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CONTENTS

| | |
|--|-----|
| The African Charter on Human and Peoples' Rights 1987–2000: An overview of its progress and problems <i>by Rachel Murray</i> | 1 |
| Africa's contribution to the development of international human rights and humanitarian law <i>by Frans Viljoen</i> | 18 |
| A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women <i>by Martin Semalulu Nsibirwa</i> | 40 |
| Prosecuting the perpetrators of the 1994 genocide in Rwanda: Its basis in international law and the implications for the protection of human rights in Africa <i>by Kithure Kindiki</i> | 64 |
| Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the <i>gacaca</i> tribunals <i>by Idi T Gaporayi</i> | 78 |
| The Special Court for Sierra Leone: Conceptual concerns and alternatives <i>by Abdul Tejan-Cole</i> | 107 |
| Emerging electoral trends in the light of recent African elections <i>by Morné van der Linde</i> | 127 |
| The protection and participation rights of the child soldier: An African and global perspective <i>by Christine Jesseman</i> | 140 |

The African Charter on Human and Peoples' Rights 1987–2000: An overview of its progress and problems

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1 Introduction

From the adoption in 1981 and coming into force in 1986 of the African Charter on Human and Peoples' Rights (African Charter),¹ this regional mechanism has been criticised for being ineffective, poorly funded, lacking impartiality and based on ambitious and unenforceable rights,² and even neglected in the mainstream debate on human rights law. Early writings on the Charter and the African Commission on Human and Peoples' Rights (Commission) questioned whether such an ambitious document could ever be implemented,³ and although it is clear that there are problems with the African human rights mechanism, as there are with all international and regional bodies, it has made some significant contributions to the development of international human rights law in its relatively short existence. This article seeks to consider the progress which has been made to implement the Charter over the last thirteen

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1 Reprinted in (1982) 21 *International Legal Materials* 58; C Heyns (ed) *Human Rights Law in Africa 1996* (1996) 7.

2 E Ankumah *The African Commission on Human and Peoples' Rights. Practices and Procedures* (1996) and R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) ch 2.

3 E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643–65.

years as well as raise some of the difficulties which will face the system in the future.

2 Positive contribution?

2.1 Interpretation of the Charter

The provisions of the African Charter were both criticised for their unrealistic and radical approach and praised for their progressive inclusion of civil and political, economic, social and cultural, peoples' rights and individual duties in one document.⁴

The eleven-member Commission created by the Charter⁵ has asserted a mandate not only to promote and protect human and peoples' rights through state reporting and communication procedures, but also to interpret the provisions of the Charter.⁶ For many years, apart from a few references to economic, social and cultural rights,⁷ the Commission seemed unwilling to focus on the more unusual aspects of the Charter.⁸ Most of its jurisprudence related to violations of articles 5, 6 and 7 of the Charter.⁹ The membership of the Commission did not create a dynamic organisation.¹⁰

Its reticence in interpreting the more unusual provisions of the Charter could be explained by the Commission's unease at developing rights where there was little other international concrete jurisprudence, thus attracting attention to itself. In addition, many of the interpretations of Charter provisions result from communications, many of which have been submitted by non-governmental organisations (NGOs). As no cases were submitted which related to the more unusual rights,¹¹ the Commission was arguably not given the opportunity to develop them.

4 n 2 above.

5 Art 31.

6 Art 45.

7 Guidelines on national periodic reports, Second Activity Report of the African Commission on Human and Peoples' Rights 1988–1989, ACHPR/RPT/2nd, Annex XII.

8 These aspects include the concepts of individual 'duties' (in eg arts 19–24 of the Charter) and 'peoples' (in eg arts 27–29 of the Charter).

9 These are the rights to be free from torture and inhuman or degrading treatment or punishment, freedom from arbitrary arrest and detention, and the right to fair trial, respectively.

10 See 3.1 below on concerns about the Commissioners' lack of independence.

11 An early decision on the Katangese people was submitted and the Commission made an important statement here in relation to peoples' right to self-determination; see Communication 75/92 *Katangese Peoples' Congress v Zaire*, Eighth Activity Report of the African Commission on Human and Peoples' Rights 1994–1995, ACHPR/RPT/8th, Annex VI.

Recent decisions, however, have indicated a willingness by both NGOs and the Commission to use these provisions of the Charter. In cases against Mauritania,¹² which alleged discrimination against the black Mauritanian population, the Commission used article 17 to argue for protection of language, stating:¹³

Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.¹⁴

In the same decision it also implied that article 23 and the right of a people to national and international peace and security could be used to protect the villages of black Mauritians against attacks,¹⁵ and that discrimination against black Mauritians was the domination of one people over another in violation of article 19.

It has also been more willing to tackle some of the controversial aspects of other rights. In a recent decision, for example, it held that Shari'a law should not be applied to non-Muslims and should also, in any event, comply with the provisions of international human rights law.¹⁶ It has also adopted decisions upholding the rights to health,¹⁷ to work¹⁸ and to education.¹⁹

12 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights, 1999–2000, ACHPR/RPT/13th, Annex V.

13 Art 17 reads: '2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.'

14 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98 (n 11 above) para 137.

15 Para 140 (n 14 above).

16 Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights 1999–2000, ACHPR/RPT/13th, Annex V, para 73.

17 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98 (n 11 above) para 122; Communications 137/94, 139/94, 154/96, 161/97 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties Organisation v Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998–1999), AHG/215 (XXXV), Annex IV.

18 Communication 39/90 *Annette Pagnoule (on behalf of Abdoulaye Mazou) v Cameroon*, Tenth Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th, Annex X.

19 Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire*, Ninth Activity Report of the African Commission on Human and Peoples' Rights 1995–1996, ACHPR/RPT/9th, Annex VIII.

2.2 Women's rights

There are several instances where the African system has given a profile to women's rights. Firstly, with the Commission itself being composed of four women,²⁰ it is certainly the most gender representative of all the regional mechanisms.²¹ Secondly, the Protocol on the Court²² has specifically required that there be gender representation in both the nomination and appointment of judges.²³

Most notably, however, has been the appointment of a Special Rapporteur on Women's Rights and the moves to adopt a Protocol on Women's Rights.²⁴ It is unfortunate that the Special Rapporteur has so far failed to undertake any of the studies on the situation of women's rights in Africa that were initially planned.²⁵

The Draft Protocol as it now stands²⁶ was a joint effort between NGOs and Commissioners. Its provisions are progressive: female circumcision is prohibited;²⁷ it includes articles against sexual violence during conflict,²⁸ and on polygamy,²⁹ and provisions for the inclusion of women into political life,³⁰ structures on dealing with conflict,³¹ as well as

20 Ms Julienne Ondziel-Gnelenga, Ms Florence Butegwa, Dr Vera Chirwa, Ms Jainaba Johm. The other Commissioners are: Prof Isaac Nguema, Prof Victor Dankwa, Mr Kamel Rezag-Bara, Dr Barney Pityana, Mr Andrew Chigovera, Dr Badawi El Sheikh, Dr Hatem Ben Salem.

21 Less than a quarter of the European Court of Human Rights judges are women; no members of the Inter-American Commission nor Court are women.

22 For further information on the Court, see 4.2 below.

23 Arts 12(2) and 14(3) of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights.

24 The approval for producing a protocol was provided by the Assembly of Heads of State and Government at its 34th session, Decision AHG/Dec 126 (XXXIV). Government experts are due to meet sometime this year to discuss the draft in order for it to be submitted for adoption to the Summit of the OAU in June/July 2001.

25 See Draft programme of activities of the Special Rapporteur on women's rights in Africa for the period 1999–2001, DOC/OS/53(XXIV); Report of the Special Rapporteur on women's rights, DOC/OS/57(XXIV).

26 Draft Protocol to the ACHRP on the rights of women in Africa, CAB/LEG/66.6 13 September 2000. The articles cited below refer to this Draft Protocol. The Draft Protocol is reprinted on 53–63 of this journal.

27 Art 6 Draft Protocol reads: 'State Parties shall . . . undertake to take all the necessary measures, *inter alia* . . . b) to prohibit the amelioration or preservation of harmful practices such as the medicalisation and para-medicalisation of female genital mutilation and scarification, in order to effect a total elimination of such practices.'

28 Art 4(d) Draft Protocol reads that states should 'ensure that in times of conflict and/or war, rape, sexual abuse and violence against girls and women are considered a war crime and are punished as such'.

29 Art 7(c) Draft Protocol reads: '[P]olygamy shall be prohibited.'

30 Art 10 Draft Protocol.

31 Art 11 Draft Protocol.

conditions of work,³² health,³³ food,³⁴ housing and environment³⁵ and development.³⁶ Although it is unfortunate that the Commission chose to make the Protocol an additional document, requiring the ratification by 15 states for it to enter into force,³⁷ the argument that an additional protocol will give its terms more force is clearly a strong one.

2.3 Increased involvement of states

All Organisation of African Unity (OAU) states are now party to the African Charter. Increasing numbers of states are attending the sessions of the Commission and contributing to the debates. At the 25th session several government representatives responded to comments made by NGOs on the human rights situation in their countries.³⁸ This indicates not just a move towards a dialogue between organisations, the Commission and states but also illustrates the serious concern of states that their compliance with the Charter is being discussed during the session.

2.4 Relationship with NGOs and others

The Commission has an important relationship with NGOs. It is clear that in the course of its existence NGOs have greatly influenced the action taken by the Commission. It was their lobbying that prompted the Commission to appoint Special Rapporteurs on Prisons and Other Conditions of Detention, on Summary, Arbitrary and Extrajudicial Executions and on Women's Rights,³⁹ and NGOs have been essential to their successful functioning. For example, one NGO, Penal Reform International, has not only produced the reports of the Special Rapporteur on Prisons but has organised, advised and accompanied him on his visits.

The Commission recognises the importance of its relationship with NGOs. Such organisations are entitled to apply for observer status with the Commission, which enables them to participate and make statements during its sessions. So far around 250 organisations have obtained such status.⁴⁰ A couple of years ago, however, the Commission

32 Art 13 Draft Protocol.

33 Art 14 Draft Protocol.

34 Art 15 Draft Protocol.

35 Arts 16 and 18 Draft Protocol.

36 Art 19 Draft Protocol.

37 Art 25(1) Draft Protocol.

38 See R Murray 'Report of the 2000 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal* (forthcoming).

39 These are individual Commissioners.

40 Status of submission of NGO Activity Reports as at 30 September 2000, DOC/OS(XXVIII)/182b.

suspended the granting of any more observer status to NGOs after the Assembly of Heads of State and Government of the OAU expressed its concern about the responsibilities of organisations to the Commission.⁴¹ The Commission thus reviewed its criteria for observer status, a move to be recommended given that they had been unclear in the past, and produced rules, stressing that NGOs should submit reports every two years on their activities.⁴² Since the criteria have been adopted the Commission has again accepted applications for observer status. It regularly now produces, as it does for state reports,⁴³ a list of whether NGOs are up to date with their commitments.⁴⁴ Although it is clear that many are not and have failed to attend the sessions and work with the Commission, and despite indications that this could lead to withdrawal of observer status, the Commission has taken no action against them.

Although it is often the same NGOs who attend the sessions, the Commission's combined policy of holding open sessions which anyone can attend, and holding sessions in different African states, has enabled local NGOs which may not have had the resources to travel to Banjul, where the Commission's Secretariat is based, for example, to participate.⁴⁵ This was particularly noticeable in Mauritania, where many local organisations attended the session, albeit after attempts by the government to prevent them from entering the hall.⁴⁶ Subsequently, many of these applied for, and obtained, observer status and many used the communication procedure of the Commission to submit allegations of serious violations of human rights. The Commission was prompted to undertake a mission.⁴⁷ A series of decisions condemning the action of the Mauritanian government has just been released.⁴⁸ There are valid criticisms that the

41 Declaration and decisions adopted by the thirty-fourth ordinary session of the Assembly of Heads of State and Government, Ouagadougou, Burkina Faso, June 1998, AHG/Dec 126 (XXXIV).

42 Resolution on the co-operation between the African Commission on Human and Peoples' Rights and NGOs having observer status with the Commission, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998–1999), AHG/215 (XXXV), Annex IV.

43 For further information on state reporting, see below.

44 Status of submission of NGO Reports (n 40 above).

45 As well as at the headquarters in The Gambia, sessions have been held in Senegal (second), Gabon (third), Egypt (fourth), Libya (fifth), Nigeria (ninth), Tunisia (eleventh), Ethiopia (first and fourteenth), Togo (seventeenth), Cape Verde (eighteenth), Burkina Faso (nineteenth), Mauritius (twentieth), Mauritania (twenty-first), Burundi (twenty-fifth), Rwanda (twenty-sixth), Algeria (twenty-seventh), Benin (twenty-eighth) and Uganda (second extraordinary).

46 R Murray 'Report of 1997 sessions of the African Commission on Human and Peoples' Rights' (1998) 19 *Human Rights Law Journal* 169.

47 Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights, Nouakchott, 19–27 June 1996, Tenth Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th, Annex IX.

48 n 12 above.

decisions were delayed for many years, the mission was not sufficiently independent, and the manner in which the Commission dealt with the situation lacked impartiality.⁴⁹ What it does indicate, however, is the increased awareness given by holding the sessions in various countries.

3 Existing concerns

3.1 Lack of independence

This has been one of the criticisms directed at the Commission for many years. Commissioners are appointed by the political Assembly of Heads of State and Government of the OAU.⁵⁰ Until recently, members of the Commission have been a mixture of former government persons and members of the judiciary and academic legal profession.⁵¹ In the most recent appointments in 1999, however, there was an attempt to appoint members from the NGO community.⁵² It is hoped that this trend will continue.

In this respect, it is not just the appearance of the lack of independence, with the inclusion of ambassadors amongst its members and senior government figures, but also evidence of an actual lack of impartiality. For example, missions taken to states were criticised for the one-sided manner in which they were conducted.⁵³ Not all mission reports have been released⁵⁴ and communications which prompted the missions in the first place have often only been published years after the visits.⁵⁵ In the case of Nigeria, the communications were published after

49 Interights, Constitutional Rights Project, RADDHO, Missions for Protective Activities, submitted to 21st session of the African Commission, 1997; R Murray 'On-site visits by the African Commission on Human and Peoples' Rights: A case study and comparison with the Inter-American Commission on Human Rights' (1999) 11 *African Journal of International and Comparative Law* 460.

50 Art 33.

51 See F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human Rights Law in Africa 1997* (1999) 51–2.

52 For example, the most recent appointments included Dr Vera Chirwa and Dr Florence Butegwa.

53 Interights (n 49 above) and Murray (n 49 above).

54 Only those of missions to Mauritania and Senegal, issued in the Tenth Activity Report, have been made public: see Report of Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights (1–7 June 1996), Tenth Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th, Annex VIII; Report of the Mission to Mauritania (n 47 above). The missions to Nigeria and Sudan, taken in 1997, have still not been reported on to the public.

55 Thirteenth Activity Report of the African Commission on Human and Peoples' Rights 1999–2000, ACHPR/RPT/13th, Annex V, which contains decisions against Mauritania, Nigeria and Sudan.

a change in government,⁵⁶ suggesting that pressure from the previous regime may have had a role to play in the past.⁵⁷

NGOs have consistently questioned the issue of Commissioner independence and at one stage it was a regular feature on the agenda of the Commission.⁵⁸ One can only hope, therefore, for the position of Commissioner to gain a better profile and that NGOs and others can lobby at the national level for non-governmental nominations and thus influence subsequent appointments to the Commission.

3.2 Lack of organisation at sessions

The Commission holds two sessions per year now lasting fifteen days each. When the OAU recently increased the budget to the Commission it enabled the latter to extend the period from ten days. Around half of the session is held in public, which anyone can attend, and the other half is in private, where confidential matters are discussed and communications heard.

There has been a marked improvement in recent years, with the location and dates of sessions now being decided at the previous session, without changes. Draft agendas are now often sent out in advance along with information on accommodation, for example.

What is still lacking, however, is the efficient use of time during the session itself. This largely depends upon the skills of the Chair to ensure time limits are respected, debate is relevant, and that the meeting keeps to items on the agenda. There has been evidence of this increasingly being the case — certainly time limits are often enforced. However, there is still no written, detailed record of the debate and decisions taken at the session. A final communiqué is produced at the end of the session, but this is only a few pages long and often does not detail discussion on specific points.⁵⁹ As a result, there are many occasions where it is either not possible to remember what issues were raised, whether any decision was reached at a previous session and, if so, what it was. There is thus considerable repetition of previous discussions, which wastes valuable time. While submissions made by participants at the session are now collected, copied and disseminated to participants, sometimes by the

56 As above.

57 R Murray 'Digest of cases of the African Commission on Human and Peoples' Rights' (2001) *South African Journal on Human Rights* (forthcoming).

58 Agenda of the 25th Ordinary Session (26 April–5 May 1999, Bujumbura, Burundi), DOC/OS(XXV)/80, item 9 reads 'Review of some of the provisions of the African Charter in the light of mainly the issue of incompatibility of the membership of the Commission'. The issue was not on the agendas of the 26th and 27th sessions.

59 Final Communiqué of the 28th Ordinary Session of the African Commission on Human and Peoples' Rights, 23 October–6 November 1999, ACHPR/FIN.COMM/XXVIII, Rev 2.

end of that day, this has been a recent development.⁶⁰ The Commission could easily improve its own efficiency by requiring its Secretariat to make a detailed report of the session and disseminate this widely amongst Commissioners, NGOs, states and other participants.

3.3 Lack of follow-up to communications

The Commission has interpreted the Charter, contrary to what was originally feared, to enable it to receive communications from individuals and NGOs alleging violations of the Charter.⁶¹ Indeed, in its latest report it made a statement expressly affirming its power to do so.⁶² All OAU states are now party to the Charter and thus subject to the Commission's jurisdiction. To date it has received nearly 300 communications and its decisions have been published, in increasing detail, since its Seventh Activity Report.

The effectiveness of the communication procedure is hampered by several factors. Firstly, although the Commission has started to lay down clearly at the end of some of its decisions what action is required of the state,⁶³ this is not done consistently. Without a clear indication of what is required it is arguable that the state may feel less pressure to respect the Commission's ruling and there is also no benchmark against which to assess any response it might make.

In addition, there has been no attempt by the Commission to check whether its rulings have been implemented or not. Certainly, there does not appear to have been any follow-up or supervisory function undertaken by the OAU organs. The Commission submits its annual report to the OAU before it can be made public. In previous years little discussion was ever taken on the contents of the report at this level. There have now been improvements, with debate taking place at the meetings of the Council of Ministers.

Article 58 enables the Commission to alert the Assembly of Heads of State and Government to situations of serious or massive violations, with the possibility that the latter will request the Commission to undertake

60 Murray (n 38 above).

61 While arts 47–54 are entitled 'Communications from states', arts 55–59 are entitled 'Other communications' and do not expressly list the procedure by which they should be considered.

62 Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights, 1999–2000, ACHPR/RPT/13th, Annex V, para 42.

63 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98 (n 12 above).

further study.⁶⁴ No response has been forthcoming from the OAU despite several cases being submitted to it.⁶⁵ It is suggested that a Special Rapporteur on follow-up would be an effective appointment. Without such a mechanism, the Commission often believes its job is finished once the decision is published, the communication does not get the necessary publicity, and it is not clear whether the victims received the remedy they deserved.

The issue of publicity is particularly important. Documents produced regularly by the Commission and available to the public are final communiqués from each session and an annual activity report. The Commission has developed a practice of publishing its decisions on communications in detail in its activity reports. Unfortunately, these reports are not disseminated widely. Those working closely with the Commission obtain them relatively easily, but there is no website for the Commission and no press release accompanying the adoption of decisions, for example. Although the reports are not withheld by the Commission and can be found in various other places on the internet⁶⁶ and obtained from various individuals, there is no coherent policy by the Commission of disseminating them at all levels, national, local and international. Few international bodies are aware of the Commission's decisions and the extent to which African and other governments receive copies is not known. It appears that even some of the OAU organs do not necessarily receive a copy of the Commission's reports. This goes clearly to the heart of the effectiveness of the Commission's communication procedure and some improvements could be made with minimal cost. Many NGOs have offered to set up a website for the Commission and others have offered to work with the Commission to publish its documents. Although a website is clearly inadequate for dissemination in all circumstances, particularly at the local level, it would be a useful starting point.

What is hampering such efforts is the reticence of the Commission to distribute its material, which is difficult to explain sometimes. It is submitted that there is a perception among the Commission that at present documents are controlled and that if they were widely disseminated the Commission would be opening itself to criticism and

64 Art 58 reads: 'When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases. 2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations. . . .'

65 Communications 25/89, 47/90, 56/91, 100/93 (n 19 above).

66 For example, the Centre for Human Rights at the University of Pretoria <<http://www.up.ac.za/chr/ahrd/ahrd.html>>; Interights <<http://www.interights.org>>.

condemnation either from governments for finding them in violation of the Charter, or from other sources for failing to go far enough. The lack of dynamism and sometimes confidence of the Commission in its own powers and functions, which is due in part to the lack of independence of some of its members, is most apparent here.

As a result, there is little interest in or attention paid to its work in the international arena. Rarely is the work of the Commission mentioned in detail in leading international textbooks, drawn upon by other international human rights bodies, or discussed in any meaningful way. The Commission is thus depriving itself of the respect it could have and the resultant impact that this would have on states to comply with its decisions.

3.4 Lack of monitoring role

Under article 62 of the Charter states are obliged to submit reports every two years on the legislative and other measures taken to implement the Charter. As with other international reporting mechanisms it is clear that states are behind in their obligations.⁶⁷ The Commission has taken action encouraging states to submit, but this has been limited.⁶⁸ Since November 1995 the Commission has been willing to receive reports which combine several years.⁶⁹

Even where reports have been submitted the procedure by which they are examined could be improved. States are invited to send a representative to the session, where questions are posed by Commissioners. Although these questions are increasingly focused, drawing upon information received from other sources, there is still not the 'constructive dialogue' the Commission says it is aiming for.⁷⁰ The Commissioners often do not probe for an answer if none is provided and the system for examination, where all questions are asked first and then all answers are given after a short break period, does not really permit matters to be delved into further. The combination of all these difficulties means that the Commission does not really monitor the ongoing situation in states through this mechanism.

Other methods available include the regular item on the agenda on the human rights situation in Africa.⁷¹ Consistently at every session NGOs and others present the situation in various African countries. Little seems

67 Just over half of all states have submitted their initial reports.

68 It adopted a Resolution on overdue reports for adoption, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights 1991–1992, ACHPR/RPT/5th, Annex VIII. Commissioners are, however, now starting to ask the authorities about the status of their reports on the promotional visits to states.

69 Note Verbale ACHPR/PR/A046, 30 November 1995.

70 Guidelines on national periodic reports (n 7 above).

71 28th Ordinary Session of the ACHPR. Annotated Agenda, item 8(a).

to be done with this information. At one stage the Commission produced a document summarising some information but with no clear indication of its subsequent action.⁷² It is submitted that NGOs should request specific action from the Commission and continue to raise these requests at subsequent sessions. Article 46⁷³ either in conjunction with or separate from article 58⁷⁴ could be used by the Commission to undertake a study on a particular country on its own initiative. So far, however, it has not exploited these provisions.

A positive development is that Commissioners have started to use their promotional functions more effectively. Commissioners are assigned particular countries for promotion. Often this means merely visiting the country. However, Commissioners have recently produced detailed reports of promotional visits⁷⁵ with clear indications of action taken by them in relation to the authorities.

All these mechanisms provide the Commission with an opportunity with which to monitor the situation in a state, but it is regrettable that so far the Commission has not used them to their full potential. A dynamic Commission, composed of individuals committed to human rights, would go some way to ensuring that these resources are employed appropriately.

3.5 Too much reliance on NGOs

This reactive rather than proactive attitude of the Commission impacts on its work with NGOs. The awareness of the Commission of this source of support has led it, on many occasions, to place the blame for its inaction on the failure of NGOs to support it. NGOs are expected to partner the Commission when it comes to holding seminars and to find the funding.⁷⁶ There does not now seem to be a presumption that these might be tasks of the Secretariat. While this might be realistic to a certain extent, it has resulted in the Commission almost abdicating any responsibility for its actions, or inaction. A clear example is the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions. This Commissioner has been in the post for six years, but so far nothing

72 The human rights situation in Africa, DOC/OS(XXV)/96.

73 Art 46 reads: 'The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.'

74 See n 64 above.

75 Commissioner Pityana's Report of the promotional mission to the Republic of Mozambique 7-9 August 2000, DOC/OS(XXVIII)/187/5; Commissioner Rezag-Bara's Report on a mission to the Republic of Chad, DOC/OS(XXVIII)/187/6 and Report on the promotional mission undertaken by Commissioner Kamel Rezag-Bara to the Republic of Djibouti (26 February-5 March 2000), DOC/OS(XXVIII)/187/6; Commissioner Chirwa's Report of mission to Republic of Tanzania, DOC/OS(XXVIII)/187/6.

76 Murray (n 38 above).

concrete has been produced. He has failed to visit countries, specifically Rwanda and Burundi, and failed to establish the database of victims or intended compensation fund.⁷⁷ One NGO offered assistance to the Commissioner, and when he was questioned at the session he attributed his lack of work to the failure of the NGO to obtain funding.⁷⁸

The Special Rapporteur on Women's Rights has also attributed her inability to function to the lack of funding, again calling on NGOs to live up to their commitments.⁷⁹ There does not appear to be a perception among the Commission that Commissioners could themselves carry out some work with minimal funding.

There must be a change in attitude from the Commission. While it is important that human rights promotion and protection are seen as the responsibility of all individuals and organisations, the status of an international institution such as the African Commission puts it in a powerful position to take a proactive role. The Commission should be exploiting its position, not hiding behind NGOs for its failure to act.

4 Future influences

Some recent developments suggest other influences on the Commission may become increasingly important.

4.1 Increased role of national human rights institutions

The Commission has recently formalised its relationship with these institutions, adopting criteria for them to apply for 'affiliated status' and thus participate and speak at its sessions.⁸⁰ The Commission has so far considered applications from and granted status to six institutions⁸¹ and an increasing number are being created and are attending the sessions of the Commission.

77 Amnesty International, *The African Commission on Human and Peoples' Rights: the Role of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, AI Index, IOR 63/05/97.

78 Murray (n 38 above).

79 R Murray 'Report of the 1999 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal* (forthcoming).

80 Resolution on granting observer status to national human rights institutions in Africa, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998–1999), AHG/215 (XXXV), Annex IV.

81 National Human Rights Observatory, ONDH (Algeria), National Human Rights Commission (Rwanda); National Human Rights Commission (Malawi), *Commission Nationale des Droits de l'Homme et des Libertés* (Niger), the National Commission for Democracy and Human Rights (Sierra Leone) and the *Comité Sénégalais des Droits de l'Homme*; see also Final Communiqué of the 28th Session (n 59 above) and Thirteenth Activity Report (n 55 above).

The Commission has at least recognised the difficulties of ensuring that such institutions are not just another arm of the government by requiring in its criteria that there is adherence to the Paris Principles. At its 28th session it heard from the institution in Niger and condemned the interference in its work by the government.⁸² In addition, the application of the Nigerian Human Rights Commission has been postponed over concerns that members were appointed by, or were in fact members of, the government.⁸³ The African Commission's approach, however, has not been consistent as the commission in Algeria, a body which has been criticised for its lack of impartiality, has been granted status.

How the Commission's relationship with such institutions will develop in the future is not clear. Obviously such institutions could have an influential role and provide support for NGOs, as long as the Commission ensures that only independent bodies are accepted. If it chooses to accept bodies closely tied to the governments, however, the Commission will have to contend with pressure from two government sources, influence which it might not be able to resist.

4.2 An African Court

In 1998 the Assembly of Heads of State and Government adopted a protocol establishing an African Court on Human and Peoples' Rights.⁸⁴ This provides for an eleven-member Court of independent judges with advisory and contentious jurisdiction. Several issues were controversial in the drafting of the Protocol, most notably whether individuals and NGOs should be able to submit a case to the Court directly, its relationship with the Commission, and also where the Court should sit.⁸⁵ The resulting provisions for the standing of individuals and NGOs are dealt with in articles 5 and 34(6). These provide that the Commission, the state party which lodged a complaint, the state against which a complaint was lodged, and the state whose citizen was a victim and African intergovernmental organisations are entitled to submit cases to the Court. In addition, article 5(3) then adds that 'the Court may entitle relevant Non Governmental Organisations (NGOs) with observer status

82 Murray (n 38 above).

83 As above.

84 Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT (I) Rev 2.

85 Report of the Experts' Meeting, Third Government Legal Experts' Meeting (enlarged to include diplomats) on the establishment of the African Court on Human and Peoples' Rights, 8–11 December 1997, Addis Ababa, Ethiopia, OAU/LEG/EXP/AFCHPR/RPT(III) Rev1; Report of the Secretary General on the conference of Ministers of Justice/Attorneys General on the Draft Protocol on the establishment of the African Court on Human and Peoples' Rights, 23–27 February 1998, CM/2051 (LXVII).

before the Commission, and individuals to institute cases directly before it, in accordance with article 46(6) of this Protocol'. Article 34(6) additionally requires states which have ratified the Protocol to make a declaration saying that they accept the jurisdiction of the Court in those circumstances. It is thus not clear exactly what standing NGOs and individuals may in fact have.

The relationship with the Commission is not fully clarified by the Protocol. The Preamble notes that the establishment of a Court is necessary to 'complement and reinforce the functions' of the Commission and article 2 states that the Court should, in carrying out the Protocol 'complement the protective mandate' of the Commission. Thus it would appear that the Commission will continue to be solely responsible for promotion. Article 4 prohibits the Court from giving an advisory opinion on a matter that is presently before the Commission. Article 8 requires the Court to have regard to the 'complementarity between the Commission and the Court' when determining its Rules of Procedure. Article 29 requires that the Court transmit its judgment to the Commission, among other things.

However, when contentious cases will go to the Court is not clear. Article 5(1)(a) enables the Commission to submit a case to the Court, but article 6(1) states that the Court will have a role in decisions on admissibility. This provision notes that 'when deciding' on admissibility the Court 'may request the opinion of the Commission which shall give it as soon as possible'. Further, article 6(3) enables the Court, under issues of admissibility, to 'consider cases or transfer them to the Commission'.

The Commission has been talking for some time about holding an extraordinary session to consider this relationship, but so far no date or firm arrangements have been made.⁸⁶ Given that only four states out of the fifteen required to bring the Protocol into force have ratified,⁸⁷ the pressure on the Commission to do so is not strong.

There is no reference in the Protocol and still no consensus on where the Court will sit.⁸⁸ Until we approach the number of ratifications required, this is unlikely to be a pressing issue. Then only will it be necessary to determine whether the Court and Commission should both sit in The Gambia or elsewhere, requiring the difficult political decision of moving the Commission. Alternatively, it will need to be considered whether the Commission should remain in The Gambia and the Court placed elsewhere, a decision which has considerable significance for their future relationship.

86 Murray (n 38 above).

87 These states are Senegal, Burkina Faso, The Gambia and Mali.

88 Art 25(1) of the Protocol states that the seat will be determined by the Assembly but it could convene in any state 'when the majority of the Court considers it desirable and with the prior consent of the State concerned'. The seat could also be changed if the Assembly is consulted: art 25(2).

4.3 Relationship with the OAU

Behind the Commission and central to its functioning lies the OAU. The African Charter expressly notes the central role played by the OAU and its organs in the funding and functioning of the Commission.⁸⁹ Yet it is clear that its involvement has been seriously limited, in particular in providing financial support, causing the Commission to rely on other sources.⁹⁰ There is no real indication that the OAU has taken an increasing interest in the work of the Commission over the years, leaving it largely to its own devices in The Gambia. However, given the changes with the adoption of the Constitutive Act of the African Union and the increased attention paid to human rights, at least in its provisions,⁹¹ it is possible that this relationship will become more important.

The Commission and OAU could collaborate on various issues. The Commission has for years discussed the possibility of an early warning mechanism, with former Commissioner Umozurike proposing a nine-point plan at a seminar on the issue.⁹² The Commission has not yet decided whether this should be formally adopted, opting for an interim solution whereby the Chair deals with any emergency in between sessions. The OAU's Conflict Mechanism has an early warning system, also in its early stages, but there has been no attempt to connect the two. Similarly, the African Commission has recently paid attention to refugees. The OAU's Refugee Division was suggested as a possible partner, but the Commission chose to determine its own procedures first before collaborating with the Division.⁹³

Thus, both the Commission and the various OAU organs have been unwilling to forge close relationships. Certainly, when advocating closer involvement with the OAU one must bear in mind that there may be unwanted political influence. But a balance can be struck whereby the OAU provides the Commission with the support necessary to carry out its functions, such as appointing adequate and effective staff committed

89 For example, as noted above in relation to the appointment of Commissioners, art 41 requires the Secretary General of the OAU to appoint the Secretary of the Commission and to ensure the adequate staff and resources. The OAU is to fund it. Art 46 envisages the involvement of the Secretary General when the Commission is undertaking investigations. The OAU also plays a role in interstate communications (arts 47–54) and in art 58, as noted above, regarding serious or massive violations or emergency situations. The Commission also submits its annual report to the OAU for its consideration (art 54).

90 See Thirteenth Activity Report (n 55 above) 12, 13.

91 For example, the promotion and protection of human and peoples' rights are expressly included amongst the objectives and principles of the proposed Union, arts 3(h) and 4(m).

92 Mechanisms for urgent response to human rights emergencies under article 58 of the African Charter on Human and Peoples' Rights, 21st session (no reference, on file with author).

93 Murray (n 38 above).

to the cause of the Commission, and taking an increased interest in and contributing to the publicity of its documents and work.

5 Conclusion

An examination of the evolution of the African Charter since its inception clearly shows that it has developed procedures and frameworks which could enable it to be a dynamic and effective system. Unfortunately, the members of the Commission so far, in general, have not felt able or willing to exploit these possibilities. The result is an organisation which is undertaking important work, has special rapporteurs on important themes and is adopting radical and progressive jurisprudence, but which seems to want such activities to remain secret and not scrutinised by any other than the small group of NGOs and those who regularly attend its sessions. This is depriving the local and international community of its contributions and the necessary publicity to pressurise governments to respect its decisions.

Africa's contribution to the development of international human rights and humanitarian law

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1 Introduction

Africa is associated more with human rights problems and humanitarian crises than with their solutions, more with the need for international human rights law than its applications, and more with the failure of international law than with its success. If Pliny had the opportunity of writing today, he would probably have coined the phrase: 'Out of Africa, always something terrible.'¹

This contribution sets out to show that this exclusive negativity is misplaced. Africans and African issues have also given rise to solutions, and have played an active role in the development of international human rights and humanitarian law, sometimes even initiating new paradigms. The focus is on a particular part of international law, and an

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¹ In his book *Natural History* Pliny referred to the common Greek saying that Africa always produces some novelty ('semper aliquid novi Africam adferre') (Book VIII, 17). In his *Historia Animalum*, Aristotle referred to the old saying 'Always something fresh in Libya' (Volume IV of JA Smith & WD Ross (eds) *The Works of Aristotle*, Book VIII, 606b, trans DW Thompson (1910)).

assessment of Africa's impact on international law in general is not attempted here.²

2 Africa and the development of international human rights law

The essential features of international human rights law as we know it were fixed in the period between 1945 and 1966. During this time the United Nations (UN) General Assembly adopted the Universal Declaration of Human Rights, followed by the elaboration and adoption of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The fact that these three instruments, with the Optional Protocol to the ICCPR (OPI), subsequently became known as the 'International Bill of Rights' is indicative of their collective foundational nature.³ The influential European regional human rights system also came into being during this period.⁴ This phase also saw the number of independent African states increase from 4 to 37. After gaining their independence, these states became members of the UN almost immediately. Despite, or maybe owing to, their colonial past, African states gradually extended their initial interest into vigorous participation in the international arena. I argue here that in the process Africa contributed meaningfully to the renewal and redefinition of international human rights law, and I shall now investigate aspects of the 'African contribution' to this development.

2.1 The African Charter on Human and Peoples' Rights

The source of 'African enrichment' of international human rights law most frequently cited is the African Charter on Human and Peoples' Rights (African Charter). The OAU Assembly of Heads of State and

2 On African participation in, for example, the composition of and cases brought before the International Court of Justice, see SRS Bedi 'African participation in the International Court of Justice: A statistical appraisal (1946-1998)' (1998) 6 *African Yearbook of International Law* 181. On the contribution of the Organisation of African Unity (OAU) to the development and expansion of international law, see TO Elias *Africa and the development of international law* (1988); T Maluwa 'International law-making in the Organisation of African Unity: An overview' (2000) 12 *African Journal of International and Comparative Law* 201.

3 See L Henkin 'The International Bill of Rights: The Universal Declaration and the Covenants' in B Bernhardt & JA Jolowicz (eds) *International enforcement of human rights* (1987) 1.

4 The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted under the auspices of the Council of Europe, and entered into force on 3 September 1953.

Government adopted this regional instrument in 1981.⁵ It entered into force in 1986. Today all 53 OAU member states are party to the African Charter.

Common wisdom has it that the African Charter is 'autochthonous' in its inclusion of the concept of 'peoples', its enumeration of individual duties, the non-justiciability of the dispute settlement procedure, its anti-colonial stance, its emphasis on morality, and its placing of first generation rights on a par with second and third generation rights.⁶ All these aspects represent the introduction of a series of ambiguities into the bipolar structural design of the international human rights discourse. The system, as it had developed by the 1970s, was premised on the dichotomies of 'individual vs community', 'rights vs duties', 'first vs second and third generation rights', 'enforceability vs non-enforceability'.⁷ In each instance, one of these polarities was privileged to construct the model or golden thread: what matters are individual rights, of the 'first generation', which are enforceable.

By unmasking the pretence of these strict dichotomies, by showing that the dualities can be bridged, and by alerting us to the reality of the ambiguity inherent in their co-existence, the African Charter makes its greatest contribution.

Western-dominated discourse privileges the individual. Human rights instruments postulate an autonomous, independent individual (complainant), who is prepared, ultimately, to dissociate from others and enter into legal battle with the collectivity (the state). The African Charter treats the human being both as an individual and as a member of the collective (the 'people'). Generally, 'every individual' is a bearer of rights under the African Charter. The communal aspect is emphasised in the rights guaranteed to 'peoples'⁸ and in the recognition of the family as the 'natural unit and basis of society'.

One reason why the Universal Declaration was not adopted as a binding document was Western opposition to implementing second generation rights in the same way as first generation rights. The subsequent creation of the two covenants stands as an illustration of this split. The

5 OAU Doc OAU/CAB/LEG/67/3/Rev 5, C Heyns (ed) *Human rights law in Africa 1996* (1996) 7; <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 1 February 2001).

6 See eg W Benedek 'Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in P Kunig, W Benedek & CR Mahalu (eds) *Regional protection of human rights by international law: The emerging African system* (1985) 59 and UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 87-96.

7 For an analysis of dichotomies from a feminist perspective, see R Murray (2000) *The African Commission on Human and Peoples' Rights and international law*.

8 For example, arts 20-24 African Charter.

same bipolarity was taken up in most international human rights treaties,⁹ domestic human rights regimes, and at the regional level.¹⁰

The African Charter does not offer any basis for a distinction in the implementation of various categories of rights. Civil and political rights are included next to socio-economic rights. The Preamble states that 'civil and political rights cannot be dissociated from economic, social and cultural rights'.¹¹ No difference in implementation of the two 'categories' of rights is provided for. However, some of the socio-economic rights are internally qualified, such as the right to enjoy the 'best attainable' state of physical and mental health.¹²

The dominant discourse at the end of the 1970s referred to 'rights' only. By implication, duties were underplayed, as they were regarded as a threat to the concept of 'rights'.¹³ The African Charter departs from the premise that rights and duties inevitably exist concomitantly. The Preamble draws the inference that 'the enjoyment of rights and freedoms also implies the performance of duties'. A list of duties is provided in article 29 of the African Charter, each implicitly embodying the 'values of African civilization'.¹⁴ The principle that rights and duties are reciprocal forms the basis of article 27(2),¹⁵ which may be described as a general limitation provision.

Despite the fact that many quasi-judicial monitoring bodies have been established, the discourse (at least at regional and domestic level) privileges enforceable judicial means. At the time the African Charter was drafted, the two other regional systems each provided for a court as final arbiter for resolving disputes. The African Charter opts for a quasi-judicial institution, the African Commission on Human and Peoples' Rights (African Commission). The African Charter and the African Commission itself have emphasised amicable settlements between parties.¹⁶ The

9 See art 4 of the 1989 Convention on the Rights of the Child (CRC), which draws a distinction in 'implementation' between 'the rights' generally, and economic, social and cultural rights.

10 The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), dealing almost exclusively with civil and political rights, was later supplemented by the European Social Charter (1961), dealing with socio-economic rights. Implementation of the 2 instruments differs, as complaints may be brought only under the first, while states have to report under the second.

11 Arts 16 and 17 African Charter.

12 Art 16(1) African Charter.

13 In the Cold War context, a political dimension was added, as the West regarded the concept of 'duties' as socialist in nature.

14 Preamble to the African Charter.

15 Art 27(2) states that rights must be 'exercised with due regard to the rights of others, collective security, morality and common interest'.

16 Art 48 African Charter and comments by Commissioners during examination of state reports at various sessions.

argument that the preference for a commission above a court reflects an inherently 'African' conception of dispute resolution may be countered if regard is given to the political context at the time of drafting. Weakening the implementation mechanism was most likely a compromise necessary to ensure the support of rulers not yet completely committed to human rights, democracy and the rule of law.¹⁷

2.2 The African Charter on the Rights and Welfare of the Child

The 1989 Convention on the Rights of the Child (CRC), which entered into force in 1990, has subsequently been ratified by all African member states of the UN except Somalia.

Even before the entry into force of the CRC, the OAU Assembly of Heads of State and Government adopted a regional pendant to the CRC: the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹⁸ Its entry into force required fifteen ratifications.¹⁹ This number was only reached after almost a decade, at the end of 1999.²⁰

In a number of respects, the African Children's Charter sets a higher level of protection for children than its UN equivalent. Some of the most dramatic differences are highlighted below:²¹

- Under the African Children's Charter no person under 18 is allowed to take part in hostilities.²² The CRC allows children between 15 and 18 to be used in direct hostilities.²³
- The CRC allows the recruitment of youths between 15 and 18,²⁴ while the African Children's Charter requires states to refrain from recruiting anyone under 18.²⁵

17 See K M'Baye *Les droits de l'homme* (1992) 164–5.

18 OAU Doc CAB/LEG/153/Rev 2; reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38; <<http://www.up.ac.za/chr/ahrd/ahrd.html>> (accessed 1 February 2001).

19 Art 47(2) African Children's Charter.

20 The African Children's Charter entered into force on 29 November 1999.

21 For a more detailed discussion, see F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199.

22 Art 22(2) African Children's Charter.

23 Art 38(2) CRC. The UN General Assembly adopted an Optional Protocol to the CRC on the involvement of children in armed conflict on 25 May 2000 (A/RES/54/263). State parties are required to take 'all feasible measures' to ensure that children under 18 do not take direct part in hostilities (art 1 of the Protocol) and to ensure that children under 18 are not 'compulsorily recruited into their armed forces' (art 2 of the Protocol). The Protocol has not yet entered into force.

24 Art 30(3) CRC.

25 Art 22(2) African Children's Charter.

- Child marriages are not allowed under the African Children's Charter.²⁶ The same does not apply to the CRC, in terms of which the age of majority may be attained below the age of 18.²⁷
- The scope of the protection of child refugees is broader under the African Children's Charter, which allows for 'internally displaced' children to qualify for refugee protection.²⁸ The causes of internal dislocation are not restricted, but may take any form, including a breakdown of the economic or social order.
- Under the African Children's Charter, the best interest of the child is 'the primary consideration',²⁹ not merely 'a primary consideration', as provided for in the CRC.³⁰

Each of these aspects resonates with the precarious position in which children find themselves in Africa. Although not restricted to Africa, child soldiers, child marriages and child refugees are recurring problems on the African continent.

As in the case of the CRC, the African Children's Charter provides for a supervisory body. The body established under the African Children's Charter, called the Committee of Experts, has a broader mandate than the CRC Committee. The African Committee of Experts is not only tasked to examine state reports, but is also to make recommendations arising from individual or interstate communications.³¹ In fact, acceptance of this complaints mechanism is part and parcel of ratifying the African Children's Charter. This contrasts sharply with the mandate of the CRC Committee, which provides only for the examination of state reports.³²

Apart from setting a higher standard in numerous respects, the African Children's Charter also incorporates some uniquely 'African' features. As in the 'mother' document, the African Charter, duties are placed on individual children.³³ However, it should be noted that collective or 'peoples' rights' are not included in the African Children's Charter.

2.3 Africa and the international protection of refugees

The UN Convention relating to the Status of Refugees (UN Refugee Convention) was adopted under the auspices of the UN in 1951, and entered into force in 1954.³⁴ The socio-political context of its adoption

26 Art 21(2), read with art 2 African Children's Charter.

27 Art 1 CRC.

28 Art 23(4) African Children's Charter.

29 Art 4(1) African Children's Charter.

30 Art 3(1) CRC.

31 Art 44 African Children's Charter.

32 Art 44 CRC.

33 Art 31 African Children's Charter.

34 For the Convention text, see EM Patel & C Watters *Human rights: fundamental instruments and documents* (1994) 231.

explains many of this Convention's features. The early period of the 1950s was the aftermath of the Second World War, and the beginning of the Cold War. The main contributors to the preceding deliberations were Western European powers. Their main concerns were related to experiences drawn from the world war (such as Jews fleeing Nazi persecution) and from a new problem: ideologically based defections from the East to the West.

Three important limitations of the Convention relate to these factors. Firstly, the basis on which someone qualifies for refugee status is limited to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.³⁵ This factor relates mainly to a subjective requirement, 'fear', that in each individual case has to be assessed for its 'well-foundedness'. Apart from this individualistic focus, the definition of the listed grounds is very restrictive and does not take into account other factors (such as natural disasters or internal wars) which may be just as instrumental in people becoming refugees. Secondly, a temporal limit was provided for in the Convention. The 'fear' had to be 'as a result of events occurring before 1 January 1951'.³⁶ This cut-off date underlines the close link to the preceding war and its effects. The third limitation, of a geographical nature, was included as an option which states could adopt at ratification (or accession). By making a declaration, states could specify that the 'events' referred to above shall be understood to mean 'events occurring in Europe'.³⁷ Few states have made such a declaration.³⁸

In the light of the above, there should be little cause for surprise in the assertion that African states saw the Convention as a 'European instrument'.³⁹ The perception of exclusion was exacerbated in the 1960s when it became clear that refugee problems in Africa continued and, most often, started well after 1951. These problems arose on a massive scale, and were mostly caused by internal conflicts. Early examples were the many refugees fleeing conditions in the Congo (later Zaïre, now the Democratic Republic of the Congo) and Nigeria.

Owing in the main to African criticism and efforts to adopt an African convention separate from the UN Convention, a brief Protocol to the 1951 Convention was adopted by the UN in 1966, and entered into force in 1967.⁴⁰ The Protocol dispensed with the temporal and geographic limitations in the 1951 Convention. In the Preamble to the

35 Art 1(A)(2) UN Refugee Convention.

36 Art 1(A)(2) UN Refugee Convention.

37 Art 1(B)(1) UN Refugee Convention.

38 P Weis 'The Convention of the Organisation of African Unity governing the specific aspects of refugee problems in Africa' (1970) 3 *Revue des Droits de l'Homme* 449.

39 Weis (n 38 above) 452.

40 Patel & Watters (n 34 above) 243.

Protocol, 'consideration' is given to the fact that 'refugee situations have arisen since the Convention was adopted'. From 1967, then, the Convention applied equally to all who qualified for refugee status. However, the definition of 'refugee' was left intact. African states actively supported the adoption of the Protocol.

After the adoption of the 1966 Protocol, African efforts to elaborate a separate UN instrument dealing with refugees were channelled into adopting a complementary regional instrument,⁴¹ with the result that the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) was adopted in 1969.⁴²

Both the historic framework and the Convention title indicate that this regional instrument should be viewed in conjunction with, and supplementary to, the international Convention that had been in existence since 1951. After 1967, efforts became directed at a regional supplement to the UN Convention. Thus the OAU Convention recognises the 1951 Convention (as modified by the 1967 Protocol) as 'the basis and universal instrument relating to the status of refugees'.⁴³ The OAU Convention goes further by adapting universal norms and standards to deal with the challenges facing Africa.

By 31 January 2001, 48 states in Africa had ratified or acceded to the UN Refugee Convention. Of all international human rights instruments, only the Convention on the Rights of the Child enjoys broader African ratification. Three of the five states that have not yet ratified the UN Refugee Convention are island states. They are Cape Verde, the Comoros and Mauritius.⁴⁴ The other two non-ratifying states in Africa are Eritrea and Libya.

The OAU Convention entered into force on 20 June 1974.⁴⁵ By 31 January 2001 it had been ratified by 44 OAU member states. Of the ten non-ratifying states, all but three (Comoros, Eritrea and Mauritius) have at least ratified the UN instruments. This means that the more universal instrument has been accepted by more states in Africa than the regional

41 Weis (n 38 above) 453.

42 UN Treaty Series vol 1001 45, adopted on 10 September 1969 and entered into force on 20 June 1974. The text of the OAU Refugee Convention is reprinted in C Heyns (ed) (n 18 above) 34; <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 1 February 2001).

43 Preamble of OAU Convention para 9. See also art 8(2): 'The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention.'

44 The fact that they are island states is probably significant in that their geographic location has in the past caused these states to be left largely unaffected by flows of refugees. It may further reflect an 'island' mentality in terms of which these states are reluctant to open up their borders (and legal systems) for the potential impact of 'continentals'.

45 Patel & Watters (n 34 above) 245. For the most recent status of ratifications, see OAU Doc CAB/LEG/24.3 (19 February 2001).

supplement. Four states (Botswana, Côte d'Ivoire, Kenya and South Africa) ratified the OAU Convention after 1990, indicating that the instrument retains its relevance in Africa today.

In an attempt to understand why an 'African supplement'⁴⁶ to existing international refugee law was added, one should draw a distinction between the two systems. In this way one may ascertain how the African contribution differs from its global equivalent.

The OAU Refugee Convention largely restates the exact wording of the UN Convention, but the term 'refugee' is broadened. The global instrument allows for a 'well-founded fear of being persecuted' as the only basic requirement for refugee status. The OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality'.⁴⁷ This extension was necessitated by the restrictive nature of the initial approach to refugees. 'Fear of persecution' concentrated on the ideas a person holds, and not on the socio-political context itself. This has led Oloka-Onyango to conclude that 'the overall ideology of those grounds . . . are rooted in the philosophy that accords primacy of place to political and civil rights over economic, social, and cultural rights.'⁴⁸ This broadened definition allows for many more factors to be invoked in seeking refugee status. These factors include serious natural disasters (such as famine, which has become prevalent in Africa) and need not affect the country as a whole.

The UN Convention's definition assumes individual screening of persons in order to establish whether they have a 'well-founded fear of persecution'. Such a system is obviously only manageable when persons flee as individuals or in small groups. When questions about refugee status arise, not in isolated cases, but from mass migrations, the application of such a test becomes impossible. Exactly the latter type of situation prevailed and still prevails in Africa. This necessitated an approach in which cumulative and objective factors could be determinative of refugee status. Such factors are events 'seriously disrupting' public order and 'foreign domination'.⁴⁹

The grounds in the OAU Convention on which refugees lose their status as refugees ('cessation of status'), or persons who are disqualified from qualifying as refugees at all ('exclusion from status'), are again derived from the UN document. But also in this regard the OAU Refugee

46 The OAU Refugee Convention recognises the UN Convention and Protocol as 'the basic and universal instrument' on the topic (Preamble).

47 Art 1(2) OAU Refugee Convention.

48 'The plight of the larger half: Human rights, gender violence and the legal status of refugee and internally displaced women in Africa' (1996) 24 *Denver Journal of International Law and Policy* 349 364.

49 Art 1(2) OAU Convention.

Convention adds to the list. The widened scope created by the broader definition of 'refugee status' is narrowed down by virtue of these additional grounds for exclusion and cessation of refugee status. Three additional categories are included in the OAU document: anyone guilty of acts contrary to the purpose and principles of the OAU; anyone who has seriously infringed the purposes and objectives of the OAU Refugee Convention; anyone who has committed a serious non-political crime outside his country of refuge after his admission to that country of refuge.⁵⁰

The OAU Refugee Convention is explicit about the obligation of states to grant asylum to refugees,⁵¹ in contrast to the UN Convention, which is silent on this issue. The duty on states under the OAU Refugee Convention is 'to use their best endeavours . . . to receive all refugees'.⁵² The way in which this duty was phrased led Weis to conclude that the requirement is recommendatory, rather than binding.⁵³ Also, because these endeavours must be 'consistent with their respective legislation',⁵⁴ states need merely comply with internal laws, whatever their content. This provision may be viewed as a precursor to the inclusion of 'claw-back' clauses in the African Charter.⁵⁵

The OAU Refugee Convention determines that a refugee has to conform with the law in the state of refuge. He or she must also 'abstain from any subversive activities against any Member State of the OAU'.⁵⁶ In this regard, states have the obligation to prohibit refugees from attacking other OAU member states through acts of armed aggression or the use of mass media.⁵⁷ Although the basis of the prohibition of the use of force and of disseminating propaganda for war has its roots in international law, the OAU Refugee Convention is unique in placing a duty on the host state to ensure compliance.

An interesting innovation in the OAU Refugee Convention is the duty placed on the country of origin in relation to returning refugees. States must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them.⁵⁸

The OAU Convention has rightly been declared a progressive contribution to international refugee law. It presents a clear example of how

50 Art 1 OAU Refugee Convention.

51 Art 2(2) OAU Refugee Convention.

52 Art 2(1) OAU Refugee Convention.

53 Weis (n 38 above) 457. However, see art 12(3) African Charter, which provides for the right 'when persecuted, to seek and obtain asylum'.

54 Art 2 OAU Refugee Convention.

55 An example of such a clause is the phrase 'provided he abides by the law' in art 10 African Charter.

56 Art 3(1) OAU Refugee Convention.

57 Art 3(2) OAU Refugee Convention.

58 Weis (n 38 above) 463.

a regional instrument can supplement an international regime by addressing problems specific to that region. The restrictive definition of 'refugee' under the UN Refugee Convention has made the application of the Convention difficult in regions other than Africa. For example, mass migrations owing to political violence and instability highlighted the inadequacy of the UN Convention definition in Latin America. Protection was granted by the Inter-American Commission to 'persons who have fled their country because their lives, safety, or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disrupted public order'.⁵⁹ This broadened definition incorporates much of the African instrument, but does not grant refugee status merely because persons had to leave their country due to disturbed public order.

2.4 Africa and the protection of the environment

In recent times, the influence of the environment on the well-being of individuals has been highlighted. Although the protection of the environment is primarily dependent on non-legal factors (such as government policy, local and international economic forces, demographics and natural elements), international treaties may also play a part by creating or stimulating an appropriate (legal) framework to improve environmental protection. The African Charter devotes one article to the right to a generally satisfactory environment 'favourable to the development of all peoples'.⁶⁰ The adoption of this provision should be seen in the context of the two treaties (one earlier and one later than the African Charter) that deal more specifically with the environment. These treaties are discussed briefly. Moreover, in the more recent Treaty Establishing the African Economic Community (AEC), specific provision is also made for the environment and the ban on import of hazardous waste into Africa and across African borders.⁶¹

a *The African Convention on the Conservation of Nature and Natural Resources*

In 1968 the OAU Heads of State and Government adopted an African instrument on the environment, the African Convention on the Conservation of Nature and Natural Resources in Algiers.⁶² It entered into force

59 Annual report of Inter-American Commission 1984–1985. This definition was subsequently affirmed by the General Assembly of the Organisation of American States. See E Arboleda 'Refugee definition in Africa and Latin America: The lessons of pragmatism' (1991) 3 *International Journal of Refugee Law* 185.

60 Art 24 African Charter.

61 Arts 58 and 59 Abuja Treaty.

62 OAU Doc CAB/LEG/24.1, adopted on 15 September 1968.

on 16 June 1969. This Convention concerns itself primarily with wildlife, but also extends to many other aspects, such as the use of resources like soil and water. It has been described (in 1985) as the 'most comprehensive multilateral treaty for the conservation of nature yet negotiated',⁶³ in which environmental concerns and development are linked.⁶⁴ As is the case with other treaties on the environment, no administrative structure is created to ensure implementation. As a result, the Convention's provisions have largely remained neglected. Still, the Convention 'has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of national legislation is based'.⁶⁵ By 1985, 28 states had become party to the Convention. A further fourteen had at that stage signed the treaty, without ratifying it.⁶⁶ Between 1985 and 1997 the number of ratifications had risen by only one.⁶⁷ This indicates that this Convention has lost some of its initial appeal.

b *The Bamako Convention*

The Bamako Convention on the ban of the import into Africa and the control of transboundary movement and management of hazardous wastes within Africa was adopted on 30 January 1991 by a conference of ministers of the environment from 51 African states who were all members of the OAU.⁶⁸ This followed on the heels of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, adopted under UN supervision on 22 March 1989.⁶⁹ Given the high degree of specialisation and uniformity due to standardised technical terminology, it should hardly be surprising that the regional treaty borrows extensively from its international predecessor. Not only the sequence of issues dealt with, but also the wording of articles correspond very closely in the two instruments.⁷⁰ The Bamako Convention has only one article more, dealing with its registration with the UN, once it becomes operational. The other 29 articles of the

63 S Lyster (1985) *International wildlife law* 115.

64 See eg art 7 of the Convention.

65 Lyster (n 63 above) 115.

66 For a list of these states, see Lyster (n 63 above) 115.

67 Only Gabon has become a party since 1985, in 1988.

68 See text in (1993) 1 *African Yearbook of International Law* 269–93.

69 See text in (1989) 28 *International Legal Materials* 657.

70 Both envisage implementation primarily through national institutions, with transnational institutions in the form of a secretariat and conference (see arts 5, 15 and 16 of the Bamako Convention).

respective documents deal with the same subject matter, mostly using the same formulations, although there are a few significant differences.⁷¹

- As its title suggests, the Bamako document deals specifically with the importing of hazardous waste **into Africa** and its movement across African borders. It places a total ban on the import of waste into the continent, and regulates waste movement within Africa itself. The Basel Convention, in contrast, contains no ban. It is regulatory in that it permits and regulates all transboundary movement of hazardous waste.⁷²
- The scope of the Bamako document is more extensive as it broadens the definition of 'hazardous waste'.⁷³ The inclusion of artificially created radio-active waste in the list of controlled waste streams is of particular relevance.⁷⁴

Other minor changes may be observed. For instance, the Basel Convention requires twenty ratifications before its entry into force, while the Bamako Convention requires ten ratifications.⁷⁵ The former entered into force on 5 May 1992.⁷⁶ By 31 December 1992 only three African states had ratified the Basel Convention: Mauritius, Nigeria and Senegal.⁷⁷ On the same date, of the three only Mauritius had also ratified the Bamako Convention. Except Mauritius, another two African countries (Tunisia and Zimbabwe) had by then ratified the regional instrument. The Bamako Convention entered into force on 22 April 1998.⁷⁸

71 See in general F Ouguerouz 'The Bamako Convention on Hazardous Waste: A new step in the development of the African international environmental law' (1993) 1 *African Yearbook of International Law* 195 and D Tladi 'The quest to ban hazardous waste import into Africa: First Bamako and now Basel' (2000) 33 *Comparative and International Law Journal of Southern Africa* 210.

72 See I Cheyne 'Africa and the international trade in hazardous wastes' (1994) 6 *African Journal of International and Comparative Law* 493 499.

73 See Ouguerouz (n 71 above) 201.

74 This aspect has probably inhibited ratification by a country like South Africa.

75 Art 25 of both conventions.

76 See Ouguerouz (n 71 above) 196.

77 As above.

78 Based on information provided by Tiyanjana Maluwa, in his capacity as legal counsel of the OAU. The Bamako Convention envisaged its entry into force on the ninetieth day after the deposit of the tenth instrument of ratification by the signatory states. This was interpreted to mean that it was only the ratification of the original signatories to the treaty which would count in computing the ten ratifications and not those ratifications by states which acceded to the treaty only after its adoption. This happened on 21 January 1998, when the tenth original signatory state (Benin) deposited its instrument of ratification. No secretariat has as yet been established, mainly because of a lack of funds (according to officials of the South African Department of Foreign Affairs).

2.5 Africa and the UN human rights treaties and treaty bodies

Six major human rights treaties, each providing for a treaty monitoring body, have been adopted under the auspices of the UN. They are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), ICCPR, ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the CRC.

African states were in particular instrumental in the adoption of the first of the six treaties, CERD, in 1965.⁷⁹ Formal acceptance of the treaty norms by African states is impressive. By 1 January 2001, 44 of the 53 African UN member states had accepted CERD, 45 the ICCPR, 43 the ICESCR, 48 CEDAW, 32 CAT and 52 CRC.⁸⁰ The optional individual complaints mechanisms of the First Optional Protocol to the ICCPR (OPI), article 14 of CERD, article 22 of CAT and the Optional Protocol to CEDAW enjoy lesser but still significant African acceptance.⁸¹ Africans have also served on all the six treaty monitoring bodies.⁸²

Despite the reluctance to comply with their obligations to submit periodic state reports, African participation has enriched the reporting process.⁸³ Numerous individual communications have been brought against African states, especially under OPI. Africans in European states have brought a number of communications against these states, especially under article 22 of CAT.

3 Africa and the development of international humanitarian law

International humanitarian law deals mainly with the protection of individuals (or groups) in times of war. International humanitarian law aims to ensure less inhumane warfare, whether of an international or non-international character. International humanitarian law is distinct

79 See E Schwelb 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 996 998.

80 See <<http://www.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV>> (accessed 1 February 2001).

81 By 31 January 2001, three African states had made declarations in terms of art 14 of CERD, 31 had accepted OPI, 6 had made a declaration in terms of art 22 of CAT and 3 African states had accepted the Optional Protocol to CEDAW.

82 For a detailed overview of this and other aspects of African involvement in the UN system, see F Viljoen 'The six major United Nations human rights treaties and monitoring mechanisms: Their relevance for Africa' (1999) 11 *African Society of International and Comparative Law Proceedings* 109.

83 C Heyns & F Viljoen *The UN human rights treaties at the national level* (2001) (forthcoming), eg ch 6, 17–19.

from international human rights law as it allows for deprivation and extensive diminution of rights (for example, allowing lawful killing). But, ultimately, they serve the same goal: the protection of the dignity and humanity of everyone.⁸⁴

3.1 The International Criminal Tribunal for Rwanda (ICTR)

On 8 November 1994, the UN Security Council adopted Resolution 955, establishing an international tribunal to prosecute and punish individuals responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between 1 January and 31 December 1994.⁸⁵ This followed in the footsteps of, and was institutionally linked to, the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993.⁸⁶

Although the ICTY was the first truly international tribunal to prosecute serious violations of international humanitarian law, the ICTR extends the ambit of the ICTY's protection. While the ICTY covers violations arising from an international armed conflict, the ICTR was created to deal with violations arising from internal (non-international) conflict.⁸⁷

Not only the creation of the ICTR, but also its functioning, has contributed to enrich international humanitarian law. The ICTR became, in *The Prosecutor v Jean Kambanda*,⁸⁸ the first court to find an individual guilty of the crime of genocide. This decision brought to life the Convention on the Prevention and Punishment of the Crime of Genocide,⁸⁹ which had largely remained a dead letter since 1948. It should be recalled that it was proposed during the deliberation of this Convention that a court be created to implement its provisions. As a result of compromise, no implementing mechanism was brought into existence. This judgment could serve as an important precedent for the to-be-established International Criminal Court (ICC).

84 See T Meron 'Convergence of international humanitarian law and human rights law' in D Warner (ed) *Human rights and humanitarian law: The quest for universality* (1997) 97-106.

85 UN Doc S/RES/955 (1994), adopted by 13 votes to 1 (Rwanda), with 1 abstention. The Statute of the ICTR is annexed to the Resolution. The Statute provides that Rwandan citizens responsible for violations 'committed in the territory of neighbouring states' may also be subjected to the jurisdiction of the ICTR (art 1 of the ICTR Statute).

86 UN Doc S/RES/827 (1993).

87 Art 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II is included in the jurisdiction of the ICTR (art 4 of the Statute of the ICTR) and not in that of the ICTY. See also Leers 'The Rwanda Tribunal' (1996) 9 *Leiden Journal of International Law* 37-38.

88 Case ICTR-97-23-5, judgment of 4 September 1998; (1998) 37 *International Legal Materials* 1411; <<http://www.ictor.org>> (accessed 1 February 2001).

89 Adopted on 9 December 1948 and entered into force on 12 January 1951.

Kambanda pleaded guilty to charges of genocide, conspiracy to commit genocide, incitement to commit genocide, complicity in genocide and crimes against humanity. In setting out the basis for his guilty plea, Kambanda admitted, amongst other things, the following:⁹⁰

- There was, in 1994, a widespread and systematic attack against the civilian Tutsi population.
- The purpose of the attack was to exterminate the Tutsi.
- As Prime Minister, he headed the Council of Ministers. At these cabinet meetings and meetings of *préfets* the course of the massacres was actively followed, but no action was taken to intervene.
- He issued the Directive on Civil Defence, which encouraged and reinforced the Interahamwe who were committing mass killing of the Tutsi civilian population.

For the first time since the Nuremberg trials, a high-ranking government official was held accountable for grave violations of humanitarian law. Jean Kambanda was the Prime Minister of the Interim Government of Rwanda from 8 April to 17 July 1994. The Interim Government was established after the air crash on 6 April 1994, in which President Habyarimana was killed. Kambanda's convictions resulted from acts committed in a position of power, as he exercised *de jure* authority over the members of his government, as well as *de jure* and *de facto* authority over senior civil servants and senior officers in the military.

He was sentenced to life imprisonment. The fact that he held such a high government position was taken into account as an aggravating factor.⁹¹ The ICTR observed as follows:⁹²

The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population.

The ICTR found the presence of mitigating factors in the fact that Kambanda's example of pleading guilty was likely to encourage others to recognise their individual responsibility.⁹³ Despite the presence of mitigation, the court concluded that the aggravating factors 'negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post, at the time he committed the said crimes'.⁹⁴

By 30 January 2001, a further ten members of the former cabinet were awaiting trial (including the Ministers of Foreign Affairs, Information, Education and Family and Women Affairs).

90 Para 39 of the judgment.

91 Art 6(2) ICTR Statute.

92 Para 44 of the judgment.

93 Para 61 of the judgment.

94 Para 62 of the judgment.

In *The Prosecutor v Jean-Paul Akayesu*,⁹⁵ for the first time, an international court applied rape in an international context. It declared that rape amounts to genocide if committed with the intention to destroy a particular group. Initially, the indictment against Jean-Paul Akayesu did not contain specific charges of sexual crimes. An amendment to the indictment, in 1997, added a count of crime against humanity (rape).⁹⁶ Accompanying this amendment, paragraphs 10A, 12A and 12B were inserted into the indictment. These paragraphs set out allegations that displaced Tutsi women, who had sought refuge at the bureau communal, were subjected repeatedly to sexual violence. Jean-Paul Akayesu, it was further alleged, knew of and encouraged the commission of these crimes.

On this basis, the ICTR Chamber found Akayesu guilty of crimes against humanity. However, the Court went further. It found, of its own accord, that the same acts also constituted genocide.⁹⁷ Article 2(2) of the ICTR Statute does not refer explicitly to sexual crimes, but makes reference to acts 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.⁹⁸

The tribunal concluded that the rapes met this requirement, remarking as follows:⁹⁹

Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

This case has been singled out for its 'immense factual and jurisprudential importance'.¹⁰⁰ It stands as the first instance of rape being included as part of the definition of genocide. Stated differently, it has now been established that rape may be committed with genocidal intent.

The tribunal has also explored and elevated into the international discourse an important aspect of traditional African society, that of restorative justice. The Tribunal Registrar has established a programme for victims, especially victims of rape and other sexual crimes. This emphasis on restorative justice rather than on (only) retribution has influenced the provision for a Trust Fund under the ICC Statute.¹⁰¹

95 ICTR 96-4-T, judgment of 2 September 1998, <<http://www.ictor.org>> (accessed 1 February 2001). Summary of case (1998) 37 *International Legal Materials* 1399; (1999) 11 *African Journal of International and Comparative Law* 336.

96 See PJ Magnarella 'Some milestones and achievements at the International Criminal Tribunal for Rwanda: The 1998 *Kambanda, Akayesu* cases' (1998) 11 *Florida Journal of International Law* 517 532.

97 Paras 731, 734 of the judgment.

98 Art 26(2) ICTR Statute.

99 Paras 731, 734 of the judgment.

100 Magnarella (n 96 above) 537.

101 Art 79 ICC Statute.

3.2 The establishment of the International Criminal Court

The process of establishing the ICTR has contributed to international law by creating the much-needed spark for the establishment of an International Criminal Court. It is correct that the Yugoslav crisis (re)opened the debate about the need for a supra-national jurisdiction to secure accountability after cases of violations of human rights. After the ICTY was in fact created, the Rwandan genocide ensued. There were persuasive arguments for the creation of another court, or the extension of the ICTY mandate. As in the Yugoslav case, the main motivation was to ensure accountability. Not creating a court to deal with the Rwandese genocide would amount to a very legitimate objection that double standards are being applied in that the Rwandese conflict is being taken less seriously than the European.¹⁰²

But the very creation of the court for Rwanda brought to the fore the problem of proliferation. Maybe there is scope for one more court to be established, but how many after that? Problems related to the establishment of multiple tribunals include limited resources, personnel duplication and time delays in establishing a tribunal infrastructure to deal with ad hoc conflicts. Against this background parties elaborated and eventually agreed on the ICC Statute.¹⁰³ As a result, something that seemed unthinkable not long before was realised.

3.3 Africa and mercenaries

Although mercenarism has existed from time immemorial, it only became an issue in international humanitarian law in this century. During the 16th century, for example, the use of mercenaries was the unquestioned norm.¹⁰⁴ In the first comprehensive codification of humanitarian law, the 1907 Hague Convention, the recruitment of mercenaries was prohibited. When the UN was formed in 1945, the single provision in the Hague Convention was still the only reference to mercenarism in international law. The UN Charter went no further than stating the general principle that states should refrain from the use of force against 'the territorial integrity or political independence'¹⁰⁵ of another state. Viewed against the background of the realities of the Second World War and the ideological conflicts flaring up immediately thereafter, mercenaries hardly merited any attention.¹⁰⁶

102 See P Akhavan 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 *American Journal of International Law* 501.

103 Adopted by a UN conference of plenipotentiaries on 17 July 1998: (1998) 37 *International Legal Materials* 999.

104 C Botha 'Soldiers of fortune or whores of war: The legal position of mercenaries with specific reference to South Africa' (1993) 15 *Strategic Review of Southern Africa* 75-78.

105 Art 2(4) UN Charter.

106 JL Taulbee 'Myths, mercenaries and contemporary international law' (1985) 15 *California Western International Law Journal* 339-345.

The independence of states previously under colonial rule coincided with an increase in and a changing attitude towards the use of mercenaries. It became a focus of concern especially in Africa. Concern was first raised about the situation in the Congo in the early 1960s. During the civil war, the Katangese secessionist forces of Moïse Tshombe were assisted by mercenaries from Europe and South Africa.¹⁰⁷ Subsequently, the government of Mobutu Sese Seko also employed foreign soldiers. Other African examples over the last few decades are Nigeria, Angola, the *coup d'Etat* by the French national Bob Denard in the Comoros, and the attempted *coup d'Etat* in the Seychelles by mercenaries under the leadership of Mike Hoare.¹⁰⁸

Gradually, mercenarism became an issue raised in international political fora. At the regional level, first the OAU Council of Ministers and later the Assembly of Heads of State and Government denounced these activities. At the global level, the UN General Assembly followed in 1968 with Resolution 2465, termed 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples', which declared the use of mercenaries against national liberation movements in colonial territories to be a criminal act. This is evidence of how an African concern has been given global recognition.

On the legal plane Africa also played a leading role. The first treaty dealing specifically with mercenaries — the OAU Convention on the Elimination of Mercenarism in Africa — was adopted under the auspices of the OAU in 1977.¹⁰⁹ After the required number of states ratified the Convention in 1985, it entered into force.¹¹⁰ It defines a mercenary as a non-national of the state against which he is employed. This includes a person who 'links himself willingly' to groups or organisations aiming to overthrow or undermine another state, or aiming to obstruct the activities of any liberation movement recognised by the OAU.¹¹¹

The African initiative impacted in two major ways on international law:

- The first is the inclusion of an article dealing with mercenaries in the 1977 Geneva Protocol I Additional to the Geneva Convention of 1949. In terms thereof, a mercenary 'shall not have the right to be a combatant or a prisoner of war'.¹¹² The article is a product of

107 PW Mourning 'Leashing the dogs of war: Outlawing the recruitment and use of mercenaries' (1981/2) 22 *Virginia Journal of International Law* 589-599.

108 On their prosecution in South Africa for contraventions of the Civil Aviation Offences Act 10 of 1972, see *S v Hoare* 1982 4 SA 865 (N).

109 OAU Doc CM/433/Rev L Annex 1 (1972). Text of substantive provisions reproduced in (1981/2) 22 *Virginia Journal of International Law* 613-18, and the International Convention Against the Activities of Mercenaries 619-25.

110 GJ Naldi *The Organisation of African Unity: An analysis of its role* (1999) gives a list of states parties in 1999 (102 (n 25)).

111 Art 1 OAU Convention on the Elimination of Mercenarism in Africa.

112 Art 47(1) Geneva Protocol I.

compromise, not going as far as the OAU Convention had already gone or as the insistence of African states required.

- Secondly, a movement for an international convention on the recruitment, use, financing and training of mercenaries was launched at the UN. In 1979, the UN General Assembly adopted a resolution dealing with the 'use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination'. An ad hoc committee for the drafting of an international convention was established. After years of debate, the General Assembly adopted the Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

The highlighting of mercenarism internationally is an African achievement. It shows the increasing prominence of Africa in the UN. But, with Taulbee, one has to question the substantive impact of these provisions. Viewed globally, mercenaries have played a very limited role in modern warfare and conflict. The African response can be explained primarily with reference to the fact that the mercenary has become 'the symbol of racism and neo-colonialism within the Afro-Asian bloc',¹¹³ because the recurring scenario was one of 'white soldiers of fortune fighting black natives'.¹¹⁴ Given the repeated involvement of South African mercenaries in African conflicts,¹¹⁵ the cohesiveness in Africa's approach becomes all the more understandable. One must also not lose sight of the context — the sovereignty of the newly independent Africa states was easily threatened, especially in the absence of a loyal citizenry and a loyal and well-trained armed force. Seen from this perspective, the outlawing of mercenaries had little to do with the protection of human rights, but

113 Taulbee (n 106 above) 342.

114 As above.

115 In the 1990s the private South African firm Executive Outcomes played a prominent role in, for example, Angola and Sierra Leone. In both these instances they were on the payroll of the government in the countries concerned. Newly elected president of Sierra Leone, Ahmed Tejan Kabbah, relied on the presence of Executive Outcomes to keep rebel forces at bay and ensure stability. In 1996 Executive Outcomes was paid \$1,2 million per month, making up a considerable percentage of state expenditure ('Kabbah strikes back' (1996) *Nov/Dec Africa Today* 43–4).

was intertwined with a movement to consolidate power in the hands of African rulers.¹¹⁶

4 Conclusion

Regional human rights treaties adopted under the auspices of the OAU have enriched international human rights law significantly over the latter half of the previous century. The African Charter represents a clear break with numerous dichotomies that prevailed in international law. As far as refugees, the environment and children are concerned, African states responded to defects or omissions in UN treaties. The UN Refugee Convention of 1951 (and the 1967 Protocol thereto) was supplemented by the OAU Refugee Convention of 1969, providing, amongst other things, for an extended definition of 'refugee'. In respect of the environment, the Basel Convention (1989) was taken a step further with the adoption of the Bamako Convention (1991). As far as children's rights are concerned, the African Children's Charter (1990) followed on the heels of the CRC (1989), elevating the protection of children in important respects of particular relevance to Africa.

As UN members, African states and their nationals also participated in the UN human rights treaty system.

Africa has further played an important role in the development of international humanitarian law. The ICTR, established to provide international justice after the genocide in Rwanda, became the first international tribunal to address the effects of a situation of internal armed conflict. The ICTR also became the first tribunal to find that rape may constitute genocide. By convicting a high government official the ICTR demonstrated unequivocally that the international trend favouring impunity may be reversed. The ICTR served as an important precedent for the establishment of the ICC. The adoption by the OAU of a treaty dealing with mercenaries served as an example for a later treaty under UN auspices.

116 The 1990s saw the emergence of a corporate army, Executive Outcomes. It played an active role in numerous African conflicts, especially in Angola and Sierra Leone. Obvious concerns have been raised: leaders with little popular support may remain in power despite national disintegration (also of the military forces), only because they control state finances. In the process, democracy may be thwarted, and national resources may become directed at the survival of a leader rather than the improvement of citizens' quality of life. On the other hand, Executive Outcomes has served as a 'private Pan-African peace-keeping force of a kind which the international community has long promised, but failed to deliver' (Pech & Beresford 'Africa's new-look dogs of war' (24-30 January 1997) *Mail and Guardian* 24). In both Angola and Sierra Leone its intervention has contributed to an eventual peace process. The absence of any meaningful role played by the OAU or the UN has created the room for the involvement of Executive Outcomes in internal African conflicts.

This contribution has not given a comprehensive overview of African involvement in and contributions towards international human rights and humanitarian law. Treaties dealing with other aspects, such as landmines and women's rights, have not been canvassed here. Recent progress towards a Protocol to the African Charter on the Rights of Women underscores the fact that the African contribution to the development of international law will continue into the next century.¹¹⁷

117 The Draft Protocol is reprinted on 53–63 of this journal.

A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women

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1 Introduction

The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Draft Women's Protocol) is aimed at protecting the rights of women.¹ It is not a final document and African states might still suggest some changes to it. African states have realised that human rights instruments at the international level do not always address the unique problems of the continent. Africa has at times had to supplement the protection mechanisms at the international level so that they meet the needs of its own unique conditions.²

This article first traces the history of the Draft Women's Protocol. This is followed by an analysis of some of its pertinent provisions. Problems that may be associated with the Draft Women's Protocol will then be identified. Lastly a conclusion is drawn.

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1 Organisation of African Unity (OAU) Doc CAB/LEG/66.6 of 13 September 2000. Attached as Annex A.

2 For example, the African Charter on the Rights and Welfare of the Child (adopted in July 1990 and entered into force on 29 November 1999 CAB/LEG/153/Rev 2) and the OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa (adopted on 10 September 1969 and entered into force on 20 June 1974 CAB/LEG/24.3) reprinted in C Heyns (ed) *Human rights law in Africa 1997 (1999)* 34–46.

2 Background to the Protocol

The history of the Draft Women's Protocol is quite a long one. The African Charter on Human and Peoples' Rights (African Charter) was intended to guarantee the rights of all individuals, men and women alike.³ Therefore there had to be strong reasons for having a protocol to the African Charter that specifically dealt with women's rights. The African Charter already contains provisions which protect women.⁴ However, these are now considered as lending insufficient protection to women, who make up the majority of Africa's population.⁵ It has been argued that article 18(3) of the African Charter protects women in the context of the family and that outside this arena there is not much protection afforded to women.⁶ There is also the problem of the African Charter having failed to address numerous issues affecting the rights of women such as female genital mutilation (FGM), inheritance by women, and forced marriages.⁷

The African Commission on Human and Peoples' Rights (African Commission), working together with Women in Law and Development in Africa (WILDAF), organised a seminar on women's rights in 1995.⁸ It was decided that an additional protocol to the African Charter should be drawn up to address women's rights.⁹ The OAU Assembly of Heads of State and Government in July 1995 affirmed the need to have an additional protocol to the African Charter.¹⁰ Experts were appointed to draft the protocol, working together with African non-governmental organisations (NGOs) and various other interested parties. In 1998 the Draft Protocol to the African Charter on the Rights of Women in Africa (Draft Kigali Protocol) was approved by the African Commission during

3 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986; reprinted in C Heyns (ed) *Human rights law in Africa 1996* (1996) 7–16.

4 Art 2 provides for equal enjoyment of all rights in the African Charter regardless of sex. Art 3 provides that all individuals shall be equal before the law and be entitled to equal protection. Art 18(3) indicates that there should be elimination of discrimination against women and also the need to protect the rights of women.

5 WILDAF 'The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights' <<http://www.wildaf.org.zw/news4.html>> (accessed 25 January 2001).

6 As above.

7 As above. See also L Kois 'Article 18 of the African Charter on Human and Peoples' Rights: A progressive approach to women's human rights' (1997) 3 *East African Journal of Peace and Human Rights* 92–5. See also M Mubiala 'Le projet de Protocol a la Charte Africaine des Droits de l'homme et des Peuples relatif aux Droits de la Femme en Afrique' (2000) *Human Rights Droits de l'homme* 23.

8 n 5 above 2–3. The seminar was held in March in Lomé, Togo.

9 As above.

10 31st Ordinary Session Resolution AHG/Res 240 (XXXI).

its session held in Kigali, Rwanda, and this draft was subsequently sent to the OAU for further action.¹¹

At the same time that the Draft Women's Protocol was being drafted, the Women's Unit within the OAU together with the Inter-African Committee on Harmful Traditional Practices Affecting the Health of Women and Children (IAC) were working on the Draft OAU Convention on the Elimination of All Forms of Harmful Practices (HPs) Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention).¹² In order to avoid duplication, the OAU suggested that there should be closer collaboration between the African Commission and the Women's Unit.¹³

The Women's Unit together with the Legal Division of the OAU made a few suggestions to be considered in order to improve the Draft Kigali Protocol.¹⁴ The OAU Legal Counsel suggested that a meeting of government experts should be convened to further discuss the instrument before it could be forwarded to the Council of Ministers and the Summit of Heads of State and Government.¹⁵ It was also suggested that for strategic and substantive reasons the Draft OAU Convention should be integrated as a chapter in the Draft Kigali Protocol.¹⁶

In September 2000 an integrated document was finalised.¹⁷ The Draft Women's Protocol is a longer document in comparison to the other two documents, namely the Draft Kigali Protocol and the Draft OAU Convention.¹⁸ The Draft Women's Protocol is a more thorough document that combines the concerns that were raised in both the Draft Kigali Protocol and Draft OAU Convention. The Draft Women's Protocol may be considered an African instrument which has gone further than the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Draft Women's Protocol still has to go through some procedures before it is presented to OAU member states for adoption. It is unlikely that it will be adopted before the year 2002. This is because there are time frames which it has to meet. For instance, governments have to be given time to study the document. It is already too late to meet these

11 26th Ordinary Session of the African Commission on Human and Peoples' Rights 1-15 November 1999 'Final Communiqué' <http://www1.umn.edu/humanrts/africa/african_charter26f.html> (accessed 20 January 2001) para 16.

12 CAL Johnson (OAU — ESCAS Department) 'Draft Protocol to the African Charter on Women' File No ES/WU/RW/51.OO (25 February 2000) 1-2.

13 As above.

14 T Maluwa (OAU — Legal Counsel) Letter to Chairman of the African Commission CAB/LEG/72.20/27/VOL.11 (7 March 2000).

15 As above.

16 As above.

17 n 1 above.

18 The Draft Women's Protocol has 27 articles whereas the Draft Kigali Protocol and the Draft OAU Convention have 23 and 13 articles respectively.

time frames before the next Summit of Heads of State and Government usually meeting in June.

3 An overview of the Draft Women's Protocol

3.1 The Preamble

The Draft Kigali Protocol has extensively influenced the Preamble to the Draft Women's Protocol. The Preamble recalls and notes various human rights instruments directed at ensuring equality of the sexes.¹⁹ The Draft Women's Protocol intends to address discrimination against women. The issue of the elimination of harmful practices that was included in both the Draft OAU Convention and the Draft Kigali Protocol is also raised in the Draft Women's Protocol. The Preamble of the Draft Women's Protocol is clearer and covers those issues that are of concern in a direct manner.

3.2 The definitional section

The Draft Women's Protocol has an article dedicated to definitions.²⁰ It defines terms such as 'discrimination against women', 'harmful practices', and 'violence against women'.²¹

The definition of 'discrimination against women' has been approached differently in the Protocol.²² Under the Draft Kigali Protocol discrimination against women dealt with 'differential treatment of which the effects compromise or destroy the recognition, enjoyment or the exercise by women of human rights and fundamental freedoms'.²³ The Draft Women's Protocol deals not only with the effect of such treatment but also with the objective of such treatment.²⁴ This therefore gives a wider definition to discrimination against women. Violence against women is defined to include physical, sexual and psychological harm. The mere threat to commit such violence is also regarded as part of the definition.²⁵ This definition is wide enough to cover any of these acts in private or public life. In effect domestic violence is included under the definition. Under this section the definition of harmful practices is not limited to acts only, but includes attitudes which negatively impact on among other things the rights to life, health and bodily integrity of women and girls.²⁶ This means that negative mindsets need to be changed.

19 Preamble para 5 Draft Women's Protocol.

20 Art 1 Draft Women's Protocol.

21 Art 1(d), (e) and (h) Draft Women's Protocol.

22 Art 1(d) Draft Women's Protocol.

23 Art 1 Draft Kigali Protocol.

24 n 22 above.

25 Art 1(h) Draft Women's Protocol.

26 Art 1(e) Draft Women's Protocol.

3.3 Emphasis on state parties to act

Right from the onset it is important to note that the Draft Women's Protocol places an obligation on the state to help women achieve their rights. Only two out of the 21 articles do not put such a direct duty on the state parties.²⁷

The Draft Women's Protocol is quite succinct in addressing the issue of discrimination against women. State parties have to embody the principle of equality between sexes in their national constitutions and legislative instruments.²⁸ This is a big challenge for many countries. However, some countries have already gone a long way in trying to ensure that such provisions exist in their constitutions and that legislation is in place to this effect. South Africa is a good example.²⁹

3.4 Protection of dignity and physical security

The respect for dignity aimed at ensuring that women enjoy equal human rights is upheld in the Draft Women's Protocol.³⁰ This provision is taken largely from the Draft Kigali Protocol and improved upon by requiring that measures be taken to prohibit the exploitation and degradation of women.³¹ The Draft Kigali Protocol seems to embody a mere statement of a principle but the Draft Women's Protocol requires that positive action be taken to achieve this principle.

A new approach on the subject of women's rights to physical and emotional security is evident from the Draft Women's Protocol. In an effort to protect the physical and emotional security of women, pregnant women are not to be sentenced to death, and experiments are not to be carried out on women without their consent. Women and girls are supposed to be protected from rape and all forms of violence.³²

3.5 Exploitation and violence

Exploitation such as commercial sexual exploitation or exploitation at work affects the dignity of women. States are therefore supposed to take measures to ensure that exploitation and degradation of women do not happen.³³ This will be part of the way to ensure that respect for the dignity of women is upheld.

27 Arts 21 and 22 Draft Women's Protocol.

28 Art 2(1)(a) Draft Women's Protocol.

29 For example, the Domestic Violence Act 116 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

30 Art 3 Draft Women's Protocol.

31 Art 3(b) Draft Women's Protocol.

32 Art 4(c) Draft Women's Protocol.

33 n 31 above.

Article 4(d) of the Draft Women's Protocol has brought about a more positive and welcome approach to the issue of treating rape and sexual abuse during conflict as war crimes. Such acts are to be considered war crimes without the prosecution having to prove that they were carried out with a political motive.³⁴ It will consequently be easier to prosecute persons who commit such acts.

The Draft Women's Protocol has dedicated an article to the need to eliminate violence against women.³⁵ This is a detailed article, as it does not merely cover the elimination of violence but also looks at how to deal with those who have been victims of violence. It requires that compensation be paid to victims.³⁶ This will act both as a deterrent to those who commit such violence and also as a way of helping women who have been victims of violence to normalise their lives. The same article requires that both rehabilitation and reparation for victims be undertaken.³⁷ This means that greater attention will be paid to victims of violence. Such attention is often lacking in legal systems in Africa. The focus is usually on punishing offenders and nothing is done for the benefit of the victims.

The most important contribution by the Draft OAU Convention to the Draft Women's Protocol is found in article 6 which deals entirely with harmful practices. For practices to be harmful they must not only affect the fundamental human rights of women and girls but they must also be contrary to recognised international standards. This could be interpreted to mean that these standards are flexible, classifying certain activities as harmful. Public awareness campaigns through formal and informal education have to be undertaken.³⁸ The issue of medicalisation and para-medicalisation of FGM victims is addressed, as is the rehabilitation of such victims.³⁹ The article also recognises the need to grant asylum to women who face the danger of these harmful practices.⁴⁰ In recent years a number of women have sought asylum for fear that harmful practices will be performed on them.⁴¹ Harmful practices remain one of the subjects that affects the lives of many women. The Protocol is looking not only at preventing these activities but also at the same time it seeks to encourage countries to assist those who have already

34 In the Draft Kigali Protocol art 5(f) had indicated that there must be a political motive for these acts to be considered war crimes.

35 Art 5 Draft Women's Protocol.

36 Art 5(c) Draft Women's Protocol.

37 Art 5(d) Draft Women's Protocol.

38 Art 6(a) Draft Women's Protocol.

39 Art 6(b) and (c) Draft Women's Protocol.

40 Art 6(d) Draft Women's Protocol.

41 Washington Post 'Deportation halted for woman fleeing mutilation' <<http://www.washingtonpost.com/wp-srv/national/daily/july99/abankwah21.htm>> (accessed 22 January 2001).

been victims. By encouraging the granting of asylum to women and girls who are in danger of being subjected to these harmful practices, the Protocol has taken a revolutionary step in this direction.

3.6 Marriage and related aspects

The issue of marriage is dealt with under the Draft Women's Protocol. Owing to the many inequalities that characterise marriages in Africa, the Protocol pays attention to establishing equality within the marriage union. Such equality would be aimed at consent to marriage, rights governing property, responsibilities for children, and the right of a woman to retain her nationality. Child marriages are prohibited under the Draft Women's Protocol as they are under the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁴²

The Protocol requires polygamy to be prohibited.⁴³ Some have argued that polygamy is not really a human rights issue, but a social issue.⁴⁴ It may also be said that women in a polygamous relationship should rather be empowered so that they are able to extricate themselves from such a relationship. It may further be argued that even if polygamy is prohibited, a husband could have extramarital affairs which have the same negative effect on the marriage as polygamy.

The polygamy clause was regarded as one that may cause difficulty in the adoption of the Draft Women's Protocol.⁴⁵ The adoption of the Draft Women's Protocol may be hindered because some member states of the OAU have large populations that either belong to religions that permit polygamy or where customary law has recognised this practice for centuries. Islam is one of the major factors in political and social development in many parts of Africa and its teachings cannot be suddenly changed or ignored.⁴⁶ Islamic countries would probably be reluctant to adopt a stance against polygamy because marrying more than one wife is generally permissible under Islam.⁴⁷

42 Art 21(2) African Children's Charter. See also F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199-209.

43 Art 7(c) Draft Women's Protocol.

44 OC Eze *Human rights in Africa: Some selected essays* (1984) 149-50.

45 Commission for Gender Equality 'Consultative Workshop on Gender Issues' of 16 October 2000, University of Pretoria, South Africa. Some participants at the workshop raised some of these arguments on the subject of the polygamy clause being included in the Draft Kigali Protocol.

46 AA El Naeim 'A modern approach to human rights in Islam: Foundations and implications for Africa' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 75.

47 Eze (n 44 above) 151-2. See also MZ Ibn'Yahya 'Women, polygamy and Islam' <<http://members.tripod.com/islamiczone/women.htm>> (accessed 22 January 2001).

One could argue that countries opposing the inclusion of the polygamy clause are free to make a reservation on this issue. On the other hand, one should not forget that reservations to a treaty should not be contrary to the object and purpose of the treaty.⁴⁸ The question would arise as to whether the subject of polygamy is vital to the Draft Women's Protocol as a whole. If not, countries could easily make reservations. Some reservations to CEDAW caused controversy, such as the reservation by the Maldives to the effect that it would not be bound by any provision requiring it to change its Constitution or laws.⁴⁹ Some states made reservations to the effect that they would not be bound by provisions contrary to Islamic Shari'a.⁵⁰

The Draft Women's Protocol requires state parties to enact legislation regarding separation and termination of marriage. Issues such as women's right to choose their place of residence or retain their nationality are very important. In the past women have been discriminated against on matters concerning the right of their children to acquire their mothers' nationality, especially where they have a foreign father, or even in matters concerning women wishing to live with their husbands in the woman's country of citizenship.⁵¹

The article in the Protocol governing separation and termination of marriages raises some issues that could cause difficulties.⁵² For instance, the issues of divorce and the annulment of marriage by a judicial officer present problems. Not all marriages are entered into by judicial process. Some are conducted by religious clerics. Others are conducted through traditional mechanisms.⁵³ There is no place for a judicial officer in such cases and consequently judicial officers may not be the appropriate persons to annul such unions.

3.7 Women and decision making

The importance of access to information and legal aid is recognised through a separate provision on the right to information and legal aid.⁵⁴ However, the Draft Women's Protocol should have contained a provision requiring women to be represented in the judicial system, as women

48 Art 19(c) of the Vienna Convention on the Law of Treaties (23 May 1969 1155 UNTS 331). See also L Lijnzaad (1995) *Reservations to UN-human rights treaties: Ratify and ruin?* (1995) 136.

49 C Chinkin 'Reservations and objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in JP Gardner (ed) *Human rights as general norms and states' right to opt out* (1997) 64 68.

50 n 49 above 69.

51 *Aumeeruddy Cuffra v Mauritius* (1981) 62 ILR 285 286. See also *Dow v Attorney General* (1992) LRC (Botswana CA) 623.

52 Art 8 Draft Women's Protocol.

53 JC Bekker *Customary law in Southern Africa* (1989) 105.

54 Art 9 Draft Women's Protocol.

comprise the majority of citizens on the continent.⁵⁵ Women need access to information and they also need legal assistance in areas such as marriage, inheritance and accessing finance. Various rights have been set out in the Protocol and there is a need to provide women with the necessary legal support. In order to ensure that women may claim and enforce their rights, the need for legal aid has been given prominence.⁵⁶

Under the Protocol, women are guaranteed the right not just to participate in the political process but also to take part in decision making.⁵⁷ This is a positive development. In fact, the Protocol requires women to be represented equally on electoral lists.⁵⁸ It was probably realised that decision making often excludes women, especially at the level of government. The right to participate in the decision-making process is extended to matters involving the right to peace.⁵⁹ This is also a positive step, given the fact that women comprise the largest group of refugees, returnees, and displaced persons.⁶⁰

3.8 Other important issues

In order to achieve the right to peace, state parties are required to take special measures to ensure that women and children are protected in conflict situations.⁶¹ This also extends to refugees, returnees and displaced women and children. There is no elaboration on the special measures that must be taken; therefore each case may be dealt with according to its merits.

Economic and social welfare rights are all well protected.⁶² Equal access to employment, equal pay and work, protection from sexual harassment, the right to choose one's occupation, and support for women in the informal sector are some of the issues being addressed.⁶³

Women's health is also given attention. The Draft Women's Protocol stipulates that women ought to have greater control over their reproductive rights.⁶⁴ Women should be able to determine the number of children that they have and the spacing of such children.⁶⁵ Many of Africa's problems may be attributed to its high rate of population growth. Giving women greater control over reproduction will not only ensure

55 n 5 above 1.

56 Art 9 Draft Women's Protocol.

57 Art 10 Draft Women's Protocol.

58 Art 10(1)(b) Draft Women's Protocol.

59 Art 11(2) Draft Women's Protocol.

60 Kois (n 7 above) 107.

61 Art 11(4)(a) Draft Women's Protocol.

62 Art 13 Draft Women's Protocol.

63 As above.

64 Art 14 Draft Women's Protocol.

65 Art 14(1)(a), (b) and (c) Draft Women's Protocol.

women better health but also help the continent to tackle the problem of rapid population growth.

The Draft Women's Protocol places great emphasis on the role of the state in ensuring that women enjoy their human rights.⁶⁶ Important rights such as the right to food security, adequate housing and the right to a positive cultural context are all included.⁶⁷ Participation by women in determining cultural policies is being encouraged.⁶⁸ This implies that women would help to eradicate the negative cultural practices and help in promoting positive ones. This may not be easy to achieve, especially in very traditional societies. Nevertheless, it is important to include such provisions because in some societies women have played a role in the continuation of negative practices that affect them.⁶⁹

Other matters that would help in the development of society as a whole are advanced in the Draft Women's Protocol. The promotion of a healthy and sustainable environment is provided for as a human right to be enjoyed by women.⁷⁰

The Draft Women's Protocol ought not to be viewed as merely advancing the rights of women, but rather as advancing the interests of society in general. This is because the whole of society gains if a healthy and sustainable environment is attained. The right to sustainable development through access to land and credit is advanced.⁷¹ If achieved, this would help millions of women who are locked in the vicious cycle of poverty and as a result it would help them to uplift the lives of their dependants.

Under the Draft Women's Protocol provision is made for the protection of widows.⁷² The Draft Women's Protocol requires that widows be protected from inhuman, degrading and humiliating practices.⁷³ In order to ensure the continuation of a family life, widows should be able to remarry and be allowed to be guardians of their children.⁷⁴ The right of widows to inherit property and the right of girls to inherit are emphasised in the Draft Women's Protocol.

An important but at the same time vague inclusion in the new draft is the 'right to specific measures of protection' for elderly women and disabled women.⁷⁵ One may argue that the 'specific measures' have

66 Arts 2–20 Draft Women's Protocol do have provisions where direct state action is mandatory. Only arts 21 and 22, which confer the right to inheritance and special protection to be accorded to elderly and disabled women, do not make the direct statement of putting the duty on the state.

67 Arts 15–17 Draft Women's Protocol.

68 Art 17(1) Draft Women's Protocol.

69 T Masland 'The ritual of pain' *Newsweek* (5 July 1999) 45–6.

70 Art 18(1) Draft Women's Protocol.

71 Art 19 Draft Women's Protocol.

72 Art 20 Draft Women's Protocol.

73 Art 20(a) Draft Women's Protocol.

74 Art 20(b) and (c) Draft Women's Protocol.

75 Art 22 Draft Women's Protocol.

been deliberately left vague so that states have leeway to act according to the prevailing conditions in their separate territories.

3.9 Interpretation

Article 23 of the Draft Women's Protocol presents some problems. It stipulates that the interpretation of the Draft Women's Protocol will be done by the African Court on Human and Peoples' Rights (African Court). This court has not yet come into existence.⁷⁶ The Protocol setting up the court requires fifteen ratifications for it to come into being and it will take some time before the court is set up and becomes functional.⁷⁷ Similarly, the Draft Women's Protocol needs fifteen ratifications before it enters into force.⁷⁸

However, one must not forget that a protocol is an addition to an already existing treaty. In this case the Draft Women's Protocol is an addendum to the African Charter. Therefore this Protocol does not exist on its own and must be interpreted with due regard to the African Charter. The African Charter already has mechanisms for its interpretation.⁷⁹ These mechanisms can be extended to also cater for the interpretation of this Protocol.

On the subject of interpretation another question needs to be considered. A situation may arise where a country has ratified the Draft Women's Protocol but not the Protocol setting up the African Court. Article 23 would have a far-reaching effect on that country in such a situation. It would mean that for purposes of the Draft Women's Protocol that particular state party would be under the jurisdiction of the African Court.

The final article of the Draft Women's Protocol is one of the most significant articles in the document.⁸⁰ This article provides that the provisions in the Protocol will not affect more favourable provisions already in existence in legislation at the domestic level or even in other conventions to which state parties have committed themselves. This means that if a complaint arises, the body interpreting the Protocol will not be limited to the Protocol but should establish the most favourable protection that can be afforded to the women. This will be done by taking into consideration other human rights instruments and the domestic law which bind the state.

76 As at July 1999 only Burkina Faso, Senegal and The Gambia had ratified the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (Protocol on African Court). Since then Mali has also ratified this Protocol. See 'Status of Ratification' <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 3 January 2001).

77 Art 34(3) Protocol on the African Court.

78 Art 25(1) Draft Women's Protocol.

79 Art 62 African Charter.

80 Art 27 Draft Women's Protocol.

4 Some problematic aspects of the Draft Women's Protocol

4.1 Duplication

It is clear that the Draft Women's Protocol is intended to be a supplement to the African Charter. The African Charter applies to everyone.⁸¹ The Draft Women's Protocol pays attention to women only. One could argue that the African Charter does not distinguish between the sexes when it guarantees the various rights and freedoms. The problem is with the implementation of the African Charter which lies with state parties. It is up to state parties to the African Charter to ensure that the rights set out in the African Charter are enjoyed by all individuals. If this is achieved, both women and men should be able to enjoy a more humane life.

4.2 Inconsistency and overambitiousness

The Draft Women's Protocol may also be said to fluctuate between setting out general principles and providing detail. There is a lack of consistency. For instance, article 3 indicates that states should 'ensure that women enjoy rights and dignity inherent in all human beings', and the article then states that 'appropriate measures to prohibit' degradation and exploitation of women should be taken. On the other hand, article 4 gives details by stating the exact treatment which women should be protected from. Article 4 therefore goes beyond a mere statement of principle.

The Draft Women's Protocol may also be said to set out goals that are difficult to attain, and for this reason it may not be ratified by some countries as they may not be in a position to attain the goals it sets out to achieve. The end result would be that the Protocol would become yet another addition to the existing body of human rights instruments meant rather for academic discourse than for practical enforcement.

The issue of child marriage is one example. It is difficult to outlaw child marriages, especially once girls reach the age of puberty. The issue of requiring states to enact legislation to ensure that through mutual agreement children can use their mother's maiden name is part of the overambitious approach portrayed by some articles in the Protocol. What happens if there is no mutual agreement, considering that mutual agreement cannot be forced on people?

4.3 Controversial provisions

The Draft Women's Protocol has created controversy on certain issues. For example, article 10(1)(b) requires that women be equally represented

⁸¹ Numerous articles in the African Charter indicate that the rights in the Charter apply to every individual.

in all elections. This does not take into consideration issues such as women's qualifications and availability as office-bearers. It rather aims at achieving a balance based on the sex of individuals. Because of this, article 10(1)(b) would be seen as controversial in many countries. While the problems of women need to be addressed, caution has to be exercised in the approach that is used. Attention should rather be focused on ensuring that people in offices of authority are gender sensitive and aware of the problems that women face. Other controversial aspects such as the prohibition of polygamy and child marriages have been discussed earlier.⁸²

5 Conclusion

Certain countries may be unwilling to ratify the Draft Women's Protocol. This does not mean, however, that the principles enunciated in this Protocol cannot be used when interpreting other human rights instruments on the continent.

An institution such as the African Commission may use this document as a guide when interpreting the African Charter. This is acceptable mainly because the African Charter itself allows the African Commission to go beyond the African Charter when interpreting the rights set out in it.⁸³ In this way the African Charter will be interpreted progressively and will include new approaches such as those raised in the Draft Women's Protocol. The African Commission has a good number of women members and they should lead the way in helping to interpret the African Charter progressively.⁸⁴

The Draft Women's Protocol has come a long way. In general it is a fair document that sets out some of the problems that affect women in Africa. It is a good starting point for countries that want to address the problems facing women.

One hopes that the Draft Women's Protocol will not become just another document that states ratify to show that they are progressive while in reality they fail to implement its provisions. There are areas in the Protocol which may still be improved. The document can still be revised so that problematic areas are adequately addressed. This discussion is aimed at contributing to the debate about the resolution of these issues.

82 See 3.6 above.

83 Arts 60 and 61 African Charter.

84 Of the 11 members 4 are women. These are Ms Florence Butegwa, Ms Jainaba Johm, Dr Vera Chirwa, and Ms Julienne Ondziel-Gnelenga. See 'African Commission on Human and Peoples' Rights — Commissioners' lists and addresses' <<http://www.up.ac.za/chr/ahrd/ahrd.html>> (accessed 23 January 2001).

ANNEX A:
**DRAFT PROTOCOL TO THE AFRICAN
CHARTER ON HUMAN AND PEOPLES'
RIGHTS ON THE RIGHTS OF WOMEN IN
AFRICA***

The State Parties to this Protocol,

CONSIDERING that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the OAU Assembly of Heads of State and Government meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

CONSIDERING that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

FURTHER CONSIDERING that Article 18 of the African Charter on Human and Peoples' Rights calls on all Member States to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

NOTING that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and

* CAB/LEG/66.6; final version of 13 September 2000.

Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and all other international conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

NOTING that women's rights and women's essential role in development have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

FURTHER NOTING that the Plans of Action adopted in Dakar and in Beijing call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions and other Conventions aimed at eliminating all forms of discrimination and at promoting equality between men and women;

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of Member States, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls should be condemned and eliminated, and **DETERMINED** to ensure that the rights of women are protected in order to enable them to enjoy fully all their human rights;

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

For the purpose of the present Protocol

- a) **'African Charter'** shall mean the African Charter on Human and Peoples' Rights;
- b) **'African Commission'** shall mean the African Commission on Human and Peoples' Rights;

- c) **'Assembly'** shall mean the Assembly of Heads of State and Government of the OAU;
- d) **'Discrimination against women'** shall mean any distinction, exclusion or restriction based on sex, or any differential treatment whose objective or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.
- e) **'Harmful Practices (HPs)'** shall mean all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health and bodily integrity.
- f) **'OAU'** shall mean the Organization of African Unity.
- g) **'State Parties'** shall mean the State Parties to this Protocol.
- h) **'Violence against women'** shall mean all acts directed against women which cause or could cause them physical, sexual, or psychological harm, including the threat of such acts; or the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of conflict/war.

Article 2

Elimination of Discrimination against Women

1. State Parties shall combat all forms of discrimination against women through appropriate legislative measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments the principle of equality between men and women and ensure its effective application;
- b) enact and effectively implement appropriate national legislative measures to prohibit all forms of harmful practices which endanger the health and general well-being of women and girls;
- c) integrate a gender perspective in their policy decisions, legislation, development plans, activities and all other spheres of life;
- d) take positive action in those areas where discrimination against women in law and in fact continues to exist.

2. State Parties shall modify the social and cultural patterns of conduct of men and women through specific actions, such as:

- a) public education, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women;
- b) support local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

Article 3
Respect of Dignity

Women contribute to the preservation of those African values that are based on the principles of equality, dignity, justice and democracy. In this regard, the State Parties shall:

- a) ensure that women enjoy rights and dignity inherent in all human beings;
- b) adopt appropriate measures to prohibit any exploitation and degradation of women.

Article 4
Right to Physical and Emotional Security

Women shall be entitled to respect of their lives and the integrity of their person. Accordingly, the State Parties shall:

- a) not pronounce or carry out death sentences on pregnant women;
- b) prohibit medical or scientific experiments on women without their informed consent;
- c) protect girls and women against rape and all other forms of violence, including the trafficking of girls and women;
- d) ensure that in times of conflict and/or war, rape, sexual abuse and violence against girls and women are considered a war crime and are punished as such.

Article 5
Elimination of Violence against Women

State Parties shall take appropriate measures to:

- a) prohibit all forms of violence against women whether physical, mental, verbal or sexual, domestic and family, whether they take place in the private sphere or in society and public life;
- b) identify the cause of violence against women and take appropriate measures to prevent and eliminate such acts of violence;
- c) punish the perpetrators of such violence committed against women and ensure that the perpetrators pay adequate compensation;
- d) establish mechanisms to ensure effective rehabilitation and reparation for victims of such violence.

Article 6
Elimination of Harmful Practices

State Parties shall condemn all harmful practices which affect the fundamental human rights of women and girls and which are contrary to recognised international standards, and undertake to take all the necessary measures, *inter alia*:

- a) to create public awareness regarding harmful practices through

- information, formal and informal education, communication campaigns and outreach programmes targeting all stakeholders;
- b) to prohibit the amelioration or preservation of harmful practices such as the medicalisation and para-medicalisation of female genital mutilation and scarification, in order to effect a total elimination of such practices;
 - c) to rehabilitate victims of harmful practices by providing them with social support services such as health services to meet their health-care needs, emotional and psychological counselling and skills training aimed at making them self-supporting in order to facilitate their reintegration into their families, communities and in other sectors of the society;
 - d) to protect and grant asylum to those women and girls who are at risk of, have been, or are being subjected to harmful practices and all other forms of intolerance.

Article 7 **Marriage**

State Parties shall ensure that men and women enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to ensure that:

- a) no marriage shall take place without the informed consent of both parties;
- b) the minimum age of marriage for men and women shall be 18 years;
- c) polygamy shall be prohibited;
- d) every marriage shall be recorded where possible in writing, as soon as possible, and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall by mutual agreement choose their place of residence;
- f) a married woman shall have the right to keep her maiden name, to use it as she pleases, jointly or separately with her husband's surname. By mutual agreement the children of a married couple may use their mother's maiden name either separately from or jointly with that of their father's;
- g) a married woman shall have the right to retain or change her nationality;
- h) a man and a woman shall have the same rights and responsibilities towards their children;
- i) during her marriage, the women shall have the right to acquire her own property and to administer and manage it freely; and in cases of joint ownership of property the husband and wife shall have the same rights.

Article 8**Separation and Termination of Marriage**

State Parties shall enact appropriate national legislative measures to ensure that men and women enjoy the same rights in case of separation and termination of marriage. In this regard, they shall ensure that:

- a) divorce and annulment of a marriage shall be effected only by judicial order;
- b) women and men shall have the same rights to seek divorce or annulment of a marriage;
- c) after divorce or annulment, women and men shall have the same rights and responsibilities with respect to the children and property of the marriage;
- d) in the event of separation women and men shall have equal rights and responsibilities with respect to the children and property of the marriage.

Article 9**Right to Information and Legal Aid**

Women shall have the right to have their cause heard and State Parties shall have the duty to promote and ensure that the rights of women are protected in this respect. They shall:

- a) take all appropriate measures to facilitate the access of women to legal aid services;
- b) support local, national, regional and continental initiatives directed at giving women access to legal aid services;
- c) put in place adequate structures including appropriate education programmes to inform women and make them aware of their rights.

Article 10**Right to Participation in Political Process and Decision Making**

1. State Parties shall take specific positive action to promote the equal participation of women in the political life of their countries, ensuring that:

- a) women do participate without any discrimination in all elections;
- b) women are represented equally at all levels with men in all electoral and candidate lists;
- c) women are partners with men at all levels of development and implementation of state policy;

2. State Parties shall ensure women's effective representation and participation at all levels of decision making.

Article 11**Right to Peace**

1. Women shall have the right to participate in the promotion and maintenance of peace, and to live in a peaceful environment.

2. State Parties shall take all appropriate measures to involve women:

- a) in programmes of education for peace and a culture of peace;
- b) in the structures for conflict prevention, management and resolution at local, national, regional, continental and international levels;
- c) in the local, national, sub-regional, regional, continental and international decisionmaking structures to ensure physical, psychological, social and legal protection of refugee, returnee and displaced women;
- d) in all levels of the structures established for the management of camps and asylum areas.

3. State Parties additionally shall reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources.

4. State Parties shall take special measures to ensure:

- a) effective protection of women and children in emergency and conflict situations;
- b) effective protection of refugee, returnee and displaced women and children.

Article 12**Right to Education and Training**

1. State Parties shall take all appropriate measures to:

- a) eliminate all forms of discrimination against women and girls in the sphere of education and training;
- b) eliminate all references in textbooks and syllabuses to the stereotypes which perpetuate such discrimination.

2. State Parties shall take specific positive action to:

- a) increase literacy among women;
- b) promote education and training for women and girls at all levels and in all disciplines;
- c) promote the retention of girls in schools and other training institutions.

Article 13**Economic and Social Welfare Rights**

1. State Parties shall guarantee women equal opportunities to work. In this respect, they shall:

- a) promote equality in access to employment;

- b) promote the right to equal remuneration for jobs of equal value for men and women;
- c) ensure transparency in employment and dismissal relating to women in order to address issues of sexual harassment in the workplace;
- d) allow women freedom to choose their occupation, and protect them from exploitation by their employers;
- e) create conditions to promote and support the occupations and economic activities dominated by women, in particular, within the informal sector;
- f) encourage the establishment of a system of protection and social insurance for women working in the informal sector;
- g) introduce a minimum age of work and prohibit children below that age from working, and prohibit the exploitation of children, especially the girl-child;
- h) take the necessary measures to recognise the economic value of the work of women in the home;
- i) guarantee adequate pre- and post-natal maternity leave;
- j) ensure equality in taxation for men and women;
- k) recognise the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l) recognise motherhood and the upbringing of children as a social function for which the State, the private sector and both parents must take responsibility.

Article 14

Health and Reproductive Rights

1. State Parties shall ensure that the right to health of women is respected and promoted. These rights include:

- a) the right to control their fertility;
- b) the right to decide whether to have children;
- c) the right to space their children;
- d) the right to choose any method of contraception;
- e) the right to protect themselves against sexually transmitted diseases, including HIV/AIDS;
- f) the right to be informed on one's health status and on the health status of one's partner.

2. State Parties shall take appropriate measures to:

- a) provide adequate, affordable and accessible health services to women especially those in rural areas;
- b) establish pre- and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- c) protect the reproductive rights of women particularly by authorising medical abortion in cases of rape and incest.

Article 15
Right to Food Security

State Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b) establish adequate systems of supply and storage to ensure food security.

Article 16
Right to Adequate Housing

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing.

Article 17
Right to Positive Cultural Context

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

2. State Parties shall take all appropriate measures to enhance the participation of women in the conception of cultural policies at all levels.

Article 18
Right to a Healthy and Sustainable Environment

1. Women shall have the right to live in a healthy and sustainable environment.

2. State Parties shall take all appropriate measures to:

- a) involve women in the management of the environment at all levels;
- b) promote research into renewable energy sources and facilitate women's access to them;
- c) regulate the management, processing and storage of domestic waste;
- d) ensure that proper standards are followed for the storage, transportation and destruction of toxic waste.

Article 19
Right to Sustainable Development

1. Women shall have the right to fully enjoy their right to sustainable development.

2. State Parties shall take all appropriate measures to:

- a) ensure that women participate fully at all levels in the conceptualisation, decisionmaking, implementation and evaluation of development policies and programmes;

- b) facilitate women's access to land and guarantee their right to property, whatever their marital status;
- c) facilitate women's access to credit and natural resources through flexible mechanisms;
- d) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- e) ensure that in the implementation of trade and economic policies and programmes such as globalisation, the negative effects on women are minimised.

Article 20

Widows' Rights

State Parties shall take appropriate measures to ensure effective implementation of the following provisions:

- a) Prohibit that widows be subjected to inhuman, humiliating and degrading treatment;
- b) Widows shall become the guardians of their children, after the death of the husband;
- c) Widows shall have the right to marry a person of their choice.

Article 21

Right to Inheritance

1. A widow/widower shall have the right to inherit each other's property. In the event of death, the surviving spouse has the right, whatever the matrimonial regime, to continue living in the matrimonial house.

2. Women and girls shall have the same rights as men and boys to inherit, in equal shares, their parents' properties.

Article 22

Special Protection of Elderly Women and Women with Disability

Elderly women and women with disability have the right to specific measures of protection commensurate with their physical and moral needs.

Article 23

Interpretation

The African Court on Human and Peoples' Right shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Article 24

Signature, Ratification and Accession

1. This Protocol shall be open to signature, ratification and accession

by the State Parties, in accordance with their respective constitutional procedures.

2. The instruments of ratification or accession shall be deposited with the Secretary General of the OAU.

Article 25

Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.

2. For each of the State Parties that accedes to this Protocol after its coming into force, the Protocol shall come into force at the date of deposit of the instrument of accession.

3. The Secretary General of the OAU shall inform the State Parties of the coming into force of this Protocol.

Article 26

Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.

2. Proposals for amendment or revision shall be submitted, in writing, to the Secretary General of the OAU who shall transmit same to the State Parties within thirty (30) days of receipt thereof.

3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of State Parties, in accordance with the provisions of paragraph 2 of this article.

4. Amendments or revision shall be adopted by the Assembly by consensus or, failing which, by a simple majority.

5. The Commission may also, through the Secretary General of the OAU, propose, amendments to this Protocol.

6. The amendment shall come into force for each State Party which has accepted it thirty (30) days after the Secretary General of the OAU has received notice of the acceptance.

Article 27

Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of rights of women contained in the national legislation of State Parties or in any other regional, sub-regional, continental or international conventions, treaties or agreements applicable in these State Parties.

Prosecuting the perpetrators of the 1994 genocide in Rwanda: Its basis in international law and the implications for the protection of human rights in Africa

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1 Introduction

Tremendous progress has been made in relation to the protection of human rights all over the world. Nevertheless, accounts of human rights violations continue to be a major feature in many countries.¹ How emerging democracies ought to address the human rights violations of the recent past when the perpetrators still wield considerable political or military influence is a significant problem.² Some states have resorted to granting amnesty to the perpetrators,³ others have opted to prosecute

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1 From dozens of countries on all continents, political regimes continue to perpetrate, tolerate or fail to stop torture, forcible deportations and persecution of whole populations, rape of women, and conscription of children into wars. For details see, for instance, Amnesty International's country reports, 2000 <<http://www.amnesty.org>> (accessed 25 January 2001).

2 J Zalaquett 'Balancing ethical imperatives and political constraints: The dilemma of new democracies confronting past human rights violations' (1992) 43 *Hastings Law Journal* 1425 1426.

3 Such as Argentina, El Salvador and South Africa.

them,⁴ and still others have done nothing about the issue, adopting a 'business as usual' attitude.⁵

This contribution examines the legal basis for the prosecution of those responsible for the genocide in Rwanda in 1994, and the implications of those prosecutions for the protection of human rights on the African continent. The introduction is followed by a brief account of the 1994 Rwandan genocide. Part 3 discusses the measures that were taken to ensure justice after the genocide. The government of Rwanda played an important role in the process that led to the establishment of the International Criminal Tribunal for Rwanda (ICTR). Moreover, the Rwandan government initiated prosecutions within the domestic court system. To deal with the problem of delays in the prosecutions in the regular courts, proposals have been made to establish *gacaca* tribunals, which will blend traditional and modern methods of administration of justice.

Part 4 analyses the legal basis for prosecuting the perpetrators of the genocide as a crime under international law. Here it is argued that Rwanda's choice to prosecute, rather than grant amnesty or ignore the perpetrators of the 1994 genocide, is compatible with the duty of states imposed by international criminal law. Part 5 examines the possible implications of Rwanda's prosecution of those accused of committing genocide on the protection of human rights on the African continent. Part 6 contains some concluding remarks.

2 The genocide

In the spring of 1994, an estimated 800 000 people⁶ were killed in Rwanda in one of the worst cases of genocide in history. The slaughter began on 6 April 1994, a few hours after the plane bringing home Rwandan President Juvenal Habyarimana and his Burundi counterpart Cyprien Ntaryamira from peace talks in Tanzania was shot down by rocket fire as it approached Kigali airport.⁷

4 Such as Rwanda.

5 Malawi, for instance, falls into this category. Despite the atrocities that were committed during the reign of 'life president' Kamuzu Banda, the successor government has not so far come up with a detailed, systematic plan for prosecuting those responsible for human rights violations during the regime of President Banda. In Eastern European countries, following the fall of communism, little action has been taken against the functionaries of the previous regimes.

6 The exact number of those who were killed during the genocide has never been known. Estimates range from 500 000 to 1 000 000 persons. See UN Doc E/CN.4/1994/7 (1994) para 24.

7 A Destexhe (1995) *Rwanda and genocide in the twentieth century* 1.

It seems that the genocide had been planned long in advance and that the only thing needed was the spark to set it off.⁸ Even before the national radio announced the death of President Habyarimana, death lists were being circulated to facilitate the identification of the targets.⁹ Furthermore, a few months before, *Radio-Télévision Libre des Mille Collines* (RTLM) had been spreading violent propaganda on a daily basis, fomenting hatred and urging its listeners to exterminate the Tutsi, whom they referred to as the *inyenzi* or 'cockroaches'.¹⁰ Working from prepared lists, an unknown number of people, often armed with machetes, nail-studded clubs or grenades, methodically murdered those on the lists. Virtually every segment of the society participated: doctors, nurses, teachers, priests, nuns, businessmen, government officials of every rank, and even children.¹¹

In Rwanda a person's ethnic identity became his or her death warrant or guarantee of survival. The crusade was led by the Rwandan Armed Forces as well as two militia groups: the *interahamwe* (those who stand together) and the *impuzamugambi* (those who only have one aim). Within a span of 100 days, almost 800 000 men, women and children (mostly Tutsis) were killed, not only in their villages but also in schools, hospitals and even churches.

3 Justice after the genocide: prosecuting the perpetrators

A pertinent question that confronted the Rwandan society after the genocide was how to deal with the perpetrators of the genocide. The scale of the genocide and the extent to which it affected the entire country and almost the entire population — whether as victims or as perpetrators — have presented Rwanda with obstacles of an unprecedented magnitude.¹² The Rwandan government set in motion a process aimed at ensuring individual criminal responsibility for the perpetrators. To this

8 See Report on the situation of human rights in Rwanda, (UN Doc E/CN.4/1995/7 (1994) para 19), where the Special Rapporteur of the UN Commission on Human Rights noted that the assassination of Habyarimana was simply the spark to the powder keg which set off the massacre of civilians and not the root cause of the genocide.

9 See Destexhe (n 7 above) 1 ; CM Peter 'The International Criminal Tribunal for Rwanda: Bringing the killers to book' (1997) 321 *International Review of the Red Cross* 695 <<http://www.ictrc.org/English/publications>> (accessed 25 January 2001).

10 Peter (n 9 above) 1; also see T Meron 'International criminalization of internal atrocities' (1995) 89 *American Journal of International Law* 554.

11 Peter (n 9 above) 2.

12 IG Tuzinde (2000) *Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the gacaca tribunals* Unpublished LLM dissertation, University of Pretoria 16.

end, the government played a crucial role in the establishment of the ICTR. The government also began to prosecute accused persons within the domestic courts.

3.1 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established by United Nations (UN) Security Council Resolution 955 of 8 November 1994.¹³ Its purpose is to 'prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January and 31 December 1994'.¹⁴ At the same time, the Security Council adopted the Statute of the ICTR (ICTR Statute) and requested the UN Secretary General to make political arrangements for its practical functioning. The ICTR is based in Arusha, Tanzania.¹⁵

The idea of creating the ICTR actually originated from the Rwandan government. Rwanda happened to be a member of the Security Council in 1994. In September that year the government of Rwanda wrote to the President of the Security Council calling for the earliest possible establishment of an international tribunal to try the alleged criminals.¹⁶ However, it is interesting to note that eventually Rwanda voted against Resolution 955, which established the Tribunal. The reasons advanced for this conduct were as follows:¹⁷

- The seat of the Tribunal should have been in Kigali, so that it could play an exemplary and deterrent role.
- The Tribunal's competence *ratione temporis* (temporal jurisdiction) was limited to acts committed in 1994. Acts committed during the preceding planning period, and smaller-scale massacres occurring before 1994, were not taken into account.

13 Rwanda was the only member of the Security Council that voted against the resolution.

14 Art 1, ICTR Statute <www.ictor.org> (accessed 25 January 2001).

15 The decision to have the ICTR in Arusha was reached after protracted deliberations. Geographical, political and legal considerations had to be taken into account.

16 See O Dubois 'Rwanda's national criminal courts and the International Tribunal' (1997) 321 *International Review of the Red Cross* 717. For the content of the Rwandan government's letter to the President of the Security Council, see UN Doc S/1994/115 of 29 September 1994. On 6 October 1994 the President of Rwanda in his address to the UN General Assembly reiterated that the establishment of an international tribunal for Rwanda was an 'extremely urgent matter': see Official Records of the UN General Assembly, 49th session, Plenary Meetings, 21st Meeting, 5.

17 These reasons are elaborated on in Dubois (n 16 above); see also V Morris & MP Scharf (1995) *The International Criminal Tribunal for Rwanda: Volume 1* generally.

- The Tribunal could not possibly deal with its task effectively, considering that the Appeals Chamber and the Prosecutor were to be common to the tribunals for Rwanda and for the former Yugoslavia.
- There was nothing in the statute to establish the Tribunal's priorities with regard to the crime of genocide underlying its very inception.
- Some countries that had supported the genocidal regime would participate in the process of nominating judges.
- The exclusion of capital punishment from the penalties that the Tribunal was empowered to impose was unacceptable because convicted persons would not be subjected to the death penalty like their counterparts convicted under the national courts in Rwanda for similar offences.

Erasmus¹⁸ has argued that the ICTR was in effect born out of the efforts of the international community to respond to the Rwandan genocide. While this may be true, one must not underestimate the role played by Rwandan authorities in pressing the international community to establish the ICTR. Security Council Resolution 955 of 1994, which established the ICTR, pertinently refers to the 'request of the Government of Rwanda',¹⁹ making it clear that the co-operation and consent of Rwanda had been obtained.²⁰

3.2 Prosecution in domestic courts

Rwandan authorities decided to supplement the work of the ICTR by prosecuting those implicated in the 1994 genocide in the domestic courts of Rwanda. To this end, Rwanda's Transitional National Assembly enacted an 'organic law'²¹ which came into effect on 1 September 1996. The Organic Law creates chambers to prosecute four levels of

18 See G Erasmus & N Fourie 'The International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?' (1997) 321 *International Review of the Red Cross* 705 708-9, where they argue that the ICTR may not be directly compared with the South African Truth and Reconciliation Commission (TRC) because, while the establishment of the ICTR was an initiative of the international community, the TRC owes its existence to a 'home-grown' process designed by South Africans themselves without international involvement. However, R Aly ('The Truth and Reconciliation Commission' (1998) Centre for Human Rights, Occasional Paper 12) argues that even with respect to the TRC, 'international experience and considerations' did play a crucial role in its establishment.

19 See Res 955 (1994) 2.

20 F Viljoen 'The role of the law in post-traumatised societies: Addressing gross human rights violations in Rwanda' (1997) 30 *De Jure* 18.

21 See Organic Law 8/96 of 30 August 1996, on the Organisation of prosecution of offences constituting the offence of genocide or crimes against humanity committed since 1 October 1990. Reprinted in *Rwanda Reconciliation* (1996) 15-22.

offenders,²² ranging from the planners of the genocide to those who merely committed offences against property.

Any person accused before domestic courts in Rwanda may confess to the alleged offence.²³ However, such a confession is only a mitigating factor,²⁴ operating similarly to the concept of 'plea bargaining' common in adversarial justice systems. Disclosure of specific offences does not exempt one from prosecution, conviction and punishment under the criminal justice system.²⁵

The justice process has remained a laborious and frustrating one in domestic courts. The trials began in 1996, yet by January 2000 no more than 2 500 people had been tried and no fewer than 120 000 are still detained and awaiting trial, often in deplorable conditions.²⁶ At the present rate, it is estimated that it would take anywhere between two and four centuries to try all those in detention.²⁷ It is against this background that the *gacaca* system of justice has been proposed.

The *gacaca* system has been proposed in order to address the number of outstanding prosecutions. The process is also expected to allow communities (usually lay people) to establish the facts and decide the fate of the vast majority of those accused of lesser offences, while at the same time addressing reconciliation objectives and involving the population on a mass scale in the disposition of justice.²⁸ The *gacaca* tribunals will apply both customary and statutory law. Whether or not the *gacaca* proposals will adhere to the procedural and substantive elements of the right to a fair trial is a matter of speculation and is outside the scope of the present enquiry.

4 The basis for prosecuting perpetrators of the crime of genocide in international law

Academic writers are sharply divided over the wisdom of the choice by transitional democracies to prosecute the perpetrators of gross violations of human rights, such as the 1994 genocide.²⁹ Amnesty is often seen as

22 Arts 2 and 14 Organic Law 8/96.

23 The admission and confession provisions are set out in Chapter III of the Organic Law.

24 Art 15; see Viljoen (n 20 above) 26.

25 Viljoen (n 20 above) 27.

26 Tuzinde (n 12 above) 33.

27 As above.

28 Tuzinde (n 12 above) 34.

29 See, for instance, MA Drumbl 'Punishment, postgenocide: From guilt to shame to *civis* in Rwanda' (2000) 75 *New York University Law Review* 1221, where the author doubts the ability of achieving peace, justice and human rights through prosecution of the perpetrators of the 1994 genocide in Rwanda. See also Tuzinde (n 12 above) 33. But other writers such as DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537 2540 (n 5) support prosecutions for atrocious crimes such as genocide.

an effective way of consolidating the society, ensuring that both the victim and the aggressor are able to continue co-existing. Despite the fact that the general issue of accountability for past human rights abuses has generated rich discussion, there has been relatively little analysis to date of applicable rules of international law.³⁰

The following part of this contribution examines some of the policy reasons that are advanced for and against the prosecution of those accused of past violations of human rights. It proceeds to elucidate the principles of international law regarding the individual prosecution of the perpetrators of genocide, with a view to measuring the reasons for and against prosecutions against the yardstick of the law. The basic presumption here is that the law has a role to play in ending cycles of violence and the consolidation of democratic institutions.

4.1 The case for amnesty

First, proponents of the view that granting amnesty to those implicated in atrocities in the past argue that amnesty helps a society to achieve reconciliation and healing after a period of conflict and social trauma.³¹ Societies must, according to this view, accept that one of the prices of consolidating a post-traumatised democracy is the forgoing of redress of past human rights violations.³² States that have relied on this argument to grant amnesty include Argentina, Benin, Chile, El Salvador and South Africa. The 'reconciliation theory' also argues that a retributive approach to past atrocities (by punishing violators) may provoke, by a causal chain, similar or even worse abuses.³³

This view sees amnesty as the best option for sustaining a young and fragile democracy that is reeling from human rights atrocities committed in the recent past.

Second, it has been argued that granting amnesty to perpetrators of gross violations of human rights helps to reveal the truth and establish an official record of what occurred.³⁴ This argument is linked to the reconciliation theory. Basically, the exposure of the truth is seen as crucial to the promotion of social healing and the provision of victims with at least some psychological satisfaction.

Third, it has been argued that amnesty is a better alternative to a complete failure to prosecute.³⁵ The failure to prosecute past violations,

30 Orentlicher (n 29 above) 2540.

31 International Council on Human Rights (1999) *Hard cases: Bringing human rights violators to justice abroad — a guide to universal jurisdiction* 15; Viljoen (n 20 above) 18.

32 Viljoen (n 20 above) generally.

33 See CS Nino 'The duty to punish past abuses of human rights put into context: The case of Argentina' (1991) 100 *Yale Law Journal* 2619 2620.

34 See International Council on Human Rights (n 31 above).

35 n 31 above 'Introduction'.

it is argued, may quite often arise from the inability to do so, for example, in weak and failed states where the legal structures for such prosecutions are not in place.³⁶ This argument may be valid in relation to Rwanda, where the large number of suspects in detention has almost overwhelmed that country's structures for the administration of justice.

4.2 The case for prosecutions

A number of arguments have been advanced in favour of prosecuting past violators of human rights. First, it is often argued that violations must be prosecuted in order to bring them to justice for the commission of terrible offences.³⁷ It is contentious what the term 'justice' means,³⁸ and there is clearly a delicate balance between seeking vengeance and desiring suitable punishment. However, some argue that punishment of some sort is a component of justice.³⁹

Second, prosecutions are considered to be supporting the rule of law. This view asserts that failure to prosecute past human rights violations will not provide a firm basis for building the rule of law in future.⁴⁰ The rule of law requires that all persons and institutions are equal before and under the law. No one is above the law. Therefore, when grave crimes are not prosecuted, these principles will be disregarded and the rule of law will be disregarded.⁴¹ The central importance of the rule of law in civilised society requires, within defined but principled limits, prosecution of especially atrocious crimes.⁴²

Third, support for prosecutions is based on the need to protect society. As long as perpetrators remain at large, they continue to be a threat to the society in which they reside. This argument, however, may not be very strong if one considers that once the perpetrators of human rights are no longer in power, their capacity to perpetuate the violations with impunity is greatly curtailed.

Fourth, past perpetrators of human rights abuses ought to be prosecuted to deter future abuses. Usually, the deterrence argument is raised to make the point that punishing offences will deter future crimes. This view is based on the assumption that perpetrators commit their crimes in the expectation that, because they hold power in their country or because the country's legal system is unwilling or unable to prosecute such crimes, they will not face justice.⁴³

36 As above.

37 n 31 above 8.

38 As above. One may also ask whether justice includes an element of retribution.

39 As above.

40 n 31 above 14.

41 n 31 above 13.

42 Orentlicher (n 29 above) 2551.

43 n 31 above 11–12.

4.3 International law and the prosecution of the crime of genocide

Despite the various policy and ethical arguments for and against prosecution as discussed above, the guiding principle when considering whether states should punish or forgive those implicated in genocide should be the provisions of the law. Legal scholars must be loyal to what the law provides and any attempt to defend or criticise a cause, however strongly one feels about it, should be premised in the law. Of course, the law does not operate in a vacuum. Rather, it resonates within the context of the society. All in all, our first port of call as legal scholars should be the provisions of the law.

Genocide falls within a category of offences known as international crimes. International law requires states to punish international crimes committed within their territorial jurisdictions.⁴⁴ The term 'international crimes' in its broadest sense comprises offences which conventional or customary international law either authorises or requires states to criminalise, prosecute and punish.⁴⁵ International law imposes a duty to prosecute these crimes, thus failure to prosecute them violates international law.⁴⁶ The duty to prosecute is owed *erga omnes* (to all the world), and those accused of international crimes may be punished by any state, not just the state where the crimes were committed. Commission of such crimes renders one *hostis humanis generis* (enemy of all mankind).

The most serious crimes that are of concern to the international community as a whole are genocide, war crimes and crimes against humanity.⁴⁷ All these crimes were reportedly committed in Rwanda, since the genocide was committed in the context of an armed conflict. It is therefore important to touch briefly on each. Genocide refers to any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.⁴⁸ War crimes are crimes committed in the context of internal or external armed conflict. These crimes are regulated by international humanitarian law, the branch of law that seeks

44 See Orentlicher (n 29 above) 2551.

45 Orentlicher (n 29 above) 2552.

46 Orentlicher (n 29 above) has argued similarly.

47 See art 5, the Rome Statute of the International Criminal Court (Rome Statute), adopted on 17 July 1998; not yet in force.

48 See the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948 (art 2) UNGA Res 260 (III) A, 78 UNTS 227; text of the Convention reproduced in FF Martin et al *International human rights law and practice* (1997) 193. See also art 2 ICTR Statute <www.ictj.org> (accessed 20 January 2001) and art 6 of the Rome Statute.

to protect human rights during situations of armed conflict.⁴⁹ The four Geneva Conventions of 12 August 1949⁵⁰ and their two Additional Protocols⁵¹ of 8 June 1977 are the principal instruments of international humanitarian law.

In the case of a non-international armed conflict such as the one that occurred in Rwanda in 1994, the applicable law on war crimes is laid down under article 3, common to the four Geneva Conventions, as modified by Additional Protocol II thereto. These rules, as reiterated in the ICTR Statute,⁵² criminalise pillage, taking of hostages, extrajudicial executions and rape.

The category of crimes against humanity includes a long list of acts, including murder, extermination, rape, and the crime of apartheid.⁵³ In the case of *Prosecutor v Duško Tadić*,⁵⁴ the International Criminal Tribunal for the Former Yugoslavia held that crimes against humanity do not require a connection to international armed conflict.

Having elaborated on the concept of international crimes, it is important to reiterate that international law provides that these offences must be punished. The most explicit obligation to punish international crimes is established by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),⁵⁵ to which Rwanda is a party. Under the Genocide Convention, contracting parties confirm that genocide is an international crime, and they undertake to prevent and **punish** (not to forgive) it.⁵⁶ Article 4 provides further that persons committing genocide shall be **punished**, whether they are constitutionally punishable rulers, public officials or private individuals. The Genocide Convention also requires that persons charged with genocide (including attempts or complicity therewith) **shall be tried** by a competent tribunal

49 International humanitarian law does not aim at humanisation of warfare as such, an impossible task in itself, but of its inevitable consequences, by strengthening the protection of persons affected by hostilities (the civilian population, combatants who have been rendered *hors de combat* by reason of sickness, wounds or shipwreck, and the prisoners of war). See K Drzewicki 'Internationalization and juridization of human rights' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights: A textbook* (1999) 25–45 43.

50 The first Convention protects the wounded and the sick in armed forces; the second Convention protects the wounded, sick and shipwrecked among armed forces at sea; the third Convention protects prisoners of war; and the fourth Convention protects civilians.

51 Additional Protocol I strengthens the protection of victims of international armed conflicts, while Additional Protocol II strengthens the protection of victims of non-international conflicts.

52 Art 4.

53 See list in art 7 of the Rome Statute.

54 (1996) 35 *International Legal Materials* 32 72.

55 n 48 above.

56 See Preamble, para 1 and art 2 of the Genocide Convention.

of the state in the territory where the act was committed, or such international penal tribunal as may have jurisdiction.⁵⁷

In pressing for the establishment of the ICTR for the prosecution of those implicated in the 1994 genocide, and in prosecuting the suspects in its domestic courts, Rwanda was complying with its obligations under the Genocide Convention. Under the international law doctrine of *pacta sunt servanda*⁵⁸ states are required to carry out obligations of the treaties they are parties to in good faith. Moreover, Rwanda was complying with the requirements of customary international law that impose a duty on states to punish those who commit genocide for the law regards such as *hostis humanis generis*.

Besides the Genocide Convention, the other basis for prosecuting those who perpetrated the tragic events that took place in Rwanda in 1994 is in the already alluded to Geneva Conventions of 1949. The conflict that occurred in Rwanda was characterised as a non-international armed conflict, and Rwanda is a party to the Geneva Conventions.⁵⁹ Thus article 3, common to the four Geneva Conventions, as well as Protocol II are applicable to the Rwandan situation. State parties are under an obligation to punish violations of common article 3, as strengthened by Protocol II.⁶⁰

Customary international law also regards the rule requiring the punishment of the perpetrators of genocide, war crimes and crimes against humanity as *jus cogens*.⁶¹ *Jus cogens* is a term usually used to denote a body of overriding or 'peremptory' norms of such paramount importance that they cannot be set aside by acquiescence or agreement of the parties to a treaty.⁶² It follows that states are not only entitled, but are also obliged to punish these crimes. This obligation is unequivocal.

Where a state is for one reason or another unable to prosecute an international crime, international law requires the state concerned to extradite the accused. This requirement is embodied in the customary international law principle of *aut dedere aut judicare*.

57 Art 6.

58 As enunciated by art 26 of the 1969 Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entry into force 27 January 1980, UN Doc A/ CONF.39/27; text reproduced in Martin *et al* (n 48 above) 991.

59 Tuzinde (n 12 above) 25.

60 As above.

61 As above.

62 The concept of *jus cogens* now forms part of treaty law and is enshrined in art 53 of the Vienna Convention on the Law of Treaties.

5 The impact of the prosecutions on the protection of human rights in Africa

The prosecution of the perpetrators of the Rwandan genocide domestically under the ICTR has gone a long way to underscore the increased desire within the international legal community to disqualify those who commit human rights atrocities from blanket amnesties. The implications of those prosecutions on the protection of human rights on the African continent are briefly discussed here.

First, it is worth noting that the prosecutions at the ICTR have targeted individuals who wielded political and military power in Rwanda during the genocide. The prosecutions of such high-profile individuals send a clear message that commission of gross human rights offences may be a thing of the past. In this regard the ICTR made history as the first international tribunal to convict a former head of state for genocide and violations of international humanitarian law. Jean Kambanda, former prime minister of Rwanda, was convicted on his own plea of guilty and was sentenced to life imprisonment. One commentator said that the indictment of Slobodan Milosevic while he was still a sitting head of state⁶³ builds on the precedent established by the ICTR.⁶⁴

The ICTR has not brought only Kambanda to justice. The UN detention facility at Arusha is housing some of the most senior people who served in the genocidal regime. These include Theoneste Bagashora (Director of Cabinet), Andre Ntagerere (Minister of Transport), Pauline Nyiramashuko (Minister of Family Welfare and the first woman to be prosecuted by an international tribunal), and many others.⁶⁵ One author quips that 'these are not minor players like Dusko Tadic',⁶⁶ obviously referring to the first convict of the International Tribunal for the Former Yugoslavia, Dusko Tadic, a former karate teacher. Prosecution of former wielders of power makes it clear that the concept of sovereign immunity would no longer be tolerated as a defense against individual criminal responsibility for human rights atrocities.

Second, the advent of the ICTR has contributed to the development in international human rights jurisprudence. In its landmark decision of

63 Mr Milosevic was reported to have been forced out of office finally on 6 October 2000 after refusing to step down, having lost the elections held on 23 September 2000. See <www.bbc.co.uk/news> (accessed 25 January 2001).

64 K Moghalu 'The International Criminal Tribunal for Rwanda and the development of an effective criminal law: Legal, political and policy dimensions' Unpublished paper presented at the International Conference Replacing the Law of Force with the Force of Law, organised by the Committee for an Effective International Criminal Law, Konstanz, Germany, 5–8 April 2000, 5 (paper on file with the author).

65 For a list of detainees, consult <<http://www.ictr.org>>.

66 Morris & Scharf (n 17 above) 705.

Prosecutor v Jean Paul Akayesu,⁶⁷ the ICTR became the court to define rape in international law. In this case, the ICTR convicted Akayesu, a former *bourgmestre* of the Taba commune in Rwanda, under the ICTR's Statute which explicitly identifies rape as a crime against humanity.⁶⁸

Third, the prosecution of the perpetrators of the Rwandan genocide of 1994 presents an opportunity for the enforcement of international humanitarian law. It is now generally accepted that human rights law and international humanitarian law are distinct but interrelated bodies of law to the extent that the two bodies of law overlap and share the same basic objective — the protection of human life and dignity.⁶⁹ International humanitarian law, without express reference to human rights, protects and promotes the most fundamental rights during armed conflict.⁷⁰ International humanitarian law usually lacks an enforcement mechanism. In applying the principles of international humanitarian law in its proceedings, the ICTR is contributing to the enforcement of this branch of law.

6 Conclusion

This contribution argues that perpetrators of international crimes such as genocide are to be prosecuted as a matter of law. As stated by the International Military Tribunal at Nuremberg, crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁷¹ Perpetrators of gross violations of human rights must be punished as a symbolic gesture against impunity for human rights atrocities.⁷² That way it will be shown that the family of nations has a conscience and a memory.⁷³

Admittedly, fragile democracies emerging from the commission of atrocities may find it difficult to sustain themselves if they choose to prosecute rather than to grant amnesty to past violators of human rights. However, it should be noted that international law itself helps to assure the survival of fragile democracies when its clear pronouncement

67 ICTR 96-4-T, judgment of 2 September 1998, reproduced in (1998) 37 *International Legal Materials*; (1999) 11 *African Journal of International and Comparative Law* 336.

68 See art 3(g) of the ICTR Statute.

69 M Griffin 'Ending the impunity of perpetrators of human rights atrocities: A major challenge for international law in the 21st century' (2000) 839 *International Review of the Red Cross* 369.

70 As above.

71 Judgment of the International Military Tribunal at Nuremberg, reprinted in (1947) 41 *American Journal of International Law* 172-333 221.

72 Viljoen (n 20 above) 27.

73 As above.

removes certain atrocities from the provincial realm of a country's internal politics and places those crimes squarely within the scope of universal concern and the conscience of all civilised people.⁷⁴ The prosecution of the perpetrators of the Rwandan genocide of 1994 makes it clear that impunity for the gross violation of human rights will no longer be tolerated in Africa. It also contributes to the jurisprudence and enforcement of international humanitarian law.

74 Orentlicher (n 29 above) 2537.

Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the *gacaca* tribunals

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1 Introduction

Rwanda was largely devastated in 1994. Among an endless host of problems, highly complex questions and dilemmas of justice, unity, and reconciliation haunt Rwanda to this day. A basic question confronting Rwanda is how to deal with the legacy of the conflict that culminated in the genocide of the Tutsi and in the massacres of Hutu opponents of the genocide. The United Nations (UN) set up the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania.¹ Rwanda has its own courts. In both cases, the process of trying accused *genocidaires* is long, laborious, and frustrating. Only eight convictions have been handed down in Arusha after five years of work, while in Rwanda only some 3 000 cases have been disposed of. At least 120 000 detainees are in prisons around the country. The majority of these prisoners are accused of

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1 On 8 November 1994, having determined that the 'genocide and other systematic, widespread and flagrant violations of international humanitarian law . . . committed in Rwanda . . . constitute a threat to international peace and security,' the Security Council adopted Resolution 955 whereby it established the 'International tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandese citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994' UN Doc S/RES/955 (1994). For an overview of the establishment of the Rwanda Tribunal, see P Akhavan 'The International Criminal Tribunal for Rwanda: the politics and pragmatics of punishment' (1996) 90 *American Journal of International Law* 501.

participation in the genocide. At the present rate it is estimated that it will take anywhere between two and four centuries to try all those in detention. The Rwandese government has developed a new procedure called *gacaca*, lower-level tribunals that attempt to blend traditional and contemporary mechanisms to expedite the justice process in a way that promotes reconciliation. This process is expected to allow communities to establish the facts and decide the fate of the majority of those accused of lesser offences, while at the same time addressing reconciliation objectives and involving the population on a mass scale in the disposition of justice.² The impact of *gacaca* remains uncertain. It certainly needs to be evaluated. An attempt is made here to evaluate the *gacaca*'s possible contribution to the perplexing questions of justice, unity and social reconstruction in the aftermath of genocide.

The present essay deals only with criminal trials. By definition, these are focused on the perpetrators of abuses and their allies. This paper mainly aims at analysing the draft legislation on the *gacaca* jurisdictions. It makes a preliminary 'human rights impact assessment' of the implementation of the draft law establishing '*gacaca* jurisdictions'. Further, the potential role of the new institution in rebuilding Rwandese society is also discussed.³ Considering the many complex issues which still surround the process of justice in Rwanda six years after the genocide, as well as the continuing challenge to the judicial system in terms of the inadequacy of resources for dealing with such an enormous caseload, recommendations to help the process follow the analysis of the *gacaca* proposals.

The *gacaca* tribunals' proposals were formally adopted on 12 October 2000 by the Transitional National Assembly (TNA).⁴ Firstly, one should be mindful of the fact that this is an original institution. In Rwanda, as in most African countries, the body of legal prescriptions is made up of two major components. There are various indigenous norms and mechanisms, largely based on traditional values, which determine the generally accepted standards of an individual's and a community's behaviour. But

2 See Preamble, Draft Organic Law setting up '*Gacaca* Jurisdictions' and Organizing prosecutions for offences that constitute the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994, Draft Organic Law (on file with author) (Draft *Gacaca* Law).

3 Although conventional wisdom holds that criminal trials promote several goals, including uncovering the truth; avoiding collective accountability by individualising guilt; breaking the cycle of impunity; deterring future war crimes; providing closure for the victims and fostering democratic institutions, little is known about the role that judicial intervention has in rebuilding societies. M Osiel *Mass atrocities, collective memory and the law* (1997) 6–10.

4 The TNA is the Rwandese parliament. The *gacaca* legislation is yet to be formally approved by the Constitutional Court Department in the Supreme Court, after which it will be promulgated by the President of the Republic and published in the Official Gazette of the Republic.

there are also the state laws largely based on the old colonial power's own legislative framework. They were introduced together with the nation-state and its general principles such as separation of powers and the rule of law.⁵ This situation is known as legal pluralism.⁶ The present aim is not to use the traditional *gacaca* process but to create a new process that shows similarities with the indigenous mechanism. In addition, this process incorporates a contemporary legislative framework with the aim of promoting social reconstruction while greatly expediting the trials of thousands of accused persons.

Secondly, it is certainly premature to make an in-depth assessment of a draft law and the merits and flaws of the legal institution it is designed to set up. As happened with the criminal trials following the adoption of the Organic Law,⁷ only gradually and over a period of time can the *gacaca* become effective and credible.⁸

Subject to these caveats, one cannot but welcome the proposals. Of course, the use of *gacaca* tribunals to deal with the genocide cases is still a controversial concept. There are those who argue that it is simply unrealistic in the current situation to introduce a concept like that for genocide trials.⁹ Others support it, as it would improve the current situation.¹⁰ Whatever the case, it is important to recognise that at least people are beginning to talk about alternatives. This contribution also

5 See also J Prendergast & D Smock Post genocidal reconciliation: building peace in Rwanda and Burundi Special Report, United States Institute of Peace (15 September 1999) also available at <<http://www.usip.org/oc/sr/sr990915/sr990915.html>> (accessed 15 September 2000).

6 The main reason behind this is Africa's colonial heritage. Without having regard to the existing concept of justice in African society, colonialism decided to apply the European concept of justice in colonial territory thereby neglecting the indigenous concept of justice. See M Hansungule African customary law and African justice (2000) unpublished paper 2 (on file with author).

7 Organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990 (30 August 1996) Organic Law 8/96, in (1 September 1996) *Official Journal of the Republic of Rwanda* (Organic Law 8/96)

8 Further research aimed at gathering data through interviews, field observations, participant observation, study and analysis of the implementation can also illuminate experience in ways that analysis of published sources do not. A thorough and sound appraisal of this new institution must, therefore, wait some time.

9 See eg J Gakwaya 'Utilisation erronée de l'institution du Gacaca dans la recherche d'une solution au génocide rwandais' (2000) 14 *Revue de Droit Africain* 226; J Sarkin 'Preconditions and processes for establishing a Truth and Reconciliation Commission in Rwanda — the possible interim role of the *gacaca* community courts' (1999) 3 *Law, Democracy and Development* 223.

10 See eg Amnesty International Rwanda: the troubled course of justice (2000); OAU International panel of eminent personalities Rwanda: the preventable genocide (2000) OAU/IPEP/PANEL <<http://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm>> (accessed 9 September 2000); (OAU Panel Report (2000)).

attempts to set out some initial and tentative comments on some of the salient traits of the future *gacaca* tribunals.

2 The Draft *Gacaca* Law: Substantive and procedural assessment

The draft legislation creating the *gacaca* jurisdictions may be considered from the viewpoint of a dispute resolution mechanism, or it may be viewed from the perspective of its contribution to the criminal justice system both substantively and procedurally.

Traditionally, *gacaca* has characterised dispute resolution. It derives its meaning from the phrase 'lawn'. This refers to members of the *gacaca* sitting on the grass, listening and considering matters before them. Defining *gacaca* is difficult, as it is an informal and non-permanent judicial or administrative institution. This meeting convenes whenever the need arises and the participants include members of one family, or different families, or all inhabitants of one hill. Traditionally, wise old men, well respected within their communities, would seek to restore social order¹¹ by leading the group discussions. The discussion generally resulted in an arrangement acceptable to all.¹² The types of conflict generally dealt with by the *gacaca* are related to land rights, cattle, marriage, inheritance rights, loans, minor attacks on personal dignity and physical integrity, damage of properties caused by one of the parties or animals, and so on.¹³

11 Previously, scholars of African justice have argued that the African concept of justice aims primarily at reconciliation of the parties. According to Hansungule, this is based on a gross misunderstanding of the African concept of law: 'Reconciliation — the restoration of social equilibrium — is of course the aim of every society and not only the African. In Africa, reconciliation of the parties becomes the main aim of the judges when the parties are in a relationship which is valuable to preserve. However, this concept does not lead to a sacrifice of legal or moral rules. Wrongdoers are upbraided and punished where they are found guilty. In other words, punishment is as much an African as it is a universal concept.' (n 6 above, 5) Contrary to the opinion of some commentators, Rwandese customary law distinguished civil and criminal matters. Thus, offences such as murder, theft, and attack on personal integrity were severely punished when established. See C Ntampaka '*Droit et croyance populaire dans la société rwandaise traditionnelle*' (1999) 211 *Dialogue* 13; Gakwaya (n 9 above) 228.

12 While it is true that in Rwanda as elsewhere in Africa, people attach the highest premium to the unity of the kinsfolk, families, and other groups, this is never done at the expense of justice. Traditional courts tend to be conciliating; they strive to effect a compromise acceptable by all parties. In other words, the main task of the judge, unlike its modern counterpart, is to try to effect a compromise. It must be stressed that this is usually when there is a relationship between the litigants which should supersede justice. However, in the end the court must pronounce its decision even if it will have undesirable consequences on the group unity. Hansungule (n 6 above) 5.

13 F Reyntjens '*Le gacaca ou la justice du gazon au Rwanda*' (1990) 40 *Politique Africaine* 31.

Considering the proposed *gacaca* process and its contribution to the criminal justice system, the draft legislation offers an original attempt to blend indigenous Rwandese culture and traditions with the European system of justice. This represents a significant departure from the traditional dichotomy between the original system of justice before colonisation and colonial law.¹⁴ The *gacaca* process is meant to handle genocide cases not falling within the first category.¹⁵ As far as criminal justice is concerned, as long as the new legislation conforms to universally accepted standards in the administration of justice, there should be no problem with judging genocide-related cases according to the *gacaca* legislation. An attempt is made to appraise in detail how the draft legislation¹⁶ creating the *gacaca* jurisdictions can provide a framework for both justice and social reconstruction in the post-genocide Rwanda.

2.1 General overview

The specialised criminal justice programme laid out in the Draft *Gacaca* Law is, in essence, quite simple. In summary, the draft law on *gacaca* proposes a system which would be loosely based on what is described as a traditional system of justice, involving ordinary citizens in trying their peers suspected of participation in the genocide.¹⁷ Local *gacaca* tribunals would be set up throughout the country, from the lowest political and administrative level of the *cellule*, to that of the *secteur*, *district* and *province*.¹⁸ Each '*gacaca* jurisdiction' includes a general assembly, a seat,

14 Following colonial rule, Rwandese customary law could apply in certain situations provided it did not supersede colonial law. See Ordonnance-loi 45 du 30 août 1924 (1924) 4 *Bulletin Officiel du Ruanda-Urundi (BORU)* (Suppl) 4–5; Gakwaya (n 9 above, 230). This situation has continued to characterise the post-colonial Rwandese Constitution. This means that even after independence, Rwandese customary law could not be invoked unless consistent with Western notions. In other words, the subordination of Rwandese customary law which started during the colonial period was perpetuated in independent Rwanda.

15 Art 2 Draft *Gacaca* Law; Organic Law 8/96.

16 The Draft *Gacaca* Law is available in French, English and Kinyarwanda. Given that it is still a draft, some inconsistencies between the three documents can easily be identified. Since there is not yet an authoritative rule of interpretation, I have tried as much as possible, while using the three versions, to reflect the intended meaning of a specific provision. As it appears, however, the Kinyarwanda version seems to be the original text.

17 Art 13 of the Draft *Gacaca* Law reads: 'Each Seat for "Gacaca Jurisdiction" is made up of 19 honest people. Honest people forming the seat of the Cell's "Gacaca Jurisdiction" are elected by and among the Cell's inhabitants.'

18 Art 4 Draft *Gacaca* Law. It should be remembered that one of the expected results from the '*gacaca* jurisdictions' is to make it possible to accelerate the prosecution of perpetrators of genocide since the trials shall be resolved by almost 11 000 *gacaca* jurisdictions while twelve specialised chambers used to take on this task. See Preamble, Draft *Gacaca* Law.

and a co-ordinating committee.¹⁹ The general assembly²⁰ of the cell's *gacaca* jurisdiction chooses within itself 24 honest persons, five of whom are delegated to the sector's *gacaca* jurisdiction, while the nineteen remaining persons form the seat of the cell's *gacaca* jurisdiction.²¹

All but Category One genocide cases would be tried by the *gacaca* jurisdictions.²² Individuals tried by the *gacaca* jurisdictions include those accused of homicide,²³ physical assault,²⁴ destruction of property²⁵ and other offences committed during the genocide, corresponding to Categories Two, Three and Four. The *gacaca* jurisdictions at the *cellule* level would try Category Four cases.²⁶ The *gacaca* jurisdictions at the *secteur* level would try Category Three cases;²⁷ and the *gacaca* at the *district* level would try Category Two cases.²⁸ The *province* level would hear appeals from the Category Two cases tried at the *district* level.²⁹ Category One defendants would continue to be tried by the ordinary courts.³⁰

19 Art 5 Draft *Gacaca* Law.

20 Art 6: 'The general assembly of the cell's *gacaca* jurisdiction is made up of all the cell's inhabitants aged 18 years and above'.

21 Art 9; see also discussions below on independence and impartiality.

22 Art 2. It is worth noting that the Draft *Gacaca* Law adopts a very similar classification of offenders as the Organic Law 8/96. The new legislation introduces some substantial modifications, however. For instance, persons who acted in positions of authority at lower levels (sector or cell), previously in Category One, shall be classified in the category corresponding to the offences they committed, 'but their position as leader exposes them to the severest penalty for the defendants in the same category' (art 52). Also, the formulation 'acts of sexual torture' in the Organic Law 8/96 (Category One in fine) is replaced by 'rape or act of torture against a person's sexual parts' (probably because of definitional difficulties). Interestingly, a new category of criminals is added to Category Two: 'the person who, with the intention of causing death, has inflicted injuries or committed other serious violences but from which the victims have not died' (art 51). It was probably felt that these offenders should not benefit from the same lenient treatment afforded to Category Three offenders: persons who committed serious attacks 'without the intention of causing death to victims' (last part added in the new law). It is no doubt meritorious to establish clearly the importance of the mental element (*mens rea*) for criminal responsibility to arise. Admittedly, in the case of genocide and crimes against humanity, the extreme gravity of the offence presupposes that it may only be perpetrated when intent and knowledge are present.

23 Art 51 (Category Two).

24 Category Three.

25 Category Four.

26 Art 39.

27 Art 40.

28 Art 41.

29 Art 43.

30 Art 2.

Following the pattern established by the Organic Law,³¹ the specialised criminal justice programme will rely on a system of plea agreements.³² Persons who fall within Category One are, in principle, not eligible for any reduction in penalty upon confession.³³ A pre-set, fixed reduction in the penalty is available to all perpetrators in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an apology to the victims.³⁴ A greater penalty reduction is made available to perpetrators who confess and plead guilty prior to prosecution than to perpetrators who come forward only after prosecution has begun.³⁵

The sentences provided under the draft *gacaca* legislation stipulate that:³⁶ Category Two perpetrators will receive a sentence of seven to eleven years' imprisonment if they plead guilty prior to prosecution, a sentence of twelve to fifteen years' imprisonment if they plead guilty after prosecution has begun, or a sentence of twenty-five years to life imprisonment if convicted at trial.³⁷ Category Three perpetrators will receive a penalty of one to three years' imprisonment if they plead guilty before prosecution, a sentence of three to five years if they plead guilty after prosecution has begun, and five to seven years if convicted at trial.³⁸ All Category Four defendants convicted are sentenced only to civil reparations of damages caused to other people's property.³⁹

A substantial reduction in sentence is provided where a Category One, Two or Three defendant submits a guilty plea before prosecution. This leniency aims to encourage perpetrators to come forward before

31 Organic Law 8/96.

32 Despite the fact that the traditional 'plea bargain' is relatively foreign to an inquisitorial justice system, in enacting the Organic Law, the Transitional National Assembly saw the need to institute some form of procedure to encourage accused persons to confess to their criminal acts. This was done to encourage reconciliation and, equally, to attempt to speed up what was clearly going to be a lengthy if not impossible process. Chapter III, Organic Law 8/96.

33 Arts 55 and 56 Draft *Gacaca* Law. See, however, art 56, which illustrates an exception in the limited circumstance where an accused who does not appear on the published list of the first category prescribed by art 51 of the draft legislation. In such cases, persons who confess and plead guilty 'will be classified in the second category.'

34 Art 54 and art 68. This is a significant departure from the Organic Law, where Category One offenders are not entitled to any reduction in the penalty.

35 Art 55 Draft *Gacaca* Law.

36 As noted above, the ordinary courts will try Category One defendants. However, if these defendants give a complete and accurate confession and, in addition, plead guilty prior to prosecution, they are classified in the second category.

37 Art 69 Draft *Gacaca* Law.

38 Art 70.

39 Art 71.

prosecution.⁴⁰ A perpetrator who pleads guilty prior to prosecution eliminates the need to conduct a full investigation and prepare a completed dossier for the case in question. Similarly, the penalties imposed pursuant to a guilty plea submitted after prosecution have begun but before conviction at trial are less severe than the penalties imposed pursuant to a conviction at trial. This structure intends to maintain incentives for perpetrators to plead guilty even after the initiation of prosecution.

The value of the proposed system will in the end depend on the soundness of the design itself and the quality of its implementation, which shall unfold after the promulgation of the *gacaca* law. In designing the plea agreements mechanism, consideration should be given to its failures under the Organic Law.⁴¹ In particular, questions of simplicity, credibility and confidence in the system itself and the safety of the accused should be key issues of consideration.

In addition, the Draft *Gacaca* Law introduces a significant innovation. All but Category One defendants, if convicted, will have two alternatives: either they will spend half the sentence in prison and the rest in community service or spend the entire sentence in prison.⁴²

Finally, the draft law entrusts the Supreme Court with the task of administering and developing the internal regulations of the '*gacaca* jurisdictions' in accordance with its powers. The Supreme Court is further to manage and co-ordinate the activities of courts and tribunals and to guard the independence of the magistracy.⁴³

The *gacaca* criminal justice programme represents a complex compromise. While full and regular criminal prosecution and punishment of every suspected perpetrator might in many respects be the most desirable course of action, the resources demanded by such an approach have quickly overwhelmed national capacities. Therefore, a decision has been made in Rwanda to establish a programme which, it is hoped, will

40 Thus, the death penalty is excluded even for those Category Two perpetrators convicted at trial (art 69). This exclusion of the death penalty constitutes a reduction in the severity of sentence that could ordinarily be imposed under the Rwandan Penal Code, which provides capital punishment for murder. Arguably, this reduction reflects a policy decision regarding the undesirability, for the society generally and for social reconstruction and security, of undertaking the execution of literally tens of thousands of perpetrators.

41 The reasons for the failure of the procedure to thus far attract large numbers of applicants relate as much to the stringent conditions the potential applicant must satisfy, as to the reluctance on the part of the defendants to confess. Some defendants doubt that their confessions will actually lead to sentence reductions, and the failure to have a penitentiary system in place to separate those who confess from those who do not puts the potential confessors at risk for their personal safety. See also CJ Ferstman 'Domestic trials for genocide and crimes against humanity: The example of Rwanda' (1997) 9 *African Journal of International and Comparative Law* 857 869–77.

42 Arts 69, 70 and 75 Draft *Gacaca* Law.

43 Art 98. See also Preamble, Draft *Gacaca* Law.

accomplish the crucial purposes of criminal justice and contribute to reconciliation while also acknowledging resource limitations.⁴⁴

2.2 Subject matter jurisdiction

The jurisdiction of the '*gacaca* jurisdiction' roughly speaking embraces three categories of crimes. First, like the Statute of the ICTR⁴⁵ and the Organic Law,⁴⁶ the Draft *Gacaca* Law grants the courts the power to prosecute persons who have committed genocide.⁴⁷ Second, the draft law — following the example set by the ICTR Statute⁴⁸ and the Organic Law⁴⁹ — confers on the courts the power to prosecute persons who have committed crimes against humanity.⁵⁰

In the circumstances of Rwanda, the crime of genocide and crimes against humanity appear to cover most of the murders that have been committed. Some killings and other offences may, however, fall outside the specific offences of the crime of genocide and crimes against humanity because of definitional difficulties or a failure to satisfy the burden of proof.

That the scope of jurisdiction of the *gacaca* is deliberately narrowed is quite understandable. This choice is probably guided by the need to restrict the jurisdiction of the *gacaca* tribunals to crimes conceived as the most heinous for which prosecution is required. The side effect of such a decision, however, is that an implicit amnesty is granted for all the offences committed between 1 October 1990 and 31 December 1994 which do not fall under any of the three very restrictive categories of crimes.

Nevertheless, proof of systematic and deliberate planning is not a requirement for establishing the violation of common article 3 or Additional Protocol II. In this case, article 4 of the ICTR Statute, unlike the Organic Law and the Draft *Gacaca* Law, provides a safety net that is the Statute's greatest innovation.⁵¹ Under article 4, the Tribunal may prosecute persons who have committed serious violations of common article 3

44 See generally Preamble, Draft *Gacaca* Law.

45 Statute of the International Criminal Tribunal for Rwanda; UN SC Res 955 Annex (8 November 1994), (1994) 33 International Legal Materials 1602, art 2.

46 Art 1(a) ICTR Statute.

47 Art 1(a) ICTR Statute.

48 Art 3 ICTR Statute.

49 Art 1(a) ICTR Statute.

50 Art 1(a) ICTR Statute.

51 T Meron 'International criminalization of internal atrocities' (1995) 89 *American Journal of International Law* 554.

of the Geneva Conventions and of Additional Protocol II.⁵² Perhaps because it was realised that the crime of genocide and crimes against humanity might not adequately cover the field and that, for practical reasons, the safety net of common article 3 and Protocol II was needed.

The lack of a similar provision in the Organic Law or in the Draft *Gacaca* Law is unfortunate.⁵³ However, common article 3 and Protocol II are treaties binding on Rwanda. They clearly prohibit certain acts that are also prohibited by the Rwandese Penal Code, albeit in different terms.

Lastly, it should be noted that the Draft *Gacaca* Law, like the earlier Organic Law, suffers from a major defect. Unlike the provisions of the Rwandese Penal Code, where the principle of **specificity** of criminal law is prevalent, the draft legislation includes provisions that do not determine the essential elements of the crimes in detail. To this extent, the Draft *Gacaca* Law departs from the fundamental principle of specificity, which requires that a criminal rule be detailed and indicate in clear terms the various elements of crime. This principle constitutes a fundamental guarantee for the potential accused and any indicted person, because it lays down in well-defined terms the confines of the prohibited conduct,

52 Art 4 of the ICTR Statute reads: 'The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments; taking of hostages; acts of terrorism; outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any indecent assault, pillage; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; threats to commit any of the following acts.'

53 Surprisingly, the Organic Law and the Draft *Gacaca* Law refer to the 'Geneva Convention relating to protecting civil persons in wartime' (probably referring to the fourth Geneva Convention relative to the protection of civilian persons in times of war) and its additional protocols (probably referring to Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts). They do so, however, only to the extent that these instruments define genocide and crimes against humanity. See common art 1(a) of the two pieces of legislation. This is confusing since the two instruments do not cover genocide **specifically** and/or crimes against humanity. Of course, some prohibited conducts (eg grave breaches and other serious violations of international humanitarian law) overlap to some extent with genocide and crimes against humanity. However, as noted above, crimes against humanity are distinguishable from genocide. Crimes against humanity are also distinguishable from war crimes in that they do not apply only in the context of war — they apply in time of war **and** peace. See also MC Bassiouni 'Crimes against humanity' in R Gutman & D Rieff *Crimes of war: what the public should know* (1999) 108.

thus giving him notice of what he stands accused. By the same token, this principle greatly restricts the court's latitude.⁵⁴

2.3 General principles of procedural law: Applicability of fair trial rights

In a context of 'transitional justice' of the type in Rwanda, when a decision is made to prosecute, the desire to use criminal sanctions against those who committed massive human rights violations may run directly counter to the development of a democratic legal order.⁵⁵ The temptation of the victims — or rather the survivors — of the genocide to make short shrift of the criminal procedural rights of those put in the dock for the evil crime is certainly understandable. Nevertheless, this question should be viewed in the context of the new regime's commitment to the rule of law.⁵⁶ If these defendants are not all afforded the same rights granted to common defendants in a democratic order, the rule of law does not exist and the democratic foundation of the new system is arguably weakened.⁵⁷ Beyond procedural consideration, the rule of law prohibits collective punishment and discrimination on the basis of political opinion or affiliation. In establishing accountability, the burden of proof should be on the authorities or the individual making the accusation, not on the accused to prove his or her innocence.

Rwanda is required to act in consonance with international human rights law and principles. On the one hand, international standards impose a duty to prosecute the most heinous violations of human rights

54 This striking feature of the Draft *Gacaca* Law and the Organic Law — the lack of specificity — manifests itself in various ways. First, and more generally, their provisions do not prohibit a certain conduct (say murder and rape) by providing a specific detailed description of such conduct. They instead embrace a broad set of offences (genocide, crimes against humanity) without individual identification by a delineation of the prohibited behaviour. It follows that, when applying these rules, one must first of all identify the general ingredients proper to each category of crime (say, crimes against humanity) and then the specific ingredients of the sub-class one may have to deal with (say, rape, murder) by reference to the penal code. Secondly, some categories of crime are quite loose and do not specify the prohibited conduct (eg crimes against humanity). See generally D de Beer *Commentaire et Jurisprudence de la loi rwandaise du 30 Août 1996 sur l'organisation des poursuites des infractions constitutive du crime de génocide ou de crimes contre l'humanité* (1999).

55 NJ Kritz (ed) *Transitional justice: how emerging democracies reckon with former regimes* (1995) xxiv.

56 Address to the nation by HE Major General Paul Kagame on his inauguration as President of the Republic of Rwanda, 22 April 2000 (on file with author).

57 Kritz (n 55 above) xxiv.

and humanitarian law.⁵⁸ On the other hand, when prosecution is undertaken, international standards related to trials, treatment of offenders and penalties must be respected.⁵⁹ Indeed, when people are subjected to unfair trials, justice cannot be served. When innocent individuals are convicted, or when trials are manifestly unfair or perceived to be unfair, the justice system loses credibility.

An approach such as that proposed in Rwanda of using *gacaca* jurisdictions offers the benefit of expediency in handling an enormous volume of cases and may contribute to 'national healing' and 'reconciliation'.⁶⁰ Provided that fair trial standards are not compromised, the introduction of the *gacaca* might go some way towards alleviating the huge burden on the courts; it could also represent a positive development in terms of involving the local population in the process of justice.⁶¹ Holding trials at the local, grassroots level encourages people to testify to events they witnessed personally during the genocide. At the same time, however, there is reason for concern about the capacity of the proposed system to operate fairly and efficiently.⁶²

a *The right to trial by a competent, independent and impartial tribunal established by law*

Clearly, one of the striking features and the main area of concern when looking at the *gacaca* proposals is the lack of legal training of members of the *gacaca* jurisdictions. The individuals who would be asked to try the cases which come before the *gacaca* jurisdictions would be elected

58 J Malamud-Goti 'Transitional governments in the breach: Why punish state criminals?' (1990) 12 *Human Rights Quarterly* 1; DF Orentlicher 'Settling account: The duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537; J Paust 'Universality and the responsibility to enforce international criminal law: No US sanctuary for alleged Nazi war criminals' (1989) *Houston Journal of International Law* 337; N Roht-Arriaza 'States responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 *California Law Review* 451.

59 Amnesty International *Fair trials manual* (1998); WA Schabas *The abolition of the death penalty in international law* (1997); M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); D McGoldrick *The Human Rights Committee: its role in the development of the international Covenant on Civil and Political Rights* (1994).

60 See, on the use of terminology, M Ignatieff 'Articles of faith' (1996) 5 *Index on censorship* 110.

61 N Roht-Arriaza 'Combating impunity: some thoughts on the way forward' (1996) 59 (4) *Law and Contemporary Problems* 93.

62 See also Amnesty International *Rwanda: The troubled course of justice* (2000).

into this role by the local population.⁶³ They would have no prior legal background or training, and yet would be expected to hand down judgments in extremely complex and sensitive cases, with sentences as heavy as life imprisonment.⁶⁴ They would also be responsible for determining the categorisation of the defendants, which sets the framework for sentences — including classifying defendants in Category One,⁶⁵ subject to the ordinary courts, where those found guilty may face the death penalty.⁶⁶ Even if these individuals are conscientious and striving to act in good faith, it is likely that they will be subjected to considerable pressures both from the accused and the complainants.⁶⁷ Trials which have taken place to date in the ordinary courts in Rwanda have already revealed significant difficulties and controversies; they have illustrated the absolute need for judges to be able to resist political and psychological pressures, to know how to distinguish genuine from false testimonies, and to respect at all times the equal rights of the defence and the prosecution.⁶⁸

63 Art 13 Draft *Gacaca* Law. Practically, the draft law provides that the general assembly — composed of all the cell's residents at least 18 years of age — selects within itself 24 'honest persons' including five who are delegated to the sector *gacaca* jurisdiction, while the nineteen who remain form the seat of the cell *gacaca* jurisdiction (n 17 above) art 9. The law does not, however, specifically address the procedures to be followed for these elections. This is left to the President of the Republic who 'determines by means of order, the modalities of organising elections for members of "*gacaca* jurisdictions" organs' (n 17 above) art 9. It is unclear, for instance, if individuals will avail themselves to stand for elections or if the residents of the cell will nominate them as candidates, a pattern recently followed for the election of lower-level administrative authorities throughout the country. It is, of course, critical that the election of members to the seats of *gacaca* jurisdictions be **perceived** to be free and fair.

64 Art 69(a).

65 Arts 34(e) and 36(d). Surprisingly, the Draft *Gacaca* Law refers to the classification of offenders adopted under the Organic law as the basis for categorisation by the seat of the *gacaca* jurisdiction of the cell (art 34(e)). This is rather confusing since the *gacaca* legislation introduces some substantial modifications (n 22 above).

66 Art 68.

67 On the downside, *gacaca* holds the potential for undermining the rule of law and perpetuating the culture of impunity if friends, family, and neighbours refuse to hold people accountable for their crimes. Arguably, in those areas where there is not any single survivor (individuals targeted by the killings but who managed to escape or survived the wounds), there might be no evidence 'for the prosecution' except the testimonies of bystanders. In this scenario, it is also difficult to conceive the election of 'honest persons' in the first place, since there might not be any opposing voice to the election of a less 'honest person' as a member of the '*gacaca* jurisdiction'. At the same time, accusations of participation in the genocide can be a powerful and dangerous weapon in Rwanda today as survivor groups can use them as a tool for political and/or economic control.

68 Amnesty International *Rwanda unfair trials: Justice denied* (1997).

Many of the judges in the ordinary courts have had only a few months' training.⁶⁹ The individuals trying the cases in the *gacaca* jurisdictions would not have benefited from any professional training, yet would presumably be expected immediately to exercise independence and impartiality. Government authorities have indicated that they would receive some 'basic' training and have appealed for international assistance for this task, but have stressed that the rules governing the *gacaca* trials must be kept simple.⁷⁰ Most international standards do not per se prohibit the establishment of specialised courts. What is required, however, is that such courts are competent, independent, and impartial, and that they afford applicable judicial guarantees so as to ensure that the proceedings are fair.⁷¹

The factors which influence the independence of the judiciary have been articulated to some extent in the Basic Principles on the Independence of the Judiciary.⁷² They include the separation of powers which

69 Although the training of magistrates was mainly organised by the Ministry of Justice, some projects were actually set up by non-governmental organisations (NGOs), such as the Brussels-based Citizens Network, which provided training courses for judicial investigators throughout the first half of 1995.

70 In fact, the government's proposal identifies the need for a massive popular education campaign, a large-scale training programme for the many people who would be involved at the various administrative levels, and an extra US\$ 32 million in the first two years. See International panel of eminent personalities (2000) Rwanda: The preventable genocide OAU/IPEP/PANEL <<http://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm>> (accessed 9 September 2000), (OAU Panel Report); see also Amnesty International (n 54 above).

71 This is generally reflected in the formulation 'everyone facing a criminal trial or a suit at law has the right to trial by an independent and impartial tribunal established by law'. See art 10 of the Universal Declaration of Human Rights, UN GA Res 217 (II), 10 December 1948 (hereinafter Universal Declaration); art 14(1) of the International Covenant on Civil and Political Rights adopted 16 Dec 1966, GA Res 2200A (XXI), UN Doc A/6316 (1966), 999 UNTS 171 (entered into force March 23, 1976) (hereinafter ICCPR); arts 7(1) and 26 of the African Charter on Human and People's Rights, adopted 27 June 1981; OAU Doc CAB/LEG/67/3/Rev 5 (1981) (entered into force 21 October 1986) reprinted in (1982) 21 ILM 58 (hereinafter African Charter); arts 8(1) and 27(2) of the American Convention on Human Rights (Pact of San Jose), signed 22 November 1969, OASTS 36, Off Rec, OEA/ser L/V/II.23, doc 21, rev 6 (1979) (entered into force 18 July 1978) reprinted in (1970) 9 ILM 673 (American Convention); art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (European Convention); see also Amnesty (n 51 above) 151. The right to trial by an independent and impartial tribunal is so basic that the Human Rights Committee has stated that it 'is an absolute right that may suffer no exception'. Communication 263/1987, *González del Río v Peru* (28 October 1992) UN Doc A/48/40 (1993) 20.

72 Basic Principles on the Independence of the Judiciary, UN GAOR 40/146 of 13 Dec 1985 (hereinafter Basic Principles on the Independence of the Judiciary). Though lacking a per se legally binding effect ('soft law'), there is consensus that the principles can play a significant role in the interpretation, application and further development of existing law. See Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, ECOSOC resolution 1989/60 of 24 May 1989.

protects the judiciary from undue influence or interference,⁷³ and practical safeguards of independence such as technical competence and security of tenure for judges.⁷⁴

Also important for the purpose of this evaluation, the independence of the tribunal means that decision makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere.⁷⁵ It also means that the people appointed as judges are selected primarily on the basis of their integrity and ability with appropriate training or qualification in law.⁷⁶ The concept of the independence of a tribunal must also be considered in regard to the question of whether the tribunal presents an appearance of independence.⁷⁷ Appearance of independence relates to the question of whether litigants have a legitimate doubt about the tribunal's independence, thus affecting the confidence which the courts must inspire in a democratic society.⁷⁸

The selection requirements of the members of the *gacaca* tribunals are set forth in the Draft *Gacaca* Law.⁷⁹ It appears that to be eligible as a member of a seat for *gacaca* jurisdiction one needs to be an 'honest Rwandan',⁸⁰ at least 21 years of age,⁸¹ and, admittedly, a Rwandese national.⁸² The requirement that an individual should be an 'honest person' seems to be guided by an effort to ensure the integrity of the elected persons. Once these conditions are fulfilled, the draft legislation

73 Basic Principles on the Independence of the Judiciary, Principles 1, 2, 3 and 4.

74 n 73 above Principle 10.

75 Principle 2 of the Basic Principles on the Independence of the Judiciary states: 'The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'

76 Principle 10 of the Basic Principles on the Independence of the Judiciary states: 'Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.'

77 'Justice must not only be done, it must also be seen to be done': *Delcourt v Belgium*, ECHR (17 January 1970) Ser A 11 para 31.

78 *Sramek v Autriche*, ECHR (22 October 1984) Ser A 84.

79 Arts 13, 10 and 11.

80 Art 10 of the draft law states that: '... is honest, any Rwandan meeting the following conditions: to have a good behaviour and morals; to always say the truth; to be trustworthy; to be characterised by a spirit of sharing speech; not to have been sentenced by a trial emanating from a tried case to a penalty of at least 6 months' imprisonment; not to have participated in perpetrating offences constituting the crime of genocide or crimes against humanity; to be free from the spirit of sectarianism and discrimination' [sic].

81 Art 10.

82 Arts 6–10.

further prohibits any other discrimination notably of sex, origin, religion, opinion, or social position.⁸³

Thus, in the proposed *gacaca* process the ability of the elected persons — as lawyers or any general level of education — does not enter into consideration in the selection procedure. More problematic, however, career magistrates are explicitly excluded from election as members of the bench *gacaca* jurisdictions at the sector, district, and province levels.⁸⁴ It is difficult to understand the intention of the drafters in this regard. One explanation could be the fear of the moral and technical influence that experienced magistrates would exert on other members of the *gacaca* jurisdictions. In addition, the presence of legal professionals in such a popular tribunal could be problematic and defeat the purpose of the speedy disposal of cases and simplicity. Surprisingly, though, the draft law further provides for advice to those sitting on the *gacaca* jurisdictions in the form of assistance by *conseillers juridiques* (legal advisers) designated by a special *gacaca* department in the Supreme Court.⁸⁵ No further information is provided on the criteria for appointing these legal advisers, nor are there any guarantees of their independence. Yet, in cases where they do advise on specific trials, they may be able to exert considerable influence, as the lay judges in the *gacaca* jurisdictions would find it difficult to challenge or reject guidance from advisers in the Supreme Court who have a legal professional background. It is submitted, however, that the legal advisers could play a critical role especially in the classification of defendants.

Furthermore, at least on this point, it is clear that the draft *gacaca* legislation is in violation of its own rules. In addition to the career magistrates, 'persons in charge of centralised or decentralised Government administrations; persons exercising political activity; soldiers who are in active service; members of the national police and local defence force who are in active service; members of political parties' leading organs, religious confessions or non-government organisations cannot be elected as members of the seat for the cell's *gacaca* jurisdictions or of the general assembly of the sector, the district and the province.⁸⁶ Whatever the arguments behind these proposals, it is submitted that the listed grounds for disqualification are *prima facie* discriminatory⁸⁷ and,

83 Art 10. It is interesting to note that the listed grounds of discrimination are illustrative and not exhaustive. It should also be noted that this is a significant departure from the traditional *gacaca*, where only 'wise' old **men** acted as judges.

84 Art 11.

85 Art 29.

86 Art 11.

87 Principle 10 of the Basic Principles on the Independence of the Judiciary states that: '... In the selection of judges, there shall be no discrimination against a person on the ground of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.'

therefore, should not be approved.⁸⁸ The main concern is that there seem to be no clearly defined criteria for excluding a specific category of individuals.

'Impartiality', on the other hand, denotes absence of prejudice or bias. The principle of impartiality, which applies to each individual case, demands that each of the decision makers, whether they be professional or lay judges, be unbiased.⁸⁹ At present, challenges to the impartiality of a tribunal usually undergo two tests: a subjective one, which aims at ascertaining the personal conviction of a judge in a given case, and an objective one, which has to investigate the existence of sufficient guarantees to exclude any legitimate doubt as to impartiality.⁹⁰ With regard to the first test, impartiality must be presumed until there is proof to the contrary. In the case of an objective approach the issue of appearance becomes relevant.⁹¹ A legitimate reason to fear a lack of impartiality should prompt a judicial officer to withdraw from the case.⁹² At stake here is 'the confidence which the courts must inspire in the public in a democratic society'.⁹³

Finally, international standards refer to 'tribunals' rather than courts.⁹⁴ Some advocates of the new *gacaca* system have argued that it is not

88 See also art 2, African Charter.

89 Communication 387/1989, *Karttunen v Finland* (23 October 1992) UN Doc A/48/40 (1993) 120, relating to lay judges; and Communication 240/1987, *Collins v Jamaica* (1 November 1991) UN Doc A/47/40 (1992) 236, para 8.4, requiring jurors to be impartial. The Human Rights Committee has stated that impartiality 'implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.' *Karttunen v Finland* para 7.2.

90 As above.

91 The African Commission on Human and People's Rights found that the creation of a special tribunal consisting of one judge and four members of the armed forces, with exclusive powers to decide, judge and sentence in cases of civil disturbances violated art 7(1)(d) of the African Charter. The Commission stated that 'regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not the actual lack of impartiality'. See Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v Nigeria*; Communication 60/91, *Constitutional Rights Project (in respect of Wahab Akamu, G Adegba and others) v Nigeria*, in the 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995.

92 Thus, for instance, art 16 of the Draft *Gacaca* Law states that the 'honest person' who is a member of a seat for *gacaca* jurisdiction must disqualify himself if one of the listed circumstances (link with the defendant) is fulfilled.

93 *Piersack v Belgium* ECHR (1 October 1982) Ser A 53, reprinted in (1982) EHRR 169.

94 Different national legal systems and international standards define terms related to fair trials in different ways. Nevertheless, 'precisely because there are so many reasons to warrant linguistic and theoretical diversity . . . the existence of strong similarities is more convincing evidence that these rights are contained in "general principles" of law.' MC Bassiouni 'Human rights in the context of criminal justice: Identifying international protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 239.

appropriate to apply international standards of fair trial in this context, claiming that the *gacaca* jurisdictions are traditional methods of resolving conflicts, not a formal court system bound by international obligations. In practice, however, they would be the equivalent of criminal tribunals, but with few procedural safeguards against error or abuse. In many respects they would mirror the ordinary courts at the local level, with the principal difference that the judges would be lay people, not legal professionals. The *gacaca* tribunals would have many of the same powers as ordinary courts: the power to try defendants for crimes as serious as murder, to sentence them to lengthy prison sentences, including life imprisonment, and to compel witnesses to testify. They would also be applying criminal state legislation — all features which require them to conform to minimum international standards.⁹⁵ Furthermore, the *gacaca* proposals have been conceived and promoted — and ultimately will be enforced — by the state. They will be introduced and administered through state legislation, and a special department in the Supreme Court has been created to supervise the activities of the *gacaca* jurisdictions.⁹⁶

In any case, the description of the *gacaca* jurisdictions as a traditional system does not mean that international standards of fair trial can be set aside. Rwanda has ratified international human rights treaties which provide for the right to a fair trial.⁹⁷ Under international law, it has an obligation to adopt legislative and other measures to give effect to the rights guaranteed in these treaties.⁹⁸ According to the Human Rights Committee, the provisions of article 14 of the ICCPR apply to trials in all courts and tribunals.⁹⁹ The African Commission on Human and Peoples' Rights interpreted the provisions of article 7 of the African Charter, dealing with aspects of the right to fair trial, as applying to any institution

95 The European Court has defined a tribunal as a body which exercises judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. See *Sramek v Autriche* (22 October 1984) 84 Ser A 17, para 36; *Le Compte, Van Leuven and De Meyere v Belgium*, ECHR (23 June 1981) Ser A 43 para 55.

96 Interestingly, the *Gacaca* Jurisdictions department in the Supreme Court has already been created, long before the adoption of the Draft *Gacaca* Law. See *Révision du 18/04/2000 de la Loi Fondamentale de la République Rwandaise* in (1/05/2000) n° 9 *Journal Officiel (JO)* 33, art 2.

97 Rwanda has been a party to the ICCPR since 1975, see Décret-loi n° 8/75 February 12, 1975 in (1975) *JO* 246.

98 Art 2 ICCPR; a similar provision can be found in art 1 of the African Charter which stipulates the all-encompassing obligation of state parties to 'recognise the rights, duties and freedoms enshrined in this Charter' and to 'adopt legislative and other measures to give effect to them'.

99 General Comment 13 (21), UN Doc A/39/40 (adopted on 12 April 1984), para 4, also in UN Doc CCPR/C/21/Add.3.

or body that can hand down decisions which may lead to imprisonment, enabling that body to impact on the liberty and security of the person.¹⁰⁰

In addition, the declaration of the Seminar on the Right to a Fair Trial in Africa, reaffirms as follows:¹⁰¹

The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.

It goes on to state: 'Traditional courts are not exempt from the provisions of the African Charter relating to a fair trial.'

b The right to defence

Unlike the Organic Law,¹⁰² the draft law on the *gacaca* jurisdictions does not make any explicit reference to the rights of the accused. In view of existing safeguards in national and international law, the accused should automatically enjoy the right to defence¹⁰³ in the *gacaca* trials. Among the minimum guarantees for a fair trial, article 14(3) of the ICCPR includes the right to defend oneself through legal counsel and to be informed of such a right, and the right to examine and call witnesses. Admittedly, nothing in the Draft *Gacaca* Law restricts the application of this right.

The right to defence includes the right to defend oneself in person or through a lawyer.¹⁰⁴ This right assures the accused of the right to participate in his or her defence, including directing and conducting his or her own defence. The Draft *Gacaca* Law suggests that the accused present at the trial will have the right to defend him or herself against the charges.¹⁰⁵ Although not explicitly mentioned, it is submitted that the accused may also decide to be assisted by a defence counsel. The further question to be determined is whether, as provided for in

100 Communication 101/93, *Civil Liberties Organisation (in respect of the Nigeria Bar Association) v Nigeria*; *Constitutional Rights Project (in respect of Wahab Akamu, G Adegba and Others) v Nigeria*, 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994–1995.

101 Organised by the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 9–11 September 1999 pursuant to art 45(1)(a) of the African Charter (on file with author).

102 Art 36 of the Organic Law holds that 'persons prosecuted under the provisions of this Organic Law enjoy the same rights of defence given to other persons subject to criminal prosecution, including the right to the defence counsel of their choice, but not at government expense.' See Organic Law 8/96.

103 Art 11(1) Universal Declaration, art 14(3)(d) ICCPR; art 7(1) African Charter; art 8(2) American Convention, art 6(3)(c) European Convention.

104 Art 14(3)(d) ICCPR; art 7(1)(c) African Charter.

105 Art 65 (7) of the draft law states that 'the session's chairperson invites the defendant to present his defence'.

the ICCPR, the accused may have counsel assigned if the person does not have a lawyer of her choice to represent her.

Under article 14(3)(d) of the ICCPR the right to have counsel assigned is conditional upon the conclusion that the interests of justice so require it. The determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issue at stake, including the potential sentence, and the complexity of the issues.¹⁰⁶ The state is required to provide counsel **free of charge** to the accused under the ICCPR if two conditions are met. The first is that the interests of justice require that counsel be appointed. The second is that the accused does not have sufficient funds to pay for a lawyer.¹⁰⁷ According to the Human Rights Committee, the interests of justice require that counsel be appointed at all stages of the proceedings for people charged with crimes punishable by death, if the accused does not have the assistance of counsel of his choice.¹⁰⁸ Arguably, therefore, the right does not apply in the *gacaca* trials since they would not apply the death penalty. Nevertheless, it could also be argued that, in the interests of justice, counsel be appointed for an accused charged with crimes punishable by sentences as heavy as life imprisonment.

In Rwanda, as elsewhere in Africa, two main obstacles to the procurement of legal counsel continue to be finances and availability of counsel.¹⁰⁹ Rwanda has never had an independent defence bar and the recent promulgation of a law creating a Rwandese Bar Association¹¹⁰ is a positive step towards assuring representation, and could be utilised as a mechanism to pool local and international resources for optimal results. Although the formal establishment of a defence bar was a step forward, two primary concerns of significance for Rwanda readily come to mind: the fact that the majority are unable to hire a lawyer because of poverty, and the unpopularity of defendants — Rwandese lawyers have been unwilling to defend individuals accused of genocide. Similar concerns could be raised in the framework of the *gacaca* jurisdictions, especially as the majority are likely to have little or no formal education, and limited awareness of their rights or knowledge of how to defend themselves in a formal or semi-formal context.

106 Communication 571/1994, *Henry v Jamaica* (26 July 1996), UN Doc CCPR/C/57/D/571/1994, para 9.2.

107 Art 14(3)(d) ICCPR.

108 *Henry* (n 106 above).

109 EA Ankumah 'The right to counsel and the independence of judges against the background of the African Charter on Human and Peoples' Rights' (1991) 3 *African Journal of International Comparative Law* 573.

110 *Loi 3/97 du 19 Mars 1997 portant création du Barreau du Rwanda* in (1/04/1997) JO 1.

c Fair trial guarantees during appeal procedures

The Draft *Gacaca* Law provides a right to appeal for defendants tried by the *gacaca* jurisdictions. However, the same concern of limited guarantees of fair trial could be raised at the appeal stage. Defendants tried at the level of the **cell** can appeal to the *gacaca* jurisdiction at the **sector** level — the next level up.¹¹¹ Likewise, those tried at the **sector** level can appeal to the level of the **district**,¹¹² and those tried at the **district** level can appeal to the level of the **province**.¹¹³

An appeal must guarantee the right to an impartial and independent tribunal, utilising procedures established by law.¹¹⁴ Verdicts returned after a confession and guilty plea cannot be appealed.¹¹⁵ Notwithstanding the plea agreement, it is submitted that this provision violates the right to appeal, especially when taking into consideration the seriousness of the offences and sanctions in issue.

If the *gacaca* jurisdictions are set up as outlined in the draft law, the trials would hardly meet basic international standards for a fair trial. To be fair, many of the defects in Rwandese justice are attributable to the country's low level of economic development. Although the right to a fair trial is identified in international law as a civil and political right, the artificiality of the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, becomes apparent when the problem of justice in a poor country is considered. Realising judicial guarantees depends on resources. These rights cannot be guaranteed in the same way in a poor country as in a rich country, despite the admonition in relevant international instrument to the contrary. They are 'positive' rights, not 'negative' rights, in that they require the state to act, and not to abstain from acting.¹¹⁶ Consequently, a state such as Rwanda must make agonising choices¹¹⁷ between investing in its judicial system in order to meet the norms set out

111 Art 84 Draft *Gacaca* Law.

112 As above.

113 As above.

114 Art 14(5) ICCPR.

115 Art 86 Draft *Gacaca* Law.

116 It is generally accepted that all human rights impose at least three different types of obligations on states: the obligations to respect, protect and fulfil. H Shue *Basic Rights* (1980) 5. The Human Rights Committee made clear that the ICCPR does place active obligations on states: 'The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdictions. This aspect calls for **specific activities** by the States parties to enable individuals to enjoy their rights in principle, this undertaking applies to all rights set forth in the Covenant' (emphasis added). See General Comment 3(13), UN Doc A/36/40, para 1.

117 See also the widely commented on South African Constitutional Court's decision in *Soobramaney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC).

in the International Covenant on Civil and Political Rights, or to invest in education, health care, and housing, so as to meet the pressing needs of the poor of Rwanda and respect the claims of the International Covenant on Economic, Social and Cultural Rights,¹¹⁸ not to mention the African Charter on Human and Peoples' Rights, with its own prerogatives.

Admittedly, fair trial rights are neither subject to the 'progressive realisation', nor to 'available resources'.¹¹⁹ Clearly, however, the obligation imposed on the state does not require the state to do more than its available resources permit.¹²⁰ Thus, the stress on the immediate nature of the obligation to implement fair trial rights should be accompanied by the clear acknowledgement that there are many obstacles to the full achievement of the recognised rights. In the case of Rwanda, a number of specific challenges should be considered, including the complete devastation of the judicial structure as a result of the civil war, genocide and other crimes. The poor economic conditions and under-development serve only to exacerbate an already bad situation. Rarely has a country anywhere had to face so many seemingly insuperable obstacles with so few resources.

However, there are other aspects of the trial process which are more feasibly within Rwanda's control. Given Rwanda's domestic obligations flowing from the constitution,¹²¹ the Arusha Accords¹²² and international obligations deriving from the ICCPR and the African Charter, it is clear that a number of provisions of the draft *gacaca* legislation should be amended to conform to basic international standards for fair trials.

3 Social reconstruction and reconciliation

Classical criminal law theory proposes several objectives for punishment: prevention, deterrence, retribution, protection of the public,

118 Adopted 16 December 1996, GA Res 2200A (XXI), UN Doc A/63/16 (1966) (entered into force 3 January 1976) (ICESCR).

119 See art 2(1) ICESCR; General Comment 3 'The nature of states parties obligations (art 2(1) of the Covenant)' (1990); Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

120 See art 2(2) ICCPR, whereby a state undertakes 'to take the necessary steps' to adopt such legislative or other measures to give effect to the rights recognised in the Covenant.

121 *Constitution de la République Rwandaise* (10 Juin 1991) JO 615.

122 The Arusha Accords, which have constitutional force in Rwanda, declare that the Universal Declaration of Human Rights shall overrule any incompatible Rwandese legislation. See Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions, 3 August 1993, art 16, (1993) 16 JO 1265.

rehabilitation, and social reconstruction in a large sense.¹²³ Some of these are echoed in the Preamble of the Draft *Gacaca* Law. For example, referring implicitly to the notion of deterrence, the Preamble to the draft law affirms the government's conviction that the legal system is 'an indispensable way to make an example of those who participated in the genocidal acts by prosecuting and convicting them so that the atrocities committed shall never be replicated'.¹²⁴

The effective prosecutions and punishment of offenders are therefore intended to deter others from committing the same crimes, and perhaps to convince those already engaged in such behaviour to stop. This argument is based on the assumption that if potential wrongdoers believe that they are likely to face punishment for their misdeeds, they may be persuaded not to initiate such activity. The punishment aspect of prosecution is therefore linked to prevention and deterrence.¹²⁵

The concept of reconciliation, on the other hand, remains elusive in countries trying to get over conflict and mass violence. A question often asked is: can there be reconciliation without justice? The majority of people do not need to read the philosophers in order to hold some basic ideas about justice. Nearly all would argue that crime deserves to be punished, whatever the nature of the offence. Further, it is contended that the punishment of the perpetrators will ultimately bring reconciliation.¹²⁶ However, the positive contribution of criminal trials to the process of reconciliation, while widely accepted, remains an empirical question: '[J]ustice in itself is not a problematic objective, but whether the attainment of justice always contributes to reconciliation is anything but evident.'¹²⁷

123 MW Reisman 'Legal responses to genocide and other massive violations of human rights' (1996) 59 (4) *Law and Contemporary Problems* 75.

124 Preamble of the Draft *Gacaca* Law; see also, in a similar vein, the resolutions setting up the two international ad hoc tribunals where the Security Council affirmed its conviction that the work of the two tribunals 'will contribute to ensuring that such violations are halted' (SC Res 827 (1993); SC Res 955 (1994)).

125 Bassiouni notes that the weakness in the argument is that it is after the fact, but its strength is that it has a crucial role to play in the formulation and strengthening of values and future prevention of victimisation in the society. See MC Bassiouni 'Searching for peace and achieving justice: The need for accountability' (1996) 59 *Law and Contemporary Problems* 27. But see M Minow *Between vengeance and forgiveness: Facing history after genocide and mass violence* (1998) 146. Minow refuses to use deterrence as an argument for international war crimes trials. See also J Malamud-Goti 'Transitional governments in the breach: Why punish states' criminals?' in Kritz (n 55 above) 189–96, who argues that 'the threat of a hypothetical conviction does not discourage criminal behaviour within a military body'.

126 Preamble, Draft *Gacaca* Law.

127 See Ignatieff (n 60 above) 110. Ignatieff describes the 'articles of faith' that underlie the commitment of the world community to international trials for war crimes. He asks: 'What does it mean for a nation to come to terms with its past?'

Generally, reconciliation refers to a process by which people who were formerly enemies put aside their memories of past wrongs, forgo vengeance and give up their prior group aspirations in favour of a commitment to a communitarian ideal. Reconciliation is a subject which is integral to all major religious and philosophical traditions. More specifically, the majority of traditions apparently place reconciliation above 'justice'.¹²⁸

Since 'reconciliation' has religious overtones that suggest a reliance almost on faith, I have chosen to use the term 'social reconstruction', which implies a task that individuals have to work on politically — it is something that people have to build and does not just happen. But it is easier to say how the term 'reconciliation' is flawed than it is to say why 'social reconstruction' is preferable or to specify what it means. The term merely describes the evolution of social institutions, economic development, community building and person-to-person connection that may underlie the commitment of people to live together. According to Reisman, 'social reconstructing' involves 'identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations'.¹²⁹ Unfortunately, even this does not offer a very clear definition of 'social reconstruction'. For our purposes, however, what is important is not so much the ability to reach a definition of 'reconciliation' or 'social reconstruction', but rather to determine whether the *gacaca* model can be regarded as a worthwhile endeavour in the building of a peaceful society in the aftermath of genocide.¹³⁰

It is submitted that the decision to reconcile, like the power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the government but of the victims.¹³¹ Reconciliation, however, also demands a positive action from the perpetrators. Therefore, reconciliation is the result of an interaction between victim and perpetrator. Groups (whether ethnic or racial) cannot be reconciled to other groups, only individuals can be reconciled to other individuals. Nevertheless, individuals can be helped to reconcile by the process of justice and the acknowledgement of the truth.

128 See D Bronkhorst *Truth and reconciliation: Obstacles and opportunities for human rights* (1995) 38.

129 Reisman (n 123 above) 76.

130 As far as I am aware, the objective of conflict prevention/resolution strategies is not so much of suppressing conflicts within specific communities since there will always be conflicts in societies. It has even been argued that conflicts can have a positive impact in the dynamic of a society. See KJ Holsti *International politics: A framework for analysis* (1995). Efforts, therefore, should aim at mitigating the negative impact/development of conflicts — especially violence — by means of developing peaceful mechanisms of conflicts prevention/resolution.

131 Bassiouni (n 125 above) 19.

Reconstruction in a context of transitional justice is a contested notion. Social reconstruction may not occur when people are faced with judicial decisions that do not correspond to their perception about what happened, that is their 'truth'. From their perspectives, some survivor groups have expressed fears that the current proposals amount to some form of amnesty.¹³² They are concerned that a Category Two suspect (a person guilty of intentional homicide or of a serious assault causing death) might confess and, as a consequence, be released after a short prison term. Fears have also been expressed that the proposed system may be used to settle personal scores through some form of collusion between defendants and local inhabitants, especially in rural areas with few or no survivors.¹³³ Thus, although the draft *gacaca* legislation affirms that within the framework of the *gacaca* jurisdictions the population shall achieve a justice based on evidence and not on passion,¹³⁴ evidence that is sufficient to produce a verdict in a court of law may not be sufficient to override solidified interest group perspectives among the ranks of legal professionals, let alone lay judges.

It has been argued that much of the struggle for justice, and the battle against impunity is the search for truth.¹³⁵ In fact, it has further been suggested that the period which will be investigated by the *gacaca* jurisdictions (crimes committed between October 1990 and December 1994) is likely to make large segments of society consider the process illegitimate. In a similar vein, it could also be argued that the *gacaca* tribunals would not address the losses that the refugees had suffered since the onset of the civil war in 1990 and, therefore, make reconciliation difficult to contemplate. Indeed, 'recognising the losses suffered by all Rwandese promises to advance the reconciliation process by reducing levels of defensiveness among returnees'.¹³⁶

It should be kept in mind that no judicial system anywhere in the world has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, and directed against hundreds of thousands. Even a prosperous country, with a sophisticated judicial system, would be required to seek special and innovative solutions to criminal law and prosecution on such a scale. This is not to say that

132 See OAU Panel Report (2000); see also *Ligue Rwandaise pour la Promotion des Droits de l'Homme* (LIPRODHOR) *Juridictions Gacaca au Rwanda: Résultats de la recherche sur les attitudes et opinions de la population rwandaise* (2000).

133 See OAU Panel Report (2000); LIPRODHOR (n 132 above).

134 Preamble, Draft *Gacaca* Law.

135 WA Schabas 'Sentencing by international tribunals: A human rights approach' (1997) 7 *Duke Journal of Comparative and International Law* 499.

136 M Summers 'The mending of the hearts: Conflict resolution and reconciliation activities among the Rwandese refugee religious groups in Ngara district, Tanzania (A preliminary field report)' (1996) 207 Working paper in African Studies (Boston University) 14 (on file with author).

historical accountability should be neglected. Respect for the rule of law in today's Rwanda is also critical in the search for a lasting peace and social reconstruction. At the same time, in its current fragile state, the judicial system, or rather the accountability mechanism proposed, will be at best distorted and at worst crushed by the demands of investigating past and present human rights abuses in addition to prosecuting ten of thousands people for genocide. Indeed, prosecuting the perpetrators of genocide is a most urgent priority. It is essential for the restoration of Rwandese society that the wheels of justice begin to turn with respect to the crimes committed during 1994. Therefore, it seems imperative to deal with the prosecution for genocide as a problem that is separate from the equally important acknowledgement of past abuses as well the building of a human rights culture in the present Rwanda.

The idea that social reconstruction depends on shared truth presumes that shared truth about the past is possible. As Ignatieff argues, however, truth is related to identity: 'what you believe to be true depends, in some measure, on who you believe yourself to be. And who you believe yourself to be is mostly defined in terms of who you are not.'¹³⁷ This does not mean that there cannot be agreement on, for instance, a shared chronology of events, though even this would be contentious; but it is difficult and almost impossible to imagine communities with a long history of antagonisms which culminated in a violent conflict and genocide ever agreeing on how to apportion responsibility and moral blame. In other words, in the aftermath of mass violence, there may be no consensus about who were the victims and who were the perpetrators.

In dealing with crimes of mass violence, the only option is to try to establish the most objective truth by means of witness testimony and other evidence.¹³⁸ Whether it should be a 'judicial truth' or one that is reached in a different manner depends on each country's experience and choices.¹³⁹ Whatever the case, it is not realistic to expect that when 'truth' is proclaimed by an official body, it is likely to be accepted by those against whom it is directed. The point is merely that it is best to be modest about what criminal trials can accomplish. Justice can serve the interests of truth. But the truth will not necessarily be believed and hence the path from truth to reconciliation is barred. All one can say is that leaving genocide perpetrators unpunished is worse: it leaves the cycle of impunity unbroken and permits societies to indulge their fantasies of denial.¹⁴⁰

137 Ignatieff (n 60 above) 114; see also A McDonald 'A right to truth and a remedy for African victims of serious violations of international humanitarian law' (1999) 3 *Law, Democracy and Development* 139 144.

138 McDonald (n 137 above) 146.

139 As above. CD Smith 'Introduction' in Kritiz (n 55 above) xvii.

140 Ignatieff (n 60 above) 118.

Attending to the competing claims, needs and goals of various groups, whether they are victims or aggressors, is critical for the efforts of rebuilding the society in Rwanda. It is critical to re-examine the assumption that criminal trials alone will uncover the truth, individualise the guilt, and ultimately reconcile the Rwandese and strengthen their unity. Additional interventions that are different from, but complementary to trials, should be considered to address the question of justice and social reconstruction in the post-genocide Rwanda.

4 Conclusions and recommendations

Rwanda's experience in prosecuting genocide will form a new chapter in the emerging practice in the area of transitional justice. In deciding to prosecute, Rwanda is complying with international standards addressing the question of accountability in the aftermath of massive violations of human rights and humanitarian law. Yet the existing judicial system is incapable, if only for practical reasons, of responding to the challenge. To expedite the procedures, to reduce the vast caseload, and to increase popular involvement in the justice system, the government has developed a new law that introduces local tribunals inspired by a traditional mechanism for local dispute resolution called the *gacaca*. The aim of this article was to make a preliminary evaluation of the potential role of the *gacaca* tribunals. Focusing on the draft legislation, the question asked was what role the *gacaca* model could possibly play in the search for justice and social reconstruction in post-genocide Rwanda.

It is commendable that the newly proposed system of using *gacaca* tribunals brings the justice process at the local (cell, district, province) level which is where most people, especially in the rural society of Rwanda, experienced the violence and its aftermath. In general, the involvement of local people in the process of collecting and processing information, rather than simply the involvement of professional staff, may set in motion a more sustained process for coming to terms with the past.¹⁴¹

The process of gathering the information of survivors telling their stories in local hearings, of having people taking testimonies and participating in the process as the need arises, further correspond to the African concept of justice.¹⁴² How many times have Rwandese doubted the justice they have got from the Western-style courtrooms and from an environment and language they could hardly comprehend? Since justice, like culture, is not supposed to be a static concept, it should be

141 N Roht-Arriaza 'Combating impunity: Some thoughts on the way forward' (1996) 59 (4) *Law and Contemporary Problems* 93.

142 At the hearing, any person who wants to do so may take the floor. See art 66(6) of the Draft *Gacaca* Law.

developed to be consistent with conditions and experiences in given situations.¹⁴³ Rwanda should learn from its rich past to nourish its concept of justice and ultimately human rights. Certainly, the *gacaca* process will 'prove the capacity of the Rwandan society to settle its own problems through a legal system based on Rwandan customs'.¹⁴⁴ Furthermore, for the lessons of an accountability process to be integrated into the life and culture of Rwanda, the nation should feel a sense of ownership and investment in the process.¹⁴⁵

The draft *gacaca* legislation appears to be less commendable as far as substantive criminal law is concerned. Crimes have been defined without the required degree of specificity and the legislation restricts considerably the jurisdiction of the *gacaca* courts over the crimes committed during the time period considered. The draft law does not specifically cover many serious violations of common article 3 and the Geneva Protocol II. Although not explicitly listed as grave breaches, these are crimes of universal concern and subject to universal condemnation as embodied in the Statute of the ICTR.

Turning to the procedural criminal law aspect, it is, in principle, up to each particular nation facing the problem to decide the specific content of a policy to deal with past massive human rights abuses. However, Rwanda must also act in consonance with international human rights law and principles. In particular, international standards related to trials, treatment of offenders and punishment should be respected. The draft law on *gacaca* jurisdictions should be amended to ensure that these trials conform to international standards for fair trials. In particular, defendants should have, at least, access to legal advice. Also, measures should be taken to ensure the competence, independence and impartiality of those elected to the *gacaca* jurisdictions, at all levels. Finally, before the *gacaca* jurisdictions begin considering cases of genocide, significant resources should be devoted to ensuring training of those elected for the *gacaca* jurisdictions, including training in international standards for fair trials.

Since legal training appears to be crucial, the disqualification of career magistrates as members of the *gacaca* jurisdictions is perplexing. Measures should also be taken to ensure that legal advisers of the *gacaca* jurisdictions are independent and impartial in providing their 'advisory opinions'. In this respect, the Supreme Court, in its supervisory and monitoring function, will have a critical role to play in ensuring that the *gacaca* jurisdictions fulfil their tasks and are seen to be competent, independent and impartial.

143 See also ABS Preis 'Human rights as a cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 293.

144 Preamble, Draft *Gacaca* Law.

145 NJ Kritz 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59 (4) *Law and Contemporary Problems* 127.

The ultimate goal of justice should be the building or rebuilding of a peaceful society.¹⁴⁶ As argued above, reconciliation results from individuals' interactions. The attainment of justice or the acknowledgement of the truth certainly serves to help the process of reconciliation. It is doubtful, however, if the process of justice necessarily leads to reconciliation. What should be achieved is not only a sense of justice but also the elimination of a sense of injustice for both the victims and the perpetrators.

The conflict in Rwanda is complex because it has multiple underlying causes.¹⁴⁷ Only when all the sources are identified can there be development of comprehensive management strategies that can result in a genuine resolution of conflict.

The dilemma of justice and social reconstruction in Rwanda is how to respond to past gross abuses in a manner that allows communities with varied experiences, needs and goals to learn to live together again. Ultimately, while justice and accountability may be significant contributors to the process of social reconstruction, criminal trials should be conceptualised as but one aspect of a larger series of possible interventions.

146 As Bassiouni notes, 'whichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part, justice, and, whenever possible reconciliation, and ultimately, peace' (n 130 above) 23.

147 For a comprehensive overview of the various interpretations of the conflict in Rwanda, see JP Kimonyo 'Revue critique des interprétations du conflit rwandais' (2000) 1 *Cahiers Centre de Gestion des Conflits, Université Nationale du Rwanda*, 1-80.

The Special Court for Sierra Leone: Conceptual concerns and alternatives

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1 Background

On 7 July 1999, in Lomé, Togo, the government of Sierra Leone and the Revolutionary United Front (RUF)¹ signed a peace accord to end the nine-year long civil war.² Although the signing of the peace deal was widely welcomed, a provision in the Accord³ granting a blanket amnesty to all combatants and collaborators was widely condemned.⁴ The Sierra Leone Bar Association, Human Rights Watch and Amnesty International, amongst others, condemned the conferring of complete impunity to those responsible for appalling atrocities against civilians.

Despite the granting of amnesty and pardon to the rebels, the atrocities did not cease.⁵ The RUF continued its reign of terror and continued to violate the human rights of the people of Sierra Leone. In May 2000, following weeks of rebel activities, the situation in Freetown degenerated. Innocent civilians demonstrating for peace were shot as

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1 The rebel movement that started the civil war in Sierra Leone in 1991. The Front was led by Corp Foday Sankoh, but is now under the leadership of Issa Sesay.

2 Peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone <<http://www.sierra-leone.org/lomeaccord.html>> (accessed 5 February 2001).

3 Art IX of the Accord.

4 For a critique of the amnesty provisions under this Accord, see A Tejan-Cole 'Painful peace — Amnesty under the Lomé Peace Agreement' (1999) 3 *Law, Democracy and Development* 239.

5 'Sierra Leone rebels violating Peace Accord' <<http://www.hrw.org/press/1999/aug/sierra3008.htm>> (accessed 30 August 1999).

they marched towards the residence of the RUF leader, Foday Sankoh.⁶ The outrage that followed led to the arrest of Sankoh and senior members of his movement. The government of Sierra Leone and the United Nations (UN)⁷ were forced to rethink their stance on the amnesty. In a letter to the Secretary General of the UN, dated 12 June 2000, President Ahmed Tejan Kabbah of Sierra Leone requested the establishment of an independent Special Court for dealing with the problems. On 14 August 2000 the UN Security Council passed a resolution requesting the Secretary General to negotiate an agreement with the government of Sierra Leone to create this Special Court.⁸

Following broad consultations, in October 2000 the Secretary General presented his report to the Security Council, annexing an agreement between the UN and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone and enclosing the Draft Statute of the Court.⁹

This contribution strives to examine the Draft Statute of the Special Court for Sierra Leone. The main features of the proposed Court will be identified and compared with other courts namely the International Criminal Tribunal for Rwanda (ICTR), the International Tribunal for the Former Yugoslavia (ICTY) and proposed Extraordinary Chambers in the Courts of Cambodia. Conceptual concerns about the proposed Special Court will be raised. Finally, alternatives to the establishment of the Special Court will be explored.

2 Main features of the proposed Special Court

2.1 Competence

The Court will have powers to prosecute 'persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.¹⁰ Both the ICTR and ICTY statutes are wider in scope in that they have powers to prosecute 'persons responsible'.¹¹ The Statute establishing

6 Under the Lomé Agreement, Sankoh was given the status of Vice President and Chairman of the Commission for the Management of Strategic Resources, National Reconstruction and Development.

7 A moral guarantor under the Lomé Agreement, the UN added a caveat to the Accord at the signing stating that the latter was inapplicable to crimes against humanity, genocide, war crimes and other serious violations of international humanitarian law.

8 Resolution 1315 (2000).

9 Report of the Secretary General on the establishment of Special Court for Sierra Leone UN Doc S/2000/915 <<http://www.un.org/Docs/sc/reports/2000/915e.pdf>> (accessed 5 February 2001).

10 Art 1 of the Statute of the Special Court for Sierra Leone (the Statute). This Statute is enclosed in the Report of the Secretary General on the establishment of Special Court for Sierra Leone UN Doc S/2000/915 21 (n 9 above).

11 Art 1 of the Statutes of ICTR and ICTY.

Extraordinary Chambers in the Courts of Cambodia is more restricted. The chamber will only try the 'senior leaders of the Democratic Kampuchea'.¹² In a letter by the Secretary General, the Security Council was requested that the Special Court be given powers to try persons 'who bear the greatest responsibility for the commission of the crimes'. It is submitted that the Secretary General's proposal is broader and includes not only leaders but also others who committed atrocities on a massive scale.

Like the ICTY, the Special Court has a limited geographical jurisdiction; offences must have been committed within Sierra Leone. The ICTR has powers to prosecute offences committed by Rwandan citizens in neighbouring states.¹³ Unlike the Rwanda Tribunal whose seat is located in a neutral country, namely Tanzania, the seat of the Court is expected to be in Freetown. However, provision is made in the Draft Statute for the Court to sit outside Sierra Leone.¹⁴

Further, the jurisdiction of the proposed Special Court is limited also by time. Its jurisdiction begins on 30 November 1996 but owing to the fact that the conflict is still ongoing, there is no cut-off date. The ICTY's jurisdiction is not limited by time, beginning in 1991. The ICTR's jurisdiction is restricted to the period between 1 January 1994 and 31 December 1994.¹⁵ The Extraordinary Chambers in the Courts of Cambodia can prosecute offences committed between 17 April 1975 and 6 January 1979.¹⁶

2.2 Subject matter jurisdiction

The proposed Special Court combines offences under international law with those under national law. The Special Court will have the power to prosecute persons for crimes against humanity, violations of article 3 common to the Geneva Conventions and Additional Protocol II, serious violations of international humanitarian law and some Sierra Leonean domestic law.

Crimes against humanity include widespread or systematic attacks against any civilian population resulting in the following crimes: murder, extermination, enslavement, deportation, imprisonment, torture, rape,

12 Art 1 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. Cambodia's National Assembly on 2 January 2001 voted to set up a special tribunal, with help from the United Nations, in order to try some of the world's most notorious mass murderers.

13 Art 1 Statute of the International Tribunal for Rwanda.

14 Art 9 of the Agreement between the UN and the government of Sierra Leone.

15 Art 1 Statute of the International Tribunal for Rwanda.

16 Arts 1 and 2 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence. This also includes persecution on political, racial, ethnic or religious grounds and other inhumane acts.¹⁷ This list follows the enumeration in the statutes of the ICTY and ICTR.¹⁸

The Court will also have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions for the protection of war victims and the Additional Protocol II thereto.¹⁹ These violations include violence to life, health and physical and mental well-being of persons, collective punishments, taking hostages, acts of terrorism, outrages upon personal dignity, pillage, passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court. Threats to commit any of these violations are also included.²⁰

Serious violations of humanitarian law include intentionally directing attacks against the civilian population,²¹ personnel, installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping missions.²² Abduction and forced recruitment of children under the age of fifteen into the armed forces or groups for the purpose of using them to participate actively in hostilities are also offences.²³

Crimes under Sierra Leonean law include offences relating to the abuse of girls²⁴ and offences relating to the wanton destruction of property.²⁵

The Statute of the ICTR covers all of these offences but also includes genocide. As there is no evidence that the atrocities in Sierra Leone were done intending to destroy a national, ethnic, religious or racial group, there was no need to include genocide in the Sierra Leonean Statute.

The Extraordinary Chambers in the Courts of Cambodia will have powers to try crimes and serious violations of Cambodian penal law,

17 Art 2 of the Statute.

18 Both were patterned on Principle VI of the principles of international law recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. See art 3 ICTR Statute and art 5 ICTY Statute.

19 Art 3 of the Statute. The crimes listed under Additional Protocol II are those under art 4 of the Statute, as the armed conflict in Sierra Leone is considered by the United Nations as 'not of an international character'.

20 Art 4 ICTR Statute.

21 Art 4(a) ICTR Statute.

22 Art 4(b) ICTR Statute.

23 Art 4(c) ICTR Statute.

24 Prevention of Cruelty to Children Act, ch 31 of the Laws of Sierra Leone 1926. Only three specific sections of the act are applicable under the Statute: abusing a girl under 13, contrary to s 6; abusing a girl between 13 and 14 years of age, contrary to s 7, and abducting a girl for immoral purposes, contrary to s 12.

25 Malicious Damage Act 1861. Prosecutions under this act are limited to three sections. Setting fire to dwelling houses contrary to s 2; setting fire to public buildings contrary to s 5, and setting fire to other buildings contrary to s 6.

international humanitarian law and international conventions recognised by Cambodia. These include genocide, crimes against humanity, grave breaches of the Geneva Convention of 12 August 1949 and destruction of cultural property during armed conflict.²⁶

2.3 Concurrent jurisdiction

The Special Court will take precedence over Sierra Leonean courts. It may at any stage request national courts to defer cases to it.²⁷ A similar provision is incorporated into the Statutes of the ICTR and ICTY.²⁸ However, the ICTR Statute differs from that of the ICTY in that it provides primacy over the national courts of all states, while the ICTY has primacy only over national courts.²⁹

Persons tried before the Special Court cannot be subsequently tried by national courts.³⁰ However, the Special Court may subsequently try a person tried by national courts if these national trials were not impartial or independent or the acts for which he was tried were characterised as an ordinary crime.³¹

2.4 Composition and structure

The Court will be a treaty-based, *sui generis* court of mixed jurisdiction and composition.³² It will have three organs: the chambers, comprising two trial chambers, and an Appeals Chamber, the Prosecutor and the Registry.³³ Three judges will serve in each of the trial chambers. The Secretary General of the UN will appoint two of the three judges, the third one being appointed by the government of Sierra Leone. The Appeals Chamber will be composed of five judges, three judges will be appointed by the Secretary General of the UN and the other two appointed by the government of Sierra Leone. These judges will be appointed for a term of four years and will be eligible for reappointment.³⁴

26 n 17 above arts 3, 4, 5, 6 and 7.

27 Art 8(2) of the Statute.

28 Art 9 ICTY Statute and art 8 ICTR Statute. For a critique of the ICTR's jurisdictional primacy, see MH Morris 'The trials of concurrent jurisdiction: The case of Rwanda' (1997) 7 *Duke Journal of Contemporary and International Law* 349.

29 Art 8(2) ICTR Statute and art 9(2) ICTY Statute.

30 Art 9(1) of the Statute.

31 Art 9(2) of the Statute.

32 Unlike the ICTR, which is based on a Resolution of the Security Council and constituted as a subsidiary organ of the UN.

33 Art 11 of the Statute.

34 Art 13(3) of the Statute.

The Rules of Procedure and evidence of the ICTR will apply to the Special Court.³⁵ Appeals will be made to the Appeal Chamber on the grounds of a procedural error, an error on a question of law invalidating the decision and an error of fact occasioning a miscarriage of justice.³⁶

An international prosecutor appointed by the Secretary General, after consultation with the government of Sierra Leone, will lead the investigation and prosecution. He will be assisted by a Sierra Leonean Deputy Prosecutor appointed by the government of Sierra Leone in consultation with the Secretary General.³⁷

The proposed Special Court is modelled on the ICTR in terms of its composition and structure.

2.5 Juveniles

The Special Court will also have jurisdiction over persons who were between the ages of fifteen and eighteen years at the time of the commission of the crime that they are accused of.³⁸ In the trial of a juvenile, the court may constitute a 'Juvenile Chamber' consisting of at least one judge possessing the required qualification and experience in juvenile justice.³⁹ Juveniles may be tried separately from adults and the court must take protective measures to ensure their privacy.

The Statute of the Court does not provide for custodial sentences for juveniles. A juvenile must be released unless his or her safety requires that he or she be placed under close supervision or in a remand home. Detention pending trial shall be a last resort. Emphasis shall be on promoting the rehabilitation and reintegration into society of the juvenile. Children may be ordered to attend vocational, educational and correctional training programmes, approved schools, disarmament demobilisation and reintegration programmes or to care, guidance and counselling programmes organised by child protection agencies.⁴⁰

35 Art 14 of the Statute.

36 Art 20 of the Statute. Art 24 of the ICTR Statute does not include procedural error as a ground of appeal.

37 Art 3(2) of the Agreement between the UN and the government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 15 (the Agreement).

38 Art 7(1) of the Statute.

39 Art 7(3)(b) of the Statute.

40 Art 7(f) of the Statute.

3 Conceptual concerns about the proposed Special Court

3.1 Primacy of the Special Court

The Statute provides that the Special Court will have concurrent jurisdiction with and primacy over Sierra Leonean courts.⁴¹ The Special Court is intended to be outside the national court system. The implementation of the Statute and the Agreement signed by the Government of Sierra Leone and the United Nations at the national level would also require the Agreement to be incorporated into the national laws of Sierra Leone in accordance with constitutional requirements.⁴²

The Constitution of Sierra Leone⁴³ provides that the judicial system of Sierra Leone consists of the Supreme Court, the Court of Appeal, the High Court and lower and traditional courts that parliament may establish by law.⁴⁴ The judiciary has jurisdiction in all civil, criminal, constitutional and such matters for which parliament may confer jurisdiction by or under an Act of Parliament.⁴⁵ The Supreme Court is the final court of appeal for Sierra Leone. It has original jurisdiction in all matters relating to the interpretation and enforcement of the Constitution and the compatibility of legislation to it.

The Constitution of Sierra Leone clearly states the composition of the various high courts of jurisdiction and the procedure of appointment of its judges. Judges are appointed by the President acting on the advice of the Judicial and Legal Service Commission and subject to approval by parliament.⁴⁶

The drafters of the Constitution of Sierra Leone did not anticipate the setting up of any court having a parallel function to the Special Court within its jurisdiction. The Court does not fit the framework of the present judicial structure. The Constitution clearly spells out the appeals procedure. Appeals from the High Court go to the Court of Appeals.⁴⁷ Appeals from the Court of Appeal go to the Supreme Court, which is the final court of appeal for Sierra Leone. The Special Court will oust the jurisdiction of the Superior Court of Judicature of Sierra Leone and impose a two-tier structure in which its Appeals Chambers will be the final court of appeal.

The Supreme Court in Sierra Leone also has supervisory jurisdiction over all lower courts in Sierra Leone.⁴⁸ As the Supreme Court is the

41 Art 8 of the Statute.

42 n 9 above paras 9 and 10.

43 Act 6 of 1991.

44 Sec 120(4).

45 Sec 120(2).

46 Sec 135(1).

47 In exceptional cases, it may lie directly to the Supreme Court.

48 The Supreme Court has over the years been very reluctant to exercise this jurisdiction. See the case of *The State v Lt Col CH Deen* (2000) *Sierra Leone Law Review* 57.

highest court under the Constitution, it follows that it would have supervisory jurisdiction over the Special Court under national law. This was not the intention of the drafters of the Statute of the Special Court. Their intention was to have a court outside the framework of the Sierra Leonean courts but in compliance with the laws of Sierra Leone.

Incorporating these provisions into the national law of Sierra Leone will require substantial amendments to entrenched provisions of the Constitution of Sierra Leone.⁴⁹ These provisions cannot be amended unless they are passed by Parliament and approved at a referendum by a two-thirds majority. Considering the current precarious state of the security in Sierra Leone and the fact that a substantial part of the country is under rebel control, it seems almost impossible to organise a referendum for this purpose.

In the Australian case of *Polyukovich v The Commonwealth* it was held that a court, when exercising jurisdiction over international crimes, is exercising the judicial power of the international community and not the judicial power of Australia.⁵⁰ In such a case, primacy of such a court would be determined by laws concerning mutual assistance in criminal matters. Although this authority is not binding on the courts in Sierra Leone, it may well be of persuasive authority.

3.2 Draft Statute

The present Draft Statute provides that the Court's powers are limited to national courts and do not extend to courts in other countries. The Court also lacks the power to request the surrender of an accused from any third state and to induce the compliance of its authorities with that request. Considering that a number of suspects are presently in third countries⁵¹ and a number of others could easily travel to such

49 Sec 108 Constitution of Sierra Leone.

50 (1991) 172 *Commonwealth Law Reports* 501. In this case, Ivan Polyukovich was charged with war crimes allegedly committed during World War II. He challenged the constitutional validity of the War Crimes Act, on the basis that the Act purported to operate retrospectively and granted jurisdiction over individuals for alleged crimes having no connection with Australia. The Court held by a four to three majority that s 51(xxix) of the Commonwealth Constitution — the 'external affairs power' — gives the Commonwealth the power to enact laws to implement international treaty obligations incumbent on Australia, and this regardless of the content of the treaty. Under these provisions, the Commonwealth Parliament also has the power to legislate and to implement customary international law. Although the Act is retrospective and operates on people who at the time of the commission of the acts had no connection with Australia, it is still a law with respect to 'external affairs'. The Act is not retrospective in operation because it only criminalises acts which were war crimes under international law as well as 'ordinary' crimes under Australian law at the time they were committed. While there is no obligation at customary international law to prosecute war criminals, there is a right to exercise universal jurisdiction. The War Crimes Act facilitates the exercise of this right.

51 One of the alleged perpetrators, Sam Bockarie, aka Mosquito, is presently in neighbouring Liberia.

countries,⁵² the Statute must request states to co-operate with the Court in the investigation and prosecution of the person accused, and to arrest, detain and extradite such persons. Failing to grant the Special Court these powers will undermine the effectiveness of the Court. Article 28 of the Statute of the ICTR provides that:

States shall co-operate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to a) The identification and location of persons; b) The taking of testimony and the production of evidence; c) The service of documents; d) The arrest or detention of persons; e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29 of the Statute of the ICTY contains a similar provision. The proposed Statute of the Special Court for Sierra Leone must be amended to incorporate the powers specified in the ICTR and ICTY Statutes.⁵³

3.3 Temporal jurisdiction

The Draft Statute of the Special Court for Sierra Leone gives the proposed Court jurisdiction over crimes against humanity, violations of article 3 common to the Geneva Conventions and Additional Protocol II thereto, serious violations of international humanitarian law and Sierra Leonean law committed since 30 November 1996. In order to choose this date the framers of the Draft Statute were guided by three considerations. Firstly, the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded. Secondly, the date should correspond to an event or a new phase of the conflict without necessarily having any political connotations. Thirdly, the date should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.⁵⁴

The framers of the Draft Statute rejected the starting date of 23 March 1991 as 'imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court'.⁵⁵ The effect is the granting of amnesty or pardon for acts committed from 23 March 1991 to October 1996.

52 The rebels control most of the border with Guinea and Liberia and could easily flee into these countries.

53 Human Rights Watch letter to Security Council members dated 31 October 2000.

54 n 9 above, para 25 Report of the Secretary General.

55 n 9 above, para 26 Report of the Secretary General.

Three alternative commencement dates were considered, 30 November 1996,⁵⁶ 25 May 1997⁵⁷ and 6 January 1999.⁵⁸ The first was selected. The date 25 May 1997 had the disadvantage of having political connotations implying that it was aimed at punishing those involved in the 1997 *coup*. The 6 January 1999 saw an offensive specifically targeted on Freetown and would have excluded all crimes before this period in the rural areas and countryside. In view of these disadvantages, 30 November 1996 was selected.

The fact that the jurisdiction of the court is restricted by this time limit might inhibit the successful prosecution of some accused persons. Further, it may result in a number of persons 'most responsible for serious violations of international humanitarian law and Sierra Leonean law' going unpunished. As an example, Human Rights Watch has cited the case of Foday Sankoh, the rebel leader.⁵⁹ Sankoh was arrested in Nigeria in March 1997 on alleged arms charges. He was held under house arrest until he was brought back to Sierra Leone in July 1998. On his return, he was tried for treason, convicted and imprisoned. He was not directly involved in the war during this period. However, there is ample evidence of atrocities committed under his direct command before 1996.⁶⁰ If the scope of the jurisdiction remains the same, the prosecution may have an exacting task establishing his guilt.

Furthermore, the truncated scope of temporal jurisdiction sends the wrong signal. Before 1997, the war had not reached Freetown. The brunt of the atrocities was committed in the provinces. By limiting the date to November 1996, it excludes most crimes committed in the provinces and sends the wrong signal that it only matters when the lives of the people of Freetown are affected.⁶¹

This truncated scope of temporal jurisdiction must be reviewed and the court must be given jurisdiction over all crimes against humanity, war crimes and breaches of Sierra Leonean law committed since 23 March 1991, when the war started.

56 The date of the signing of the Abidjan Peace Accord between the government of Sierra Leone and the RUF. See <<http://www.sierra-leone.org/abidjanaccord.html>> (accessed 5 February 2001).

57 This was the date of the *coup* staged by the Armed Forces Revolutionary Council led by Johnny Paul Koroma overthrowing the elected government of President Tejan Kabbah. For an account of the atrocities committed during this period see A Tejan-Cole, 'Human rights under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone: A catalogue of abuse' (1998) 10 *African Journal of International and Comparative Law* 481.

58 The date the former soldiers of the Republic of Sierra Leone military forces and the RUF launched an attack on Freetown.

59 Human Rights Watch letter to Security Council members dated 31 October 2000.

60 In the treason trial of Sankoh, several former RUF combatants gave evidence about atrocities they committed (or witnessed) on the command or orders of Sankoh.

61 This further exacerbates the tensions existing since the colonial period between the then Colony, now the Western Area, and the Provinces.

3.4 Prosecution of children

An account of the atrocities in Sierra Leone shows clearly that children have committed some of the worst crimes known to mankind.⁶² Yet some of these children are themselves victims, abducted from their families and drugged by adults before using them as cannon fodder by sending them to the war front.⁶³

The issue of prosecuting children raises difficult moral dilemmas and has created a chasm between the people of Sierra Leone. There are two main opinions. The first suggests that child combatants between the ages of fifteen and eighteen years must face a Truth and Reconciliation Commission. Thus, they can tell their stories without due process of law, repent and be forgivingly rehabilitated in order to heal the wounds of their horrific childhood trauma. This is endorsed by amongst others UNICEF and a number of local human rights organisations, including child rights monitoring groups.

The second view requires that child combatants between fifteen and eighteen years be made to go through the judicial process of accountability without punishment in a court of law providing all internationally recognised guarantees of juvenile justice.⁶⁴ In a letter to the President and members of the Security Council, dated 10 December 2000, civil society groups in Sierra Leone stated, 'We believe that children between the ages of fifteen and eighteen must be accountable for offences they committed. We urge that the statute of the Court does not specifically prevent the trial of children but the decision whether to prosecute children be left to the prosecutor to determine on a case-by-case basis.'⁶⁵ This is in accordance with existing international and Sierra Leonean law. The Convention on the Rights of the Child⁶⁶ and the International Covenant on Civil and Political Rights make provision for juveniles to be prosecuted. Three other non-binding texts, the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985,⁶⁷ the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990, and the UN

62 See <<http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/soldier.html>> (accessed 5 February 2001).

63 Amnesty International press release, AFR 51/038/2000, of 16 June 2000, 'Sierra Leone: War crimes against children continue.'

64 The government of Sierra Leone and the UN Secretary General in his report supported this view.

65 The Bar Association, Campaign for Good Governance and the Sierra Leone Association of Journalists. See <<http://slcgg.com/unletter.htm>> (accessed 5 February 2001).

66 See art 37 and 40. Sierra Leone ratified the Convention in 1996.

67 The Beijing Rules adopted by the UN General Assembly Resolution 40/33 of 29 November 1985.

Guidelines for the Prevention of Juvenile Delinquency⁶⁸ provide rules for the trial of juveniles.⁶⁹

The law of Sierra Leone provides for children and young persons to be tried in the High Court of Sierra Leone for capital offences including murder.⁷⁰ All summary offences are to be tried by the juvenile courts, except trials involving adults and juveniles jointly charged. Section 210 of the Criminal Procedure Act,⁷¹ which regulates criminal trials in Sierra Leone, provides that children and young persons accused of criminal offences shall be apprehended and tried in accordance with the provisions of the Children and Young Persons Act.⁷²

Most of the guarantees provided by the Act have been incorporated into the proposed Statute of the Special Court. Art 7(2) of the Statute provides for a juvenile to be treated 'with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society'. This ensures that a child combatant, if tried and found guilty, will not be given a custodial sentence but will be committed to an accredited rehabilitation centre for his reform and development. In the words of the Sierra Leonean lawyer Mohamed Pa-Momo Fofanah,⁷³

trying children between 15 and 18 years of age without punishing them in the strict sense of the word strengthens the due process of law, decimates impunity without trial which the Lomé Accord of 7 July 1999 legitimises and discourages juvenile criminality especially as certain child combatants, eg 'small commandos' between that age bracket, are known to have 'knowingly' committed horrendous felonies with or without the influence of drugs.

This debate may well be academic. The proposed court will have the power to try persons 'who bear the greatest responsibility for the commission of the crimes'. This definition is very restricted. It is doubtful whether any child will fall within this definition.

68 The Riyadh Guidelines adopted by the UN General Assembly Resolution 45/112 of 14 December 1990.

69 An exception is art 26 of the Rome Statute establishing an International Criminal Court which provides that the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

70 The Children and Young Persons Act distinguishes the two groups. 'Young person' is defined as a person between the ages of 14 and 17 years and a 'child' means a person under the age of 14 years.

71 Act 32 of 1965.

72 Ch 44 of the Laws of Sierra Leone 1960.

73 A Tejan-Cole & MP Fofanah (2001) 'Child combatants and the proposed Special Court' (unpublished article).

3.5 The link between the Truth and Reconciliation Commission and the Special Court

In January 2000 the Sierra Leone Parliament enacted the Truth and Reconciliation Commission (TRC) Act.⁷⁴ The TRC's objective is 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone' from 1991 to 1999, to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.⁷⁵

The TRC and the proposed Special Court will both play an important role in promoting justice, accountability and reconciliation in Sierra Leone. However, the roles of these institutions will overlap. It is therefore imperative that the relationship between these institutions be clearly and carefully considered. The Security Council must mandate a co-operative relationship between these two institutions in the Statute establishing the Special Court. Without such co-operation, the two institutions may squander very limited resources and waste substantial time.

By every indication only a limited number of perpetrators will be tried by the proposed Special Court.⁷⁶ The TRC will address those not tried by the Court. It will afford victims an opportunity to tell their stories and have their sufferings acknowledged and give perpetrators an opportunity to explain their side of the story and seek repentance.

The TRC and the Special Court can also complement each other by jointly engaging in public awareness and educational campaigns, collaborating in providing witness protection services and in collecting evidence.

3.6 'Sierra Leonean judges'

The Statute of the proposed Court and the Agreement provide for each chamber of the court to be composed of two judges appointed by the Secretary General and one 'Sierra Leonean judge'. At the request of the government of Sierra Leone the phrase 'Sierra Leonean' was replaced by 'judges appointed by the government of Sierra Leone'. While this does not preclude the appointment of a Sierra Leonean judge, it creates the possibility that Sierra Leoneans may not play any adjudicating role in this process.

The Special Court presents a unique opportunity to develop the judiciary and the legal system in Sierra Leone. Limiting the role Sierra

74 Act 4 of 2000. Provision for the establishment of the Commission was made in the Lomé Peace Agreement.

75 Sec 6. The Commission has not yet been established.

76 Recent estimates suggest that not more than 24 persons will be tried. If the tribunals in Rwanda and former Yugoslavia are good precedents, they confirm the accuracy of this statistic.

Leoneans play in the process may alienate the citizens of Sierra Leone from the process. The participation of Sierra Leoneans, judges as well as lawyers, in the proposed court will lead to more tangible justice for the people of Sierra Leone and help strengthen the judicial institutions of the country. The tribunal will certainly not be 'mixed' if it lacks a Sierra Leonean component. The present system, consisting of two judges appointed by the Secretary General and one Sierra Leonean judge, ensures that the system will be broad based, fair and will not be politically manipulated. Long after the trials, those Sierra Leonean judges who gained from their experiences in the Court will continue to apply international law in their jurisdiction. Foreign judges will also benefit from the insights of Sierra Leonean judges as regards the application of Sierra Leone law.

3.7 Time

The need for justice in Sierra Leone is urgent and expectations are high. Recent estimates suggest that the Special Court will at the earliest be operational in about two years. The UN bureaucracy has been procrastinating. The Security Council resolution was adopted in August. The Secretary General's report was produced in October 2000. It took the Security Council until December 2000 to forward its response to the Secretary General's report. It may take a couple of months more before the final draft of the statute is adopted. With every passing day, material evidence continues to disappear.

The court will serve little or no effect if held long after the war. Swift trials conducted immediately after the war and which capture public attention will be more effective than protracted symbolic trials held long after the war.⁷⁷

3.8 Detention of alleged perpetrators

Another significant reason why the court must be established soon is that since May 2000 the top echelons of the RUF, including Foday Sankoh, have been detained by the government of Sierra Leone under the emergency provisions of the Constitution. These provisions give the President sweeping powers of arrest and detention. The government cannot release these RUF members but as the Special Court has not yet been set up they cannot be brought before it. One suggestion has been for them to be tried for some minor offences under domestic law

77 S Landsman 'Retroactive trials and justice' (1998) 96 *Michigan Law Review* 1456 1468.

pending the establishment of the Special Court.⁷⁸ This may not only be a waste of time and money but it may provoke a huge outcry from a largely illiterate population who will be thinking that Sankoh has been let loose lightly. The long and somewhat irregular detention period may well become an issue before the Special Court.

It is trite law that the seriousness of the offence cannot justify a prolonged detention without charge.⁷⁹ States have an obligation under international law to bring suspects to trial as soon as possible. No one should be subject to arbitrary arrest and detention in contravention of article 9 of the Universal Declaration and article 9 of the ICCPR. All prisoners should be treated humanely in accordance with article 10 of the ICCPR. The UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, and articles 7 and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment all condemn prolonged detention.

3.9 Definition of the crime of recruitment of child soldiers

The Statute defines the crime of recruitment of child soldiers as 'abduction and forced recruitment of children under the age of fifteen years into armed forces or groups for the purpose of using them to participate actively in hostilities'.⁸⁰

Protocol II of the Geneva Conventions of 1949 prohibits any recruitment by armed forces or groups, or participation of children in hostilities who have not attained the age of fifteen years.⁸¹ The Convention on the Rights of the Child urges state parties to 'take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities'.⁸² It further provides that 'state parties

78 There is some doubt as to whether they could be tried under domestic law in view of the amnesty granted under the Lomé Peace Agreement. This writer subscribes to the view that amnesty was unconstitutional under Sierra Leone law and as such they could be tried. Further, as was established in the Privy Council case of *Attorney-General of Trinidad and Tobago v Lennox Phillip* (No 2) (1995), 1 AC 396, an amnesty may expunge past offences but it cannot be used to dispense with future lawbreaking. Sankoh and his ilk cannot rely on the 1999 amnesty for any criminal act committed after the amnesty.

79 See *Republic v Sudi Adaka Sulaimana* (1996) 1 *Commonwealth Human Rights Law Digest* 106.

80 Art 4(c) of the Statute.

81 Art 4(3)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 United Nations Treaty Series 609, entered into force 7 December 1978.

82 Art 38(2) of the Convention on the Rights of the Child GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990 (Children Convention).

shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, state parties shall endeavour to give priority to those who are oldest.⁸³

The Rome Statute of the International Criminal Court defines the conscription and enlistment of children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities as a war crime.⁸⁴

According to Human Rights Watch, the definition contained in the proposed Statute 'considerably narrows the well-established prohibition on any recruitment or use of children'.⁸⁵ Any recruitment of children, regardless of the purpose of their recruitment, must be made a war crime.

4 Possible alternatives

4.1 An international tribunal for Sierra Leone?

No one so far has seriously advocated the establishment of an international tribunal for Sierra Leone. The problems of the existing tribunals have been well documented. Both the ICTY and ICTR have been criticised primarily for their weak enforcement powers, apparent slow progress in starting trials and bureaucracy-laden institutions.⁸⁶

The actions of the ICTY's have been described as counterproductive because the indictments have hardened the Serbs' opposition to the peace treaty. Most Bosnian Serbs also complain that the tribunal is biased because it has selectively prosecuted more Serbs than Croats or Moslems, even though all sides committed atrocities.

On the other hand, the ICTR has been accused of administrative incompetence and mishandling of funds. In February 1997, a UN investigative panel released a report concluding that the ICTR had been plagued with bureaucratic waste and mismanagement since its establishment in 1994. Critics have also focused on the ICTR's mandate, which they say is too narrow. They argue that the ICTR will prove to be less effective than hoped because its scope is limited to violations within Rwanda itself and it is allowed to investigate abuses that occurred in the 1994 calendar year only. The ICTR has also not established a positive working relationship with the current Rwandan government.

83 Art 38(2) and (3) Children Convention.

84 Art 8(2)(b)(xxvi) of the Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9 (1998).

85 Human Rights Watch letter to Security Council members dated 31 October 2000.

86 K Roth 'International injustice: The tragedy of Sierra Leone' (2000) *Wall Street Journal* (Europe).

Neither tribunal has yet indicated that it is able to act as a deterrent to war crimes in the future. Neither Karadzic nor Mladic, for example, was influenced by the ICTY's war crimes indictments, and they continued to incite and oversee atrocities during the civil war. The 'fear of apprehension' has not been a deterrent.

4.2 National trials

Similarly, the argument for a national trial has not been forcefully canvassed. The judicial system is largely decimated as a result of the war. It is only functional in Freetown and lacks the enormous human and financial resources required to undertake such a trial. Further, most people have been affected by the war. Some have had their houses burnt, others assaulted and most have lost relatives as a result of atrocities committed by one or other of the fighting forces. Some writers have suggested that to ensure that the trial is 'broad-based, unbiased, and fair' the Sierra Leonean judiciary must of necessity play a limited role.⁸⁷ National trials may further polarise the society and do more harm than good. In the words of Alvarez, 'sham trials by insincere regimes implicated in the very atrocities adjudicated or political show trials by successor regimes bent on vengeance instead of justice are not likely to advance the rule of law at either the national or international levels.'⁸⁸

It has been argued that international tribunals, as opposed to national trials, more readily fulfill victims' expectations for the 'highest form of justice'⁸⁹ and are better at upholding the 'rule of international law'.⁹⁰ Alvarez further states as follows:⁹¹

By comparison to national courts, international tribunals are perceived to enjoy certain advantages: they are less destabilizing to fragile governments, are less likely to cede to short-term objectives of national politics, can count on the expertise of jurists who are better qualified and able to progressively develop international law, are more impartial than proceedings adjudicated by national judges 'caught up in the milieu which is the subject of the trials', are more likely to be respected by national authorities, can investigate crimes with ramifications in many states more easily and can render more uniform justice.

87 As above.

88 JE Alvarez 'Crimes of states/crimes of hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365 370.

89 R Goldstone 'The United Nations' War Crimes Tribunals: An assessment' (1997) 12 *Connecticut Journal of International Law* 227.

90 A Cassese 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9 *European Journal of International Law* 2-17 <http://www3.oup.co.uk/ejilaw/hdb/Volume_09/Issue_01> (accessed 5 February 2001).

91 Alvarez (n 88 above) 375, summarising the arguments of Goldstone and Cassese on the advantages of an international tribunal.

4.3 National hybrid system

A third possible alternative has received very little attention. Like the proposed Special Court, it blends the national and international legal systems. But unlike the proposed Special Court, it will be based under the Sierra Leonean system. The Constitution of Sierra Leone provides that a person shall be qualified for appointment to the Superior Court of Judicature if he is entitled to practise as counsel in a court having unlimited jurisdiction in civil and criminal matters in Sierra Leone or in any other country having a system of law analogous to that of Sierra Leone.⁹² Thus, judges from other Commonwealth and common law countries are eligible to be appointed to serve as judges in the superior courts in Sierra Leone. This alternative enables judges from the Commonwealth and common law nations not directly involved in the war⁹³ to be appointed as judges in Sierra Leonean courts. This will address the fears of unfairness and bias. In the Court of Appeal, which is normally composed of a panel of three judges, two non-Sierra Leonean judges would sit with a Sierra Leonean judge. The presiding judge would preferably be one of the foreign judges. In the Supreme Court, with a normal panel of five judges, at least three judges will not be Sierra Leoneans.

Such a court will also be in a position to try the same crimes as stated in the statute of the proposed Special Court. Crimes provided for in the statute are all crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.⁹⁴ Common article 3 of the Geneva Conventions and article 4 of the Additional Protocol II are part of international customary law. The Statute of the International Criminal Court also recognises these crimes as war crimes.⁹⁵ Attacks against civilians and persons *hors de combat* have long been recognised as violations of customary international law.

This system will address most of the concerns raised with the special court. The legacy will be lasting. The improvements to the legal system will be utilised long after the trials are over. However, this system also raises some concerns. The financial costs are enormous. The government of Sierra Leone will not be able to meet all the costs. It is not very likely that the national courts of Sierra Leone will receive the funding required

92 In the 1960s and 1970s a number of judges from Commonwealth countries, including Sri Lanka and India, served in the Superior Courts of Judicature in Sierra Leone. In the 1980s and 1990s, Nigerian and Ghanaian judges were appointed based on this provision. Presently, a Ghanaian judge sits in the Supreme Court and a Nigerian in the Court of Appeal.

93 Britain and Nigeria have been actively involved in the war on the side of the government and for this reason ought to be excluded.

94 n 9 above para 12.

95 Sierra Leone ratified the statute this year. The statute is not yet in force.

to overhaul the legal system. The law courts need refurbishing estimated at US\$1,5 million; building new courts or renovating the present buildings is estimated at US\$5,8 million and the estimated costs of renovating one prison is US\$600 000.⁹⁶

Further, although it is proposed that the majority of judges in each court should be foreigners, it is doubtful whether all the parties to the conflict would consider this unbiased. The judges, whether Sierra Leonean or not, are appointed by the President acting on the advice of the Judicial and Legal Service Commission and subject to approval by parliament.⁹⁷ Such control may send the wrong signals.

Such a court may sit within or outside of Sierra Leone. There is no provision in the laws of Sierra Leone for a national court to sit outside Sierra Leone. Considering the precarious security situation in Sierra Leone, any outbreak of violence would lead to the annulment of trials.

Further, most of the Conventions which have been ratified by Sierra Leone are not applicable within the country as parliament has not enacted or adopted them.⁹⁸ The customary nature of some of the crimes mentioned in the statute is questionable.

The Extraordinary Chambers in the Courts of Cambodia adopt a similar model. However, unlike this proposal, Cambodians are in the majority in all courts. The Cambodian system will be composed of five judges, including the president of court, three of whom will be Cambodian and two foreign. The Appeals Court will comprise seven judges, of whom four shall be Cambodian and three foreign. The Extraordinary Chambers will be established within the existing structure of the Cambodian judicial system. There are two co-prosecutors, one Cambodian and the other a foreign judge.

5 Conclusion

Most Sierra Leoneans have heard about the Special Court but know little or nothing about its particulars. However, the prospect of the Special Court continues to arouse a great deal of anxiety among many in the human rights and NGO community. While the concept of the court is generally embraced, some Sierra Leoneans fear that the prospect of the Special Court may create a disincentive for rebels to leave the bush. Others are resentful about the fact that millions of dollars will be spent on trying the accused persons, while the victims of the war live in abject poverty.

⁹⁶ n 9 above paras 60 and 62.

⁹⁷ Sec 135(1) of the constitution.

⁹⁸ Sec 40 of the Constitution requires the parliament to enact or adopt by resolution any treaty, agreement or Convention executed by the President that, *inter alia*, alters the law of Sierra Leone.

Furthermore, many question the timing of the trials while the war is ongoing.⁹⁹ Others question whether it is a serious attempt by the UN to address impunity. One speaker even suggested that the Special Court is another means for enriching UN staff and paying lip service to justice. This coincides with the general public's perception about the UN Mission in Sierra Leone.¹⁰⁰

There is still a lot of misinformation about the Special Court. It is absolutely essential that the UN and the government of Sierra Leone implement the right system that will address the concerns of the people and not a system imported from another country. With the right model and an effective public information campaign, these qualms will be minimised and the Court's prospects of providing justice for the victims greatly enhanced.

99 At a panel discussion organised by the Law Society at Fourah Bay College on 13 December 2000 on the theme 'Efficacy of War Crimes Tribunal *vis-à-vis* the sustenance of peace in post-war Sierra Leone', several speakers including Dr Dennis Bright and Osman Kamara, MP questioned the timing of the establishment of the Special Court in view of the ongoing war.

100 Comments by callers to the weekly local radio talk show, Security Talk, broadcast on FM 98.1 on Sundays at 1 pm.

Emerging electoral trends in the light of recent African elections

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1 Introduction

Africa has a relatively brief election history, beginning essentially after the end of colonial rule. This paper presents recent developments in respect of elections and briefly analyses six of the elections that took place in Africa during the year 2000. These particular elections were selected because they can be seen as representative of the nature of the electoral process on the continent as a whole.¹ A brief survey of various political trends and movements over the last four decades will sketch a background against which these elections may be seen. Following this, elections to be held in 2001 will be outlined and finally developing trends will be highlighted.

2 Post-colonial period

Most African countries became independent in the late 1950s and early 1960s.² During the early stages of independence African countries generally inaugurated their recent independence through elections. These elections usually took place in an environment characterised by democratic electoral structures, universal suffrage as well as parliamentary institutions encouraging political competition.³

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1 The factors making these countries representative are noted in 4 below.

2 Ghana was the first African state to emerge from colonialism into independence on 6 March 1957.

3 FM Howard (ed) *Elections in independent Africa* (1987) 9.

During the late 1960s the zest for elections subsided and elections became less regular.⁴ Leaders and political elite applied increasing pressure in order to suppress political participation and electoral competition.⁵ Various factors influenced this apparent shift. President Nkrumah of Ghana, for example, sought to dismantle party participation in the name of ethnic harmony.⁶ Other factors relate to the fact that political participation and competition were perceived to be a threat by those in power and by other political elites; there were fears of instability and disorder; fears of potential ethnic conflict; class interest and the desire to maintain power.

Since the 1952 Egyptian revolution, 85 violent or unconstitutional changes of government have occurred in Africa.⁷ Thus, less than a decade after independence, prevalent political regimes were characterised by authoritarian rule — oligarchies, military regimes, one-party states and those under presidential rule.⁸ Subsequent periods in the continent's history were marked by political instabilities, corruption, famine, wars, large foreign debt and large-scale human rights violations.

3 Movement towards democracy

The 1990s brought yet another change when a wave of democratisation swept across the continent.⁹ This movement towards democracy has not gone unscathed. Criticisms relate to its depth and sincerity. Landmark elections during this period are the 1992 Ghanaian elections, which effectively witnessed the country's transition from a military regime to a period of civilian rule, and marked the start of Ghana's Fourth Republic. Subsequent elections were held in 1996 and in 2000.

After pro-democracy demonstrations and international pressure in Kenya, multi-party elections were held in 1992. Despite all the criticisms of the 1992 elections, President Moi proved victorious. Subsequent elections were held in 1997.¹⁰ In South Africa the country's first fully

4 Examples found in Ghana, Kenya, Tanzania and Senegal.

5 As above.

6 Howard (n 3 above) 9.

7 Africa Institute of South Africa *Africa A–Z Continental and country profiles* (1998) 43. Most of these takeovers were initiated by civilian leaders.

8 J Daniel, R Southall & M Shieftel (eds) *Voting for democracy: watershed elections in contemporary Anglophone Africa* (1999) 2.

9 Elections in Cape Verde, Sao Tomé, Benin and Zambia during 1991 resulted in the first changes in government and marked the start of the transition to democracy.

10 Finnish League for Human Rights *Elections in Kenya 1997 — From the viewpoint of human rights and democracy* <<http://www.ihmisoikeusliitto.fi/english/kenya-elections.html>> (accessed 20 January 2001).

democratic elections were held in 1994. South Africans of all races voted in the 1994 elections and this historic event marked the end of an extended period of racial domination and the end of the era of apartheid. Subsequent elections were held in 1999.¹¹

By January 1998, 124 multi-party elections had been held in a total of 45 countries across the continent. These elections included 54 presidential and 70 legislative elections.¹²

The following observations may be made: the process in countries such as Zambia and Malawi produced disappointing results. In Kenya, oligarchy remains under President Moi's rule using elections to further political decay. Although South Africa produced workable democratic institutions, disillusionment surfaces through grim images of a post-apartheid South African society.¹³

Despite these criticisms, some academics consider democracy the lesser of two evils in Africa. Post-colonial Africa has shown that it is a more viable option to be governed by legitimate, democratically elected leaders than by self-proclaimed dictators such as Jean-Bedel Bokassa, Idi Amin or Mengistu Haile Miriam.¹⁴

In a critical article of 1992, Geisler asks the question whether the African electorate has not suffered a double deceit.¹⁵ Firstly, she states that the electorate has been robbed in various instances of the chance to change their leaders.¹⁶ It is true that in many African countries ex-military leaders have remained in power through the ballot box. Ghana and Senegal serve as good examples where one finds the previous incumbent under the new banner of democracy. The outcome of many elections was predictable, the actual elections almost taking the form of a mere rubber stamp.

Secondly, Geisler criticises the 'democracy police' (election observers) for not condemning seriously flawed elections and consequently deceiving the electorate. It is indeed true that some observer missions risk stepping into various pitfalls.¹⁷ It is time to re-evaluate the scope, content and sincerity of the institution of election observation. As illustrated, it is not only transitional elections that are important, but also subsequent elections. Observer groups should therefore evaluate the process having

11 J Daniel, R Southall & M Shieftel (n 8 above) 1.

12 n 7 above 43.

13 J Hyslop *African democracy in an era of globalisation* (1999) ix.

14 EK Quashigah & E Okafor *Legitimate governance in Africa: International and domestic legal perspectives* (1999) 469.

15 G Geisler 'Fair? What has fairness got to do with it? Vagaries of election observation and democratic standards' (1993) 31 *Journal of Modern African Studies* 616.

16 As above.

17 The Commonwealth observer group to the 1992 Ghanaian serves as an excellent example.

due regard for the context in which the election takes place as well as the context of previous elections. Observers are not only there to detect fraud and irregularities but their function is also to assist and help establish measures for improving the electoral process in current and forthcoming elections.

This paper does not necessitate an in-depth discussion on the concepts or critiques of democracy. What follows is merely commentary on recent elections as an undeniable and essential ingredient for a workable and sustainable democracy. One should realise that there are no 'quick fixes' on the road to democracy and that democracy is attained only through battles stretching over a number of years. Transitional elections are of great importance but one cannot afford to disregard subsequent elections in the evaluation process.

4 Elections in 2000

Elections in Africa in the year 2000 include elections held in Comoros, Côte d'Ivoire, Egypt, Equatorial Guinea, Ethiopia, Gambia, Ghana, Guinea-Bissau, Madagascar, Malawi, Morocco, Mauritius, Rwanda, Senegal, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.¹⁸ These elections covered a broad spectrum and include presidential, parliamentary, national, provincial, municipal, rerun, run-off and by-elections. Out of the multitude of elections held during the year 2000, brief consideration will be given to those in Côte d'Ivoire, Egypt, Ghana, Senegal, Tanzania and Zimbabwe.

These countries were chosen for discussion for a variety of reasons. First, they are all culturally diverse, and unique in that sense alone. Second, they are fairly representative of Africa as they include Arab, Anglo and Francophone countries. They are also representative of the various geographic subregions within the continent. The following additional factors add to their significance: their colonial backgrounds, political stability or instability, form of pre-democracy rule, prevalent economic conditions, form of electoral system and the presence of democratic institutions.

This presentation aims to familiarise the reader with the historical and political backgrounds of each country. This will be followed by an analysis of the elections that took place during 2000.

4.1 Côte d'Ivoire

This former French colony gained its independence in 1960. In 1990 President Houphouët-Boigny won his seventh presidential mandate after

18 Klipsan Press *International elections calendar* <<http://www.Klipsan.com/calendar.htm>> (accessed 15 January 2001).

he introduced multi-party politics to the country. Henri Konan Bédié succeeded Houphouët-Boigny after his death in 1993 and was elected President in 1995. The popular Democratic Party won a majority of the legislative seats.¹⁹ President Bédié and his government were overthrown by a military *coup d'état* on 24 December 1999. Prior to this, concerns were raised in respect of the potentially volatile political situation in the country.²⁰ Considering the non-democratic character of the Bédié government, the *coup* may have been perceived as a progressive step; it however raised serious doubts and concerns about the democratic future of the country and the then upcoming 2000 elections.²¹

The 1960 Constitution provides for an Executive President elected by direct vote for a five-year term.²² The National Assembly, which is the legislative body composed of 175 members, is elected for a period of five years.²³

The military, led by General Robert Guei, established the Committee for the Salvation of the Republic (CNSP). An interim government and Electoral Consultative Commission were appointed to draft a new constitution and electoral code. The military announced that it intended to play a neutral role in aid of the country's transition. The CNSP announced the proposed dates for the elections in May 2000. In addition, amendments to the proposed new constitution six days before the referendum implied that an attempt was being made to block potential candidacy and left citizens uninformed as to the actual text of the constitution being voted on.²⁴ By July the political instability of the country had dramatically increased.²⁵ The National Democratic Institute identified poor election administration, poor access to state-owned media, poor civic and voter education, the lack of domestic election observers, restrictions on political activity and the narrow scope of participation as areas of concern in the run up to the elections. These concerns needed immediate action to ensure free, fair and credible elections.²⁶

With the Supreme Court disqualifying two candidates from parties that enjoyed mass following, General Guei managed to ensure that there was only one other credible candidate beside himself left in the presidential elections of 22 October 2000. The candidate was Laurent

19 C Heyns (ed) *Human Rights in Africa 1997* (1999) 152.

20 National Democratic Institute (NDI) *Statement on political developments in Côte d'Ivoire* (11 August 2000) NDI 2.

21 n 20 above 3.

22 It has been amended several times.

23 n 7 above 149.

24 n 20 above 4.

25 Contributing factors were the exclusion of candidates, exclusion of parties from campaigning and the violent suppression of a peaceful demonstration on 31 July 2000.

26 n 20 above 6.

Gbagbo of the Front Populaire Ivoirien (FPI). Of the 37 per cent of the electorate that cast their vote, 59 per cent did so in favour of Gbagbo. The outcome of the elections thus did not favour Guei.²⁷ Upon realising his misfortune, General Guei dissolved the National Electoral Commission and declared himself the winner of these elections. This action resulted in mass protests in the streets. Without the backing of the army, General Guei decided to flee the country. Following civil clashes, which left approximately 150 people dead, Gbagbo stepped in as the leader of the country.

The situation in Côte d'Ivoire remains volatile and unstable. A return to democratic principles and a respect for human rights in the near future remain questionable. This is evident through priority concerns in respect of the prevalent conditions in the country raised at the 28th ordinary session of the African Commission on Human and Peoples' Rights in Cotonou, Benin (23 October–6 November 2000) as well as a foiled *coup* bid as recently as January 2001.²⁸

4.2 Egypt

Egypt, formerly a British protectorate, became independent in 1922. A multi-party system was introduced to the country in 1977. The electorate elects the People's Assembly, which has a membership of 444, for a five-year term.²⁹ A two-thirds majority of the People's Assembly nominates the President.³⁰ The nomination is then confirmed by a referendum. The President's power extends to the point where he is able to veto legislation.

President Hosni Mubarak has been the leader of the country since 1981. After the 1995 legislative elections his National Democratic Party (NDP) gained an overwhelming majority of the legislative seats.³¹

Parliamentary elections were held again in 2000. In addition to the ruling party, thirteen other parties participated. These elections were conducted in three rounds, starting on 18 October and ending on 15 November 2000.³² According to officials, voter turnout in the first two stages of the elections was bigger than any other elections previously conducted in the country.³³ Amnesty International alleged that the first

27 Centre for Democracy and Development *Commentary on Côte d'Ivoire Elections: The politics of people's power* <<http://www.cdd.org.uk/cotedivoirelection.htm>> (accessed 25 January 2001).

28 'In Brief' *Sunday Times* (South Africa) (14 January 2001) 4.

29 As above.

30 n 7 above 157.

31 Heyns (n 19 above) 154.

32 'Recent elections said heralding start of political reform in Egypt' *London Al-Shaq al-Aswat* (7 November 2001) 3.

33 'Egyptian Minister reviews parliamentary elections' *Cairo MENA* 11 October 2000.

round witnessed patterns of harassment of political opponents and human rights activists.³⁴ On the other hand Amnesty International saw the ruling by the Egyptian Supreme Constitutional Court which led to full judicial supervision of the elections as a good move in an attempt to ensure free and fair elections.³⁵ In the view of the Egyptian Minister of the Interior, Habib Al Adli, elections were held under 'full' guarantees.³⁶ He said that the strong security presence was necessitated by the enormous turnout of voters, and added that police acted with due care and handled incidents such as rioting, harassment and possible intimidation quickly. According to this source, cases of misconduct were investigated and amounted to less than six.³⁷

Nevertheless, the fact that the 2000 elections witnessed one of the largest voter participations in Egypt's history should be an indication and reflection of the mindset of the people and their commitment to the electoral process. Competing for a total of 454 seats, the NDP won a total of 353, the independents won 35 and the remaining seats went to the opposition parties with an average of less than ten votes per party. This outcome raises doubts as to the possibility of an effective policy by the opposition parties, which is indispensable in a balanced democracy.

4.3 Ghana

The 1992 elections transformed Ghana from a military regime to governance under civilian rule. Allegations of irregularities surrounding the presidential elections led to a challenge of the transitional process by a non-violent protest and boycott by all major opposition parties of the parliamentary elections of December 1992.³⁸ According to Gyimah-Boadi from the Centre for Democracy and Development in Ghana, the exclusion of most of the opposition parties from the elections resulted in *de facto* domination of the parliament by one party. Presidential and parliamentary elections took place again in 1996. As in the previous elections, Jerry J Rawlings, ex-military leader and head of the National Democratic Congress (NDC), retained his stronghold and continued to rule from 'Osu Castle'.

In the Fourth Republic of Ghana, the President is elected for a four-year term. His term can be renewed only once. The National Assembly of 200

34 Amnesty International *Elections in Egypt* 19 November 2000 <<http://www.Amnesty.org>> (accessed 25 January 2001).

35 As above.

36 Egyptian State Information Service *PA elections held under full guarantees* (19 November 2001) 1.

37 As above.

38 E Gyimah Boadi 'Managing electoral conflicts: Lessons from Ghana' in TD Sisk & A Reynolds (eds) *Elections and conflict management in Africa* (1999).

members, which is the legislative organ, is elected for four-year terms on the basis of single-member constituencies.³⁹

Last year saw yet another set of elections in Ghana. According to the Ghanaian Constitution Rawlings is compelled to step down from the presidency in the event that the ruling party, the NDC, retains power after the December 2000 elections. Competitive campaigning, appropriate action by democratic institutions,⁴⁰ an active NGO community⁴¹ and well-informed civil society marked the pre-election period. Each election seems to confirm a trend towards progressive political competitiveness and levelling of the electoral playing fields. The 2000 elections were no different, with nine parties⁴² participating in the 7 December 2000 elections. However, only two parties, the NDC and the NPP (New Patriotic Party), surfaced as the main contenders. The NPP won 93 seats and the NDC 92 seats out of a total of 200 seats.⁴³ The first round of the presidential elections ended in a stalemate between the two leading candidates Atta Mills (NDC) and John Agyekum Kufour (NPP).⁴⁴ Presidential run-off elections were rescheduled for 28 December 2000. Kufour (NPP) took the lead over Mills (NDC) with 56,9 per cent of the votes.⁴⁵

The 2000 Ghanaian parliamentary and presidential elections serve as good examples of democracy in action. The incumbent (also an ex-military leader) was effectively replaced through the ballot box after the third set of elections in Ghana's Fourth Republic.

4.4 Senegal

Senegal gained independence as part of the Mali Federation on 20 June 1960. On 5 September 1960 the country celebrated its independence as a separate state.⁴⁶ In 1974 an opposition party was allowed to register

39 n 7 above 189.

40 Such institutions include the country's National Media Commission (NMC), the Electoral Commission (EC) and the Commission on Human Rights and Administrative Justice (SHRAJ).

41 For example, the CDD undertook the immense task of training and co-ordinating domestic observers, monitoring the independence of the media in respect of the various parties in an attempt to ensure equal access to state-owned media. It also organised and stimulated various political debates.

42 These were the GCPP, NDC, CCP, PNC, UGM, NRP, NPP, IND, Remain.

43 Ghana elections 2000: Daily updates on the political scene *Summary of the presidential and parliamentary elections* <<http://www.ghanaelections.com/index-summary.htm>> (accessed 15 January 2001).

44 Ghana elections 2000 Round II *Ghana and run-off presidential elections* <http://www.myjoyonline.com/election2000/latest_news.html> (accessed 11 January 2001).

45 Ghana Elections 2000: Daily updates on the political scene *Summary of presidential run-off results* <<http://www.ghanaelections.com/run-off.htm>> (accessed 18 January 2001).

46 n 19 above 229.

and after this, in 1976, a three-party system was encouraged. In the following year a multi-party system was restored.⁴⁷ Prior to 1976 Senegal was a *de facto* single-party state. President Abdou Diouf has been the leader of Senegal since 1981. During the 1983 elections a large number of parties contested the elections.⁴⁸ The 1988 elections were marked by large-scale accusations by frustrated opposition parties. Subsequent elections were conducted in 1994, 1996 and 1998.⁴⁹

The Senegalese President is elected for a seven-year term, which may only be renewed once. The National Assembly (140 members) and the Senate (60 members) are elected for a five-year term.⁵⁰

The 2000 presidential elections were scheduled for 27 February and 19 March 2000. During the 1998 parliamentary elections, thirteen rival parties competed with the *Parti Socialiste* (PS), the country's leading party since 1960.⁵¹ The dominance of the socialist party as well as the continuous conflict in the south of the country was increasingly criticised by the Senegalese people, and especially by the younger parts of the population. Allegations of electoral fraud and the growing popularity of his rival, Abdoulaye Wade, leader of the opposition party *Parti Democratique Sénégalais* (PDS), endangered a further victory for President Diouf.

The period preceding the elections was marked by high emotions, especially from the ranks of the opposition parties. These high emotions, bred by a tradition of electoral 'cheating', were further fuelled by claims of irregularities in the pre-election phase. These irregularities pertained mostly to voter registers and voter registration cards.⁵² Fortunately, most of the problems experienced during the pre-election phase as well as the controversy in respect of the voter cards were resolved before the actual voting. Observers noted that voter turnout was generally high. Only minor incidents of violence were reported.⁵³

In the first round of the presidential elections President Diouf gained 41,3 per cent of the votes and Wade 30,1 per cent. During the second, a shift of power resulted in Wade winning over President Diouf by 58,5 per cent to 41,5 per cent of the votes.⁵⁴ Interesting results are to be expected from the upcoming parliamentary elections as currently 93 out of the 140 members are from the socialist party, with only 23 seats for the PDS.

47 n 7 above 42.

48 n 7 above 299.

49 As above.

50 n 7 above 300.

51 Elections in Senegal <<http://www.agora.stm.it/elections/senegal.htm>> (accessed 15 January 2001).

52 Elections: Opposition take up battle stations <<http://ds.dial.pipex.com/town/terrace/lf41/ab/feb00/absp0201.htm>> (accessed 15 January 2001).

53 IRIN 'Senegal: Voting peaceful in presidential elections' <<http://www.reliefweb.int/IRIN/wa/countrystories/senegal/20000228a.htm>> (accessed 18 January 2001).

54 n 51 above.

4.5 Tanzania

Tanganyika⁵⁵ and Zanzibar⁵⁶ became a unified state on 26 April 1964, although Zanzibar maintained a large measure of autonomy after unification. In 1992, the country adopted a multi-party system and the first general elections were held in 1995. President Benjamin Mkapa has been the leader of Tanzania since President Ali Hassan Mwinyi retired in 1995.⁵⁷

The President and Vice-President of Tanzania are elected by direct vote for five-year terms renewable only once. The President of Zanzibar is also elected for a period of five years. The National Assembly (mainland)⁵⁸ consisting of a total of 274 members as well as the House of Representatives (Zanzibar) are elected for a period of five years.⁵⁹

The two main parties in the 2000 elections were the governing party, *Chama cha Mapinduzi* (CCM), and the Civic United Front (CUF). Although the country had a peaceful tradition, concerns as to the prevalent volatile political climate in Tanzania were raised.⁶⁰ President Mkapa was expected to be victorious on the mainland. The predominantly Muslim CUF, having its main power base on Zanzibar, had grown considerably in strength on the mainland since the 1995 elections.⁶¹ Although various attempts were made to establish peaceful relations between these two parties, emotions remained volatile up until the elections.

Benjamin Mkapa (CCM) won the elections with 71,7 per cent of the votes and was sworn in for his second term of office on 9 November 2000. During the parliamentary elections the CCM won 167 of the 181 seats on the mainland, and also took 35 of 50 seats on Zanzibar.⁶² President Amani Abeid Karume (CCM) was sworn in on 8 November 2000 as the President of Zanzibar.⁶³

The second multi-party elections seemingly received greater acceptance both at a national and international level than the transitional elections in 1995. Although the credibility of the elections on the island

55 Date of independence: 9 December 1961.

56 Date of independence: 9 December 1963.

57 Heyns (n 19 above) 282.

58 In union matters, the National Assembly has the power to legislate for both the mainland and Zanzibar.

59 n 23 above 343.

60 The situation has been relatively tense after the opposition (CUF) accused the ruling party (CCM) of vote stealing during the 1995 elections.

61 18 August: Troubled islands overshadow Tanzania elections *The Times of India* 18 August 2000.

62 Electoral Institute of Southern Africa *Tanzania parliamentary elections 2000* <<http://www.eisa.org.za/issues/countries/tanzania.htm>>.

63 As above.

has been questioned, there seems to be a general acceptance of the credibility of the elections conducted on the mainland.

4.6 Zimbabwe

The former British colony of Rhodesia became the independent state of Zimbabwe on 18 April 1980. The first post-independence elections were conducted in 1980 and Robert Mugabe of the Zimbabwe African National Union (Patriotic Front) (ZANU (PF)) has been President of the country ever since. The party retained its power in subsequent elections, which took place in 1985, 1990 and 1995. In 1996 President Mugabe was re-elected for another six-year term.

The President is elected for a period of six years while the House of Assembly (the legislative body of 150 members) is elected on a five-year basis.⁶⁴

Zimbabwe conducted its parliamentary elections in June 2000. The governing party ZANU (PF) remained in power after this very controversial election. The governing party was faced with strong opposition from the Movement for Democratic Change (MDC), the only party that could possibly challenge it. The country's involvement in the Democratic Republic of Congo (DRC), the high inflation rate, joblessness and the country's massive economic decline strengthened the calls for reform made by the opposition. The period preceding the elections was marked by a four-month campaign of violence, allegedly unleashed by the governing party and aimed at members of the opposition party, and coinciding with farm invasions.⁶⁵

Twenty-four hours before the elections most of the violence and incidents of intimidation subsided. Agyeman-Duah, director of the Ghana-based NGO Centre for Democracy and Development, described the actual election phase as one of the most sincere elections in Africa and certainly one we can all learn a great deal from.⁶⁶ The electorate turned up in large numbers and votes were mostly cast in an environment conducive to the execution of civil and political rights.⁶⁷

Months after the election the crisis continues as uncertainty prevails on issues such as the settlement of the land crisis, the country's involve-

64 n 7 above 378.

65 Harare Financial Gazette 'Article views cabinet's 100 days in office' 19 October 2000 <<http://www.africaonline.com/fingaz>> (accessed 15 January 2001); SAPA 'Former editor admits anti-state propaganda before June 2000 elections' <<http://www.sapa.org.za>> (accessed 10 January 2001).

66 Personal communication with Agyeman-Duah.

67 Thus free from fear, intimidation and interference. Please note that this is a personal observation made during the actual election phase and qualified in the sense that it does not reflect on the large-scale intimidation and violence preceding the actual election phase and its possible impact on this phase.

ment in the DRC and the difficult economical situation.⁶⁸ In addition to the country's questionable human rights record, international human rights activists were outraged at President Mugabe's announcement of blanket amnesty for those who perpetrated any politically motivated crimes during the period 31 January 2000 and 31 July 2000.⁶⁹ Motions for impeachment taken by the opposition as well as the President's intentions to run as ZANU (PF)'s sole candidate in the 2002 presidential elections cast further doubts on the country's political stability and prospects for good governance.⁷⁰

5 Forthcoming elections

Apart from provincial and municipal elections, the following seventeen presidential or parliamentary elections are scheduled in Africa for the year 2001:⁷¹

| Country | Election type | Date |
|-----------------------|---------------|--------------------|
| Benin | Presidential | March 2001 |
| Equatorial Guinea | Presidential | March 2001 |
| Eritrea | Parliamentary | December 2001 |
| Ethiopia | Presidential | not yet determined |
| Gabon | Parliamentary | December 2001 |
| Gambia | Presidential | January 2001 |
| Gambia | Parliamentary | October 2001 |
| Lesotho | Presidential | not determined |
| Madagascar | Presidential | not yet determined |
| Sao Tomé and Príncipe | Presidential | not yet determined |
| Senegal | Parliamentary | March 2001 |
| Sierra Leone | Parliamentary | June 2001 |
| Sierra Leone | Presidential | March 2001 |

68 The Financial Gazette 'International anti conflict group urges diplomatic sanctions on Zimbabwe' 5 October 2000 Harare, Zimbabwe <<http://www.africaonline.com/fingaz>> (accessed 15 January 2001).

69 SAPA Amnesty International says Mugabe's clemency order 'unjust' 11 October 2000 Johannesburg <<http://www.sapa.org.za>> (accessed 15 January 2001).

70 The Financial Gazette *Impeachment motion said 'hurting' Mugabe politically* 26 October 2000 <<http://www.africaonline.com/fingaz>> (accessed 10 January 2001).

71 Elections around the world: The electoral calendar <<http://www.agora.stm.it/elections/calendar.htm>> (accessed 20 January 2001).

| Country | Election type | Date |
|---------|---------------|--------------|
| Uganda | Parliamentary | July 2001 |
| Uganda | Presidential | March 2001 |
| Zambia | Parliamentary | October 2001 |
| Zambia | Presidential | October 2001 |

6 Conclusion

Elections should not be viewed as a one-day event. Recent trends are towards transparent, free and fair elections within the democratic process. In the case of Ghana and Senegal it has surfaced that this can even occur after the third or even later elections where the incumbent is effectively removed through the ballot box. A country such as Tanzania, generally viewed as a stable and peaceful country, is constantly refining its democracy and reconciling issues pertaining to Zanzibar on the political front. But when one turns to the electoral process and political developments in countries such as Côte d'Ivoire and Zimbabwe one cannot help but be concerned. Zimbabwe's involvement in the Democratic Republic of the Congo contributes to the destabilisation of the subregion. Zimbabwe is steered by a leader unwilling to step down. Côte d'Ivoire is plagued by political instability.

Recent political developments show that democracy, elections and human rights are interdependent. Experience has shown that human rights are far better protected where genuine, free and fair elections are conducted. One may conclude that the first 'wave of democratisation' has come to an end as most African countries have moved beyond this important transitional phase.

The challenge ahead is to stabilise and refine African democracies already in place. As J Freedman says, 'democratisation is a long process and stabilisation is even a longer process . . . Proper democracy cannot be possible without a proper electoral process.'⁷² One can therefore conclude that although elections as such are no guarantee for democracy, they are a major contributing factor and an essential ingredient in its success and continuation.

⁷² J Freedman Election observation: A step towards the democratisation path <<http://www.oneworld.org>> (accessed 10 July 2000).

The protection and participation rights of the child soldier: An African and global perspective

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1 Introduction

In retrospect it may be regarded as somewhat ominous that the Geneva Declaration of the Rights of the Child¹ was inspired by, and remained closely allied to, our encountering of war.² The pendulum of our conception of the involvement of children in war has since swung from that of the exclusive categorisation of the child as the 'civilian' victim deserving of the ideal of 'peace and universal brotherhood'³ and worthy of special protection in that context,⁴ to the special protection afforded to children as combatants. This happened in both the Additional Protocols

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1 Records of the Fifth Assembly Supplement (1924) 23 *League of Nations Official Journal* (adopted in September 1924). It marked the evolution of child 'welfare' from a focus on social work to 'an official object of international relations' (D Marshall 'The construction of children as an object of international relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations, 1900–1924' (1999) 7 *International Journal of Children's Rights* 103).

2 Marshall (n 1 above) 133.

3 Principle 10 Declaration of the Rights of the Child, General Assembly (GA) Res 1386 XIV (adopted on 20 November 1959). See arts 14, 17, 23, 24, 38, 50, 51, and 68 of the Convention Relative to the Protection of Civilian Persons in Time of War 12 August 1949 (Geneva Convention No IV) 75 *United Nations Treaty Series* 287.

4 Art 25(2) of the Universal Declaration of Human Rights GA Res 217A(III) (adopted on 10 December 1948).

to the Geneva Conventions of 1949,⁵ the Convention on the Rights of the Child (CRC)⁶ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁷ Indeed, the 1995 Statement on the First Regional Consultation on the Impact of Armed Conflict on Children in the Horn, Eastern, Central and Southern Africa realised the truth of the ominous inception of children's rights, opening with the phrase: 'A threat haunts Africa . . .'.⁸

The question of the nature of the special protection afforded to children in armed conflict has been described as the most controversial issue debated during the course of the CRC negotiations.⁹ The outcome of this debate was dissatisfactory and revealed a 'general lack of innovation'.¹⁰ Furthermore, the higher standard of protection subsequently granted by the African Children's Charter¹¹ was seen as being of little practical use. This was due to its inability to gain sufficient support to enter into force,¹² until recently.¹³ The African Children's Charter inevitably presents the same obstacles encountered in the enforcement of the provisions of the CRC.

However, the CRC recognises the child as the bearer of rights entrenched in a binding international instrument, comprising various categories of rights including protection and participation rights.¹⁴ So does the African Children's Charter. The struggle between these competing rights is epitomised in the case of child soldiers who are at the same time entitled

5 See art 77(2)–(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Geneva Protocol I) (1977) 16 *International Legal Materials* 1391. See also art 4(3)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (Geneva Protocol II) (1977) 16 *International Legal Materials* 1442.

6 Art 38(2)–(3) GA Res 44/25 (1989) 28 *International Legal Materials* 1448 (adopted on 20 November 1989 and entered into force on 2 September 1990). See also the Preamble to the Declaration on the Protection of Women and Children in Emergency and Armed Conflict GA Resolution 3318(XXIX) of 14 December 1974 for the specific reference to 'women and children belonging to the civilian population'.

7 OAU Doc CAB/LEG/153/Rev 2 (1990), which entered into force on 29 November 1999.

8 Report of the Secretary General on the impact of armed conflict on children: UN Doc E/CN.4/1996/110/Add.1 of 11 March 1996, Annex 1.

9 LJ LeBlanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (1995) 148.

10 LeBlanc (n 9 above) 280.

11 Art 22(2), read with art 2 CRC.

12 G Van Bueren *The International law on the rights of the child* (1995) 332. See also B Thompson 'Africa's Charter on Children's Rights: A normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432.

13 The African Children's Charter entered into force on 29 November 1999. By the end of September 2000, it had been ratified by 21 states (OAU DOC/OS(XXVIII)INF.25).

14 Van Bueren (n 12 above) 15.

to the special protection accorded to children in situations of armed conflict and to exercise their participation rights. As Graça Machel, the previous United Nations (UN) expert on children in armed conflict, stated:¹⁵

[I]t is important to note that children may also identify with and fight for social causes, religious expression, self-determination and national liberation. As happened in South Africa or in the occupied territories, they may join the struggle in pursuit of political freedom.

It is this conflict between protection and participation rights, the role of prevention and provision rights¹⁶ and the 'suspect classification'¹⁷ of age, that this article seeks to explore. Viewing the issue as being merely one of protection as opposed to participation 'is too simplistic'.¹⁸ This article hopes to meet the challenge posed by the realisation that for some children participation is their only means of survival¹⁹ — a consequence of socio-economic and political circumstance. It is necessary to throw off the shackles of 'symbolic politics'²⁰ in order to return to the empowerment of children. We need to consider them not only within the constraints and challenges of their present situation, but also as 'a privileged way to speak about the future'.²¹

2 Placing the debate in an African context

Although the African Children's Charter came into force only recently, the question of the impact on, and involvement of children in armed conflict has long since lingered on African agendas.²² In July 1996 the Organisation of African Unity (OAU) adopted a resolution on the plight of African children in situations of armed conflict.²³ This conviction was reiterated in its decision of July 1999.²⁴

15 G Machel Impact of armed conflict on children: Report of the expert of the Secretary General, Ms Graça Machel (Machel Report), submitted pursuant to GA Res 48/157: UN Doc A/51/306 and Addendum 1 of 26 August 1996, para 43.

16 Van Bueren (n 12 above) 15.

17 M Freeman 'Taking children's rights more seriously' (1992) 6 *International Journal of Law and the Family* 52 66.

18 G Van Bueren 'The international legal protection of children in armed conflicts' (1994) 43 *International and Comparative Law Quarterly* 809 816.

19 As above.

20 n 17 above 61.

21 Marshall (n 1 above) 143.

22 n 9 above.

23 Res 1659 (LXIV) adopted in Yaoundé, Cameroon. See also report of an international workshop 'Armed conflict and minority and indigenous children in the Horn and Great Lakes regions of Africa' 23–24 April 1998, Kampala, Uganda <<http://www2.essex.ac.uk/c&acu/international/comment/Text/paper005.htm>> (accessed 8 February 2001).

24 Decision of the African Conference on the Use of Children as Soldiers CM/Dec.482 (LXX) <<http://www.child-soldiers.org>> (accessed 8 February 2001).

Most significantly, the concern felt for this threat to African children culminated in the African Conference on the Use of Children as Soldiers in April 1999, and the adoption at this conference of the Maputo Declaration on the Use of Children as Soldiers.²⁵ The extent of the participation of children in armed conflicts in Africa was captured in the *Africa Report* that was released at this conference: At the time more than 120 000 children under eighteen years were participating in armed conflicts across Africa. The countries most affected by this problem were Algeria, Angola, Burundi, Congo-Brazzaville, the Democratic Republic of Congo, Liberia, Rwanda, Sierra-Leone, Sudan, Uganda, and to a lesser extent Ethiopia and Eritrea.²⁶

Recently, Graça Machel concluded that despite humanitarian efforts and the intervention of governments, 'our promises to children throughout the world remain unfulfilled. This review is a second call to action.'²⁷

However, this is not only an African problem. African states are also not only subject to regional treaties, but also to obligations under UN treaties. It is in this context that the CRC, the African Children's Charter and the Optional Protocol to the Children's Convention on the Involvement of Children in Armed Conflicts (Optional Protocol) are considered. The Machel Report encouraged this co-operation 'within the framework of the Convention on the Rights of the Child and other relevant international and regional treaties, declarations and guidelines that emphasise children's rights'.²⁸ This approach is adopted here.

3 International law and the human rights of the child soldier

3.1 An overview of humanitarian protection

The provisions and underlying perceptions of international humanitarian law are relevant not only in a global, but also in a regional context. The African Children's Charter specifically requires that states respect the 'rules of international humanitarian law applicable in armed conflicts

25 Maputo Declaration on the Use of Children as Soldiers, Maputo, Mozambique 22 April 1999 <<http://www.hrw.org/campaigns/crp/maputo-declaration.htm>> (accessed 8 February 2001).

26 The coalition to stop the use of child soldiers *Africa Report* March 1999 <http://www.child-soldiers.org/reports_africa/report_cover.html> (accessed 8 February 2001).

27 G Machel 'The impact of armed conflict on children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children' <<http://www.war-affected-children.org/machel-e.asp>> (accessed 8 February 2001), paper delivered at the International Conference on war-affected children held in Winnipeg, Canada in September 2000.

28 n 15 above para 279.

which affect the child'.²⁹ This overview begins with the Geneva Declaration of the Rights of the Child that was, admittedly, based on a 'certain conception of childhood'.³⁰ Its only reference to children affected by armed conflict was that they were to 'be the first to receive relief in times of distress'.³¹ The 1959 Declaration of the Rights of the Child represents considerable progress.³² However, this non-binding instrument omits specific reference to the plight of children affected by armed conflict, and contains no definition of childhood. Similarly, the definition of childhood in contemporary international law is imprecise.³³

By 1960 the assumption that children were affected by war only in their capacity as civilians could no longer be sustained owing to the use of child soldiers in various wars of national liberation and self-determination.³⁴ The question of child soldiers was therefore addressed for the first time in both Geneva Protocol I and II, which set fifteen as the minimum age for the recruitment of child soldiers with regard to international and non-international armed conflicts.³⁵ However, the position in Geneva Protocol II with regard to non-international armed conflicts is more stringent.³⁶ It does not limit participation restrictions to that of the 'direct' participation of children in hostilities,³⁷ and it clearly applies to both 'recruitment' and voluntary enlistment.³⁸ Protocol II also omits the limitation of states' obligations to the taking of all 'feasible measures' alone.³⁹ All these restrictions on states' obligations are included in Geneva Protocol I.

Commentators have noted that the prohibition of recruitment and the restriction on participation of children under the age of fifteen⁴⁰ were manifestations of the perception that children who reached that age

29 Art 22(1).

30 Marshall (n 1 above) 143.

31 Principle III. See also P Veerman *The rights of the child and the changing image of childhood* (1992) 168–180.

32 Van Bueren (n 12 above) 12.

33 Van Bueren (n 12 above) 333.

34 H Mann 'International law and the child soldier' (1987) 36 *International and Comparative Law Quarterly* 32 35–6.

35 Art 4(3)(c) Geneva Protocol II. Art 77(2) Geneva Protocol I.

36 Mann (n 34 above) 50, as to the motivation of states for reducing the perceived military advantage of dissident groups.

37 Mann (n 34 above) 46 for the debate between states over this provision. See also art 4(3)(c) of the Geneva Protocol II and art 77(2) of the Geneva Protocol I.

38 Van Bueren (n 12 above) 813–15. See also art 4(3)(c) of the Geneva Protocol II and art 77(2) of the Geneva Protocol I.

39 Art 4(3) of the Geneva Protocol II and art 77(2) of the Geneva Protocol I. See also Mann (n 34 above) 44 for the drafting procedure substituting the word 'feasible' for that of 'necessary'.

40 See also the provision in art 77(2) of the Geneva Protocol I which provides a measure of protection to children between the ages of 15 and 18 by requiring states to 'endeavour to give priority to those who are oldest'.

were at that stage of development which did not require the same special or systemic protection.⁴¹ However, international humanitarian law is inconsistent in this regard, placing a prohibition on the execution of the death penalty on children under eighteen,⁴² owing to their lack of judgment and recognition of the consequence of their actions. This is an inconsistency which one commentator attributes to the 'differentiation between the physical and developmental needs catered to under the concept of special protection'.⁴³

State parties to these international humanitarian instruments did not consider the participation rights of children. One exception is the failed attempt of Vietnam to have a provision included in article 77(1) of Geneva Protocol I concerning the early release of child prisoners of war arrested because of their 'political non-submission' or patriotism.⁴⁴

Having compromised with regard to the protection of children affected by armed conflict, having disregarded the socio-economic and political root causes of such participation as well as children's rights (whether participatory or protectionist), the criticism that 'humanitarian law represents a compromise between humanitarian considerations and military necessity'⁴⁵ rings ominously true.

3.2 The 'contribution' of the CRC

The CRC entrenched children's rights in a binding document. It is the entrenchment of children's participation rights that is most significant in the context of the further evolution of children's rights. Children's participation rights are also the most controversial category of rights to be recognised.⁴⁶ Although the CRC protects child soldiers and establishes a minimum age for recruitment and participation in hostilities, the framing of these provisions was not concerned with an examination of the developmental needs or abilities of children with regard to either protection or participation rights.⁴⁷

41 Van Bueren (n 12 above) 333. See also Mann (n 34 above) 39–40.

42 Art 68(4) Geneva Convention IV, art 77(5) Geneva Protocol I and art 6(4) Geneva Protocol II.

43 n 34 above 40. See also C Reis 'Trying the future, avenging the past: The implications of prosecuting children for participation in internal armed conflict' (1997) 28 *Columbia Human Rights Law Review* 629.

44 Van Bueren (n 12 above) 44.

45 n 15 above para 218.

46 Van Bueren (n 12 above) 15.

47 Van Bueren (n 18 above) 814 for the dismissal of Algeria's proposal concerning voluntary enlistment of children over 15 in wars of national liberation.

Instead, article 38⁴⁸ is an 'approximation'⁴⁹ of article 77(2) of the Geneva Protocol I and in fact is inferior to the protection afforded by the Geneva Protocol II. Article 38 of the CRC therefore undermines existing humanitarian standards.⁵⁰ This regression is evidenced by the restriction on the prohibition of participation in hostilities to that of 'direct' participation.⁵¹ This limitation is also contained in the African Children's Charter.⁵² The answer to Colombia's question as to why the Working Group was prepared to recognise the rights of children generally up to the age of eighteen, but was only prepared to protect child soldiers up to the age of fifteen,⁵³ is that states were concerned primarily with making the provisions compatible with their domestic legislation.⁵⁴ The contention was that the Working Group was not the correct forum for, nor empowered to amend existing international humanitarian law standards.⁵⁵ General dissatisfaction with the resulting protection led several states to attach declarations to their ratifications, stating their adherence to a higher standard of protection.⁵⁶

Sadly, it is evident from the observations of the UN Committee on the Rights of the Child (UN Children's Committee) that even these low standards with regard to the protection of child soldiers are not being enforced. Examples are the UN Children's Committee's reports on Uganda and Sierra Leone.⁵⁷ This reveals little prospect for compliance with the higher standard embodied in the African Children's Charter, which requires that 'no child', being a person under the age of eighteen,⁵⁸ takes a direct part in hostilities or be recruited.⁵⁹

An innovative feature of the CRC is its provisions with regard to states' obligations concerning the psychological recovery and social reintegration of children affected by armed conflict.⁶⁰ Unfortunately this

48 Art 38(2) setting the minimum age for 'direct' participation of children in hostilities at 15 and requiring states to merely take all 'feasible measures' to enforce this. Art 38(3) requires states to refrain from 'recruiting' children under the age of 15 and to give preference to the older of those children between 15 and 18 years.

49 Mann (n 34 above) 56.

50 S Detrick and others (eds) *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* (1992) 515.

51 Art 38(2) CRC.

52 Art 22(2) African Children's Charter.

53 n 50 above 514.

54 n 9 above 281.

55 n 50 above 514.

56 n 9 above 153-4.

57 Committee on the Rights of the Child Concluding observations of the Committee on the Rights of the Child: Uganda (21/10/97) UN Doc CRC/C/15/Add.80 para 19. See Committee on the Rights of the Child Concluding observations of the Committee on the Rights of the Child: Sierra Leone (28/01/2000) UN Doc CRC/C/15/Add.116 para 70.

58 Art 2.

59 Art 22(2).

60 Art 39. See also arts 37 and 40.

innovation is not mirrored in the African Children's Charter. Furthermore, the greatest contribution of the UN Children's Committee is undoubtedly its recognition that poverty and armed conflict are difficulties affecting the implementation of children's rights generally.⁶¹ The UN Children's Committee has therefore already begun to place children's rights in a country and environment specific context with regard to enforcement, which may assist in combating the 'unique factors' which determine the critical situation of many African children as recognised in the Preamble of the African Children's Charter.⁶² The next step is to consider the definition and to weigh up such rights in this light.

3.3 The impact of the Optional Protocol to the CRC

The dissatisfaction with the final provisions of the CRC concerning armed conflict resulted in the UN Economic and Social Council (ECOSOC) establishing an open-ended Working Group. Its purpose was to draft an Optional Protocol to the CRC dealing with this issue.⁶³

It was agreed that various areas required the raising of standards,⁶⁴ but commentators noted that the Optional Protocol would 'represent a squandered opportunity if its sole purpose is the raising of minimum ages'.⁶⁵ However, this remained the focus of the Working Group, which at first failed to reach consensus on the minimum age of recruitment.⁶⁶ Later the Working Group adopted a Draft Optional Protocol.⁶⁷

61 Uganda (n 57 above) para 6. See also Sierra Leone (n 57 above) para 5. See also Committee on the Rights of the Child Concluding observations of the Committee on the Rights of the Child: Sri Lanka (21/06/95) UN Doc CRC/C/15/Add.40 para 6.

62 The Preamble refers to African children's unique 'socio-economic, cultural, traditional and developmental circumstances', exacerbated by 'natural disasters, armed conflicts, exploitation and hunger'.

63 Adopted and opened for signature, ratification and accession by GA resolution UN Doc A/RES/54/263 of 25 May 2000 (Optional Protocol) UN Doc ECOSOC Resolution 1994/10. See also Commission on Human Rights Inter-sessional working group on the Draft Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts Fifth Session Geneva 11 January 1999, UN Doc E/CN.4/1999/WG.13/3, paras 7–18, for the background and scope of the issue (Chairman's Report); see <http://www.unhcr.ch/html/menu3/b/treaty17_esp.htm> (accessed 8 February 2001) for the signatories and ratifications of the Optional Protocol. As at 4 January 2001, no African state had ratified the Optional Protocol.

64 Van Bueren (n 18 above) 825–6. See Chairman's Report (n 63 above) para 15.

65 Van Bueren (n 18 above) 825–6.

66 See Commission on Human Rights Inter-sessional working group on the Draft Optional Protocol to the Convention on Rights of the Child on the involvement of child soldiers in armed conflicts, Sixth Session, Geneva, 10–21 January 2000, UN Doc E/CN.4/2000/WG.13/3, para 8 for alternative proposals.

67 Adopted on 21 January 2000.

In its Preamble the Optional Protocol states that the raising of the age of possible recruitment and participation of children would, in itself, somehow 'contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children'.⁶⁸ This fails to consider the root causes of child recruitment and participation, and the fact that existing standards are not being implemented.

Instead it perpetuates the attempt of the CRC and the African Children's Charter⁶⁹ to implement obligations by means of the state reporting system. The UN Children's Committee has already shown that a reporting obligation is not a guarantee of the implementation of children's rights.⁷⁰ In mitigation, it should be stated that the Preamble recognises the political, economic and social root causes of children's involvement in armed conflict.⁷¹ However, it contains no substantive provisions in this regard. This recognition is absent from both the CRC and the African Children's Charter. Furthermore, the only reference in the Optional Protocol to the developmental difference between children of the age of eighteen as opposed to the existing standard of fifteen was made by the Quakers, who merely stated that it should be debated no further than to say that it heralded the essential distinction between adults and children.⁷²

The ultimate failure of the Optional Protocol is that despite its emphasis on the importance of raising the minimum age of recruitment and participation from its present level of fifteen years, it in fact fails to do so. The result is that those states that decide to ratify it undertake to raise this minimum age to at least that of sixteen.⁷³

68 Para 8 of the Preamble to the Optional Protocol <<http://www.unhchr.ch>> (accessed 8 February 2001).

69 Art 43 African Children's Charter; art 44 CRC.

70 Art 8 Optional Protocol. See also R Harvey 'Recruitment and deployment of child soldiers — The beginning of the end?' <<http://www2.essex.ac.uk/c%26acu/News%20Folder/Future/2000News/Comments/DraftOPCS.htm>> (accessed 8 February 2000).

71 Para 15 and 16 of the Preamble Optional Protocol.

72 Commission on Human Rights Inter-sessional working group on the Draft Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, Sixth Session, Geneva, 10–21 January 2000, UN Doc E/CN.4/2000/WG.13/2 <<http://www.unhchr.ch>> (accessed 8 February 2001).

73 Arts 2, 3 and 4 of the Optional Protocol; Special representative for children and armed conflict welcomes agreement on minimum age for participation in conflict, 26 January 2000 press release HR/4455, <<http://www.un.org/News/Press/docs/2000/20000126.hr4455.doc.html>> (accessed 24 April 2000); Human Rights Watch International community welcomes the agreement to raise the minimum age for participation in conflict to 18 years 22 January 2000 <<http://www.essex.ac.uk/c%26acu/News%20Folder/Future/2000News/Breaking/breaking.htm>> (accessed 24 April 2000).

3.4 United Nations and regional initiatives outside the CRC structure

The UN emphasised, unfortunately outside the structure of the CRC, the importance for the prevention of participation of children in armed conflicts, of providing children with alternatives to such involvement.⁷⁴ These have also been recognised at a regional level in various declarations concerning child soldiers in Latin America,⁷⁵ Europe⁷⁶ and Africa.⁷⁷ Furthermore, the Machel Report reiterated that one of the 'most basic reasons that children join armed forces is economic'.⁷⁸ Combined, these approaches are very useful. We must both realise the root causes of the involvement of children in armed conflict, as well as respect their participation rights by providing alternative methods by which they can contribute to their social, cultural or political convictions.

The ultimate realisation is that the law itself cannot be relied upon as the only safeguard.⁷⁹

4 The role of autonomy and participation rights

4.1 Considering the children's rights perspective as opposed to 'our view' of children

Considering children as 'autonomous beings' is widely contested,⁸⁰ and the adult-centred perspective of many researchers often focuses on attitudes 'towards and of children'.⁸¹ It is within this context that fundamental problems arise for those who advocate greater participation rights for children concerning decisions affecting their lives, as their attitudes 'towards' children intervene with regard to the question of the participation of children in armed conflicts.⁸²

Critics of the realisation of the child as an autonomous bearer of rights see this autonomy as an 'isolated benefit' justified by rights rhetoric.⁸³ However, this view employs the same tools as the proponents of child

74 Res of the Security Council, 25 August 1999, S/RES/1261 (1999) para 13.

75 Para 8 (a) of Montevideo Declaration on the Use of Children as Soldiers 8 July 1999 <http://www.hrw.org/campaigns/crp/monte_dec.htm> (accessed 8 February 2001).

76 Para 7(iv) of Berlin Declaration on the Use of Children as Soldiers, 20 October 1999 <<http://www.hrw.org/campaigns/crp/berlin.htm>> (accessed 8 February 2001).

77 n 25 above para 8.

78 n 15 above para 39.

79 n 15 above para 36.

80 C Lowy 'Autonomy and the appropriate projects of children: A comment on Freeman' (1992) 6 *International Journal of Law and the Family* 72.

81 Veerman (n 31 above) 10.

82 Van Bueren (n 12 above) 335.

83 A Morita Beyond the myth of children's rights <http://www.worldcongress.org/gen99_speakers/gen99_morita.htm> (accessed 8 February 2001).

autonomy who resort to welfarism and the 'best interests' principle in restricting the very autonomy they wish to confer.⁸⁴ Eekelaar describes 'welfarism' as being those actions which hold the promotion of the welfare of another as their sole motivation,⁸⁵ and poses the question as to whether any meaningful rights are possessed by the child if another has the right to determine that child's welfare.⁸⁶

It should be borne in mind throughout that childhood is a social construction and a relative concept defined by those in authority. It is also dependent upon cultural, social, environmental and political variants.⁸⁷ Seen against this background, the use of age as a means of classification of status or capacity becomes 'suspect'.⁸⁸ With regard to the restriction of children's participation rights, the use of a specific age as a means of rights limitation (or protection) ignores the consequent varying rate of the moral and cognitive development of children.⁸⁹ The exercise of autonomy cannot necessarily be dependant upon the achievement of a specific age.⁹⁰

Others argue that children's autonomy should be respected only with regard to 'appropriate projects'.⁹¹ But this argument may in fact not involve the exercise of autonomy as the child is not the person to determine these 'appropriate projects'. A possible compromise involves the reconciliation of actions taken with the objective of furthering a child's best interests and the view of the child as a bearer of rights.⁹² This compromise allows children to contribute in determining what their interests are.⁹³ Further clarity can be obtained by giving a child's basic interests a pre-eminent status, whereas the child's developmental and autonomy interests can reasonably be compromised.⁹⁴

4.2 Assessing specific participation rights

Not all rights entrenched in the CRC are protective in nature, as some relate to children being heard in matters that affect their lives and empower them to act.⁹⁵ These empowerment or participation rights

84 Van Bueren (n 18 above) 816.

85 J Eekelaar 'The importance of thinking that children have rights' (1992) 6 *International Journal of Law and the Family* 231 228.

86 n 85 above 223.

87 Freeman (n 17 above) 56; Veerman (n 31 above) 10; Van Bueren (n 12 above) 6.

88 Freeman (n 17 above) 66.

89 Freeman (n 17 above) 58-9.

90 Freeman (n 17 above) 64.

91 Lowy (n 80 above) 74.

92 J Eekelaar 'The interests of the child and the child's wishes: The role of the dynamic self-determinism' (1994) 8 *International Journal of the Law and the Family* 42.

93 Eekelaar (n 92 above) 43.

94 Eekelaar (n 85 above) 231.

95 n 9 above 157.

include the right to freedom of expression,⁹⁶ the right to have his or her views heard⁹⁷ and freedom of association.⁹⁸ The 'evolving capacities of the child'⁹⁹ is the guiding principle in respect of these rights.¹⁰⁰ It is the conflict between this category of rights, dealt with more insubstantially than other categories of rights in the CRC,¹⁰¹ and protection rights, more specifically the safeguards provided by article 38 of the CRC and article 22 of the African Children's Charter concerning the voluntary participation of children in armed conflict, which deserves examination.

One argument favours the view that the safeguards in article 38(2) and (3) of the CRC, and by comparative analysis article 22(2) of the African Children's Charter, restrict the manifestation of a child's right to freedom of expression and freedom of association.¹⁰² During the drafting of the CRC the United States maintained that the importance of the right to freedom of association lay in the fact that adolescents have often acquired 'the skills necessary to participate fully and effectively in society'.¹⁰³ Despite the reservations attached to this provision,¹⁰⁴ it may be maintained that the importance of this right for children lies in increasing the power of individuals by 'conferring on them the right to participate in group activity'.¹⁰⁵ This right is an important right, especially for older children.¹⁰⁶ Van Bueren argues that the safeguards concerning voluntary participation in armed conflict limit the right to freedom of association more persuasively than the argument relating to the right to freedom of expression.¹⁰⁷ The argument concerning the limitation of freedom of expression reiterates that the protective provisions in article 38 are an 'appropriate humanitarian gesture', but that its underlying philosophy may conflict with that of article 13, especially with regard to the expression of political views.¹⁰⁸ This would be of specific relevance to wars of national liberation.

96 Arts 13 and 14 CRC. See also arts 7 and 9 African Children's Charter.

97 Art 12 CRC; art 4(2) African Children's Charter.

98 Art 15 CRC; art 8 African Children's Charter.

99 Art 12(1) CRC; art 4(1) African Children's Charter.

100 n 9 above 157.

101 As above.

102 Van Bueren (n 18 above) 816.

103 n 9 above 173.

104 n 9 above 174-5.

105 Van Bueren (n 12 above) 144.

106 Lowy (n 80 above) 74.

107 Van Bueren (n 18 above) 816.

108 F Olsen 'Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' (1992) 6 *International Journal of Law and the Family* 192 214.

It is important to note that children are not always forcibly recruited into the armed forces. Only voluntary enlistment is focused upon here.¹⁰⁹ As was the case in Ethiopia, Eritrea and South Africa, an appeal was made to children's sense of patriotism in their fight for self-determination and national liberation.¹¹⁰ The debate is therefore complicated by some children's belief that fighting in wars of national liberation is the only means for them to contribute to a political or social cause, as was sometimes the case in Uganda.¹¹¹ In this regard it is important to note the responsibilities placed upon the child in the African Children's Charter, which include the duty to 'serve his national community by placing his physical and intellectual abilities at its service',¹¹² 'to preserve and strengthen social and national solidarity'¹¹³ and 'to preserve and strengthen the independence and the integrity of his country'¹¹⁴ — more specifically how these duties may be interpreted in the light of the wars of liberation and in the context of other remnants of colonisation.

An argument used in justifying the limitation on the voluntary enlisting of children is that of equating it with 'participation in specific forms of exploitation'.¹¹⁵ This comparison may have philosophical limitations.¹¹⁶ Also, the European Commission on Human Rights held that the voluntary enlistment of children under the age of eighteen did not amount to 'forced or compulsory labour'. Noting that in the particular instance parental consent had been given, it added that the young age at which the applicants had entered into the armed service could not 'in itself attribute the character of "servitude" ' to such service.¹¹⁷

Both sides of the protection versus participation debate, however credible either may be considered, depart from the premise that there is either an autonomy right to be exercised or that protection must be conferred. Neither departs from the premise that there is often no autonomy right being exercised at all, but merely actions taken to secure basic needs for survival — bearing in mind the primacy of the child's right to survival and development as the point of departure,¹¹⁸ however we may wish to package it.

109 Goodwin-Gill and Cohn *Child soldiers* (1994) 24–34 who cite, *inter alia*, past reported examples of coercive recruitment by Uganda's National Resistance Army, the Sudanese Peoples Liberation Army and RENAMO of Mozambique.

110 TW Bennet 'Using children in armed conflict: A legitimate African tradition?' <<http://www2.essex.ac.uk/c%26acu/issues/Texts/Soldiers002.htm>> (accessed 8 February 2001). See also n 15 above para 43.

111 Van Bueren (n 18 above) 816.

112 Art 31(b).

113 Art 31(c).

114 Art 31(e).

115 Van Bueren (n 18 above) 816–17.

116 As above.

117 European Commission of Human Rights, *W, X, Y and Z v United Kingdom*, 19 July 1968.

118 This right is enshrined in art 5 of the African Children's Charter and art 6 of the CRC.

5 The way for the wars ahead

During the drafting of the CRC the proposal was made, and rejected, that the Working Group should not limit itself to provisions concerning recruitment and recruitment age, as the problem was essentially that of the 'militarization of children' itself.¹¹⁹ Commentators have noted that setting a minimum age for the recruitment or participation of children in armed conflicts,¹²⁰ and the emphasis on treaty amendment are misplaced.¹²¹ These do not address the question of the participation rights of children, the root causes of their participation, or provide sufficient protection. However, this approach has been perpetuated by the Optional Protocol, and excessive optimism would therefore be misplaced. It has been 'weakened by compromise in some of its key provisions'.¹²² It contains a mere reference to the necessity 'to take into *consideration* the economic, social and political root causes of the involvement of children in armed conflicts'.¹²³ Its provisions alone are consequently insufficient to either prevent recruitment or to ensure state parties' compliance.¹²⁴

In order to provide for the exercise of participation rights and effective protection it is essential that alternatives be provided to those children who are induced by circumstances to join armed forces, as is stated in the Maputo Declaration on the Use of Children as Soldiers.¹²⁵ The aim should be to provide children with the opportunity to make a valuable contribution in accordance with their convictions, by other means.¹²⁶ An issue for immediate attention is that of 'decision-making [entailing] that we partake in decisions governing our families, countries and the world in general'.¹²⁷ This remains a desirable ideal, despite the realisation that this ideal is somewhat complex owing to the need to take into account 'the social and cultural context of the country and communities involved',¹²⁸ and more specifically the 'unique factors' alluded to in the African Children's Charter.

119 Detrick (n 50 above) 510.

120 Van Bueren (n 12 above) 334.

121 Van Bueren (n 12 above) 350.

122 Harvey (n 70 above) 4–5.

123 Para 16 of the Preamble to the Optional Protocol (emphasis added).

124 Harvey (n 70 above) 4.

125 n 25 above para 8(a); see also para 8(a) of Montevideo Declaration on the Use of Children as Soldiers (n 75 above) and para 7(iv) of Berlin Declaration on the Use of Children as Soldiers (n 76 above).

126 Van Bueren (n 12 above) 350.

127 Annexes to the Statement of the Third Regional Consultation (n 8 above).

128 Reis (n 43 above) 653.

In order to implement participation alternatives and fulfil children's basic needs, we need to return to the necessity of redressing resource allocation. Without addressing these concerns, 'there is little point [in] creating an improved legal framework or instituting greater participation rights for children'.¹²⁹ This concern is a common thread which runs through the UN Children's Committee's recommendations to states in which large numbers of children are known to participate in armed conflicts.¹³⁰

The case for considering children's views as opposed to 'our' view of children was succinctly stated in the recommendations adopted at the Statement of the Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa:¹³¹

Children have the right to shape their own lives. They have the right to their own beliefs and to express them, and to participate in decisions affecting their lives. Children must be an integral part of the design and implementation of programmes and strategies. . . .

The protection versus participation debate should be reduced to a fundamental realisation in order to achieve the aims of the proponents of both views: The empowerment of children and not mere symbolic politics is what is needed to create a secure and enriching environment for children as autonomous beings.

129 Freeman (n 17 above) 61.

130 Concluding observations of the Committee on the Rights of the Child: Belize (10/05/99) UN Doc CRC/C/15/Add.99 para 12. Concluding observations of the Committee on the Rights of the Child: Iraq (21/10/98) UN Doc CRC/C/15/Add.94 para 13. See also Sierra Leone (n 57 above) para 14.

131 n 8 above Annex III.