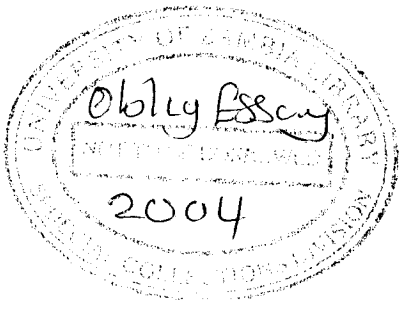

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the obligatory Essay prepared under my supervision

By

IAN MWANAJITI MABBOLOBBOLO

Entitled

DOUBLE STANDARDS IN THE OBSERVANCE OF DEMOCRATIC GOVERNANCE, RULE OF LAW AND HUMAN RIGHTS: CASE AGAINST THE UNITED STATES OF AMERICA AND THE UNITED NATIONS - LESSONS FOR A FRICAN STATES IN THEIR ELUSIVE SEARCH FOR A VALID DEMOCRATIC ORDER.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirement as to format as laid down in the regulations governing obligatory essays.

..... 16/12/04

MR. MULENGA GEOFFREY — DATE
SUPERVISOR

DOUBLE STANDARDS IN THE OBSERVANCE OF DEMOCRATIC GOVERNANCE, RULE OF LAW AND HUMAN RIGHTS: CASE AGAINST THE UNITED STATES OF AMERICA AND THE UNITED NATIONS - LESSONS FOR AFRICAN STATES IN THEIR ELUSIVE SEARCH FOR A VALID DEMOCRATIC ORDER.

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A directed research paper submitted to the University of Zambia Law faculty in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

UNZA **DECEMBER,2004**

DEDICATION

To my wife, son, daughter and family without whose love, understanding and encouragement I should never have made great strides in my endeavors.

And to all the people who have suffered as a result of inconsistencies in the observance of democratic governance, rule of Law and Human Rights.

As for you, my brothers, you were called to be free. But do not let this freedom become an excuse for letting your physical desires control you. Instead, let love make you serve one another. For the whole Law is summed up in one command: *"Love your neighbour as you love yourself."* But if you act like wild animals, hurting and harming each other, then watch out, or you will completely destroy one another. GALATIANS 5:13:15.

ACKNOWLEDGEMENT

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I would like to express my most sincere gratitude to Mr. Geoffrey Mulenga, my Supervisor, for his counsel and guidance. He acted, as a supervisor should-allowing the author to do his work but keeping him up to the mark. His alert and analytical mind is responsible for the good work that this essay has turned out to be.

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Thanks also go to Professor Jeremy Gould of Helsinki University, Finland, who had retained me as his Research Assistant, for the book he gave to me. The book on *"International Law in an Age of complexity"* has been invaluable for this obligatory essay.

I am greatly indebted to the members of my study group-Messrs K. Mulife, S. Siloka, E. Simukoko, F.Chilunga, H. Kupalelwa, E. Mazyoba and M. Hibajene with whom we shared words of encouragement during the long and arduous journey in the law school.

I will also be failing if I do not acknowledge many other friends in my class who I cannot name owing to limited space.

Last but in no way the least, thanks go to Mukuli Chikuba for the typing and printing facilities.

I take full responsibility for any errors and/or omissions in this directed paper.

ABREVIATIONS

APRM	-	African Peer Review Mechanism.
AU	-	African Union.
CIA	-	Central Court of Human Rights.
ECHR	-	European Court of Human Rights.
ICC	-	International Criminal Court.
ICRC	-	International Committee of Red Cross.
ICTY	-	International Criminal Tribunal on Yugoslavia.
ILO	-	International Labour Organisation.
IMF	-	International Monetary Fund.
JEM	-	Justice and Equality Movement.
MPLA	-	People's Movement for the Liberation of Angola.
NEPAD	-	New Partnership for African Development.
NRM	-	National Resistance movement.
OAU	-	Organization of African Unity.
PAP	-	Pan African Parliament.
SC	-	Security Council.
SLF	-	Sudan Liberation Front.
UK	-	United Kingdom.
UN	-	United Nations.
UNITA	-	Union for the Total Independence of Angola.
U.S	-	United States of America.

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ABSTRACT

Although the United States government has been a strong backer of international justice for other people it continues to display inconsistencies in some of its affairs. Infact some authors have gone as far as saying that America is least qualified in the world to judge what happens in other countries. Further, as the US has held itself as a strong advocate of international justice, other countries (including African countries) use the transgressions by the United States to justify transgressions in their own countries-if America can do it why can't we do it too?

Faith in the United Nations has been seriously shaken, as a result of its failure to stand up to what many consider as the American hegemony. This has brought questions about the relevancy of the UN in this contemporary age of complexity. There is a felt need by the International community to have a legal order predicated on an agreed rule of law.

That there is an inextricable link between the three distinct though kindred conceptions of democracy, respect for the rule of law and human rights is incontrovertible. African countries are enjoined to espouse these ideals in their elusive search for a valid democratic order.

CHAPTER ONE

INTRODUCTION

In the contemporary world, International law has taken centre stage in human affairs which inevitably revolve around human rights. This paper will argue, giving examples, that International law means little or nothing to America and its allies. Whatever happened to the values and ideals of great men like Washington, Jefferson and Lincoln, which left their mark on the history of the America nation?

It is said that the genius of the constitution in organising the federal government has given the United States extra ordinary ability over the course of the last two centuries. Further that the bill of rights and subsequent constitutional arrangements amendments guarantee the American people the fullest opportunity to enjoy fundamental human rights[1]. A lofty ideal indeed which one could wish extended not only to Americans but to all mankind irrespective of nationality. Alas, this is but an ideal yet to be realised.

"Through out the world, on any given day, a man , woman, or child, is likely to be displaced, tortured, killed or 'disappeared' at the hands of governments or armed political groups. More often than not, the United States shares the blame"[2]

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[1] An outline of the American Government – United States Information agency (1989)
[2] Amnesty International [Quoted from 'Stop The War On Iraq- The Case Against Bush and Blair', Socialist Workers Party, London, Larkharm Printing and Publishing (2003) p. 13]

This buttresses the argument that although the United States government has held itself out as a strong backer of international justice for other people it continues to display inconsistencies in some of its affairs. Instances of in consistencies abound as will be seen, but suffice in this introductory part to say that the international community was opposed to the war that the America government (and its allies) unleashed on Iraq without any type of international authorisation, against world public opinion with enormous material damage and the deaths of civilians. The world is also concerned by the more than 600 prisoners who are, at the time of writing this essay (November, 2004), still locked up at the Guantanamo naval base in a juridical limbo. These persons are not treated as persons and will be presented in secret U.S military courts unless pressure is brought to bear on the United States.

By 1999, the United States had continued to exempt itself from many of its international obligations, particularly where international human rights law granted protection or redress not available under U.S law.[3] In ratifying international human rights treaties, it typically carved added reservations, declarations and understandings. Even years after ratifying key human rights treaties, the U.S still failed to acknowledge human rights law as U.S law[4].

[3] Human Rights Watch, World Report, NewYork (2000) p.401
[4] Ibid

In the outcome of the terrorist attacks of September 11 2001, the world's awareness of the need to eradicate terrorism has increased. President Bush, in his speech to the joint session of Congress on September 20, 2001 declared 'Tonight, we are a country awakened to danger and called to defend freedom'. It is incontrovertible that there has been heightened awareness about terrorism since September 11 2001. What is not true, however, is that terrorism started with the bombing of the twin towers of the U.S. The U.S. itself has been sponsoring dissident groups and Cuba is a good example. A foreign diplomat (U.S) is on record funding the youth branch of the Cuban Liberal Party[5]. It is ironical and inconceivable that a foreign citizen can found a political party in another country as there is no legislation the world over for that kind of ingenuity. There can be no double standards. Terrorism must be combated and eliminated whether it is committed against a big and powerful country or against small countries. There is no such thing as bad terrorism and good terrorism[6].

In the report on Orlando Bosch submitted to congress in 1989 by Under Secretary of Justice Joe D. Whitley, whose administrative position made him less subject to political pressures or foreign policy considerations, he stated thus:

"The United States can not tolerate the inherent inhumanity of terrorism as a way of settling disputes. Appeasement of those who would use force will only breed more

[5] Press conference by Foreign Minister of the Republic of Cuba, Roque P.F"We are not prepared to renounce our sovereignty", April 9, 2003.

[6] Gonzalez L., With Honour Courage and Pride, December 2001. This is one of the defence statements at the sentencing hearing of the five Cuban patriots unjustly condemned by a Miami Federal Court. Published by the Printing Office of the Cuban Council of State (2002).

terrorists. We must look on terrorism as a universal evil even if directed towards those with whom we have no political sympathy".

This, in this writer's opinion, is the kind of advice that no Executive organ of any state can ill afford to ignore for it is important to look at the present and reflect upon the future. Yesterday's hypocrisy is today's tragedy and what is today's hypocrisy will be tomorrow's tragedy. Governments then have responsibility towards future generations which transcend artificial and political prejudices. That responsibility obliges them to put aside today's hypocrisy so that they can bequeath to future generations a tomorrow devoid of tragedies.

Arising out of some of the real or perceived inconsistencies, some writers have rightly or wrongly gone as far as saying that the United States of America is least qualified in the world to judge what happens in other countries. They charge that they (U.S) "talk the talk, but do not walk the walk". Further, as the United States has held out itself as a backer of international justice, other developing countries use the transgressions of the U.S to justify transgressions in their own countries – if America can do it why can we not do it too? A good example is Zimbabwe, which, after the disputed election in 2002, the ruling party referred critics to the American election. A more recent case is when the United Nations voted to keep Sudan on the Human Rights Commission in May 2004. The United States walked out of a UN meeting in protest against the decision to give Sudan a third term on the Human Rights Commission, the world body's Human Rights

Watchdog[7]. The U.S. ambassador called the vote an "absurdity" and accused Sudan of massive human rights violations and "ethnic cleansing". He went on "The least we should be able to do is not to elect a country to a global body charged with protecting human rights, at the precise time when tens of thousands of its citizens are being murdered or left to die of starvation"

"Consider the ramifications of standing by and allowing the Commission to become a safe haven for the world's worst violators, especially one engaged in ethnic cleansing" he said.

Sudan's deputy U.N ambassador while acknowledging the humanitarian problem in Darfur answered in this manner:

"It is yet very ironic that the United States delegation while shedding crocodile tears over the situation in Darfur ..... is turning a blind eye to the atrocities committed by American forces against the innocent civilian population in Iraq including women and children." He also cited the " brutal attacks against innocent civilians in Falluja where for the first time in our lives we saw live reporting of mass graves- women, children, and elderly and other innocent civilians buried in a football stadium" and the "infamous and degrading treatment of Iraq prisoners by American soldiers in Abu Graib prison. The ambassador ended by saying "so Sudan's seat on the Human Rights Commission is not at all different from the U.S. presence"[8] This analogy is to say the least unfortunate as it is a fundamental disaster to the protection of human rights. This writer can not

[7] Reuters 'UN Votes to Keep Sudan on Human Rights Commission', the Post, May 6, 2004.
[8] Ibid

agree more with Koffi Anan when he said "I am aware of the fact that some view the concern for human rights as a luxury of the rich countries for which Africa is not ready. I know that others treat it as an imposition, if not a plot, by the industrialised West. I find these thoughts truly demeaning, demeaning of the yearning for human dignity that resides in every African heart"[9]. As Anan asked "Do not African mothers weep when their sons or daughters are maimed or killed by agents of repressive rule? Are not African fathers saddened when their children are unjustly jailed or tortured? Is not Africa as a whole impoverished when one of its voices is silenced?". The answers to these questions are fundamental truths that can not be ignored even by the violators of human rights on the continent of Africa. So the leaders must know that the masquerades of international justice must not be emulated in their inconsistencies for whatever reason.

What then is the role of the United Nations in all this? It has been the fervent hope of people that the U.N. can stop the U.S. and other super powers from bullying the world, but that does not seem to be the case. The U.N. does not appear to be a force which can do that. It is dominated by five countries- the United States of America, Britain, France, Russia and China. These five nuclear powers have permanent seats in the Security Council which is where crucial decisions are taken at the U.N. This grouping can veto any ruling, making sure

[9] Address to the Annual Assembly of Heads of State and Government of the Organisation of African Unity, Harare, 2 June, 1997.

that no combination of smaller powers can override the interests of the world's biggest powers.

The U.N. Charter outlaws the use of force internationally. There are however, two exceptions to the ban on forcible response by states to international disputes. The first relates to self defence, individually or collectively in the event of actual or threatened attack[10]. The second exception relates to enforcement action under regional arrangements[11], or under the U.N. collective security system[12]. The use of military force, though permissible under the circumstances described to prevent severe human rights crimes has given rise to a range of concerns. The importance of scrupulously complying with international humanitarian law is one. Another common concern, as the world has now come to know is that military intervention might and actually has become a pretext for military adventure in pursuit of ulterior motives[13]. One may ask- is the U.N. in its present form relevant in this age of complexity? There is no doubt that faith in the U.N. has been seriously shaken by its inability or failure to uphold international law and prevent the illegal invasion and occupation of a sovereign country by the U.S. and Britain[14]. As Anyangwe states although faith in the U.N. has been shaken, it has not been destroyed. The reason is that there is no other credible alternative to the U.N. system. What is being mooted is the urgent need to meaningfully reform

[10] Article 51
[11] Article 53
[12] Articles 24, 39-50, 106
[13] Supra note 3 P. xviii.
[14] Anyangwe, 'The relevance of International Law Today: Should the Unfolding Events of this World Make Us Abandon the System?' ,UNZA, Lusaka, May 13, 2004

the U.N. system, taking the configuration of the contemporary world into account[15].

[15] Ibid P.6

CHAPTER TWO

2.0 RELEVANT PRINCIPLES.

This chapter will in brief terms outline some principles and concepts that are relevant in the discussion at hand.

2.1 HUMAN RIGHTS AND THEIR CHARACTERISTICS

Human rights are literally the rights that one has simply because one is human. This deceptively simple idea has profound social and political consequences. Human rights being held by everyone against the state and society provide a frame work for political organisation and standard of political legitimacy.

Article 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights". Clearly, however, equality can not refer to the conditions or circumstances in which human beings are born, for many are unfortunately born into slavery or into very unequal social environments[16]. It refers to the value of being human. Consequently, Scarlet has made this point in the following terms:

[16] C. D. Malone, 'Towards A Consistent Ethic of Human Rights', Zambia Law Journal (2003) Vol. 35 P. 36.

"The drafters of the declaration would have been stupid indeed if they thought that people are equal in strength, beauty, wisdom, intelligence and so on. They thought that, inequalities aside, there is a basic human reality in which we are equal, so that racism and sexism are not acceptable"[17].

In international documents human rights are identified as being inherent, inalienable and universal.

a) **Inherent-** This feature basically has the same meaning as "intrinsic", namely that these rights belong to the object because of the value it has in itself. It is not bestowed upon the object by human beings nor is it the kind of value that is intended to achieve some other goal. It is a right based on an intrinsic value that can only be recognised or discovered by human beings[18].

b) **Inalienable-** This refers to the fact that unlike property which can be traded or alienated by an owner, human life can not be morally owned or consequently handed over to anyone else. In this sense, a slave for instance, although compelled to act as a slave, is not morally entitled to hand over his/her life to another. Nor does a person have a moral right to commit suicide[19]

c) **Universal-** The Universal Declaration of Human Rights insists on the universality of human attributes as the basis for truly human existence[20].

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[17] B. Scarlett,' The Moral Uniqueness Of The Human Animal', In D. S. Oderberg and J. A. Laing (Eds), Human Lives (1997) P.79
[18] Opcit.
[19] Ibid P.37
[20] Ibid

Universality is the basis for any valid codification of human rights. Of course universality does not mean that the right to life is universally upheld. It means rather that human life has a unique value which must be respected wherever it is found. Diemer makes the point very clearly:

"These rights are first and foremost, prerequisites for human existence. They are claimed by reference to universally valid principles, be it in the form of reason, which, so the tradition of enlightenment runs, subsumes the notion of "conscience". The object of these demands is declared a priori innate and can not be based on covenants or conventions.....Universality is the basis of any valid codification of human rights.....Universality means intrisicality , here in relation to man as human being. It has little to do with history, culture, nation or state, but is rather transcultural, transnational, transhistorical, transideological and so on. It is assumed to be self evident that a human being is "anyone of human aspect" whether man or woman, adult or child....."[21]

The UDHR clarifies what characterises human beings by stating that "they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[22]. Three characteristic features are clearly discernible here- reason, conscience and spirit of brotherhood. These are all self conscious capacities with which human beings are naturally endowed.

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[21] A. Diemer, The 1948 Declaration: An Analysis of Meanings in UNESCO's Philosophical Foundations of Human Rights (1986) P.62

[22] Article 1 - All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

It may be said by way of conclusion then that all societies posses notions of justice, fairness, dignity and respect. As Vaclav Havel stated ".....Whenever someone categorically claimed that we were this or that, I always objected that society is a very mysterious entity and it is not wise to trust the face it chooses to show you. I am happy I was not mistaken. People all around the world wondered how those meek, humiliated, cynical citizens of Czechoslovakia, who seemed to believe in nothing, found the strength to cast off the totalitarian system in several weeks, and do it in a decent and peaceful manner. And let us ask: where did young people who never knew another system get their longing for truth, their love for free thought, their political imagination, their civic courage and their civic prudence? How did their parents- precisely the generation thought to be lost- join them? How it is possible that so many people immediately grasped what had to be done, without needing anyone's advice or instructions? I think that there are two main reasons: First of all, people are not merely a product of the external world- they are always able to respond to something superior, however systematically the external world tries to snuff out that ability. Second, humanistic and democratic traditions.....did after all slumber in the subconscious of our nations and national minorities. These traditions were inconspicuously passed from one generation to another so that each of us could discover them at the right time and transform them into deeds.....[23]

[23] From his New Year's address, January 1, 1990, to the people of Czechoslovakia, three days after being elected President of Czechoslovakia

2.2 BASIC TENETS OF A DEMOCRATIC STATE

Democracy is less hateful than other forms of contemporary government, and to that extent, it has been espoused by the international community at large. Democracy is difficult to define and because of that, this writer will adopt a descriptive approach and describe the characteristics of a functioning democracy as enunciated by Muna Ndulo[24]. In a democracy the following conditions are deemed essential:

a) System wide pluralism- there should be no hindrance to alternative ideas, institutions and leaders competing for public office.

b) Freedom of expression and association and the protection of human rights.

c) An independent Judiciary which has power to rule on the constitutionality of legislation.

d) Accountability of the political leadership to the governed on the basis of openness, probity and honesty.

e) A non partisan, ethnically diverse and professional Civil Service and

f) Periodic elections for the leaders to obtain the consent of the citizens and to allow the voters whether to renew the mandate of existing leaders or to elect new ones.

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[24] The Democratic State in Africa: The Challenges for Institution Building', Zambia Law Journal (1999) Vol.31 P.22

Although the essentials listed above appear varied on the face of it, a careful analysis reveals that they all crystallise into two cheers for democracy: one because it admits variety and two because it permits criticism. Democracy starts from the premise that the individual is important and that all types are needed to make civilisation. All people need to express themselves; they can not do so unless society allows them to do so, and the society which allows them most liberty is a democracy. Democracy has another merit- it allows criticism and if there is not public criticism there is bound to be hushed up scandals[25].

A related principle which must be necessarily mentioned is the **rule of law** which is fundamental in human rights law. The expression means that within a state, rights must themselves be protected by law. Any dispute about rights must not be resolved by the exercise of some arbitrary discretion. The dispute must be consistently capable of being submitted for adjudication to a competent, impartial and independent tribunal. The tribunal must be capable of applying procedures which will ensure full equality and fairness to all the parties. It must also be capable of determining the question with clear, specific and pre-existing laws and openly proclaimed. The application of the rule of law is of particular importance in establishing the boundaries of the different conflicting human rights of various individuals and groups. In the words of A.V. Dicey "no man is punishable or can

[25] E. M. Forster, "Two cheers for Democracy" in J. Lively and A. Lively, Democracy in Britain, Oxford, Blackwell (1994) p.172

be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the courts of the land"[26].

There is no doubt that democracy has become the goal in contemporary human struggles. To some it means the right of people to choose their own representatives to work according to their will and in their interest. Furthermore that the people must also have the power to replace their representatives any time so that the representatives can not go on deceiving others in the name of the people. To others democracy means the maximum attainable freedom so far known by human beings. Admittedly, there may never be perfection in relations among people. But in democracy, the gap between ideal and practice must be constantly narrowed. "For democracy, to prosper, or even to live, must ever be dynamic. It must move forward towards the goals of greater freedom, better life, and fuller dignity for the people it serves. Any backward step, any encroachment upon the rights of democracy's citizens, any violation of the dignity of the individual, any retreat in the well being of the people strikes at the virility of the ideal and retards the course of human progress"[27]

2.3 SOVEREIGN EQUALITY OF STATES

This concept is connected to the discussion as it is one of the principles that have been impugned by the US in its conduct of affairs as will be seen presently.

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[26] A.V. Dicey, The Rule of Law, Ibid P. 178

[27] R. Bunche -Nobel Prize Winner (1950) " The road to peace" a speech delivered to The National Education Association, 92nd Annual Convention, New York, June 30, 1954.

An elaborate discussion of this important concept is inappropriate in an essay like this but an outline is essential. All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature[28].

In international law, the sovereign equality of states is a fundamental principle which member states or the international community is expected to respect. The activities of the so called "coalition of the willing" most especially the U.S and the U.K poses a great risk to the erosion of these fundamental principles[29]. Nationalist writers who sought to establish a link between the law of nations and the law of nature introduced the doctrine of equality in international law. This is clearly brought out in the passage, for instance, by Christian Wolff in his major work *jus gentium methodo scientifica pertratatum:*

> "By nature all nations are equal to one another. For nations are considered as individual free persons leaving in a state of nature. Therefore, since by nature all men are equal, all nations too by nature are equal the one to the other"[30].

Today, the doctrine of equality exists with some encouraging emphasis as shown by its affirmation and definition under the heading " The principle of sovereign equality of states" in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance

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[28] United Nations General Assembly – Resolution 2625 (XXV).In particular (c) Each state has the duty to respect the personality of other states and (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.
[29] K Muzenga, The legality of the U.S Led War Against Iraq, UNZA, 2003 (Obligatory Essay).
[30].This proposition was adopted in the UNO charter- article 2 Para 1 provides that the organisation is based on the principle of sovereign equality of all its members.

with the Charter of the United Nations (1970)[31]. This declaration espoused that all states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, not withstanding differences of economic, social, political, or any other such artificial barriers.

Flowing from this principle, each member of the UNO is entitled to one vote in the General Assembly in decision making. There are however, acceptable inequalities which are tentatively recognised in the Charter. For instance the five great powers, the United Kingdom, Russia, United States, France and China are the sole permanent members of the United Nations Security Council, and may "veto" decisions of the council[32]. In challenging the efficacy of the doctrine of sovereign equality of all states as originally espoused, Brierly says that ' politically the great powers have long exercised a primacy among states, and both in the covenant and the Charter this has been converted in a legal primacy'[33]

2.4. INTERNATIONAL LAW AND THE PROHIBITION OF WAR.

Like the previous concept, this one is included among the relevant themes because the US has engaged in wars which it has justified. This paper will,

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[31] General Assembly Resolution 2625(xxv), as compiled in Blackstone's International Law Documents [4 th Ed] P. 173.
[32] See article 27.
[33] The Law Of Nations" An Introduction to International Law of Peace" (1963) [6th ed] p.132

however attempt to show that some of these engagements have been contrary to international law and the prohibition of war.

The UN Charter outlaws the use of force internationally.[34] The International Law Commission in the course of its work on the codification of the law of treaties expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes an example of a rule in international law having the character of jus *cogens.*

The Inter national Court of Justice in the case of **Nicaragua v United States**[35] with regard to prohibition on the use of force, referred to the widely held view that this principle was *jus cogens,* in other words, a peremptory norm of international law from which states can not derogate.

The development of this fundamental principle in international law dates back to a period shortly after early 1928 under the *Briand-Kellog Pact*[36] the member state parties declared in the most categorical terms the renouncement of recourse to war for the resolution of international controversies and make it absolutely illegal. A further development of this principle is evident in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty[37].

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[34] Article 2 paragraph 4 of the Charter of the United Nations provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other inconsistence with the Charter".

[35] (1986) ICJ Reports 14at Para 190

[36] Known as the General Treaty of Paris for the Renunciation of War of 27 August, 1928.

[37] General Assembly Resolution 2625 (XXV). It declares in part that no state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal affairs of any other state. Consequently armed intervention and all other forms of interference or attempted threats

The above notwithstanding there are some exceptions to the general ban on the use of force. The first relates to self defence, individually or collectively, in the event of an actual or threatened attack; and the second relates to enforcement action under regional arrangements or under UN collective security under chapter VII of the UN Charter.[38]

The concept of Humanitarian Intervention also calls for mention here. The doctrine permits states to intervene in situations where another state mistreats its citizens in a way failing "general standards recognised by civilised people" as to shock the conscience of mankind[39]. Although a good number of authors and scholars recognise the lawfulness of this kind of intervention there are numerous others who explicitly deny the legality of humanitarian intervention. Authors have differed in some questions such as the grounds of intervention; the character of intervention and who is permitted to intervene. An essential condition of humanitarian intervention then is that it be of "disinterested character" on political or economic grounds[40].The theory of humanitarian intervention does not allow for intervention by individual states, but by a group based on collective decision[41]. The doctrine has been greatly misused in the past and has often served as a

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against the personality of the state or against its political, economic and cultural elements are not condoned.

[38] Supra notes 10-13.

[39] Fonteyene J. P., 'Forcible Self Help By States to Protect Human Rights: Recent Views from the United Nations', in Lillich R. (ed) Humanitarian Intervention and the United Nations(1973) p.198

[40] Michalska A., 'Humanitarian Intervention' In Mahoney k and P. Mahoney (eds) Human Rights in the Twenty First Century: A Global Challenge, London, Martinus Nijhoff Publishers (1993) p.393

[41] Ibid.

pretext for the occupation or invasion of weaker countries[42] . Nevertheless, the doctrine of humanitarian intervention was the first to give expression to the principle that there were some limits to the freedom of states in dealing with their own nationals.

It is submitted, as Anyangwe does, that any use of force internationally outside the permissible categories of use of force constitutes an illegal use of force, a war of aggression, and a breach of the UN Charter and a violation of International Law. In the event of such a breach of the Charter, the UN is expected to hold the deviant state and its leaders legally accountable by taking enforcement action under chapter 7.[43]

[42] I. Brownlie, 'Humanitarian Intervention' In. Moore (ed) Law and Civil War in the Modern World (1974), Baltimore, John Hopkins University press, p.217- 218
[43] Supra note 14 at p.3

CHAPTER THREE

3.0 INCONSISTENCIES BY THE UNITED STATES OF AMERICA AND THE UNITED NATIONS.

This Chapter is the core of this essay. The author will endeavour to highlight the double standards exhibited either covertly or overtly by mostly the US and to a lesser extent the UN. It must be stated from the outset that the list of what will be discussed is not in any way exhaustive, but is merely illustrative. It must be appreciated that a subject of this nature can not possibly be discussed exhaustively in an essay like this one.

3.1 MILITARY ADVENTURE IN PURSUIT OF ULTERIOR MOTIVES

The use of military force to prevent severe military force to prevent severe human rights crimes has given rise to a range of concerns. The importance of scrupulously complying with international human rights is one. Another common concern is that military intervention might become a pretext for military adventure in pursuit of ulterior motives.

The United States which is a dominant power in the UN is ready to use it or ignore it as it sees fit in order to pursue its interests. The US leaders will horse trade in the most cynical fashion if they think they need the fig leaf of the UN to

take action, but they are willing to take action without the UN if they want to. A recent case in point is the Iraq war where Collin Powell is quoted as saying:

"The United States believes because of past material breaches, current material breaches and new breaches there is more than enough authority for it to act..... I can assure you that if he does not comply this time, we are going to ask the UN to give authorisation for all necessary means, and if the UN isn't willing to do that, the United States with like minded nations will go and disarm him forcefully".[44]

True to his (Powell) word, America and its allies went ahead and waged a war against Iraq. It is surprising though that the US and UK sought to rely on Security Council Resolution 1441 as an authority for the use of force against Iraq because after the first draft which provided for such authorisation was rejected, the two states made changes to it, which removed such kind of 'automaticity' and 'hidden triggers'. So as the Resolution stood before the war, authorisation was lacking.[45]

Michael Mandel, a professor of Law at York University in Toronto, stated categorically that "Resolution 1441 makes a lot of demands on Iraq many completely unreasonable, but it does not say or even imply that any state can

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[44] Daily Telegraph, 11 November 2002.

[45] See the opinion by Rabinger Sigh and Charlotte Kilroy, "in the matter of the potential Use of Armed Force by UK against Iraq and in the Matter of reliance for that use of Force on the UNSC resolution of 15th Nov.2003 [www.publicinterestlawyers.co.uk]. The first draft circulated at the UN by UK and US sought express authorization but were rejected by the Security Council members. It contained the following passage "The Security council ..... determined to secure full compliance with its decision, acting under Chapter VII of the Charter of the UN .....Decides that false statement or omissions in the declarations submitted by Iraq to the Council and the failure by Iraq at any time to comply and cooperate fully in accordance with the provisions laid out in this resolution, shall constitute a further material breach of Iraq's obligations and that such breach authorizes member states to use all necessary means to restore international peace and security in the area.

attack the country for failing to comply with them. It says that it is the responsibility of the SC as a body to decide whether and to what extent there has been compliance and what to do about it and the SC can only lawfully act when nine of the 15 members vote in favour and none of the five permanent members exercises its veto[46]

That kind of arrogance exhibited by a senior US official over Iraq is not new. As far back as 1948, a US state department official was quoted as having said that:

> "The US has about 50 percent of the world's wealth, but only 6.3 percent of its population. Our real task in the coming period is to devise a pattern of relationships which will permit us to maintain this position of disparity without positive detriment to our national security. To do so, we have to dispense with all sentimentality and daydreaming, and our attention will have to be concentrated everywhere on our immediate national objectives. We need not deceive ourselves that we can afford the luxury of altruism and world benefaction. We should cease to talk about such vague and unreal objectives as human rights, the raising of living standards and democratisation. The day is not far off when we are going to have to deal in straight power concepts. The less we are hampered by idealistic slogans, the better".[47]

Capitalism's demand for oil combined with the desire of the ruling class to dominate the globe militarily and economically appear to be the driving aims behind these wars. Globally, oil is dominated by five companies- the US based Exxon-Mobil and Chevron Texaco, the British based BP, the Anglo Dutch Shell

[46] K. Muzenga,Supra note 26 p.18
[47] George Keenan, in 1948 laying out his ruling class' post second world war strategy.

and the French based Total Fina Elf[48].The desire to control this oil underpins all the western powers' intervention in the Middle East. A US General during the 1991 Gulf war (after Iraq invaded Kuwait) admitted:

"If Kuwaiti grew carrots we wouldn't give a damn"

This was an admission of what has long been reality. In the 1950s, Britain's Foreign Secretary Selwyn Lloyd put the issue with brutal simplicity;

"At all costs these oil fields must be kept in western hands. We need, when things go wrong, to ruthlessly intervene"

The US replaced Britain as the dominant power in the Middle East after the Second World War. It has pursued a double pronged strategy to secure control of the Middle East and its oil. The US has propped up brutal dictatorships through out the region without a care about human rights or democracy.[49]

It is submitted that domination, foreign or racial, overt or covert, is wrong, immoral and inevitably destructive. It denies to men the control over their own lives that seems, to a reasonable person, inseparable from humanity. America in a good number of instances is wrong because it arrogates to itself the power of choice that belongs to all men of whatever colour through majority decision. Even if it were to do so in perfect selflessness, and of course it dos not, it would be wrong, for that would still be denying the whole human condition. Common Article 1 of the two International Covenants (ICCPR and ICESCR) provides for

[48] Case against Bush and Blair, p.13
[49] Ibid pp.15-16.

the right to Self Determination of peoples[50]. The US actions in Iraq, for instance, amount to a violation of the Iraq people's right to self determination.

Domination, it is averred, is immoral and unreasonable because its costs are invariably greater than its receipts. It is a transaction in moral suicide. Above all, domination disfigures the dominated turning trust to hatred, reason to violence, aspiration to greed.

3.2 INSTITUTION OF A PARALLEL LEGAL SYSTEM TO TRY SUSPECTS.

The international community is concerned by the more than 600 prisoners who are still locked up at the Guantanamo Naval Base, in juridical limbo, who are not treated as persons and will be presented in U.S. military courts. In the first session of the hearings in Guantanamo, detainees disclosed that they were forced to carry guns during the war; however, they never clashed with anyone. One of the detainees said 'since I know that Americans are advocates of human rights, I surrendered myself.'[51]

It is also worth noting that there are more than 2000 prisoners[52] that are still being held in U.S jails and not even their names are yet known, despite the many

[50] All peoples have the right of self – determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
[51] http:/www.zaman.com. 07.08.2004.
[52] This is the case as at the time of writing this essay.

actions that civil society has protested as the creation of a parallel system of justice, where the accused are considered to be dangerous to the national security, and there has been an extraordinary increase in measures of this kind. The administration of President Bush has developed a parallel legal system to investigate, incarcerate, interrogate, condemn and punish suspects, including U.S. citizens. [53] The procedures include indefinite military detention, authorised by the President. Authorisation to record communications and forced entry into installations; trials carried out by military commissions and deportation orders following secret hearings. An editorial in the December 27, 2002 edition of the Washington Post expresses opposition to the CIA "using torture and violence in their interrogations" and suggests that "these new tactics in the war against terrorism are being developed secretly"

When the abuse of Iraq prisoners made headlines world wide in April and May 2004, George W Bush claimed "it doesn't represent the America I know". That is ironical because it surely represents the America that a good number of prisoners in America know all too well. An illustration is apt at this point to drive home the point. Gerardo Hernandez, Ramon Labanino, Fernando Gonzalez, Antonio Guerrero and Rene Gonzalez are what others have called victims of an abominable injustice and of cruel, inhuman and degrading treatment that blatantly violates their human rights and is irrefutable proof of the arbitrariness and illegitimacy of the legal proceedings to which they were subjected. From the day of their arrest until February 3, 2000, throughout 17 months, they were kept

[53] The Washington Post, December 1, 2002.

in solitary confinement, isolated from each other and from other prisoners. They were shut up the entire time in the "hole", a term used to describe the unspeakable treatment reserved for part of the U.S. prison population[54].The five men were treated contrary to Articles 10 and 14 of the International Covenant for Civil and Political Rights (ICCPR)[55]

The legal team for the five fought tenaciously until the five men were finally integrated into the regular prison system. But the fact that this was accomplished in no way diminishes the unjustifiable atrocity committed against them. What is more, their treatment constituted a violation of U.S. prison regulations, which establish the use of solitary confinement solely as punishment for infractions committed in prison, and limit its length to a maximum of 60 days for the most serious cases such as murder.[56] They had obviously not violated any of the prison regulations before being imprisoned, nor had they ever killed anyone. Nevertheless, they were kept in total isolation and it is worth reiterating, throughout 17 months. During this lengthy period, it was impossible for them to maintain adequate communication with their attorneys and prepare their defences with the minimum guarantees of the due process. One shudders to

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[54] 'A Sun That Will Never Burn Out'- Introduction to the book published by the Colombia-Cuba Friendship Association, containing the statements made by the five at their sentencing hearings in Miami. The brazenly treacherous conduct of the U.S. authorities in this case reveals their genuine stance towards terrorism and the utter hypocrisy of the campaign deployed after the horrific attack of September, 11, 2001. These five Cubans are being punished because of the fact that they truly did fight against terrorism against their country, at the cost of their own lives. .

[55] Article 10(1) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 14(3) – In the determination of any criminal charge against him, everyone shall be entitled to the following guarantees, in full equality a) to be informed promptly and in detail in a Language which he understands of the nature and cause of the charge against him. b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; c) to be tried without undue delay.

[56] Ibid

imagine what kind of justice will be dispensed under the parallel system if there can be such a façade under the established court system.

The United States is struggling to convince governments, lawyers and human rights activists that everything at Guantanamo 'war on terror' detention camp is above board. The U.S. military may face a legal battle over the two and a half years most of the detainees have spent behind razor wire barriers, under interrogations, without access to a lawyer or court. In a rare public statement the International Committee of the Red Cross (ICRC) has expressed concern about the legal situation of and the impact of the seemingly open-ended detention on the internees.[57] In an equally rare expression of judicial criticism, the English Court of Appeal castigated the legal black hole in which those detained were placed and expressed the view that the US courts might be able to remedy the situation. In an extra-judicial statement, a UK Law Lord, described the situation as a 'monstrous failure of justice'.[58] The U.S. Supreme Court ruled in June that

[57] McGouldrick, D. " From '9 – 11' to the ' Iraq War 2003' " , Oxford and Portland, Oregon, Hart Publishing (2004) p.23

[58] "The world's most powerful democracy is detaining hundreds of suspected soldiers of the Taliban in a legal black hole at the American naval base at Guantanamo Bay, Cuba, where they await trial on capital charges by military tribunals. As matters stand, courts in America would refuse to hear a prisoner who produces credible medical evidence that he has been tortured.....The blanket presidential order deprives them of any rights whatsoever. As a lawyer brought up to admire the ideals of American justice, I have to say that I regard this as a monstrous failure of justice. It is a recurring theme in history that in times of war, armed conflict or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis...
Ought our government to make plain our condemnation of this utter lawlessness? John Donne gave the context of the question four centuries ago: No man is an island, entire of itself; everyman is apiece of the continent, a part of the main...any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; for it tolls for thee.

the Defence Department had failed to give the inmates most of who were detained in the Afghanistan war in 2001, their full rights.[59]

Following the release of 25 year old Mehdi Ghezali from the camp in July, Swedish Foreign Minister said "it was not easy to convince the Americans of the need to follow basic legal principles in this matter"[60].

The tragedy of the colossal failure by the U.S. to follow basic legal principles has encouraged other governments to lower the standards of human rights around the world by introducing limitations and restrictions under the guise of fighting terrorism. For example, the principle legislative response in the UK was the Anti-Terrorism, Crime and Security Act 2002. The powers of detention under the Act were upheld by the court of Appeal as compatible with the ECHR in **A, X and Y v. Secretary of state for the Home Department**[61]. Amnesty International has strongly criticised the powers in the Act as being inconsistent with the UK's international human rights treaty obligations. It has also accused the UK of having a 'Guantanamo Bay in its own backyard' describing the system as one of 'justice perverted'.[62]

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[59] http://www.channelnewsasia.comm. 8/10/2004. Jonathan Turley, a law professor at George Washington University who has closely followed the enemy combatant cases, said the Supreme Court should have given clearer guidelines on the detainees' rights.
[60] Supra note 48
[61] [2002] EWCA Civ 1502
[62] 'Justice Perverted under the Anti terrorism, Crime and Security Act' – http://web.amnesty.org.

Israel has also increased its reliance on the use of force against Palestinian terrorists often relying on identical US arguments relating to war on terrorism.[63] If the above instances are anything to go by, some developing countries will follow suit because big brother has led the way.

It may be said by way of ending that the U.S. government is now at odds with the international and American legal community over Guantanamo. For many states and indeed jurists, prosecution before an ICC would be more acceptable than the kind of military tribunals established by the U.S. For those states (and they are not few) that see the ICC as another human rights instrument, or as another instrument of law that could be used against international terrorists, the U.S. position appears inconsistent at worst and hypocritical at best.

3.3 FAILURE BY THE UNITED STATES OF AMERICA TO RATIFY UNITED NATIONS CONVENTIONS.

"We are number one.....among countries in the United Nations with a legally constituted government not to ratify the UN Convention on the right of the child; we are number one in the likelihood of children under the age of fifteen to die from gunfire; we are number one in the number of known executions of child offenders....."[64]

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[63] FL Kirgis, 'Israel's Intensified Military Campaign against Terrorism' http://www.asil.org.

[64] Moore M.,' Stupid White Men', London, Penguin Books (2002) p. 175-176. Michael Moore is a thorn in the side of corporate America, scourge of political hypocrisy and all-round critic of all whose conduct calls for it. 'Stupid White Men tells one everything he needs to know about how the mighty take advantage of the weak in society. The book is only available uncensored because public pressure forced the original publishers to publish a book they felt was too hot to handle.

The U.S. disregard for international human rights standards is not limited to domestic matters. It has also 'unsigned' the treaty setting up an International Criminal Court. The ICC was to be the first institution of the century. On a philosophical level it purported to signify global justice, human rights and the rule of law as universal values. However, in an ominous sign that all was not well in the international legal order, the U.S. was, and has continued to be, a committed opponent of the ICC in the form that it was agreed. It will not allow its troops and politicians to be held accountable for whatever crimes they commit. Contrary to the principle of equal treatment that has been discussed in the previous chapter, the U.S. continued to oppose the I.C.C. and insisted upon special exemption for its citizens.[65]

Other issues of broad international interest which the U.S. continued to oppose include those on anti-personnel landmines and child soldiers. The U.S. refused to sign a comprehensive anti-landmine treaty signed by 135 other nations while announcing that it would sign the treaty in 2006 if it is able to come up with alternative weapons before that date. It continued to block international efforts to end the use of child soldiers arguing against a proposed protocol to the Convention on the Rights of the Child that would raise the minimum age for military recruitment to 18. It also opposed a broad prohibition on the use of child soldiers as part of an ILO Convention on the worst forms of child labour.[66]

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[65] Human Rights Watch, World Report, NewYork, (2000) p.401
[66] Ibid p.401-402

3.4 FAILURE BY THE UNITED NATIONS TO PREVENT GENOCIDE IN RWANDA.

"The Americans were interested in saving money; the Belgians were interested in saving face and; the French were interested in saving their ally- the genocidal government – all that took priority over saving lives"[67]

Over one million people died in the Rwandan genocide. Did the world do enough to prevent the massacres? The answer is of course an emphatic NO. The international community shamefully turned its back on genocide in Rwanda. It was reported that some Human Rights groups have accused UN officials including then Secretary general Boutros Boutros Ghali and the then Head of UN Peace Keeping Koffi Anan of failing to act promptly when UNAMIR officials warned from Rwanda about massacre preparations. The UN staff allegedly failed to provide adequate information and guidance to the members of the Security Council[68]

The question that begs an honest response at least in the hearts of many, if not publicly is whether the genocide in Rwanda would have been handled in the manner it was if 'Rwanda was not growing carrots'.[69]

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[67] 'Too Little, Too Late, AFRONET FILE, Issue No.9, April –June 1999.
[68] 'Leave None to Tell the Story: Genocide in Rwanda' , Human Rights Watch (HRW), 1999
[69] An expression used by a US General during the 1991 Gulf War to refer to something that is of no importance to America – 'if Kuwaiti grew carrots we would not give a damn'.

3.5 FAILURE BY THE UNITED NATIONS TO HOLD DEVIANT STATES LEADERS ACCOUNTABLE.

The American – led illegal war against Iraq is perhaps the greatest threat ever, in recent times, to international peace and security. This dealt a heavy blow to what little faith people had in the UN. As well as raising the narrow issue of the legality of the war the event has wider ramifications. It is one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the last century. The UN failed in its most fundamental mission to prevent war and ensure peace. The recent admission by the UN Secretary General, in an interview with the BBC, that the war on Iraq was illegal should have been made earlier and louder before the invasion.

The U.S. government has always, with impunity, ignored resolutions when it suited its economic and political interests to do so. Israel, the U.S.' key ally in the Middle East has defied far more resolutions than any other country including Iraq. The following are some of the instances:[70]

- Israeli settlers ethnically cleansed 750,000 Arabs from their homes in Palestine in 1948. The UN resolution calling for them to return home has been passed 28 times. It has been ignored every time by Israel and the U.S. has done nothing.

[70] 'Stop the war on Iraq: Case against Bush and Blair', Socialist Worker, London, Larkham Printing and Publishing (2003) p. 11 - 12

- UN Security Council Resolution 242 calls for Israel's withdrawal from the occupied territories of the West Bank and Gaza which it conquered in 1967. It is still there.
- UN Security Council Resolution 446 declares Israel's settlements in the occupied territories illegal. There are now around 400,000 Israeli settlers on Palestinian land.
- Israel refused to allow a UN fact finding mission into the Jenin Refugee Camp to investigate reports of massacre of Palestinians in defiance of a UN resolution

In the last three decades, the U.S. has vetoed 34 resolutions that criticise Israel and seek to restrain its behaviour. Ironically, the U.S. is not prepared to have its decisions stopped or vetoed by another country. What type of World leadership can the U.S. claim to represent with this type of double standards and hypocrisy? In the event of a breech of the UN Charter and a violation of international law, the UN is expected to hold the deviant state and its leaders legally accountable by taking enforcement action under Chapter 7. But there are impediments to dealing with delinquent states. First, it is the Security Council that determines the existence of any threat to peace, breach of peace or act of aggression.[71] The Security Council decides whether or not there has been an act of aggression and there after makes recommendations. It decides whether or not enforcement action should be taken. The Security Council includes the five permanent members, China, Russia, Britain, France and the United States of America.

[71] Article 39 of the UN Charter.

Therein lies the fallacy. In the words of Anyangwe, one does not need to visit a 'Sangoma' to see that any attempt to invoke Chapter VII against any of these powers would be thwarted by a cynical use of the veto by the power concerned.[72]

The second obstacle lies in the fact that under international law a head of state/ government (including a foreign minister) is not amenable to municipal or foreign courts on account of the doctrine of sovereign immunity. The point was reaffirmed by the International Court of justice in **Democratic Republic of Congo v. Belgium (2002)**[73].It must be said , however, that this does not apply to so called crimes against humanity under the principle of Universal Jurisdiction. An offence subject to universal jurisdiction is one which comes under the jurisdiction of all states wherever it is committed. In as much as by general admission, the offence is contrary to the interests of the international community, it is treated as a *delict jure gentium* and all states are entitled to apprehend and punish the offenders[74]. In the case of **Prosecutor v Jean Kambanda**[75], a high ranking government official was held accountable for violations of International Humanitarian Law. The Tribunal found Mr kambanda culpable because he

[72] At the Security Council, decisions on all non procedural matters are made by an affirmative vote of 9 members including the concurring votes of all the permanent members. This effectively gives each of the five permanent members the power to veto any decision it does not like.
[73] Supra note 14 p. 3 – 4. As a result of the principle of complimentarity enshrined in the preambular paragraph 10 and Articles 1 and 7 of the Rome Statute on the ICC, national courts have primacy over the ICC. The ICC can only embark on a prosecution where the state which has jurisdiction is either unwilling or unable to genuinely carry out the prosecution.
[74] Starke J.G., 'Introduction to International Law', (10th edition),London, (1989) p.234
[75] ICTR 97-23-S Judgement No. 4 of September 1998. It was noted that the crimes were committed when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Further that he abused his authority and trust of the civilian population by personally participating in the genocide (distributing arms, making incendiary speeches and presiding over cabinet and other meetings were planned and discussed). He failed to take necessary and reasonable measures to prevent his subordinates from committing crimes against the population.

exercised *de jure* and *defacto* authority over the members of his government, civil servants and military o0fficials.

Well, the ICTY and ICTR are adhoc arrangements with limited competence *ratione, loci, personae, tempore.* The subject matter jurisdiction of the International Criminal Court at The Hague is confined to genocide, war crimes, crimes against humanity and aggression. Even so, the crime of aggression remains beyond the reach of international criminal law because the experts are still unable to reach an agreed definition of that term. [76] Moreover the U.S. which led the illegal war against Iraq, not to mention the other transgressions, is not party to the Rome Statute of the International Criminal Court.

It is submitted, in the final analysis, that the problems of the human race can not be resolved by destroying any country. For many centuries, empires have been destroyed only for similar or worse empires to be built on their ruins. It will always be the interest of even the superpowers for the system of international law to survive. Fundamental to that system is the idea of an agreed rule of law.

The challenge for the US (and indeed any other country that may be entertaining similar ideas) is to remedy what it sees as defects of the current system without destroying the credibility and the effectiveness of the system itself. It needs to be part of the solution not the problem.[77] As Talbott[78] wrote

[76] Ibid
[77] Supra note 48 at 121

'There is a difference between being a leader and a boss. If the US fails to see that difference or does see it but makes the wrong choice, the result could be the consolidation of exactly the sort of international consensus we do not want – a consensus on the part of every country on the earth except for the US that American power is a problem for the entire world, a problem to be managed, offset and, to borrow a phrase from another era... to be contained. That... would be bad for everyone'.

Put simply, contemporary American leaders must cling to the real and genuine values that inspired the founding fathers of that nation. The lack of these values pushed aside by other less idealistic interests is the real threat to the contemporary world. Power and technology can become a real menace in the hands of uncultured people. A passionate plea to the American leaders is that they must go back to Mark Twain and forget about Rambo if they really want to leave their people a better country.

[78] S. Talbott, ' War in Iraq – Revolution in America' (2003) 79 International Relations 1037 at 1043

CHAPTER FOUR

4.0 LESSONS LEARNT BY AFRICAN STATES.

This chapter focuses on the human rights record in Africa and how foreign forces have contributed to the observance or indeed non-observance of human rights.

It has been argued in certain circles that Africans have a penchant for brewing up trouble and causing chaos in their territories. This, according to the proponents of this view is borne out by the numerous conflicts that arise one after the other on the continent. It is said that no sooner is a conflict resolved in one area than another erupts elsewhere. It is submitted here that a good number of repressive governments and massive violators of human rights have been allies of the US and have been supported by them or other big powers with pecuniary interests. This should not be construed to mean that African leaders are absolved from their fair share of blame for doing so would be to miss the point. The genocide in Rwanda provides a good illustration. Outsiders often assume that the genocide sprung spontaneously from primeval ethnic antagonism. On the contrary, it was planned over many months- militias had to be organised, machetes bought and distributed, and Hutu peasants persuaded, through skilful propaganda, that all Tutsis were their enemies[79]. The small gang of Hutus who organised the genocide were rational men in pursuit of a rational – albeit evil – objective. They wanted to stay in power, and they harnessed ethnic hatred as a means to an

[79] The Economist, ' Rwanda Remembered', March 27th 2004, p11

end. Ten years after the Genocide in Rwanda, Sudan has become a spotlight as far as human rights are concerned. The government of Sudan has been accused of exploiting historical hostilities between different ethnic groupings in Darfur in order to defeat the Sudan Liberation Front (SLF) and the Justice and Equality Movement (JEM) or in order to punish certain Negroid tribes for supporting the insurgents. Thus the government has supplied offensive firearms to Rizeigat Janjaweed and encouraged them to attack those tribes supporting SLF and JEM[80]. No doubt, the offences inflicted on the civilian population of Negroid origin by the direct action of the government forces or by the Janjaweed whether described as atrocities, violation of security of persons, attack on personal integrity, rape, ethnic cleansing and so on may be defined as crimes against humanity[81]. It is incidents such as these ones that lend credence to assertions that Africans do not want to live peacefully and African leaders will do well to address these issues.

4.1 GENERAL APPRAISAL OF THE HUMAN RIGHTS RECORD IN AFRICA.

Numerous studies before this one have been undertaken on the dismal record of human rights in Africa and it is not within the province of this essay to regurgitate the findings of such studies. Pages of history and experiences tell us volumes about how the people in Africa have suffered unparalleled human rights abuses over centuries under successive oppressive regimes (colonial and indigenous).

[80] S. Kulusika, "Satan's Dominion", Sunday Post, August 22, 2004. p.11
[81] Ibid.

Looking back and recalling what has happened over the decades, who violated human rights, who fathered most of the coup d'etats? Who trained the torturers in the most sophisticated techniques, which country armed and supported them? In Angola, for example, who armed UNITA, which for more than two decades massacred entire villages and killed hundreds of thousands of Angolans? The United States supported UNITA politically, financially and militarily, in the hope that UNITA would topple the MPLA and so help foster its influence in the region[82]. Human rights organisations blamed UNITA for abuses against civilians including raping, beatings and killings. Savimbi himself was accused of Human rights violations of the worst kind. Journalist and former Savimbi confidante, Fred Bridgeland, revealed in 1999 how Savimbi once publicly burnt women and children accused of witchcraft on a bonfire. On another occasion, Savimbi, according to Bridgeland, took his teenage niece, Raquel Matos, as one of his concubines. When her parents protested this move they were summarily executed[83]

During the despotic rule of one party regimes in Africa which were common after most countries attained flag independence, the regimes made unity as the main excuse for the violation of human rights. It was argued, for instance, in Zambia by the advocates for the introduction of the one party state that the multi-party system endangered national unity[84]. The formation of a one party state in Zambia

[82] L.J. Roos, 'Jonas Savimbi: A Critical Appraisal of his Role for Peace and War', The Human Rights Observer (2002) Vol. 8 p 11.
[83] Ibid p.12
[84] Mwanakatwe J. ' End of Kaunda Era', Lusaka, Multimedia Zambia (1994) p.84

and many other countries in Africa was a flagrant violation of Articles 19 and 21 of the UDHR[85] . The same can be said of Uganda where President Yoweri Museveni's National Resistance Movement, in power since 1986, has continued to govern through what is called the "movement" or "no-party" system of government, justifying its restrictions on political participation as essential to prevent a return to Uganda's past. The NRM's direct access to state resources and the exclusion of the "movement" structures from the stringent regulations placed on political parties guarantees the NRM's political dominance and effectively prevents independent political parties from organising for change through electoral action[86]. It is clear then that after the new rulers assumed the reigns of government, they reduced human rights issues to mere lip service and perfected the abuses left by former masters. Some leaders sought to rely on the provisions of Article 20(1)[87] of the Charter on Human and Peoples' Rights as a way of precluding other states from censuring their human rights record. The late Nigerian military dictator Sani Abacha attempted to rely, interalia, on this principle during his reign (1993- 1998) by adoption of an inherently defective isolationist policy[88]. On 12th June 1993 a presidential election was held in Nigeria. Both foreign and local elections monitoring groups observed the conduct of the

[85] Article 19- Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 21- Everyone has the right to take part in the government of his country, directly or through freely chosen representatives; equal access to public service in his country. The will of the people shall be the basis of authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures.
[86] Human Rights watch. World Report (2000) p.83
[87] 'All people shall have the right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
[88] Nherum S. Okgubule, 'An Appraisal of Regional Models of Human Rights Protection', Zambia Law Journal (2001) vol. 33 p.18

election and were generally satisfied that the elections were free and fair. On June 23 the Federal Military Government announced the annulment of the election for many reasons among them the fact that the military government was not happy that Abiola, the Social Democratic candidate, appeared to have won. Dissatisfied with the decision of the Federal Military Government to annul the results, Abiola and others went to the Supreme Court to seek redress. Shortly thereafter, the Government promulgated several decrees ousting the jurisdiction of the Courts and restating the decision of the Nigerian Government to annul the elections[89]. In addition to reaffirming the annulment, the decrees gave legal backing to ensure that the two presidential candidates were banned from contesting any Presidential elections in the country. Many activists and journalists who protested over the annulment were arrested and detained in violation of Articles 1, 6, 9 and 13 of the African Charter[90] as the Commission found.

Today, the violation of human rights continues under a different guise – under the cover of democracy, even condemning the slogan of unity as a false and forced unity. Indeed, a benevolent dictator can very easily masquerade as a

[89] Decisions on Communications. 24thOrdinary Session, Banjul, October 1998. 102/93 Constitutional Rights Project and Civil Liberties Organization/Nigeria

[90] Article1. The member states of the OAU parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other measures to give effect to them ; Article6- Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained; Article9- Every individual shall have the right (1) to receive information (2) to express and disseminate his opinions within the law; Article 13(1) – Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representative in accordance with the provisions of law.

democrat as stated by K.K. Mwenda. Through out history, the aid and moral support given to most African regimes, in one way or another, played a role in perpetuating the age of violation of human rights and the suffering of the masses. Today also, it is not uncommon to hear some sections of society saying that the present government is better than the previous one. The million dollar question is – for whom is the present regime better? Is it for the people in power and those who benefit from the suffering of the people or is it for the common people? The most serious human rights issue in Africa today is poverty which thwarts enjoyment of economic, social and cultural rights as provided for in the International Covenant for Economic, Social and Cultural Rights (ICESCR). The right to development has generally been recognised as an inalienable human[91] right by virtue of which every person and all persons are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. It is worth noting that although the right to development is recognised in the Declaration on the Right to Development (DRD), it is yet to find expression in a legally binding instrument. In its present form it is merely a soft Law instrument.

The right to development also includes the full realisation of a people's right to self determination which includes the exercise of their inalienable right to full sovereignty over their natural resources, in accordance with the relevant

[91] Declaration on the Right to Development (DRD), 1986 Article1

principles of international law[92].The notion of sovereignty has however been getting increasingly tenuous for most African countries that are besieged by a host of forces over which they have no control. IMF Structural Adjustment Programmes, for example, have tended to adversely impinge upon state sovereignty. The IMF requires a strong and almost " dictator – like " state to implement its adjustment programmes which are usually resisted by citizens due to their harsh conditions[93].As a result SAPs have also led to growing political authoritarianism . For example, in Ghana former President Rawlings and former Finance Minister Kofi Botchway enforced strict discipline and opponents or 'obstructionists' to these structural adjustments were eliminated. President Museveni of Uganda has also replicated these actions[94]. It goes without saying that this kind of government repression as governments crack down on popular opposition to adjustment measures endangers not only civil and political rights, but also erodes people's economic status and threatens their economic, social and cultural rights[95]. No doubt, there has been a denial of democratic participation in decisions about whether and how to move from socialist to market based political and economic systems[96]

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[92] E. Mulembe, 'Human Rights and Development in the Twenty-First Century: The African Challenges', Zambia Law Journal (1999) vol. 31 p.50
[93] J.K. Mapulanga – Hulston, 'The Implementation of Structural Adjustment programmes in Sub-Saharan Africa: An Infringement of State Sovereignty', Zambia Law Journal (2003) vol.35 p.16.
[94] Ibid
[95] Ibid p.17
[96] A. Orford, 'Locating the International: Military and Monetary Intervention After the Cold War', in 38(2) Harvard International Law Journal (1997) p.469.

4.2 TOWARDS A BETTER AFRICA.

The African continent is now pregnant with a sense of hope from its peoples and sympathisers; some publicists and African scholars are propagating an African Renaissance for the new millennium[97]. There is currently a powerful resurgence, a reawakening of the revolutionary liberation spirit on the continent of Africa. The most important stimulus for the renewal is coming from, inter alia, the youngest African democracy – South Africa. So strong is the desire in the South African president to renew Africa out of the fringes of imposed poverty and backwardness that in a space of a decade, he has not only pushed for the transformation of the Organisation of African Unity (OAU) into the African Union (AU), but we have also seen the strongest efforts yet in devising a continent wide socio-economic programme.

The New Partnership for African Development (NEPAD) initiative is a noble one and has good intentions. Two proposed institutions of NEPAD of relevance to human rights are the African Peer Review Mechanism (APRM), whose mandate is to evaluate compliance by states of NEPAD principles including human rights, and the position of Commissioner for Democracy, Human Rights and Good Governance. But as Dr Chigunta[98] says the potential of NEPAD to address Africa's problems is limited by inherent weaknesses in the current political and

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[97] K.K. Mwenda 'Benevolent and Enlightened Dictators and Standards of Human Rights in Africa" in Legality Journal, 2002 p14

[98] University of Zambia Lecturer in Development Studies. Presented a paper at the Southern African Centre for the Constructive Resolution of Disputes(SACCORD)

economic systems. The problem of bad governance in Africa as reflected in weak state capacities needs to be examined within the context of the dominant political system on the continent. 'Personal' or 'neo-patrimonial' rule is seen by many people as the dominant paradigm in African states and politics. This means that politics and rule are centred on big men and political administrative power instead of having the impersonal and abstract character of legal rational authority specific to the modern state. There is often also a desire on the part of African presidents to keep their Legislatures weak and subordinate. A lingering attraction for strong leadership persists in the context of an authoritarian political culture. This is normally embodied in a strong Executive in the constitution and an overly centralised administration. These features imply that the system of politics in much of contemporary Africa lacks effective and accountable leadership, democracy and respect for the rule of law and human rights.

The concept of respect for others – the notion that there are certain things that we can not do to one another and some duties we owe to each other – is universal to all civilisations, albeit these core interests have been defined in a different way by different cultures through out history. The most significant determinant of these core interests have been periods of social conflict and strife, after which people looked back and asked themselves how this happened and how a recurrence in the future can be prevented.

In the increasingly interactive modern world the need has arisen for humanity as a whole to come to a common understanding of the core interests in order to avoid conflict and allow human interactions across previously existing borders[99]. To a large extent an attempt has been made in Africa to do this under the rubric of the concept of "human rights", which has become short hand for referring to the developing global consensus on the core interests. Adherence to human rights has become the precondition for admission into the global village[100]. Since the concept of human rights relates to nearly all aspects of human interaction, it is best protected when people by and large observe these norms voluntarily and this is a basic idea that countries like the US that want to use their power of might must understand.

It is heartening to note that Parliaments in Africa have been resurrected at least formally and there is a growing confidence and assertiveness among Africa's new Legislatures in relation to Executive branches. Legislatures have increased their involvement in the ratification of international treaties and in making policies in their respective countries. By July 15, 1995, Forty- two African countries had ratified or acceded to the ICCPR. Of those, Twenty-one were party to the First Optional Protocol which allows for filing of individual petitions[101]. There were a total of four reservations to the ICCPR which are rather few in comparison to

[99] 'The Regional Protection of Human Rights in Africa: An Overview and Evaluation' AFRONET FILE' Issue No. 9, April – June, 1999. p.6
[100] Ibid.
[101] http.//www.umn.edu/humanrts/index.org. 11.12.04

other regions of the world[102]. It significant that over half of the countries in Africa have ratified the ICCPR and that the majority of these are also party to the First Optional Protocol. This entails considerable potential for observance and respect for human rights on the continent.

Attempts are being made to enforcement of greater transparency and accountability in government operations and public access to parliaments is being expanded. But serious barriers to representative government remain, including low levels of institutional development. Most parliaments are notoriously deficient in equipment, technical capacities and skills. Financial resources are always very limited. It is hoped, however, that the Pan-African Parliament (PAP) which opened near Johannesburg on 16th September, 2004 will be a fearless champion that will give meaning to the maxim that people shall govern. During the grand opening, President Thabo Mbeki of South Africa said the eyes of all Africans were looking to PAP to see whether it would give birth to a humane Africa that had eluded it for a long time. He also said that PAP was for the renewal of the continent whose people did not need military rulers to determine their destiny[103].

It is also encouraging to see that a prototype United States of Africa is well underway. Soon, most of the fundamental governing pillars of such a state will be in place – an African Bank, an African military institution, an African Judiciary and

[102] Ibid.
[103] The Post, September 17, 2004.

all the relevant instruments to regulate and govern behaviour in the social and economic spheres. Although only time will tell whether or not the AU will be more effective than its predecessor, the OAU, it is noteworthy that the provisions of the Constitutive Act of the African Union, especially those concerning intervention, radically depart from those of the OAU Charter. The Constitutive Act of the AU contains a number of general provisions on collective security and these provisions envisage an interventionist organisation[104]. This will be good for African states that will not have to depend entirely on rapid response from outside the region. The perpetrators of genocide in Rwanda, for instance would have been deterred. Their regime was heavily dependent on aid. If donors had made it clear that aid would cease forever unless the genocide ceased immediately, the genocidares would have found it much harder to persuade the rest of the Hutus to go along with the plan. During the Genocide, requests from the French government, for instance, not to attack a hotel where many prominent Tutsis had sought sanctuary, brought immediate results. Sterner warnings might have had a calming effect[105]. Failing that, Western powers could have used force to end the ghastly killings. Romeo Dallire, a UN soldier on the spot, said it would have taken only about 5000 troops. Instead, the UN withdrew its tiny presence. No one even jammed the radio station that urged on the killers with slogans such as "the graves are not yet full"[106].

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[104] K. K indiki, 'The increasing Role of Intergovernmental Organisations in Issues of Regional Peace, Security and the Protection of Human Rights: Legal Aspects' Zambia Law Journal (2003) vol.35 p.94.
[105] Supra note 66
[106] Ibid.

Ten years on some lessons have been learnt. Rwanda's Tutsi dominated government, born of the rebel army that stopped the genocide, has learned never to trust the UN or any other foreign body, to protect its people. This is not to say that this regime is perfect. Far from that and in some circles, it has been described as a thinly disguised autocracy. Although the rest of the world has learned different lessons from its failures ten years ago, Africa is urged to learn a fundamental truth that it has the primary responsibility of ensuring that there is democracy, observance of human rights and respect for the rule of law on the continent. The grimmest lesson from 1994 is that men are capable of evil most people would consider "un imaginable". The manifest indifference of the US, both in terms of political rhetoric and even financial commitment calls for comment. One lesson is that the US will not come to the aid of an African state that is engulfed in situations of human rights violations, unless there are some political or economic interests from which it could possibly benefit.

The ominous echoes of Rwanda jolted the world into reconsidering how to prosecute mass killers. Adhoc international tribunals for Rwanda and the former Yugoslavia, though slow and costly, are gradually securing convictions. In its landmark decision of **Prosecutor v Jean Paul Akayesu**[107], the ICTR became the first court to define rape in International Humanitarian Law, and to find that rape, if committed with genocidal intent amounts to an act of genocide[108]. The Tribunal convicted Akayesu, a former *bourgemestre* of the Taba commune in

[107] ICTR 96- 41-1 Judgment No.2 of 1998
[108] Kindiki K., ' Contribution of the International Criminal Tribunal for Rwanda to the Development of International Humanitarian Law', Zambia Law Journal (2001) Vol. 33 p.41

Rwanda, under the ICTR's Statute which identifies rape as a crime against humanity. This pioneering opinion marks the first time an International Criminal Tribunal has tried and convicted an individual for genocide and international crimes of sexual violence[109].

The impetus to set up an International Criminal Court sprung partly from the world's shame over Rwanda. One would have thought that the US being the great champion of human rights that it holds itself out to be, would whole heartedly embrace the ICC. Alas, that was not to be as was amply discussed in the previous chapter. If this and other inconsistencies that have been discussed are not sufficient to jolt African leaders into realising the fatality of placing all their confidence in the notion that only the UN, donors and other big power will make this continent a better place as far as human rights and democracy are concerned, then this writer wonders what will.

[109] Ibid.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS.

This essay has attempted to demystify the myth that Americans consider human rights to be a defining feature of their national heritage. Although it has been said that in the almost 400 years since America was first settled, significant strides have been made towards ensuring that all Americans – and people the world over – enjoy those rights, it is submitted here that more often than not those strides have been actuated more by economic and political considerations than anything else. This is especially so with the contemporary leaders who, evidently, are not imbued with the values that inspired the founders of that great country. It might be argued that what is important is not the leadership, but the fact that there are institutions in place through which people might seek redress when aggrieved. This argument is flawed because it does not take into account the fact that really bad people can ignore the institutions at the exigencies of the moment. If this were not so, the issue of parallel systems of trying suspects such as those being held at Guantanamo Bay by the US, would not be taxing the whole world today. It is no wonder that some analysts have gone as far as saying that America is least qualified in the world to judge what happens in other countries. Such analysts charge that 'they talk the talk, but do not walk the walk' in reference to the inconsistencies that the US displays in some of its affairs.

It has been the fervent hope of people, amidst all these double standards, that the United Nations would stop the US and other similar minded 'super powers' from bullying the world. It is a notorious fact that the UN has not acquitted itself too well in this respect. The requirement, in the Security Council, of the affirmative vote of nine members "including the concurring votes of the permanent members" results in the power of any permanent member to prevent by its sole vote the taking of a decision which has the support of a majority of the Council, i.e. of nine members. This power, the power of veto, has been the instrument whereby much of the efficacy of the Council has been destroyed and the permanent members have not hesitated to use the veto when they felt their vital interests were at stake[110]

This leads us to another question – where do these double standards and failure by the UN to do anything about these inconsistencies leave the African countries in their quest for a democratic order? The case for democracy and human rights is hardly one that should need to be argued, and yet again and again we have to appeal to the world to think of these issues not just to a few but to the underprivileged countries. In every epoch, there comes a time when people must take the destiny of their lives into their on hands. In the final analysis African leaders must realise the enormity of the responsibilities that are thrust upon them to make this continent a more democratic place where good governance, respect

[110] Bowett D.W., 'The Law of International Institutions', 4th ed. Sydney, Sweet and Maxwell (1982) p.31

for human rights and the rule of law will be the norms rather than exceptions. This is vital if posterity is not to judge the 21st century leaders harshly.

5.1 INTERCONNECTEDNESS OF DEMOCRACY, RULE OF LAW AND HUMAN RIGHTS.

That there is an inextricable link between democracy, rule of law and human rights may not seem obvious at a cursory glance. Careful thought, however, reveals that nations with democratic institutions are more likely to respect human rights than those where democratic institutions are nascent or absent. It has been said therefore that a pro- democracy policy is a pro human rights policy. Democracy is more than just a system of government. It is also an ideal, an appeal to our common humanity. It contains an implicit notion of the common man, to a natural equality of worth that takes precedence over hierarchies of rank and wealth. It is clear therefore, that any nation that wishes to achieve maximum goodness for its citizens must espouse these three distinct though kindred conceptions.

5.2 WHITHER THE UN.

There is no doubt that faith in the UN has been seriously shaken given its not too impressive performance in the recent past. Will the normative system that restored peace and security after the second world war be seen by future

and goodwill. The importance of this can not be overemphasised as failure to do so will lead to the emasculation of the world system. We surely need a UN that reflects the world we live in today and can meet the challenges we will face tomorrow.

By way of postscript, the major conclusions may be summarised as follows:

- The US' concern for good governance, respect for the Rule of Law and Human rights is mostly motivated by economic and political concerns.
- Human rights are not a Western concept. There are some very basic standards of behaviour violations of which are simply unacceptable.
- There is no prototype for democracy, yet for the entire world, there must be democracy.
- There is an inextricable link between the three distinct but kindred conceptions of democracy, rule of law and human rights.
- Faith and confidence in the UN system have been seriously shaken.

Arising from the above, it is recommended that:

- African leaders of the Twenty-First Century establish democratic institutions where these do not exist and strengthen those in existence to ensure good governance and respect for the rule of law and human rights.
- A meaningful reform of the principal organs of the UN is undertaken as a matter of urgency.

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