need to come up with extra efforts to ensure that human rights remain at the top of the political agenda. And exactly now we need to take extra care that it does not remain with good intentions, but that words are indeed turned into actions. It is therefore of importance that we strive towards an approach as effective and realistic as possible, along with all the other goals of foreign policy.

How this is achieved is the subject of this paper.

A good place to start is with the observations of Peter Baehr, an influential academic authority on human rights and foreign policy. He asks a series of questions in this regard, encapsulated in the title of his inaugural address in 1986: ‘Human rights and foreign policy: Are they compatible?’<sup>5</sup> In answering the question, he provides a sober outline to deal with the challenges of human rights and foreign policy. His approach is still highly relevant and valuable.

Baehr poses six questions (which are paraphrased here):

- *Can* a government promote the implementation of human rights in another country?
- *Should* a government promote the implementation of human rights in another country?
- *Which* governments?
- *Which* countries?

- Which rights?
- In *what* way?

These are the questions facing a country when asked the question about the compatibility of human rights with foreign policy.

Historically, the place of human rights in foreign policy is not to be separated from the gross violations of human rights by the Nazi regime during the period 1933–45.<sup>6</sup> The absence of appropriate reaction from the international community in this instance seemed to suggest that it was time to codify the rights that all should enjoy — merely by virtue of their humanity — and by implication, the (largely undefined and non-binding) duty of other states to uphold these rights, even across borders. Today there are many countries where violations of human rights are commonplace, underlining the ongoing relevance of Baehr's questions.

## HUMAN RIGHTS INSTRUMENTS

The foundation of all international 'instruments' promoting and protecting fundamental human rights is the UDHR. This statement is premised on the belief that this declaration is accepted worldwide. Human rights, or at least a core group of them, are considered to be universal.

The first sentence of the Preamble of the UDHR states: 'Recognition of the inherent dignity and of the equal and inalienable rights of all members on the human family is the foundation of freedom, justice and peace in the world'.

No member state of the UN in 1948 voted against the UDHR. The adoption of the declaration took place when a large part of the world was still under colonial rule — and thus developing countries have at times argued that as they were not part of this process, the UDHR inadequately represents their perspectives. Nevertheless, the declaration has a particular international moral authority, and today no country will openly denounce it. At the vote on the adoption of the UDHR on 10 December 1948, 48 countries were in favour and none were against, while eight abstained.<sup>7</sup> The eight states that abstained from voting were the Soviet Union and five of its allies, Saudi Arabia, and South Africa. South Africa — with its policies on race — objected to the equality principle of Articles 1 and 2. Saudi Arabia's abstention related to the fact that freedom of religion included the right to change one's religion, to which it was opposed. The Soviet Union and its allies would not accept that individual rights existed outside the context of the state, and wanted to see a greater emphasis on national sovereignty.

The Soviet bloc's latter argument — the question of national sovereignty — is one with ongoing resonance. The role of human rights as a binding concept in international affairs challenges the notion of state sovereignty, and this is brought to the fore by international human rights instruments. By accepting international human rights obligations, states implicitly agree to limit their sovereignty. In some instances, this is linked to monitoring or enforcement by supranational organisations, such as the UN, the EU or the African Union (AU).

The UDHR proclaims equal rights for all members of the human family. According to Hector Gros Espiell, president of the Inter-American Court of Human Rights,<sup>8</sup>

this means taking them into account with their respective identities and differences. The right to difference is accordingly claimed, and this is essential if the identity of each human being is to be a genuine and undisputed reality. The human objective of the Declaration is to unite all individuals over and above their differences, to combine unity and diversity in the name of equal dignity in regard to differences of identity.

The power that the declaration, and others like it, wields rests to a very significant degree in the extent to which it is able to exercise moral authority. The British law lord Lord Acton captured this in a reaction to the French Declaration on the Rights of Man (1789) by referring to 'this single page of print, which outweighs libraries, and is stronger than all the armies of Napoleon'.<sup>9</sup>

Baehr, however, cautions that the acceptance of these texts does not mean that the universal character of human rights has been generally accepted. He refers to the following criticisms of the UDHR:<sup>10</sup>

- It was drafted when most of the nations of the developing world were still under colonial domination; those nations that subsequently incorporated the standards of the UDHR in their constitutions or accepted them as members of the Organisation of African Unity or the Organisation of American States did so under Western pressure.
- The rights in the UDHR are said to reflect mainly Western ideological views, rather than values dominant in non-Western societies.
- The UDHR uses an individualistic approach to human rights, which is supposedly not suitable for societies that emphasise collective values.

The problem of the understanding universality of these rights was the subject of two UN International Conferences on Human Rights, held in Tehran in 1968 and Vienna in 1993, which confirmed the universality of rights. The Proclamation of Tehran of 13 May 1968 solemnly declares in paragraph 2: 'The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the international community'.

The Vienna conference, which took place 25 years later in 1993, found itself in a world that had undergone tremendous changes. The Vienna Declaration could therefore go much further than the Proclamation of Tehran.<sup>11</sup> It recognised that the common basis of these rights is to be found in the dignity of the person.

In its first paragraph, the UDHR states: 'The universal nature of these rights and freedoms is beyond question.' The fifth paragraph addresses the question of universality more fully:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.

Espiell views the provisions of the Vienna Declaration as leading to the following conclusions:<sup>12</sup>

- They state once and for all that dignity is the common basis of all human rights;
- They proclaim the universal character of those rights;
- They recognise, within the acceptance of this universal understanding, the need for taking account of national and religious particularities and of various historical, cultural and religious heritages.

As to the differences of opinion regarding the concept of universality and its relationship to cultural diversity; national and regional particularities; and various historical, religious and ideological heritages, Espiell regards these as the 'expression of political realities that cannot be disregarded'. However, they<sup>13</sup>

cannot set aside the interpretation of an instrument approved by consensus, which has to be construed and understood in accordance with its literal meaning in the context of the instrument, taking into account the object and purpose of the Final Act of the Vienna Conference.

Baehr, by contrast, is less optimistic.<sup>14</sup> He is not prepared to accept that the Vienna conference has settled the matter of the universality of human rights. Paragraph 5 of the Vienna Declaration to him is, to put it mildly, unclear. What do 'regional particularities' mean in the context of the universal application of human rights, in particular when we consider the examples of torture and the death penalty, and when most countries pretend to respect the international norms of human rights?

Mindful of these debates on the universality or not of human rights, the UDHR is still recognised as the foundation document of human rights throughout the world, and practically no state will argue that it will flout this declaration. In fact, it has been argued that the declaration has reached the status of international customary law.<sup>15</sup>

Regional bodies have attempted to draw up human rights instruments for their own jurisdictions. In respect of Africa, for example, a key instrument is the African Charter on Human and Peoples' Rights. As its name implies, it attempts to deal with the rights of both communities and individuals. The enforcement of these rights — indeed, of human rights generally — in Africa is weaker than in the EU. Yet we need to bear in mind that Europe had a head start of fifty years with its European Convention for Human Rights of 1950. However, an African Court of Human Rights has been established and the African Commission of Human Rights is attempting to play a key role in human rights implementation on the continent.

## HUMAN RIGHTS IN SOUTH AFRICA AND THE FOREIGN POLICY CONNECTION

Human rights considerations in South Africa's foreign policy should not only or necessarily be viewed as being 'constitutional' in the national sense (i.e. arising from South Africa's national Constitution), but also 'international' (arising from international human rights instruments). There is an interplay between constitutional human rights and international human rights law that provides the framework within which South Africa should approach the question of human rights in its foreign policy. In South Africa, the 1996 Constitution



provides an enabling framework for constitutional human rights. The international community also bestows upon the country's citizens international human rights that need to be implemented in terms of the international treaties and agreements that South Africa signs and ratifies.

When a country signs and ratifies international human rights instruments, it takes upon itself the obligations to implement those rights, and to promote and protect them. These two regimes of rights (international and constitutional) jointly provide the framework within which citizens exercise their rights. In South Africa at present the focus is very much on constitutional rights. But the international regime of human rights is where human rights and foreign policy operate.

The International Bill of Rights is a composite of a number of instruments, and forms the foundation of a number of related international human rights instruments. In brief, the International Bill of Rights<sup>16</sup> consists of:

- the Universal Declaration of Human Rights of 1948;
- the International Covenant on Civil and Political Rights of 1966;
- the International Covenant on Economic, Social and Cultural Rights of 1996; and
- the Optional Protocol to the International Covenant on Civil and Political Rights of 1976.

Related to this are such instruments as the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, the Convention Against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, and the Convention on the Rights of the Child of 1989. The major regional human rights treaties are the African Charter on Human and Peoples' Rights of 1981, the American Convention on Human Rights of 1969 and the European Convention on Human Rights of 1950.

These more focused instruments carry the original broad commitments of the UDHR further. The UDHR was very clear on the equality of women, and yet further covenants were still deemed necessary to give further impetus to this idea. Civil and political rights, as well as socio-economic rights — respectively the so-called first generation rights and second generation rights — were likewise also expanded upon in separate documents.

When South Africa is therefore engaging at international forums on the issue of human rights, it is not so much in terms of its Constitution, but to what extent the country as a whole is giving effect to its international obligations under the different international instruments the government of the country has signed on behalf of its people. These, then, are the norms and standards within which the relationship between human rights and foreign policy is played out.

## HUMAN RIGHTS AND STATE SOVEREIGNTY

The most transformative aspect of the human rights regime for the international system is found not in its growth in scope, instruments, implementation and players, but in its impact on a fundamental principle of international relations: state sovereignty.<sup>17</sup>

The principle of state sovereignty is established in Article 2(7) of the UN Charter, which prohibits the UN from intervening in ‘matters which are essentially within the domestic jurisdiction of any State’. However, Louis Henkin<sup>18</sup> on the one hand describes Article 2(7) as the ‘voice of impenetrable statehood’, and on the other hand recognises that what the UN Charter contemplated regarding human rights from the beginning (i.e. the promotion of human rights and co-operation with other member states) was not seen as ‘intervention’ by the UN in the domestic jurisdiction of any state. We see this in the human rights articles of the UN Charter:<sup>19</sup>

The UN Charter recognises the promotion of human rights as a purpose of the United Nations in article 1(3). In article 1(2) the General Assembly is clothed with the responsibility to ‘make recommendations’ for the purpose of ‘assisting in the realisation of human rights’. In article 62(2) and (3) the Charter gives the Economic and Social Council (ECOSOC) direct responsibility for human rights to ‘make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all’ and to ‘prepare draft conventions’.

Ihsan Dağı, a Turkish professor of international relations, concludes that there is an ‘inescapable tension between human rights and foreign policy’.<sup>20</sup> This tension as seen above between Articles 2(7) and 1(3) of the UN Charter is between a liberal-universal understanding of human rights and an absolutist notion of territorial sovereignty. This, says Dağı, gives birth to a ‘realist’ conception of international relations — in other words, a notion of international relations premised on the exercise of power and cold national interest in politics.

Other figures in international politics have made a contrary argument. The former UN secretary general, Boutros-Boutros Ghali, in his *Agenda for Peace*<sup>21</sup> — a special report on peace published in September 1992 — wrote that ‘the time of absolute and exclusive sovereignty has passed’.<sup>22</sup> Another former UN secretary general, Kofi Annan, argued for a redefinition of state sovereignty:<sup>23</sup>

State sovereignty, in its most basic sense, is being redefined .... States are now widely understood, to be instruments at the service of their peoples, and not vice versa [while] individual sovereignty — by which I mean the fundamental freedom of each individual, enshrined in the Charter of the United Nations and subsequent international treaties — has been advanced by a renewed and spreading consciousness of individual rights.

Article 2(7) of the UN Charter makes it very clear that no state has the right to interfere in the domestic affairs of another state. That states enjoy sovereign equality is considered to be the foundation of the current international system. However, many scholars agree with Henkin, above, that by granting rights to individuals, the conception of human rights limits state sovereignty — human rights abuses within state borders, even perpetrated by a government against its own people, are no longer matters solely within the purview of domestic affairs.<sup>24</sup> A state’s legitimacy is tied to the proper treatment of its citizens and an offending state can no longer hide behind a mantle of sovereignty alone.<sup>25</sup>

This perspective highlights the fact that whatever the discussions and debates on markets and bigger governments, multilateralism or unilateralism, new financial

institutions, and so on, there is a fundamental process of transformation at work. This is the globalisation of the world in terms of its people: people with rights, and people that matter.<sup>26</sup>

This issue — the nature of the relationship between human rights and state sovereignty — lies at the core of many contemporary debates in the field: the cultural relativity of rights, international humanitarian intervention, human rights abuses as underlying causes of conflict, and how to address past abuses in post-conflict peacebuilding. For these reasons, human rights have to feature as a consideration in foreign policy and international relations.

### SOUTH AFRICA'S POSITIONS CRITIQUED

Public concern over South Africa's approach to human rights in its foreign policy came to a head in 2008 and 2009. This stemmed largely from the stance the country adopted particularly on the crisis in Zimbabwe and positions it took at as a member of the UN Security Council and the UN Human Rights Council. To many, this suggested that human rights were no longer a notable consideration for South Africa's foreign policy.

These concerns were not limited to those outside government. Towards the beginning of 2009 South Africa declined to issue a visa to the Dalai Lama to participate in a conference. This was sharply condemned by a range of activists and commentators, who argued that South Africa was betraying its commitment to human rights (the Dalai Lama is widely respected in many human rights circles), probably to appease China (a country with a problematic human rights record). The minister of health at the time, Barbara Hogan, took the extraordinary step of stating that: 'My government is dismissive of human rights'. She added: 'They [i.e. the government] should apologise'.<sup>27</sup> This was quite extraordinary, and refreshingly so.<sup>28</sup> She was chided afterwards by the government; however, her stance was a strong shift away from the traditional cabinet collective responsibility and she was not forced to resign. In fact, she was made part of the cabinet in the newly elected government under President Jacob Zuma.

It is interesting to note the South African government's position on human rights and foreign policy.<sup>29</sup> It has stood by its claims that the human rights 'underpinnings' of foreign policy continue to guide it. The minister of foreign affairs (as the post was then known) argued in response to a question on this matter in parliament a follows:<sup>30</sup>

There has been no change in the fundamental underpinnings of our foreign policy since the advent of our democracy in 1994. Our stand of human rights is still the same. We believe in multilateralism. Whatever limitation it may have it is still far better than unilateralism. Acting within the AU and SADC [Southern African Development Community] is better than acting alone on this issue.

It should perhaps be noted that the questioner included a significant reference to Zimbabwe in the question.<sup>31</sup> The specifics of this are not addressed in the minister's answer.

As far as the South African government is concerned, the status quo on human rights and foreign policy is clearly established, and it argues that it does not deviate from the

approach of the Mandela era. In this respect, human rights remain the putative 'light that guides our foreign affairs'. This being the case, the South African state can therefore be held accountable in terms of this stated position.

Human Rights Watch is one of the more credible international human rights non-governmental organisations (NGOs). Two critiques of South Africa's foreign policy (in 2008 and 2009) emanating from officials of this organisation highlight widely held perspectives on South Africa's foreign policy and the role that human rights plays in such policy. These analyses, of course, reference a concern for the place occupied by human rights considerations in the country's foreign policy.

Caroll Bogert, associate director of Human Rights Watch in 2008, opened her article in the *Sunday Independent* as follows:<sup>32</sup>

Supporters of human rights around the world watched in joy 14 years ago as apartheid ended and a new era of democratic governance began in South Africa. But many of us are now watching in dismay as the country's foreign policy often aligns with global enemies of human rights.

Her article lists a number of concerns about the direction that South Africa's foreign policy was taking. She comments on the government's unwillingness to confront President Robert Mugabe on his 'extremely abusive governance' of Zimbabwe. She also refers to the less well-known international issues where South Africa has sided with 'reactionary' rather than 'progressive' forces. These related to South African opposition to a warrant to arrest the president of Sudan for trial before the International Criminal Court (ICC), its position with respect to Burma<sup>33</sup> and a general 'alignment' with countries whose human rights records were very poor. In its first stint as a non-permanent member of the UN Security Council for two years in 2007 and 2008, South Africa had many opportunities to speak out 'forcefully for human rights — or to join those speaking out against them. Again, and again, it has chosen the latter course.'

Bogert refers to Burma as a case in point. With Russia and China, South Africa has blocked efforts to condemn the military government's lethal crackdown on peaceful protesters in 2007. More than that, she sees an uncanny similarity in the arguments that confronted anti-apartheid activists and the arguments confronting human rights activists from the very government that holds office in large measure because of such international pressure:

The international solidarity movement against apartheid constantly confronted the argument that what happened inside a country's borders was none of the rest of the world's business. That is precisely the argument the South African government now makes frequently at the Security Council. It narrowly defines what constitutes a 'threat to international peace and security', and insists that all other matters be taken up at the UN Human Rights Council in Geneva.

Bogert therefore highlights the shift of post-apartheid South Africa towards arguments in favour of the protection of sovereignty. This tends to be the argument favoured by the violators of human rights, and, as discussed earlier, is a central challenge to the institutionalisation of human rights in foreign policy.<sup>34</sup> This will be elucidated later.

A year later, a different approach appears to characterise the response of Kenneth Roth, director of Human Rights Watch based in Washington, DC. During a discussion at South Africa's Institute for Security Studies in June 2009,<sup>35</sup> Roth appeared to be a bit more positive about South Africa's direction under the government of Jacob Zuma than did his colleague, Bogert, about the country's then government.

He argued that post-apartheid South Africa was initially welcomed as a member of the international community of high moral stature as a result of its peaceful reconciliation efforts after apartheid and for having a constitution devoted to securing people's human rights.

During the Mbeki era, South Africa's reputation as an active agent for the promotion of human rights was damaged. President Thabo Mbeki's positions on HIV and AIDS and engagement with Zimbabwe in the face of massive human rights violations was internationally regarded as an unwelcome regression of South Africa's principled stance on human rights. South Africa's reputation became 'debatable because its focus on promoting African solidarity was at odds with promoting respectful adherence to human rights'. Mbeki was accused of cosying up to African dictators, and South Africa's positions at the UN Security Council<sup>36</sup> failed to contribute to promoting human rights worldwide. 'South Africa was therefore seen to undermine the human rights agenda South Africa under Mbeki who increasingly viewed human rights as an internal matter'.<sup>37</sup>

However, Roth said that South Africa's performance and stance on human rights is generally positive. He notes the country's role in fostering congruence in Africa towards human rights due to the institutionalisation of human rights advocacy by means of the AU and the African Charter of Human and Peoples' Rights. Moreover, South Africa contributed to supporting peace in Burundi and promoting African support for the ICC, to which 30 African member states subscribed.

With regard to the current president, Jacob Zuma, Roth argues that while it was difficult to produce a conclusive opinion yet, signals were generally positive. South Africa has protested (in August 2009) against the unlawful detention of Burmese opposition leader Aung San Suu Kyi and expressed its concern about the situation in Sri Lanka, where it joined the call for an independent investigation into the abusive practices of the Sri Lankan government during the civil war with the Tamil Tigers of Eelam. He argues that South Africa's stance on African matters has been outspoken, which signals a departure from Mbeki's policy of 'quiet diplomacy'. President Zuma made it very clear that Sudan's President Al-Bashir was not welcome at the former's presidential inauguration as South Africa, as a signatory to the Rome Statute, would have been forced to arrest him.<sup>38</sup> It needs to be noted, however, that at the AU summit in Libya in July, 2009 South Africa was part of the decision that Africa would ignore the warrant of arrest for Al-Bashir.

On Zimbabwe, Roth rather controversially stated that South Africa has welcomed many Zimbabweans fleeing the violence and repression who took up residence in South Africa, which is an important humanitarian gesture, even though it has not yet been accompanied by a change in government policy on Zimbabwe.<sup>39</sup>

According to Roth, some of the challenges and opportunities for South Africa, include:

- putting pressure on Somali protagonists by fighting impunity by means of an international investigation;

- pressuring President Kabila of the Democratic Republic of Congo (DRC) to ensure that the DRC army respects human rights and forcing the DRC to arrest Bosco Ntaganda (wanted by the ICC for war crimes);
- pushing for a non-deferral of Al-Bashir's indictment (in terms of this, the ICC warrant would remain active and could be acted upon);
- pushing for true power sharing in Zimbabwe (there was substantial criticism that the power-sharing government in Zimbabwe was hobbled by the intransigence of the former ruling party, ZANU-PF, and its leader, Robert Mugabe; South Africa was widely seen as partial to them, to the detriment of the former opposition Movement for Democratic Change);
- exercising leadership with a pro-human rights stance in the Human Rights Council (this would involve reorienting South Africa's current stance); and
- forcefully advocating against a culture of impunity on the African continent (African leaders have often assumed that they would be shielded by other states from criticism of and punishment for their misdeeds, thus allowing them to retire unmolested after questionable tenures in office or even accommodating them in 'power-sharing' governments when they refuse to step down after they have lost elections, as occurred recently in Zimbabwe and Kenya).

Roth contends that South Africa is today less influential than in the immediate post-apartheid era due to the character of the foreign policy under Mbeki. Roth calls for a resumption of (what is widely perceived to have been) the moral- and value-laden South African foreign policy of the Mandela era.

The critiques by Bogart and Roth point to a number of expectations that human rights advocates (and, indeed, many ordinary South Africans) have of the place in foreign policy that will be occupied by human rights considerations and the way in which South Africa should conduct itself, and how it should orient its participation at international organisations and on the continent.

On the other hand, the self-image South Africa has vis-à-vis its conduct on human rights matters is that it is in fact committed to them. Concurrently, however, it has tied its diplomacy to an understanding of the international order that assumes the primacy of state sovereignty. As this is a position taken by less democratic and less human rights-minded states, it finds itself in the company of many regimes whose commitment to human rights — domestically and internationally — is dubious. In order to move beyond this, South Africa would need to accord a larger intellectual and policy space to diplomacy that focuses on people and explicitly accepts limitations to state sovereignty.

## CONCLUSION: CAN HUMAN RIGHTS AND FOREIGN POLICY BE MADE COMPATIBLE?

In conclusion, it is useful to reiterate Baehr's questions:

- *Can* a government promote the implementation of human rights in another country?
- *Should* a government promote the implementation of human rights in another country?

- Which governments?
- Which countries?
- Which rights?
- In *what* way?

There is a need — in South Africa and elsewhere — to establish very clearly what the foreign policy of a government can do to counter gross human rights violations outside its own jurisdiction. This is also the question to the South African government: If human rights are the guiding light of the country's foreign policy, surely it should be transformed into concrete policy and practice?’

Countries invariably claim to position their policies in terms of the highest principles and ethics. That means they can be addressed in terms of these norms.

As to *which* human rights are to be promoted, the obvious response is that these must include the whole spectrum in the International Bill of Rights. But as different types of rights exist (the so-called ‘three generations’ of rights<sup>40</sup>), some will in all likelihood receive more attention than others. Emphasis will tend to focus on the so-called ‘first generation’ or classic rights. These are the rights that are generally enforceable before the courts, civil and political rights such as the right to a fair trial, the right not to be tortured, the right to freedom of expression and others. But it is obviously debatable whether such prioritisation is justifiable. It may be argued that the recent outbreak of cholera in Zimbabwe has implications for the wider Southern African region and needs to be addressed as a foreign policy matter with reference to human rights. The right to health is considered to be a second generation or socio-economic right. The outbreak of cholera — serious in itself, but profoundly political in that it arose from the state of economic meltdown that had followed in the wake of the political crisis afflicting Zimbabwe — is the sort of matter that ought to be part of South Africa's foreign policy approach. Human rights applications in foreign policy should thus not only relate to first generation rights.

With regard to the question of whether countries *can* and *should* attempt to promote human rights through their foreign policies, the opening observation is that human rights do not focus on the promotion of a country's material interests; indeed, the promotion of human rights can even be in conflict with a country's material interests. For example, in respect of China, ongoing human rights violations are generally accepted as a fact. Yet with the economic prospects of trading with China, countries are not prone to engage the economic giant on its human rights record, and certainly not in a confrontational way, because it is not in the material interests of most countries to do this. Countries that wish to promote human rights in other countries therefore do not take an easy task upon themselves, and they consistently find themselves balancing interests and determining priorities. Yet many countries still include human rights in their foreign policies.

Human rights can be dealt with as an independent policy goal, but also as an instrument to achieve other goals of foreign policy. There is an ongoing debate about whether this is a good idea. An active human rights policy always boils down to interference in matters that are traditionally seen as the internal affairs of a country.

Fundamentally, this demands that states prioritise their foreign policy concerns, and how human rights issues rank within that framework in relation to other interests. This leads to consideration of the question of *in what way* rights can be promoted. What is more important is the issue of the promotion of a state's own economic interests (which



involve private sector interests, as well as employment and, by extension, social stability) or the promotion of human rights in another country. What about the allegiance a state might have to certain partner states in the region? It is indeed easier to ask these questions than to answer them.

In terms of international treaties and the obligations that states undertake when they commit themselves to such agreements, this very clearly involves limiting countries' sovereignty. The strengthening of supranational organisations is paramount as a suitable framework for redefining national sovereignty. A great deal needs to be done to strengthen the world's supranational institutions.

When it comes to choosing measures to implement a human rights-oriented foreign policy, the effectiveness of policy will need to be the guiding criteria. What will be most effective is not always what will be most consistent. Perhaps this, then, relates to the question of *which countries* and *which governments* — the answer being that the emphasis might need to fall on those countries and situations where the prospects of success are greatest.

NGOs should be supported and their advice taken seriously, as they have expertise that can be quite valuable to governments and diplomats. Some countries forward the reports by Amnesty International to all their embassies as a means to keep informed. South Africa does not appear to avail itself of this opportunity. The world's conscience needs to be worked upon and Amnesty International's strategy of the 'mobilisation of shame' is quite formidable in doing so.

In this context, given both the commitments South Africa has made in terms of the treaties and instruments to which it is a party and the criticism it has attracted because of its failure to give priority to human rights in its foreign policy and its dealings with other states, the South African government would be well advised to start an evaluation of its human rights policy. To a limited degree, this has occurred, although whether signals to this effect reflect a profound change of course or merely a change of the country's public relations policy is a question that can at this point not properly be answered.

There are countries that have established good reputations in their promotion of human rights in their foreign policy. But the flip side to this is that countries can lose their reputations. South Africa has certainly lost its reputation and practically all the gains of the Mandela era. The country needs to strive to regain that reputation.

## ENDNOTES

- 1 Morgenthau HJ, 'Human rights and foreign policy', First Distinguished CRIA (Council on Religion and International Affairs) Lecture on Morality and Foreign Policy. New York: CRIA, 1979, p. 1.
- 2 Taken from Mandela N, 'South Africa's future foreign policy', *Foreign Affairs*, 72, 5, 1993, pp. 86–97.
- 3 Netherlands Ministry of Foreign Affairs, *Naar een menswaardig bestaan: Een mensenrechtenstrategie voor het buitenlands beleid*, November 2007, <<http://www.minbuza.nl>>.
- 4 *Ibid.*, p. viii.
- 5 Baehr P, 'Human rights and foreign policy: Are they compatible?', inaugural lecture, University of Leiden, 1986.



- 6 This is accepted, but we also cannot ignore the gross violations of slavery, colonialism and apartheid.
- 7 A reasonable account of the adoption of the declaration can be found at <[http://en.wikipedia.org/wiki/Universal\\_Declaration\\_of\\_Human\\_Rights](http://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights)>, accessed 28 October 2009.
- 8 Espiell HG, 'Universality of human rights and cultural diversity', *International Social Science Journal*, 158, December 1998, p. 526.
- 9 Drew MG, *Acton, Gladstone and Others*. London: Nisbeth, 1924, p. 18.
- 10 Baehr PR, *De rechten van de mens: Universaliteit in de praktijk*. Amsterdam: Boom, 1998, p. 28; author's paraphrased translation.
- 11 UN General Assembly, Vienna Declaration and Programme of Action, A/CONF.157/23 of 25 June 1993.
- 12 Espiell HG, *op. cit.*, p. 526.
- 13 *Ibid.*
- 14 Baehr PR, 1998, *op. cit.*, pp. 28–29.
- 15 Robertson AH, *Human Rights in the World*, 2<sup>nd</sup> ed. Manchester: Manchester University Press, 1982, p. 70. See also Humphrey JP, *Human Rights and the United Nations: A Great Adventure*. New York: Transnational, 1984, p. 65, which states: 'The Universal Declaration of Human Rights is now part of the customary law of nations and therefore binding on all states'.
- 16 UNCHR (UN Centre for Human Rights), *The International Bill of Rights*. Geneva: UNCHR, 1988, p. 1. A further element is the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.
- 17 *Ibid.*
- 18 Henkin L, *Recueil des Cours*, vol. IV, 1989, p. 209; quoted in Titus DJ, 'The applicability of international norms of human rights to the South African legal system, with specific reference to the judiciary', unpublished LLD dissertation, University of Leiden, 1993, p. 16.
- 19 *Ibid.*
- 20 Daği I, 'Human rights, foreign policy and the question of intervention', *Journal of International Affairs*, 6, 2, June–July 2001.
- 21 This was a special report on peace by the former UN secretary general published in the *UN Chronicle*, September 1992.
- 22 Rosenau J, 'Sovereignty in a turbulent world', quoted in Daği I, *op. cit.*, fn. 10.
- 23 Coicaud JM, Doyle MW & AM Gardner (eds), *The Globalization of Human Rights*. Tokyo: UN University Press, 2003, p. 3.
- 24 *Ibid.*, p. 3.
- 25 *Ibid.*
- 26 *Ibid.*, p. 4.
- 27 This statement featured prominently at the time of the Human Rights and South Africa's Foreign Engagements Workshop on 25 March 2009; see footnote 1.
- 28 Hogan was severely chided for her comments. However, her stance indicated that not everyone was satisfied with the position that South Africa has taken, including within the political elite, shared what evidently constituted the government position. She was also reappointed to the cabinet after the April elections, albeit to a different portfolio.
- 29 This is evidenced by the response to a question in parliament on this issue; see <<http://www.dfa.gov.za/docs/2007pq/pq25.htm>>, accessed 16 November 2009.
- 30 Taken from the Department of Foreign Affairs website.
- 31 The questioner asks the minister: 'Whether she will give a similar undertaking as that given by

former President Nelson Mandela in 1994 that human rights will be the light that guides our foreign affairs; if not, why not; if so, how is that undertaking reconciled with the Government's approach to the situation in Zimbabwe; and whether our participation in forums such as the AU and SADC has stifled or suppressed our commitment to human rights; if not, how does she explain the failure of both the AU and the SADC to turn the situation in Zimbabwe around; if so, how does she propose putting the protection and promotion of human rights at the forefront of the AU and SADC's agenda?"

- 32 Bogert C, 'SA's human rights reputation tarnished', *Sunday Independent*, 7 September 2008.
- 33 South Africa had voted with Russia and China at the UN Security Council to stop the condemnation of Burma's military government, arguing that this needed to be dealt with at the Human Rights Council.
- 34 I recall a discussion with a Department of Foreign Affairs official who told me of an occasion at the UN Human Rights Commission, the predecessor of the UN Human Rights Council, where he spoke of a motion of censure against the former Nigerian leader Sani Abacha (in the mid-1990s) by South African representative in Geneva, Jackie Selebi, and seconded by Zimbabwe. How times have changed!
- 35 ISS (Institute for Security Studies), *Human Rights Principles in South African Foreign Policy*, ISS seminar report, 24 June 2009, <[http://www.iss.co.za/dynamic/administration/file/\\_manager/file\\_links/24JUN09HRINSAREPORT.pdf](http://www.iss.co.za/dynamic/administration/file/_manager/file_links/24JUN09HRINSAREPORT.pdf)>.
- 36 For example, in the UN Security Council, South Africa declined to support action against Burma and Zimbabwe. These positions and the impression they created about the orientation of South Africa's foreign policy (in particular, that it did not place a great deal of emphasis on human rights) were the subjects of Bogert's piece.
- 37 ISS, *op. cit.*
- 38 There has been a great deal of controversy in African elite circles about the ICC's arrest warrants, with accusations that the court was targeting African countries. When Sudan's president became the subject of an arrest warrant, some African states indicated that they would not enforce it and South Africa initially spoke out against it.
- 39 This is subject to enormous challenge, given outbreaks of xenophobic violence, harassment by state officials (as was exposed in television documentary programme some years ago that recorded police officers extorting money from the families of Zimbabweans in South Africa illegally), and the lack of a coherent policy for Zimbabwean refugees (the acceptance of their presence in a sort of twilight world, ignoring the problem, or deportation).
- 40 To recap, 'first generation' rights are the classic liberal rights, such as the right to freedom of speech or religion. 'Second generation' rights are social rights and have to do with satisfying people's material needs, such as the right to housing or food. 'Third generation' rights concern those pertaining to a healthy environment.

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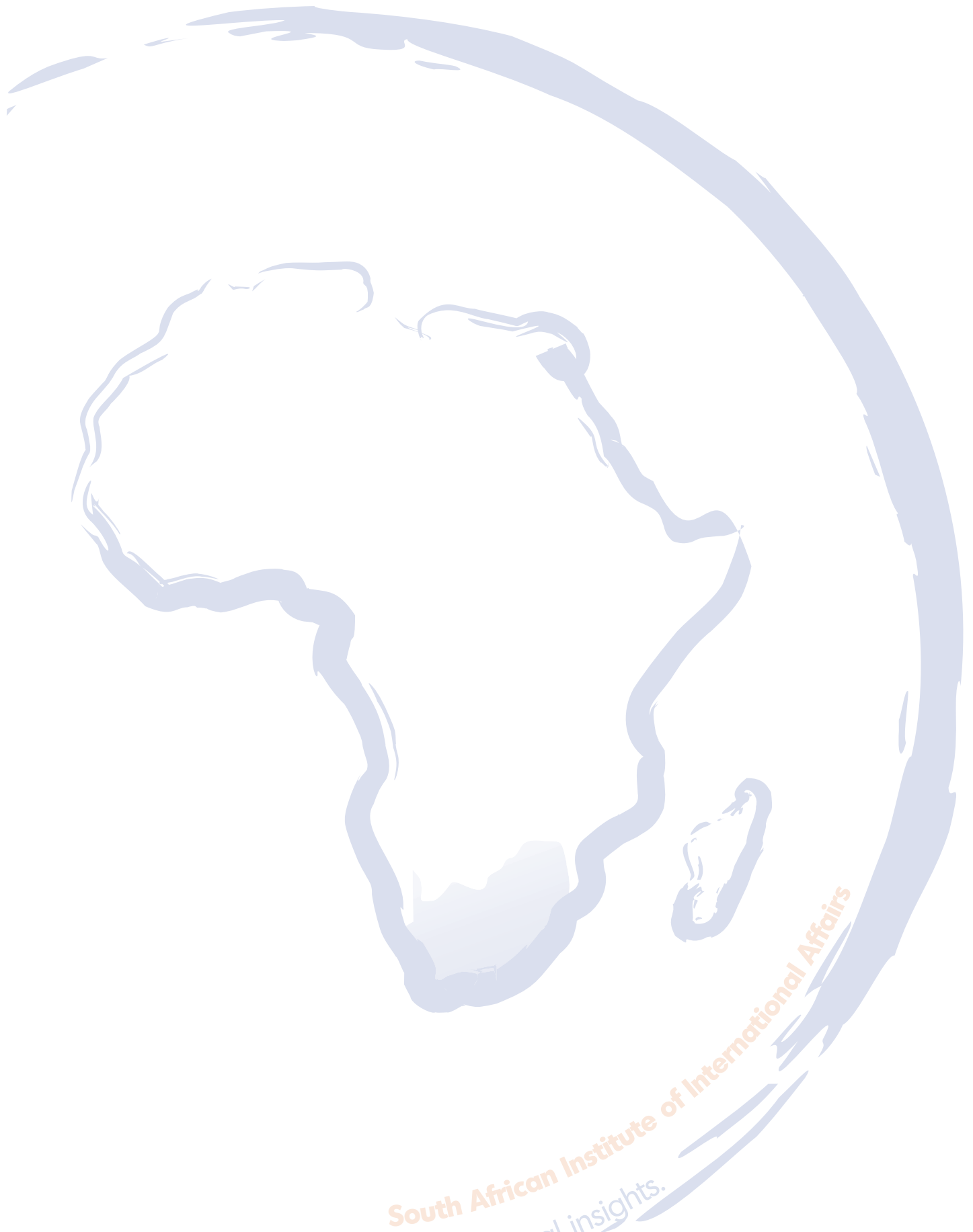
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