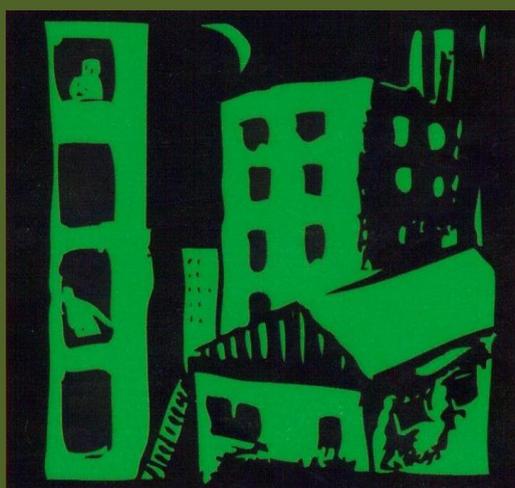


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Towards a human rights-based approach to trade and investment in Africa in the context of globalisation¹

JOHN CANTIUS MUBANGIZI

Professor, Deputy Vice-Chancellor and Head of the College of Law and Management Studies, University of KwaZulu-Natal, South Africa

1 INTRODUCTION

Much has been said and written about the benefits of globalisation, and its positive contribution to economic growth and development worldwide. Critics, however, disagree, and rather argue that globalisation has led to the impoverishment and devastation of many countries, particularly in Africa and other Third World regions. The debate in fact goes on and on – it is a never-ending polemic. But whilst the jury is still out on the advantages and disadvantages of globalisation, there is

¹ The original version of this paper was presented at the International Conference on International Trade and Investment, hosted by the University of Mauritius in Collaboration with WTO Chairs Programme, Le Meridien Hotel, Mauritius 19-21 December 2011.

no doubting the various impacts that globalisation has had, and continues to have, on human rights in Africa - particularly in recent decades. The knock-on socio-economic effects of the recent global financial crisis on Africa, are a good example.

After discussing the concepts of human rights and globalisation, this paper explores the implications of globalisation in Africa, in the specific context of trade and investment. In so doing, there is a focus on the relationships between globalisation, human rights and trade and investment in Africa - taking into account Africa's many unique and peculiar challenges. These challenges include poverty, disease (notably HIV/AIDS), cultural traditions, gender issues, low levels of education, and political and civil strife. An attempt is made to promote an understanding of the dynamics and the inextricable and complex interplay between globalisation, human rights, and trade and investment in Africa. The ultimate aim is to promote the notion that economic factors - particularly relating to international trade relations and the activities of large national and transnational corporations - should not supplant the benefits derived from the protection and promotion of human rights in various international human rights' instruments. And in the particular African context, a suitable balance between globalisation, human rights and trade and investment is called for. Fundamental to this balance is a human rights-based approach towards trade and investment and, it is concluded, if the balance is right, human rights can be good for trade and investment and vice-versa.

2 GLOBALISATION AND HUMAN RIGHTS

Any meaningful discussion of the relationship between globalisation and human rights first requires a clear understanding of the two concepts, as there is far from universal agreement on the definitions of those concepts. Indeed, globalisation is usually defined in different ways, depending on the context within which the definition is required. Most definitions tend to relate to an economic context, as globalisation is largely considered to be an economic phenomenon. Hence globalisation has been defined, for example, as "a process of integrating economic decision-making ... a process of creating a global market place in which, increasingly, all nations are forced to participate."² It has also been defined as "the integration of economies throughout the world through trade, financial flows, the exchange of technology and information, and the movement of people."³

It must be emphasised, however, that because globalisation is a complex process, it should be seen and understood "as an all-encompassing concept that has political,

² Kwanashie M "The Concept and Process of Globalization" quoted in N.S. Okogbule, "Globalization, Economic Sovereignty and African Development: From Principles to Realities", (2008) 25(1) *Journal of Third World Studies* 215.

³ Ouattara A D "The challenges of globalization for Africa", available at: <http://www.imf.org/external/np/speeches/1997/052197.htm> (accessed 14 November 2011).

economic, social and institutional dimensions.”⁴ In that broad sense, the definition offered by Apolo Nsibambi is that globalisation is:

“a process of advancement and increase in interaction among the world’s countries and peoples facilitated by progressive technological changes in locomotion, communication, political and military power, knowledge and skills, as well as interfacing of cultural and value systems and practices.”⁵

Similarly, Armstrong Matiu Adejo has defined globalization as “an ever increasing integration of national economies into the global economy through trade and investment rules and privatization, aided by technological advances.”⁶ Ouattara’s and Adejo’s definitions are aptly aggregated in Glenda Litong’s description of globalisation, as follows:

“Globalization refers primarily to the progressive elimination of barriers to trade and investment and unprecedented international mobility of capital. It also refers to the rapidly improved communication systems, which have served to reduce distances between different countries and regions, bringing not only a greater exchange of goods and services but more exchanges between people and information from different countries.”⁷

As with globalisation, the definition of human rights has long been a controversial topic amongst scholars. Some define human rights from an idealistic and narrow perspective. Charles Humana, for example, defines human rights as “laws and practices that have evolved over the centuries to protect ordinary people, minorities, groups, and races from oppressive rules and governments.”⁸ This narrow definition obviously fails to take into account those persons who do not fall into the mentioned categories. Similarly, Alyson Brysk’s definition of human rights as a set of universal claims to safeguard human dignity from illegitimate coercion, is equally narrow.⁹ Liberal thinkers, on the other hand, conceptualise human rights as those rights which individuals possess by virtue of being human. According to James Griffin for example, human rights are those rights that humans have “simply in virtue of being human.”¹⁰ In this general sense, human rights are understood as rights which belong to an individual as a consequence of being a human being, and for no other reason.¹¹ Jack Domelly conceptualises this view in the following terms:

⁴ Edoho F M “Overview: Africa in the Age of Globalization and the New World Order” in Edoho (Ed.) *Globalization and the New World Order: Promises, Problems and Prospects for Africa in the Twenty-First Century* (1997) 3.

⁵ Nsibambi A “The effects of globalization on the state in Africa: Harnessing the benefits and minimizing the costs”, Panel discussion on globalisation and the state, United Nations General Assembly, Second Committee, 2 November 2001.

⁶ Adejo A M “The Roots of Globalization: A Historical Review” (2001) 1(1) *Journal of Globalization and International Studies* 4.

⁷ Litong G T “Making a case for human rights in the context of globalization or vice versa?” available at <http://www.aprnet.org/downloadable-resources?func=fileinfo&id=50> (accessed 16 November 2011).

⁸ See Ambrose B O *Democratization and the protection of human rights in Africa* (1995) at 29.

⁹ Brysk A (ed), *Globalization and human rights* (2002).

¹⁰ See Gardener J “‘Simply in virtue of being human’: the whos and whys of human rights” (2008) 2(2) *Journal of ethics and social philosophy* 1.

¹¹ See Ambrose (note 8 above) at 29.

“Human rights are the rights that one has simply as a human being. As such they are equal rights, because we are all equal human beings. They are also inalienable rights because no matter how inhumanely we act or are treated, we cannot become other than human beings.”¹²

It is this view that has been adopted by the United Nations, and which describes human rights as those rights which are inherent in our nature, and without which we cannot live as human beings. For the purposes of the discussion in this paper, the “liberal” definition of human rights espoused by Griffin and Donnelly, among others, is preferable.

As will be seen later, the international human rights regime is composed of the regional and global systems for the protection of human rights. The fact that these systems and the idea of human rights originated from the West is not debatable. It is a plain, historical fact. What can be debated, though, is the extent to which human rights have become an integral part of the process of globalisation, and how Western countries have increasingly used their views of human rights in dealing with developing countries. In that regard, the main contradiction between globalisation and human rights, is the question as to whether globalisation enhances or inhibits the realisation of human rights - particularly in the African context.

In attempting an answer to this question, Apolo Nsibambi’s broad definition of globalisation - mentioned earlier - should be kept in mind.¹³ If, in terms of that conception, globalisation is seen as “a process of advancement ... facilitated by progressive technological changes ...”, one would assume then that globalisation would bring prosperity to all corners of the globe, and with it would come democracy, freedom and human rights. That unfortunately is not the case; in fact the opposite is true. With globalisation, the world is experiencing unprecedented levels of conflict, accompanied by gross violations of human rights. Africa is home to many of these conflicts, with human rights abuses often at the centre of such conflicts.

One of the effects of globalisation, is that it has turned the world into a global market for goods and services produced and supplied by the powerful transnational corporations and countries of the West. These entities are mainly driven by the maximisation of profit, and the underlying capitalist agenda. It can therefore be argued that while there is no doubt about the Western origin of the concept of human rights, there is also no doubt that the West will go all out to support the violation of the same human rights, if such violation is deemed to be in the best interests of its global capitalist agenda.¹⁴ Moreover, Western countries are increasingly using their view of human rights as a yardstick to judge developing countries, with respect to trade

¹² See Donnelly J, “Human Rights, Democracy and Development” (1999) 21(3) *Human Rights Quarterly* 612.

¹³ See Nsibambi (note 5 above).

¹⁴ See Mazrui A M “Globalism and some linguistic dimensions of human rights in Africa” in Asefa T, Rugumamu S M & Ahmed A G M *Globalization, Democracy and Development in Africa: Challenges and Prospects* (2001) 55.

relations and extending development assistance.¹⁵ As a result, “globalization intensifies impoverishment by increasing poverty, insecurity, fragmentation of society and this violates human rights and human dignity of millions of people.”¹⁶ In the African context, a clear example of this is Zimbabwe.

An important contradiction between globalisation and human rights is illustrated by the highly political nature of the relationship between the two. There are some who argue that globalisation can have only negative social, political and economic effects. As such, globalisation undermines human rights. This, according to Rhoda Howard-Hassman, is because people “are more likely to enjoy their human rights if they live in a locally, rather than globally-controlled environment.”¹⁷ In the African context, this perhaps explains the untold suffering and gross violation of human rights associated with immigration, and human trafficking - both of which are rampant on the continent. It also explains why the worst forms of human rights abuses in Africa were occasioned by slave trade, colonisation and apartheid, all of which were a consequence of human movement into or out of Africa.

Critics of globalisation see it as a threat to human rights. They argue that “local decision-making and democratic participation are undermined when multinational companies ... set national economic and social policies”, and that “accumulations of power and wealth in the hands of these multinational companies increases unemployment, poverty and marginalization of vulnerable groups.”¹⁸ Moreover, it is further argued that the protectionist policies of Western countries and organisations, have the inevitable effect of threatening economic, social and cultural rights of people in developing countries. The example usually given is that of the so-called Structural Adjustment Programmes (SAPs), usually imposed by the World Bank and the International Monetary Fund (IMF) on developing countries, to ensure debt repayment and economic restructuring. Although SAPs have essentially been replaced by the so-called Poverty Reduction Strategy Papers (PRSPs), the threat to the enjoyment of socio-economic rights still remains as (just as the SAPs) these PRSPs usually lead to a reduction in public spending on things like health, education and development. This is particularly the case in African countries, which are fraught with several other challenges and the implications of globalisation - an aspect which is now discussed.

3 GLOBALISATION AND SPECIFIC AFRICAN CHALLENGES

At the outset, it must be acknowledged that Africa faces numerous unique and peculiar challenges. These - to name a few - range from poverty to internal and regional conflicts; HIV/AIDS and other diseases such as malaria and tuberculosis; unemployment;

¹⁵ See Chunakara M G “Globalisation and its impact on human rights”, available at: <http://www.religion-online.org/showchapter.asp?title=1559&c=1398> (accessed 15 November 2011).

¹⁶ Ibid.

¹⁷ See Howard-Hassman R E “The second great transformation: Human rights leapfrogging in the era of globalization” 2005 (27) *Human Rights Quarterly* 16.

¹⁸ See Shelton D “Protecting human rights in a globalized world” 2002 (25) *Boston College International and Comparative Law Review* 294.

corruption; poor governance; mismanagement in the public and private sectors; and low levels of education. While some will argue that globalisation is the vehicle through which these challenges may be alleviated and addressed, it is submitted that globalisation sometimes worsens and aggravates these challenges instead.

Take poverty, for example. It has been argued that “globalization has become a threat to the poor rather than an opportunity for global action to eradicate poverty.”¹⁹ This argument is premised in the reality that the economic and trade policies espoused and introduced by globalisation have led to an increase in the debt burden of many African countries - thereby limiting their ability to provide for their people. It is also premised in the exploitation of African resources by developed countries, due to inequities in power relations, and trading and economic relations, and the inequalities in global economic structures. As a result, poor (African) countries are getting poorer, in an increasingly globalised economic system.

In so far as the problems of conflict in Africa are concerned, there is no doubt that globalisation has played and continues to play a central role in such conflicts. As mentioned earlier, globalisation is not only an economic phenomenon. It involves a lot more than that. As opined by Apolo Nsibambi, it includes several other things, such as “the domination by some super-powers through military coercive means and the impositions that go with it. It involves internationalization of conflicts that would otherwise remain local.”²⁰ The involvement of North Atlantic Treaty Organization (NATO) forces in the Libyan conflict that led to the removal of Colonel Gaddafi from power in late 2011, is a case in point. There are numerous other, older examples.

It is wrong and even dangerous to blame all Africa’s problems on globalisation. It is a reality, however, that most of these problems are exacerbated by globalisation. Take HIV/AIDS for example. While it is unfair to say that HIV/AIDS is a disease of globalisation, the fact of the matter is that the spread of such epidemics is facilitated by the tools of globalisation such as travel, immigration and trade.²¹ Moreover, research has shown that there is a strong link between HIV/AIDS and poverty.²² If, as mentioned earlier, globalisation raises poverty levels, “then it must be considered a contributing factor to the HIV/AIDS epidemic in Africa.”²³ Poverty fuels the HIV/AIDS epidemic in various ways. Poor people are unable to access health services, including treatment; they have no access to HIV/AIDS prevention services and information; and their living conditions and lack of proper nutrition increase their risks of exposure to HIV/AIDS and other infections. It must also be mentioned that the health care system and services in

¹⁹ See Akindele S T, Gidado T O and Oloopo O R “Globalization, its implications and consequences for Africa”, available at: <http://www.postcolonialweb.org/africa/akindele1b.html> (accessed 16 November 2011).

²⁰ See Nsibambi (note 5 above).

²¹ See Patterson A S “The new globalization and HIV/AIDS in Africa” in Kieh G K *Africa and the New Globalization* (2008) 155.

²² See, for example, Tladi L S “Poverty and HIV/AIDS in South Africa: An Empirical Contribution (2006) 3(1) *Journal of Social Aspects of HIV/AIDS* 369-381.

²³ See Stone M “Globalization and HIV/AIDS policies in Africa”, A Concept Paper, AID Transparency, Regional Think Tank on HIV/AIDS, August 2002.

poor countries are inadequate, insufficient and ill-equipped to deal with the HIV/AIDS epidemic, and other diseases such as malaria and tuberculosis. This further underlines the interface between poverty, HIV/AIDS and globalisation.

Unemployment is another specific African challenge that can be closely linked to globalisation. Technological developments, which are a feature of globalisation, have led to innovation and widespread automation. Although the automation boom has brought new jobs into the information technology (IT) sector, it has led to massive losses of jobs in other economic sectors. A good example is the loss of jobs in the travel and banking industries, where customers now use online travel booking and internet banking, instead of obtaining such services from travel agents and bank personnel.

Corruption and poor governance are two other serious endemic challenges that are widespread in Africa. I have argued elsewhere that corruption and poor governance undermine the potential benefits of globalisation.²⁴ They increase the risks and costs of trade and investment, and this deters investors and business people. While there is no clear evidence to suggest that increasing globalisation has a direct correlation with corruption and poor governance, there is no doubt that corruption and poor governance in Africa have become more widespread over the last twenty years. Moreover, the interconnectedness and interdependence brought about by globalisation, have led to the faster “exportation” and ‘importation’ of corruption between different parts of the African continent and beyond. This is also exacerbated by the growth in information and communication technology and social networking, brought about by globalisation.

4 GLOBALISATION AND TRADE AND INVESTMENT

The United Nations Ministerial Conference of the Least Developed Countries, held in Istanbul in July 2007, acknowledged that “trade can be a powerful source of economic growth”, and that “international trade can expand markets, facilitate competition and disseminate knowledge which can catalyze economic growth and human development.”²⁵ A year later, the United Nations Conference on Trade and Development (UNCTAD) analysed some of the emerging trade and investment opportunities and challenges - for developing countries in particular - in the context of rapid globalisation.²⁶

UNCTAD acknowledged the dramatic expansion of international trade flows and the value of trade over the past three decades. A number of factors were identified as having played a key role in the recent expansion of trade and investment. These

²⁴ See Mubangizi J C “Democracy and development in the Age of Globalization: Tensions and contradictions in the context of specific African challenges” (2010) 14(2) *Law, Democracy and Development* (available at <http://www.ddd.org.za>).

²⁵ UNDP “Globalization and the Least Developed Countries: Issues in Trade and Investment”, United Nations Ministerial Conference of the Least Developed Countries: Making globalization work for the LDCs, Istanbul, 9-11 July 2007.

²⁶ UNCTAD “Globalization for Development: The International Trade Perspective”, available at: http://www.unctad.org/en/docs/ditc20071_en.pdf (accessed 23 November 2011).

included, among other things, the liberalisation of tariffs and other trade barriers, and the increase in foreign direct investment through trade negotiations and agreements.²⁷

The primary engine that drives international trade in the context of globalisation is trade liberalisation. In that regard, globalisation requires and ensures that trade among states should be subjected to minimal restrictions, and that countries should open their markets for the exchange of goods and services. According to one commentator “a key assumption underlying the trade liberalization drive is that once markets are free from trade restrictions, factors of production will be directed by the unrestricted forces of demand and supply, leading to efficient investment by producers.”²⁸

Due to trade liberalisation and other trade reform measures, the overall trade performance of developing countries has been relatively impressive over the last three decades. Between 1995 and 2005, for example, the share of developing countries in world trade increased threefold - to a staggering US\$3.7 trillion.²⁹ Led by Asian countries such as China, developing countries have also significantly increased their presence in developed economies since the 1980s.³⁰ However, despite this trend, and despite the best efforts to open borders to world trade and to attract foreign investments, economic growth in African countries has generally lagged behind other developing regions, and the continent remains less integrated in the world economy. This poor performance seems to have worsened after the 2008/2009 global recession. For example, Africa’s overall trade declined in 2009, with the continent’s contribution to world trade dipping to 3% compared to Asia’s 29%.³¹

There are several reasons for Africa’s poor performance on the global trade scene. Although trade liberalisation is now widely accepted in Africa, it “has been constrained, in part, by structural distortions that have raised transactions costs for economic agents and impeded effective resource allocation and globalization.”³² Moreover, apart from the fact that trade reform is generally a complex process, trade liberalisation in Africa has been confronted with different circumstances and challenges.

Firstly, for trade liberalisation to function as an engine of growth, complementary actions in other macroeconomic areas have to take place. Trade liberalisation can therefore only be enhanced if it is preceded by reforms in the exchange system, price controls and privatisation of state trading, amongst other things.³³ Secondly, trade liberalisation is likely to succeed if it is undertaken with boldness and vigour, rather than with hesitance and uncertainty. Thirdly, for trade liberalisation to have any

²⁷ Ibid vii.

²⁸ Mubiru E “The effects of globalization on trade – A special focus on rural farmers in Uganda”, available at: www.globalempowerment.org/PolicyAdvocacy/...5.../Edward.pdf (accessed 23 November 2011).

²⁹ See UNCTAD (note 26 above) at 16.

³⁰ Ibid.

³¹ See “Globalization and Monetary Policy Institute 2010 Annual Report: Africa - Missing globalization rewards”, available at: <http://dallasfed.org/institute/annual/2010/annual10d.cfm> (accessed 25 November 2011).

³² See Iqbal Z & Khan M S “Trade Reforms and Regional Integration – An overview” in Iqbal Z & Khan M S (eds), *Trade Reform and Regional Integration in Africa* (1998) 4.

³³ See Mussa M “Trade liberalization” in Iqbal & Khan (eds) (1998) at 25.

meaningful impact, other macroeconomic fundamentals ought to be in place. This requires prudent macroeconomic policies, and fiscal stability. Competitive exchange rates are also an important requirement. Unfortunately the economic and political situations in many African states, do not lend themselves to any easy resolutions to the above challenges. As a result, the economic and political situation in Africa has limited the continent's ability to benefit from trade liberalisation, and other impacts of globalisation associated with it.

The challenges to trade liberalisation in Africa have to be seen in the context of the global multilateral trading system. This is the system that has been formed as a result of the global trade relations, with the bulk of world trade being governed by the World Trade Organization (WTO) agreements. Because these agreements are based on the principle of a single undertaking, all members of the WTO are obliged to be party to all the agreements.³⁴ This has had the effect of reducing the extent of domestic policy space, within which African countries can operate.

In so far as investment is concerned, there is no doubt that globalisation has played as much of a key role, as it has done with trade. Over the last three decades, Africa's trade increase was accompanied by a rise in foreign direct investment (FDI), which is also an important element of economic integration.³⁵ FDI in Africa has been characterised by rapid expansion of multilateral companies from developed countries, operating on the continent - an important effect of globalisation.³⁶ Indeed, FDI is regarded "as an engine of growth as it provides much needed capital for investment, increases competition in the host country industries, and aids local firms to become more productive ..."³⁷

It should be noted that whereas the structure of FDI worldwide has generally shifted towards services, FDI in Africa is mainly aimed at the primary sector, which consists of such activities as agriculture, forestry, mining and oil extraction. As such, the challenges facing trade are also applicable here. In particular, macroeconomic policies, foreign exchange systems and price controls, are quite significant. Falling commodity prices, for example, can reduce profits and lead to the curtailment of FDI - which is why there was a significant FDI drop in 2009 (much the same as with overall trade performance), as a result of the 2008/2009 global recession. According to UNCTAD, the significance of FDI to African economics (as measured by the ration of FDI to the region's gross fixed capital formation) dipped to 19 percent in 2009, from 27 percent in 2006.³⁸

It should also be noted that the benefits of FDI across Africa are rather limited, because the FDI that flows into the continent is concentrated in a few countries, which

³⁴ See UNCTAD (note 26 above) at 2.

³⁵ See Mubiri (note 28 above).

³⁶ *Ibid* at 4.

³⁷ See Ajayi S I "The determinants of Foreign Direct Investment in Africa: A survey of the evidence" in Ajayi S I (ed) *Foreign Direct Investment in Sub-Saharan Africa: Origins, Targets, Impacts and Potential* (2006) 11-12.

³⁸ See Globalization and Monetary Policy Institute 2010 Annual Report (note 31 above) at 6.

traditionally include Angola, Egypt, Nigeria and South Africa.³⁹ This is mainly due to the nature of activities usually targeted by FDI. The existence of extensive oil and mineral reserves in the aforementioned countries, verifies that fact.

There are several other factors that determine which African countries will benefit most from FDI. Due to globalisation, FDI will flow more easily towards low-cost areas of production. In a globalised and liberalised environment, investors are likely to move their investment and production capital to countries where labour is cheap. This is because profit plays an important role in foreign investment, much as it does in international trade. Indeed, profit compliments the regulatory function of pricing in international trade, and is one of the factors that attracts FDI to any particular country. Other factors include the size of the market, the availability of good infrastructure, the availability of natural resources, and economic and political stability.⁴⁰

One factor that is of crucial importance, is the institutional environment of a particular country. FDI is likely to be more easily attracted to a country that has a strong institutional framework, that can deal effectively with corruption, bribery and embezzlement. The existence of acceptable and adequate levels of bureaucracy, and fiscal and financial incentives, can also attract FDI and promote investment, as does the existence of a functional and independent judiciary and the rule of law. This latter factor is crucial, as international trade and FDI have far-reaching legal implications to their existence, functions and relations. In particular, there are important underlying human rights implications and linkages, an aspect which is now discussed.

5 HUMAN RIGHTS, TRADE AND INVESTMENT

There is an unavoidable link between international trade, foreign direct investment, and the enjoyment of human rights. To begin with, the protection of human rights in a particular country, or lack thereof, has a significant bearing on the attractiveness of that country for FDI. Some argue that human rights repression can make a country more attractive to FDI, because such a country is able to reduce risk and uncertainty for FDI by repressing opposition and uprisings, by keeping labour costs low, and by providing favourable treatment to investors.⁴¹ On the other hand, there are those who contend that respect for human rights encourages FDI, because it can directly reduce risk by enhancing political stability and predictability, and can create an environment conducive to the development of human capital, and also encourage a more open, well-trained, and economically efficient society.⁴²

Whichever way you look at it, the ultimate goal of free trade and foreign investment is economic growth and development. Economic growth resulting from free trade and foreign investment can increase the resources available for the protection and

³⁹ See Ajayi (note 37 above).

⁴⁰ Ibid.

⁴¹ See Blanton S L & Blanton R G "What Attracts Foreign Investors and Foreign Direct Investment?" (2007) 69(1) *The Journal of Politics* 144.

⁴² Ibid.

realisation of human rights. It is within that context that the Universal Declaration of Human Rights (UDHR) provides for the right to an adequate standard of living,⁴³ a right that is further elaborated in Article 11 of the International Covenant of Economic, Social and Cultural Rights (ICESCR).⁴⁴ It is therefore interesting to note that although the preamble to the WTO Agreement does not explicitly mention human rights, it refers to raising “standards of living” and the need for “sustainable development.”⁴⁵

It should also be noted that the United Nations Commission on Human Rights has shown increasing concern over the years about the relationship between trade, investment, and human rights in the context of globalisation.⁴⁶ In 1998, the United Nations Sub-Commission on Human Rights, for example, adopted a resolution on “human rights as the primary objective of trade, investment and financial policy”, and in 1999 the Sub-Commission adopted a resolution on trade liberalisation and its impact on human rights.⁴⁷ There are several other relevant resolutions and reports that have been adopted by other UN agencies, such as the UN High Commission for Human Rights.⁴⁸

The concerns raised by UN agencies regarding the impact of trade and investment on the protection of human rights, are quite understandable. There is no doubt, for example, that international trade and foreign investment have had a significant impact on environmental rights in Africa. The degradation of the environment caused by oil exploration in Nigeria and other parts of Africa, is a case in point. Another human rights issue on which trade and investment have a significant impact, is the right to health. Issues of access to health care and essential medicines immediately come to mind. The problems arising from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) regarding the realisation of the right to health in developing countries, have been well documented. The main concern in this regard has usually been the high drug prices resulting from patent protection, leading to limited access to drugs - an important component of the right to health.

The rights of specific groups of people have also increasingly come under the spotlight in the trade and investment context. These include the rights of workers, children’s rights, and women’s rights. In the context of workers’ rights, mention was earlier made of the loss of jobs resulting from automation and other technological developments. Stories of sweatshops and plantations, where workers are forced to work up to 80 hours a week in unsafe conditions and with minimal pay, are also not

⁴³Article 25(1) of the Universal Declaration of Human Rights (1948).

⁴⁴ Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966).

⁴⁵ See Preamble to the World Trade Agreement.

⁴⁶ The CHR has passed numerous resolutions on “Globalization and its impact on the full enjoyment of all human rights”, including Resolution 2002/28, Resolution 2003/23, Resolution 2004/24 and Resolution 2005/17.

⁴⁷Resolution 1999/30.

⁴⁸ See for example Resolutions on globalization and its impact on the full enjoyment of all human rights (A/RES/57/205), (A/RES/56/165), (E/CN.4/RES/2003/239 and (E/CN.4/RES/2002/28), Resolutions on human rights, trade and investment, (E/CN.4/Sub.2/RES/2002/11), Resolution on Liberalization of trade in services, and human rights, (E/CN.4/Sub.2/RES/2001/4), and Resolutions on Intellectual property and human rights, (E/CN.4/Sub.2/RES/2001/21), (E/CN.4/Sub.2/RES/2000/7), and (E/CN.4/Sub.2/RES/1999/30).

uncommon.⁴⁹ In so far as children's rights are concerned, the issue of child labour and exploitation is pertinent. And with regard to the implications of trade and investment on women's rights, many factors come into play, particularly in the African context. Such factors include women's limited access to resources, information, education and training. They also include widespread discrimination, usually occasioned by patriarchal attitudes and cultural beliefs, and leading to gender wage differentials and discrimination in the workplace.

From the foregoing discussion, it is clear that in order to realise the benefits of globalisation through trade and investment, respect for human rights is crucial. Trade and investment regimes cannot therefore be developed in isolation from human rights' regimes. Olivier De Schutter has suggested a number of techniques that may be explored to avoid the fragmentation that may be caused if trade and investment regimes are developed in isolation from human rights regimes.⁵⁰ These techniques include: a) the insertion of exception clauses or flexibilities into trade or investment agreements, b) conducting *ex ante* human rights impact assessments, c) the harmonisation of international agreements through interpretation, in accordance with evolving international law, and d) the insertion of sunset (or rendezvous) clauses into trade and investment agreements, "allowing such agreements to be revised if it appears that they conflict with the commitments of states towards fulfilling their human rights obligations."⁵¹ In addition a delicate balance between trade, investment and human rights has to be maintained. It is submitted that such a balance can be obtained through a human rights-based approach to trade and investment, the discussion of which concludes this paper.

6 A HUMAN RIGHTS-BASED APPROACH TO TRADE AND INVESTMENT IN AFRICA

After the Second World War, world leaders recognised that a commitment to the protection of human rights was essential to world peace. This commitment was embodied in the Charter of the United Nations, adopted at the conclusion of the UN Conference on International Organisation in June 1945. In an attempt to give substance to human rights and fundamental freedoms envisaged in the Charter, the Universal Declaration of Human Rights was adopted by the UN in 1948. And in 1966 two covenants were adopted by the UN General Assembly: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition to these general human rights' instruments, a number of declarations and conventions dealing with specific human rights issues have

⁴⁹ See Amnesty International "Human rights, trade and investment matters", available at: <http://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf> (accessed 28 November 2011).

⁵⁰ De Schutter O "The global food challenge: Towards a human rights approach to trade and investment policies", available at: <http://www.fian.org/resources/documents/others/the-global-food-challenge/pdf> (accessed 01 December 2011)

⁵¹ Ibid.

come into being under the auspices of the UN,⁵² or through continental regional arrangements.⁵³

As a result of the above framework, human rights have not only acquired the status of customary international law, but have also acquired a specific normative status. It is for this reason that the UN High Commissioner for Human Rights has described a rights-based approach to trade as “a conceptual framework for the processes of trade reform that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.”⁵⁴ What that means, is that any international treaty that conflicts with human rights norms, should be considered null and void. In the context of trade and investment, it means that where a conflict arises between the obligations imposed on a state under a trade or investment agreement, and obligations imposed under international human rights law, the latter should prevail. This approach is informed by two important considerations. The first is the “unavoidable link” between human rights and international trade agreements, as a result of which such agreements cannot escape scrutiny for their human rights impact and implications. The second is the primacy of human rights, as a result of which the promotion and protection of such rights “must be accepted as the fundamental framework for, and goal of, all multilateral and bilateral investment, trade and financial agreements.”⁵⁵ Accordingly, if such agreements exclude or ignore human rights’ principles and objectives, they will lose their fundamental claim to legitimacy.⁵⁶

In so far as the African continent is concerned, a human rights-based approach to trade and investment has to be seen in the context of the African Charter on Human and Peoples’ Rights⁵⁷, which is the primary instrument for the protection and promotion of human rights in Africa. As I have opined elsewhere, the African Charter is a unique instrument, and it differs considerably from the other regional/continental human rights’ conventions.⁵⁸ Firstly, not only does it provide for the traditional individual civil and political rights, but it also seeks to promote economic, social and cultural rights, and the so-called third generation rights. Secondly, it emphasises peoples’ rights. Although

⁵² Such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948); the International Convention on the Elimination of All Forms of Discrimination Against Women (1979); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Rights of the Child (1989); and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

⁵³ Such arrangements include the European System which revolves around the European Convention of Human Rights, and the American system which revolves around the African Charter on Human and Peoples’ Rights.

⁵⁴ See OHCHR “Globalization – trade and investment”, available at: <http://www.ohchr.org/EN/Issues/Globalization/Pages/GlobalizationIndex.aspx> (accessed 30 November 2011).

⁵⁵ See International NGO Committee on Human Rights in Trade & Investment Policy Statement: “Investment, trade and finance - The human rights framework: Focussing on the Multilateral Agreement on Investment (MAI)”, available at: <http://www.twinside.org.sg/title/ngocom-cn.htm> (accessed 30 November 2011).

⁵⁶ Ibid.

⁵⁷ OAU Doc. CAB/LEG/67/3 rev. 5, adopted 27 June 1981, entered into force 21 October 1986.

⁵⁸ See Mubangizi J C *The protection of human rights in South Africa: A legal and practical guide* (2004) 26-27.

there is no definition of “peoples’ rights” in the Charter, the concept could be interpreted as the collective rights of people as a group or a community, and hence the inclusion of the so-called third generation rights, which are by their nature collective rather than individual. Thirdly, unlike the European and American Conventions, the African Charter proclaims rights, as well as duties. Not only does an individual have “duties towards his family, society, the State and other legally recognized communities and the international community”,⁵⁹ the enjoyment of his or her rights is also limited by his duty to exercise them “with due regard to the rights of others, collective security, morality and common interest.”⁶⁰ Other duties include the individual’s duty not to discriminate against others,⁶¹ and the duty to “preserve and strengthen social and national solidarity, particularly when the latter is threatened.”⁶²

The distinctive features of the African Charter on Human and Peoples’ Rights, have implications for a human rights-based approach to trade and investment. The emphasis on socio-economic and cultural rights, and on the concept of peoples’ rights, promotes the idea of popular participation in the development of trade and investment policies. Such policies are more likely to take into account the needs of communities if there is consultation in the process of policy development. It also recognises the potential impact of trade and investment policies on the human rights of individuals and groups, particularly marginalised, vulnerable and disadvantaged communities - of which there is abundance across the African continent. Furthermore, by providing for rights and duties, the African Charter promotes accountability and non-discrimination. In terms of the former, accountability is indeed important in the process of trade liberalisation. And in terms of the latter, respecting the principle of non-discrimination does not only ensure that individuals and groups are protected against direct and indirect discrimination, but it also ensures that individuals and communities are not left out of trade and investment activities and benefits.

7 CONCLUSION

A human rights-based approach to trade and investment entails embracing a culture of human rights, and placing it at the centre of all trade and investment processes and outcomes. It entails constantly monitoring how trade and investment affect the enjoyment of human rights, and it entails placing the promotion and protection of human rights among the objectives of trade reform.⁶³ In so doing, the mechanisms through which a human rights-based approach to trade and investment could be adopted, as suggested by Olivier De Schutter, are worth pursuing.

⁵⁹ Article 27(1).

⁶⁰ Article 27(2).

⁶¹ Article 28.

⁶² Article 29(4).

⁶³ See OHCHR “Globalization - trade and investment”, available at: <http://www.ohchr.org/EN/Issues/Globalization/Pages/GlobalizationIndex.aspx> (accessed 01 December 2011).

In the unique African context, cognisance needs to be taken of the African Charter on Human and Peoples' Rights - which is the primary instrument for the protection and promotion of human rights in Africa. The African Charter is particularly relevant, given its emphasis of both socio-economic and cultural rights, and because it promotes the notion of popular participation in the development of trade and investment policies. The benefits of trade and investment, and indeed trade liberalisation, should not be extolled without consideration of the human rights protected and promoted by the African Charter.

Africa is faced with unique problems and challenges. Globalisation poses its own challenges, particularly with regard to its adverse effects on the protection of human rights in the context of trade and investment. Although the overall trade and DFI performance in Africa have risen considerably - largely as a result of globalisation - globalisation has also had a significantly adverse impact on the protection of human rights on the continent. Adopting a human rights-based approach towards trade and investment can go a long way towards mitigating the adverse effects of globalisation in Africa, and the resultant implications for trade and investment. If the balance between human rights and trade and investment is right, human rights can be good for trade and investment, and vice-versa.

BIBLIOGRAPHY

Adejo A M "The roots of globalization: A historical review" (2001) 1 (1) *Journal of Globalization and International Studies* 4

Ajayi S I "The determinants of Foreign Direct Investment in Africa: A survey of the evidence" in Ajayi S I (ed) *Foreign Direct Investment in Sub-Saharan Africa: Origins, targets, impacts and potential* Nairobi: African Economic Research Consortium (2006).

Akindele S T, Gidado T O and Oloopo O R "Globalization, its implications and consequences for Africa", at: <http://www.postcolonialweb.org/africa/akindele1b.html> (accessed 16 November 2011).

Ambrose B O *Democratization and the protection of human rights in Africa* London: Westport Publishers (1995).

Blanton S L & Blanton R G "What attracts foreign investors and Foreign Direct Investment?" (2007) 69 (1) *The Journal of Politics* 143

Brysk A (ed) *Globalization and human rights* Berkeley, CA:University of California Press (2002)

Chunakara M G "Globalisation and its impact on human rights", at: <http://www.religion-online.org/showchapter.asp?title=1559&c=1398> (accessed 15 November 2011).

De Schutter O “The global food challenge: Towards a human rights approach to trade and investment policies”, available at: <http://www.fian.org/resources/documents/others/the-global-food-challenge/pdf> (accessed 01 December 2011)

Donnelly J “Human rights, democracy and development” (1999) 21 (3) *Human Rights Quarterly* 608

Edoho F M “Overview: Africa in the Age of Globalization and the New World Order” in Edoho F M (ed) *Globalization and the New World Order: Promises, problems and prospects for Africa in the Twenty-First Century* Westport, CT: Praeger (1997).

Gardener J “‘Simply in virtue of being human’: the whos and whys of human rights” (2008) 2(2) *Journal of Ethics and social philosophy*.

Howard-Hassman R E “The second great transformation: Human rights leapfrogging in the Era of Globalization” 2005 (27) *Human Rights Quarterly* 1.

International NGO Committee on Human Rights in Trade & Investment Policy Statement: “Investment, trade and finance - The human rights framework: Focussing on the Multilateral Agreement on Investment (MAI)”, at: <http://www.twinside.org.sg/title/ngocom-cn.htm> (accessed 30 November 2011).

Iqbal Z & Khan M S “Trade reforms and regional integration - An overview” in Iqbal Z & Khan M S (eds) *Trade reform and regional integration in Africa* International Monetary Fund (1998).

Kwanashie M “The concept and process of globalization” quoted in Okogbule N S “Globalization, economic sovereignty and African development: From principles to realities” (2008) 25 (1) *Journal of Third World Studies* 215

Litong G T “Making a case for human rights in the context of globalization or vice versa?” at <http://www.aprnet.org/downloadable-resources?func=fileinfo&id=50> (accessed 16 November 2011).

Mazrui A M “Globalism and some linguistic dimensions of human rights in Africa” in Asefa T, Rugumamu S M & Ahmed A G M *Globalization, democracy and development in Africa: Challenges and prospects* Organisation for Social Science Research in Eastern and Southern Africa (2001).

Mubangizi J C “Democracy and development in the Age of Globalization: Tensions and contradictions in the context of specific African challenges” (2010) 14 (2) *Law, Democracy and Development* 188.

Mubangizi J C *The protection of human rights in South Africa: A legal and practical guide* Lansdowne: Juta (2004).

Mubiru E “The effects of globalization on trade – A special focus on rural farmers in Uganda”, at: www.globalempowerment.org/PolicyAdvocacy/...5.../Edward.pdf (accessed 23 November 2011).

Mussa M "Trade liberalization" in Iqbal Z & Khan M S (eds) *Trade reform and regional integration in Africa* International Monetary Fund (1998).

Nsibambi A "The effects of globalization on the state in Africa: Harnessing the benefits and minimizing the costs", Panel discussion on globalisation and the state, United Nations General Assembly, Second Committee, 2 November 2001.

OHCHR "Globalization – trade and investment", at: <http://www.ohchr.org/EN/Issues/Globalization/Pages/GlobalizationIndex.aspx> (accessed 30 November 2011).

Patterson A S "The new globalization and HIV/AIDS in Africa" in Kieh G K (ed) *Africa and the new globalization* Aldershot, England: Ashgate Publishing Ltd (2008).

Ouattara A D "The challenges of globalization for Africa" (1997) at <http://www.imf.org/external/np/speeches/1997/052197.htm> (accessed 14 November 2011)

Shelton D "Protecting human rights in a globalized world" (2002) 25 *Boston College International and Comparative Law Review* 273.

Stone M "Globalization and HIV/AIDS policies in Africa", (2002) A Concept Paper, AID Transparency, Regional Think Tank on HIV/AIDS, August 2002.

Tladi L S "Poverty and HIV/AIDS in South Africa: An empirical contribution" (2006) 3 (1) *Journal des Aspects Sociaux du VIH/SIDA* 369.

UNCTAD "Globalization for Development: The International Trade Perspective", at: http://www.unctad.org/en/docs/ditc20071_en.pdf (accessed 23 November 2011).

UNDP "Globalization and the Least Developed Countries: Issues in Trade and Investment", United Nations Ministerial Conference of the Least Developed Countries: Making globalization work for the LDCs, Istanbul, 9-11 July 2007.