Abstract

The failure of the post-apartheid government to deliver on some of the promises of the South African Bill of Rights, coupled with the appropriation of the Bill of Rights by the international human rights movement, create the impression that the Bill of Rights is a neo-liberal instrument which is irrelevant to the needs of South Africans and the realities of their circumstances. If the people of South Africa are convinced that the Bill of Rights embraces a Western agenda more than it expresses their collective aspirations, it will lose its legitimacy. While acknowledging that the conception of the Bill of Rights is contested between the international human rights movement and some South Africans, this article shows that the Bill of Rights was neither adopted nor borrowed from the international human rights movement. South Africans did not assimilate the International Bill of Rights but conceived their own Bill of Rights in the early decades of the 20th Century. The conception of the South African Bill of Rights was a response to colonialism and apartheid and was not a consequence of tutelage by the international human rights movement.

Keywords

International human rights movement; International Bill of Rights; human rights discourse; Bill of Rights; South Africa.
1 Introduction

The international human rights movement views the South African Bill of Rights as one of its most remarkable achievements. The desire of the international human rights movement to claim credit for progress in human rights in South Africa is not surprising, considering the strides made by the state in the protection, respect and promotion of human rights since the abolition of apartheid. The appropriation of the beautiful South African human rights story by the international human rights movement is motivated by four main reasons. First, the drafters of the South African Constitution borrowed from the text of the International Bill of Rights. Second, the drafters of the International Bill of Rights conceived the global human rights movement. The second reason clouds (and potentially distorts) scholarly understanding of the genesis of the South African human rights movement, particularly given the Western view that "human rights norms [are] antibiotics that must be administered to the sick, in this case the global South, even if they are unwilling to cooperate." Third, President Mandela signed the current South African Constitution on the anniversary of the adoption of the Universal Declaration of Human Rights (the UDHR) and thus inadvertently created the impression that South Africa adopted its Bill of Rights.

1 Mutua 1997 Harv Hum Rts J 63-64. For a definition of the international human rights movement, see Neier International Human Rights Movement 2 and Mutua 2001 Harv Int'l LJ 201.
3 Roberts Contentious History of the International Bill of Rights 2-3 argues that the International Bill of Rights is composed of the Universal Declaration of Human Rights (1948) (the UDHR hereinafter), the International Covenant on Civil and Political Rights (1966) (the ICCPR hereinafter), and the International Covenant on Economic, Social and Cultural Rights (1966) (the ICESCR hereinafter). Notably, the drafters of the South African Constitution drew some wisdom from the texts of the constitutions of liberal Western states such as Canada, Germany and the United States of America – see Davis 2003 ICON 187.
4 Mutua "Transformation of Africa" 906.
5 Mutua "Transformation of Africa" 911 (emphasis added) attributes the statement to Kenneth Roth, formerly the executive director of Human Rights Watch.
Rights pursuant to the efforts of the international human rights movement. Fourth, some scholars ascribe the adoption of the Constitution and its Bill of Rights to globalisation, legal transplants of the 20th Century, and the "third wave of democratisation".

There is a need to set the record straight on the genesis of the South African Bill of Rights. The failure of the post-apartheid state to deliver on some of the most important promises of the Bill of Rights, coupled with the appropriation of the Bill of Rights by the international human rights movement, creates the impression that the Bill of Rights is Eurocentric and irrelevant to the needs of South Africans. If the people of South Africa are convinced that the Bill of Rights embraces a Western agenda more than it expresses their collective aspirations, then the Bill of Rights might as well lose its legitimacy, since often political and social realities, not formal legal criteria, validate the legitimacy of governments and legal systems.

This article is structured as follows. The first section after this introduction contextualises the global human rights movement through the lenses of leading scholars on human rights discourse. The section briefly analyses the conception and birth of the International Bill of Rights from the UDHR in 1948 to show that South Africans were, to the least extent possible, unintended and accidental beneficiaries of the International Bill of Rights. The section examines the conditions that spurred the conception of the South African human rights movement before the adoption of the UDHR and demonstrates that a South African human rights movement existed before the UDHR. The third section focusses on two principal instruments adopted by the African National Congress (the ANC) – the vanguard of the liberation movement in South Africa - namely, the African Bill of Rights (1923) and the African's Claims in South Africa (1943). The two documents are essential to the discussion as they illustrate South African aspirations for a Bill of Rights before the adoption of the UDHR, the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social, Religious and Cultural Rights (the ICESCR).

The fourth section analyses the local human rights movement after the adoption of the UDHR and covers the Defiance Campaign Against Unjust

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7 See Klug Constituting Democracy 1-2; Venter 2010 SAJHR 45-65; Fombad "Evolution of Modern African Constitutions" 13.
8 See Ngcukaitobi The Land is Ours 1-2.
9 See Greenberg et al "Introduction" xix.
Laws (1952), the Freedom Charter (1955) and the Guidelines for a Democratic South Africa (1989). The section also illustrates that despite the momentum of the international human rights movement in the last half of the 20th Century, South Africans continued to charter the path for a Bill of Rights independent of the global human rights movement. The fifth section focusses on the formal adoption of the Bill of Rights in both the transitional and final Constitutions to show the influence of the International Bill of Rights at that stage. The fifth section also illustrates the application of the International Bill of Rights under the South African Constitution.

2 The global human rights movement in the South African context

This section discusses the birth of the international human rights movement in the context of South African realities to reiterate the view expressed by Mutua that the global human rights movement was conceived as a response to the atrocities of Europeans against Europeans, not as a means for the end of colonialism, which subjugated Africans to brutal colonial regimes. In the context of this work, the human rights movement refers "to that collection of norms, processes, and institutions that traces its immediate ancestry to the Universal Declaration of Human Rights." The international human rights movement encompasses persons and organisations that contributed to the commitment of the United Nations to adopt the rights embodied in the principal instruments which comprise the International Bill of Rights, namely the UDHR, the ICCPR and the ICESCR. The Charter of the United Nations, adopted at the end of World War II, did not specify the universal human rights to which it alluded. Hence, the United Nations adopted the UDHR to catalogue inherent human rights. However, the UDHR was a mere declaration ratified by the General Assembly of the United Nations but not signed by member states. As such, the UDHR is

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10 The transitional Constitution was the *Constitution of the Republic of South Africa Act* 200 of 1993.
11 See Mutua 1997 *Harv Hum Rts J* 63 on the birth of the international human rights movement as a response to "the abominations of World War II". Jayawickrama *Judicial Application of Human Rights Law* 24 also argues that the terrors of German Nazis and the birth of the United Nations in the middle of the 20th Century prompted the birth of international human rights law.
12 Mutua 2001 *Harv Int'l LJ*. Given scholarly consensus that the international human rights commenced at the end of World War II, the argument by Neier *International Human Rights Movement* 3 that the Soweto riots of 1976 in South Africa contributed to the birth of the international human rights movement cannot be sustained.
not an international treaty *per se*.\(^\text{17}\) Notwithstanding, the UDHR is binding under customary international law.\(^\text{18}\) Presently, the UDHR is the gold standard for the protection of human rights.\(^\text{19}\) The UDHR is the cornerstone of international human rights law and an embodiment of the global spirit for the universality of moral standards for human dignity and other inalienable rights.\(^\text{20}\)

Whereas the drafting of the UDHR commenced in 1947,\(^\text{21}\) the adoption of the UDHR in 1948 coincided with the formal adoption of apartheid in South Africa.\(^\text{22}\) Apartheid was a policy of the National Party which codified racial discrimination and repression, under-development and the brutal exploitation of Africans for the benefit of whites in South Africa.\(^\text{23}\) Apartheid “formalise[d] and systematise[d], with often vindictive cruelty, existing racial subordination, humiliation and exclusion.”\(^\text{24}\) South Africa’s adoption of apartheid in the same year as the UDHR illustrates that the UDHR had nothing to do with calls for the amelioration of the conditions of peoples living under colonial rule.\(^\text{25}\) South Africa refused to participate in the ratification of the UDHR since the UDHR contrasts with everything which apartheid represented.

Nonetheless, the adoption of the UDHR was insignificant for Africans in South Africa. Africans had no representation in the adoption of the UDHR.\(^\text{26}\) Their plight under a brutal regime was neither mentioned nor condemned in the text of the UDHR. The omission to incorporate the liberation of Africans living under colonial regimes in the UDHR implies that the drafters did not intend to address colonial subjugation and that they did not consider decolonisation an issue of sufficient international concern to warrant inclusion in such an important instrument.\(^\text{27}\)

\(^{17}\) Jayawickrama *Judicial Application of Human Rights Law* 29.


\(^{19}\) Roberts *Contentious History of the International Bill of Rights* 1.

\(^{20}\) Roberts *Contentious History of the International Bill of Rights* 264, 266.

\(^{21}\) Leher *Dignity and Human Rights* 21.


\(^{23}\) The literature on the racially discriminative and exploitative nature of apartheid is vast. See, for instance (in general), Clark and Worger *South Africa*.

\(^{24}\) Hinds 1985 *Crime and Social Justice* 5.

\(^{25}\) According to Heyns and Viljoen 2001 *Hum Rts Q* 483, the assessment of the success or failure of international human rights instruments should be evaluated on their impact on human in the domestic environment.

\(^{26}\) *Ruta v Minister of Home Affairs* 2019 3 BCLR 383 (CC) para 25.

\(^{27}\) See Mutua 2001 *Harv Intl LJ* 211 for a full analysis.
On face value, it is ironic that the UDHR, which proclaims that "[a]ll humans are born free and equal in dignity and rights,"\(^{28}\) and that "[e]veryone is entitled to all the rights and freedoms",\(^{29}\) does not contain a single sentence on the liberation of subjugated peoples. The omission leaves one wondering whether terms such as "all humans" and "everyone" in the UDHR could have been intended to include Africans at all. It appears that South Africans were incidental, accidental and unintended beneficiaries of the UDHR – supposing that one assumes that the UDHR had any immediate benefits for Africans. Given that the drafters of the UDHR were the founders of the international human rights movement,\(^{30}\) it is conceivable that the human rights movement did not intend the International Bill of Rights to benefit South Africans and other Africans. The ICCPR and the ICESCR, the two instruments which reinforce the nonbinding UDHR,\(^{31}\) should also be understood in the context in which world powers adopted the UDHR.\(^{32}\)

3 The conception of the local human rights movement in South Africa

This section discusses the genesis of the local human rights movement in South Africa to show that contrary to the claims of the international human rights movement, South Africans who lived under colonial rule conceived human rights with the formation of the South African Native National Congress (now the ANC) in 1912.\(^{33}\) The section proves that the South African human rights movement was born for two purposes – liberation from colonial rule and the attainment of a democratic system of government based on the free will of the governed. The context in which the formation of the ANC conceived South African human rights is critical to the proper understanding of the roots of the Bill of Rights, particularly given that the history of South Africa is punctuated with colonisation and apartheid.

The arrival of Jan van Riebeek and his crew on the shores of modern-day Cape Town in 1652 marked the beginning of colonial encroachment on South Africa. Feuds between Dutch and British settlers led to the formation of two independent Boer Republics in the Orange Free State and the Transvaal. In both republics, "colonisation remained wedded to brutal

\(^{28}\) Article 1 of the UDHR.

\(^{29}\) Article 2 of the UDHR.

\(^{30}\) Mutua "Transformation of Africa" 906.

\(^{31}\) Roberts Contentious History of the International Bill of Rights 2.

\(^{32}\) See Jayawickrama Judicial Application of Human Rights Law 44 on the conception of the ICCPR and the ICESCR in 1952.

\(^{33}\) For the reader’s convenience, this article uses "ANC" to refer to the liberation movement in its formative years when it was the South African Native National Congress and when it began formally pronouncing itself as the ANC.
exploitation of the conquered population.\textsuperscript{34} The establishment of the Union of South Africa in 1910 cemented the exploitation of Africans by whites, leading African lawyers under the ANC to demand a Bill of Rights.\textsuperscript{35} It is disheartening that whereas there is ample literature on gross colonial and apartheid violations in South Africa,\textsuperscript{36} contemporary legal and historical accounts of pre-1994 give scant attention to the role played by African intellectuals in South Africa’s long journey to constitutional democracy.\textsuperscript{37} Scholarly neglect of the contributions of Africans to the liberation struggle undermines efforts towards an understanding and appreciation of the role of the local human rights movement towards constitutionalism in South Africa.\textsuperscript{38} Sachs J relates the scholarly neglect to the machinations of the apartheid regime as follows:

Apartheid had distorted [the contribution of Africans towards freedom], subordinating each and every action to its racist context, suppressing all that was noble and highlighting all that was ugly. The ideals of democracy and freedom are presented as white ideals, the assumption being that blacks are only interested in a full stomach, not in questions of freedom. Daily life refutes this notion. It is the anti-apartheid struggle that has kept democracy alive in South Africa.\textsuperscript{39}

Africans formed the ANC in 1912 to defend their rights and to liberate themselves from a colonial government which relegated them to "hewers of wood and drawers of water".\textsuperscript{40} African lawyers committed to constitutionalism and reiterated their fidelity to the law even in the face of the most institutionally exploitative political, economic and social environment. The resistance of Africans against apartheid was thus a struggle for liberation, for the rule of law, for justice and for the attainment of authentic and inclusive democracy. African lawyers believed that "injustice could only be fought with justice, illegality with legality and colonialism with constitutionalism."\textsuperscript{41} Whereas several African organisations contributed to the end of apartheid and the adoption of the current

\begin{itemize}
\item \textsuperscript{34} Meierhenrich \textit{Legacies of Law} 89. The irony is not lost that in the middle of the 19\textsuperscript{th} Century, the drafters of the \textit{Orange Free State Constitution}, 1854 copied whole sections from the \textit{Constitution of the United States of America}, 1787 not because they admired liberal democracy but "as an attempt to legitimise the boer settlers' preferences for slavery and oppressive race discrimination laws" - Loveland \textit{By Due Process of Law}? 49.
\item \textsuperscript{35} Asmal, Chidester and Lubisi \textit{Legacy of Freedom} 47-51.
\item \textsuperscript{36} Some of the principal works are Clark and Worger \textit{South Africa}; Dyzenhaus \textit{Judging the Judges}; Dugard \textit{Human Rights and the South African Legal Order} and Madala 2000 \textit{NC J Intl L & Com Reg} 743-765.
\item \textsuperscript{37} Ngcukaitobi \textit{The Land is Ours} 5.
\item \textsuperscript{38} See Fowkes \textit{Building the Constitution} 3.
\item \textsuperscript{39} Sachs \textit{We, the People} 25.
\item \textsuperscript{40} See Venter 2010 \textit{SAJHR} 47.
\item \textsuperscript{41} Ngcukaitobi \textit{The Land is Ours} 74.
\end{itemize}
constitutional order, the ANC emerged as the most potent. However, the
ANC struggled to be "the big tent in which the diverse opposition elements
could rally towards a collective end." In this article, the account of the
efforts of Africans against the apartheid system mostly focusses on the work
of the ANC. The analysis does not intend (and should not be understood)

to glorify the ANC or recognise its work as being more important than that
of other organisations.

It is also essential to highlight that although the struggle against apartheid
was a struggle of Africans against a white system of government, some
whites contributed to the struggle and sacrificed as much, if not more, than
many Africans. Venter points out that in the academia, Professors Ben
Beinart, John Dugard and Johan van Vyver (among others) contributed to
the human rights discourse in the 1960s and 1970s. Mutua also
recognises the contribution of whites and the cooperation of whites
and Africans in the fight against apartheid but cynically questions the
overemphasis on the contribution of whites (the do-gooders) to the liberation
struggle. Mutua's cynicism should be understood within the context that
some whites saw the approach of the end of apartheid and strategically
positioned themselves for a new South Africa. Mutua gives the example of
Arthur Chaskalson, whom President Mandela appointed as the first Judge
President of the Constitutional Court.

Another suitable example for Mutua's argument would be Richard
Goldstone. In the biography The Trials of Richard Goldstone, Terris presents
Goldstone J as an apartheid judge whose foresight enabled him
to change gears with such alacrity as to secure a seat on the first bench of
the Constitutional Court. Like many judicial officers who served the
apartheid regime, Goldstone J contributed to the validation and legitimation
of unjust laws and government actions through judicial decisions. Notwithstanding, the genuine intentions and contributions of people like
Sachs J to the fight against apartheid cannot be questioned. Sachs J fled to
exile and lost his hand and eye in a targeted bombing by apartheid forces.

Notwithstanding contestations on the contributions of Africans and whites to

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42 Issacharoff Fragile Democracies 168.
43 Venter 2010 SAJHR 50-51.
45 Terris Trials of Richard Goldstone (see generally).
46 For a discussion of judicial complicity in human rights violations under apartheid, see
47 For a full account of Justice Sachs' contribution to the struggle against the apartheid
regime, see (in general) Sachs We, the People.
the adoption of the Bill of Rights, the formation of the ANC marked the birth of a local human rights movement in South Africa. The ANC was composed of African intellectuals who opposed the colonial system and advocated the liberation of Africans and respect for human rights. As such, the ANC was both a liberation movement and a human rights movement. In 1923 an ANC conference in Bloemfontein adopted the African Bill of Rights.48 The central themes in the African Bill of Rights were the demand for land, freedom, the equality of all citizens before the law, and justice.49 Although the colonial administration treated Africans as subhuman and therefore felt justified in denying them access to justice and the freedoms which it accorded to whites, the ANC never adopted a resolution to exclude whites from the enjoyment of the rights which it advocated for Africans.50 In its eyes, all South Africans were equal (and continue to be), regardless of their gender, race and origin. The 1923 African Bill of Rights called for the representation of Africans in the legislature and agitated for no taxation of Africans without representation in Parliament.51

Two decades after the adoption of the African Bill of Rights, African intellectuals drew another Bill of Rights, contained in a document entitled the "African's Claims in South Africa", which was adopted by the ANC on 16 December 1943.52 The African's Claims emanated from deliberations on the accommodation of Africans in the post-World War II era.53 The document was a response to the Atlantic Charter, a precursor to the Charter of the United Nations and the UDHR. Hence, the African's Claims is also known as the Atlantic Charter from the African's Point of View.54 The ANC intended to present the African's Claims at a peace conference which would follow World War II.55 The African's Claims originated from the idea that the eradication of threats to humanity, peace and racial goodwill required a universal application of the Atlantic Charter. At the heart of the African's Claims lay the demand for universal adult suffrage and the end of racial discrimination.56 The expansive Bill of Rights in the African's Claims included the rights to full citizenship, equality in the courts, justice, representation in all forms of governance, freedom of trade and occupation,
equality in the workplace, adequate medical and health facilities, and non-discrimination in all spheres of South African life.\textsuperscript{57}

In the current South African Constitution, the founding provisions express the resolutions of the African's Claims.\textsuperscript{58} Therefore, it is clear that the ANC committed to the founding constitutional values four decades before the adoption of the transitional Constitution. Although the Preamble and section 1 of the current Constitution do not mention the African's Claims, they are an acknowledgement and expression of its values for constitutionalism and human rights.\textsuperscript{59} However, the 1923 and 1943 Bill of Rights did not yield fruits for the ANC. The atrocities of World War II firmly gripped the West, leading to the adoption of the Charter of the United Nations, the UDHR, the ICCPR and the ICESCR.

4 The South African human rights movement after the adoption of the UDHR

This section discusses the local human rights movement after the adoption of the UDHR to show that the momentum for liberation and human rights in South Africa continued independently from international events which followed World War II. The section seeks to prove that despite the adoption of the UDHR, South Africans continued to charter a human rights course without the influence of the international human rights movement. In 1952 it was clear to the ANC that peaceful overtures to the government and proposals for constitutional change would not achieve the desired outcomes for freedom, justice and democratic representation for Africans. The government had enacted more repressive laws against Africans.\textsuperscript{60} Instead of using "petitions, deputations, meetings and polite persuasions [to bring about the repeal of discriminatory and unjust laws, it was necessary to shift to] mass actions, boycotts and strikes."\textsuperscript{61} Before embarking on the Defiance Campaign Against Unjust Laws, the ANC gave the government an ultimatum to repeal the repressive laws by 6 April 1952. The office of the Prime Minister responded to the ultimatum and questioned the audacity and fraudulent attempt by the ANC to speak on behalf of Africans. The

\textsuperscript{57} For a discussion of the content of the 1943 Bill of Rights, see Nthai 1998 Consultus 143 and Ngcukaitobi The Land is Ours 6. Also see Benson African Patriots 117.

\textsuperscript{58} Ngcukaitobi The Land is Ours 1.

\textsuperscript{59} For a further discussion of the significance of the African's Claims for modern constitutionalism, see Sachs We, the People 12-13.

\textsuperscript{60} Some of the statutes were the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952; Group Areas Act 41 of 1950; Suppression of Communism Act 44 of 1950; Separate Representation of Voters Act 46 of 1951 and the Bantu Authorities Act 68 of 1951.

\textsuperscript{61} Cameron Justice 29-30.
government also threatened to unleash violence, despite the commitment of the ANC to conduct a peaceful campaign. The Defiance Campaign was a testimony that if a people cannot bring their government to account through peaceful and democratic processes, they are likely to resort to radical measures. In contemporary times, the relevance of the Defiance Campaign to the discourse on constitutionalism and human rights is found in some of its defining features, particularly the unifying struggle chants Afrika and Mayibuye.

The apartheid government responded to the Defiance Campaign with force and detentions. Mandela, then a young lawyer, led the Defiance and was subsequently arrested and convicted under section 11(b) of the Suppression of Communism Act, which criminalised all acts committed to bring social and political change. Although the statute was disguised as a pushback against the spread of communism, it was mostly intended to suppress activities of Africans against unjust and suppressive legislation. When the Law Society moved an application in the Supreme Court to strike Mandela off the roll of attorneys because of his conviction on criminal charges, the court was not convinced and argued that Mandela’s actions in leading the Defiance were driven by a desire to serve Africans and to bring about the repeal of unjust apartheid laws. The court held that Mandela’s conduct was not dishonest, and neither were his actions disgraceful, nor dishonourable, to warrant removal from the roll of attorneys. However, the Defiance Campaign did not yield tangible results for the ANC. Hence, in 1955 the ANC adopted the Freedom Charter as a vision for the realisation of the aims of the Defiance Campaign.

A Congress of the People adopted the Freedom Charter in Kliptown. The conception of the Freedom Charter was momentous for Africans and their struggle towards a free and just society. The Preamble to the Freedom

62 Benson African Patriots 175-176.
63 See the analysis by Mogoeng CJ in United Democratic Movement v Speaker of the National Assembly 2017 8 BCLR 1061 (CC) para 7. For an account of struggle songs during the Defiance Campaign, see SAHO 2017 http://www.sahistory.org.za/topic/defiance-campaign-1952. Struggle songs often evoke emotions and spark litigation in contemporary South Africa. For some of the cases, see Afri-Forum v Malema 2011 4 All SA 293 (EqC) and Duncanmec (Pty) Ltd v Gaylard 2018 11 BCLR 1335 (CC).
64 Suppression of Communism Act 44 of 1950.
65 Incorporated Law Society, Transvaal v Mandela 1954 3 SA 102 (T) 108D-E.
66 Davis 2003 ICON 181-195.
67 Ngcukaitobi The Land is Ours 6.
Charter starts with the declaration "We, the People of South Africa", as an indication of the representative and inclusiveness of the delegates who adopted it. It goes further to declare "that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief." The Freedom Charter contains ten sections conceived on the ideals of a just and free South Africa which recognises the equality of everyone before the law. The Freedom Charter also gives practical relevance, within the context of oppression and unjust laws, to the ideals of democracy, human rights and freedoms. Perhaps the most critical provision in the Freedom Charter is that "The People shall govern". The Freedom Charter was a recognition of the illegitimacy of the apartheid regime and the need to establish a constitutional democracy.

The Freedom Charter was a vision of a South Africa designed in many ways to be the opposite of that of the apartheid regime. Although framed in quasi-political language, the Freedom Charter contains provisions of a contemporary Bill of Rights. The ideals of the Freedom Charter lived throughout the reign of the apartheid regime and find expression in the Constitutional Guidelines for a Democratic South Africa. Today, the Preamble to the Constitution and the founding provisions restate core aspects of the Freedom Charter, such as "South Africa belongs to all who live in it, black and white." The founding provisions in section 1 of the Constitution (freedom, equality, human dignity and political rights) espouse all the ideals of the Freedom Charter. However, the apartheid regime and its supporters viewed the Freedom Charter as a socialist expression and an anti-capitalist instrument. These negative interpretations were motivated by the reality that under apartheid the en masse oppression of Africans was entangled with capitalist exploitation.

The commitments to constitutionalism previously expressed in the African’s Claims found their way into the Constitutional Guidelines for a Democratic South Africa, adopted by the ANC in 1989. The ANC believed that racial domination and inequality perpetrated over the previous centuries had to be

69 See the commentary by Sachs We, the People 21.
70 Corder and Davis 1989 SALJ 634-635.
71 Davis 2003 ICON 183.
overcome with corrective action grounded in constitutional law.\textsuperscript{75} The Constitutional Guidelines committed the ANC to constitutional limitations on the exercise of public power.\textsuperscript{76} Admittedly, the liberation movement also understood the need for a written and supreme constitution to regulate the exercise of power in an orderly, organised and predictable manner. The ANC also appreciated constitutionalism as an essential guarantee for the exercise of public power in a democratic state which holds the government accountable and protects rights through an independent judiciary.\textsuperscript{77}

The adoption of the Constitutional Guidelines affirmed to the international community that the ANC and its members were human rights proponents and constitutionalists. The document cast doubt on the apartheid narrative that the liberation movement was no more than a group of power-hungry communist thugs.\textsuperscript{78} Notably, the Constitutional Guidelines was the brainchild of ANC President Oliver Tambo. As Sachs J observes, the Constitution contains the DNA of Oliver Tambo, to whom constitutionalism was important for the constitution-making process and his vision to secure the rights of all the people of South Africa.\textsuperscript{79} His aim was “to convert the Freedom Charter into an operational document and become the cornerstone of our country’s new constitutional order.”\textsuperscript{80} What made it more critical for Tambo to push for the protection and entrenchment of human rights, among other limitations on government authority, was his status as an exile. Banned from his country, Tambo had no abstract concept of the need to protect human rights. His situation was painfully real.\textsuperscript{81}

5 The birth of the South African Bill of Rights

Although the analyses in the preceding sections of this article show that South Africans conceived the local human rights movement independently of and without the influence of the global human rights movement, this section recognises and discusses the (limited) contribution of the international human rights movement to the birth of the Bill of Rights. The aim of this section is to illustrate that whereas South Africans conceived and gestated the Bill of Rights without the involvement of the international

\textsuperscript{75} Ngcukaitobi \textit{The Land is Ours} 6.
\textsuperscript{76} Davis 2003 \textit{ICON} 183.
\textsuperscript{77} Corder and Davis 1989 \textit{SALJ} 633-634.
\textsuperscript{78} Sachs \textit{We, the People} 10.
\textsuperscript{79} Sachs \textit{We, the People} 11-12.
\textsuperscript{80} Sachs \textit{We, the People} 13.
\textsuperscript{81} In addition to the Freedom Charter and the Constitutional Guidelines, the ANC had the benefit of the Harare Declaration, adopted in 1989, as a template to guide it in the negotiations and constitution-drafting processes - see Venter 2010 \textit{SAJHR} 48 for a discussion. The Harare Declaration is beyond the scope of this work.
human rights movement, the global human rights movement contributed to
the birth of the Bill of Rights. If one uses a metaphor which depicts the Bill
of Rights as a child, South Africans are the parents of the child, whereas the
international human rights movement could be taken for the midwife who
facilitates the birth of the child. No matter how immense her role, a midwife
has no legal basis for claiming maternity of the child.

The analysis in this section begins with the observation that despite initial
indifference at colonialism and apartheid, the United Nations condemned
apartheid. Between 1952 and 1990 the General Assembly of the United
Nations criticised apartheid for conflicting with articles 55 and 56 of the
Charter of the United Nations.\(^8^2\) In 1973 the United Nations criminalised
apartheid with the International Convention on the Suppression and
Punishment of the Crime of Apartheid (the Apartheid Convention).\(^8^3\) The
Convention classified apartheid as a crime against humanity and was a
stinging rebuke of the discriminatory racial policy in South Africa.\(^8^4\) The
atrocities of the apartheid regime prompted the international community to
monitor the situation in South Africa. The Soweto Uprising of 1976, in which
apartheid forces gunned down youths, attracted international condemnation
and sanctions.\(^8^5\)

At the end of the 1980s the apartheid regime accepted that the cost of
maintaining apartheid was unsustainable.\(^8^6\) The regime faced serious
domestic and global challenges to its legitimacy.\(^8^7\) The international
community was in solidarity with Africans and had suspended and expelled
South Africa from all international bodies.\(^8^8\) Economic sanctions and an
arms embargo imposed by the United Nations Security Council had caused
high inflation and ballooned the sovereign debt until the country was on the
verge of bankruptcy. Economic and political challenges left the government
with no choice but to lean towards negotiation with its exiled political
opponents. Hence, in 1987 the regime began secret negotiations with the
ANC and other political groups. The collapse of the Soviet Union and the
fall of the Iron Curtain catalysed the process of internal engagement in
South Africa. For the ANC, the collapse of the Soviet Union ended a

\(^8^3\) International Convention on the Suppression and Punishment of the Crime of
Apartheid (1973) (the Apartheid Convention).
\(^8^4\) Article 1 of the Apartheid Convention.
\(^8^5\) See Neier International Human Rights Movement 16.
\(^8^6\) Gibson and Gouws Overcoming Intolerance in South Africa 16; Van der Schyff Judicial
Review of Legislation 39.
\(^8^7\) Van der Schyff Judicial Review of Legislation 39. See also Cornell Law and Revolution
in South Africa 1; Gibson and Gouws Overcoming Intolerance in South Africa 17.
\(^8^8\) Moseneke My Own Liberator 233, 258.
relationship with a valuable ally. For the apartheid regime, the collapse of the Soviet Union took away the "last remaining international card ... of the Western anticommunist alliance." 89

At the beginning of the last decade of the 20th Century, the apartheid regime unbanned its political opponents to create a political climate conducive to engagement. It also commenced formal negotiations at the Convention for a Democratic South Africa (CODESA). 90 However, the CODESA negotiations collapsed, with the result that another negotiation process, the Multi-Party Negotiation Process (MPNP), was established. In the middle of 1993 the negotiating parties announced that they had reached consensus on the first inclusive elections and that they had agreed on a two-stage transition to constitutional democracy. 91 The parties agreed that the Constitutional Assembly, 92 composed of members of a democratically elected legislature, would draft a Constitution based on pre-agreed principles espoused in Schedule 4 of the transitional Constitution. 93 In addition to commitments to a diverse, united, equal and free South Africa, the negotiating parties agreed that there should be a supreme, written Constitution in which all South Africans enjoyed universal rights and freedoms protected in international law. 94 It is in these commitments that one appreciates the birth of the Bill of Rights at the MPNP. Whereas African intellectuals conceived the African Bill of Rights many decades earlier, the negotiation process gave birth to a justiciable Bill of Rights. 95

However, not all South African scholars agree on the genesis of the local human rights movement. Venter argues that the adoption of liberal constitutionalism (which introduced an entrenched and justiciable Bill of Rights) was an "unintended consequence" because none of the negotiating parties were "'natural' proponents of late 20th-century constitutionalism". 96 Venter argues that:

The ANC did have a documentary record of propounding human rights in its campaigns to mobilise international support for its cause, but in the preceding

89 Issacharoff Fragile Democracies 167.
90 For a discussion of the prearrangements for the formal negotiations, see Issacharoff Fragile Democracies 167.
91 For a full discussion of the negotiations and the transition phase, see Klug "Public Participation and the Death Penalty" 259-264.
92 Section 68(1) of the transitional Constitution created the Constitutional Assembly, composed of the National Assembly and the Senate sitting jointly for the purpose of constitution-making.
93 Section 71 of the transitional Constitution.
94 Cameron Justice 79.
95 Cameron Justice 180.
96 Venter 2010 SAJHR 49.
97 Venter 2010 SAJHR 49-50.
decades it was supported materially and doctrinally by the governments with
the poorest human rights records of the time. Under the influence of the Soviet
c bloc and the enthusiastic promotion of socialism within the ANC by the South
African Communist Party, much of the thinking in the organisation favoured a
centralised state, the redistribution of wealth and a people's revolution. … On
the other side of the table the government was one operating within the
tradition of a constitutional framework entrenched in the bedrock of
parliamentary sovereignty, in principle hostile to the notion of an enforceable
Bill of Rights and with a recent record of suppressing fundamental freedoms
and autocratic utilisation of legislation and executive fiat for the purposes of
achieving political goals.

Venter's argument shows that the ANC was in a catch-22 situation. It could
seek and receive support from communist regimes with poor human rights
records and risk soiling its image as a liberation movement committed to
liberal democracy, or it could try (with guaranteed futility) to obtain military,
financial, logistical and other support from Western liberal states which
brought colonisation to Africa. With no resources, the ANC was bound to
accept aid from any state, even if doing so meant seeking and accepting
help from some of the alleged worst human rights violators such as the
Soviet Union. Ironically, the drafters of the UDHR, who started the
international human rights movement, did not provide support to the South
African liberation movement. The irony is not lost that the Western human
rights movement wants to take credit for a Bill of Rights brought about partly
through the support of communist regimes with ugly human rights records
when it did not itself give support to the liberation movement.

The apartheid regime was notorious for "codified repression" and the
brutal violations of human rights. However, it is not surprising that it
pushed for the adoption of an entrenched and justiciable Bill of Rights
backed by the Constitutional Court, since

Threatened political elites, eager to preserve their current status beyond future
majoritarian elections, press for the constitutionalization of rights (as they
understand them) to preserve their policy preferences: 'judicial empowerment
through the constitutionalization of rights and the establishment of judicial
review may provide an efficient institutional means by which political elites can
insulate their increasingly challenged policy preferences against popular
pressure, especially when majoritarian decision-making procedures are not
operating to their advantage.'

Therefore, one can argue that the apartheid regime supported the adoption
of a Bill of Rights for its own ends, not for the broader concerns of all South
Africans. Notwithstanding different perspectives on the correct source and
motives of the local human rights movement, the International Bill of Rights

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98 See Moseneke My Own Liberator 209.
99 Venter 2010 SAJHR 50.
had some influence (albeit limited) on the text of the South African Bill of Rights. Whereas it is not the intention of this article to juxtapose the wording and substantive content of the South African Bill of Rights with that of the International Bill of Rights, one example illustrates the influence of one on the wording of the other. There is a correlation between the founding provisions of the UDHR and the South African Bill of Rights. Both are founded on the inherence of human dignity and equality. Whereas the Preamble to the UDHR recognises the inherence of human dignity and equality, the South African Bill of Rights is a cornerstone of democracy founded inter alia on human dignity.101 The similarity in the texts of some parts of the UDHR and the Bill of Rights shows that the drafting process of the latter was influenced by the language of the former.

The Bill of Rights protects all the rights in the UDHR, the ICCPR and the ICESCR. The human rights jurisprudence developed by the courts in South Africa is firmly anchored in international human rights law, although there are fewer than expected cases in which the courts have alluded to the instruments which comprise the International Bill of Rights.102 Despite the seemingly limited judicial appetite to invoke the International Bill of Rights in judgments, courts have a constitutional obligation to consider international law and foreign law when interpreting the Bill of Rights.103 Section 323 of the Constitution further binds South Africa to customary international law, which includes the International Bill of Rights.104 The provision illustrates the tremendous influence of the global human rights movement on the drafting of the Bill of Rights in South Africa.

6 Conclusion

Whereas the efforts of the international human rights movement were seminal in the development of international human rights law, as espoused in the International Bill of Rights, their influence in colonial and apartheid South Africa was insignificant. African intellectuals conceived the local human rights movement for a democratic South Africa independently from,

101 Section 7(1) of the Constitution.

102 See, for instance, Claasen v Minister of Justice and Constitutional Development 2010 2 SACR 451 (WCC) paras 16, 24, 36 and 37; S v Dodo 2001 5 BCLR 423 (CC) paras 46-47; South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services 2017 4 All SA 234 (GJ) para 45; Ruta v Minister of Home Affairs 2019 3 BCLR 383 (CC) paras 25-26; Rahube v Rahube 2019 1 BCLR 125 (CC) para 1.

103 Section 39(1) of the Constitution.

104 See Jayawickrama Judicial Application of Human Rights Law 6 on the UDHR as a binding aspect of customary international law. Also see article 38 of the Statute of the International Court of Justice (1946) on the sources of international law.
and before, the adoption of the UDHR. Consequently, the South African Bill of Rights is not a product of adoption of, assimilation of or borrowing from the International Bill of Rights. South Africans own the Bill of Rights. The fact that the international human rights movement played a role in the drafting of the Bill of Rights does not distract from the reality that South Africans conceptualised a human rights approach to colonisation.

In this work, the focus is on the work of the ANC because the liberation movement dominated the apartheid struggle and presently governs South Africa. The ANC opposed exploitative and illegitimate colonial and apartheid systems by actively pushing for the overhaul of the political and economic system to insulate the people of South Africa from state abuse and to protect rights. The ANC adopted the first Bill of Rights in 1923 and the African’s Claims in South Africa in 1943 as antidotes for colonisation and apartheid. After the adoption of the UDHR and its sister instruments, the South African human rights movement gained momentum without the influence of the global human rights movement. The Defiance Campaign Against Unjust Laws (1952), the Freedom Charter (1955) and the Constitutional Guidelines for a Democratic South Africa (1989) illustrate the independent and unique growth of the South African human rights movement. The documents highlight the contribution of Africans to a human rights culture and reiterate that human rights are not an alien concept to the people of South Africa.

Although Africans conceived the notion of local human rights in South Africa, they were not alone after the first half of the 20th Century. Some whites contributed immensely to the struggle for liberation and human rights, some more than others, albeit with different intentions at different times. Given the contribution of both Africans and whites to the struggle against apartheid, South Africans are collectively responsible for the adoption of the Bill of Rights in its present state, regardless of their satisfaction or lack thereof with it. Whether or not the Bill of Rights is adequate for the correction of the injustices of colonialism and apartheid is a question which should be addressed from the premise that contrary to the claims of the international human rights movement, the Bill of Rights is a product of the collective efforts of progressive South Africans. Conclusively, the South African Bill of Rights was neither adopted nor borrowed from the International Bill of Rights.
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List of Abbreviations

ANC African National Congress
CODESA Convention for a Democratic South Africa
Harv Hum Rts J Harvard Human Rights Journal
Harv Int’l LJ Harvard International Law Journal
Hum Rts Q Human Rights Quarterly
ICCPR International Covenant on Civil and Political Rights
ICESRC International Covenant on Economic, Social, Religious and Cultural Rights
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<th>Description</th>
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<tbody>
<tr>
<td>ICON</td>
<td>International Journal of Constitutional Law</td>
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<tr>
<td>MPNP</td>
<td>Multi-Party Negotiation Process</td>
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