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As democratic practices and the protection of human rights struggle to become rooted in Africa, and an African Court of Human and Peoples' Rights is in the process of being established, the *African Human Rights Law Journal* has been launched. There is a more pressing need for a monitoring and reporting periodical in this field in Africa than ever before. The *Journal* aims to publish contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. In the process, the *African Human Rights Law Journal* hopes to contribute towards an indigenous African jurisprudence. The *Journal* appears twice a year, in March and October.

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Editorial

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The next issue will focus on the Protocol Establishing the African Court on Human and Peoples' Rights, adopted in 1998.

Please note that this issue of the *African Human Rights Law Journal*, as well as the October 2002 issue, should be cited as (2002) 2 *African Human Rights Law Journal*. Both the 2001 issues should be cited as (2001) 1 *African Human Rights Law Journal*.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Interim measures of protection in the African system for the protection of human and peoples' rights

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1 Introduction

Many human rights instruments make provision for the appropriate convention enforcement organs to indicate interim, or provisional, measures of protection in cases of urgency in order to safeguard the rights and persons of victims of violations of human rights.[1] The purpose of this note is to examine the issue of interim measures in the African human rights system. This system is of recent origin and is the least developed of the regional systems, but it is arguably confronted with some of the greatest challenges.

The principal instrument for the protection of human rights and fundamental freedoms in Africa is the African Charter on Human and

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1 Rule 86 of the Rules of Procedure of the UN Human Rights Committee enables the Committee to request a state party to take interim measures in order to avoid irreparable damage to apparent victims, UN Doc CCPR/C/3/Rev 5 19. Under the American Convention on Human Rights, art 63(2) authorises the court, in 'cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons', to 'adopt such provisional measures as it deems pertinent'. The court may also 'act at the request of the Commission' with respect to a case not yet submitted to it. In addition, art 29(2) of the Regulations of the Inter-American Commission on Human Rights permits the Commission to request provisional measures in 'urgent cases, when it becomes necessary to avoid irreparable damage to persons'. In Europe, Rule 39(1) of the Rules of the European Court of Human Rights allows the Chamber or its President to 'indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. See JG Merrills & AH Robertson *Human Rights in Europe* (2001) 317–18.

Peoples' Rights (African Charter or Charter),[2] adopted under the auspices of the Organisation of African Unity (OAU).[3] The effectiveness of the Charter in promoting and protecting human rights in Africa has divided opinion and has generated considerable debate. The Charter is notable for its statist and duty-oriented nature and its inclusion of third generation rights, and has been described as 'modest in its objectives and flexible in its means'.[4] Concerns about the substantive provisions of the Charter have been widely discussed and any further debate on these issues is beyond the scope of this paper.

2 The African Commission on Human and Peoples' Rights

The Charter established the African Commission on Human and Peoples' Rights (African Commission or Commission) which, mandated with promoting and ensuring protection of human and peoples' rights,[5] became operational in 1987. As part of its protective mandate the

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2 Adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at Nairobi in July 1981, entered into force on 21 October 1986, reproduced in (1982) 21 *International Legal Materials* 58; and GJ Naldi (ed) *Documents of the Organisation of African Unity* (1992) 109. All of the OAU's 53 member states have now ratified the Charter. See Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 AHG/222 (XXXVI) Annex I. For an analysis of the Charter, see EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 111–77; GJ Naldi *The Organisation of African Unity: An analysis of its role* (1999) 109–212; UO Umozurike *The African Charter on Human and Peoples' Rights* (1997).

3 It should be observed that the OAU is due to be replaced in the near future by a new pan-African organisation, the African Union. See art 33(1) of the Constitutive Act of the African Union, reproduced in (2000) 12 *African Journal of International and Comparative Law* 629, entered into force on 26 May 2001. All OAU treaties are currently being reviewed with a view to their adoption by the African Union. See Council of Ministers 74th ordinary session, CM/Dec.588(LXXIV).

4 B Obinna Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 158. For other sceptical assessments, see G Robertson *Crimes against humanity* (1999) 57–58; R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; P Amoah 'The African Charter on Human and Peoples' Rights — An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 226.

5 Arts 30 & 45 of the Charter, n 3 above. Ankumah (n 2 above) at 8 prefers to describe the Commission as a 'supervisory institution'. For an analysis of the Commission, see Ankumah (n 2 above) ch 2–4; Naldi *The Organisation of African Unity* (n 2 above) 139–47; R Murray *The African Commission on Human and Peoples' Rights and international law* (2000). An extremely useful recent book is R Murray & M Evans (eds) *Documents of The African Commission on Human and Peoples' Rights* (2001) which contains, *inter alia*, the Commission's Annual Activity Reports from 1987–99.

Commission is competent to entertain applications from individuals and NGOs alleging violations of the Charter.[6] However, the Commission has been criticised as being generally unable to act as a forceful guardian of rights.[7] A literal reading of the Charter certainly suggests that the Commission possesses relatively weak powers of investigation and

[6] These so-called 'other' communications are governed by arts 55–59 of the Charter, and ch XVII of the Commission's Rules of Procedure (revised), (1997) 18 *Human Rights Law Journal* 154 161–63. See further Ankumah (n 2 above) 20–28 79–110; Naldi *The Organisation of African Unity* (n 2 above) 144–47. According to the Commission the main aim of this procedure is 'to initiate a positive dialogue, resulting in an amicable resolution . . . which remedies the prejudice complained of. A prerequisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.' Communication 25/89 *Free Legal Assistance Group v Zaire* (1997) 4 *International Human Rights Reports* 89 para 39. See further CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 359 374–78. It has been suggested that the Charter does not expressly authorise the Commission to consider individual communications. Murray (n 5 above) 17–18, but Rule 114 of the original Rules of Procedure, reproduced in Naldi (ed) *Documents of the Organisation of African Unity* (n 2 above) 151–52, explicitly stated that individuals and communications could petition the Commission. In any case, this procedure is now well established in the Commission's practice. See Communications 147/95 & 149/96 *Sir Dawda K Jawara v The Gambia* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 paras 41–42. It is important to note that one of the difficulties encountered by a student of the work of the Commission is the fact that, whereas its decisions in individual communications are available from different sources, the text of some of these decisions can vary from source to source. This becomes evident if a comparison is drawn between the communications published in the *International Human Rights Reports* and Murray & Evans (n 5 above) on the one hand, and Law Reports of the African Commission Series A Volume 1 ACHPR\LR\A\1, on the database of the Centre for Human Rights, University of Pretoria, available at <http://www.up.ac.za/chr/ahrdb/ahrdb.html> (accessed 31 January 2002). It is difficult to assert which should be considered the authoritative source.

[7] Ankumah (n 2 above) 179–98; Robertson (n 4 above) 58–9. Makau wa Mutua thus describes the Commission as 'a facade, a yoke that African leaders have put around our necks', (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 5 11. J Oloka-Onyango, although not as critical, is also unimpressed, 'Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa' (1995) 26 *California Western International Law Journal* 1 52–56. HJ Steiner & P Alston write that the Commission 'has few powers, and for the most part has been hesitant in exercising those powers or creatively interpreting and developing them', *International human rights in context* (2000) 920. See also Amoah (n 4 above) 232–237. For kinder assessments, see Umozurike (n 3 above) 67–85; Murray (n 5 above). Ankumah (n 2 above) 9, while acknowledging its failings, is nevertheless of the view that the Commission has the potential to become an effective body. More recently Odinkalu writes that 'any conclusions . . . about the work of the Commission . . . must remain tentative and probably lie somewhere between the extremes of opinion', but that 'any temptation to dismiss it as a worthless institution today must be regarded as premature, ill-informed, or both'; CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 359 401–402.

enforcement.[8] Its decisions are not formally considered to have the binding force of a ruling of a court of law, but rather persuasive authority akin to the opinions of the United Nations (UN) Human Rights Committee.[9] However, it is encouraging to note that an expectation of compliance appears to have been engendered.[10] In addition, an analysis of the Commission's decisions in recent times does suggest that the Commission is generally becoming more robust in carrying out its mandate.[11] Thus Odinkalu expresses the view that 'on its interpretation of the Charter, the Commission has been mostly positive and sometimes even innovative.'[12] He adds that the Commission has been successfully addressing the deficiencies in the Charter 'through its practice, evolving procedures, and jurisprudence.'[13]

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8 Z Motala 'Human rights in Africa: A cultural, ideologica, and legal examination' (1989) 12 *Hastings International and Comparative Law Review* 373 405. Arts 47–54 of the Charter (n 3 above) make provision for inter-state communications; one has been submitted to date. See further Odinkalu (n 7 above) 374–378. A state reporting procedure is also required under art 62. In addition, protective missions have been sent to various countries and thematic rapporteurs have been appointed, although their effectiveness is still open to debate. See further Ankumah (n 3 above) 20–28, 51–77 & 79–110; Murray (n 5 above) 16–25; Naldi *The Organisation of African Unity* (n 3 above) 139–147.

9 See art 59 of the Charter and Rule 120 of the Commission's Rules of Procedure, as amended (n 7 above) 163; Ankumah (n 3 above) 24 & 74–75. Murray writes that the Commission has relied on these provisions enabling it to declare that there have been violations of the Charter. R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412 428.

10 This approach would appear to be required under art 1 of the Charter. See Communication 129/94 *Civil Liberties Organisation v Nigeria* (1997) 18 *Human Rights Law Quarterly* 35. See further C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights (1998) 10 *African Journal of International and Comparative Law* 625. It may be that the Commission has come to regard its decisions on communications as binding. See 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* (2000) 7 *International Human Rights Reports* 274 paras 113–6; Murray (n 9 above) 431; Murray (n 5 above) 53–55.

11 See, eg, Communications 27/89, 46/91, 49/91 & 99/93 *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Democrates and Others v Rwanda* (1999) 6 *International Human Rights Reporting* 816; Communications 105/93, 128/94, 130/94 & 152/96 *Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) 7 *International Human Rights Reports* 265; 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* (2000) 7 *International Human Rights Reports* 274. See further Murray (n 9 above) 428–32.

12 Odinkalu (n 7 above) 402.

13 As above, 398.

2.1 The Commission's authority to indicate interim measures of protection

Although the African Charter does not provide for interim measures, Rule 111 of the Rules of Procedure does. Rule 111 states:[14]

> 1 Before making its final views known to the Assembly on the communication, the Commission may inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. In so doing, the Commission shall inform the state party that the expression on its views on the adoption of those provisional measures does not imply a decision on the substance of the communication.
>
> 2 The Commission, or when it is not in session, the Chairman, in consultation with other members of the Commission, may indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.
>
> 3 In case of urgency when the Commission is not in session, the Chairman, in consultation with other members of the Commission, may take any necessary action on behalf of the Commission. As soon as the Commission is again in session, the Chairman shall report to it on any action taken.

The purpose of interim measures is clearly then to 'avoid irreparable damage being caused to the victim' and/or to protect the interests of the parties or to ensure the proper conduct of the proceedings.[15] There does not appear to be anything outwardly exceptional about this provision, and the provision conforms to standard international practice. However, an analysis of the wording of comparable human rights instruments suggests that the Commission may actually have a wider margin of discretion, at least on paper. For example, the Rules of the European Court of Human Rights refer to 'the interests of the parties or of the proper conduct of the proceedings' only. Those of the Human

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14 Revised Rule 111 expands on former Rule 109, reproduced in Naldi (ed) *Documents of the Organisation of African Unity* (n 2 above) 124 150, which corresponded to what is now Rule 111(1), with the interesting exception that the term 'irreparable prejudice' was used instead of 'irreparable damage'. The ordinary meaning of 'damage' in this context may be susceptible to a wider interpretation and therefore seems preferable. Rule 111 allows the Commission or its chairman to indicate interim measures when the Commission is not sitting.

15 Communication 133/94 *Association pour la Defence des Droits de l'Homme et des Libertes v Djibouti* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 AHG/222 (XXXVI) Annex V p 90 para 5; Communications 140/94, 141/94 & 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 AHG/222 (XXXVI) Annex V 52 para 17, seeking to ensure that that the health of the victims was not endangered.

Rights Committee and the Inter-American Commission and Court of Human Rights specify avoiding 'irreparable damage' to victims only.[16] Rule 111 therefore expressly takes account of the different scenarios that may arise. It is also interesting to note that, in contrast to the position in the American system, the Commission is not restricted to indicating interim measures in urgent cases only.[17]

According to Rule 111, the Commission is competent to decide on its own motion whether interim measures should be indicated in any particular case.[18] Unlike article 29(1) of the Regulations of the Inter-American Commission on Human Rights, however, Rule 111 is silent as to whether the Commission can act at the request of the parties. Although there is little authority in this regard, it appears that the Commission can do so.[19] It is submitted that this must be the correct approach, as to do otherwise would be to minimise the obligations undertaken by the state parties.

Again in conformity with standard international practice, it is set out that an indication of interim measures should not be interpreted as prejudging the case on the merits.[20]

2.2 The Commission's practice on the indication of interim measures of protection

The Commission has indicated interim measures in a number of cases[21] and although the reasoning on its motivation to grant interim measures is not extensive, it is still nevertheless possible to discern certain principles.

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16 n 1 above. It should be observed that the Human Rights Committee has found that disagreeable consequences do not constitute 'irreparable damage' under rule 86 of its rules of procedure. Communication 558/1993 *Canepa v Canada* UN Doc CCPR/C/D/558/1993 (1994) para 7.

17 n 1 above.

18 Communications 140/94, 141/94 & 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 para 17.

19 Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria* at <http://www.up.ac.za/chr/ahrdb/ahrdb.html>; 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* (2000) 7 *International Human Rights Reports* 274 para 30.

20 See Rule 86 of the UN Human Rights Committee (n 1 above).

21 Communication 60/91 *Constitutional Rights Project v Nigeria* at <http://www.up.ac.za/chr/ahrdb/ahrdb.html>; Communications 93/92, 88/93 & 91/93 *Jean Yaovi Degli (on behalf of Corporal N Bikagni), Union Interafricaine des Droits de l'Homme, Commission Internationale de Juristes v Togo* at <http://www.up.ac.za/chr/ahrdb/ahrdb.html>; Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria* at <http://www.up.ac.za/chr/ahrdb/ahrdb.html>; Communications 140/94, 141/94 & 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000, AHG/222 (XXXVI) Annex V.

The case of *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* is instructive in this regard.[22] In 1994 and 1995 the Commission received a number of communications claiming that the detention and trial of Ken Saro-Wiwa and a number of fellow co-defendants violated their rights under the Charter, claims that were subsequently vindicated.[23] In October 1995 most of the accused, including Ken Saro-Wiwa, were sentenced to death. Given that the communications were before it, the Commission adopted interim measures, asking that the death sentences be suspended until the Commission had discussed the case with the Nigerian regime.[24] Regrettably the Commission was disregarded and the sentences were carried out with unseemly haste in November 1995.[25] The Commission was critical of the actions of the state party. It stated:

> Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.[26]

Clearly, in keeping with the *raison d'être* of interim measures, the Commission had an expectation that the respondent state would stay proceedings until such time as it had pronounced on the matter before it.

An important question that needs to be addressed is whether the Commission's decision on the adoption of interim measures is to be considered as binding on the parties to the case or whether it is to be viewed as merely advisory. The language of Rule 111 sheds no light on this matter. However, the Commission has made it clear beyond a doubt that it considers its decision on interim measures binding. In the case cited above concerning Ken Saro-Wiwa and others, the Commission observed that Nigeria was bound by article 1 of the African Charter and that one of the Commission's functions was to assist state parties to implement their obligations under the Charter.[27] In its reasoning the Commission found that the trial and implementation of the death sentence were in violation of the African Charter. Moreover:[28]

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22 Communications 137/94, 139/94, 154/96 & 161/97, (2000) 7 *International Human Rights Reports* 274.
23 As above, 285.
24 As above, paras 8, 19 & 21.
25 As above, paras 9–10.
26 As above, para 114.
27 As above, paras 113–114.
28 As above, para 103.

> [t]he violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any 'irreparable prejudice' to the subjects of the communications before the Commission had concluded its consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rules on provisional measures . . . and the Commission had hoped that a similar situation will obtain in the case of Ken Saro-Wiwa and others. It is a matter of deep regret that this did not happen.

The Commission therefore held that the Nigerian Government had, 'in ignoring its obligations to institute provisional measures', violated article 1 of the Charter.[29] The Commission added:[30]

> To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. *That it is a violation of the Charter is an understatement* (my emphasis).

The Commission's finding that its indication of interim measures is binding on a state party, wilful ignorance of which amounts to a violation of the Charter, must be welcomed as an extremely positive development.[31] It should strengthen considerably the Commission's protective mandate. Although the Commission has not provided a deeply reasoned justification for its determination, its conclusion, commensurate with the teleological method of interpretation appropriate to human rights treaties,[32] must be considered correct, if only on the utilitarian ground of seeking to ensure maximum protection for people at risk.

3 The African Court on Human and Peoples' Rights

It has been observed that the Commission was assigned the original role of safeguarding human rights under the Charter. However, the creation

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29 As above, 285.

30 As above, para 115.

31 It is interesting to note that in the case of *LaGrand* (*Germany v United States of America*), judgment of 27 June 2001, available at <http://www.cij-icj.org> (accessed 31 January 2002), the International Court of Justice held for the first time in its history that its orders on provisional measures of protection are binding.

32 *Wemhoff* v *Germany* Series A Vol. 7 (1968); *Compulsory Membership of Journalists Association Case* (1986) 25 *International Legal Materials* 123.

of an African Court on Human and Peoples' Rights[33] (the Court) with the specific task of reinforcing the role of the Commission[34] would appear to enhance in theory the prospects of promoting the protection of human rights in Africa. In the context of this paper, it is important to note that the Court is empowered under the Protocol to grant provisional measures. Thus, article 27(2) reads:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

We must await the Court's Rules of Procedure and the relevant jurisprudence to determine how the Court will exercise these powers.[35] However, the question arises whether the Court will exercise its power to indicate provisional measures only when it is seized of a case or whether it will follow the American pattern and consider adopting provisional measures at the request of the Commission even before a case has been submitted to it. In terms of enhancing the protection of human rights, the latter scenario seems preferable since provisional measures could be ordered with the full authority of the Court at an early stage of the proceedings. Another question concerns the Court's position on the measures adopted by the Commission, in particular, whether such measures will be deemed to remain in force or whether they will have to be reissued by the Court. On the nature of its provisional measures it is to be hoped that, in light of the Commission's stance on this issue and developments in other jurisdictions, they will be considered obligatory.

4 Conclusion

Since its foundation, a general air of pessimism has surrounded the Commission and its work. However, the time has arrived when this perception demands reappraisal since 'through its practice, evolving procedures, and jurisprudence' the Commission has been successfully addressing deficiencies in the Charter.[36]

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33 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the OAU Assembly of Heads of State and Government at its 34th ordinary session in Ouagadougou in 1998. For one of the draft protocols, see (1997) 9 *African Journal of International and Comparative Law* 953. For the final Protocol, see <http://www.up.ac.za/chr/ahrdb/ahrdb.html>. The Protocol requires 15 ratifications to enter into force. See art 34(3). At the time of writing, six states have ratified. For an analysis of the Protocol, see GJ Naldi & K Magliveras 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431.

34 Art 2 Protocol (n 33 above).

35 It would appear that these powers have been modelled on those of the Inter-American Court of Human Rights; Naldi & Magliveras (n 33 above) 451–2.

36 Odinkalu (n 7 above) 398.

Although the problems that still persist should not be minimised, we should welcome the fact that the Commission has taken concrete steps to improve the protection of human rights. The Commission has arguably been given a broader mandate to provide provisional measures of protection than comparable international human rights systems. Its approach to the provision of provisional measures seems to be developing in a confident manner that tolerates comparison with the practices of other international human rights organs.[37] An important consideration is the fact that the Commission's provision of provisional measures is binding on respondent states. The Commission appears to be taking seriously its mandate that state parties to the Charter be held accountable. Indeed, it has already been observed that the Commission's jurisprudence seems to be developing positively, particularly due to the fact that its decisions are considered as binding. The Charter's protective mandate is immeasurably strengthened thereby. It may be concluded that the Commission is making progress.

37 It should be observed that under arts 60 and 61 of the Charter (n 3 above), the Commission can draw inspiration from other international human rights instruments and general international law.

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A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child

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1 Introduction

The African Charter on the Rights and Welfare of the Child (African Children's Charter) was adopted by the 26th ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU Assembly) on 11 July 1990 in Addis Ababa, Ethiopia.[1] It entered into force on 29 November 1999, after 15 member states of the OAU had ratified it.[2]

The African Children's Charter is a 'self-standing' charter, which has evolved in distinct separation from the African Charter on Human and Peoples' Rights (African Charter). The African Children's Charter is not a supplement to the African Charter, neither is it institutionally linked to the African Charter. It is a document for the explicit protection of children

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1 CAB/LEG/153/Rev 2, reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38.

2 Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Eritrea, Guinea, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, South Africa, Togo, Uganda and Zimbabwe had all ratified the African Children's Charter. On the other hand, Algeria, Congo, Djibouti, Egypt, Gabon, Ghana, Liberia, Libya, Madagascar, Namibia, Rwanda, Sierra Leone, Somalia, Swaziland, Tanzania, Tunisia and Zambia had all signed the African Children's Charter, but were yet to ratify it. For a more detailed look at the status of ratification, see <www.up.ac.za/chr/ahrdb/statorat_14.html> (accessed 31 January 2002).

and their rights, of which the monitoring and enforcement lies in the hands of the African Committee of Experts on the Rights and Welfare of the Child (Committee).[3]

The Committee consists of 11 members of high moral standing, with competence in matters relating to the rights and welfare of the child,[4] who serve in their personal capacity.[5] The Committee is bound by its own Rules of Procedures,[6] and not those associated with the African Commission on Human and Peoples' Rights (African Commission). The Committee has a broad mandate. This mandate includes promotion and protection as well as monitoring the implementation of the rights enshrined in the African Children's Charter, the interpretation of the provisions of the Charter and, lastly, the performance of any other task entrusted to it by the OAU Assembly, the Secretary-General of the OAU or the United Nations (UN).[7] State parties to the African Children's Charter are required to submit their first reports on the measures they have adopted to implement the African Children's Charter to the Committee through the Secretary-General of the OAU by the end of 2001.[8] Thereafter, the state parties must submit a report every three years.

2 The need for an African Children's Charter

Children's rights are already protected in a number of international conventions.[9] However, these conventions only mention certain rights attributable to children and are primarily concerned with other areas of human rights. The UN Convention on the Rights of the Child (CRC) of 1990 is the first international instrument with a specific focus on the protection of the child as such, recognising children as human beings of equal value.[10] The rights prescribed therein are not collectively

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3 The Committee was formally established in July 2001 during the Assembly of Heads of State and Government of the OAU 74th Summit in Lusaka, Zambia.

4 Art 33(1) African Children's Charter.

5 Art 33(2) African Children's Charter.

6 The Rules of Procedure were to be determined during the Committee's first meeting. This was scheduled for 15 December 2001, yet did not take place. It was re-scheduled for January 2002, yet at the time of writing no meeting had taken place and no concrete date had been fixed.

7 Art 42 African Children's Charter.

8 Art 43 African Children's Charter: An initial report is due two years after entry into force of the African Children's Charter. No state reports had been submitted to the Committee by 11 February 2002.

9 For example the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

10 T Hammarberg 'The United Nations Convention on the Rights of the Child — And how to make it work' (1990) 12 *Human Rights Quarterly* 97 99.

contained in any other binding international instrument.[11] Prior to the CRC, the rights contained in general treaties applied in theory to both adults and children, but in practice children were often denied such rights.[12] The CRC is the most widely ratified international convention and is deemed to have become customary international law to which all states, whether they have ratified the CRC or not, will be required to adhere to by the international community.[13]

The African Charter provides that state parties shall ensure the protection of the rights of the child as stipulated in international declarations and conventions.[14] Thus, state parties to the African Charter have a duty to implement those conventions and declarations relating to the rights of the child.[15] Nevertheless, Africa has found it necessary to take the protection of children's rights further at the supra-national level, providing a voice for Africa's children. Africa has taken the lead in setting the standards for children's rights in a regional context.[16] The OAU is the first regional organisation to adopt a binding regional instrument concerned with children's rights,[17] offering human rights guarantees and safeguards for the child, thereby fulfilling its international obligations.

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11 Children's rights were contained in the Declaration on the Rights of the Child 1924 and 1959, but they were non-binding, and rarely incorporated into municipal law, thus the impact was rather limited and symbolic. The Declarations were aspirational and framed children's rights in broad terms. D Fottrell 'One step forward or two steps sideways? Assessing the first decade of the Children's Convention on the Rights of the Child' in D Fottrell (ed) *Revisiting children's rights. Ten years of the UN Convention on the Rights of the Child* (2000).

12 *Handyside v UK* ECHR (7 December 1976) Ser A 24; *Nielson v Denmark* ECHR (28 November 1988) Ser A 144. But compare the approach taken in the USA: *Tinker v Des Moines* 393 US 503 (1969). Fottrell (n 11 above).

13 This is contentious, yet through the application of the CRC at a domestic level and the jurisprudence that has emerged, the rights contained therein can now be considered norms of customary international law, such as those (comparable) rights in the Universal Declaration. See AS Wako 'Towards an African Charter on the Rights of the Child' in *The Rights of the child. Selected proceedings of a workshop on the draft convention on the rights of the child: An African perspective* Nairobi (1989) 41.

14 Art 18(3) African Charter.

15 Children's rights are different form adult rights, because they include protection, hence the need for a specific charter dealing with children's rights.

16 On the African Children's Charter as an African 'supplement' to the CRC, 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.

17 Despite an attempt to draft a 'European Convention for the Protection of the Rights of the Child.' This 'draft' was issued in January 1984 by the International Union for Child Welfare (IUCW). In 1979 the Assembly of the Council of Europe had proposed the creation of a European Convention on the Rights of the Child, but was not followed up by the Committee of Ministers. PE Veerman *The Rights of the Child and the Changing Image of Childhood* (1992) 270.

The UN General Assembly has affirmed the value of regional agreements to promote and protect human rights, as regional treaties are best placed to consider and resolve their own human rights situations, whilst upholding cultures, traditions and histories unique to the region.[18] The African Children's Charter was also necessary as each region has its own unique human rights problems or priorities that it wishes to address, often difficult to tackle in international agreements due to the background disparities of each state. For example, the right of children to know of their exact origins, if conceived through in vitro fertilisation, is of less importance in Africa than in Europe. Africa may be more concerned with a provision for the protection of the child against regimes practising discrimination and for the prohibition of negative and prejudicial regional cultural practices, and this is exactly what the African Children's Charter has achieved.[19]

A further justification for the development of a regional children's rights charter in Africa is the special difficulties of securing these rights in 'severely depressed economic situations'.[20] The African Children's Charter has made 'important progress by not including a provision similar to article 4 of the CRC, which jeopardises the implementation of all economic, social and cultural rights', by providing that '[s]tates shall take implementation measures ''to the maximum extent of their available resources'' '.[21]

The African Children's Charter offers a higher level of protection than that offered by the CRC, which is often criticised as having a Western

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18 Wako (n 13 above); Viljoen (n 16 above) 205. For example, see GA/SHC.362, <www.un.org> (accessed 31 January 2002).

19 Art 26 African Children's Charter — Protection against Apartheid and Discrimination. The CRC does not include such a provision, as apartheid was a problem specific to Africa and of no concern to other regions. Art 21 African Children's Charter — Protection against Harmful and Social and Cultural Practices, which similarly is region specific and could not be agreed upon during the drafting process of the CRC. Although the significance of these provisions is somewhat marred by art 1(3): 'Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be *discouraged*' (my emphasis). States only have the obligation to discourage inconsistent cultural practices.

20 As referred to by J Essombe, Legal Advisor for the African Commission at the African Contexts of Children's Rights Seminar in Harare in January 1998, Ngone Diop Tine & Judith Enew in 'The African Contexts of Children's Rights Seminar Report', at <www.childwatch.uio.no/cwi/projects/indicators/contexts1.html> (accessed 31 January 2002).

21 There is still little debate amongst economists about the precise effects on children of economic policies, including structural adjustment and national development plans. It is insufficient to grant children rights with little means of implementation, states need to be prepared to effectively implement such rights. 'The Children's Budget' in South Africa examines the extent to which the government is prioritising children in policy planning and budget allocation. For a detailed discussion see 'The African Contexts of Children's Rights Seminar Report' (n 20 above).

bias.[22] The Preamble to the African Children's Charter not only outlines the background to the adoption of the Charter, but also refers to previous human rights instruments relevant to children adopted by the OAU and the UN. It stresses the cultural context in familiar African regional conventional language, reflecting the spirit of traditional cultural values. Further, the Preamble acknowledges the critical situation children find themselves in due to socio-economic, cultural and developmental circumstances, armed conflicts, and exploitation, among others. The Preamble further acknowledges the notion that the promotion and protection of rights and welfare of the child implies the performance of duties on the part of everyone, reiterating the significance of the group in Africa.

The African Children's Charter puts children's rights legally and culturally into perspective. In order for the African Children's Charter to have significance for children's rights in Africa and effectively change children's lives, people and the governments collectively need to believe in and accept children's rights as *legal* rights and recognise binding duties on them. Nevertheless, the African Children's Charter is a key source of inspiration for African member states and is a collective recognition of the rights and welfare of African children and establishes a legal framework for their protection.

The law appears to be neutral with regard to children. Yet, in reality, it embraces predominantly the language and thought processes of adults, highlighting children's lack of power under the law and contributing to their traditionally perceived vulnerability. There is a continuing need for children to be given a 'voice', by way of a constitutional order or legislative provision.[23] The way has been somewhat pathed by South Africa and the invocation of a 'children's charter', which was created predominantly by children, and which thus no longer can be criticised as solely the thought process of adults.[24] Children drafted the charter, sat at all the meetings of ministers and provided numerous resolutions. One of the demands was that children be represented within the government, by peers, not adults, as children have the right to participate in and be consulted with about government.[25] Other countries may wish

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22 African involvement in the drafting process of the CRC was limited. Only three African states participated for five of the nine years that the working group took to draft the final proposal. See Viljoen (n 16 above) 200.

23 For example 'The Declaration of the Rights of Mozambican Children' (1979).

24 This was launched on 1 June 1992 at the Children's Summit of South Africa, as a follow-up to the Harare Conference on Children and contains 50 rights. See M King 'Against children's rights' (1996) *Acta Juridica* 28 and 'South African children speak out' (1993) 1 *The International Journal of Children's Rights* 71.

25 The rights contained were taken into account when the 1996 Constitution was drafted, following the period of apartheid. 'South African children speak out' (n 24 above).

to follow in the footsteps of South Africa by giving children a voice in a similar fashion.

The African Children's Charter may be criticised in so far as it did not allow in its drafting process for children to make their opinions clear and voice what would be in their best interests. Yet by looking at the CRC and the time taken to adopt its provisions by adults, it could be held that a regional protection instrument would never have been enacted, let alone ratified, if children had been given a predominant role in its drafting process, particularly as there is a general cultural regard for children as their parents' 'property'.[26] Such an assertion runs counter to the Preamble, which states that a 'child occupies a unique and privileged position in African society'. The African Children's Charter discourages traditional or cultural views that may be inconsistent with the spirit and the provisions of the Charter. This is nevertheless a modernised view of Africa and an aspirational standard. At the time of drafting the treaty, many of the traditional and cultural views, such as the regard for children as property, were still valued. Thus, a treaty drafted mainly by minors would not have gained credibility, and may have prevented ratification.

What is yet to be seen is how individual states will implement the African Children's Charter. One of the most contentious areas of international children's rights is the issue of consent. The rights of children to consent or withhold their consent to issues concerning them have not been traditionally encompassed in the image of childhood. In some communities the right to consent distinguishes childhood from adulthood. The right to consent is a civil right derived in international law from at least two rights: the right to have respect for privacy[27] and the right to freedom of expression.[28] These rights are to be interpreted within the framework of the African Children's Charter's principles: the evolving capacity of the child, the best interests of the child[29] and the

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26 'Children should not be regarded as property. Traditionally, this has been the case. In most areas the economic value of bride betrothals varied according to the beauty, education and social status of the girl. Elsewhere, concepts of parental ''rights'' have been replaced by the notion of parental ''responsibility''. But in Malawi the child either belongs to the father's side or the mother's side according to tradition.' Kamchedzera, Garton & Sandifolo 'The rights of the child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country' (1991) 5 *International Journal of Law and the Family* 241 246. 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; 'The doctrine of parental authority over children is strongly present in contemporary Africa, and children are often perceived as the property of their parents or legal guardians.': KCJM Arts 'The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 *African Journal of International and Comparative Law* 139 158.

27 Art 10 African Children's Charter.

28 Art 7 African Children's Charter.

29 Art 4 African Children's Charter.

principle of non-discrimination.[30] Given that the notion of consent by a child in Africa seems to run counter to the child's duties to 'respect his parents and elders at all times',[31] it would be interesting to see how African countries give effect to the provisions of the African Children's Charter as they relate to the issue of consent.

The most important element of human rights law relating to children is that children's best interests are given paramount consideration.[32] Article 4(1) of the African Children's Charter states that the best interests of the child are *the* primary consideration, providing for the higher standard[33] contained in the Declaration of the Rights of the Child 1959.[34] The difference in using the definite article instead of the indefinite may seem a pedantic assertion, yet it has significant practical ramifications. The lower standard in the CRC has been interpreted as a procedural fairness requirement; judges and others must 'consider' what is in the child's best interest, but the decision may not reflect these interests.[35] The principle of 'in the child's best interests', despite being a fundamental principle in international law,[36] is nonetheless vague and allows for primacy of whatever cultural norms on upbringing happen to be current.

The principle is worded in relative terms, enabling conflicting rules to be ranked. Some Africanists deem recruitment of child soldiers as a legitimate cultural tradition.[37] Yet, whenever the right to preserve a culture conflicts with a child's best interest, the latter must prevail. Article 21 of the African Children's Charter highlights this by prohibiting practices that might be prejudicial to a child's health or life. The well-being and safety of children are of overriding importance, and group rights to culture are relatively weaker and subordinate to other human rights.

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30 Art 3 African Children's Charter.

31 Art 31 African Children's Charter.

32 Art 3(1) CRC: 'The best interests of the child are to be given *a* primary consideration.'

33 See Viljoen (n 16 above) 208; J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11 *South African Journal on Human Rights* 401 404.

34 Fortunately, art 4(1) has a stricter definition than that contained in the CRC, namely 'a primary consideration'. For a more detailed discussion on the best interests principle, see G Van Bueren 'A new children's treaty' (1991) 8 Special Issue *International Children's Rights Monitor* 20 21.

35 J Todres 'Emerging limitations on the rights of the child: The United Nations Convention on the Rights and Welfare of the Child and its early case law' (1998) 30 *Columbia Human Rights Law Review* 159–200 176. See *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALR 517 (Austl.); *Schier v Removal Review Authority* [1998] NZAR 230 (NZ) both at 177.

36 G Van Bueren 'Children's rights: Balancing traditional values and cultural plurality' in G Douglas & L Sebba (eds) *Children's rights and traditional values* (1998) 15.

37 See TW Bennett *Using children in armed conflict: A legitimate African tradition?* Institute for Security Studies Monograph Series No 32 (1998) 1.

State parties to the African Children's Charter are obliged to consider what is in the child's best interests, and due caution must be asserted regarding the disparity of this principle in domestic law, and regard the assessment of this principle as the overriding consideration. The possible effects of this principle are far-reaching in Africa, the effectiveness of which may be hindered by domestic interpretation.[38] The area of family law tests how realistic the African Children's Charter's philosophy really is. The doctrine of parental autonomy and children as their parents' property can be regarded as a core value of Africa's cultural heritage.[39] Therefore, it is difficult to foresee how effect can be given to specific rights guaranteed by the Charter, while at the same time consider the best interests of the child of the primary importance.

Article 1(3) could, theoretically, be invoked and one could view the doctrine of parental autonomy as an inconsistent tradition or custom.[40] However, the general legal position in modern African states modifies the doctrine of absolute parental rights with the notion of the best interests of the child. At present it can be noted that the general legal position appears to be in harmony with the philosophy of the Charter, while the customary law practice is not and reflects a normative disparity both with the Charter and general law.[41] No matter how much emphasis is given to the importance of family law in traditional African systems, it would be insufficient. The family unit is crucial in traditional customary family law and is the best developed.[42]

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38 The nature of domestic interpretation of international obligations is discussed in detail in AO Adede 'Constitutionalism, culture and tradition: African experiences on the incorporation of treaties into domestic law' (1999) 7 *African Yearbook of International Law* 239; G Carpenter 'Constitutional interpretation in Bophutswana — Still no joy' (1990/1991) 16 *South African Yearbook of International Law* 143; AW Chanda 'Gaps in the law and policy in the implementation of the Convention on the Rights of the Child in Zambia' (2000) 32 *Zambia Law Journal* 1; EVO Dankwa 'Implementation of international human rights instruments: Ghana as an illustration' (1991) *African Society of Comparative and International Law Proceedings* 57; GM Erasmus 'The Namibian Constitution and the application of international law' (1989/90) 15 *South African Yearbook of International Law* 81; PF Gonidec 'The relationship of international law and national law in Africa' (1998) 10 *African Journal of International and Comparative Law* 244; JH Jackson 'Status of treaties in domestic legal systems: A policy analysis' (1992) 86 *American Journal of International Law* 310; G Kasozi 'Domestic implementation of human rights standards in Lesotho' (1993–1994) *The Lesotho Law Reports and Legal Bulletin* 523; T Maluwa 'The incorporation of international law, and its interpretational role in municipal legal systems in Africa: An exploratory survey (1998) 23 *South African Yearbook of International Law* 45; OB Tshosa, 'Giving effect to treaties in the domestic law of Botswana: Modern judicial practice' (1997) 10 *Lesotho Law Journal* 205.

39 Thompson (n 26 above).

40 Nevertheless art 1(3) only 'discourages'; it does not prohibit such practices.

41 Thompson (n 26 above).

42 RT Nhlapo 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of Law and Family* 1.

The basic principles of the best interests of the child are: All rights apply to all children without exception; every child has an inherent right to life and the state has the obligation to ensure the child's survival and development; all actions concerning the child should take full account of her best interests and the child has the right to express her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.[43] States' municipal legislation needs to be examined in order to see how far this principle is upheld domestically. The general answer is that states do not incorporate the requisite standard as provided for by the African Children's Charter. For example, the Zambian Bill of Rights guarantees to everyone, including children, the right to life and freedom from discrimination. These provisions do not go far enough, as they do not offer the level of protection nor the promotion of children's rights as envisaged under the Charter.[44]

The African Children's Charter prides itself on its African perspective on rights, yet was inspired by the trends evident in the UN system. The UN system bases itself on the 'rights of the child' and the 'best interests', with a brief mention of the community and the extended family in article 5 of the CRC. Although the African tradition predominantly bases itself on the welfare of the extended family, the strict standards applied in the African Children's Charter reflect the modernisation of Africa.[45] It can be asserted that the required number of African states have ratified the Charter in order for it to come into force. Thus, the best interests principle cannot be so far removed from African ideology, especially if Africa wants to keep progressing in the realm of human rights protection.[46] This principle is to be invoked as an interpretative aid when invoking other provisions of the African Children's Charter. The principle is also flexible, as shown by the interpretation of the principle in Zimbabwe. Different results can be produced, depending on the construction used. Whether this is legal, political, cultural or material, it will shape the resulting determination. For example, if a cultural construction is employed in Zimbabwe, the custody of the child rests with the family and not with the individual.[47]

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43 Chanda (n 38 above).

44 As above.

45 As opposed to 'westernisation'.

46 Despite the standard of the best interests being the primary consideration being in conformity with the general domestic law, customary law often does not. For example, in Sierra Leone, under customary law the father is entitled to custody of the child upon divorce. Neither fault nor welfare of the child is a decisive consideration. Many African countries still make a distinction between children born in and out of wedlock — which is contrary to art 3 the African Children's Charter on Non-Discrimination, and the prohibition on child betrothals will clash with both the best interests principle and art 21(2) of the African Children's Charter. See Arts (n 26 above) 158.

47 Todres (n 35 above).

Article 2 of the African Children's Charter is one of the most important provisions, as a children's charter defining those who fall within its ambit is of fundamental importance.[48] Nevertheless, defining age has many cultural implications and the definition of childhood and of a child is culture-specific.[49] The African Children's Charter offers wider protection of young people than the global standard established in the CRC.[50] It states unequivocally that a child is every human being below the age of 18. There are no conditions such as the suspension of this right if the child participates in armed conflict. Thankfully, the drafters of the African Children's Charter have had the foresight to set a strict definition, without exceptions.

The African Children's Charter has established in clear and unambiguous terms when a child is a child. It is now in the hands of the member states to ensure that this clear definition is mirrored in domestic law, otherwise it will be impossible to enforce the right contained in the African Children's Charter. Nevertheless, there are grass root problems relating to birth registration, and due to the current socio-economic situation children are taking on roles and responsibilities previously assumed by adults. Thus, defining children by chronological age may not provide a realistic and practical solution to child abuse and exploitation. The African Children's Charter is silent on the need to implement effective birth registration across the continent. Articles 6(2) and (4) of the African Children's Charter state that every child shall be registered immediately after birth in order to acquire a name and nationality. It fails to accord importance to birth registration for the reason of denoting chronological age and the fundamental issue of childhood.

During the drafting process of the CRC, 'children and armed conflicts' was the most disputed issue.[51] Article 38 was the result, and has provoked much criticism, mainly due to the fact that it allows the recruitment of children as young as 15 into armed groupings. The Charter provides for a higher level of protection for child soldiers. In article 22, states are under the obligation to ensure no child participates directly in hostilities and to refrain from recruiting any child. This provision should be read in the light of article 2, resulting in no under 18 year-olds being recruited. The message is loud and clear — it is not in the best interests of the child to fight.[52]

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48 Despite the importance of this provision, it has been defined in vague terms and only one sentence was used to define 'child'.

49 With reference to age sets; chronological age amongst other ways of defining age and 'childhood'.

50 The CRC defines a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'.

51 Arts (n 26 above).

52 Van Bueren (n 34 above).

Article 22 also refers to international humanitarian law whereby it is asserted that obligations to protect the civilian population and the protection and care of children affected by armed conflicts shall also apply to internal conflicts.[53] Perhaps the most substantive omission in the Charter is the fact that, unlike the CRC,[54] it fails to promote[55] the physical and psychological recovery and social reintegration of a child victim. Article 23[56] is another innovative provision, furthering protection to not only refugees, but also including internally displaced persons, showing a great sense of realism about the intricacies of such a problem in Africa.

The African Children's Charter's definition of the child's right to life, the one fundamental right from which all others flow, goes further than the international standard.[57] Stating the obligation to provide the necessities for survival to those who lack the means of subsistence: 'State parties shall ensure to the maximum extent possible the survival and development of the child'[58] is a positive development.

It cannot be doubted that the African Children's Charter is a progressive development in the legal evolution of human rights protection within Africa. It stipulates a comprehensive set of children's rights and confirms or strengthens the global standards contained in the CRC. Article 1(2) states that the Charter shall not affect provisions of municipal law or any other international conventions in force in the state concerned if they are more conducive to the realisation of children's rights. Thus, the Charter is the bare minimum that will be tolerated and provisions in municipal law or international treaties that are not in conformity with standards in the African Children's Charter will only prevail if they are *more conclusive* to the realisation of children's rights, and obviously where the African Children's Charter contains stricter provisions, such as the recruitment of child soldiers,[59] child betrothals,[60] other harmful and cultural practices[61] and child refugees,[62] the stricter provisions prevail. The African Children's Charter could be seen as an overriding *lex specialis*.[63]

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53 As codified in Additional Protocol II to the Geneva Convention, regulating the protection of victims of non-international armed conflicts.

54 Art 39 CRC.

55 It should also be noted that the obligation to *promote* is a weak obligation in itself.

56 Referring to refugee children.

57 The right to life was the right not to have your life taken away except by due process of law.

58 Art 5 African Children's Charter.

59 Art 22 African Children's Charter.

60 Art 21(2) African Children's Charter.

61 Art 21(1) African Children's Charter.

62 Art 23 African Children's Charter. Providing a more exhaustive right for African children, as it includes internally displaced children, unlike the CRC.

63 Arts (n 26 above) 154.

The African Children's Charter protects children against harmful social and cultural practices in article 21, despite the recognised importance of cultural heritage and the values of African civilisation in the Preamble, albeit imposing only a rather weak obligation. Although the Charter has regard for the cultural context of Africa, it does in parts differ greatly from the standards recognised and applied in African countries. One of the areas the Charter could have a significant evolutionary impact on state practice is in the area of family law.

The rights of children born out of wedlock also have the potential to develop within the auspices of family law,[64] especially important as several African countries still make a distinction between legitimate and illegitimate children. However, the ban on child marriages will continue to clash with various cultural traditions. Thus, the practical implementation of the African Children's Charter could be marred by the disparities between customs and the African Children's Charter.

However, the African Children's Charter achieves the optimal situation for Africa, improving the status of children and furthering their rights, not merely restating their existing rights, nor maintaining that the cultural practices performed are all in the best interests. It has regard and respect for cultural practices, and those most likely to conflict with the Charter are contentious[65] and their validity highly disputed.[66] Thus, reform in this area of African culture and custom needs to be addressed, which is precisely why the African Children's Charter prevents cultural practices which may be harmful or prejudicial to a child's health and bans other practices such as child marriages.

It is hoped that, unlike the African Charter, the African Children's Charter will not be regarded as *lex imperfecta* and *lex simulata*.[67] Africa, and in particular the OAU and the OAU Assembly, genuinely wishes to enhance the African child's life, as opposed to merely responding to moral demands that something must be done about human rights violations in Africa, through the adoption of the African Children's Charter. This view contrasts with the assertion that it is a conscious enactment by politicians in response to 'an aggravated crisis of confidence in a way, which seeks to reinforce belief in the legal-political system, but with a built-in planned efficiency'.[68] The following discussion

64 Girls are often sexually abused in times of conflict, thus resulting in unwanted pregnancies and more to the point: children born out of wedlock.

65 Both within Africa and globally.

66 Such as female infibulation and child betrothals.

67 P Takirambudde 'Six years of the African Charter on Human and Peoples' Rights: An assessment' (1991) 7 (2) *Lesotho Law Journal* 35–67.

68 As above. It is asserted by Takirambudde that the ineffectiveness of the African Charter is not accidental. He expresses the view that given the origins, record and history of the OAU in general, the nature and character must have been conscious, deliberate and planned.

of the enforcement mechanisms will show that the African Children's Charter is not *lex imperfecta*, thus not taking the form of law backed by an inadequate enforcement system staffed with incompetents.

The success of the Charter now lies in the hands of the OAU member states and their commitment to ensure respect for children's rights in practice, and the efficiency and effectiveness of the Committee. The advancement of children's rights in Africa will depend to a large extent on state practice, the practice in particular of the Committee and of the OAU Assembly. Jurisprudence that suits best the needs of Africa and African children will emerge gradually within municipal courts.

3 The Committee on the Rights and Welfare of the Child

The African Committee has the potential to break new ground through its jurisdiction to receive and hear communications from state parties, from NGOs and from children[69] and adults within the jurisdiction of the OAU member states regarding any matter contained in the African Children's Charter, including violations of a child's economic, social and cultural rights.[70] This challenges the assumption held at the time of drafting the CRC, that a treaty on children's rights was not a suitable instrument for a complaints mechanism.[71] The reasons for this were that it would harm the co-operation for implementing the rights of the child and that economic, social and cultural rights are unsuitable for litigation.[72] Children under the African Children's Charter are not solely reliant on the legal infrastructure and political goodwill of states to act on their behalf.

Part Two of the African Children's Charter prescribes mechanisms for the protection and enforcement of children's rights. The mandate of the African Committee is defined more precisely than the mandate of the UN Committee on the Rights of the Child (CRC Committee). Article 42 of the Charter states the Committee has a 'promote and protect' function. The Committee is mandated to collect and document information, to commission interdisciplinary assessments of situations on African problems in the children's rights sphere, to organise meetings, to encourage

69 'Children within the jurisdiction of these mechanisms can litigate their rights before these regional bodies and those who are not can bring complaints under universal human rights treaties, such as the ICCPR, which allow for individual petition.' Fottrell (n 11 above) 8.

70 By virtue of art 44 of the African Children's Charter. This is a huge step forward for a communication's procedure, thus enabling individual persons, NGOs recognised by the OAU, member states or the UN, to send communications relating to a violation of the rights protected in the Charter, this was not able to be achieved by the UN.

71 Van Bueren (n 34 above) 22.

72 Ideas taken from Van Bueren as above.

national and local institutions concerned with the rights and welfare of the child, and to give its views and make recommendations to governments where necessary.[73] Most of these powers are not conferred on the CRC Committee.[74] Thus, the African Children's Charter has provided a progressive and action-orientated enforcement mechanism. The African Committee also has authority to formulate and lay down principles aimed at protecting children's rights in Africa and on request from state parties, and institutions of the OAU, can interpret the Charter's provisions.[75] The Committee has further been charged with the task of monitoring the implementation of the Charter and of ensuring that the enshrined rights are protected. The CRC Committee can only examine progress made by state parties in implementing the CRC.

3.1 Monitoring mechanism

What monitoring is and how it will work provide an important test of the willingness of state parties to take seriously the issue of respect for children and their rights.[76] A monitoring mechanism should primarily be an authentic voice of the children, not merely a voice speaking up for children. This should be the guiding fundamental principle of any monitoring mechanism for the fulfilment of children's rights.[77] Children are a part of society as much as any other group, yet a child is almost always seen as someone who is 'on the way to' integration in society: the society of adults. This is no less true in Africa, where children are often regarded as inferior and as property. For the monitoring mechanism established by the Committee under the African Children's Charter to be effective, children need to be regarded as having valid views and certain 'powers'. Adults and children may have different social roles, therefore it is likely that they would still have different group views, even if the difference in power between them disappeared. Even though the concepts and views of children would be different from those of adults, they should no longer to be considered as subservient.[78]

The shorter reporting period of three years should lessen the risk of losing momentum and commitment to increasing the protection of the

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73 Art 42 African Children's Charter.

74 For example, the UN Committee has not been given the separate task of collecting information and relies completely on the General Assembly for the undertaking of studies. Art 45(d) CRC.

75 The UN Committee was not given this task, but can express its views as regards the interpretation of the CRC.

76 E Verhellen 'The search for the Achilles heel: Monitoring of the UN Convention on the Rights of the Child and its implications for the states parties' in E Verhellen & F Speisschaert (eds) *Children's rights: Monitoring issues* (1994) 3.

77 M Flekkoy 'Monitoring implementation of the UN Convention on the national level' (1993) 1 *International Journal of Children's Rights* 233.

78 Such a line of reasoning is discussed in Verhellen (n 76 above).

rights of the child.[79] States bound by both the African Children's Charter and the CRC should not find the double reporting obligation to two different monitoring bodies an extra burden, as the reports to the African Children's Charter could be utilised as a basis for those to the CRC and the other way round.[80] The states' country reports allow the Committee to monitor how the state parties have implemented the provisions and spirit of the Charter into municipal law.[81] Yet how and by whom will the report be written? The problem of being both judge and jury arises. Both generations[82] of human rights are provided for in the African Children's Charter and there is a mixture of both roles, making monitoring more complex, highlighting the importance of identifying the judge and jury phenomenon, which is not immediately apparent.[83] It is not particularly difficult to imagine what would happen if states write their own reports.

The form and content of the reports should have to meet minimum quality requirements, which could be attained if the Charter provided for a committee in every state party, allowing the Committee to function independently.[84] However, there is no such provision and the independence of the Committee can be criticised. Any monitoring mechanism should be independent in relation to political administration, legislature and political organs, disallowing manipulation by governments or political parties. Governmental officials should not be able to intervene in its functioning and should be able to respond honestly to individuals seeking help. In short, the Committee should be able to observe and if necessary criticise government and the legislature without fear of reprisal. However, article 32 of the African Children's Charter expressly stipulates that 'the Committee shall be established within the OAU', leaving the power to make decisions with the OAU Assembly. As a result, the African Children's Charter not only leaves to its major political arm any possible implementation of steps, but also seems to prevent the Committee from taking steps that might be trenchant. This subordination of the Committee to the OAU generates scepticism about its impartiality and credibility. Also states' reports are

79 But is this realistic? The African Charter has encountered problems adhering to the submission of reports every two years.

80 Van Bueren (n 34 above).

81 See also Kasozi (n 38 above).

82 Referring to civil and political rights, often considered as first generation rights and economic, social and political rights, often referred to as second generation rights.

83 Verhellen (n 76 above).

84 Lesotho should be regarded as a role model in this area. Lesotho has provided national machinery to oversee implementation of international human rights instruments. The Ministry of Justice and Human Rights (MJHR) ensures the effective promotion of and protection of human rights. However, it must be borne in mind that the MJHR is not completely independent of all political control, considering it is the line Ministry with prime responsibility as the operational arm of government in the Justice sector. See Kasozi (n 38 above) 527.

sent through the Secretary-General of the OAU to the Committee,[85] which could also affect its independence.

It is still to be seen if the Committee will effectively promote and protect children's rights in Africa. If it is to be successful this monitoring system should transmit information to children and make the needs of children publicly known. The Committee should also impart information to children,[86] making sure that children are aware of the African Children's Charter and its relevance to their daily lives.[87] The Committee should also be accessible to everyone, especially children.

The African Children's Charter does not make any provision for resources for the Committee. For the Committee to function properly it must be provided with the necessary tools, in terms of authority, and material and financial resources. With regards to authority, the Committee lacks power to impose any form of sanctions and its decisions are non-binding on the parties. The Committee can merely make recommendations, which are submitted to the OAU Assembly, but the African Children's Charter fails to state what the Assembly should do with them.[88] In theory, the Committee should be provided with an adequate budget to enable it to maintain an efficient secretariat and to finance its activities. Whether this will be the case is yet to be seen. Nevertheless, with reference to the African Commission, this is doubtful in practice. According to Kisanga, financial constraint is the most serious problem encountered by the Commission in carrying out its functions.[89]

Finally, the confidentiality afforded to communications under article 44(2) of the African Children's Charter has the negative effect of providing the Committee with a shield to hide behind when considering human rights violations, rather than exposing them.

3.2 Enforcement mechanism

The affirmation of rights should be accompanied with a clear, unambiguous mode of enforcement, otherwise the granted rights are valueless.[90] In short, a law without a mechanism for effective enforcement is not worth the paper it is written on.[91] Only time will tell if the 'aspirations'

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85 Art 43(1) African Children's Charter.

86 Which should be available in all relevant languages.

87 See Flekkoy (n 77 above).

88 By analogy, see RH Kisanga 'Fundamental rights and freedoms in Africa: The work of the African Commission on Human and Peoples' Rights' in CM Peter & I Juma (eds) *Fundamental rights and freedoms in Tanzania* (1998) 225.

89 As above.

90 See CM Peter 'The enforcement of fundamental rights and freedoms in Tanzania: Matching theory and practice' & CM Peter 'Enforcement of fundamental rights and freedoms: The case of Tanzania' both in Peter & Juma (n 88 above) 47 & 81 respectively.

91 In Tanzanian history throughout post independence indicates the existence of a government with no intention of promoting or protecting fundamental rights.

in the African Children's Charter will be effective, or merely a sign of good will, showing presumptive evidence of Africa's adherence to and promotion of children's rights. By referring to the African Charter's enforcement machinery, it may be possible to estimate how effective the enforcement of children's rights will be.

The African Children's Charter is a less restrictive and a more accessible instrument to the peoples of Africa, because the Committee is expressly mandated to receive and consider communications from state parties directed against other state parties, and uniquely, to consider individual petitions, communications from NGOs on behalf of individuals and other institutions or organisations recognised by the OAU and the UN members.[92] In this respect, the African Children's Charter goes further than the African Charter and the CRC. The African Children's Charter is very vague and somewhat ambiguous with regard to the right to individual petition. It does provide for an explicit right for individuals, but does not qualify a specific interest requirement.[93] It states that 'the Committee may receive communication, from any person, group . . . relating to any matter covered by this Charter'. Is this intended to make the Charter accessible to all or is it shrewd ambiguity, allowing for a 'colourful' interpretation?[94] The terminology 'may' is permissive and could be open to abuse. To employ the word 'must' would have been unambiguous, providing for all communications to be considered, regardless of content.[95] To prevent this from being over-burdensome, a filter mechanism is required, as with all legal mechanisms for the redress of grievances.

Despite the explicit, if somewhat ambiguous right of individuals to lodge communications under the African Children's Charter, it is primarily a paper right and one that is largely unenforceable given the socio-economic conditions of Africa. The majority of Africans, particularly those in the rural areas, are largely ignorant of the existence of the Charter.[96] This is not a fault of the Charter, but significantly due to the high percentage of illiteracy that exists among the populace.[97] In practice, granted rights are often violated with impunity because unaware of such

92 Art 44(1) African Children's Charter.

93 The requirement to be a victim or have an interest in the matter forms an integral part of the right of individuals to lodge communications under other regional and international systems, such as art 25 of the European Convention and art 44 of the American Convention.

94 However, the Committee is likely to favour a purposive interpretation.

95 On the negative side, allowing all communications could in effect provide so much work as to result in backlog and communications never or at least not promptly being considered.

96 This could be due to the fact that the instrument is so new, yet such ignorance and unawareness still exits with the African Charter. See Kisanga (n 88 above).

97 For example in Malawi, literacy is at 41%. See Kamachedzera (n 26 above).

rights, people are unable to take steps to demand them. Thus, communications do not reach the Committee and in return the effectiveness of the Committee is reduced. The peoples of Africa also do not generally possess the financial capability to institute proceedings to enforce their rights. It could be argued that children's rights are irrelevant in poor countries, as they depend on material conditions for their realisation. Nevertheless, it would be erroneous to suppose that children's rights can only be realised in favourable material conditions. Some rights can be achieved irrespective of wealth.[98] It would seem that in this regard the enforcement mechanism is forward-thinking only in writing. If its intentions were genuine, why does the Charter fail to make any provision for legal aid to poor litigants? Such a provision would have made the rights 'real and effective'.[99] With reference to the African Charter, the complaints procedure is further weakened by the potential delay of processing a communication. The African Charter is the mother-charter to the African Children's Charter, therefore it is likely that the precedents laid by the African Charter will be followed by the African Children's Charter and such delays will be part of the procedure.[100]

Solace may be found when remembering that the implementation provisions in the African Children's Charter are much stronger than those contained in the African Charter. The Committee may feel obliged to act promptly and make their own precedents when dealing with communications, particularly as they will regard children. The Committee must do all in its power to protect children's rights and their vulnerability. Despite the fact that these communications are to be treated in confidence and only lead to a biannual report to the Assembly, the African Children's Charter represents a significant advance in the potential enforcement of children's rights, utilising the far reaching mandate to 'resort to any appropriate method of investigation'.[101]

Another problem with the individual's right to enforce rights through the Committee is due to the fact that it is 'so embryonic that we are basically looking at a blank slate'.[102] Whether this enforcement mechanism is *lex imperfecta* or *simulata* or indeed intended to be effective in practice, can only be adequately assessed when the African Children's Charter and the Committee have had time to find their feet, make the provisions publicly known and apply the provisions. Loopholes in any

98 For a more detailed discussion, see Kamachedzera (n 26 above) 245.

99 For example, the European Convention of Human Rights provides in art 6 (fair trial) for a claimant to receive legal aid, particularly in relation to civil claims, in order to make the rights contained 'real and effective'. See *Human rights: Children's hearing system: Legal Aid* (2001) *Public Law* 613.

100 From 1987 to 1998 the Commission has only heard and concluded nine complaints out of over 100 complaints sent to it.

101 Art 45(1) African Children's Charter.

102 According to Posner in Takirambudde (n 67 above) 59.

law are difficult to detect without the application of the law in practice over a fairly lengthy period.

In theory, the African Children's Charter is a stronger instrument than its mother-charter and has the prospect to enhance children's rights in Africa and provide effective monitoring and enforcement mechanisms. As stated previously, it is too early to detail the effects in practice but it is hoped it will have a more influential and successful impact than the African Charter. However, if the practice of the African Charter is anything to go by, the enforcement mechanisms will be problematic and the Committee is likely to have a slow start in terms of having a significant impact on the promotion and protection of children's rights.[103] The regime dedicated to children will be weak, growth will be slow and the Committee, in the absence of a court with compulsory jurisdiction, is a body for weaker monitoring procedures, policy co-ordination and rudimentary forms of information exchange.[104]

A common problem encountered in the implementation of international law in a municipal state is the fact that treaties, even though they have been ratified, could not be applied domestically, because they had not been integrated into the national legal systems.[105] Such a failure to incorporate treaties into municipal legislation could be due to the dualist approach taken by the state, or due to an absence of clear constitutional provisions. Such *lacunae* in constitutional norms can be highlighted with reference to Zambia,[106] Kenya[107] and Ethiopia.[108] Kenya and Zambia and those states with similar constitutions are completely silent about the implementation of treaties and their relation to

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103 See F Viljoen and C Heyns 'An overview of international human rights protection in Africa' (1999) 15 *South African Journal on Human Rights* 421. By the end of 1996, the African Commission had only finalised 72 cases. Of these, 50 were declared inadmissible, five were withdrawn and five were settled amicably.

104 See Takirambudde (n 67 above).

105 A series of workshops on the problem of 'Implementation of treaty-based rights of women and children in Eastern and Southern Africa', May–September 1999, were carried out and principally focused on CEDAW and CRC. Adede (n 38 above) 239.

106 'This Constitution is the Supreme Law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void' (art 1(3) of the Constitution).

107 'This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void' (sec 3 of the Constitution).

108 '1. The Constitution is the Supreme Law of the Land. Any law, customary practice, an act of an agency of government or official that contravenes the Constitution is invalid. 2. All citizens, governmental bodies, political parties and other associations and their officials are bound by this Constitution. They also have the duty to ensure its observance. 3. No one can assume or exercise the powers of government except in accordance with the provisions of this Constitution. 4. All international agreements ratified by Ethiopia are an integral part of the country' (art 9 of the Constitution).

the supreme law of the land and other municipal laws. Kenya does not even refer to the supremacy of the Constitution itself. Ethiopia, as a minimum, attempts to inform citizens that ratified treaties form an integral part of the municipal law.[109] Yet the question of how treaties can be incorporated into municipal law is not addressed.

Constitutional clauses ensure certainty, uniformity and predictability between international law and municipal law. It also gives courts a tool to enrich national law with international standards.[110] Article 1 of the African Children's Charter sets out the basic obligations of the state parties to 'recognise' and take 'necessary steps, in accordance with their constitutional processes' and to 'adopt legislative and other measures[111] to give effect' to the rights, freedoms and duties enshrined in the African Children's Charter. The judicial application of the African Children's Charter depends greatly on the status that international human rights norms enjoy in a local legal system. It is most unlikely that municipal courts will make findings based on the provisions of the African Children's Charter, if it is not regarded as part of the municipal law. The courts are more likely to use the African Children's Charter as an interpretative or a navigational aid to give guidance, thereby providing for a non-legislative measure to 'give effect' to the Charter. It is unfortunate that the African Children's Charter fails to contain a provision guaranteeing the right of appeal to competent national organs to redress the violation of rights recognised by international law. The African Charter does by virtue of article 7(1) explicitly provide that state parties guarantee the right of individuals to bring cases on the basis of the Charter, even before municipal courts.[112]

4 Conclusion

The African Children's Charter can be criticised as having a Western bias, due to the fact that it prescribes rights for children, which historically is alien to African culture, as the degree of respect varied according to age, ability and sex. Moreover, the African Children's Charter was also largely modelled on the CRC. Thus, the provisions of the African Children's Charter may not be effectively implemented or adhered to if they are regarded as so far removed from Africa's cultural and traditional

109 Adede (n 38 above).

110 See Tshosa (n 38 above). International standards provide the minimum, thus if international standards are less than domestic standards, the domestic standards prevail.

111 The meaning of 'by other measures' is ambiguous and is in need of definition as to what it incorporates.

112 See F Viljoen 'Application of the African Charter on Human and Peoples' rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

perspective.[113] This assertion can be rebutted by reference to the Preamble, which emphasises historical tradition and the values of African civilisation. The emphasis on traditional African values represents a significant departure from other international human rights documents, especially the perception that the enjoyment of human rights entails duties. Most international human rights instruments are concerned with duties owed by the state to the individual. The African Children's Charter articulates duties owed by the individual to the state.[114] This concept of children's responsibilities helps educate others in the potential value of children's contributions to society. The African Children's Charter does not impose Western conceptions of human rights on Africa; it promotes a modernised Africa, departing from the traditional perception of children as property. Children now have the right to a certain degree of self-determination; children can no longer be regarded as mere 'property'. The key provisions supporting this message are articles 4(2) and 7 of the African Children's Charter, as they grant children a right to have a say in matters affecting their lives.[115] The African Children's Charter is the advancement of society in general, not an attempt to westernise Africa.

The adoption of the African Children's Charter is a regional response to human rights concerns and reflects the realities of Africa. Children are exploited and abused. Prior to the African Children's Charter, the plight of children was analysed only through the eyes of adults on behalf of children. Children did not have easily identifiable rights targeted directly at them, and contained in a legal framework, especially formulated to incorporate the intricate issues of childhood,[116] consent[117] and the child's best interests.[118] Basically, before the adoption of the African Children's Charter, children had no voice, no specific rights or protection. Children were unable to act for themselves, consistently relying on the will of the state or their parents/legal guardians/community (who

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113 Children's rights are problematic, because not all African societies believe that children deserve special status.

114 The dominant African conception of human rights combines a system of rights and obligations. Thus, the African Children's Charter relates to this concept.

115 The provisions are impaired by the insertion of 'if capable . . .' (art 4(1)) and 'who is capable . . .' (art 7). What test will be applied to the condition that children need to be *capable*? How are *capable* children to be assessed? Surely, this has the result of rendering the right valueless as authorities can merely contend that the child cannot have his say as he is not *capable*.

116 Art 2 Africa Children's Charter

117 Prior to the African Children's Charter, the issue of children volunteering for combat was used as a shield for the exploitation; C Hamilton 'Children in armed conflict — New moves for an old problem' (1995) 7 *Journal of Conflict Law* 38; but since the adoption of the Charter the legal entitlements granted to children, no longer impinge on whether a child was forced or volunteered, whether consensual or not — all forms of exploitation are strictly prohibited.

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

are often the perpetrators of the violations) to redress children's human rights violations. The framework of the African Children's Charter provides children with a viable mechanism to express themselves in judicial and administrative proceedings and are able to express their opinions freely in all matters affecting them, and if occasion requires, they can lodge a communication about human rights violations perpetrated against them, in exchange for the discharge of their responsibilities enshrined in article 31. To this extent the African Children's Charter is a positive achievement. It encompasses a holistic view of rights and duties: economic, social, civil, cultural and moral, and the need for development consistent with the holistic view of people as reflected in the African tradition of human dignity.

The African Children's Charter has limitations. Most African governments, due to the socio-economic conditions prevalent in Africa, cannot solve the specific problem of children's human rights violations.[119] Socio-economic conditions make it impossible for many countries to fully achieve the rights contained in the African Children's Charter, and these problems are perpetuated by the political and economic systems which are in need of restructuring. The enforcement mechanisms appear to be weak and the Committee has no binding authority but is mandated to promote and protect children's rights.

At present, it is fair to assert that there is no general culture of children's rights in Africa, particularly due to the embryonic nature of the African Children's Charter. For some Africans the very idea of children having rights is threatening, and there is much misunderstanding about what children's rights actually mean. There is, however, eager willingness to promote the fulfilment of children's *needs*. There needs to be a better understanding of the societal views of children, the idea that children have rights should no longer be deemed as 'un-African'.[120] There is a lack of awareness of the African Children's Charter, and a notable lack of academic debate. Better understanding of what children's rights mean in the rich variety of African cultures has the objective of providing tools for implementing children's rights instruments and ultimately monitoring the effects of policy and programme interventions.

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119 There is the basic contradiction between African problems such as poverty, the lack of national unity, and underdevelopment, which impede the implementation of human rights and the measures required to solve the problems. See Z Motala 'Human rights in Africa: A cultural, ideological, and legal examination' (1989) 12 *Hastings International and Comparative Law Review* 373 392.

120 With regard to the so called 'participation rights' — arts 12–15 African Children's Charter. The above propositions were made at the African Contexts of Children's Rights Seminar, Harare 12–14 January 1998. This seminar was hosted by Redd Barna Zimbabwe and organised by ANPPCAN Zimbabwe, Childwatch International and CODESRIA (n 20 above).

AFRICAN HUMAN RIGHTS LAW JOURNAL

A review of the African Convention on Nature and Natural Resources

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1 Introduction

Although international environmental norms have been developing since the early 1900s, the first major breakthrough in environmental protection at the global level was the Stockholm Declaration (1972), which highlighted concerns such as the relationship between development and the environment, respect for environmental standards and the need for inter-state co-operation. Subsequent landmark developments at the global level include the creation of the United Nations Environmental Programme (UNEP), the formulation of Principle 21, the World Charter for Nature (1982), the Rio Summit (1992) and the Rio + 5 Conference (1997).

Regional efforts of the Organisation of African Unity (OAU), aimed at the protection of the environment, are abundant. These efforts consist of both 'soft' law and treaty law. Traditionally, 'soft' law has a non-binding nature, whereas treaty law is binding on parties to a convention.

An examination of 'soft' law on the continent reveals that an approximate figure of 45 resolutions pertaining to the environment were adopted by the Council of Ministers of the OAU between 1968 and 1986.[1] Assuming that the same rate of adoption persists within the Council, it is conceivable that approximately 90 environmental resolutions will be adopted by the year 2004. The African Common Position on Environment and Sustainable Development (1992)[2] and the African

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1 OAU compendium on environmental resolutions 1968–1986.

2 This Common Position was adopted in Côte d'Ivoire in 1992 in preparation for the Rio de Janeiro Earth Summit in June 1992.

Common Position on the Yokohama Conference on Natural Disasters Management and Reduction (IDNDR) (1994) may also be considered two of the most prominent OAU achievements amongst programmes of action and other environmental actions taken at a regional level. [3]

African regional treaties emerged in 1968 with the adoption of the African Convention on Nature and Natural Resources (African Convention) by the OAU in Algiers.[4] The African Convention entered into force in 1969. Environmental awareness was further stimulated in 1988 after trade in toxic and hazardous waste was exposed on the continent. Two OAU documents followed in response to the then apparent threat. The first document dealing with the waste trade was the Anti Dumping Resolution.[5] The second document, which took the form of a multilateral treaty, was the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Managements of Toxic and Hazardous Waste in Africa (Bamako Convention). [6] Although adopted in 1991, the Bamako Convention only entered into force in 1998.[7] Of significance to the efforts made by the OAU in the protection of the environment was the contentious shift in approach from the regulatory nature of the other environmental treaties, to a rights based approach with the inclusion of the right to a satisfactory environment in the African Charter on Human and Peoples' Rights (African Charter) in 1986.[8]

A cursory evaluation of regional environmental norms prompts an impression of ineffectiveness. This view stems from the fact that it is apparent that the current normative approach to environmental protection has not produced viable results. However, closer scrutiny reveals the possibility of a contradictory notion.

This paper considers the review of the African Convention. This Convention has been in place for approximately 30 years, allowing for an evaluation as to its effectiveness in meeting the objectives as set out in articles II and VIII(1) of the African Convention. It also permits an evaluation of the effectiveness of enforcement mechanisms and the effective settlement of disputes under the African Convention. One can also evaluate the current need for the African Convention and determine whether it should be replaced. As indicated below, the values embodied in the African Convention have been questioned by the OAU and it is important to note that plans to revise the African Convention are

3 OAU publication *The OAU: 35 years in the service of Africa* (1997) 81.

4 1001 UNTS 3.

5 CM/Res 1153/28 (1989) *International Legal Materials* 567.

6 (1991) 30 *International Legal Materials* 773.

7 It should be noted that only ten states were needed to ratify the African Convention for it to come into force.

8 Art 24.

currently underway. A review is further necessitated by the lack of academic scholarly work on the African Convention. Consideration will be given to the process behind the initial African Convention as well as the process in respect of the draft revised African Convention.[9] This paper is premised on the progressive movement towards a rights based approach to environmental protection that started with the inclusion of the right to a satisfactory environment in the African Charter. This approach is further acknowledged in the Preamble of the Bamako Convention, and firmly entrenched in the draft revised African Convention. Acknowledging the right to a satisfactory environment as a fundamental right emphasises its connection to the realisation of other rights, such as the right to development, access to information and procedural fairness.

2 Historical context

Two international agreements on the environment preceded the African Convention and dealt specifically with the African continent. The first was the African Convention on the Preservation of Wild Animals, Birds and Fish in Africa (Convention on Wild Animals) of 1900.[10] It was endorsed by those colonial powers present in Africa at the time. The Convention on Wild Animals aimed to regulate the uncontrolled killing of a diverse species of wild animals in Africa. According to Lyster, an underlying objective of the Convention on Wild Animals was to ensure a fair supply of game for trophy hunters, ivory and skin traders.[11] The second Convention was the African Convention Relative to the Preservation of Fauna and Flora in their Natural State (African Convention on Fauna) of 1933.[12] The provisions of the African Convention on Fauna were similar to those of its predecessor, emphasis being placed on the creation of protected areas. After Africa's independence from colonial rule, the necessity arose for the creation of an African convention reflecting values more relevant to modern Africa than those contained in the treaties created by colonial powers. The extent of environmental disasters (drought, deforestation, deterioration of water resources, land concentration and desertification)[13] common to the region further necessitated the construction of a regional convention within the newly established OAU.

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9 Research has revealed one article on the African Convention, it dates back to 1985. See S Lyster *International wildlife law* (1985) 112.

10 94 BFSP 715.

11 n 9 above.

12 172 LNTS 241.

13 GJ Naldi *The Organization of African Unity* (1999) 227. Also see Council of Ministers Resolutions CM/ Res 118(IX), 145(X), 169(XI), 316(XXI), 336(XXI), 450(XXVI), 465(XXVI), 540(XXVII) and 575(XXIX). This is not a comprehensive list and serves as a mere example of the environmental problems that faced the continent at the time.

Steps taken to bring to life a regional convention dealing with the environment may be traced back to 1964.[14] By 1967, a preliminary draft of the African Convention was in place and member states of the OAU were encouraged to submit their views on the draft to the General Secretariat.[15] A Committee of Experts was established to amend this draft. The amendment was once again sent to member states and additional observations and comments were invited. These had to reach the General Secretariat before 30 June 1968. In the event that no additional commentaries were received, the African Convention would be prepared for adoption on the 11th ordinary session of the Council of Ministers and approval by the 5th ordinary session of the Assembly of Heads of State and Government.[16] Thereafter the African Convention would be open for signature and subsequent ratification and application by member states. The African Convention was finally adopted in Algiers in 1968. The African Convention came into force on 16 June 1969 after the ratification of the required four states.[17]

Before 1 January 1970, states that ratified the African Convention included Burkina Faso, Côte d'Ivoire, Ghana, Kenya and Swaziland. Another 21 states ratified the African Convention during the period from 1 January 1970 to 1 January 1980.[18] The rapid rate of ratification should be seen as a clear indication of African governments' (63%)[19] formal commitment and acceptance of the provisions contained in this Convention. As at 7 December 2001, 31 states had ratified the African Convention. A further nine countries have signed the African Convention, although scepticism is raised as to whether these countries would in fact ratify the African Convention, as most of the signatures date back to 1968.[20]

3 Normative legal framework created by the African Convention

This section briefly explores the normative legal framework put in place by the African Convention. For reasons of clarity the provisions and the

14 Historical note on the *African Convention on Nature and Natural Resources* published by the General Secretariat of the OAU.

15 OAU CM/Res 118 (IX).

16 OAU CM/Res 145 (X). This should be an indication that the Convention, given the political and socio-economic conditions prevalent at the time and the possible demands of such a comprehensive treaty on a state party, was accepted with relative ease in the African Community.

17 Art XXI. These four states were Côte d'Ivoire, Swaziland, Ghana and Kenya.

18 OAU Doc Ref CAB/LEG/24.1.

19 This percentage reflects the status of ratification as at December 2001.

20 As above.

headings will be explored in the same order as found in the African Convention.

Recognition is given in the Preamble of the African Convention to the importance to humankind of resources such as soil, water, flora and fauna from an economic, nutritional, scientific, educational, cultural and aesthetic point of view. A duty is established to control the natural and human resources of the continent for the advancement of the African people. These resources are recognised as irreplaceable. The Preamble also envisages the concept of sustainable development and firmly establishes the belief that this instrument would advance the attainment of these ideals.[21]

3.1 Substantive provisions

3.1.1 *Fundamental principle*

The 'fundamental principle' as set out in article II of the African Convention expounds its purpose. This principle places an obligation on states to take the measures required to conserve, utilise and develop resources such as soil, water, fauna and flora. In addition it requires that conservation, utilisation, and development should meet scientific standards and be conducted in such a manner that it does not negatively affect the best interests of the people.[22] Although these objectives attempt to address a large area of concern, no indication is given as to the specific criteria to be used in the determination of these 'scientific' standards, nor to the determination of the concept of the 'best interest of the people'.

3.1.2 *Definitions*

Article III, the definition clause of the African Convention, provides for 10 contextual definitions in the interpretation and application of the African Convention. Definitions pertain to natural resources,[23] specimens,[24] trophies[25] and conservation areas.[26] Three types of conservation areas are defined and they comprise strict nature reserves,[27] national parks[28] and special reserves.[29] These special reserves are further divided

21 Preamble.
22 Art II.
23 Art III(1).
24 Art III(2).
25 Art III(3).
26 Art III(4).
27 Art III(4)(a).
28 Art III(4)(b).
29 Art III(4)(c).

into game reserves,[30] partial reserves,[31] and soil, water and forest reserves.[32]

3.1.3 *Soil, water, flora and fauna resources*

Soil, water, flora and fauna resources are dealt with in articles IV, V, VI and VII respectively. These articles in essence give life to the purpose of the African Convention as set out in article II.[33] These articles provide an indication of the measures to be adopted in the attainment of the purpose of the African Convention.

Soil is to be protected and improved through measures based on scientific principles and effective land use in order to combat erosion and the misuse of soil.[34] These measures are not to be limited to the agricultural sector only but should apply in other areas as well.[35]

The African Convention places emphasis on the utilisation and development of ground water. In order to achieve this objective, policies must be developed and implemented.[36] Parties must further make an effort to supply suitable drinking water to their populations, having due regard to factors which impact negatively on the availability of water supplies. Development and administration of these issues must also be implemented and enforced by state parties.[37] In addition, the African Convention indirectly recognises the adverse effects of water pollution and obliges states to control and water pollution through the above-mentioned measures. The proactive stance taken on this issue is a welcome addition to environmental protection at the regional level.[38] The African Convention also provides for co-operation between contracting states when water sources, surface or underground, are shared by two or more contracting states.[39] The utilisation and conservation of these resources fall upon all concerned parties and there is an obligation created by the African Convention that research, studies and settlement in this regard be conducted by interstate commissions.[40] No guidelines are provided for the establishment or operation of these commissions and perhaps the assumption is that this falls within the discretion of the respective states.

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30 Art III(4)(c)(1).
31 Art III(4)(c)(2).
32 Art III(4)(c)(3).
33 See 3.1.2 above.
34 Art IV.
35 Arts IV(a) and (b).
36 Art V(1).
37 Arts V(1)(1), (2) & (3).
38 Art V(1)(4).
39 Art V(2).
40 As above.

Flora is to be protected. Any development and utilisation of flora should be done with due regard to its protection.[41] These measures pertain to the conservation, utilisation and management of forests and rangelands,[42] identifying areas of concern in this regard,[43] the creation of forest reserves and forestation programmes,[44] regeneration of forest areas through the minimisation of forest grazing,[45] and the necessity for the establishment of botanical gardens.[46] The African Convention further obliges states to conserve plant species and communities of plant species that are threatened, are of a special scientific interest, or possess aesthetic value.[47]

Fauna resources are extensively covered in article VII of the African Convention. This article provides for the conservation, wise use and development of fauna resources within a specific framework of planning land use and economic and social development. It also provides for a set of principles, which must be considered by states when implementing the above.[48] Article VII places further obligations on states to adopt adequate legislation in respect of hunting, the capture of wildlife and fishing.[49] Subsections (2)(a) to (e) of article VII provide guidelines on the legislation to be enacted.

3.1.4 *Protected species*

Provisions dealing with protected species are contained in article VIII of the African Convention as well as an annex to the African Convention. Protected species as identified by the African Convention include both animal and plant species threatened with extinction. The African Convention covers species that may become extinct in future, although it does not specify the criteria to be considered for determining the future threat to a specific species.[50] The African Convention also accords similar protection to the habitat necessary for the survival of these species.

A distinction is made by the African Convention with regard to species that deserve special protection. Species are divided into Classes A and B in an annex to the African Convention, and Class A species are accorded a higher level of protection than Class B.[51] Class A extends special

41 Art VI(1).
42 Art VI(1)(a).
43 Art VI(1)(b).
44 Art VI(1)(c).
45 Art VI(1)(d).
46 Art VI(1)(e).
47 Art VI(2).
48 Arts VII(1)(a) & (b).
49 Art VII(2).
50 Art VII(1).
51 Arts VIII(1)(1) & (2).

protection to mammals and birds. Species not excluded, but covered to a lesser degree include reptiles, fish, toads and plants. Class B deals mainly with mammals, of which seventy species are listed.[52]

As noted earlier, no criteria are set to identify new species threatened by extinction. States are obviously not precluded from identifying species not included in the Annex, but this discretion lies entirely within the capacity of the state party concerned.[53] It can be said that the list contained in the Annex is not a true reflection on the current status of 'endangered' species and a revision would be appropriate.

3.1.5 *Traffic in specimens*

Trade is regulated by the African Convention and pertains specifically to those species not listed, thus species excluded by article VIII and as such not identified in the annex as Class A or Class B species. States are to regulate trade and transportation of such species and trophies. In addition to mere regulation, states are to control the application of these regulations in order to prevent illegal trade in these species and trophies.[54] Apart from these, additional measures are put in place when it comes to species covered by article VIII of the African Convention. These measures are more stringent and require special authorisation.[55] In respect of trade of species the African Convention has for all intents and purposes been superseded by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973. CITES as an international conservation treaty deals mainly with the trade in animal and plant species as well as wildlife products. CITES deals more comprehensively with the issue of trade in species. In the event that an African country is a party to the African Convention and not a party to CITES, the provisions of the African Convention are nevertheless still applicable. Tanzania is at present the only country to which such a situation would apply.[56]

3.1.6 *Conservation areas*

As mentioned above, the African Convention places emphasis on the establishment of conservation areas. This is apparent through the elaborate definitions of the conservation areas contained in article III. The African Convention reinforces state responsibility in maintaining and extending existing conservation areas, whether land or marine.[57] Parties

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52 Annex to the African Convention. See also Lyster (n 9 above) 119.

53 Art VIII(2).

54 Arts IX(1)(a) & (b).

55 See Art IX(2).

56 Tanzania ratified the African Convention on 7 September 1974. It has to date not ratified CITES; <http://www.cites.org> (accessed 31 January 2001).

57 Art X(1).

shall further have due regard to land use programmes and assess the need for establishing supplementary conservation areas. These measures pertain specifically to ecosystems, which are, in any respect, atypical to their territories.[58] Obligations to maintain current and establish additional conservation areas are further extended to ensure that all species, particularly those that are listed (Class A and B), are afforded protection.[59]

State parties are also obliged to establish 'buffer' zones around the borders of conservation areas in order to regulate activities that might be harmful to the natural resources protected.[60]

3.1.7 *Customary rights*

Article XI of the African Convention obliges contracting states to ensure that customary rights are reconciled with the provisions of the African Convention. This is to be achieved through legislative measures, but should not be read to exclude other measures that could possibly be adopted in a complementary fashion. The African Convention, however, does not make provision for a definition of customary rights and the determination of such rights presumably falls within the discretion of state parties to the African Convention. These rights seemingly pertain to customs and values inherent to indigenous people and local communities.

3.1.8 *Research, conservation, education and development plans*

Research into conservation, utilisation and management of natural resources is to be promoted and encouraged. Factors to be considered in research cover ecological and sociological factors.[61] Despite impediments such as lack of resources and limited technologies that can negatively impact on research, the inclusion of research in natural resources may be seen as a progressive element of the African Convention at the time of its adoption.

The African Convention further recognises the importance of conservation related education and the need for peoples to realise their dependence on natural resources. States are compelled to fulfil this through educational programmes at all levels and also by creating public awareness on matters pertaining to conservation.[62]

Regional and national development plans must include issues such as the conservation and management of natural resources. Ecological,

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58 Art X(1)(1).
59 Art X(1)(2).
60 Art X(2).
61 Art XII.
62 Art XIII.

economic and social factors are to be considered in the formulation of development plans. In addition, the African Convention provides for consultation between states when the development plans of one state will have an impact on another state.[63]

4 Administration, implementation and enforcement of the African Convention

The African Convention does not contain any provision establishing a formal treaty body for the administration of the African Convention. The main responsibility for the administration and regulation of its implementation lies with the OAU. Although the General Secretariat was initially burdened with it, the responsibility has shifted several times during restructuring. The responsibility was initially placed on the Environment and Conservation of Natural Resources Division. This division is a sub-division of the OAU Education, Science, Culture and Social Affairs (ESCAS) Unit at the OAU General Secretariat. Following recent restructuring at the OAU, the African Convention is now administered by the Industry, Science and Technology, Energy, Natural Resources and Environment Division.

As a regulatory mechanism contained in the African Convention, state parties are obliged to co-operate on an interstate level in order to achieve the aims of the African Convention. Additionally, state parties are to account to the OAU about laws, regulations or other measures taken to ensure that the provisions of the African Convention are implemented.[64]

The implementation and enforcement of the African Convention largely depend on two factors. Firstly, the African Convention makes provision for the establishment of single national conservation agencies in the territories of state parties. These national agencies are empowered to deal with matters contained in the African Convention.[65] To date, approximately 30 years after the African Convention entered into force, none of the 31 states that have ratified the African Convention have informed the Secretariat as to whether they have established the agencies provided for by article XV of the African Convention.[66]

Secondly, in accordance with article XVIII, any dispute arising from the interpretation or application of the African Convention which cannot be settled through negotiation, shall at the request of any party be submitted to the Commission on Mediation, Conciliation and Arbitration, a specialised agency of the OAU for consideration and settlement.

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63 Art XIV.

64 Art XVI.

65 Art XV.

66 OAU Doc Ref CAB/LEG/24.1/63/Vol III.

According to Wolfers, this Commission was envisaged as an institution and mechanism to discharge an exclusively African role in the settlement of disputes at a relatively low cost.[67] As a non-judicial agency, any settlement by the Commission would rely on the good offices of parties to the dispute. Nevertheless, it has proved to be a great source of frustration because it has never been convened. This can partially be attributed to the appointment of *ad hoc* committees for dispute settlement and also lack of funding.[68] The Commission has therefore neither dealt with any complaints pertaining to the interpretation and application of this Convention nor any other dispute at a regional level. According to the OAU Legal Division, no complaints related to the African Convention have arisen.

Without countries reporting on their treaty obligations, it is virtually impossible to evaluate the effect of the African Convention. Lyster is of the view that a number of countries have either adopted legislation or amended legislation as a consequence of the African Convention.[69] On the other hand it can be argued that at the time of the African Convention's introduction, African countries had recently overcome the yoke of colonialism and that environmental legislation probably did not feature high on any particular country's list of priorities.

The African Convention remains an umbrella environmental treaty covering a variety of environmental aspects at a regional level. The substantive provisions of the African Convention are definitely not in line with the Rio instruments and other contemporary multilateral treaties and developments pertaining to the environment. This has been recognised by the OAU and an inter-agency review of the African Convention is currently underway.[70] Such a review is in line with article XXIV of the African Convention pertaining to the revision of the Convention in order to bring the Convention in line with contemporary environmental developments.[71]

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67 M Wolfers *Politics in the Oganization of African Unity* (1976) 107.

68 OAU CM/924 (XXXI).

69 Lyster (n 9 above); such countries include Ghana, Tanzania and Sierra Leone.

70 OAU Doc Ref CAB/LEG/24.1. Agencies involved include the OAU, United Nations Environmental Programme (UNEP) and the International Union for Conservation of Nature and Natural Resources (IUCN).

71 Art XXIV reads:

'Revision:

(1) After the expiry of a period of five years from the date of entry into force of this Convention, any Contracting State may at anytime make a request for the revision of part or this Convention by notification in writing addressed to the Administrative Secretary-General of the Organisation of African Unity.

(2) In the event of such a request the appropriate organ of the Organisation of African Unity shall deal with the matter in accordance with the provision of section 3 of Article XVI of this Convention.

5 Attempt to revise the 1968 Convention

Bearing in mind that state parties to the African Convention could have considered a revision of the Convention after a period of five years, it is interesting to note that no serious attempts to revise the Convention were made until the early 1980s.

5.1 Attempts to revise the African Convention: 1968 to 1999

The first initiative to revise the African Convention was taken in 1983 by the General Secretariat of the OAU, having considered developments such as the Lagos Plan of Action on Economic Development of Africa, CITES, UN developments in respect of the Law of the Sea, and the World Charter for Nature.[72] Member states responded positively[73] to the Secretariat's note and a Meeting of Experts was scheduled for 23 November 1984 in order to consider the revision.[74] This meeting consisted of experts drawn from 15 member states from the five OAU regions. The experts were from Algeria, Benin, Cameroon, Egypt, Ethiopia, Gabon, Kenya, Mozambique, Mauritius, Nigeria, Senegal, Tunisia, Zaire (DRC), Zambia and Zimbabwe.[75] International agencies that participated included the United Nations Scientific and Cultural Organisation (UNESCO), the Food and Agricultural Organisation of the UN (FAO), UNEP, ECA and IUCN. The first revision of the African Convention was produced during this meeting and forwarded to member states for their comments. The amended text did not include any additional articles to the African Convention and proposed amendments related to the

3(i) At the request of one or more Contracting States and notwithstanding the provisions of paragraphs (1) or (2) of this Article, the annex to this Convention may be revised or added to by the appropriate organ of the Organisation of African Unity.

(ii) Such revision or addition shall come into force three months after the approval by the appropriate organ of the Organisation of African Unity.'

Art XVI reads:

'Interstate co-operation:

. . .

(3) If so requested by a Contracting States, the Organisation of African Unity shall organize any meeting which may be necessary to dispose of any matters covered by this Convention. Requests for such meetings must be made by at least three of the Contracting States and be approved by two thirds of the States which it is proposed should participate in such meetings.'

72 OAU Note ESCAS/NR/1/359-83.

73 States that responded included Algeria, Cameroon and Nigeria. See also OAU CM/1349 (XLIII) Add.I CNNR/2(I) ANNEX I.

74 OAU CM/1477 (XLVII) Rev 1.

75 OAU CM/1349 (XLII) Add.II CNNR/Rapt rpt Rev I.

Preamble and several articles.[76] No amendments were proposed in respect of the list of protected species (Class A and B).[77]

In 1988, the Secretary-General released a report on the revision of the African Convention at the 47th ordinary session of the Council of Ministers of the OAU.[78] His report emphasised the need to revise the African Convention and the following documents were attached to the report:

- the text of the African Convention, incorporating amendments proposed by the Meeting of Experts;[79]
- a background document on the African Convention as presented to the Meeting of Experts;[80]
- the report of the Meeting of Experts for the Revision of this Convention.[81]

After this report, the revision of the African Convention seemingly subsided to a point where it was no longer on any agenda. The Secretary-General did, however, circulate the amended text to contracting parties for commentary, but the process was not completed and the African Convention was never updated.

5.2 Interagency review of the African Convention: 2000 and beyond

A renewed attempt to revise the African Convention was made in 1997 when the government of Burkina Faso requested a revision under article XXIV. This was the first time since the inception of the African Convention that a state party initiated a review under this article.

The African Convention had to be updated according to the request having regard to the following:[82]

- the Treaty Establishing the African Economic Community (1991);
- the African Convention on Biological Diversity (1992);
- the four Conventions covering marine environment (adopted under the auspices of UNEP Regional Seas Development);
- the Rio Declaration (1992);
- the United Nations Convention to Combat Desertification in Countries Experiencing Drought and/or Desertification, particularly in Africa (1994); and

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76 Arts I, II, III, IV, VI, VII, VIII, IX, X, XIII, XIV, XV, XVII, XXI, XXIV & XXV African Convention.

77 OAU CMM/1477 (XLVII).

78 22–27 February 1988, Addis Ababa, Ethiopia.

79 OAU CM/1447 (XLVII) Annex I.

80 OAU CNNR/2 (I).

81 OAU CNNR/Rapt Rev 1.

82 A proposal for the revision of the African Convention prepared by UNEP (ELIPAC and ROA) 2.

- any development in respect of environmental thought as may be recognised by contracting parties.

The original aim was to have these revised amendments adopted by September 1998 on the thirtieth anniversary of the African Convention.

5.3 First Inter-Agency Meeting

The First Inter-Agency Meeting on the Revision of the African Convention was held at the UNEP headquarters in Nairobi, Kenya on 27 and 28 July 2000. Agencies participating in this meeting included UNEP, the OAU and the IUCN. These agencies were to consult, advise and agree on the methodologies to be used in the revision of the African Convention.

The following progress was made during this meeting:[83]

- Dates and guidelines were formulated for subsequent meetings.
- A need was identified to consult with NGOs, other agencies, and governments at a global level in order to incorporate the best possible views into the revised African Convention.
- Gaining support and political backing at a higher level (possibly the Council of Ministers) was considered to be of great importance.
- It was decided that the revision would include:
  - i considering current provisions and updating these provisions to be in line with contemporary environmental developments;[84]
  - ii extending the jurisdictional scope of the African Convention;[85]
  - iii including a provision pertaining to compliance into the African Convention;
  - iv in revising the African Convention consideration will be given to existing environmental treaties. These will serve as mere guidelines and the provisions of other treaties will not be copied into the African Convention. This departure point is a welcome addition to the methodological approach to this revision process.
- Consideration was given to the issue of human and financial resources in respect of the implementation of this Convention.
- The possibility of integrating current political and economic realities into the revised African Convention was also considered.

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83 Report of the First Inter-Agency Meeting on the Revision of the African Convention.

84 For example the Preamble needed to reflect the spirit of existing Conventions and new arrangements such as the AMCEM.

85 To take into account *inter alia* the management of non-renewable resources and to include the principle of equity into the African Convention. This was not the case in a comparative analysis between the Bamako (OAU) and Basel (UN) Conventions regulating the waste trade.

In comparing this attempt to the 1983/4 attempt to revise the African Convention, one can deduct that African governments, the OAU and other intergovernmental organisations are indeed sincere about the current revision process.

5.4 Second Inter-Agency Meeting

The second meeting on the revision of the African Convention was held at the OAU headquarters in Addis Ababa, Ethiopia on 23 and 24 November 2000. The objective of this meeting was to evaluate the first draft revision of the African Convention and bring it up to date with recent environmental laws whilst maintaining its original African characteristics.

The following issues were discussed during this meeting:[86]

- The relationship between the revised African Convention and the 'Abuja Treaty' was questioned.[87] Although it was decided that the relational aspects would be decided at a later date, it was clear that these treaties should be linked. For such a linkage to be achieved the wording of the relevant articles of the 'Abuja Treaty' should be incorporated into the revised African Convention.[88] It remains a possibility that the revised African Convention can be adopted as the

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86 n 83 above.

87 Treaty Establishing the African Economic Community.

88 The relevant articles of the Abuja Treaty include:

Art 54, which reads:

'Energy and Natural Resources

1. Member states shall co-ordinate and harmonise their policies and programmes in the field of energy and natural resources.
2. To this end, they shall:
   (a) ensure the effective development of the continent's energy and natural resources;
   (b) establish appropriate cooperation mechanisms with a view to ensuring a regular supply of diversification of sources of energy;
   (c) promote the development of a new and renewable energy in the framework of the policy of diversification of sources of energy. . . .'

Art 56, which reads:

'Natural Resources:

In order to promote cooperation in the area of natural resources and energy, member states shall:

(a) exchange information on the prospection, mapping, production and processing of mineral resources, as well as on the prospection, exploitation and distribution of water resources;
(b) coordinate their programmes for development and utilisation of mineral and water resources;
(c) promote vertical and horizontal inter-industrial relationships which may be established among member states in the course of Developing such resources;
(d) coordinate their positions in all international negotiations on raw materials;

Environment, Natural resources and Energy Protocol under the 'Abuja Treaty'.[89]

- It was decided that the revised text requires an unmistakable assertion of the objectives and principles of the African Convention.[90]
- It was decided that a Secretariat should be established as an independent body with a link to the OAU.

It was evident that a breakthrough was made in respect of the African Convention and that various aspects had to be considered before the final draft of the revised African Convention could be published. Nevertheless, a revised and modern African Convention seemed like a greater reality.

5.5 Seventy-third/eighth ordinary session of Council of Ministers of the African Economic Community (AEC)

During this session, held on 22 to 26 February 2001 in Tripoli (Libya), the Council of Ministers acknowledged attempts made in 1983 and noted that the process could not be concluded. The Council further

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(e) develop a system of transfer of know-how and exchange of scientific, technical and economic data in remote sensing among member states; and

(f) prepare and implement joint training and further training programmes for cadres in order to develop human resources and the appropriate local technological capabilities required for exploration, exploitation and processing of mineral and water resources.'

Art 57, which reads:

'Protocol on Energy and Natural Resources:

For the purposes of Articles 54, 55 and 56 of this Treaty, member states shall in accordance with the provisions of the Protocol on Energy and Natural Resources.'

Art 58, which reads:

'Environment:

1. Member states undertake to promote a healthy environment. To this end, they shall adopt national, regional and continental policies, strategies and programmes and establish appropriate institutions for the protection and enhancement of the environment.
2. For purposes of paragraph 1 of this Article, member states shall take the necessary measures to accelerate the reform and innovation process leading to ecologically rational, economically sound and socially acceptable development policies and programmes.'

Art 59, which reads:

'Control of Hazardous Wastes:

Member states undertake, individually and collectively, to take appropriate steps [*sic*] to ban the importation and dumping of hazardous wastes in their respective territories. They further undertake to cooperate in the transboundary movement, management and processing of such wastes produced in Africa.'

Art 60, which reads:

'Protocol on the Environment:

For the purposes of Articles 58 and 59 of this Treaty, member states shall cooperate in accordance with the provisions on the Protocol on the Environment.'

89 See 5.5 below.

90 A new article was to be introduced and general principles were to be included under the Preambular statements.

accredited the current revision and the fact that the revised African Convention could possibly be considered as the Environmental Protocol to the 'Abuja Treaty'. By doing this, duplication of efforts could be avoided.[91]

The Council of Ministers made the following recommendations:[92]

- that the Secretary-General should allocate sufficient funds to the revision process, particularly providing for the convening of experts meetings;
- that member states should support the revision process; and
- that member states should send experienced environmental experts to ensure the timely conclusion of the revision process.

These actions by the Council of Ministers gave the revision process the necessary political backing and ensured the continuation of this revision.

5.6 Fourth Inter-Agency and Experts Meetings

Research indicates that two meetings were held during the year 2001. The first meeting was an inter-agency meeting held between May/June and the second a meeting of experts held in August/October of 2001.

A substantial document (revised draft) was produced in August 2001 and was to be considered at the next inter-agency Meeting of Experts. After various communications between the agencies involved, it was decided that the next meeting was to commence on Monday 13 January 2002.[93]

6 The revised African Convention as discussed at the Fifth Inter-Agency Meeting (January 2002)

6.1 The draft revised African Convention on Nature and Natural Resources

Brief consideration is given to the revised draft that was to be discussed during the meeting held in Nairobi, Kenya in January 2002. A discussion is of importance in that it is expected that the draft as it stands now will, with the exception of minor amendments, become the new African Convention.

The revised draft Convention included a revision of the existing provisions, the inclusion of 28 new articles and two additional annexes.[94]

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91 If this was to be achieved the revision process should be considered with emphasis on a general environmental context and a broader statement of the purpose of the African Convention. This is necessitated by the fact that Energy and Natural resources are covered by certain provisions of the 'Abuja Treaty' and Environment and Hazardous Wastes by others. See arts 54 & 56–60 of the 'Abuja Treaty'. See also n 90 above.

92 OAU CM/2193 (LXXIII) g.

93 This revised draft is on file with the author.

94 On file with the author.

These additional articles relate to the African Convention's scope and objectives, fundamental obligations under the African Convention, processes and activities affecting natural resources, sustainable development and natural resources, military and hostile activities, compliance and liability, the Secretariat, financial resources, reports and information, the right to vote, procedural rights, the relationship between the contracting parties to the 1968 African Convention and revised African Convention, and the African Convention's relationship with other international agreements.

6.2 Updating existing provisions of the African Convention

The existing articles of the African Convention are updated and current environmental views are reflected throughout the revised draft Convention. This section will attempt to highlight the most important revisions in respect of the African Convention.

The revised Preamble clearly considers a broader notion of the natural environment, its resources and its importance to Africa. This position is exemplified by the words:[95]

> Affirming that the conservation of the global environment is a common concern of all mankind as a whole, and the conservation of the African environment a common concern of all Africans.

The revised Preamble further contains specific reference to the concept of sustainable development and recognises the importance as well as the need for the implementation of a number of international instruments, declarations and principles.

Of note is the reference to Organisation of African Unity (OAU)/African Union (AU). This presumably confirms the sincerity of the revision process and the fact that cognisance is given to the current restructuring process within the organisation.

Article I, now entitled Scope of the African Convention, recognises the national jurisdiction of contracting parties in the regulation of matters covered in the African Convention. This provision is also in line with the jurisdictional scope as exemplified by article 4 of the 1992 Convention on Biological Diversity.[96]

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95 This notion and the emphasis on sustainable development was according to the Meeting of Experts greatly inspired by the African Convention on Biological Diversity (1992). See also the Preamble of this Convention in respect of 'concern of mankind'.

96 As above.

Article IV[97] is entitled Fundamental Obligation and places emphasis on the preventative[98] and precautionary[99] measures in respect of environmental protection and the concept of sustainable development.[100] These measures are consistent with measures taken in the 1992 UN Convention on Climate Change.

Article V,[101] dealing with definitions, has been streamlined in that the elaborate definitions contained in the African Convention pertaining to conservation areas have been moved to Annex 1. Other minor adjustments have been made to the text of this article.

Article VI,[102] on land and soil, focuses on the prevention of land degradation and the sustainable development, management and rehabilitation of land resources. Reference is made to non-agricultural land use.[103] Although largely inspired by the CCD, one can foresee that actions taken in terms of rehabilitation and sound management should be consistent with the integrated approach[104] as encountered in Agenda 21.[105]

Article VII[106] stresses the importance of the management and maintenance of water resources to ensure the highest possible quantitative and qualitative levels. Additional inclusions pertain to pollution control measures, conservation of catchment areas, underground water resources and equitable utilisation of this resource (water).

Article VIII,[107] relating to vegetation cover, includes minor amendments to the old text in order to reflect modern views.[108]

Article IX,[109] the title of which has been changed from 'Fauna resources' (1968 Convention) to 'Species and genetic diversity', gives particular attention to economically valuable, threatened, vulnerable and endangered species and policies to be adopted in respect of their conservation and utilisation. Emphasis is also placed on measures to

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97 Previously art II.

98 This requires the prevention/minimisation of environmental degradation.

99 This principle entails the application of protective measures in situations of scientific uncertainty where a specific course of action may cause damage to the environment.

100 The 1984 amendments contributed to the revision of this article.

101 Previously art III.

102 Previously art IV.

103 Amendments in this article was inspired by the 1984 draft and the UN Convention to Combat Desertification (1994).

104 In essence this approach should consider economic, trade, energy, agricultural and other dimensions in environmental policy making.

105 Agenda 21 was adopted by the UN General Conference on Environment in Rio de Janeiro, 4 to 14 June 1992.

106 Previously art V.

107 Previously art VI.

108 Note that sub-sec 2 has been deleted.

109 Previously art VII.

ensure sound management and monitoring of such species within a framework of land-use planning and sustainable development. Existing provisions on hunting, capture and fishing have been replaced with new regulatory measures.

Article X,[110] dealing with protected species, sees the inclusion of a new sub-section (2) regulating the protection of species through legislation and developing concerted protection measures throughout the continent. Sub-sections 1(a) and (b) have been deleted.

Article XI,[111] covering the issue of trade in specimens, places an obligation on countries to consider international agreements such as CITES and to co-operate on this issue through bilateral or sub-regional agreements. This concept is established in current environmental treaties whereby cognisance is taken of other appropriate instruments. This presumably extends the ambit of protection of a particular convention and avoids unnecessary duplication of efforts.

Article XIII[112] attempts to establish an equilibrium between the rights of local communities and the objectives of the African Convention. Emphasis is placed on achieving an appropriate level of participation at a community level through the creation of incentives pertaining to participation in conservation and suitable use of these resources.[113] This provision is in line with Principle 22 of the Rio Declaration on Environment and Development, which recognises the vital role of local communities in environmental management.[114]

Article XV[115] elaborates on existing research methodologies.

Article XVII,[116] the title of which has been changed from 'Conservation' to 'Capacity building, education and training', places an obligation on state parties to promote environmental education, training and awareness. This article contains measures to be taken in order to ensure that these objectives are implemented.

Article XVIII.[117] The title of this article now reads 'Sustainable development and natural resources'. Specific reference is made to the concept of sustainable development and contracting parties must:

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110 Previously art VIII.

111 Previously art IX.

112 Previously art XI.

113 Examples where such strategies heave been used to the benefit of local communities include the CAMPFIRE project (Zimbabwe), and projects in Wakkerstroom and Kwambonambi (South Africa). See also M van der Linde 'Globalisation and the right to a healthy environment: The South African experience' (2000) 6 *East African Journal of Peace and Human Rights* 258.

114 The Rio Declaration on Environment and Development was adopted by the UN Conference on Environment and Development in Rio de Janeiro, 3 to 14 June 1992.

115 Previously art XII.

116 Previously art XIII.

117 Previously art XIV.

- monitor the state of these resources and to conduct environmental impact studies in respect of developmental activities;
- conduct environmental monitoring and audits in respect of such activities; and
- ensure that these activities are based on sound environmental policies and minimise any adverse effects of such activities.

This article reflects modern environmental measures in respect of environmental protection.[118]

Article XX[119] contains minor amendments to the text of the existing provision.

Article XXI[120] places greater emphasis on interstate co-operation and measures of co-operation. Cognisance is given to measures under other international conventions and the harmonisation of policies and laws at a regional level. This is in line with the principles contained in the Rio Declaration, Agenda 21 and other treaties such as the CBD and CCD. Sub-section (1) includes sections (a) to (d). A new sub-section (2) containing a further seven subsections has been included. Sub-sections (3) and (4) have been deleted.

Article XXV,[121] dealing with exceptions, contains a new sub-section (3), which places an obligation on states to inform the Conference of Parties without delay of the nature and circumstances of such measures.

Article XXXV[122] institutes a new organ in respect of the settlement of disputes. If no amicable settlement[123] is reached within a period of 12 months, the matter must be referred to the Court of the African Economic Community/African Union. The decision of the court is final and cannot be taken on appeal.

Article XXXVI[124] provides for the possibility of signature and ratification under the OAU.

Article XXXVII[125] prohibits states to accede to the African Convention after the adoption of this Convention. Minor amendments have been made to the existing text of this article.

Articles XXI and XXIII to XXV of the African Convention have not been discussed. One should note that article XXIV of the African Convention dealing with the revision will probably not be contained in the revised African Convention.

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118 Principles 3, 4 and 17 of the Rio Declaration are per example reflected through this article.

119 Previously art XV.

120 Previously art XVI.

121 Previously art XVII.

122 Previously art XVIII.

123 In line with Principle 26 of the Rio Declaration.

124 Previously art XIX.

125 Previously art XXII.

6.3 New provisions included into the draft revised African Convention

The proposed revised African Convention contains 28 new articles and two additional annexes. These new articles will briefly be explored in order to consider whether the revised African Convention will meet modern environmental standards. These new articles deal with the following aspects:

In respect of the principles,[126] as contained in article III, inspiration was drawn from the African Charter. Recognition is given to article 24 dealing with the right to a satisfactory environment. A duty is further placed on states to ensure the right to development. The right to development, according to this Convention, entails the obligation to meet developmental and environmental needs in a sustainable and equitable manner in the interest of present and future generations. This article thus effectively links the traditional regulatory approach to environmental protection to the rights based approach as contained in the African Charter. It additionally links the right to a satisfactory environment to the issue of development through this article. Maluwa illustrates the relationship between the environment and development as a controversial relationship in that it is both causative and corrective — causative in the sense that environmental degradation is often caused by aspects relating to development itself. Measures employed to remedy environmental degradation are also often related to development processes.[127] The right as provided for by this principle and the African Charter potentially runs the risk of being negatively balanced by the right to development. Nevertheless, the right should not be utilised arbitrarily nor should it impose an unjustifiable restriction on international trade.[128] The relationship should strive to be a symbiotic relationship as proposed by Agenda 21. Ultimately, the decision lies with the Court.

Processes and activities affecting the environment and natural resources are covered in article XIV of the revised draft African Convention. An obligation is placed on states to mitigate, control and prevent activities that might adversely affect these resources. Once again reference is made to other conventions. Measures are also considered in order to attain this objective. Inspiration in respect of strengthening national standards and policies was drawn from the Berne Convention (1979).

The development and transfer of technology are considered under article XVI, with a view to accelerate the transition to sustainable development. Contracting parties are to cooperate and strengthen

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126 Art III.

127 For a full discussion on the linkage between the environment and development see ch 12: 'Environment and development in Africa in the 1990s: Some legal issues' in T Maluwa *International law in post-colonial Africa* (1999) 307.

128 Principle 12 Rio Declaration.

access to and transfer of, environmentally sound technologies. These measures would effectively place sound environmental management policies, techniques and processes within the reach of less developed countries, which will undoubtedly enhance such a country's capacity to fulfil and respect all the principles of the Rio Declaration.[129] These measures extend to the utilisation of this aspiration on a grassroots level.[130]

Military and hostile activities and their impact during armed conflicts are recognised. An obligation is placed on parties to refrain from methods of warfare that can possibly cause widespread, long-term or severe damage to the environment. Parties must also undertake to rehabilitate damaged areas at the end of conflict situations. By including this provision, revisers acknowledged the grave impact of armed conflicts on the African environment and presumably considered the provisions of the Geneva Conventions, their Additional Protocols and Principle 24 of the Rio Declaration.

Procedural rights in respect of environmental protection are guaranteed. Legislation and regulatory measures are to be adopted at a national level to ensure the dissemination of environmental information, access of the public to such information, public participation in environmental decision-making and access to justice in this regard.[131]

The Conference of Parties is to establish institutional mechanisms to investigate and address non-compliance in respect of the African Convention.

Liability covered in article XXIV pertains to measures to be adopted at a national level concerning liability and compensation for environmental damage arising from breaches of the provisions covered in the African Convention.

A Conference of Parties (COP) is established by article XXVI as a decision-making body under the African Convention. The COP can establish subsidiary bodies at their discretion and must adopt rules governing the Secretariat. It is also mandated to *inter alia* promote and review the effective implementation of the African Convention. The African Convention also makes provision for the attendance of other intergovernmental organisations, sub-regional institutions and observers to participate in the sessions of the COP.

The Secretariat is established under article XXVII and is responsible for the general administration of the African Convention.

Financial resources and the importance of its availability are acknowledged. Contributions will mainly be received from the contracting states

129 See the provisions of both the Rio Declaration and Agenda 21.

130 Art XVI.

131 Art XXII.

and OAU and to a lesser extent from other institutions such as non-governmental organisations.[132]

The relationship between contracting parties to the revised African Convention and the African Convention grants preference to the application of the revised African Convention. The relationship between a party to the 1968 African Convention and a party to the revised African Convention are governed by the 1968 African Convention.

In considering these new provisions it is obvious that not only are attempts being made to reflect contemporary environmental views into the African Convention, but also to ensure the effective implementation and administration of the provisions to be contained in the revised African Convention.

8 Conclusion

At first glance, the African Convention if evaluated in contemporary times can be described as a failure, particularly when it comes to its implementation, effectiveness and contributions. Lyster, in 1985, described the African Convention as the 'most comprehensive multi-lateral treaty for the conservation of nature yet negotiated'.[133] The African Convention covers a wide range of topics such as wildlife, conservation of natural resources, protected areas, trade and conservation education, research and development. These topics are, however, not covered in great detail. Comparing environmental treaties reveals that they can be divided into approximately 18 categories.[134] The African Convention covers roughly five of these. They are biological diversity (fauna and flora), forest resources, marine/coastal resources, and the environment and water resources management.[135] Thus, the African Convention might have been the 'most comprehensive' environmental treaty at its introduction in 1968, but one can hardly refer to it as such in contemporary times.

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132 Art XXX.

133 Lyster (n 9 above) 115. See also FJ Viljoen *The realisation of human rights in Africa through intergovernmental institutions* (1997) unpublished LLD thesis, University of Pretoria, 1997 345.

134 Those dealing with Antarctica, Atmospheric Pollution, Biological diversity (Fauna), Biological Diversity (Flora), Cultural Heritage, Energy, Fisheries, Forest Resources, Marine Environment, Marine Pollution, Marine/Coastal Resources and the Environment, Ozone Layer Protection, Peace and the Environment, Pests and Diseases, Toxic and Hazardous Substances, Water Resources Management, and the Working Environment.

135 See REC Beyond Boundaries: Appendix III for a comprehensive listing of environmental treaties both global and regional within these identified categories. Available on the internet: <http://www.rec.org/REC/Publications/BndBound/app3.html> (accessed 6 January 2002).

Considering what has been stated, one must agree that although environmental degradation and human rights violations that adversely impact on the environment, appear to have grown in magnitude over recent years, environmental concerns remain high on Africa's agenda. African environmental law is a reality. There is no shortage of environmental norm setting at a regional level and countries are formally committed to these norms, their effective implementation and administration.[136]

The African Convention presumably marked the way for subsequent international environmental developments. It can be said that after its adoption in 1968, it played a role in ensuing legislation and environmental management in African countries, even if only to a lesser degree.[137] The African Convention is vulnerable to criticism in respect of both its effectiveness and on its reflection of contemporary environmental norms. It can also be argued that no convention that has been in force for over 30 years would reflect contemporary norms and developments. The OAU has acknowledged this and an active revision process has been in progress since 1997 with a view of producing a convention that is in line with modern environmental standards.[138]

The revision process, as discussed above, reveals the following:

- This process is indeed an earnest attempt and a new African Convention is in the process of being established.
- The experts have both updated existing articles and included new articles to reflect modern environmental values.
- Although the African Convention will contain stronger enforcement mechanisms, a number of uncertainties remain.

The process started in 1983/4 and was resumed in 1997. This inter-agency review showed a renewed enthusiasm, which has seen the revision process continuing into 2002. The sincerity of this revision process further stems from the fact that this process operated according to well-structured methodologies and guidelines in order to reach the zero draft that was presented to the Council of Ministers in 2001. In addition to these methodologies, inspiration was drawn from the 1984 draft and international agreements in order to bring the African Convention in line with current environmental developments.[139]

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136 This should be evident from the Introduction and the historical context as discussed above.

137 Lyster (n 9 above).

138 n 74 & 83 above.

139 These Conventions include but are not limited to the: Convention on Biological Diversity, UN Convention to Combat Desertification, Basel Convention, Bamako Convention, Bern Convention, Abuja Treaty, the IUCN Guidelines for Protected Area Management Categories, the Constitutive Act of the African Union and African Charter on Human and Peoples' Rights.

It is interesting to note that when comparing the African Convention to its draft revised version that instead of creating a new convention in its entirety, the structure of the African Convention was retained, updated with new articles pertaining to contemporary environmental values. In the event that an article was of no significance, it was either replaced or deleted. The Preamble contains specific reference to sustainable development and reflects a stronger African spirit. It also acknowledges the importance of other international instruments regardless of the comprehensive nature of the revised product. The second significant step is the effective merger between the rights based approach and the traditional regulatory approach to environmental protection.[140]

The rights based approach to environmental protection has various progressive qualities. Firstly, it creates a wider scope for environmental protection beyond the specific regulation of certain concerns as contained in both the African Convention and the Bamako Convention. Secondly, the African Commission on Human and Peoples' Rights (African Commission) could apply the provisions of both the Charter and the revised African Convention.[141] In order for the right to a satisfactory environment as contained in the Charter to be meaningful, the African Commission must adopt a progressive analysis of this right in communications. This can be done by interpreting this right broadly in line with the revised draft Convention with specific emphasis on the substantive and procedural aspects as contained in the revised African Convention. This would breathe some life into the provisions of the Charter and assist in the realisation of its intended purpose.

The revised African Convention also emphasises the issue of armed conflict and its potential impact on the environment.[142]

In comparing the African Convention to the draft revised African Convention, it is evident that the revisers came to the realisation that the African Convention was without any 'teeth'. This issue was addressed through the establishment of a COP and an independent secretariat to the African Convention. In this regard consideration was also given to financial resources needed for these bodies to function successfully.[143] Another striking addition was in respect of dispute settlement in the referral of disputes to the Court of Justice of the African Economic Community of the African Union.[144]

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140 Arts III & XVI (revised).

141 This can be done directly through the application of arts 60 and 61 of the Charter, which allows for the consideration of such instruments in the interpretation of the Charter and communications before the Commission.

142 Art VX (revised).

143 Arts XX, VXXVI & XXVII.

144 The possibility exist that the African Court on Human and Peoples Rights may also consider the provisions of this Convention.

In conclusion, it seems a reality that Africa will have a modern environmental treaty in place within a period of two years. Uncertainties remain as to African parties' acceptance of this stronger revised African Convention with its serious obligations and the time frame in which it will gain prominence in the regional arena. The Bamako Convention serves as an example of a convention that took years to enter into force and remains with few ratifications, presumably due to its strong provisions. For the African Convention to be effective, the OAU must advocate for an accelerated rate of ratification of the revised African Convention. Another potential problem lies with the establishment of the COP and Secretariat, which could be hampered due to a lack of financial resources. This was the case with the Bamako Convention and to date none of the organs envisaged under the African Convention have been established.

It is time that the importance of the environment and its maintenance is realised by all Africans, individuals and governments alike. Cognisance must be taken of the fact that factors that impact adversely on the environment, will generally negatively impact on a wider scope of Africans' basic fundamental human rights. It is time that we take a stance in aid of our environment and support this potentially powerful environmental treaty that would be to the benefit of all Africans.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Protecting refugee rights — Getting serious about terminology

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1 Introduction

The emergence of Vladimir Zhirinovsky in Russia, Jean Marie le Pen in France, Skinheads in the United Kingdom and the rise of neo-Nazism in Europe and the United States clearly reflect the rise of intolerance against the 'other' in the world we inhabit. This is often reflected in a nauseating tide of xenophobia. Attacks on foreigners on the streets of Moscow, Manchester or Madrid are becoming more commonplace. Indeed, the catalyst for this article was television footage of the murder of a Mozambican refugee on the streets of Cape Town for the reprehensible crime of being different. That this can take place in a country which had undergone the scourge of apartheid is appalling. Small wonder then that policy-makers and academics are examining ways in which to enhance refugee protection. Rather than ensuring effective monitoring and enforcement of the existing refugee regime, efforts to date have focused on extending this regime by equating illegal immigrants with refugees, and by using terms such as 'economic refugees' and 'environmental refugees'. In doing so, these efforts unwittingly undermine the cause of refugee protection.

2 Who is an undocumented migrant?

This might sound like a banal question. It could be argued, for instance, that it is self-evident that an undocumented migrant or illegal immigrant is one who is residing in a country without the required documentation or illegally. Such a view would be strengthened by a perusal of South

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Africa's Aliens Control Act of 1991. The Act stipulates that a person is an 'illegal alien' if he or she:

- enters South Africa at a place other than a port of entry;
- remains in the country without a valid residence permit;
- acts in contravention of his or her residence permit;
- remains in South Africa after the expiry of a residence permit;
- is prohibited from entering the country; or
- becomes a prohibited person while in South Africa.[1]

The idea that one can make a distinction between undocumented migrants (or illegal immigrants) and refugees, is implied in the current definition of the term 'refugee'. For example, the 1951 United Nations Convention Relating to the Status of Refugees (UN Refugee Convention) defines refugees as persons who are living outside their country because of a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[2]

According to this definition, almost 18 million of the world's migrants may be classified as refugees. But this UN definition has been criticised by several scholars for being too restrictive. Woehlcke, for instance, notes that the Convention was originally intended to regulate the European refugee problem after the Second World War and that it is no longer applicable today where 'economic refugees' (those fleeing poverty and economic hardship) and 'environmental refugees' (those fleeing ecological catastrophe) make up the bulk of the numbers.[3] Loescher further elaborates:[4]

> [I]n many developing countries which have few resources and weak government structures, economic hardship is generally exacerbated by political violence. Thus it has become increasingly difficult to make hard and fast distinctions between refugees (as defined by the 1951 UN Convention with its political bias) and economic migrants.

In the same vein, Astrid Surhke notes that the criterion determining refugee status is persecution, usually referring to an act of a government against an individual.[5] This, she asserts, excludes those fleeing from generalised conditions of violence, insecurity and oppression, for example, in the case of the Democratic Republic of Congo. It also excludes the inhabitants of states where violence is externally induced. South Africa's destabilisation of the Frontline States (FLS) throughout

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1 Arts 1 to 6 Aliens Control Act 96 of 1991.

2 Art 1A(2) UN Refugee Convention, signed on 28 July 1951 and entered into force 22 April 1954, quoted in G Loescher *Refugee movements and international security, Adelphi Paper* (1992) 2.

3 M Woehlcke 'Environmental refugees' (1992) 43(3) *Aussenpolitik* 287-288.

4 Loescher (n 2 above) 7.

5 Quoted in H Solomon 'In search of Canaan: A critical evaluation of the causes and effects of migration within Southern Africa, and strategies to cope with them' (1993) 24 *Southern African Perspectives* 3–4.

much of the 1980s, as a result of its support of proxy groups — such as the National Resistance Movement of Mozambique (Renamo); the National Union for the Total Independence of Angola (Unita); the Lesotho Liberation Army and the Mashala Gang in Zambia — is an example of such externally induced unrest.[6]

Scholars such as Dolan argue that in South Africa the conventional distinction between undocumented migrants and refugees does not adequately reflect empirical reality and therefore is bound to produce ineffective policies.[7] For a more inclusive definition of refugee status, many point to the Organisation of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), adopted in Addis Ababa on 10 September 1969, as containing such an inclusive definition. The OAU Refugee Convention defines that a person is a refugee if:[8]

> [o]wing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of or the whole of his country of origin or nationality, [he] is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Is the definition provided for by the UN Refugee Convention inadequate in meeting the needs of protection for contemporary refugees? The answer is no. This paper will highlight the continued relevance of the 1951 UN Convention. There are key weaknesses in the arguments made by critics of the UN Refugee Convention.

Firstly, what will the implications be of broadening this definition? It can be argued that broadening the definition will adversely affect domestic stability as borders are opened without restriction and large numbers of people from impoverished and politically unstable states stream through national boundaries to relatively more prosperous and politically stable polities. The situation in receiving states would be made more serious, since only a minority of the world's people live in societies that respect human rights or that can meet the material needs of their members. Weiner puts it this way:[9]

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6 See X Carim 'Critical and postmodern readings of strategic culture in the 1990s' paper read at the Conference on a Culture of Peace in Commemoration of Dr Martin Luther King Jr, University of Zimbabwe, Harare, 1995; H Solomon 'Change and continuity in South Africa's foreign policy, 1978–1991' unpublished MA dissertation, University of Durban-Westville, 1994 169.

7 C Dolan 'Policy challenges for the new South Africa' *Southern African Migration: Domestic and Regional Policy Implications* Workshop Proceedings 14, Johannesburg: Centre for Policy Studies, 1995 53–54.

8 Art 1(2) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969 (OAU Doc CAB/LEG/24.3), adopted on 10 September 1969 and entered into force on 20 June 1974.

9 M Weiner *The global migration crisis: Challenge to states and to human rights* (1995) 189.

> There are, however, several legitimate objections to broadening the definition of refugees. If acts of discrimination short of persecution are the basis for claiming asylum, a large part of the world's population could do so. Asylum on the basis of discrimination could plausibly be claimed, for example, by over 100 million Indian Muslims whose mosque at Ayodhya was destroyed and who were fearful after many Muslims in Bombay and elsewhere were killed by Hindus. Millions of women around the world could similarly point to discriminatory restrictions imposed by their state or society as justification for seeking asylum. Moreover, a country that does not want its minorities could engage in systematic discrimination and impel countries that embrace a liberal conception of refugees to admit all whose human rights have been violated. The more liberal democratic states and international agencies become in granting asylum to persecuted minorities, the greater the inducement for a nationalist regime to engage in some form of 'ethnic cleansing'.

Building on this theme, Martin notes that refugee status is a scarce resource.[10] Individuals who have been granted refugee status are in a privileged category; it is an entitlement that allows them to move to a safe country for protection and assistance. Governments themselves must decide to whom such an entitlement should be given and how generous they should be. The broader the definition and the greater the entitlement, the more refugees will in all likelihood come.

But critics of the UN Refugee Convention will not be silenced. They argue that, while it makes sense from the perspective of the interests of the potential host state, it does not take the interests of the potential illegal immigrant or refugee into account. In other words, it is argued that the UN Refugee Convention is overly state-centric and is not sympathetic enough towards the human imperatives that drive people away from their homes.[11] However, Melander disputes this assertion.[12] He argues that the definition provided in the UN Refugee Convention is as relevant today as it was in the 1950s when it was adopted. In practice, he states that the 1951 definition is far more flexible than its critics would have us believe. This flexibility is evident in the immediate aftermath of the Soviet suppression of the 1956 Hungarian uprising which saw all Western governments following the lead of the United Nations High Commissioner for Refugees (UNHCR) in declaring all Hungarians fleeing from their native land to be refugees. More recently, the UN Refugee Convention has been interpreted so broadly by the UNHCR, that the organisation became involved in the early stages of the Yugoslav crisis even before the break-up of Tito's 'monolithic' communist state and before those who were internally displaced, crossed international frontiers. Through the UN Security Council's Resolution 688 of 1991, the UNHCR also set up 'safety zones' within Iraq to provide protection for

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10 D Martin 'The refugee concept: On definitions, politics and the careful use of a scarce resource' in H Adelman (ed) *Refugee Policy* (1991).

11 See in this regard A Shacknove 'Who is a refugee?' (1985) *Ethics* 274–284.

12 G Melander 'The two refugee definitions' *Report, 4*, Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1987.

displaced Kurds.[13] According to a strict interpretation of the refugee definition in the UN Refugee Convention, the UNHCR was clearly overstepping its mark. But, when asked about this, a senior UNHCR representative stated that the organisation uses a wider interpretation of the 1951 Convention's definition of a refugee. Moreover, she argued that a clear linkage existed between those internally displaced and refugees, in general.[14]

The question that may be posed is why one does not simply broaden the definition of the term refugee, if it is to be interpreted broadly anyway. The answer to this question lies in the fact that, should the term be broadened any further, it will be open to abuse by a number of people. As noted earlier, the broader the formal definition, the more the refugees, the more porous the borders and the more chances there are of domestic, and hence, international instability.

One of the most fundamental criticisms of the 1951 Refugee Convention is that it is unclear about what constitutes persecution and asserts that emphasis on the individual negates the concept of 'group persecution'. Once more, it is maintained that this criticism is unfair. While the UNHCR makes it clear that there is no universally accepted definition of persecution, this does not mean that there is no internationally acceptable criterion for determining whether a person has a 'well-founded fear of persecution'.[15] Melander observes that there is a growing tendency to make reference to basic human rights, that is, the criterion for persecution may be fulfilled if the applicant fears exposure to human rights violations.[16] In this respect, it is civil and political rights, in particular, that are relevant, in other words, those rights often dealing with the protection of the individual from state authority. The criterion may also be fulfilled when economic, social and cultural rights may be violated, in particular, if the applicant fears discriminatory measures.

Existing human rights instruments are also used by the UNHCR to assist it in interpreting the term 'persecution'. For instance, the Universal Declaration of Human Rights of 1948 (Universal Declaration) and the International Covenant on Civil and Political Rights[17] provide good guidelines as to when persecution is involved. A person who fears arbitrary detention contrary to article 9 of the Universal Declaration may be persecuted. The same applies to a person who fears punishment contrary to the right to freedom of opinion or expression, as prescribed in article 19 of the Universal Declaration. Actually, all substantive articles

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13 Weiner (n 9 above) 156.

14 Telephonic conversation with Ms Pia Prutz Phiri, Senior Protection Officer, Southern African Office of the UNHCR, 23 April 1996.

15 UNHCR *Handbook on procedures and criteria for determining refugee status* (1979) 14.

16 Melander (n 12 above) 13.

17 C Humana *World human rights guide* (1983) 13–23.

of the Universal Declaration can be used to understand the meaning of 'persecution'.

However, every person who has been or will be faced with a human rights violation in his or her country of origin cannot be considered a refugee. An important prerequisite is that the violation must reach a certain degree of severity before it will be classified as persecution. An arbitrary arrest must be of a certain duration to fulfil this criterion. In addition, the human rights violation must be motivated by one or more of the five causes of persecution mentioned in the 1951 Convention: race, religion, nationality, membership of a particular social group or political opinion.[18] The question of gender would be subsumed under the rubric of 'social group'. A 1996 case in the United States illustrates this well. A nineteen-year old woman from Togo fled her country to the United States and asked for refuge on the basis that she was being forced to undergo female genital mutilation. The United States Immigration Board of Appeals agreed with her that female genital mutilation constituted gender discrimination and persecution. Thus, she was granted asylum in the United States.[19]

Finally, according to the UN Refugee Convention, the fear of persecution must be individualised, that is, it is necessary that the applicant personally fears such measures. The same applies to human rights violations which, according to relevant international instruments, can always be related to an individual. This fact, however, does *not* preclude group persecution or group violations of human rights, for instance when it is based on race. Likewise, it may be established that parts of the population fear human rights violations. Thus, in South Africa, the policy of apartheid was directed against every person who did not belong to the white minority. As such, black South Africans were accorded the status of refugees in their respective host states.

In the same vein, Nobel argues strongly for the retention of the 1951 Convention, noting that any confusion relating to the status of refugees is harmful to the cause of their protection.[20] Moreover, he attacks scholars such as Woehlcke and Loescher who wish to extend refugee status to economic and environmental migrants, and points out that terms such as 'economic refugee' and 'environmental refugee' are non-existent in international law.[21] The underlying rationale for this legal

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18 n 15 above, 14.

19 'United States: Department of Justice, Board of Immigration appeals decision in re Fauziya Kasinga (female genital mutilation as a basis for asylum) (13 June 1996)'; reproduced in (1997) 9 *African Journal of International and Comparative Law* 195–216. H Solomon 'Who is an illegal immigrant?' (1996) 5(6) *African Security Review*; Melander (n 12 above) 7.

20 P Nobel 'Protection of refugees in Europe as seen in 1987' Report No 4, Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (1987) 28.

21 As above, 26–27.

stance is obvious: A distinction can be made between an illegal immigrant and a refugee based on the causes prompting a person to leave his or her country and to settle in another. Toolo and Bethlehem put it this way:[22]

> It is possible to argue that there is a difference between *refugees* (my emphasis) who have been driven from their own countries in large numbers as a result of a national crisis and *illegal immigrants* (my emphasis) who make a primarily individual decision to come to South Africa. While such an individual decision may reflect the conditions faced by people in the home country, this would be different from the crisis-driven nature of refugees. Refugees are only in a position to return to home when the crisis in their own country has been resolved, whereas illegal immigrants would not be dependent on a political or military solution.

Moreover, contrary to the claims of critics of the UN Refugee Convention, the OAU Refugee Convention does not extend protection under the refugee regime to illegal immigrants. Weiner[23] notes in this regard that there are more similarities than differences between the two Conventions. Both definitions view refugees as individuals who lack the protection of their own government. Neither definition applies to displaced persons within a country irrespective of whether there is persecution or violence, or to individuals fleeing from natural disasters such as floods, droughts or earthquakes. Moreover, neither definition includes individuals who flee from a tyrannical regime unless they are personally persecuted or their society is torn by life-threatening violence. Thus, it would be wrong to counterpose the two Conventions, since they are so similar. Furthermore, in the Preamble to the OAU Refugee Convention it is stated categorically that the OAU Refugee Convention is meant to complement and not oppose the UN Refugee Convention.

3 Conclusion

From the above, it is clear that the UN Refugee Convention steers a middle path between the rights of the individual and those of the state. This is as it should be, since undue emphasis on the rights of individuals can only lead to anarchy (open borders with its attendant domestic instability), while undue emphasis on the rights of states can only lead to regimes unconcerned with their moral obligations to the suffering of broader humanity outside the confines of citizenship.

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22 H Toolo & L Bethlehem 'Labour migration to South Africa' paper read at the National Labour and Economic Development Institute (NALEDI) Workshop on Labour Migration to South Africa, Johannesburg, 31 August 1994 5.

23 Weiner (n 9 above) 188–189.

South Africa has ratified both the UN Refugee Convention and the 1969 OAU Convention. Government policy consequently reflects this narrower version of the term 'refugee'. Scholars and policy makers who are serious about protecting refugee rights should give more attention to monitoring the implementation and enforcement of the existing refugee regime rather than seeking to broaden and thereby undermine the status of *bona fide* refugees.

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Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence

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1 Introduction

The international community has demonstrated renewed interest in the protection and promotion of human rights during the last few decades. By signing and ratifying human rights instruments, many states have incurred legal obligations to implement international human rights standards domestically. Despite the renewed interest, human rights violations remain rampant in Africa and throughout the world. In most instances, such violations are directly attributable to states and their governments.

In an attempt to curb these violations, close to 100 countries have established national human rights institutions to serve as independent bodies for the protection and promotion of human rights. In Africa, 24 such institutions have been established.[1] The purpose of this contribution is to examine the independence of these institutions, focusing

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1 Human Rights Watch identified the following national human rights commissions in Africa: Observatoire National des Droits de l'Homme (Algeria); Commission Beninoise des Droits de l'Homme (Benin); National Commission on Human Rights and Freedoms (Cameroon); Haut-Commissariat charge des Droits de l'Homme et de la Promotion de la Cutlture Democratique (Central African Republic); Commission Nationale des Droits de l'Homme (Chad); National Commission for Human Rights and Ombudsman (Ethiopia); Commission on Human Rights and Administrative Justice (Ghana); Standing Committee on Human Rights (Kenya); Human Rights Commission (Liberia); Human

particularly on the Ugandan Human Rights Commission (UHRC) and the South African Human Rights Commission (SAHRC).

The UHRC was founded in November 1996, on the recommendation of the Commission of Inquiry into Violations of Human Rights in Uganda (CIVHU) which was established by the National Resistance Army Movement (NRAM) government in 1986. The CIVHU had to document human rights violations in Uganda, occurring during the period 1962 to 1986 when the country was governed by various repressive regimes. Pursuant to its findings, CIVHU proposed to the Uganda Constitutional Commission (UCC) that a permanent and independent human rights Commission be included in the new constitutional draft.[2]. This proposal was accepted by UCC and provision for the establishment of the UHRC was made in the constitutional draft. When the Uganda Constitution was adopted in 1995, the UHRC was constitutionally entrenched in articles 51 to 59. These articles define the function, powers, and structure of the institution.

Although the SAHRC came into being under similar political circumstances, its establishment was not recommended by a commission of inquiry. The establishment of the SAHRC was an integral part of South Africa's paradigm shift from the apartheid legacy to a new constitutional order based on respect and protection of human rights. The SAHRC was established with a view to ensure that 'the appalling human rights abuses of South Africa's past could not be repeated'.[3]

The interim Constitution,[4] which came into force on 27 April 1994, made provision for a wide array of government-funded monitoring bodies[5], including a national human rights commission. After the 1994

Rights Commission (Malawi); Commission Nationale Consultative des Droits de l'Homme (Mali); Commissariat aux Droits de l'Homme, a la Lutte contre la Pauvrete et a l'Insertion (Mauritania); Conseil Consultatif des Droits de l'Homme (Morrocco); Commission Nationale des Droits de l'Homme et des Libertes Fondamentales (Niger); National Human Rights Commission (Nigeria); Commission National des Droits de l'Homme (Rwanda); Comite Senegalais des Droits de l'Homme (Senegal); National Commission for Democracy and Human Rights (Sierra Leone) South African Human Rights Commission (South Africa); Advisory Council for Human Rights (Sudan); Commission Nationale des Droits de l'Homme (Togo); Higher Committee on Human Rights and Fundamental Freedoms (Tunisia); Uganda Human Rights Commission (Uganda); Human Rights Commission (Zambia). See Human Rights Watch *Protectors or pretenders? Government human rights commissions in Africa* (2001).

2 The UCC was established by the government of Uganda in 1988 and was charged with the task of writing a new draft constitution for Uganda.

3 Human Rights Watch (n 1 above) 293.

4 Constitution of the Republic of South Africa Act 200 of 1993.

5 Chapter 8 of the interim Constitution provides for the office of the Public Protector, a Human Rights Commission and the Commission on Gender Equality. In addition to these institutions the final Constitution of the Republic of South Africa Act 108 of 1996 provides for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (art 185–186), an Auditor-General (art 188), an Electoral Commission (art 190–191) and an Independent Authority to Regulate Broadcasting (art 192).

elections, South Africa's first democratically elected parliament drafted legislation establishing the SAHRC and President Mandela signed the Human Rights Commission Act[6] into law on 23 November 1994. The Act came into force in September 1995 and the SAHRC held its first working session in October 1995.

The decision to focus specifically on the independence of the UHRC and the SAHRC is based on two factors. Firstly, Uganda and South Africa share a chequered history in which the violation of human rights was the norm rather than the exception. With the lessons from the demise of post-colonial democracies in other African countries, Uganda and South Africa found themselves facing the huge task of consolidating their recently attained democracies. The UHRC and the SAHRC were thus established to show unequivocal government commitment to a culture of respect, protection and promotion of human rights. The second factor is the fact that there has recently been much debate in the media and in academic circles on the independence of these two institutions.

2 Importance of independence

The independence and impartiality of national human rights institutions are frequently cited as prerequisites for their effective operation.[7] As far as national human rights commissions are concerned, the United Nations (UN) maintains that such institutions should operate in such a manner that their independence is beyond reproach.[8] The Paris Principles,[9] which were adopted at a workshop organised under the auspices of the UN Commission on Human Rights, provide as follows with regard to the independence of national human rights institutions:

Composition and guarantees of Independence and Pluralism

1 The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

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6 Human Rights Commission Act 54 of 1994.

7 See, eg, Commonwealth Secretariat Human Rights Unit *National human rights institutions: Manual* (1998) 15; UN Centre for Human Rights *National human rights institutions: A handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* (1995) 10.

8 UN Centre for Human Rights (n 7 above) 10.

9 The Principles Relating to the Status of National Institutions for the Protection and Promotion of Human Rights, Resolution 18/134 of 20 December 1993. The principles were adopted at a workshop that was held in Paris from 7 to 9 October 1991.

a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
b) Trends in philosophical or religious thought;
c) Universities and qualified experts;
d) Parliament;
e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2 The national institution shall have infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3 In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

The effectiveness of national human rights institutions primarily depends on their capacity to act independently of government. It also depends to a large extent on the institutions' demonstrated ability to act independently of all other activities, governmental or not, that may impinge on their work. Thus, independence is one of the yardsticks against which the competence of a national human rights institution as an effective mechanism for the protection and promotion of human rights is to be tested.

Independence is, however, a relative concept as far as national human rights institutions are concerned. The relativity of the concept manifests itself in three ways. Firstly, national human rights institutions are established by law and thus derive their powers and functions from the enabling and empowering legislation. As such, they are inextricably linked to the legislature. The legislature therefore has the competence to determine the extent to which the institutions can exercise their authority. Secondly, it is an established and general practice for national human rights institutions to be required to report on their activities to parliament in most jurisdictions. This requirement ensures that these institutions do not exercise their powers arbitrarily. Lastly, a lack of full financial autonomy is another reality that inhibits complete independence.

The preceding paragraph gives some indication of the complex nature of the relationship between national human rights institutions and governments.[10] The reporting obligations and financial dependence

[10] The relationship is complicated by the fact that it does not fit easily into the normal structure of democratic governance. In the South African context, this is so because the government has overlapping accountabilities to parliament and the SAHRC. The relationship is further complicated by the fact that the SAHRC, just like the UHRC, primarily depends on the government for financial support.

of national human rights institutions are important innovations aimed at ensuring accountability. However, it is also important that there is, at all times, an understanding of the nature of the underlying relationship between these institutions and governments. The credibility of national human rights institutions and governments depends on the extent to which governments are prepared to respect the independence of the institutions and on the willingness of these institutions to respect governmental authority.

Although the establishment of a national human rights institution inevitably entails the imposition of specific restrictions on the institution, it is vital that restrictions on independence be minimal. Restrictions must not be of such a nature that the institution is rendered incapable of discharging its responsibilities. According to the Paris Principles and the guidelines laid down by the UN Centre for Human Rights,[11] the following four criteria are used to determine the independence of national human rights institutions:

- Does the institution enjoy legal and operational independence?
- Does the institution have clearly defined appointment and dismissal procedures?
- Does it control its own finances?
- Is it composed of individuals capable of acting independently?

All of these requirements are necessary manifestations of independence and require respect and observance from government. In the next section, each of these requirements is discussed in the light of the UHRC and the SAHRC. To that extent, this study is a comparative analysis of the independence of the two institutions.

3 Legal and operational independence

3.1 The UHRC

The 1995 Uganda Constitution establishes the UHRC as an independent state institution.[12] The Commission is compelled by the Constitution to be independent *in the performance of its duties*,[13] and not to be subject to the direction or control of any person or authority.[14] The question to be asked is whether this constitutional mandate has been effectively discharged.

11 UN Centre for Human Rights (n 7 above) 10.
12 Art 54 Constitution of the Republic of Uganda (1995).
13 My emphasis.
14 Art 54 Constitution of the Republic of Uganda (1995).

Uganda's history has been characterised by political turmoil and considerable executive control of all state institutions.[15] All state institutions established under previous regimes were literally rubberstamps and did not enjoy any measure of independence from the government. Although the present government has attempted to change the position, much still needs to be done before there can be any public confidence in state institutions. It is in this light that the operational independence of the UHRC has to be evaluated.

That said, an examination of the work of the UHRC since its establishment[16] reveals that the institution has managed to perform its constitutional functions to a great extent.[17] This it has done independently of government, thus enhancing its credibility. The Commission has achieved this by exposing to the public human rights violations resulting from government's actions or inactions. The Commission has particularly criticised the government on three main areas of concern in Uganda.

In the first instance, the UHRC came out strongly against the death penalty and fiercely criticised the government's failure to abolish the death sentence.[18] Secondly, the Commission was very critical on detentions without trial, detentions under inhuman conditions, and cruel, inhuman and degrading treatment.[19] Thirdly, the Commission criticised the Ugandan government for its failure to curb the insurgencies in northern Uganda.[20]

These three examples demonstrate that the UHRC can and does criticise the government. The fact that a state-created institution reacts strongly against state policies or human rights abuses perpetuated by the state may be taken as a clear indication that the institution is committed to the protection and promotion of human rights. In my opinion, such criticism also constitutes an unequivocal assertion of institutional independence from the government.

Apart from these three examples, the UHRC has also demonstrated its institutional independence by handing down crucial decisions against

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15 For a discussion of the political history of Uganda, see the following: Report of the Commission of Inquiry into Human Rights Violations in Uganda *Findings, conclusions, and recommendations* (October 1994); B Wairama *Pearl of blood, A pamphlet summary of the report of the Uganda Commission of Inquiry into the Violations of Human Rights* (October 1994); D Mukholi *A complete guide to Uganda's Fourth Constitution: History, politics, and the law* (1995); O Odongo *A political history of Uganda* (2000).

16 The UHRC was established in November 1996 and opened its doors to the public for the first time in April 1997.

17 The Commission's functions are set out in art 53 of the Constitution of the Republic of Uganda (1995).

18 UHRC (June/July 1999) 2 *Your Rights* 2. See also UHRC (August 1999) 2 *Your Rights* 29.

19 UHRC *Annual Report* (1998) 31. See also UHRC (February 2000) 3 *Your Rights* 10.

20 UHRC (n 19 above) 56.

government officials guilty of human rights abuses.[21] Similarly, reports published by the Commission on the human rights situation in Uganda indicate a measure of independence from government.[22]

These examples notwithstanding, the UHRC has been criticised for focusing on civil and political rights, thus failing to pay sufficient attention to the enforcement of socio-economic rights in Uganda. The Commission is said to have paid 'scant attention to these rights [socio-economic rights] in its 1997 annual report'.[23] Although the Commission is alleged to have failed 'to appreciate and emphasise the interrelationship that exists in the enjoyment of the two sets of rights'[24] in the report, it should not be crucified for this. Perhaps the reason for its apathy is the fact that socio-economic rights are not emphasised in Uganda. Ugandan courts also tend to deal with civil and political rights on a larger scale than socio-economic rights.[25] The failure to protect socio-economic rights can be attributed partly to the nature of the economic, social, cultural, political and legal environment under which the institution operates. In my opinion, the environment curtails the activities and operations of the Commission. Generally speaking, it is my argument that the UHRC acts independently of the government and has managed to contribute towards the creation of a culture of respect for human rights in Uganda. In the next section I consider the legal and operational independence of the SAHRC with a view to determine whether that institution carries out its mandate in an independent manner.

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21 See, eg, the decisions of the Commission in the following cases: *Kasoga and Hon Basoga Nsadhu* UHRC 264/97; *Katende Angello and Hon Zimula Mugwanya* UHRC 16/98; *Masombuko Edward and Hon Muganwa Kajira* UHRC 679/98; *Mwesineza A and Hon Lt DG Gumisiriza* UHRC 804/98; *Busima T John and Hon AWH Kanyike* UHRC 926/98; *Makode Christopher and Hon Basoga Nsadhu* UHRC 61/99; *Wandera Zephania and Hon Baitera Maiteki* UHRC 66/99; *Osekeny PE and Hon Tom Butime* UHRC 153/99; *Ssalongo Ibrahim Lulika and Hon Janat Mukwaya* UHRC 393/99; *Wanyera George and Hon Pajobo Joram* UHRC 444/99; *Mugabo Goret and Hon Eddy Kwizera* UHRC 479/99; *Begambagye G and Hon Stephen Karuma* UHRC 504/99; *Kasule Silas and Hon Tom Butime* UHRC 834/99; *Nyarubona Rose Mary and Hon Manzi Tumubweine* UHRC 870/99; *Katerega John and Hon Kezimbira Muyingo* UHRC 1023/99; *Wafula Wilson and Hon Pascal Mukasa* UHRC 1147/99; *Siluma Charles and Hon Wanjusi Wasyeba* UHRC 1256/99; *Kabuga Onesimus and Hon Dr Timothy Mutesasira* UHRC 102/2000; *Ahimbisibwe et al and Hon DG Gumisiriza* UHRC 201/2000;*Ruhemba K Ruth and Hon K Ruhemba* UHRC 308/2000; *Kizza Charles and Hon Miria Matembe* UHRC 655/2000; *Kubona L Louisa and Hon Basoga Nsandlu* UHRC 769/2000.

22 In this regard see the UHRC (n 19 above). For a critique of the 1997 report, see A Makubuya 'Breaking silence: A review of the maiden report of the Uganda Human Rights Commission' (1999) 5 *East African Journal of Peace and Human Rights* 213.

23 Makubuya (n 22 above) 213. The broad focus of the 1997 report was on civil and political rights.

24 Makubuya (n 22 above) 213.

25 This is evidenced by the fact that there are very few, if any, cases dealing with socio-economic rights that have come before Ugandan courts.

3.2 The SAHRC

The SAHRC is an independent, constitutionally entrenched institution.[26] The SAHRC is explicitly designated as a state institution supporting constitutional democracy.[27] The Commission is subject only to the Constitution and other organs of state are obliged, through legislative and other measures, to assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness.[28] They are also barred from interfering with its functioning.[29]

Despite constitutional guarantees, practical problems remain in respect of the nature of the obligations imposed by the Constitution'.[30] The problem is said to be complicated by the 'variations of understanding of the nature and meaning of independence depending on who spoke among cabinet ministers'.[31] The problem of the independence of the SAHRC is also said to stem from the fact that 'politicians seemed resentful about the extent of the independence from state institutions'.[32]

Having realised the gravity of the problem and the fact that political whims were likely to affect its independence, the Commission decided that its members should desist from active participation in party politics and a register of members' interests was opened.[33] This was done immediately upon the commissioners assuming office. In an attempt to be people-centred, the Commission also forged links with non-governmental organisations (NGOs) and human rights experts through its standing committee system.[34] By incorporating the knowledge of

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26 Sec 181(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution). It should be noted that the SAHRC was established under secs 115–118 of the interim Constitution and the Human Rights Commission Act 54 of 1994 was passed under this Constitution.

27 See in this regard ch 9 final Constitution.

28 Sec 181(3) final Constitution.

29 Sec 181(4) final Constitution.

30 B Pityana 'National institutions at work: The case of the South African Human Rights Commission' (1998) unpublished paper on file with author 5.

31 Pityana (n 30 above) 5. The Commission also noted in its fourth annual report to parliament (SAHRC *Fourth Annual Report* December 1998–December 1999) that there is a lack of understanding of the role of the Commission within government circles and an inability to utilise the Commission to good effect. The problem, the Commission observes, emanates from the fact that 'in the minds of some civil servants and ministers, the Commission is of no more than nuisance value'.

32 Pityana (n 30 above) 5.

33 See in this regard SAHRC *Annual Report* (1995–1996) 10.

34 According to sec 5(1) of the Human Rights Commission Act 54 of 1994, the Commission may establish one or more committees consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it. Sec 5(4) further provides that the committee shall, subject to the directions of the Commission, exercise such powers and perform such duties and functions of the Commission as the Commission may confer on or assign

people from outside, the Commission sought to emphasise the importance of partnerships with experts and members of civil society in the development of a national culture of human rights.[35]

Although the SAHRC generally performs its functions independently of executive and political manipulations, there is a growing concern within the human rights community that it is not effectively discharging its constitutional mandate.[36] The Commission has been criticised for 'focusing on the 'softer' human rights issues and ignoring human rights issues with major relevance for South Africa'.[37] Concerns have also been raised about the Commission's operation and its broad mandate to protect and promote human rights.[38]

The SAHRC has also been criticised for its alleged failure to promote human rights awareness in South Africa. The obligation to promote an awareness of human rights in the country falls within the Commission's promotional mandate.[39] In 1998 the Community Agency for Social Enquiry (CASE), which carried out research in a bid to assess the awareness of human rights and knowledge about the Bill of Rights among the general South African public and specified target groups,[40] found that just over half of the South African population (55%) had heard about the Bill of Rights.[41] In addition, CASE found that participants were in the dark regarding organisations and structures that were available to assist them. No mention of human rights bodies such as the SAHRC, Commission for Gender Equality (CGE) or any other relevant NGO working in the field of human rights was made.[42]

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to it and follow such procedure during such exercising of powers and performance of duties and functions as the Commission may direct. In accordance with the section, the SAHRC has established standing committees consisting of commissioners and outside experts and stakeholders who advise the Commission on policy and help implement the Commission's programmes.

35 See SAHRC *Annual Report* (1997–1998) 40.

36 J Sarkin 'Reviewing and reformulating appointment processes to constitutional (chapter 9) structures' (1999) 15 *South African Journal on Human Rights* 587 596.

37 As above.

38 The US State Department in its South Africa country report on human rights practices for 1998 noted that 'the SAHRC's operations have been hampered by red tape, budgetary concerns, the absence of civil liberties legislation, several high-level staff resignations, and concerns about the Commission's broad mandate.' The report is available on <http://www.state.gov/www/global/human_rights/1998_hrp_report/southafr.html> (accessed 14 May 2001).

39 Sec 7(1)(a) of the Human Rights Commission Act 54 of 1994 provides that 'the SAHRC shall develop and conduct information programmes to foster public understanding of [t]his Act, Chapter 3 of the interim Constitution [the Bill of Rights], and the role and activities of the Commission'.

40 The specified target groups were children, prisoners, refugees, disabled people, people living with HIV/AIDS, and dispossessed people.

41 P Pigou, R Greenstein & N Valji (1998); <http://www.case.org.za/htm/knowle2.html> (accessed 19 May 2001).

42 As above.

Criticisms levelled against the operational efficiency of the SAHRC notwithstanding, the SAHRC has, in its five years of existence,[43] managed to discharge its constitutional[44] and legislative[45] mandate in an independent manner. The Commission has attempted, through its various programmes and activities,[46] to comply with and appreciate the circumstances under which it is expected to operate, especially in a highly politically charged environment like that of South Africa. The Commission has, for instance, issued a number of publications[47] that generally contribute to human rights awareness in the country, promote knowledge of the Commission's complaint procedures, and assist other bodies in conducting their own human rights training and awareness campaigns. The Commission intervened as *amicus curiae* in a number of court cases,[48] addressing pertinent human rights issues. These interventions are a useful advocacy tool and provide evidence of the Commission's commitment to a culture of respect, protection and promotion of human rights.

Section 9(1)(c) of the Human Rights Commission Act provides the SAHRC with the power to require *any person* by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of its staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation. In the recent past, the Commission used its power to subpoena prominent government officials to appear before

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43 The SAHRC held its first working session on 12 October 1995 and was officially launched on 21 March 1996.

44 In terms of sec 184(1) of the final Constitution, the Commission must promote respect for human rights and a culture of human rights; promote the protection, development, and attainment of human rights; and monitor and assess the observance of human rights in the Republic. The Commission is also implored by sec 184(3) to require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of socio-economic rights in the Bill of Rights.

45 The SAHRC has additional functions set out in national legislation, supplementing its constitutional mandate. This include the functions of the Commission in terms of the Human Rights Commission Act 54 of 1994; the Promotion of Access to Information Act 2 of 2000; and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

46 Major programmes and projects of the commission include: National Action Plan and Strategy to Combat Racism; Roll Back Xenophobia Campaign; Socio-economic Rights Campaign; and Investigations into Racism in the Media. For a detailed discussion of the Commission's activities, see Human Rights Watch (n 1 above) 297–303.

47 These include booklets, comics, a newsletter, pamphlets, and workshop manuals.

48 Examples of the cases include: *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); *Fose v Minister of Safety & Security* [1997] 7 BCLR 851 (CC); *S v Twala* [2000] 1 BCLR 106 (CC).

it.[49] It is therefore my argument that, despite the minor pitfalls, the SAHRC has managed to perform its functions independently of the government.

3.3 Concluding remarks

Although it is perfectly legitimate to evaluate and criticise the UHRC and the SAHRC, it is important that we do not lose sight of the fact that the two Commissions have only been operational for five and six years respectively. The process of establishing themselves is a slow, hard, and sometimes painful process requiring great endurance and patience. Their success depends on various factors, including social, economic and political. Credit must be given where it is due, and where it is not, criticism should be levelled. The discussion now focuses on the appointment and dismissal procedures and processes of the UHRC and SAHRC.

4 Independence through appointment and dismissal procedures

4.1 The UHRC

The method by which members of a national human rights institution are appointed is crucial in ensuring the independence of the institution. An appointments procedure can be described as 'a confidence-building exercise for the government, citizens, and organs of civil society in the integrity, independence, and competence of the institution'.[50] As far as possible there should be little executive influence over the process.

The 1995 Constitution of Uganda provides for the appointment of the commissioners of the UHRC by the president with the approval of parliament.[51] Although this is allegedly working fairly well in practice, 'the procedure itself is flawed in that it gives the president [and thus the executive] too great an influence in the exercise'.[52] There is minimal or no opportunity for input from the organs of civil society.[53] The appointment of commissioners of the UHRC is essentially a governmental issue. Members of the public are completely excluded from the exercise. The

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49 Government officials subpoenaed by the Commission in the past include: the premier of the Northern Cape, Mr Manne Dipico; the MEC for Health in Mpumalanga, Ms Sibongile Manana; the former chief of the South African National Defence Force (SANDF), General Georg Meiring and the former Minister of Health, Dr Nkosazana Zuma.

50 J Hatchard 'A new breed of institution: The development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission' (1999) *Comparative and International Law Journal of Southern Africa* 28.

51 Art 51(2) Constitution of the Republic of Uganda (1995).

52 Hatchard (n 50 above) 32.

53 As above.

entire process takes place in secrecy. When asked whether NGOs play any role in the process, a representative of the Uganda Association of Women Lawyers (FIDA) commented as follows:[54]

> Not to my knowledge, because these things are normally confidential. Normally we just see them in newspapers. You just see once in a while in papers that so and so have been nominated and will be going to screening by Parliament. We even do not know how they were selected in the first place. The whole process is not transparent. We as NGOs do not play any role. We are not consulted.

The participation of civil society and its organs in the consultative process leading to the creation of national human rights institutions is vital for two reasons. Firstly, it grounds these entities within the context of the common people, eventually leading to credibility and independence. Secondly, it ensures that the institutions are perceived by citizens as true representatives of their interests, rather than mere creatures of governmental processes born out of closed negotiations between bureaucrats and politicians.

The exclusion of civil society and NGOs from the appointment process is deplorable, particularly when considering that the institutions are created primarily to cater for and safeguard the rights and interests of members of civil society. The question is how members of civil society can be expected to have confidence in the institution when appointments take place behind closed doors.

Despite the problems inherent in the appointments procedure and process, members of the UHRC have security of tenure. Commissioners serve for a renewable period of six years,[55] enjoy the same terms and conditions of service as judges, and they are immune from civil proceedings.[56] In addition, the commissioners are protected, by virtue of article 56 of the Ugandan Constitution, from arbitrary removal from office. This is achieved by providing for the same formal removal process as that of a judge, namely, inability to perform the duties of office by reason of mental incapacity, misconduct, misbehaviour or incompetence.[57]

4.2 The SAHRC

Under the interim Constitution, the formal power of appointment of members of the SAHRC vested with the president who had to appoint persons nominated by a joint committee of the two houses of

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54 Interview with Ms Maria-Goretti Karuhanga Mayiga, 25 September 2000.

55 The Ugandan Constitution and the Uganda Human Rights Commission Act 4 of 1997 are silent on the issue of the number of times that the commissioners' term may be renewed. The Constitution simply state that the commissioners' term of office is renewable. It therefore, by implication, presupposes that the term may be renewed more than once.

56 Arts 51 & 56 Constitution of the Republic of Uganda (1995).

57 Hatchard (n 50 above) 34.

parliament.[58] Commissioners are appointed to hold office for a fixed term of up to seven years, which is renewable only once.[59] Although the interim Constitution contained detailed appointment procedures, neither the independence of the SAHRC nor dismissal procedures were provided for in the interim Constitution. These matters were left to the legislature and are covered in greater detail by the Human Rights Commission Act. In terms of section 3 of the Act, the president is given the power to remove any member of the SAHRC if a joint committee of parliament requests such a removal. The request has to be approved by parliament by means of a resolution adopted by a majority of at least 75% of the members present and voting. The Act does not set out the reasons for which or the circumstances under which a member may be dismissed. These are set out in section 194 of the final Constitution. The section provides that members of the SAHRC may be removed from office only on —

a. the ground of misconduct, incapacity or incompetence;
b. a finding to that effect by a committee of the National Assembly; and
c. the adoption by the Assembly of a resolution calling for that person's removal form office.[60]

The procedure for the appointment of members of the SAHRC is now governed by section 193 of the final Constitution, which repealed the interim Constitution. In terms of section 195, the President appoints the commissioners on the recommendation of the National Assembly.[61] The marked distinction between the appointment procedure of the UHRC and the SAHRC should be noted: In the case of the UHRC it is the President who makes the appointment subject to approval by parliament, whereas in the case of the SAHRC the President approves the appointment on the recommendation of the National Assembly.

The process for the appointment of members of the SAHRC started in early 1995. The public was invited, by advertisement in the press, to submit nominations to the joint committee.[62] However, no short-listing process took place. The committee decided that all nominees should be interviewed. By March 1995 each political party had submitted its proposed list of commissioners. The nomination of the 11 commissioners

58 Sec 115(3) interim Constitution.
59 Sec 3 Human Rights Commission Act 54 of 1994.
60 Sec 194 (1)(a)–(c) final Constitution.
61 Sec 193 (4) final Constitution.
62 The committee operated under the chairpersonship of African National Congress (ANC) Senator Bulelani Ngcuka, now the Director of Public Prosecutions.

was unanimously approved by parliament on 6 April 1995.[63] Former President Nelson Mandela made the formal approval of the appointments on 1 October 1995, some six months after the appointments were approved by parliament. The delay in approval of the appointments by the President is said to have been caused by, among others, negotiations between the Department of Justice and the nominees about their salaries, the seat of the Commission, and who would serve as full-time and who part-time.[64]

Despite the political consensus[65] surrounding the appointment of the SAHRC commissioners, human rights activists expressed fierce criticism of the practicalities of the procedure and the politicised nature of the process.[66] The following discrepancies were identified during the interview process:[67]

> Firstly, no single member of the joint parliamentary committee except Chairperson Bulelani Ngcuka was present for all the interviews. Secondly, white men consistently dominated the interviewing panel. Thirdly, interviews were very short, lasting only 20 to 30 minutes. Fourthly, the questioning of nominees was grossly inconsistent. Fifthly, a number of questions were inappropriate, and lastly, there was little media coverage of the process.

Given the highly politicised nature of the appointment process of the SAHRC commissioners under the interim Constitution, it is becoming increasingly apparent that necessary safeguards have to be put place to prevent a future recurrence of the problem. If this is not done the legitimacy and independence of the institution will be grossly jeopardised. Perhaps the first step in addressing this impasse will be to forbid future appointees from holding or having held any political office.[68] Another alternative will be to review the nature and role of parliament's participation in the process.

Sarkin proposes that 'while parliament should undoubtedly play a role in the determination of the composition of the SAHRC, it is also essential

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63 The commissioners appointed were: Barney Pityana (Chairperson), Shirley Mabusela (Deputy Chairperson), Max Coleman, Helen Suzman, Anne Routier, Rhoda Kadalie, Pansy Tlakula, Brigalia Bam, Karthy Govender, Charles Dlamini and Chris de Jager. Commissioners Marx Coleman, Helen Suzman, Anne Routier, Rhoda Kadalie, Brigalia Bam and Chris de Jager have since resigned from the Commission and they have been replaced by Commissioners Jody Kollapen, Zonke Majodina, Charlotte McClain, Tom Manthata and Leon Wessels.

64 Sarkin (n 36 above) 593.

65 It is important to note that the nomination and appointment of SAHRC commissioners under the interim Constitution were very much a political compromise. This, however, is no longer the position under the final Constitution.

66 Sarkin (n 36 above) 593.

67 As above.

68 Sec 6 of the Uganda Human Rights Commission Act 4 of 1997 obligates persons holding office as members of parliament, members of local government councils, members of the executive of political parties or political organisations, and public officers to relinquish their duties upon appointment as commissioners of the UHRC.

that adequate safeguards, as well as checks and balances be put in place to prevent unwarranted political manipulation'.[69] He is of the view that an independent panel should be created to receive nominations, perform interviews, and recommend candidates for appointment.[70] This should, however, not be construed to mean that parliament should play no role in the appointment process. The most tenable situation will be for a limited number of parliamentarians, as elected representatives of society, to serve on the proposed panel.[71] However, the majority of the panellists should be non-partisan members of civil society. Such a panel, Sarkin suggests, should be composed of one member nominated by the president's office; one member nominated by the National Council of Provinces; one member nominated by the National Assembly; and four members of civil society nominated by the SAHRC, the CGE, the Public Protector, and the Auditor General respectively.[72] To this list I wish to add three members nominated by law faculties of institutions of higher learning in South Africa.[73]

4.3 Concluding remarks

In conclusion on the point of appointments, I would like to reiterate that civil society should play a clearly defined role in the appointment of members of both the UHRC and the SAHRC. An inclusive approach should be adopted in order to afford civil society a more participatory role in the process. The public may, for instance, be afforded an opportunity to comment on the nominations, to lodge objections to the appointment of certain nominees, or to provide input into the interview questions. This will inevitably require the adoption by the stakeholders of a rigorous advertising campaign of the process. To ensure maximum participation by the public in the process, such a campaign will inevitably have to set out lucid time frames for the receipt of nominations and for lodging objections. The campaign will also have to entail substantial and sufficient advertising of the interview times and schedules.[74]

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69 Sarkin (n 36 above) 610. The primary purpose of undertaking this venture will be to ensure that the institution functions independently of party politics.

70 Sarkin (n 36 above) 611.

71 As above.

72 As above. The same panel is with the necessary changes recommended for the UHRC.

73 Legal academics constitute what one can term the 'brain' of the legal profession and will therefore add impetus to the proceedings.

74 For a detailed suggestion on how the publicity plan can be conducted, see Sarkin (n 36 above) 612.

5 Financial independence

5.1 The UHRC

The concept of financial independence, as far as national human rights institutions are concerned, implies the ability to have access to funds reasonably required to perform constitutional obligations.[75] Access to adequate financial resources and an ability to have control over those resources are prerequisites for the effective operation of national human rights institutions.

The 1995 Uganda Constitution states that the administrative expenses of the UHRC must be charged to the country's consolidated fund.[76] Similarly, the Ugandan parliament is required to ensure that adequate resources and facilities are provided to the Commission to enable it to perform its functions effectively.[77]

The UHRC enjoys a measure of financial independence from the executive. In practice the Commission submits its proposed budget to the president, who tables it *without revision* before parliament for approval.[78] The president is only permitted to make his recommendations on the proposed budget.[79]

Even though the UHRC is assured financial autonomy in the Constitution, practical problems remain. The government constantly underfunds the Commission.[80] As a result, the UHRC finds itself in the unfortunate position of having to obtain funds from sources other than government, which has the primary obligation to finance the institution. The Uganda Human Rights Commission Act permits the Commission to obtain grants and donations from other sources, whether within or outside the country.[81] However, the Commission requires the approval of the Minister of Justice, acting in consultation with the Minister of Finance, to fundraise.[82]

The requirement for ministerial approval 'places both an unnecessary and unfortunate restriction on the functioning and fundraising ventures

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75 H Corder, S Jagwanth & F Soltau *Report on parliamentary oversight and accountability* (July 1999) 88.

76 Art 155 Constitution of the Republic of Uganda (1995).

77 Sec 13 Uganda Human Rights Commission Act 4 of 1997.

78 My emphasis.

79 Art 155(3) Constitution of the Republic of Uganda (1995).

80 For example, in the 1997–98 fiscal year the Commission had budgeted for 5 billion Uganda shillings, but the Treasury reduced the amount to 1,3 billion Uganda shillings.

81 Sec 13(3) Uganda Human Rights Commission Act 4 of 1997. The main external funders of the Commission include the following institutions: the Swedish government, the Royal Belgium government, the British government, the Australian government, the Raoul Wallenberg Institute of Human Rights and Humanitarian law, the Friedrich Ebert Foundation, the Konrad Adenauer Foundation and The Danish Centre for Human Rights.

82 Sec 13(3) Uganda Human Rights Commission Act 4 of 1997.

of the commission'.[83] Fundraising is a matter that should be left entirely to the discretion of the Commission. In principle, so long as the Commission's independence is not compromised, there should be no government involvement in the fundraising ventures of the Commission. Perhaps the only caveat on external funding should be that it must be limited to projects and other activities of the Commission. In other words, 'administrative and operational expenditures must remain covered by government funding to guard against the possible future withdrawal, non-renewal, or non-availability of donor funds'.[84] It is therefore suggested that the section should be amended to allow the Commission to fundraise without undue hindrance or interference from the executive.

5.2 The SAHRC

One of the ways in which the independence of the SAHRC has been rigorously tested has been in the administrative arrangements for the funding of the Commission. Although the SAHRC is assured financial independence by the Human Rights Commission Act, it competes with other departments in the Ministry of Justice for funds. The Commission pointed out in its maiden report[85] that the Ministry of Justice had made provision for it out of its own budget. This arrangement, the Commission argues, does not appear to be what the Human Rights Commission Act intended. The Commission's main objection against the present[86] financial arrangement is twofold. Firstly, the Commission does not believe that state officials should dictate to it how it should do its work. Secondly, the Commission feels that it is grossly inappropriate for a national institution to be dependent upon and supervised by a governmental department to undertake its work.

The present financial arrangement does not in any way comply with international standards[87] for the maintenance of independent national human rights institutions. Government's commitment towards human rights inevitably lies in the amount of financial independence it provides to the Commission and the present arrangement does not appear to comply with that commitment. The provision of an adequate and independent budget helps establish and maintain an effective and clearly independent and impartial institution.

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83 Hatchard (n 50 above) 36.

84 As above.

85 SAHRC (n 33 above) 40.

86 Correct as of 31st December 2001.

87 In this regard, see The Paris Principles 'Composition and guarantees of independence and pluralism,' art 2 Commonwealth Secretariat (n 5 above) 29, and UN Centre for Human Rights (n 5 above) 11.

The Zimbabwean situation serves as a good example of the problems inherent in the present financial arrangement of the SAHRC. In Zimbabwe, funding for the office of the Ombudsperson (except the salary of the Ombudsperson) comes from the Ministry of Justice, Legal and Parliamentary Affairs.[88] As the Ombudsperson has noted, this situation 'tarnishes the image of the office as an independent body in the eyes of the public and causes problems when investigations are undertaken following complaints against the ministry itself'.[89]

To be able to carry out its functions effectively, the SAHRC requires financial independence from the executive, particularly from ministerial bureaucracies. In their report on Parliamentary Oversight and Accountability, Corder, Jagwanth and Soltau argue that:[90]

> [T]o make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. These institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases.

Pursuant to this argument, the ideal situation would be for the SAHRC's funding to be supervised by parliament and drawn from the country's national revenue fund, as in the case of the UHRC.[91]

In *New National Party of South Africa v Government of the Republic of South Africa*,[92] the South African Constitutional Court noted the importance of guaranteeing both financial and administrative independence to the Independent Electoral Commission (IEC). As the IEC is also explicitly designated as a state institution supporting constitutional democracy,[93] the findings of the Constitutional Court in this regard apply with the necessary force to other chapter 9 institutions. As far as financial independence is concerned, the Court remarked that:[94]

> In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which . . . are relevant to 'independence'. The first is 'financial independence'. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution . . . This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. *It is for parliament, and not the executive*

88 Commonwealth Secretariat (n 7 above) 30.

89 As above.

90 Corder, Jagwanth & Soltau (n 76 above) 88.

91 See discussion below.

92 *New National Party v Government of the Republic of South Africa* [1999] 5 BCLR 489 (CC).

93 Sec 181(1)(f) final Constitution.

94 *New National Party* (n 92 above) para 98.

> *arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate*.[95] The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before parliament or its relevant committees.

At the moment the situation regarding the budget and financing of the SAHRC has allegedly reached rock-bottom and is a cause for concern.[96] The Department of State Expenditure, without consultation, has allegedly adopted a practice of not designating funds to be made available to the Department of Justice for the budget of the Commission.[97] Contrary to the express provisions of section 16(3) of the Human Rights Commission Act, the SAHRC is allegedly not invited to participate in the budgetary process that determines its annual budget or in the determination of its Medium Term Expenditure Plans.[98] The Department of Finance allegedly insists on communicating with the Department of Justice about the financial arrangements of the SAHRC. The Department of Finance is reported to have sought to inscribe the arrangement into law by requiring that in terms of the Treasury Control Bill,[99] the accounting officer of the SAHRC account to the accounting officer of the Department of Justice.

The current financial arrangement of the SAHRC is, in my view, unacceptable. It is in conflict with the provisions of the Human Rights Commission Act, which require that the SAHRC participates in the budget process *not through another state Department*,[100] but as if it was a fully-fledged department of state.[101] The arrangement also flies in the face of the Constitution, which not only obliges state organs to give assistance to the Commission, but also that they must do so as 'to ensure the independence, impartiality, dignity and effectiveness of the institution.'[102] In the *New National Party* Case, Langa DP held that:[103]

> [i]f this constitutional obligation means that old legislative and policy arrangements, public administration practices and *budgetary conventions*[104] must be adjusted to be brought in line with the new constitutional prescripts, so be it.

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95 My emphasis.

96 The SAHRC has threatened to take the issue of the financing of the institution to the Constitutional Court if it is not resolved as a matter of urgency. The threatened lawsuit will, if pursued, sour relations between the government and the institution.

97 The author is indebted to Donna Reid (Communication Technician) of the SAHRC for the information.

98 As above.

99 Now the Public Finance Management Act 1 of 1999.

100 My emphasis.

101 Sec 16(3)(a) Human Rights Commission Act 54 of 1994.

102 Sec 181(3) final Constitution.

103 *New National Party* (n 92 above) para 78.

104 My emphasis.

As far as the allocation of adequate resources to the Commission is concerned, the SAHRC, like the UHRC, constantly faces practical problems of underfunding by the government. For instance, in the 1998–1999 financial year, the Commission was allocated R13,2 million, a figure which it described as inadequate for its work.[105] Although the Human Rights Commission Act and the final Constitution are silent on whether the Commission can fundraise, the Commission receives a lot of financial, material and technical support and assistance from donors.[106] The fundraising activities of the Commission are governed by an internal Commission policy.[107] A working plan has to be submitted to the Chairperson of the Commission or the Chief Executive Officer before any fundraising activity is undertaken.[108] In the event the funds to be received from donors are in excess of R100 000, the venture has to be submitted before and approved by parliament.[109] In November 1998, a trust fund was set up by the SAHRC to raise money from donors. The fund is chaired by a High Court judge.

5.3 Concluding remarks

The allocation of adequate resources and an independent budget are essential to a national human rights institution for three major reasons. First of all, they help establish and maintain an effective and clearly independent and impartial institution. Secondly, financial security is a prerequisite to the satisfactory development of national institutions. Thirdly and lastly financial independence ensures that institutions are free to utilise their resources without political interference or manipulation.[110]

6 Independence through composition

The Paris Principles, because national human rights institutions themselves have formulated them, are the benchmark against which the composition of these institutions may be judged. These principles delineate broad guidelines for a composition that can minimally ensure the independence and pluralism of national human rights institutions. These principles require that a commission 'shall be established in accordance

105 Human Rights Watch (n 3 above) 304.

106 These include the United Nations Commonwealth Secretariat; human rights institutions in individual Commonwealth countries like Australia, Canada, India, New Zealand and the United Kingdom; United Nations High Commissioner for Human Rights; and USAID.

107 The author is indebted to Thediso Tipanyane of the SAHRC for the information.

108 As above.

109 As above.

110 For further exposition, see in this regard Commonwealth Secretariat (n 7 above) 30.

with a procedure which affords all necessary guarantees to ensure the pluralistic representation of the social forces (of civilian society) involved in the protection and promotion of human rights'.[111]

The composition of national human rights commissions is 'a threshold issue that is inextricably linked to the commission's mandate and independence in any particular jurisdiction'.[112] Human rights commissions form an informal counter to the frequently formal adversarial methods of adjudication. As quasi-judicial bodies, they are vital to the interests of the poor as an approachable place for conciliation and enforcement of rights. Serving this broad segment of the population makes diversity of composition a pre-requisite. Therefore, human rights commissions must include NGOs, women, men, differently-abled people and other minorities. In the next section I consider whether the composition of the UHRC and the SAHRC complies with this requirement. In carrying out the analysis, I refer to the profiles of the current commissioners of the two institutions.[113]

6.1 The UHRC

Although the UHRC acts independently of the government, its composition leaves much to be desired. Of the seven commissioners, four were members of parliament immediately prior to their appointment.[114] According to the director of the Human Rights and Peace Centre (HURIPEC) at Makerere University, three were appointed after they failed to be re-elected as members of parliament in the 1996 Uganda general elections.[115] Although three of the commissioners are women, only one has been actively involved in NGO work.

The current composition of the UHRC indicates that the institution is not broadly representative of Ugandan society and therefore does not represent the aspirations of society. It thus fails to comply with the provisions and guidelines laid down in the Paris Principles. The composition of the institution calls for immediate review. In my view a human rights commission must be composed of individuals who have worked tirelessly and are well versed in human rights principles. This, however, does not seem to be the case with the UHRC. According to Ms Maria-Goretti Karuhanga Mayiga, the current commissioners were appointed not on the basis of performance or past human rights experience, but because of lobbying and their allegiance to the current regime.[116]

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111 The Paris Principles 'Composition and Guarantees of Independence and Pluralism' art 1.

112 Commonwealth Secretariat (n 7 above) 35.

113 The information is correct as of 31st December 2001.

114 These are Mr Constantine Karusoke, Mrs Faith Mwondha and Mr Andrian Sibo.

115 The situation is clearly indicative of the problems inherent in the appointment process of the Commission members discussed above.

116 Interview with Ms Maria-Goretti Karuhanga Mayiga, 25 September 2000.

According to her, the government picked the people it knew would safeguard its interests. Her sentiments were shared by Mr Sam Tindifa of HURIPEC who maintains that current commissioners were primarily appointed on the basis of their loyalty to the president and the political system existent in the country.[117]

The indiscriminate appointment of political allies and acquaintances as commissioners of national human rights institutions is very problematic. This is even more obtrusive in a country that is in the process of re-building public confidence in state-created institutions. Commissioners should be appointed on merit and not on the basis of their past or present allegiance to a president or government. That will ensure that they carry out the institution's constitutional mandate wholeheartedly without fear or favour. The task of ensuring that independent commissioners are appointed falls squarely on the shoulders of the Ugandan parliament. It assumes the responsibility primarily and largely because it is a representative and custodian of civil society. Similarly, NGOs should also play a pivotal role in ensuring that the *status quo* is not maintained and perpetuated.

6.2 The SAHRC

In contrast to the UHRC and despite being political appointees, commissioners of the SAHRC reflect a composition that is truly representative of all the social forces of South African society. Of the 11 commissioners, six are lawyers, two theologians, one a psychologist, one an academic, and one a social worker.[118] Four of the commissioners are women and commissioners Jerry Nkeli and Charlotte McClaine represent the differently-abled community in the Commission. Most of the commissioners have also been and are still actively involved in NGO work. This brings credibility and respect to the Commission.

6.3 Concluding remarks

The above analysis depicts that, on the whole, the SAHRC is broadly representative of South African society.[119] Against this backdrop, it is clear that the SAHRC, unlike the UHRC, complies with the conditions laid down by the Paris Principles for a composition that ensures the pluralist representation of the social forces involved in the promotion and protection of human rights. This composition guarantees the

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117 Interview with Sam Tindifa, 26 September 2000.

118 The commissioners also come from diverse political backgrounds and adhere to different political ideologies. For example, Dr Barney Pityana was an ANC member, while Commissioner Leon Wessels was an active member of the then National Party.

119 The commissioners are also, to a great extent, a true reflection of the racial demographics in the country.

independence of the Commission from the executive and affords the institution credibility.

7 Conclusion

Establishing and maintaining independent and effective national human rights institutions are challenges that all governments have to meet. This is so because national human rights institutions not only provide a new layer of accountability, but they also 'contribute towards the establishment of a fresh constitutional order in which human rights are widely known and fully respected'.[120] Drawing from the experiences of the UHRC and the SAHRC, this paper demonstrates not only the potential of national human rights institutions as appropriate *fora* for the protection and promotion of human rights, but also the care necessary to make them genuinely independent and effective. As the study demonstrated, national human rights institutions are vulnerable to executive and bureaucratic manipulations. Consequently, their effectiveness depends largely upon legal and operational autonomy, financial autonomy, clear and transparent appointment and dismissal procedures, and the appointment of demonstrably able, independent, and effective commissioners.

It may be difficult to prescribe exhaustively how the vexed issue of the independence of national human rights institutions should be addressed globally. However, the following recommendations can be made in respect of both the UHRC and the SAHRC. In the first instance, urgent attention must be paid to the financial arrangements of the SAHRC. Mechanisms need to be put in place to affirm the independence of the Commission so as to honour the legislative requirement that the Commission participates in the budget process, not through another state department, but as if it was a fully-fledged department of state.

Secondly, the system of appointment of members of the two institutions needs to be reviewed. Civil society has to be afforded a more participatory role in the appointment process so that it can have more confidence in the institutions. The institutions must also develop a mechanism for the effective link with human rights organisations and civil society organisations as a whole. Furthermore, there must be institutionalised dialogue between the institutions and civil organisations in a manner that would ensure that current human rights issues and concerns are recognised and addressed.

Lastly, there should be mutual respect for the relationship between the two institutions and their respective governments, so as to guarantee the independence of the former. It is also recommended that governments

120 Hatchard (n 50 above) 51.

desist from exercising political interference in the activities of the institutions. Similarly, commissioners should desist from political activism upon assumption of office. In this way the credibility of these institutions and their respective governments will remain intact and unhampered. If these concerns are addressed, the UHRC and the SAHRC will certainly raise the protection and promotion of human rights to a higher level. However, this will only be possible if the respective governments have the political will to respect the institutions' autonomy, thus enhancing their credibility and effectiveness.

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Emerging trends in the protection of prisoners' rights in Southern Africa

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> Traditionally, courts in many jurisdictions have adopted a broad 'hands off' attitude towards matters of prison administration. This stems from a healthy awareness of realism that prison administrators are responsible for securing their institutions against escapes or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems.[1]
>
> [P]risoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed. Of course, the inroads which incarceration necessarily makes upon prisoners' personal rights and their liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.[2]

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1 *Per* Gubbay CJ in the case of *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) 60.

2 *Per* Sachs J in *August and another v Electoral Commission and others* [1999] 4 BCLR 363 (CC) 372–373).

1 Introduction

The controversy surrounding the treatment of people admitted into prison, whether upon court sentence or awaiting trial, is a familiar subject to correctional services staff around the world, including those in Central and Southern Africa. One of the central issues is whether such prison inmates have any rights whatsoever.[3] Some of the inmates know that they have some rights, and insist that those rights be respected. Instances are known where prison authorities have found themselves being summoned to court to explain how prisoners under their care were being treated. However, until fairly recently most governments did not have a high regard for prisoners' rights, and courts, when called upon to decide such issues, were generally inclined to decide in favour of prison authorities.

In the past 20 or so years, the situation appears to have changed dramatically.[4] In most countries, constitutions with detailed provisions for the protection of the fundamental rights and freedoms of all people, including prison inmates, have been enacted. In addition, governments have, of their own volition, also established other mechanisms to monitor, investigate and report on conditions in prisons in general, and the treatment of inmates in particular. Legislation has also been passed which makes specific provisions regarding the rights of inmates. Besides government initiatives, different non-governmental organisations (NGOs) have also become interested in prison life.[5] Partly as a result of all these mechanisms and other factors, courts have become more sympathetic, and have expressed their unreserved willingness, to depart from the past 'hands-off' approach in the protection of prisoners' rights. These developments show that, of late, prisoners have scored major victories in the battle for the protection of their human rights against intrusive prison authorities.

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3 It is important to emphasise that any meaningful discussion of inmates' rights must be located in the context of multiple factors including, the protection of individual rights in general, the end of the cold war era, and most importantly, the changing theories of crime and punishment. J Braithwaite 'Crime in a convict republic' (2001) 64 *Modern Law Review* 11, for example, discusses the practical aspects of the changing theories of punishment in the context of Australia.

4 For a discussion of how grim the situation was in apartheid South Africa, see for example G Rudolph 'Man's inhumanity to man makes countless thousands mourn: Do prisoners have rights?' (1979) 96 *South African Law Journal* 640 and D van Zyl Smit ' ''Normal'' prisons in an ''abnormal'' society? A comparative perspective on South African prison law and practice' (1987) 3 *South African Journal on Human Rights* 147.

5 See eg the tireless and phenomenal achievements by the Howard League (named after John Howard) established in 1866. Although the Penal Reform International, on the other hand, was only established in 1989, its campaigns are well known, so are its enormous worldwide successes.

This paper outlines different mechanisms that have recently been put in place in recognition and protection of prisoners' rights. These range from international instruments, national mechanisms such as constitutional provisions, the establishment of offices of the ombudsmen, to favourable legislation. How courts have dealt with prisoners' rights in different countries in the region will also be examined. The way in which prison authorities and staff handle inmates under their care has come under strict scrutiny in recognition of inmates' rights. What this means in practical terms is that prison officers not only have to be increasingly aware of and sensitive to prisoners' rights; they also have to change their working practices to conform with these important individual rights and freedoms. These are the challenges facing prison authorities and personnel in the new millennium.

2 Kinds of safeguards

In order to have a clear grasp of what prisoners' rights are and how they are protected, three levels of safeguards need to be borne in mind, namely international standards, regional mechanisms, as well as measures provided by each individual nation. For want of time and space, international and regional mechanisms will only be mentioned in passing, while national safeguards, including court decisions, will be examined in a little more detail.

2.1 International and regional standards

The world in which we live is nowadays referred to as a global village. It is in that respect, too, that the welfare of inmates is no longer only a matter of concern to members of inmates' families and individual nations. The international community is interested in, and has taken steps, to ensure that standards of the civilised community are adhered to, and inmates, as members of the civilised world, are treated in accordance with these same standards.

Several international instruments have been agreed upon and ratified by governments under the auspices of the United Nations (UN).[6]

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[6] The following selected international treaties are relevant to prison administration:
(i) Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977;
(ii) Basic Principles for the Treatment of Prisoners: adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990;
(iii) Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment: adopted by General Assembly resolution 43/173 of 9 December 1988;

Ratification of these instruments makes them binding on, and creates obligations to, member countries. Whereas those standards could be breached with impunity in the past, governments have come to understand that it is in their best interest to comply.[7]

All the countries in the Southern African region are members of the African Union (AU).[8] Its predecessor, the Organisation of African Unity (OAU) passed the African Charter in 1986 and pledged to adhere to and protect human rights.[9] It is in accordance with article 30 of the Charter that the African Commission on Human and Peoples' Rights came into existence. Recently, a decision to create an African Court of Human Rights was taken.[10] These initiatives suggest that heads of African governments are continually committing themselves, and expressing

(iv) Code of Conduct for Law Enforcement Officials: adopted by General Assembly resolution 34/169 of 17 December 1979;

(v) Basic Principles on the use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990;

(vi) United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990;

(vii) United Nations Rules for the Protection of Juveniles Deprived of their Liberty: adopted by the United Nations General Assembly resolution 45/113 of 14 December 1990;

(viii) The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 (entry into force 23 March 1976);

(x) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (entry into force on 26 June 1987, in accordance with art 27(1)).

Most of this information has been obtained from United Nations *Human rights and law enforcement: A manual on human rights training for the police* (1997). See also NS Rodley *The treatment of prisoners under international law* (1987), and JW Palmer *Constitutional rights of prisoners* (1997). Also D van Zyl Smit 'South African prisons and international law' (1988) 4 *South African Journal on Human Rights* 21.

7 n 5 above.

8 For the Constitutive Act and a discussion, see E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

9 Organisation of African Unity *African Charter on Human and Peoples' Rights* (also referred to as the African or Banjul Charter) (adopted 26 June 1981, and entered into force on 21 October 1986). See also 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) 47–116. On the influence the European Convention had on England, for example, see G Zellick 'The rights of prisoners and the European Convention' (1975) 38 *Modern Law Review* 683; also 'Human rights and the treatment of offenders' in JA Andrews (ed) *Human rights in criminal procedure: A comparative study* (1982) 375–416. See also JM Schone 'The short life and painful death of prisoners' rights' (2001) 40 *Howard Law Journal* 70 73.

10 Organisation of African Unity *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted on 9 June 1998). See also M Mutua 'The African human rights court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

their willingness, to protect and safeguard the human rights of their people, including inmates, in accordance with international and regional standards.

2.2 National mechanisms

Whereas the enumerated international and regional instruments are drafted elsewhere by bodies to which national governments participate, they are assumed to be universal and of general application, and apply to and bind those countries that are signatories. At the national level, however, different ways and means of protecting individual rights in general, and rights of inmates in particular, are initiated and made by national organs themselves. In most instances national efforts are taken to harmonise national laws, and bring them in line with international standards, mentioned earlier. In that respect some of the national measures of protection have become so common and widespread to the extent that they are getting more and more standardised. The following are only a few examples.

2.2.1 *Constitutional safeguards*

With the advent of the third wave of democratisation, constitutions of different countries recognise and make provision for basic fundamental rights and freedoms of individuals. As will be shown below, prison inmates are first and foremost human beings, who are also entitled to enjoy those constitutional protections.

Chapter 3 of Zimbabwe's Independence Constitution of 1980, for example, made detailed provisions for fundamental rights and freedoms (styled as a declaration of rights),[11] and ten years later, in 1990, fundamental rights and freedoms were incorporated in the Namibian Constitution.[12] South Africa followed in 1993. The people of South Africa, like their Namibian counterparts, suffered immensely during the apartheid era. With democratisation, these people were not only eager to get rid of their tortuous past; they also recognised the urgent need to make a fresh beginning. The Postamble to the 1993 Interim Constitution of South Africa, for example, expressed the desire of building a bridge from the past into the future in the following words:

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11 For a detailed discussion of the bill of rights in post-colonial commonwealth Africa, see JS Reads 'Bills of rights in the third world: Some commonwealth experiences' (1973) 6 *Verfassung und Recht in Ubersee* (VRU) 21. Fundamental rights and freedoms provisions in the Zimbabwe Independence Constitution were not to be amended for a period of 10 years after independence.

12 It must be emphasised that although most of the rights protected by different constitutions may bear some resemblance, there are important differences in the wording of the respective provisions.

> This constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief, or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The Constitution of Namibia captures this background succinctly in the preamble as follows:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;
>
> Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;
>
> Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;
>
> Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid. . . .

In the case of Zimbabwe, chapter 3 was not to be amended for a period of ten years after independence. The Namibian Constitution, on the other hand, made an express undertaking in article 25(1) that the rights enshrined in chapter 3 would never be reduced. Tanzania (which became politically independent as Tanganyika in 1961), on the other hand, did not have a bill of rights until 1984, and even then, the rights in question remained suspended for another four years until 1988.[13]

As part of the provisions protecting individual human rights, the Constitutions of Namibia (article 8) and Mozambique (article 70(2) (both passed in 1990), outlawed the death penalty as a form of punishment. Law makers in the two countries took the bold step of abolishing capital punishment in the Constitution, instead of leaving the matter to be decided by the higher courts.[14] In recognition of these countries' past, the respective governments have taken deliberate steps to protect and safeguard the rights of their own people, including those of inmates.

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13 See Tanzania Constitution (Fifth) (Amendment) Act 15 of 1984, which incorporated a bill of rights into the 1977 Constitution. These provisions, however, were suspended (not to become effective) for four years (sec 5(2)). See CM Peter *Human rights in Tanzania: Selected cases and materials* (1997) 12.

14 It is known that parties to the constitutional negotiation process in South Africa could not agree on a solution to the death penalty problem. See F Viljoen 'The impact of fundamental rights on criminal justice under the Interim Constitution (pre-trial to prison)' (1994) 27 *De Jure* 231 247 and D Davis 'Democracy and integrity: Making sense of the Constitution' (1998) 14 *South African Journal on Human Rights* 127 131. For a detailed discussion on the campaign against the death penalty around the world, see the judgments of the Constitutional Court in *S v Makwanyane and another* [1995] 6 BCLR 665 (CC).

2.2.2 *Governmental institutions*

In addition to constitutional provisions, some governments have gone even further and established human rights watchdog institutions. Where such have been established, they are funded by governments from taxpayers' money, in itself further evidence of their commitment to human rights. In some instances, legislation establishing such institutions guarantees their autonomy and operational independence.[15] Chapter 9 of the Constitution of the Republic of South Africa 1996, for example, establishes what are known as state institutions supporting constitutional democracy.[16] Institutions relevant to this discussion include the Human Rights Commission and the Public Protector. Tanzania, like South Africa, established the Permanent Commission of Inquiry in 1967, and most recently passed a law setting up the Human Rights Commission. Namibia, like other countries in the region, has an independent Ombudsman.[17]

The Namibian Ombudsman, for instance, has a mandate to investigate human rights abuses and reports annually to parliament. Inmates have exercised their legal rights, granted by section 67(2)(a) of the Prison Act 1998, to report their grievances, without censorship, to the Ombudsman. Since the formation of the Ministry of Prisons and Correctional Services in 1995, complaints emanating from prisons have made out a

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15 Human Rights Watch report 'Government human rights commission in Africa: Protectors or pretenders' <http://www.hrw.org/reports/2001/africa> (accessed 31 January 2002) provides a critical assessment of the performance of these institutions.

16 For a detailed discussion of South African constitutional institutions established under ch 9, see J Sarkin 'An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission for Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in developing a human rights culture in South Africa' (2000) 15 *SA Public Law* 385; and 'Reviewing and reformulating appointment processes to constitutional (chapter 9) structures' (1999) 15 *South African Journal on Human Rights* 587.

17 The institution of ombudsman also exists in Botswana, Malawi, Lesotho, Zambia and Zimbabwe. For constitutional provisions and enabling legislation, see E Kasuto & A Wehmhormer (eds) *The Ombudsman in Southern Africa: Report of a sub-regional conference* (1996). For a detailed discussion of a history of ombudsman in Africa and its variants, see VO Ayeni 'The ombudsman concept in Southern Africa: Evolution, problems and prospects' in E Kasuto & A Wehmhormer (eds) *The Ombudsman in Southern Africa: Report of a sub-regional conference* (1996) 27–52 and 'From Tanzania to Gambia: The ombudsman institution in Africa at the turn of the millennium' (Conference papers of the 6th Africa Regional ombudsman conference, held in Windhoek, Namibia 18–22 October 1999). Also GN Barrie 'The ombudsman: Governor of the government' (1970) 87 *South African Law Journal* 224. See also J Hatchard 'The institution of the ombudsman in Africa with special reference to Zimbabwe' (1986) 35 *International and Comparative Law Quarterly* 255 and 'The ombudsman in Africa revisited' (1991) 40 *International and Comparative Law Quarterly* 937.

large percentage of the overall complaints made to the Ombudsman every year.[18]

2.2.3 *'Friendly' correctional services legislation*

Some countries in the region have amended or repealed their outdated legislation governing prison administration bringing them in line with international standards, and in some cases with their own constitutional provisions. In this respect, South Africa is the best example. The Preamble to the Correctional Services Act 111 of 1998 states as follows:[19]

> Preamble
> With the object of changing the laws governing the correctional system and giving effect to the Bill of Rights in the Constitution, 1996, and in particular its provisions with regard to prisoners;
>
> Recognising —
> international principles on correctional matters;
>
> Regulating —
> the release of prisoners and the system of community corrections;
> in general, the activities of the Department of Correctional Services; and
>
> Providing —
> for independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services. . . .

Where outdated prison administration legislation has not been repealed or amended, as was the case in Namibia between 1990 and 1998, courts have been asked, and have stepped in, to examine whether actions taken and decisions made by prison authorities were in conformity with

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18 Ch 10 arts 89–94 of the Namibian Constitution and the Ombudsman Act 7 of 1990. In the Ombudsman's Annual Report for the year 1999, it was suggested that '[t]he increase in complaints against the Prison Service might be an early indication of deteriorating prison conditions which should be considered by prison authorities'. The statistics below show the number of complaints received by the office of the Ombudsman in Namibia between 1995 and 2000. The numbers, which have been extracted from various Ombudsman annual reports must, however, be read cautiously because they do not show how many of the complaints are, upon investigation, found to be genuine or otherwise.

Year — Number of complaints received
1995 — 40
1996 — 88
1997 — 85
1998 — 103
1999 — 194
2000 — 226

From 1996 the Ombudsman has been visiting a number of prisons every year. See Ombudsman annual reports (1996 at 7, 1998 at 7, 1999, at 18 and 2000 at 20).

19 The passage of the South African Correctional Services Act 1998 was preceded by a White Paper (WPG-94) as well as the New Legislative Framework for Corrections. See Government Notice 1155 of 1995, *Government Gazette* 16804. The Act was approved on 11 September 1998 and assented on 19 November 1998. It is very unfortunate that only a few selected number of sections of that Act have so far been brought into effect (19 February 1999). See South African *Government Gazette GG* 19778.

constitutional provisions. Offensive provisions and unacceptable practices have in some cases been found to be unconstitutional and invalid, as will be shown below.

2.2.4 *Monitoring NGOs*

Besides governmental measures and initiatives outlined above, there are also mechanisms initiated by non-governmental organisations. These organisations, which operate at both the national and international level, monitor and report on human rights in general and, particularly, about the rights of inmates. The strength of these bodies has been enhanced by their recognition by international human rights monitoring organisations. Amnesty International and Human Rights Watch are well known for their vigilant work on human rights generally, and prisoners' rights in particular. Several more exist.

NGOs in various countries report annually on the human rights (including the rights of inmates) situations in their respective countries. Two examples come to mind: the South African Prisoners' Organisation for Human Rights (SAPOHR) and the National Society for Human Rights of Namibia (NSHR). NSHR, for instance, has an observer status with the African Commission on Human and Peoples' Rights and the Economic and Social Council of the United Nations.[20] The Legal Assistance Centre (a public interest law centre in Namibia) concentrates on public interest related cases, including those in which the rights of prison inmates are concerned.[21]

In each country local NGOs have recognised the need to form umbrella organisations to co-ordinate their efforts, avoid duplication and share resources. In the Kingdom of Swaziland, for example, the Human Rights Association of Swaziland (HUMARAS) co-ordinates several local NGOS, as are the Namibian Non-Governmental Forum (NANGOF) and the Tanzania Non-Governmental Organisations (TANGO), among many others. At the regional level these NGOs have created a co-ordinating body, known as the Southern African Human Rights Non-Governmental

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20 See National Society for Human Rights of Namibia (NSHR) *The state of prisons and detention conditions* (1995). Like other human rights NGOs in many countries, the NSHR does not appear to be popular with the Namibian government. On how governments respond to human rights reports, see S Cohen 'Government responses to human rights reports: Claims, denials, and counterclaims' (1996) 18 *Human Rights Quarterly* 517. The role NGOs can play in the promotion and protection of human rights in general is discussed in detail by CE Welch *Protecting human rights in Africa: Strategies and roles of NGOs* (1996), especially ch 2 42–83.

21 Public interest law firms, like the Namibian Legal Assistance Centre, exist and operate in other countries, for example, Lesotho (Community Legal Resource Centre); South Africa (the Legal Resource Centre, Community Law Centre, etc); Tanzania (Legal and Human Rights Centre and the Zanzibar Legal Services Centre); Zimbabwe (Zimrights), among others.

Organisations Network (SAHRNGON) to promote human rights, including those of prison inmates. SAHRNGON representatives hold their meeting in tandem with Southern African Development Community (SADC) heads of states so that their presence can be felt and their voices heard by governments.

3 Examples of what courts have decided on inmates' rights

Courts are usually regarded as the custodians of justice and guardians of fundamental rights and freedoms. This is also true in regard to the role they play in the protection of inmates' rights. As indicated by Sachs J, in the introductory quotation to this article, an inmate who has been treated unfairly, or whose rights have been unlawfully infringed, is entitled not only to approach the courts, but also to an appropriate remedy where the alleged infringement is proven. This is based on a long established legal rule expressed in Latin as *ubi ius ibi remedium* (meaning that where there is a right there is a remedy). The following are only a few examples.

3.1 South Africa

The South African process of constitutional negotiations led to the formulation of a constitution with unique features. South African courts, on their part, have been willing to lead the way to establish how inmates should be treated under the new dispensation. Prison administration legislation and practices found not to be in conformity with constitutional requirements have been set aside. A few illustrations are offered below.

In the case of *S v Makwanyane and another*[22] the Constitutional Court had to decide an issue that South African constitutional negotiators (unlike their counterparts in Mozambique and Namibia) shunned; that is whether the death penalty was constitutional. All members of the Court unanimously decided that it was not.[23] They observed that the death penalty was a violation of the right to life and cruel, inhuman and degrading in nature. The death penalty was also an invasion of human dignity, and the nature of its imposition was arbitrary.

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22 1995 (3) SA 391(CC), [1995] 6 BCLR 665 (CC), 1995 (2) SACR 1 (CC). See n 17 above.

23 See also the case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General Zimbabwe and others* 1993 (4) SA 239 (ZS) in which death row prisoners contested the constitutionality of their indefinite detention, as death row prisoners, without any clear indication as to when their death penalty was to be implemented. Taken together with the prison conditions in which those death row prisoners were held, the court found sufficient reasons to set aside the death penalty and substitute it with life imprisonment.

A few days later, the same Constitutional Court was faced with another question regarding the rights of inmates: whether corporal punishment by organs of state was constitutional. In the case of *S v Williams and Others,*[24] in a unanimous decision, the court said it was not.[25]

South African prisoners[26] also fought for their right to vote in general and local government elections, and subsequently won it in the Constitutional Court. See the case of *August and another v Electoral Commission and Others.*[27]

In the case of *Van Biljon and others v Minister of Correctional Services and Others*[28] four prison inmates who were HIV positive asked the high court to intervene in their demand for the right of access to medical care, including special medication like AZT, ddI, 3TC or ddC treatment, the cost to be borne by the state. The Department of Correctional Services argued that prisoners should have access to health care equal to that available to any other patient attending a provincial hospital. In such hospitals, it was argued, AZT was only available to patients whose conditions had developed to full-blown AIDS. In the case in question the prisoners' conditions were only at an asymptomatic stage of the disease. In effect the Department relied on the defence of budgetary constraints.

The court considered whether prisoners were constitutionally entitled to special medication and whether the state was obliged to pay for such treatment. Put differently, the question was whether the rights of prisoners were stronger than the rights of people outside prison. Justice Brand looked at article 35(2)(e) of the Constitution, 1996, which provides that '[e]veryone who is detained, including a sentenced prisoner, has a right . . . the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'. The judge decided in favour of the inmates. In the course of the judgment he commented that prison conditions were more likely to give

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24 1995 (3) SA 632 (CC), [1995] 7 BCLR 861 (CC), 1995 (2) SACR 251 (CC).

25 After Namibia's independence, the Attorney General asked the Supreme Court to decide whether the use of corporal punishment by organs of state was constitutional. See *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC), 1991 (3) SA 76 (Nm).

26 Sentenced and awaiting trial.

27 [1999] 4 BCLR 363 (CC). Sachs J, who wrote the judgment, in which all court members concurred, observed as follows: 'Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of universal franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood . . . The vote of each and every citizen is a badge of dignity and of personhood' (372).

28 1997 (2) SACR 50 (C), also reported as *B and others v Minister of Correctional Services and others* [1997] 6 BCLR 789 (C).

rise to infections, therefore placing a heavier responsibility on prison authorities.

Commentators have noted that Justice Brand had made a brave decision. None of them, however, found the decision to be faulty.[29] In the light of dwindling resources, the nature of the problem of the HIV/AIDS pandemic and current levels of prison overcrowding, this decision will have grave implications to prison authorities.[30]

Strydom v Minister of Correctional Services and Others[31] arose out of prison practices in a maximum-security prison. Prison authorities had allowed certain categories of prisoners the privilege of obtaining, keeping and making use of electrical appliances in their prison cells. When the maximum-security section of the prison was built, no plug points were provided in single cells, but prisoners, through their own ingenuity (including illegal connections), procured power for their appliances. The practice was widespread and even acquiesced to by prison authorities. At some stage, the authorities decided to bring the practice to a halt. The prison authorities planned to install electric plugs in the cells and money was budgeted. The Department of Works (who was responsible for installing the connections) recommended that it could not proceed with that work until all illegal electricity connections were removed. Around the same time, prison authorities had launched a campaign to improve discipline and security in the prison, including the removal of unauthorised wiring and seizure of all electrical appliances not specified in prison regulations.

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29 See comments in 1997 *Annual Survey of South African Law* 809. Also F ka Mdumbe 'Socio-economic rights: *Van Biljon v Soobramoney*' (1998) 13 *SA Public Law* 460, 461, and H Corder & D van Zyl Smit 'Privatised prisons and the Constitution' (1998) 11 *South African Journal of Criminal Justice* 475 480. Whether a sick person convicted of a crime should be given a lenient sentence was one of the issues considered by courts in Zimbabwe and South Africa. In both cases, however, no definitive answer was given. Instead, the courts only made passing remarks. See *S v Mahachi* 1993 (2) SACR 36 (Z), an HIV-positive person, and *S v Mazibuko and others* 1997 (1) SACR 255 (W), a person rendered quadriplegic by wounds suffered as a result of shootout between police and suspects, of which the accused was a party. For a comment on the Mahachi case, see Z Achmat & E Cameron 'Judges and policy on AIDS: Prisons and medical ethics' (1995) 112 *South African Law Journal* 1 2.

30 By 31 December 1999, Namibian prisons with a capacity of 3 514, had a total of 4 620 prisoners. Tanzanian prisons, on the other hand, have a capacity of 21 188 prisoners. As of 1 March 1999, there were 43 866 inmates. See LS Mmbaga 'Overcrowding in prisons in Tanzania: A statistical analysis' paper presented at the seminar on prisons and alternative sentencing as a human rights issue, Arusha, Tanzania, 6–10 April 1999. Note that Namibia has a population of about 1,8 million while that of Tanzania is about 30 million. From time to time, prison authorities in different parts of the world experience the problem of overcrowding. There is a general understanding that the problem is invariably associated with other prison difficulties like inadequate living space, poor ventilation and possible eruption of epidemics.

31 [1999] 3 BCLR 342 (W).

One of the inmates approached the High Court to prevent prison authorities from removing electrical appliances in the possession of prisoners in his section of the prison. The applicant relied on section 10 of the Constitution, which protects human dignity, and section 12(1)(c) that guarantees freedom and security from all forms of violence. On their part, prison authorities argued that they had definite plans for the installation of electric plugs in the cells. They insisted, however, that they could neither be compelled to do so immediately at the insistence of the prisoners, nor were they under any obligation to commit themselves to a time frame for the execution of the work.

Justice Schwartzman referred to the constitutional provisions cited by the applicants, and reaffirmed that the applicants' constitutional rights were being infringed.[32] Although the court allowed prison authorities to remove all electrical equipment and appliances (with the exception of battery operated ones) from inmates, the authorities were instructed to set out the timetable within which the electrical work would be commenced and completed. Once the work was completed, the authorities were obliged to return the removed items to the prisoners from whom they were taken.[33]

3.2 Namibia

The words of the Preamble to the Namibian Constitution were referred to earlier as an illustration of the extent to which the Namibian people, through their representatives in the constituent assembly, felt about their colonial and racist past. When inmates challenged the constitution-

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32 The court also found in favour of the applicants on the basis of the principle of legitimate expectation. That is to say in this case, that by the act of authorities, allowing prisoners to connect electricity from whatever source, in order to use their appliances, they had created an expectation, on the part of the prisoners, that was capable of being enforced. See also S Foster 'Legitimate expectations and prisoners' rights: The right to get what you are given' (1997) 60 *Modern Law Review* 727.

33 Other South African cases include: *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), on the legality of solitary confinement; *S v Mazibuko and others* 1997 (1) SACR 255 (W), whether a quadriplegic person should be given a lighter sentence; *C v Minister of Correctional Services* 1996 (4) SA 292 (T), an illegal testing of a prisoner for HIV. The case of *Coetzee v The Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison, and others* 1995 (4) SA 631 (CC) arose out of apartheid era provisions in secs 65A–M of the Magistrates' Courts Act 32 of 1944 which authorised the imprisonment of civil debtors.In Namibia, the High Court was also asked to decide on the constitutionality of the same secs 65A–M of the MCA 1944 regarding the imprisonment of civil debtors in the case of *Julius v Commanding Officer, Windhoek Prison; Nel v Commanding Officer, Windhoek Prison* 1996 NR 390 (HC). The court arrived at the same conclusion as the South African constitutional court. The provisions were declared unconstitutional and of no effect.

ality of the use of leg-irons, for example, the Supreme Court had no hesitation in declaring the practice an invasion of individual dignity and, consequently, unconstitutional.[34] The courts were also willing to order government to compensate inmates placed under these irons after 1990.[35] The court awarded the applicant inmate N$ 15 000 as general damages and damages for pain suffering and impairment of dignity.

The case of *Titus Amakali v Minister of Prisons and Correctional Services*,[36] on the other hand, emanated from the illegal detention of an inmate by prison officers, beyond the date of his lawful imprisonment. The applicant was supposed to have been released on 8 March 1999, but he was detained for 18 more days until he was released at the order of the court on 26 March 1999. The delay was caused by an improper and erroneous decision of a prison officer. The court awarded the applicant damages amounting to N$ 25 000.

3.3 Zimbabwe

Post-apartheid South African courts have been able to lead the way on the strength of the historical bridge mentioned in the Post-amble to the interim Constitution, an innovative bill of rights, and 'user friendly' correctional services legislation. The Zimbabwean courts have also made a significant contribution in their own way, based on the declaration of rights in the country's constitution. The Supreme Court of Zimbabwe, for example, was the first in the region to declare corporal punishment of juveniles and adults unconstitutional.[37]

In the case of *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others*[38] the Supreme Court was called upon to decide the question of prison conditions.[39] A prison inmate, convicted of murder and sentenced to death, was held in a single and tiny cell in a maximum-security prison of 4,6 metres long by 1,42 metres wide. His main complaint was that, as a result of prolonged detention, he had very

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34 [2000] 6 BCLR 671 (NmS). For a discussion of other developments in the Namibian prison service since independence, see SH Bukurura and JW Nyoka 'The Namibian prison service and the Constitution: Lessons and experiences, 1990–2000' (2001) 34 *De Jure* 96.

35 See *Norman John Gerald Engelbrecht v Minister of Prisons and Correctional Services* High Court Case No I 1110/99, unreported judgment delivered 17 November 2000.

36 See *In re Thomas Namunjepo and Commanding Officer, Windhoek Prison* High Court Case No A 66/99, unreported judgment delivered 27 October 2000.

37 In regard to corporal punishment for juveniles, see *S v A Juvenile* 1990 (4) SA 151 (ZS). As for adults, see *S v Ncube* 1988 (2) SA 702 (ZS). See also J Hatchard 'The fall and rise of the cane in Zimbabwe' (1991) 35 *Journal of African Law* 198.

38 1992 (2) SA 56 (ZS).

39 Other Zimbabwean cases in which prison conditions were challenged include *S v Masitere* 1991 (1) SA 821 (ZS) and *Blanchard and others v Minister of Justice Legal and Parliamentary Affairs and Others* [1999] 10 BCLR 1169 (ZS).

limited access to open air, sunshine and physical exercise (especially on weekends and public holidays). He requested the intervention of the Supreme Court, arguing that the conditions in which he was held were so excessive as to amount to inhuman treatment, and an infringement of his constitutional right to dignity, humanity and decency.

Prison authorities attempted to justify their actions (of strict curtailment of exercises) by referring to shortage of staff during weekends and public holidays, and the high security risk posed by the prisoner. After making reference to provisions of section 102(3) and (4) of the Prison Act and section 179 of the Prison Regulations (both of which lay down the duration of one hour exercises each day for prisoners under solitary confinement), the court decided in favour of the applicant. Most importantly, the court made the following observation:

> [T]o deprive the applicant of access to fresh air, sunlight and the ability to exercise properly for a period of 23h30 hours per day, by holding him in a confined space, is virtually to treat him as non-human. I think it is repugnant to the attitude of contemporary society. The emphasis must always be on man's basic dignity, on civilised precepts and on flexibility and improvement in standards of decency as society progresses and matures.

Prison authorities in different countries in the region have in the past determined not only the number of letters prisoners can send and receive, but also prescribed a restricted time frame within which that could be done. That has not always been considered acceptable to prisoners eager to write and receive letters. The Supreme Court of Zimbabwe was asked to decide the constitutionality of such restrictive measures in the case of *Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others*.[40] The prisoner argued that section 141(1)(a) of the Prison Regulations that restricted the sending and receiving of one letter in four weeks, was an infringement of his right to freedom of expression. The court examined the purposes of the regulation, and the circumstances in which it was implemented. The conclusion arrived at was that there were no good reasons of public safety or public order to justify such restrictions in a democratic society. The matter was decided in favour of the inmates.

3.4 The Kingdom of Swaziland

Unlike Namibia, South Africa and Zimbabwe which have constitutional safeguards, the Swaziland Independence Constitution, enacted in 1968 with similar provisions, was abrogated in 1973. Since then the people of Swaziland have been without such protection. The lack of constitu-

[40] 1995 (1) SA 703 (ZS).

tional protection did not prevent the High Court from finding a remedy for an aggrieved prison inmate in the case of *Meshack Shabangu v Attorney General*.[41] Upon completion of his prison sentence, Shabangu approached the High Court seeking damages suffered as a result of being subjected to unauthorised, unlawful and degrading labour at the hands of the prison commander. His argument was that during part of his imprisonment he was made to work as a house servant at the commander's house, which included washing clothes of family members, taking care of the baby of the prison commander, feeding it and changing its nappies. He also bathed the father of the prison commander, and treated his skin disease and leg wound. The court relied on general legal principles and granted the applicant damages to the tune of E 40 000.[42]

4 Conclusion

In this discussion, a combination of mechanisms for the protection of inmates' rights, ranging from international standards to local measures, have been outlined. From the examples and illustrations given, a conclusion can safely be drawn that these rights are now not only recognised but also entrenched. Rights and standards for the protection of inmates in civilised societies have not only been adequately demarcated, but monitoring and enforcement measures and institutions are already in

41 Civil case No 838/95 (unreported, judgment delivered on 15 September 98). Although the court's decision in the *Meshack Shabangu* case is unreported, it has turned out be widely read among prison officers. The case was featured in the *Times of Swaziland* Sunday 17 September 1998. At the time the decision was given, some senior prison officers in Swaziland were attending an in-service training at the Prison College. There was, therefore, an opportunity to use the decision as a case study. I learnt from one of the participants, who turned out to have studied at the University of Swaziland, that most course participants had a lot of sympathy with the officer in charge of the prison at which Shabangu was imprisoned. The reason for the sympathy was that, after all, most prison officers in the Kingdom of Swaziland were in the habit of using prison labour for their own private work without a complaint from anyone. Some officers were of the view that Shabangu should have considered himself privileged to work as a servant at the commander's house instead of complaining. Their view was, therefore, that it was only unfortunate that the ex-prisoner, Shabangu, went to court, where most prisoners could not even have cared. In Tanzania, the case was featured in the *Daily News* 13 July 1999. The writer, a person with over 30 years of working experience in the prison service, started the story as follows: 'Think of a prisoner, after serving a two-year sentence at Ukonga Central Prison, in Dar es Salaam, goes to court for redress, and is awarded repayment for the wrong that has been done. It has never happened, at least to my knowledge.' It is known that this newspaper report became a talking point among prison officers, not only for the message it carried but, most importantly, the motive of its author. In Namibia, the decision was circulated to all heads of prisons not only for their information but also as a caution.

42 Swazi *lilangeni* (singular), *emalangeni* (plural) equivalent to South African Rand.

place and playing their part. In the cases mentioned above, for example, it has been shown that courts are presently more willing to intervene in the enforcement of these rights than ever before, and have granted appropriate remedies, including awards for damages, where necessary. In that respect, it is of utmost benefit to prison authorities, at all levels (lower, middle and high), not only to embrace these rights, but also to adapt working practices in conformity with them. Training and re-training of all prison officers is not only necessary, but will have to be accompanied by a change of attitudes accepting these rights as a fact and not fiction. It is going to be hard, but not impossible.

It may be very tempting to assume that training or re-training will be accompanied by the requisite change of attitude. There is some indication that this is not always the case. In most countries, prison establishments are composed of the old generation of prison officers, who were trained in old methods of dealing with prison inmates, on the basis of old and outdated theories of punishment, and who have acquired many years of experience in old-style prison management. It cannot be assumed that these officials will easily recognise and embrace prisoners' rights. Prison authorities, therefore, need to have a plan of action for the checking and consistent monitoring of an attitude change among staff. It needs to be emphasised that in real life situations, any form of change has its doubting Thomas. The greatest challenge to those prison authorities who accept change and the need to embrace it, will be to know how to bring on board their doubtful colleagues. As shown by the decisions discussed here, the consequences for any kind of delay is likely to be enormous. Those who are dragging their feet in catching up with the emerging trends might have to be left behind, with huge bills incurred from damages awarded to successful inmates.

The doubting Thomas of this region has to be aware of the fact that so far there is sufficient international and regional pressure being exerted in favour of adherence to international standards of decency. Monitoring mechanisms at the national level are gaining in strength, thanks to alliances and collaborations with their regional and international counterparts. As observed by Chief Justice Gubbay, in the second quotation above, courts in the southern African region have started to assert their role and play a meaningful part in ensuring that international standards are adhered to.

We do not know what may happen in the future, just as much as less was known about the current developments in the past. As things stand now, however, prisoners' rights are of concern to the international community, as well as at regional and national levels. If this assessment is correct, actions taken and decisions made by prison authorities need to be guided by, determined and constrained through international and regional standards, as well as national laws and practices. This is not only good for prisoners, but for humanity as a whole.[43]

[43] In order to appreciate the importance of respect for human dignity of inmates, one needs to look at the people who, at one point or other, have spent many precious years in prison whether as sentenced or awaiting trial prisoners or detainees. The imprisonment of many African heroes, the kinds of Nelson Mandela (South Africa), Jomo Kenyatta (Kenya), Robert Mugabe (Zimbabwe), and the easily forgotten and least mentioned heroines like Edna Jimmy and Rona Nambinga (Namibia) and Albertina Sisulu (South Africa), Titi Mohamed (Tanzania), Mbuya Nehanda (Zimbabwe) Alice Lenshina (Zambia), to mention only a few, speaks volumes. Recently, Anwar Ibrahim (Malaysia) and Nawaz Sharriff (Pakistan) also found themselves in prison. These examples show how false it is to believe that only bad people are sent to prison. No one knows, therefore, who the next prison visitor, and ultimate tenant, might be.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Human rights NGOs in Nigeria: Emergence, governmental reactions and the future

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1 Introduction

Human rights were entrenched in the Nigerian constitutional structure in the 1960 Independence Constitution and reaffirmed in the 1963 Republican Constitution and the 1979 Constitution. The last instrument also added a chapter on Fundamental Objectives and Directive Principles of State Policy, which essentially is a statement of social, economic and cultural rights. Pursuant to the 1979 Constitution, the Fundamental Rights (Enforcement Procedure) Rules were drawn up to guarantee the effective enjoyment of the rights protected under the Constitution.

Despite these normative and structural guarantees, human rights have been the subject of unredressed abuses by successive Nigerian governments, both military and civilian. Diverse reasons have been invoked to justify the violation of individual rights. For much of this period no formal organisations existed whose primary aim was to secure redress for victims of human rights violations. The impact of foreign-based human rights groups was limited. They were ignored whenever they highlighted rights violations, as were a few other Nigerians, including lawyers, leftist ideologues and radical intellectuals who led the crusade for respect for human rights in the absence of formal human rights groups. Moreover, human rights groups could only hope to stigmatise the government, and put pressure on the government to respect the rights of its citizens.

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The first Nigerian human rights NGO came into existence in 1987. Since then many others have joined the field. This paper considers the origins of the human rights movement in Nigeria, the activities of the groups, their achievements, and the problems they face. Governmental responses to the groups and to allegations of human rights abuses are also examined, as are the prospects for the continued existence of these groups. This paper examines the period up to the beginning of the present democratic dispensation in 1999.

2 Background

The first human rights NGO in Nigeria was established on 15 October 1987.[1] Prior to this time, Amnesty International (AI) was the only notable human rights NGO operating in the country although some other NGOs, which had different primary goals, devoted some of their energy and resources to the human rights cause. In this category were professional organisations of lawyers, journalists, medical doctors and educators.[2] These groups sought to hold the government accountable for its actions and inaction on human rights. They were largely ineffective, however, as they were not set up primarily to advance the human rights struggle and thus their involvement was merely incidental.

Even though they had limited impact, their tendency to disagree with state policies did not diminish. Many of these groups protested and pressed their cases, but as noted by Mutua:[3]

> [t]he despotic state was not always a good listener and more often than not openly confrontational groups and individuals were either co-opted, ousted, and harassed or simply detained or murdered if they were perceived as serious threats to those in power. The iron fist cowered opponents and forced them to present their grievances to those in power in a friendly and constructive style. For many, the distant voice of AI was the only independent corroboration of their suffering.

Also, in the period before the emergence of human rights NGOs, human rights abuses were treated as a by-product of the military dictatorship under which the country had labored for most of the years after independence, and as the excesses of some intolerant government officials in the few years of democratic rule.[4] There were feeble protests, and those who could afford it sought redress through the courts.

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1 See below.

2 These included the Nigerian Bar Association (NBA), the Nigerian Medical Association (NMA), and the National Council for Women Societies (NCWS). Trade unions like the Nigerian Labour Congress (NLC) and the Academic Staff Union of Universities (ASUU) were also involved in the struggle.

3 M wa Mutua 'Domestic human rights organisations in Africa: Problems and perspectives' (1994) 22 *A Journal of Opinion* 30 31.

4 'CLO — Waging war for liberty' *Newswatch* (25-09-1989) 17.

Individuals could also express their grievances through the Public Complaints Commission (the National Ombudsman), but the Commission could not achieve much because it was set up only to resolve cases of maladministration or injustice arising from the action and inaction of the administration and its agencies.[5] Clearly, rights violations do occur as a consequence of administrative policies, but the Commission was simply not equipped for that task, and was not directly involved in human rights work. It also did not help matters that the prestige and social respect accorded the Commission by the general public were eroded by allegations of bias made against the commissioners, some of whom were alleged to be card-carrying members of the then ruling party, instead of being functionaries who were supposed to be above the reach of party politics.

At the close of the Second Republic, in 1983, human rights abuses became rampant but were hardly redressed. The police and other security agencies detained many individuals, but the effective manipulation of the judiciary by the ruling party prevented the effective operation of the Fundamental Rights (Enforcement Procedure) Rules, which could have been the means of securing the release of detainees.[6] By the time the ruling party and the government were overthrown in a military coup on 31 December 1983, the populace heaved a sigh of relief, believing the new military regime of General Buhari would make all the necessary efforts to dispel the gloom that had encircled the country.

3 The new military regime

The expectations of the people were not matched by the regime of General Buhari. As soon as it came to power, it indicated that it would pay scant regard to human rights, and the regime was true to its word. It promulgated decrees in draconian terms, and placed many Nigerians

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5 See the Public Complaints Commission Decree No 31, 1975, in the 1979 Constitution of the Federal Republic of Nigeria.

6 One of the most prominent cases of the Second Republic was that of *Shugaba A Darman v the Federal Minister of Internal Affairs & Others* [1981] 2 Nigerian Constitutional Law Reports (NCLR) 459. Alhaji Shugaba was a member of the Great Nigerian Peoples' Party (GNPP), and the Majority Leader of the Borno State House of Assembly. The Federal Government on 24 January 1980 deported him to the Republic of Chad on the allegation that he was not a Nigerian. It was clear that the action of the Federal Government was politically motivated as Alhaji Shugaba was a political thorn in the flesh of the government. He brought an action against the Federal Government before the Borno High Court, which ruled that he was a Nigerian, and awarded him compensatory and exemplary (punitive) damages for his unlawful deportation from Nigeria. The Federal Government appealed the decision of the lower court, but the appeal was dismissed in *Federal Minister of Internal Affairs & Others v Shugaba A Darman* [1982] 3 NCLR 915.

in indefinite detention without trial — many of them belonged to the former political class, and some were opponents of the regime. The government also seriously curtailed press freedom and imposed a blanket ban on political activities, which was later extended to include a ban on debates on the political future of the country. There was serious erosion of the civil liberties of Nigerians, and by the time the regime was overthrown in another coup on 27 August 1985, Nigerians were suffocating under a number of oppressive decrees, which showed the regime's utter contempt for human rights.

The open-faced repression of the regime had the effect of sensitising the hitherto apathetic population to the issue of human rights. General Ibrahim Babangida, who succeeded to power after the overthrow of General Buhari, was a prominent member of the prior regime. By the time he took power, however, a critical attitude had developed among Nigerians to the Buhari-led administration, and because of this, the Babangida administration sought to distance itself as much as possible from the abuses perpetrated by the Buhari-led regime. In his maiden address, Babangida openly promised to respect human rights. 'Fundamental rights and civil liberties will be respected,' he declared. According to him, '[I]n line with [the] government's intention to uphold fundamental human rights, the issue of detainees will be looked into with despatch.' He further announced the intention of his administration to review all decrees promulgated by the previous administration, as they had 'generated a lot of controversy'.[7]

The Babangida regime thus rested its quest for legitimacy upon human rights. It immediately repealed the much-dreaded Decree No 4 of 1984,[8] which had curtailed press freedom extensively during the Buhari regime. It released many detainees and also opened up to the public glare secret detention centers where abuses of human rights were perpetrated.[9] In assuming this 'human rights posture', the Babangida regime distanced itself from the discredited Buhari regime, justifying its intervention in government by painting the Buhari regime as a villain.

While there was reason to hail these gestures as a 'refreshing departure' from the style of the past regime,[10] there was not much to celebrate. At that point in time, Nigerians expected from the Babangida

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7 General Babangida, Address to the Nation, 27 August 1985, reprinted in *Portraits of a new Nigeria: Selected speeches of IBB* 21–26. See Civil Liberties Organisation *Human rights in retreat* (1993).

8 The Public Officers (Protection Against False Accusation) Decree No 4 of 1984.

9 The detention centres belonged to the Nigerian Security Organisation (NSO), the secret service arm of the government, which was later dissolved and replaced by another body.

10 *The Guardian* termed it a 'refreshing departure from the stone-hearted, anti-egalitarian tendencies of the Buhari administration'. See 'Human rights — Cracks in the wall' *Newswatch* (29-08-1988) 12.

government the full and unrestricted enjoyment of human rights as guaranteed by the Constitution. The enjoyment of rights could not just be limited to a legitimacy-seeking exercise by a government, which lacked a constitutional basis for governance, and which, therefore, had to search for relevance and acceptability among the populace.

4 Descent to autocracy

As it turned out, the purported commitment to human rights was highly questionable. The great gestures were an attempt to divert the attention of the people in the face of more repressive acts. Events tested claims about the government's respect for human rights. An alleged coup plot was uncovered late in 1985. The suspects were tried and most convicted. Some were sentenced to death and others to various terms of imprisonment. Domestic and international pleas for clemency were ignored, and their executions were carried out. Nigerians and other interested watchers began to take notice.

Gradually it became clear that the regime was not ready to keep the promises it had made on human rights, and a steady descent into autocracy began. The regime manifested a desire to prolong its stay in power. It formulated various economic, political and social programmes, sometimes hastily, and implemented them half-heartedly. Many of these programmes were seemingly designed to fail, and they did.[11] It introduced an IMF-recommended Structural Adjustment Programme (SAP) in 1986 to address the underlying malaise in the economy, and the challenge posed by the collapse of oil revenues upon which the economy was heavily dependent.[12] The SAP policy was one of high and rapid inflation, high unemployment rates, low wage levels and substantial

11 All the actions of the Babangida government were placed in proper context later. According to the Information Minister, Mr Uche Chukwumerije in a British Broadcasting Corporation (BBC) interview, 'For us, [General Babangida] is an artist trying to chisel a beautiful sculpture out of a granite stone and at every juncture in his work he pauses back to see whether he is going in the right direction' (30 June 1993). See 'Nigeria: Democracy derailed' (1993) 5 *Africa Watch*.

12 The objective of the Structural Adjustment Programme was to help promote economic efficiency and private sector development as a basis for long-term economic growth. Nigeria's peculiar brand of SAP (it did not take a loan from the IMF) combined exchange rate and trade policy reform with stabilisation policies. It included efforts to downsize the public sector, and improve the management of public owned assets. However, there was not much expenditure directed toward the provision of basic social services or infrastructure projects designed to build human and physical capability, and to meet the needs of a majority of the people. Spending on the social sector had contracted sharply before SAP, and that was maintained during the SAP era. Eg, the expenditure on social services fell from 14% in 1986 to an average 12% of the budget. It even fell to an all-time low of 3% in 1987. This can be contrasted with expenditure on interest on the debt obligations of the government, which rose

erosion of the purchasing power of public sector employees — which was more pronounced because wages were not indexed to inflation. It was also, very importantly, a policy of economic repression and the wholesale denial of the rights of the people. Though the policy had an economic basis, its content had the capacity to, and did, generate social and political crises. There were protests as the burden of SAP became heavy, and the government had to resort to force to maintain its grip on power.[13]

Repression was not restricted to the economic front. In the execution of its political programmes, the government was brazen in its suppression of the rights of the people. It drafted a political transition programme, which it tinkered with many times. It promulgated a number of decrees prohibiting some Nigerians, mostly former politicians, from engaging in political activities. It shifted the dates for the handing-over of political power to civilians.[14] It even made it clear on some occasions that it would not be 'stampeded out of office', thereby leading to fears that the regime was bent on perpetuating itself in office.[15]

A major assault on the nascent civil society was required to maintain the government's iron grip on power. One way by which this was accomplished was through the subversion of the rule of law. The government mounted an attack on the legal order, and thus demonstrated its utter contempt for human rights. The judiciary was emasculated through the use of decrees, and special (military) tribunals were set up as institutions parallel to the ordinary court system. The government ignored court orders that were not in its favor, and the Federal Attorney General even issued a warning to judges to desist from issuing orders directed at the federal government.

The regime promulgated retroactive laws, despite the constitutional prohibition of *ex post facto* laws, and also enacted laws to give legitimacy to otherwise illegal actions of government. These decrees could not be challenged in any law court. Also, contrary to earlier indications, some of the laws passed by the Buhari regime were retained, including the

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from 26% in 1986 to 55% in 1987, and has been consistently high since. In the process, the urban middle class, primarily civil servants and workers in import-substituting industries bore the cost of adjusting to the downturn in oil markets and the collapse of foreign exchange earnings.

13 There were violent riots in April 1988 against the removal of subsidy on prices of petroleum products. There was another anti-SAP riot in May 1989. The government had to hurriedly arrange a relief package to cushion the effect of SAP on the populace.

14 While it had earlier indicated its intention of ceding power by October 1990, it shifted that date in 1987 to October 1992. As 1992 approached, it became clear that the regime was not in a hurry to leave office.

15 The date was shifted, again, from October 1992 to January 1993, and later to August 1993, when the regime had to leave power contrary to its expectation.

notorious Decree No 2 of 1984.[16] This Decree empowered government to detain, without charge or trial, persons considered a threat to the economy or security of the state. Such persons could be detained for up to three months, subject to indefinite renewals. The government's 1985 promise to repeal the enactment was not kept, and the regime utilised the decree against many of its opponents, keeping behind bars many who expressed views different from that of the regime. The Decree was an effective weapon in curtailing the liberties of Nigerians.

5 Babangida versus the press

At the outset, the Babangida regime realised the need for favorable press coverage, recognising the power of the press to sway public opinion. As noted, it repealed Decree No 4 of 1984,[17] and released from jail two journalists who had been convicted under that decree. The regime demonstrated an initial willingness to work with the press, and pursue a policy of cooperation rather than confrontation. The press responded in kind, and there was largely no opposition from the press to the regime for some time.

However, in April 1987, the *Newswatch* magazine was proscribed for six months. The magazine had published extracts from the yet-to-be-officially-released report of the Political Bureau, which the government had set up much earlier.[18] The proscription marked the beginning of an unprecedented wave of repression of the press, with journalists being detained, victimised and subjected to harassment. With the press also highlighting the deterioration in socio-economic conditions in the country, especially after the effect of SAP on the populace became more visible, the regime had to abandon its 'no-confrontation' stance with the press, and showed its distaste of criticism. Despite press self-censorship, reports on sensitive issues such as corruption in high places, ethnic and religious violence and student demonstrations, often resulted in the arrest of offending journalists, and sometimes in the closure of the offending newspaper or magazine.

16 The State Security (Detention of Persons) Decree No 2 of 1984, which was amended several times to suit the wishes of the government.

17 n 8 above.

18 But the BBC and the London-based Africa Confidential had earlier disclosed portions of the actual recommendations of the Political Bureau. See *Human rights in retreat* (n 7 above) 57.

6 Unrelenting oppression

The muzzling of the normally vibrant Nigerian press was accompanied by repression of the entire society. A heavy clampdown on critics, coupled with the earlier ban on party politics, left no group to challenge the autocracy of the military regime. No forum existed to articulate alternative ideas,[19] nor were there any institutional processes to check the excesses of the dictatorship.

Harassment and detentions were joined by the loss of many lives due to the excesses of the Nigerian police force, and other security agencies. The latter engaged in illegal detention, torture, extra-judicial killings, and public harassment of citizens, amongst others.[20] The security forces demonstrated rampant lawlessness, but the government showed no interest in curbing these excesses. There seemed to have been a convergence of interests between the government and the police in the matter of human rights violations. Not many citizens were interested in holding the police accountable for its actions, and not many could, anyway. While some cases were reported by the press, many were not, and in most cases, there were no official sanctions against erring members of the force. Even when internal police panels were set up due to public pressure, they usually covered up serious abuses of human rights.

7 Emergence of human rights NGOs

The overall attitude of the Babangida regime towards human rights was a major reason for the emergence of the Civil Liberties Organisation (CLO) in 1987. In retrospect, it is hard to comprehend that there was no such group prior to that time. But, it appears that by the time the groups started appearing, civil society was willing to accept them as part of the political landscape. The dictatorship of the military had sensitised the populace to their human rights, and the fact of the dictatorship obviated the initial danger of non-acceptance that the groups would have faced. About this time as well, events happening outside the

19 Eg, the government steadfastly maintained, albeit ludicrously, that there was no alternative to the SAP policy it had introduced in 1986. Anyone who held otherwise was liable to being branded and enemy of the state. The government's political transition program and SAP policy were highly segmented, and both 'urged acquiescence and sacrifice without discussion and choice'. See *Human rights in retreat* (n 7 above) 46.

20 In 1990, for instance, the Committee for Defence of Human Rights (CDHR) reported 17 instances of extra-judicial killings involving more than 25 victims. See *Human rights in retreat* (n 7 above) 11.

country impacted on the country. Nigeria had joined other countries in insisting on the imposition of sanctions upon the apartheid regime in South Africa, and a former head of state, Olusegun Obasanjo, was Co-Chairperson of the Commonwealth Eminent Persons Group, which sought to find a solution to the problem of South Africa. The lack of logic of demanding respect for the rule of law in South Africa, while denying Nigerians the same was not lost on Nigerians. Nigeria had ratified the African Charter on Human and Peoples' Rights (African Charter) much earlier and it had become part of Nigeria's law in 1983. Nigerian lawyers had also become sensitised to human rights issues, because of the increasing incidence of disregard for the rule of law. These events were close in time to each other as a critical mass developed which led to the inevitability of the emergence of human rights NGOs within the country.

Two lawyers, Olisa Agbakoba and Clement Nwankwo, established the CLO. The latter had been involved in litigation on behalf of the oppressed while doing one year compulsory national service. Thereafter, he collaborated with Agbakoba to concretise and expand the work he had begun earlier. As lawyers, they felt the need to use the law and, in particular, human rights to make a case for their clients. The choice of human rights was rational as it was difficult for anyone to argue against it as a moral imperative.

The formation of the CLO was the first attempt to institutionalise a non-governmental human rights initiative in the country. At the outset its basic concern was with public interest litigation in prison work. Later, it expanded its work to covering and monitoring government activities, including violations of human rights, and actively seeking the observance of human rights as contained in international human rights instruments which Nigeria had signed and ratified.

By starting with the provision of legal services to the poor and monitoring prison conditions in the country, the organisation avoided being branded as a group of agitators, or being seen as confrontational at the outset, which could have provoked an outright ban by the government. And, consciously or otherwise, this followed the pattern in some African countries,[21] where most groups started with legal aid as cover for the new movements, as legal aid did not 'directly threaten the state unless political prisoners [were] represented'.[22]

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21 Eg Kenya and the Democratic Republic of Congo.

22 Mutua (n 3 above) 31.

Other groups soon emerged and prominent on the list was the Constitutional Rights Project (CRP), set up in 1990.[23] The multiplication of the groups was a direct consequence of increased oppression in society which, in turn, could not be divorced from the subtle attempts of the Babangida government to perpetuate itself in power. This desire for a prolonged stay in power necessitated an assault on the society by the regime. The more violations, the more groups began to emerge to oppose the regime.

8 Legal status and affiliation

Human rights groups began as non-profit, non-governmental initiatives, and have remained that way since. While there were hints at various times that they could be subject to regulation by the state, no law was passed to regulate them. However, they are registered by a regulatory commission, which is responsible for all corporate bodies in Nigeria. Even through that body, no attempt has been made, overtly, to withdraw their licences to operate.

The groups have also found a way to cooperate with each other and with other pressure groups in society. There is some 'alliance' between these groups and the press, church groups, students unions, and radical intellectuals in society. This has been a productive endeavor because the cooperation has made it clear that the cause being espoused by the groups is not based on self-interest.

9 Activities and achievements

Nigerian human rights NGOs have engaged in a variety of activities in the years since they were formed. Through these activities they succeeded in raising the profile of human rights in the country, and this they have done at great risk to their membership, some of whom have suffered deprivation, long periods of detention, and other indignities. In their activities lie their achievements, which cannot be ignored. These activities include:

[23] Others include Human Rights Africa (HRA), set up in 1988 to address human rights issues from an African perspective, Committee for the Defence of Human Rights (CDHR), formed in 1989. Quasi human rights groups include the National Association of Democratic Lawyers (NADL), which had been formed in 1984 in response to the new military regime of General Buhari, and the perceived inaction of the Nigerian Bar Association (NBA), at that time, and the Legal Research and Resource Development Centre (LRRDC), formed in 1990 to promote human rights through research and teaching.

9.1 Monitoring state behaviour

This is a normal function of human rights NGOs all around the world and Nigerian ones have been no exception. They engaged in this function by gathering, evaluating, and disseminating information on human rights violations by the government and its agencies. They do all these by collecting information from around the country. They have a staff network which enables them to function in association with local people in order to get to the root of rights abuses. They also publish annual reports in which these violations are documented. They publish specialised reports in which the results of research on particular projects are documented.[24] The accuracy of many of these reports has helped in projecting the groups as fair and not given to sensationalism. Thus they have managed to establish credibility for themselves through their reports. The fact that it is open to everyone to see that governmental assertions are mostly inaccurate had given weight to the reports of the groups.

Additionally, they provide information to inter-governmental organisations involved with human rights on the state of human rights in Nigeria. They serve as alternate sources of information about the state of human rights in Nigeria, and their reports are more representative of the human rights situation in Nigeria than what the government serves the outside world.

9.2 Litigation

Some groups, like the CLO and the CRP, have litigated several human rights cases to secure the rights of individuals oppressed by state agents and institutions. Many have been set at liberty through these efforts. The CLO for instance has represented over 4 000 indigent victims of human rights abuses, while the CRP has also litigated several such cases.[25]

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[24] See eg Civil Liberties Organisation *Behind the wall: A report on prison conditions in Nigeria and the Nigerian prison system* (1991) and Constitutional Rights Project *The press and dictatorship in Nigeria* (1993).

[25] In *Abdulahi & 6 others v Attorney-General, Lagos State & 2 Others, Suit No M/61/91*. In 'Cases and materials on human rights' (1994) 4 *Journal of Human Rights Law and Practice* (Civil Liberties Organisation) 285, a Lagos High Court ordered the release of the applicants, who had been detained for a period ranging from 6 to 11 years without trial. The court found their detention illegal, ordered their immediate release, and awarded compensatory damages to the applicants, whose suit had been filed by the CLO. In another situation there was a public outcry, which followed an allegation that seven persons had been murdered in cold blood by the police at Oko-Oba, Agege, Lagos, on 6 March 1991. The police set up an internal panel to investigate the incident and the alleged involvement of its officers. Three months later, the panel submitted a report that absolved the policemen involved in the killing, stating that the seven were shot by the police in self-defence. But the actual facts contradicted the story proffered by the police. The autopsy report showed that the seven had been

In consequence, human rights groups have helped to develop human rights jurisprudence within the country. This appears to be their most significant contribution to the Nigerian legal order. Through various cases before the Nigerian courts on behalf of the oppressed, human rights groups have assisted in building the body of laws in areas hitherto untraversed. At times, to the uninitiated, some of the cases bordered on the absurd, but the certainty of failure did not discourage them from pursuing those cases in court. In a case which turned on the position of the African Charter within Nigerian law, *The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria,*[26] the applicants sought an order of the court to stop the execution of Major-General Zamani Lekwot (retired), and five others who were condemned to death by the Zangon-Kataf Disturbances Tribunal in Kaduna, on the ground that they did not receive a fair hearing. The court not only assumed jurisdiction,[27] contrary to the contention of the defendants; it also restrained the government from executing the convicted persons. Very importantly, the court held that the African Charter preserved the jurisdiction of the court, and that it overrides the ouster of jurisdiction clauses in military decrees. The ruling in this case, and in many other cases before Nigerian courts of record, constitute significant interpretations of the constitutional guarantees of human rights under the Nigerian Constitution.

9.3 Public awareness activities

The groups have taken steps to increase public awareness of human rights within the country. In this they have succeeded tremendously. They have organised conferences, workshops and seminars, all in a bid to sensitise public opinion to human rights issues. Some of these have been done in conjunction with the press, and other parts of civil society, including church and student groups.

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shot at point-blank range. Also, contrary to the claims of the police that they were members of an armed robbery gang killed in a shootout, the men were actually shot dead in one of the victim's home, six of them lying flat on the floor, and shot in that position, and one was shot while facing the wall. The police displayed the victims' bodies at the police station and one gun allegedly used by the victims. See Constitutional Rights Project *Human rights practices in the Nigerian police* 41 (1994). The CLO instituted an action against the Nigerian police force on behalf of the families of the victims. The Federal Government, in accepting responsibility for the action of the police, agreed to pay compensation to the tune of N2,5 million. *See* Civil Liberties Organisation *Annual Report* 1994 9–11.

26 Suit No M/102/93, 5 May 1993. See 'Cases and materials on human rights' (n 25 above) 218.

27 This was unusual, and contrary to expectation as the courts normally declined jurisdiction in such matters.

9.4 Lobbying national and international authorities

At various times, human rights groups have engaged in the process of lobbying, both at the national and international levels. Nationally, they have sought governmental action on issues like the repeal of legislation infringing the civil liberties of Nigerians. Nigerian human rights NGOs have also engaged in advocacy for the voiceless in society. In 1990, for instance, the groups vigorously protested the demolition exercise carried out by the Lagos State Government at Maroko, Lagos, in which the sprawling slum was demolished, rendering an estimated 300,000 people homeless. They also campaigned, successfully, to save 11 'kid' robbers from death. The 11 had been sentenced to death in 1985 for their alleged involvement in armed robbery. Pleas for clemency were made on their behalf by the groups on the ground, amongst others, that they were under-aged at the time they were tried and convicted. In 1992, the death sentence was commuted to 10 years' imprisonment effective from the date their trial commenced, which was in 1984. They were eventually released. It was a great triumph for human rights groups.

Additionally, Nigerian human rights NGOs have lobbied inter-governmental organisations to seek redress for rights violations that could not be remedied locally.[28] They also called for international sanctions against the military regime, when it appeared that the regime was not ready to relinquish power. In all these, they enjoyed qualified success.

9.5 Lobbying and the pro-democracy struggle

Human rights groups campaigned forcefully for the restoration of the democratic order, and for respect of the civil and political rights of Nigerians, which were severely curtailed by the military dictatorship. The Babangida regime had succeeded in muffling the civil society and the groups had to work actively to open the political system to enable citizens to freely exercise their rights, and for professional politicians to operate freely as guaranteed by the Constitution. To achieve this goal, a coalition of social forces, including human rights groups, formed the Campaign for Democracy (CD), which joined issue with the government on the political transition programme.

The CD operated within a background of manifest unwillingness on the part of the Babangida regime to quit power. The level of harassment of activists increased significantly in the period after November 1992, when the Babangida government decided to postpone the transition to

[28] Some groups have presented petitions before the African Commission on Human and Peoples' Rights on behalf of victims, and have also sought the invalidation of local legislation through the Commission, especially those in conflict with the provisions of the African Charter. See eg *Civil Liberties Organisation/Nigeria*, Decisions of the African Commission on Human and Peoples' Rights, 1986–1997, Law Reports of the African Commission, Series A vol 1 (Banjul, 1997).

civil rule. When the results of the 12 June 1993 presidential elections were annulled by the regime, the CD called for demonstrations and strikes against the government. These forces against military rule did not relent although there was a marked increase in the violation of rights, including the killing of demonstrators, detention of activists and journalists, and the closure of several newspaper houses. Eventually, the Babangida regime left power due to these and other pressures mounted from within and outside Nigeria.

It is worth noting that the leaders of CD were, largely, leaders of some of the human rights NGOs.[29] At some point, it was hard distinguishing between their activities, as human rights NGOs, or as pro-democracy activists. By and large, however, the pro-democracy struggle was an essential part of the human rights movement, as success in that area would definitely make it easier for the groups to operate as human rights NGOs.

10 From accommodation to hostility — The government and human rights groups

In the early years of the CLO, there was commendation from all sides for its success. The openness with which the organisation pursued its mission went some way in influencing official attitudes towards it. The government openly commended it several times and acknowledged that they did a good job, and also helped to ensure speedy trials for detainees. There was some measure of governmental tolerance of its activities. But as the socio-economic and political environment deteriorated, the groups protested the misrule by government. As the opposition from the groups intensified, the government manifested open hostility towards the groups. In contradictory fashion, the government also maintained that the groups were free to operate.

Later, government attitudes changed as it launched a series of attacks on the groups, portraying them as unpatriotic because they were receiving external funding. The government maintained that NGOs were agents of foreign organisations seeking to destabilise the country. Some of the groups admitted to being funded externally, but maintained that the issue was not that of funding, but of the human rights violations in the country. All of them denied being agents of foreign organisations.[30]

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29 The Chairperson of CD was also the Chairperson of the Committee for the Defence of Human Rights (CDHR).

30 See 'Trading hard tackles: Human rights organisations engage government in a battle of words' *Timesweek* (28-10-1991) 17; 'Who funds civil rights groups?' *Newswatch* (21-10-1991) 13; M Asuquo 'Expanding the frontiers of human rights' *The Guardian* (28-09-1992) 11.

It is worth noting that many of the projects executed by some of the human rights NGOs have been funded by external agencies. At the developmental stage of the groups, such funding has been critical because without it, many of their activities would have been grounded. This is partly so because financial support for the groups within the country has not been substantial. Suffice to say that the groups weathered the storm.

At other times, the leadership of many of the groups was intimidated and harassed. Some were detained for long periods without charge or trial, travel documents were seized at the point of departure, but the activists were largely spared the fate that befell some of their counterparts in some other African countries who paid the ultimate price of death in defence of the rights and liberties of their fellow citizens.

11 Government rhetoric and human rights reality

General Babangida's open promise to respect human rights at the inception of his regime, and certain actions, aforementioned, in that regard, led to an initial popularity of the regime, both at home and abroad. As an observer noted, 'the world took notice'.[31] In 1986, General Babangida received an international citation for the protection of human rights. The US State Department, in a report to the Senate and House Committees on Foreign Affairs, commended General Babangida for abolishing the death penalty for drug trafficking, and for his commitment to human rights.

Human rights groups emerged later and began to highlight governmental violations of human rights. While human rights groups maintained there were rights violations, the government, at every opportunity, sought to impress Nigerians, and the outside world, with its human rights credentials. At the opening of the ninth session of the African Commission on Human and Peoples' Rights (African Commission) in Lagos on 18 March 1991, the Vice-President, Augustus Aikhomu, told the audience that Nigeria had a good working climate for human rights groups, many of which, according to him, were decidedly critical of the government. He maintained that the government had[32]

> generously allowed many human rights groups to operate without molestation. The existence of those groups which experienced no fetters, except for the normal checks and balances built into our whole system by law, [was] in itself, an irrefutable evidence of our preparedness to allow all Nigerians the freedom to purse their legitimate endeavors without unwarranted restrictions.

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31 'Human rights — Cracks in the wall' (n 10 above) 12.

32 'Aikhomu waives government's human rights credentials' *The Guardian* (19-03-1991) 20.

He conceded, however, that the government was not completely free from criticism, at the same time claiming that no country's record was absolutely impeccable. But as the facts showed, the Vice-President was simply being economical with the truth.[33]

The President himself was not left out. In a British Broadcasting Corporation (BBC) interview in October 1991, General Babangida, when asked about the human rights situation in Nigeria, asserted:[34]

> This is the freest country in Africa. This is the only country where *we still respect the courts and I will dare say that so far, we are the best* (my emphasis).

This was not true. At the very least, the press was not free,[35] and there was little or no respect for the courts.[36]

Even though the government sought to present a clean image on human rights, the reality was different. Abuses continued, and as the socio-economic environment deteriorated, including the collapse of social infrastructure, respect for human rights wore thin. The government's authoritarianism did not diminish as it held on to power. It would have been criminal on the part of the human rights groups to be silent in the face of repression. They maintained their opposition even as government maintained a false posture on human rights. Because of this, government changed tactics, and began to counter-attack the human rights groups while it continued its chest beating over its claimed respect for human rights. In February 1992, the Vice-President, in an international human rights seminar held in Lagos, expressed concern for the 'activities of certain individuals who would want to tarnish obviously well-intended policies and actions with the paint brush of human rights'.

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33 A few days earlier, the same Vice-President addressed the International Federation of Women Lawyers (FIDA) and defended the repressive Decree No 2 of 1984, stating that the Decree was not enacted to trample upon the rights of citizens, and that the government had no intention of repealing it. See 'Decree 2: CLO asks government to clarify Aikhomu's statement' *The Guardian* (08-03-1991) 2.

34 Asuquo (n 30 above) 11.

35 In 1990 alone, the CLO reported the closure by security agents of five media houses for a total of about 195 days. Twenty-two journalists, including publishers, were arrested and detained for all sorts of reasons, which invariably lacked merit. See Civil Liberties Organisation *Annual Report* (1990) 43.

36 The government had a track record of disobeying court orders. It became so rampant that a High Court judge had to berate the Federal Attorney-General for disobedience of court orders. He said: 'The conduct of the Federal Attorney-General, and of the Federal Government of Nigeria in disobeying the court order is reprehensible. The government's disobedience of court orders is in fact destroying the basis in (*sic*) which lawyers can defend the rights of Nigerian citizens.' Further, he said: 'If citizens, whose rights the Federal Government now seeks to protect follow the government's bad example and refuse to obey court orders, it will lead not only to the disruption of the administration of justice . . . but also to chaos, anarchy and ultimate dismemberment of the Federal Republic of Nigeria.' See *Attorney-General of the Federation v Chief Adigun Ogunseitan* unreported Suit No. LD/1799/92, July 2, 1992. Even though this case was decided after the Babangida interview, it was fully representative of the situation before and after the interview.

He asked such people to realise that crusading for human rights was 'not a license to lampoon the integrity of fellow citizens'.[37]

12 Problems faced by NGOs

The aforementioned attacks are part of the problems faced by Nigerian NGOs. In their efforts at ensuring better respect for human rights, they have been subjected to physical risks, both the leadership and the memberships of the groups. Human rights activists have been deprived of their liberty through harassment, arrests and detention for long

[37] Address by the Vice-President, Admiral Augustus Aikhomu, in Clement Akpamgbo (ed) *Perspectives on human rights* (1992) 282 290. This was a reference to human rights groups, which had campaigned vigorously against the nomination of a former head of state, General Olusegun Obasanjo (rtd), and of Prince Bola Ajibola, the erstwhile Federal Attorney-General and Minister of Justice for international appointments. Obasanjo had been nominated for the post of UN Secretary-General, while Ajibola had been nominated for a seat at the International Court of Justice (ICJ), made vacant by the death of eminent Nigerian jurist, Dr TO Elias. Human rights groups opposed Obasanjo's nomination on the grounds that he had a poor human rights record while in office as head of state, between 1976 and 1979. They cited as example the alleged establishment of a crocodile-infested detention camp at Ita-Oko, an island in Lagos. Ajibola was a former president of the Nigerian Bar Association (NBA), who was accused of condoning violations of the independence of the judiciary and disobedience of court orders by the Babangida regime, when he was the Federal Attorney-General. The groups frowned at Ajibola's 'reluctance to curb extra-judicial police killings and abuses, bare-faced inaccuracies and contradictions witnessed during his tenure as attorney-general, inaction over detention of lawyers without trial at various times and his attitude towards the preventive and detention decrees and press freedom, including freedom of expression.' The campaign led the Vice-President to convey government's irritation to the groups at his weekly press briefing on 4 October 1991. He said: 'We are trying to lobby, to present our case as to why these two gentlemen should be elected into these offices . . . I think the activities of these human rights organisations at this point in time about General Obasanjo and Mr Ajibola are most unpatriotic . . . Today, we are fighting people responsible for illegal dealings in drugs, rapists, people who want to turn the society into a jungle, but the so-called human rights organisations in this country have interest to defend the rights of these enemies of the society more than anything else.' However, in a letter to the president, one of the groups, the CDHR, refuted the Vice-President's allegation, and stated that: '[T]hose who are trying to turn our country into a jungle and who have certainly succeeded in turning Nigeria into the 13th poorest nation in the world, in spite of the massive human and natural resources with which the country is endowed, are those who have caused hunger, hopelessness and joblessness in our country and who with their foreign and indigenous backers have turned the Naira into a worthless currency.' The organisation reasoned that since Obasanjo could properly oppose the candidature of another Nigerian, Chief Emeka Anyaoku, for the post of Commonwealth Secretary-General (to which he was eventually appointed) — without being branded as unpatriotic, any individual or organisation should be free to castigate Obasanjo's nomination for any international appointment. According to Femi Falana of the NADL, his organisation had no apologies for its stance on the two government nominees, and said it would not embrace what he called 'fake patriotism'. See 'Trading hard tackles' (n 30 above) 18–19.

periods, often without trial, and have borne all sorts of physical indignity.[38] The continued operation of these groups in the harsh environment has principally been due to the tenacity of the activists in the face of all hazards.

Many times the government also sought to destroy the credibility of their work by casting doubt on the validity and reliability of their reports, and as seen earlier, by questioning their motives.[39] This was an on-going attack by the government.

Groups have faced identity crises, occasioned by their deep involvement in the pro-democracy struggle. As noted, at some point, it was hard distinguishing human rights groups and pro-democracy groups — the latter had the sole aim of returning the country to party politics. The pro-democracy groups thrived, but later began to lose credibility. This loss of credibility impacted the human rights NGOs, partly because they were seen as synonymous with pro-democracy groups. Human rights NGOs managed to extricate themselves by their stature as human rights groups. While the human rights struggle is, in the main, a political struggle, there is a limit to which human rights groups could involve themselves in the political agenda. The human rights groups, like the pro-democracy groups, had concentrated on political issues, but unlike the latter, needed to keep in mind that the crisis of the Nigerian state transcended politics. Many of the problems, including endemic corruption, religious and ethnic intolerance, deteriorating socio-economic environment[40] and others, were manifestations of structural imbalances in society, which required, amongst others, fundamental attitude changes on the part of the ruling political power elite in order to deal with problems. Mere establishment of democratic structures, which the pro-democracy movement canvassed, was not sufficient. Such structures would simply have collapsed under the weight of those problems.

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38 Activists like Olisa Agbakoba, Clement Nwankwo, Femi Falana and Beko Ransome-Kuti have all been arrested and detained several times; and prevented from attending conferences and seminars outside the country by confiscation of their international passports and travelling documents. Ransome-Kuti was sacked as Chairperson of the Lagos University Teaching Hospital (LUTH) Board, a government position, when he refused to 'tone down' his criticisms of the government.

39 See 'Trading hard tackles' (n 30 above) 17.

40 As a commentator noted: 'At probably no other time in the history of the Federal Republic of Nigeria were there greater signs of a . . . nation truly diminished in stature: a nation wanting in vision, and a polity bereft of men of substance. The quality of governance is on the decrease, the professions and the professionals are becoming less impressive every year; the foundations of civil society and the pillars of the rule of law are subverted; decorum has fled through the window; and the quality of soldiering in Nigeria has become embarrassing.' See 'Symptoms of a deep crisis' *The Guardian* (28-08-1996) 25.

There is also the problem of funding. There is not much financial support for the groups internally. It has been difficult getting donors to support human rights causes, which do not have the potential of advancing the business or political interests of the donors. But more critically, the parlous state of the Nigerian economy has made it difficult to raise money through avenues such as members' contributions. The narrow membership base of the groups has not helped matters. As a result, raising money through their membership has never been a viable option.

While the groups have had some success in securing the release of detainees, they have had to contend with the problem of rehabilitation of freed detainees. Many of them have nowhere to go after having been detained for long periods. The groups have had to do something to enable such people to remain and not turn to a life of crime.[41]

13 Challenges for the future

Human rights groups face multiple challenges to their continued relevance in the Nigerian socio-political environment. They have come to stay, but they need to pay attention to the following:

13.1 Understanding society, broadening appeal, and rights education

Groups must know that there is a particular social milieu in which they operate and, therefore, they need to thoroughly understand the society in which they operate. This will form the basis of their actions and operations. The strategies and tactics they adopt in pursuing their goals must be such as are relevant in the context of society. They need not ape the strategies of human rights NGOs based in the West. The success of particular strategies depends on where it is applied.

Also, it is suggested that, for maximum effectiveness, human rights groups need to broaden their appeal so that ordinary citizens would be able to appreciate their work. It is necessary to take issues beyond the realm of political sophistry so that the needs and aspirations of ordinary citizens can be met. As Mutua notes, the leadership of human rights

41 It is said that 'some of the detainees have spent so long behind bars that they lose track of their relatives. Others who once had a means of livelihood come out not knowing how to survive. Worse still, the psychological stress of long confinement frequently results in mental problems in some cases.' According to Olisa Agbakoba, part of the problem 'is how to feed and cater for the more hopeless, helpless cases until they are ready to return to normal life'. And Abdul Oroh, executive member of CLO adds: 'When we get someone out of prison, we want to be able to keep him out of prison by giving him money to get in touch with his loved ones.' See 'CLO — Waging war for liberty' (n 4 above) 21. They would need lots of money for that.

movements across Africa is drawn from a narrow urban elite in the professions. Like the elite elsewhere, most of Africa's privileged are detached from the social reality of the poor rural majority. Since a viable movement cannot be created where there is alienation from potential and actual victims of human rights abuse, it is necessary to expand the areas of operation in order to draw their leadership from all sectors of society.[42]

13.2 Standard setting

The adverse socio-economic conditions in Nigeria demand that serious attention be paid to human rights, especially socio-economic rights, more than ever before. Violations are not limited to violations of civil and political rights, but include mass poverty, disease, illiteracy, homelessness, environmental degradation and the total breakdown of social infrastructure. To eradicate this, there is an urgent need to raise the profile of economic, social and cultural rights, and ensure their realisation. The present emphasis on civil and political rights is not enough. The full development of the human personality in Nigerian society demands that attention be paid to all classes of rights. The Nigerian Constitution explicitly recognises civil and political rights, while it classifies economic, social and cultural rights as fundamental objectives and directive principles of state policy. These are unjusticiable, and therefore cannot be litigated upon. Human rights groups are well placed to lead the struggle to transform these rights from their present status as mere directives to actual rights to be enjoyed by the citizenry.

13.3 Funding

It is generally acknowledged that funding for human rights groups is critical in many countries.[43] The situation is no different in Nigeria.[44] Securing adequate funding is a big challenge for human rights groups, and it is necessary that groups seek financial support from interested constituencies within Nigeria. The dependency of many of the groups on foreign sources is not healthy, as this necessarily restricts the scope of their activities. It causes them to lay a greater emphasis on civil and political rights — for which most of those funds are intended anyway.

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42 See Mutua (n 3 above) 31. It is worth noting that one of the groups, Human Rights Monitor, was started in January 1993 in Kaduna, Northern Nigeria, by some who perceived the need for a human rights body in the north, which was not headquartered in Lagos, the base of most human rights NGOs in Nigeria.

43 According to RL Bernstein, '[r]elative to the central role of human rights and the success of most human endeavours, the human rights movement is the world's most important under-funded cause.' See Human Rights Watch *World Report* (1993) 2.

44 Some of the groups are completely self-funded, like the Human Rights Monitor. This situation seriously hampers its activities.

But the effectiveness of NGOs depends much on their financial independence. When human rights groups accept funds from these sources, it is difficult to ignore the danger that they will have to submit to a political will not always consistent with a human rights logic. However, in a sense, they may be right to accept money that makes it possible for them to function.[45]

As for internal sources, it is acknowledged that NGOs face an uphill task in raising funds from these sources, as fewer resources are devoted to such issues in developing countries. Despite this, there is a need to enlighten interested constituencies, including individuals and corporate bodies, that support for the human rights movement is not tantamount to opposition to government, and that, in any event, it is in the interest of all to have a society where human rights are respected. Socio-economic and political activities cannot thrive in an environment where there is little or no respect for human rights.

Additionally, human rights groups need to adopt a policy of transparent accounting, which will enable donors to realise that their funds are being used for their intended purpose(s). In this way, they can secure for themselves survival and credibility. They may also adopt a policy similar to that of Amnesty International (AI). In order to maintain its independence and impartiality, the International Council of AI established strict guidelines for the acceptance of funds to guarantee that any 'funds received by AI (its secretariat, national sections, committees and groups) must in no way compromise the integrity of the principles for which AI works, limit the freedom of activity and expression enjoyed by the organisation or restrict its areas of concern'.[46] This is a guideline that should be considered carefully by Nigerian human rights NGOs.

13.4 Objective and impartial reporting

Generally, human rights groups should be able to command the confidence and respect of all, including the victims of rights violations, each other, and of government and its agencies. They must not only be impartial, but be seen to be so. Nigerian human rights NGOs cannot divorce themselves from this reality. There is a need to thoroughly investigate complaints of human rights abuse before bringing them to the public notice. Once the facts have been established, they are better placed to bring it to governmental and public attention, without fear of contradiction.

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45 See P Aeberhard 'A historical survey of humanitarian action' (1996) 2 *Health and Human Rights* 43.

46 *Impartiality and the defence of human rights* (Amnesty International) iii (nd).

The technique adopted will depend on the situation. Sometimes, the facts are such that they must be brought to public attention, especially if they call for a massive public outcry, and they have to awaken public opinion boldly and loudly. At other times, they may have to adopt a private approach when public intervention may harm the prisoner (or his family),[47] or the cause being espoused. The technique adopted will vary from case to case.

Where the situation is brought to government attention and the alleged abuse is not redressed, groups may seek redress in the law courts. However, they need not wait for an infraction to occur before commencing legal action. The Nigerian Constitution gives citizens the right to ask the court for protection when their fundamental human right 'has been, *is being*, or *is likely* to be contravened' (my emphasis).[48]

Very importantly, groups need not maintain a permanently belligerent attitude to government or turn themselves into a permanent opposition party to government. It is therefore necessary to avoid sensational reports and the promotion and execution of personal agenda. It is needless to stigmatise a government for an infraction which did not occur. This need for objectivity and impartiality is further made necessary by the fact that government usually seeks ways of destroying the credibility of these groups and their reports. This is done by assertions that the reports of the groups, one of their main tools, are neither objective nor impartial, but biased. The legitimacy and moral authority of human rights NGOs depend on the credibility of their work, including their information, and so groups must watch out for attempts to de-legitimise their work through any subtle means.

13.5 Inter-NGO relationship

There is a need for human rights groups to maintain a healthy relationship with each other. This is necessary for solidarity building and information sharing. They need to develop strategies with each other, and exchange information and ideas which are shared to their benefit. This they need to do, not only in Nigeria, but also with their counterparts on the African continent.[49] Groups have worked together at various times,

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47 As above, iv.

48 Sec 42(2) 1979 Constitution of the Federal Republic of Nigeria.

49 See Mutua (n 3 above) 32, where he states: 'Frequently [human rights] organisations in Kenya will have more to learn from groups in Zimbabwe, Nigeria or the Philippines than from similar groups in New York or London. The value of the Zimbabwean experience with brutality by security forces or domestic violence against women is likely more appropriate for a Kenyan organisation with similar experiences than by groups in Houston or Boston for the simple reasons of history and levels of development. Exchanges and internships between organisations in the south would strengthen ties and enrich their work. Lack of co-operation or knowledge about groups in other African countries is astounding and saddening. Intra-African knowledge and collaboration are essential for a strong continental movement.'

including under the umbrella of the pro-democracy group, Campaign for Democracy (CD). They also share information with each other and cooperate on other matters.[50] But they certainly can improve on this.

13.6 Training

It is important that groups train their staff to develop skills and competence in matters such as fact-finding, information handling, communications (print and electronic), lobbying and human rights education. Those who have acquired such skills and competence should assist others in developing similar competence. This is necessary, as failure to do so will leave them perpetually in the shadows of their Western counterparts.

Additionally, professionalisation and specialisation[51] would help the groups to function better, especially as their numbers increase. Specialisation should keep them from spreading themselves too thin, in view of the wide range of issues with which they are concerned, and in view of limited resources for such activities. The current level of specialisation along 'strategy' and 'issue' lines must be advanced further. While some are concerned mainly with litigation, some are involved only in investigating and reporting on human rights violations.

Also, human rights groups must seek to gain access to regional and international human rights systems, and effectively utilise the procedures in those areas in the struggle at home. So also, it is necessary to engage in research into, and reflect on strategies and tactics, especially those for confronting new challenges to the human rights movement.[52] Groups may also need to develop a professional code of conduct which is in conformity with international standards. This code could be used to fight against the manipulation or abuse of their skills or knowledge by government or private groups to commit violations of human rights.[53]

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50 Eg the Human Rights Monitor has taken cases to court with the CLO and issued joint releases with the same body on human rights issues in the north.

51 A good start is the one provided by the Human Rights Law Service (HURI-LAWS), a human rights NGO, which is the first specialist provider of public interest law and human rights law service in Nigeria. Olisa Agbakoba, co-founder of the CLO, formed the group in1997. In a 1995 report for the International Centre for the Legal Protection of Human Rights (INTERIGHTS), and the Inter-African Network for Human Rights and Development (AFRONET), Agbakoba had identified a critical need for specialist human rights providers. HURI-LAWS was thus founded to advance human rights through organised and consistent public interest litigation and its main work includes legislative advocacy and legal assistance — in addition to public interest and human rights litigation. See Huri-Laws *1997–1998 Annual Reports and Accounts* 2 (1999).

52 Commonwealth Human Rights Initiative *Put our world to right — Towards a commonwealth human rights policy* (1991) 172.

53 As above, 190.

14 Conclusion

Human rights groups emerged in Nigeria in response to crises in society. These crises are still manifest. The economic stagnation and the specter of fascism still loom large, and command the attention of all, now more than ever. The power of the state is still largely undiminished, and there are forces within the state that are interested in the collapse of the Nigerian structure. As noted by a political economist, Claude Ake, there is a need 'to combat social forces which threaten to send us back to a more violent barbarism.' This can only be done through 'a broad coalition of radicals, populists, liberals, and even humane conservatives'.[54] Human rights NGOs are well placed to lead the struggle. They are needed at these critical times.

When the Babangida dictatorship was eventually swept from power, it appeared as if there would be greater respect for human rights. However, the government installed to succeed him, led by Chief Ernest Shonekan, could not hold the country together, and in November 1993 another of the generals, Sani Abacha, came to power after pushing Shonekan aside. Abacha's regime was one of utter depravity, and malicious disregard for the rights of Nigerians. It certainly was the lowest point for the country, which had never known repression on such a grand scale. Repression was accompanied by larceny of grand proportions and respect for human rights was certainly at its lowest point. Many Nigerians were forced into exile, and some — particularly in the pro-democracy movement — lost their lives in the struggle against the dictatorship.

At the initial stage, human rights NGOs were light-footed in dealing with the Abacha regime. It took some time before they realised the evil he presented, but opposing the General was a dangerous venture. Abacha borrowed heavily from the style of his former boss, Babangida, and he took repression to advanced levels. He eventually succumbed to his own machinations. After his sudden and unexpected death in 1998, another general, Abdusalami Abubakar, took over and set in motion the process of transition to civil rule, which culminated in the election of another former military general, and former head of state, Olusegun Obasanjo, as President in February 1999. He was sworn in as President in May 1999.

Since the period of General Abubakar, there has been an air of relative freedom. Abubakar set free almost all of the detainees of the Abacha regime, and one could safely say that, for the first time in many years, Nigeria had no political prisoners. The new Obasanjo regime also set in motion the process of remedying the wrongs of the past regimes with

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[54] C Ake 'The African context of human rights' in J Ihonvbere (ed) *The political economy of crisis and underdevelopment in Africa: Selected works of Claude Ake* (1989) 86 88–89.

the establishment of a human rights violations investigations commission soon after the inauguration of his presidency.

In all of these, the concern is that the human rights movement may suffer in a democratic dispensation. The fear has been that many in the movement would be swept into political positions and that the ranks would be depleted. So far, this has not happened and the groups seem to be mindful of their mission this time around. In any event, the problems have not all disappeared. In fact, tensions, all bottled up during the military era, have been exploding, and containing the 'genie in a bottle' has been difficult. However, there is some optimism that the Nigerian state would survive. Groups are doing all that is in their power to ensure the government is accountable to the people, and that human rights are respected, as guaranteed in the new (1999) Constitution.

The other worry is that there is a possibility of a cut-off of foreign funding for groups. That has not happened yet, and it may never happen. It certainly will be a sad thing if donors were to watch all their investment in these groups collapse just because there is some democratic structure in place. In fact, human rights groups need more money to ensure that the civil society is fully aware and ready to ensure the success of the democratic dispensation. There must be no lapse that will allow the military to return to power in Nigeria.

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The bill of rights and constitutional order: A Kenyan perspective

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1 Introduction

The inclusion of a bill of rights in a constitutional order as a mechanism of ensuring the rights and freedoms of the individual and as a means of regulating state power has increasingly been accepted the world over.[1] The United States of America was the first state to break away from the eighteenth century Anglo-Saxon attitude that was hostile to the concept of a bill of rights. The Anglo-Saxon attitude prevailed until the second half of the twentieth century when most African states became independent. De Smith observes:[2]

> Neither in the British Constitution itself nor in any of those Commonwealth constitutions in which British influence had been predominant was there to be found any comprehensive statement of human rights.

Early Commonwealth constitutions that included bills of rights were those of India (1950) and Pakistan (1957). These constitutions, however, were homegrown after independence and are not attributable to Anglo-Saxon initiatives.[3] The trend changed in 1959 with the enactment of the Nigerian Independence Constitution, which listed a number of fundamental rights. Most of the bills of rights that emerged thereafter were imposed by colonial authorities as a precondition to independence. This was notably so in Kenya, Uganda, Malawi and Sierra Leone.

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1 The only exceptions today are Britain and Israel, which do not have written constitutions. In the past three decades, countries which previously had written constitutions but no bills of rights or with rights proclaimed but not justiciable, have adopted justiciable bills of rights, notably Canada, New Zealand and Tanzania.

2 SA de Smith *The new Commonwealth and its constitutions* (1964) 162.

3 As above.

Anglo-Saxon hostility to bills of rights is traceable to the writings of Jeremy Bentham who, in reaction to the French Declaration of the Rights of the Person of 1789, described natural rights as 'rhetorical nonsense — nonsense upon stilts'.[4] So entrenched was this attitude that the Simon Commission on the Indian Constitution was of the view that entrenching rights in a constitution was of little practical value.[5]

The change of attitude towards bills of rights in the twentieth century was due to a realisation that they provided a standard of achievement in democratic states. Bills of rights were therefore seen as a means of preventing an assault by governments on the rights and freedoms of the individual. Constitutionalism as a basic idea evolved at a more specific juristic stage into a human rights issue.[6]

The experience of countries with 'durable constitutions', such as the United States, shows that a bill of rights is essential in any constitutional order as a safeguard against the abuse of state power and as a vehicle for vindicating human dignity. To effectively occupy its place in the constitutional scheme, the bill must emanate from the citizens of the state. It must espouse their vision of the exercise of state power and how far that power may encroach on their rights and freedoms. It is the core of the social contract between the people and their rulers.

The Kenyan Bill of Rights is one of many bills imposed on newly independent nations by departing colonial authorities with a view to protect minority interests and more particularly the interests of European settler communities.[7] Consequently, over the years and in the face of authoritarian one-party rule, it was reduced to a mere declaration. This contribution seeks to evaluate the efficacy of the Kenyan Bill of Rights from a historical perspective.

2 The colonial constitutional order

The evolution and development of the constitutional order in Kenya can be traced to the declaration of the British East Africa Protectorate on 15 June 1895.[8] The declaration of protectorate status marked the beginning of direct administration by the British government of a territory that had previously been administered by Sir William Mackinon's Imperial

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4 J Bentham 'Anarchical fallacies' quoted in De Smith (n 2 above) 164.

5 *Report of the Simon Commission on the Constitution of India* (1940) (Cmnd 3569) 22–23.

6 JB Ojwang 'Constitutionalism — In classical terms and in African nationhood' (1990) 6 *Lesotho Law Journal* 57 71.

7 Chapter V Constitution of Kenya Act 5 of 1969.

8 For a detailed discussion of the pre-1895 historical background, see C Singh 'The Republican Constitution of Kenya: A historical background and analysis' (1965) 14 *International and Comparative Law Quarterly* 878.

British East Africa Company under Royal Charter.[9] What had hitherto been 'stateless' ethnic communities with distinct political and social characters, were brought together into a centralised state.

Initially, the protectorate did not have any form of political governance and was for all purposes regarded as a consular district of the Sultanate of Zanzibar.[10] In 1897, the first signs of organised administration emerged with the promulgation of the East Africa Order in Council. The Order's provisions defined the territorial jurisdiction of the English monarch over the protectorate. The Office of the Commissioner of the East Africa Protectorate was established, and the Commissioner was empowered to set up administrative institutions for the purpose of effective governance.

The Commissioner was vested with powers which authorised him to make laws known as Queen's Regulations and to establish courts to enforce those laws.[11] In all his operations, the Commissioner was answerable and subject to the Secretary of State. Pursuant to his powers, the Commissioner made provision for taxation, appointment of headmen and the mounting of punitive expeditions against hostile tribes.[12]

The Commissioner's powerful position was further enhanced by the East Africa Order in Council, 1902.[13] The Commissioner was granted authority to partition the protectorate into such provinces or districts for purposes of administration as he deemed fit. His legislative powers were increased and his enactments, now known as ordinances, were no longer subject to the approval of the Secretary of State.[14] Officials in the public service held their offices at his pleasure. Further consolidation of the Commissioner's powers came by way of the East Africa Order in Council (1905) which changed his designation to Governor and Commander-in-Chief of the Protectorate. The Governor was empowered to appoint all judicial officers including judges of the High Court.[15]

In 1920, the British East Africa Protectorate became the Kenya Colony by virtue of the Kenya (Annexation) Order in Council of that year. The implication of this was that the territory no longer was governed under the provisions of the Foreign Jurisdiction Act (1890). The British government was enjoined by the British Settlements Act (1887) to assume legal

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9 YP Ghai & JPWB McAuslan *Public law and political change in Kenya* (1970) 14. See also JB Ojwang *Constitutional development in Kenya* (1990) 22–24.

10 As above, 23.

11 Ojwang (n 9 above) 30.

12 As above.

13 It has been argued that the Kenyan constitutional evolution could be traced to the 1902 Order in Council, as it set out clearly how the protectorate would be administered. See 'The story of the Kenya Constitution' (1988) 10 *Nairobi Law Monthly* 9.

14 Ojwang (n 9 above) 31.

15 As above. The 1902 Order in Council established a High Court for the protectorate. Appeals were to be directed to Her Britannic Majesty's Court for East Africa.

duties of a different nature from those required in a foreign territory governed under the former statute.[16] One of those duties was to ensure the establishment of a Legislative Council in order to assume the Governor's legislative powers.

In practice, however, the Governor's hand remained visible in legislation as he was the Speaker of the Legislative Council until 1948 when a substantive speaker was appointed. Before then, the Governor was solely responsible for the promulgation of the Regulations and Standing Orders that superintended the Council's functioning. After the appointment of a substantive speaker, he retained the power to veto any proposed legislation.

The Legislative Council was established at a time when European settlers were pushing for the creation of a 'white man's country' in the colony. As a direct consequence, membership of the Council was restricted to European representation. Hopes of creating a 'white man's country' were, however, crushed by the Devonshire White Paper of 1923 which declared Kenya to be an African territory in which the interests of the 'natives' would be paramount.[17] In 1925, therefore, provision was made for African representation in the Legislative Council. However, this provision adopted a paternalistic attitude based on the assumption that 'natives' were not capable of representing their own interests. European missionaries were invariably appointed to represent African interests in the Council. It was not until 1944 that the first African, Eliud Mathu, was appointed to represent those interests.

The political tension that ensued was the product of opposing racial interests in the post-annexation period. Its enormity necessitated a considerable amount of constitutional change.[18] Inevitably, this came only after the Mau Mau rebellion and the attendant declaration of a state of emergency. A move towards multi-racialism in government began in 1954, this being a recommendation of the British parliamentary delegation to the Colonial Secretary.[19] This resulted in the Lyttleton Constitution of 1954 which was the first public endorsement by colonial authorities of multi-racial participation in government.[20] It established a Council of Ministers consisting of 12 persons. Half of these were the Governor's appointees, the rest being elected representatives in the following proportions: three Europeans, two Asians and one African.

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16 Singh (n 8 above) 890. See also Ghai & McAuslan (n 9 above) 50–52.

17 By the Devonshire White Paper, the British government regarded itself as exercising a trust on behalf of Africans, the object of the trust being protection and advancement of the 'native'.

18 Ojwang (n 9 above) 33; Singh (n 8 above) 892.

19 G Muigai 'Constitutional government and human rights in Kenya' (1990) 6 *Lesotho Law Journal* 107 113.

20 Ojwang (n 9 above) 33.

Following protestation from African leaders against this 'timid move towards multi-racialism' the Lennox Boyd Constitution came into being in 1958.[21]. The Council of Ministers was expanded to a membership of 16 persons, half of whom were to be elected members of the Legislative Council. Further, African representation was increased to 14 members in the Legislative Council, equal in number to elected Europeans. Despite being aimed at enhancing accountability in government,[22] the Lennox Boyd Constitution did not receive a different reaction than the one received by its predecessor. Indeed, the Lennox Boyd Constitution opened the door to larger demands.[23] African members of the Legislative Council declined to co-operate in government, arguing that representation still weighed heavily in favour of the settlers who constituted a minority of the population. They demanded a constitutional conference to map their political destiny.

In January and February 1960 the first constitutional conference was held at Lancaster House, London. The Secretary of State appointed a constitutional adviser to this conference. Ian Macleod presided over the conference. In contrast to subsequent conferences, this conference was one of racial groupings.[24] The synthesis of the conference was the Macleod Constitution, which expanded membership of the Legislative Council to 65 persons and provided for the protection of minority interests by reserving 20 seats for racial minorities.[25] Provision was made for a Council of Ministers with an African majority; three portfolios were assigned to Europeans and one to Asians.

After the 1960 conference, two national African political parties were formed. They were the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). It had previously been unlawful for Kenyans to organise themselves politically on a national scale.[26] The Macleod Constitution allowed elections to be held in February 1961.[27] These elections were ultimately a test case in so far as the role of political parties in governance was concerned.[28] Membership of, and representation in the Legislative Council, were for the first time apportioned along party and not racial lines. Despite winning the poll, KANU, honouring its electoral pledge, declined to form the government until Kenyatta, the nationalist leader, was released from detention. KADU and the New

21 Muigai (n 20 above) 113.
22 Ojwang (n 9 above) 34.
23 As above.
24 Singh (n 8 above) 893.
25 Ojwang (n 9 above) 35.
26 Muigai (n 20 above) 115.
27 KANU garnered 16 seats in the Legislative Council with 67% of the votes, whereas KADU won 11 seats and 17% of the votes.
28 Ojwang (n 9 above) 35.

Kenya Party, a European outfit, formed a coalition government which was dominated by colonial officials and never exercised any real power.[29]

The second constitutional conference was held between February and April 1962 at Lancaster House amidst deep-seated mistrust and differences between KANU and KADU. The party lines made agreement all the more difficult.[30] Arguments emerging from this conference were based on compromises between these two parties.[31] The internal self-governing constitution that evolved was the product of vigorous bargaining by all parties. With minor modifications, this constitution later formed the basis of the Independence Constitution.[32]

In its substance, the new Constitution established a form of Westminster government. It provided for a bi-cameral legislature. The leader of the majority party in the Lower House was to be appointed Prime Minister by the Governor. Authority over what were deemed to be crucial matters of state, namely defence, foreign policy and internal security, remained vested in the Governor. The country was divided into seven regions, each with its own legislature and executive.

Upon the establishment of internal self-government in 1963, negotiations for the Independence Constitution began. In September that year the final constitutional conference was held in London. A number of changes were made to the 1962 Constitution with a view to making it more durable and workable.[33] It was decided that Kenya would be granted independence under dominion status and not as a republic. Her Majesty would remain the head of state. The Independence Constitution was born.

The Independence Constitution was negotiated and agreed upon, not as a basis on which a new nation would be founded, but as a mechanism by which governmental power and responsibility were handed over to the Kenyans. Although not intended to espouse the values and aspirations of the Kenyan people, it had the effect of creating a democracy based on the Westminster model of limited government. Kenya became independent on 12 December 1963.

3 The Independence Constitution

The British government renounced all rights of governmental authority and legislation in Kenya and removed all limitations to the competence

29 Muigai (n 20 above) 115.

30 Singh (n 8 above) 895.

31 As above.

32 Ghai & McAuslan (n 9 above) 177.

33 *Report of the Final London Conference, Kenya: Independence Constitution 1963* (1963) (Cmnd 2156) para 32. For an evaluation of the amendments made, see Singh (n 8 above) 898–900.

of the legislature through the Kenya Independence Act, 1963, and the Kenya Independence Order in Council of the same year.[34]

The Order in Council proclaimed that by the provisions of the Act, Kenya had attained independence. The Independence Constitution was set out in schedule two of the Order in Council. It was a long, detailed and complex document, strongly based on the principles of parliamentary government and the protection of minorities. The complexity of the Independence Constitution is best explained by the circumstances that attended its formulation. Awareness that the colonial authorities were about to transfer power to the Kenyans set off acrimonious debate as to how power was to be distributed upon that eventuality. Minorities became increasingly aware of their precarious position in a newly independent state. With a view to self-preservation, minorities persistently lobbied for constitutional safeguards and other means of power sharing.[35]

The Independence Constitution was a manifestation of a mistrust of power with the result that a weak form of government was established, in contrast with the previous colonial government which was premised on the consolidation of power in the executive.[36] Three broad themes characterised this Constitution: regionalism to safeguard KADU, safeguards for minorities and the control of the exercise of political power.[37]

4 Background to the Bill of Rights

The idea of an entrenched bill of rights in the Constitution first arose in 1960 when it became apparent that Kenya, like most British colonies at the time, was heading towards independence. The principle of a bill of rights was accepted at the Lancaster House constitutional conference of that year.[38] Her Majesty's government was of the firm view that legal provisions for the judicial protection of human rights were essential in the proposed Kenyan Constitution.[39]

However, a bill of rights was not incorporated into this Constitution. It became part of the Constitution through a constitutional amendment in December 1960.[40] The Bill of Rights guaranteed the traditional civil

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34 Ghai & McAuslan (n 9 above) 178.

35 YP Ghai 'Constitutions and political order in East Africa' (1972) 21 *International and Comparative Law Quarterly* 403 410. The term 'minorities' is used to denote the numerically smaller ethnic groups, Asians and European settler communities.

36 As above, 410.

37 Muigai (n 20 above) 116.

38 Singh (n 8 above) 913.

39 *Report of the Kenya Constitutional Conference 1960* (1960) (Cmnd 960) 9. See also De Smith (n 2 above) 163.

40 Kenya (Constitution) (Amendment No 2) Order in Council 1960.

and political rights as set out in the Universal Declaration of Human Rights and guaranteed equality of economic opportunity. Africans regarded this as a belated gesture of goodwill on the part of the British Government. The irony of a British initiative towards the protection of human rights by way of a justiciable bill of rights is to be found in the English position on the subject at that time, which Jennings captures:[41]

> . . . [I]n Britain we have no bill of rights; we merely have liberty according to the law; and we think — I truly believe — that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man.

Although African nationalist leaders at Lancaster House did not oppose the idea of a justiciable bill of rights, their attitude towards protection of human rights was no different from the one adopted by Dr Hastings Banda at the Nyasaland Constitutional Conference of 1962. While not objecting to a bill of rights, Dr Banda's position was that the true guarantee for the protection of minorities was the goodwill of the majority.[42]

At the second Lancaster House Conference in 1962, it was agreed to set up a committee to consider and report to the Conference on the provisions to be included in a bill of rights.[43] The Committee was presided over by Sir John Martin at the behest of the British and Kenya Colony governments and included representatives from KANU, KADU and the Kenya Coalition. It recommended substantial reformulation of the 1960 Bill.

Although human rights advocacy in Kenya preceded the introduction of the Bill of Rights, its incorporation in the Constitution is wholly attributable to British authorities. They made this a precondition to independence. It would appear that a bill of rights was not a priority issue for African leaders at the constitutional conferences. Their prime concern was independence, the transfer of power to Kenyans and power sharing among Kenyans upon independence.

The Kenyan Bill of Rights, therefore, like those of many former British colonies, cannot be said to be representative of a set of higher values emanating from, and subscribed to, by the Kenyan people. Indeed, it was meant to be nothing more than a bulwark against political power in the hands of 'natives', primarily to protect the interests of European settlers.

An analysis of the reception of the concept of human rights in Africa bears out the above assertion. The post-Second World War period in the 1950s witnessed a wave of African nationalism and the emergence of newly independent African states in the 1960s. At a conference held in

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41 I Jennings *The approach to self-government* (1956) quoted in De Smith (n 2 above) 167.

42 *Report of the Nyasaland Constitutional Conference 1962* (1962) (Cmnd 1887) 20.

43 *Report of the Kenya Constitutional Conference 1962* (1962) (Cmnd 1700) 19.

Accra in 1958 under the auspices of the United Nations (UN), the idea of human rights began to take root in Africa. The resolutions reached at that conference proclaimed, among other things, 'unswerving loyalty to the Charter of the UN and the Universal Declaration of Human Rights'.[44]

In 1960, a follow-up conference in Addis Ababa reaffirmed the commitment of independent African states to human rights.[45] In 1961, the International Commission of Jurists hosted an African conference on the Rule of Law in Lagos, where various aspects of human rights and its socio-economic implications were discussed. That conference invited African governments to study the possibility of adopting an African convention on human rights and the creation of a court of appropriate jurisdiction, with signatory states having recourse to it.[46] Clearly, an 'African' dimension to human rights was identified at this conference.

Despite the growing awareness of human rights on the continent in the 1960s, the run-up to independence lacked a commitment to such values on the part of nationalists. The idea of a constitutional bill of rights was largely a colonial initiative with Africans accepting it as the price for independence. It was only in Zambia and Nigeria that a bill of rights was incorporated in the Independence Constitutions at the instance of the nationalists.[47]

There was no bill of rights in the Independence Constitution in Tanganyika, which was administered by the British under the UN mandate system after the Second World War and until independence in 1961. The African nationalist movement vigorously opposed the inclusion of a bill of rights in that Constitution.[48] That the British did concede to this opposition is explicable. They did not have substantial interests or white settler populations in the territory. The scenario in the neighbouring Kenya colony was altogether different. There were heavy British investments and considerable settler interests in the White Highlands in the Rift Valley and Central Kenya.

British insistence on a bill of rights in the Independence Constitution cannot for this reason be seen as a humanitarian gesture towards Africans, especially in the light of an extremely repressive colonial past characterised by inhuman and degrading treatment of the colonised people. It is best seen as a manifestation of the British and colonial authorities' concern over the security of the white settlers resident in Kenya and their property in a newly independent state.[49]

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44 LS Zimba *The constitutional protection of fundamental rights and freedoms in Zambia* (1979) 74.

45 As above, 75.

46 As above, 77.

47 As above, 78.

48 CM Peter *Human rights in Africa: A comparative study of the African Charter on Human and Peoples' Rights and the new Tanzanian Bill of Rights* (1990) 2.

49 As above.

The Kenyan Bill of Rights was modelled on the Ugandan example. At the first meeting of the committee on a bill of rights at the second Lancaster House Conference, it was agreed that its working paper would be the Bill of Rights contained in the Uganda (Constitution) Order in Council, 1962.[50] The reasoning was that the Ugandan Bill was the most contemporary model and that it was further of special relevance because it was part of the constitution of a neighbouring East African country.

In turn, the Ugandan Bill was based on the Nigerian example as incorporated in the Nigerian Constitution of 1959.[51] The rights enshrined in the Nigerian Constitution were eurocentric in their formulation in that these rights drew heavily from, and reflected, the individualistic approach found in the European Convention on Human Rights.

These rights were limited to civil and political rights. It is through that Constitution that the Western concept of human rights was imported into Africa.[52]

5 The Kenyan Bill of Rights

The Kenyan Bill of Rights[53] is included as chapter V of the Constitution of Kenya, Act 5 of 1969, and is entitled 'Protection of Fundamental Rights and Freedoms of the Individual'. It runs from section 70 through to 86. Being modelled on the European Convention on Human Rights, it guarantees the traditional civil and political rights only.

Section 70 takes a preambular form and assures every person in Kenya the fundamental rights and freedoms of the individual regardless of his race, tribe, place of origin or residence, political opinion, colour, creed

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50 *Report of the Kenya Constitutional Conference 1962* (n 45 above) 19. See also A Wamala 'Some reflections on Africa's constitutional history' in B de Villiers (ed) *Birth of a constitution* (1994) 315.

51 For a historical account of the origins of the Nigerian Bill of Rights, see GO Ezejiofor *Protection of human rights under the law* (1964) 178–183.

52 W Strasser & C Heyns 'The relevance of the European Convention on Human Rights for Africa' in D Brand *et al* (eds) *From human wrongs to human rights III* (1996) 51. See also BO Nwabueze *A constitutional history of Nigeria* (1982) 116–120; YP Ghai 'Independence and constitutional safeguards in Kenya' (1967) 3 *East African Law Journal* 177 192.

53 See C Heyns (ed) *Human rights law in Africa 1996* (1998) 175–185. The Bill as reprinted in this volume has since been amended twice through (a) the Constitution of Kenya (Amendment) Act 9 of 1992 which inserted sec 84(5)(b) to enable parliament to make provision for legal aid to indigent persons wishing to prosecute claims under the Bill of Rights, and (b) the Constitution of Kenya (Amendment) Act 9 of 1997 which added 'sex' to the explicitly prohibited grounds of discrimination in sec 82 and inserted sec 84(7) to provide for appeals from the High Court to the Court of Appeal on any determination made in cases brought to enforce the Bill of Rights.

or sex.[54] In *Wadhwa v City Council of Nairobi*[55] the High Court emphasised that this declaratory provision declares the rights of the individual as a human person without any reference to any matter of nationality, citizenship or domicile.[56]

5.1 Civil and political rights

5.1.1 *The right to life*

Traditionally, the right to life is considered most important and serves as the basis of the enjoyment of other rights.[57] In Kenya, the right to life is respected. Section 71(1) of the Constitution provides that no person shall be deprived of his life intentionally save in execution of a court sentence in respect of a criminal offence. In *M'Riungu v Republic*[58] the High Court reaffirmed the constitutionality of the death penalty.[59]

Section 71(2) is a 'claw-back' clause to the right to life. This section provides that it is justifiable to deprive one of the right to life by force in order to defend any person from violence or to defend property; effect lawful arrest or prevent escape of a lawfully detained person; suppress a riot; insurrection or mutiny or to prevent the commission of a criminal offence by anyone. Further, this right is not violated where a person dies as a result of a lawful act of war. It has been argued that due to its vital nature, the right, being the basis of humanity should be made absolute by, among others, abolishing the death penalty.[60]

5.1.2 *The right to personal liberty*

This right is guaranteed, save in cases where it may be abridged by law.[61] These instances include, among others, execution of a sentence or order of a court, upon reasonable suspicion that one has committed or is about to commit a criminal offence and to prevent unlawful entry of any person into Kenya. Any person who is arrested or detained is entitled to be informed expeditiously and in a language he understands, of the reasons

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54 In substance, however, sec 70 is a general limitation clause.

55 (1968) EA 406.

56 As above, 409.

57 CM Peter 'Fundamental rights and freedoms in Kenya: A review essay' (1991) 3 *African Journal of International and Comparative Law* 61 64.

58 Nyeri Criminal Appeal No 902 of 1981 (unreported).

59 However, in *M'Riungu* the issue as to whether the death penalty is unconstitutional on the grounds of being cruel or inhuman punishment remains unresolved. For a further discussion on the death penalty in Kenya, see G Imanyara 'The death penalty and Kenyan law' (1989) 17 *Nairobi Law Monthly* 19; DW Gachuki 'The hanging bill: Kenya's response to the crime of robbery' (1989) 17 *Nairobi Law Monthly* 24; C Mpaka 'Death penalty: The unending debate' (1989) 17 *Nairobi Law Monthly* 21.

60 Peter (n 57 above) 65.

61 Sec 72(1)(a)–(j).

for his arrest or detention. In terms of section 72(3) of the Constitution, such a person must be brought before a court within 24 hours of his arrest or detention and in a case where one is suspected of having committed a capital offence, within 14 days.

In *Wamwere v Attorney-General*[62] the High Court held that the right to personal liberty was not infringed despite the fact that the applicant's arrest was by way of kidnapping from a neighbouring country. In the court's view it was sufficient that the state had shown that the applicant was arrested on reasonable suspicion of having committed a criminal offence in terms of section 72(1)(e) of the Constitution.[63]

Prior to December 1997, one of the severest abridgments to the right to liberty was section 4(2)(a) of the Preservation of Public Security Act, which provided for detention without trial.[64] It was invariably applied to criminalise political dissent. Once a detainee was furnished with a valid detention order courts would not intervene. Judges held that they had no powers to look into the reasons for detention once the order was duly served on the detainee.[65]

5.1.3 *Protection from slavery and forced labour*

Section 73(1) of the Constitution provides that no person shall be held in slavery or servitude. Although slavery has not been the subject of litigation in Kenya, the issue of servitude was addressed in *Republic v Kadhi of Kisumu ex parte Nasreen*.[66] In this case the Kadhi made orders in an action brought by the applicant's husband upon her leaving the matrimonial home, compelling her to return to her husband. In granting her an order of *certiorari* quashing the Kadhi's orders, Justice Harris held that the implementation of those orders would in the circumstances subject the applicant to her husband's dominion to an extent amounting to servitude.[67]

Section 73(2) guarantees that no one shall be required to perform forced labour. However, section 73(3) removes certain forms of labour from the definition of forced labour. While most of these exceptions are justifiable, it is not easy to define what is meant by 'labour that is

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62 (1991) LWR 25.

63 As above, 27. See *Kihoro v Attorney-General* Court of Appeal Civil Appeal No 151 of 1988 (unreported) where the Court of Appeal held that being held for 74 days without being charged in a court of law violated the right to personal liberty.

64 This provision was repealed by the Statute Laws (Repeals and Miscellaneous Amendments) Act 10 of 1997.

65 See eg *Odinga v Attorney-General* High Court Miscellaneous Civil Application No 104 of 1986 (unreported); *Republic v Commissioner of Prisons, ex parte Wachira and three others* Miscellaneous No 60 of 1984. See also K Murungi 'The administration of the Preservation of Public Security Act' (1986) 16 *Nairobi Law Monthly* 27.

66 (1973) EA 153.

67 As above, 161.

reasonably required as part of reasonable and normal communal or civic obligations'.

5.1.4 *Protection from inhuman treatment*

Claims based on the protection from torture and inhuman and degrading treatment, as provided for in section 74 of the Constitution, have been largely unsuccessful.[68] Subsection (2) of this section, however, allows for punishment that may be inhuman and degrading, subject to the condition that it was lawful in Kenya on 11 December 1963. That explains why corporal punishment, though widely viewed as degrading and inhuman, is still lawful in Kenya.

In *Mwau v Attorney-General*[69] it was contended that the exercise of the Attorney-General's powers to terminate criminal proceedings by entering *nolle prosequi* and a later re-opening of the same charges, amounted to inhuman treatment of the accused. In upholding the Attorney-General's decision to reinstate the charges, the court held that that decision did not amount to inhuman treatment as it did not have characteristics lacking in natural kindness. Neither was it brutal or unfeeling.

In *Marete v Attorney-General*[70] the applicant, a married civil servant who was the father of four children, was denied his salary for a period of two and a half years for allegedly being involved in activities disruptive of the public interest. He was, however, not formally dismissed from employment. The court had no difficulty in finding that subjecting a person to a period of two and a half years without pay, work and freedom to seek alternative employment amounted to mental torture and therefore inhuman and degrading punishment.

5.1.5 *Protection from deprivation of property*

This right is essential in a capitalist society. Section 75 of the Constitution protects property negatively by promising that private property cannot be taken away without paying full compensation.[71] Furthermore, such property can only be acquired in the interests of defence, public safety, public order, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit. The necessity of taking such a course of action must rationally justify the hardship caused to the persons affected.[72]

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68 Ojwang (n 9 above) 164; JB Ojwang & JA Otieno-Odek 'The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya' (1988) 35 *Netherlands International Law Review* 29 34.

69 High Court Criminal Application of 1983 (unreported).

70 High Court Miscellaneous Civil Application No 688 of 1986 (unreported).

71 Peter (n 57 above) 66.

72 Sec 75(1)(a)–(c). See also Ojwang & Otieno-Odek (n 68 above) 45.

In *Changanlal v Kericho Urban District Council*[73] it was held that although the law permitted a town planning scheme to be brought into operation, the scheme was subject to payment of compensation and no legislation could pass the constitutional test if it took away private property rights without compensation. Where consensus as to compensation is not reached, courts will be called upon to determine the appropriate amount to be paid to the dispossessed.[74]

The courts are, however, reluctant to aid individuals who, with a view to defeating the greater and justifiable public interest, refuse to negotiate compensation with the state. Therefore, in *Desterio v Attorney-General*[75] the High Court declined to shield a land speculator who had been duly notified by the government of his intention to acquire his land in the public interest but was not willing to negotiate compensation.

5.1.6 *Protection against arbitrary search or entry*

In recognition of the inviolability of the person and of human dignity, section 76(1) shields the individual from arbitrary searches of his person and property or the entry by other persons on his property without his consent. Section 76(2), however, weakens this protection by authorising acts pursuant to any law which restricts the right:

(a) in the public interest;
(b) to protect the rights and freedoms of others;
(c) to enable government officers to enter any premises to inspect it for purposes of levying taxes or rates due or to enable carrying out work connected with government property on the premises; or
(d) to enforce the judgment or order of a court in civil proceedings.

Under any of these circumstances, the onus is on the person claiming that his rights have been infringed to show that such action or law is not reasonably justifiable in a democratic society.[76]

This provision has not been the subject of constitutional litigation. Its implications for criminal law is disturbing. For instance, the legal position on illegally obtained evidence was laid down by the Privy Council in *Kaniu v Regina.*[77] This was a pre-constitutional case. The appellant had been convicted and sentenced to death by a Court of Emergency Assize of the then Supreme Court of Kenya for being in unlawful possession of two rounds of ammunition, contrary to Regulation 8A(1)(b) of the Emergency Regulations, 1952. The ammunition was found on him upon

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73 (1965) EA 370.

74 See eg *New Munyu Estates Limited v Attorney General* (1972) EA 88.

75 (1982) 8 *Commonwealth Law Bulletin* 1392.

76 Proviso to sec 76(2). It would be expected that in order to effectively safeguard individual liberties, the onus of proof would be the other way round.

77 (1955) 1 All ER 236.

a search by security officers of a rank below that permitted by the Regulations. In dismissing the appeal, Lord Goddard said:[78]

> The test to be applied in considering whether the evidence is admissible, is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.

While this decision did not qualify the rule that confessions must be voluntary, it portends grave danger to human dignity, especially where mere suspicion of a criminal offence exists.

5.1.7 *Protection of the law*

Section 77 spells out what in criminal law are commonly referred to as principles of legality. Section 77(1) provides that a person charged with a criminal offence must be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. In *Riungu v Republic*[79] the applicant was joined in a criminal prosecution containing 93 counts with four other persons. He was only affected by the last three counts. In finding the charge sheet to be so overloaded as to render it impossible to afford a fair hearing to the applicant, the court emphasised that an accused person must at all times be in a position to understand the case against him and that that was an integral part of a fair trial.

Section 77(2) sets out the safeguards for a fair hearing as envisaged by section 77(1).[80] It is couched in such terms as to ensure that every person charged with a criminal offence shall be:

(a) presumed innocent until proven guilty. This read together with section 72(5) is the very basis of granting bail pending trial. In Kenya, the four capital offences of murder, treason, robbery with violence and attempted robbery with violence are non-bailable.[81]
(b) informed expeditiously and in a language he understands, the nature of the offence with which he is charged;
(c) given adequate time and facilities to prepare his defence;
(d) allowed to defend himself in person or by a legal representative of his own choice;[82]
(e) afforded an opportunity to examine prosecution witnesses and facilities to procure attendance of his witnesses;

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78 As above, 239.

79 High Court Criminal Application No 472 of 1996 (unreported).

80 See *Pattni v Republic* High Court Criminal Application 481 of 1995 (unreported).

81 On the issue of non-bailable offences and the constitutional implications thereof, see K M'Inoti 'Bail in capital offences: A case for the restoration of the discretionary power of the High Court' (1991) 31 *Nairobi Law Monthly* 32.

82 See K M'Inoti 'Defending the unpopular: The right to counsel as a right of all accused persons' (1990) 20 *Nairobi Law Monthly* 30.

(f) permitted, without cost, to have the assistance of an interpreter if the trial is in a language he cannot understand. In *Andrea v Republic*[83] the High Court allowed an appeal on the ground that the lower court had failed to provide an interpreter at the trial of a Portuguese speaking foreigner.

In section 77(7) the right not to be compelled to give incriminating evidence is protected. In *Republic v El Mann*[84] the accused was required to answer certain queries on a statutory form by revenue officials. His answers disclosed offences in terms of the Exchange Control Act. Upon prosecution for those offences, he objected to the form being produced in evidence on the ground that it violated section 77(7). The court admitted the statutory form in evidence by restrictively interpreting the constitutional provision and by holding that a literal meaning had to be attached to it.[85]

Section 77(8) prescribes that no one may be convicted and sentenced for an offence not provided for by a written law and the penalty therefor prescribed. This means that common law crimes known to English law do not apply in Kenya. The only exception to this rule is contempt of court.[86]

5.1.8 *Freedom of conscience*

The Constitution envisages a society which respects the individual's conscience and protects his right to think and live as he wishes.[87] Section 78(1) guarantees that no one shall be hindered in the enjoyment of his freedom of conscience. This right comprises freedom of worship, belief and thought.[88]

In *Patel v Premji*[89] the Court of Appeal held that the constitutionally protected freedom of conscience precluded courts from interfering with matters of religion, except where it constituted a breach of the law. In effect the Kenya position on freedom of worship can be summarised as follows:[90]

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83 (1970) EA 46.

84 (1969) EA 357.

85 The soundness of this decision was unsuccessfully challenged in *Okang v Republic* High Court Criminal Case No 1189 of 1979 (unreported). Here the accused person's fingerprints were taken without his consent while in police custody. In upholding *El Mann* the court ruled that sec 77(7) must be construed strictly. In effect, and unfortunately so, the position in Kenyan law is that sec 77(7) only guarantees the right to remain silent at one's trial.

86 Proviso to sec 77(8).

87 P Muite & GK Kuria 'The Kenya Constitution and the church: Freedom of worship and related freedoms of association and speech' (1990) 20 *Nairobi Law Monthly* 25 27.

88 Ojwang & Odek (n 68 above) 36.

89 (1976) KLR 112.

90 Lord Denning 'Freedom under the law' (1949) quoted in Muite & Kuria (n 87 above) 27.

> . . . [W]e are free to worship or not to worship, to affirm the existence of God or deny it, to believe in Christian religion or in any other religion or in none, just as we choose.

On the right to belief and thought, the case of *M'Mpwii v Kariuki* is instructive.[91] In that case a Kenyan rugby club refused to honour a fixture against an English club for the reason that the club had sporting links with South Africa, despite an international call to boycott sports links with South Africa as a response to apartheid. The organisers of the match, Kenya Rugby Football Union, took disciplinary action and imposed fines and suspensions on the club. In challenging the decision in court, the club's officials asserted their right to freedom of conscience. The court upheld their argument and declared the Union's action *ultra vires*.

5.1.9 *Freedom of expression*

A society in which ideas cannot be continuously generated and disseminated risks economic, social and cultural stagnation.[92] One should be able to hold opinions and to voice them without interference. Section 79 of the Constitution recognises this right.

The law of sedition heavily limits this right.[93] In enforcing sedition laws, the courts have invariably cut back on the freedom of expression and have been a tool for suppressing political dissent. This judicial attitude can be traced to the colonial period and particularly the case of *Republic v Oguda*[94] which imported the reasoning of the Privy Council in *Wallace Johnson v Republic*.[95]

5.1.10 *Freedom of assembly and association*

Section 80 protects the individual's freedom to assemble and associate freely with other people. Subsection (1) particularly singles out freedom to form or belong to trade unions or other associations aimed at protecting one's interests. Public meetings are regulated by the Public Order Act, which sets out the procedure for convening such meetings.

In *Angaha v Registrar of Trade Unions*[96] a decision by the Registrar refusing registration of the appellant's trade union was upheld on the basis that while the Constitution protected their rights to belong to a trade union, it conferred no right to belong to a particular one.

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91 High Court Civil Case No 556 of 1981 (unreported).

92 Peter (n 57 above) 72.

93 Secs 56 & 57 Penal Code.

94 (1960) EA 749.

95 (1940) AC 231. In terms of this decision, in sedition cases evidence of a threat to public order is not required. As a consequence courts do not bother to define the point at which constructive criticism ends and sedition begins.

96 (1973) EA 297.

5.1.11 *Freedom of movement*

Section 81(1) guarantees this right to all citizens. Every citizen may move freely within the country, reside in any part of it and leave or enter the country. It further gives every citizen immunity from expulsion from Kenya.

Leaving the country has raised significant problems.[97] For instance, the right to acquire a passport so as to enjoy freedom of movement remains a vexing issue. In *Mwau v Attorney-General*[98] the High Court held that a passport was not a right. In affirming that decision, the Court of Appeal stated further that the issue and withdrawal of passports are 'the prerogative of the President . . .'.[99]

5.1.12 *Freedom from discrimination*

This is the final right listed in the Bill of Rights. Section 82 prohibits discrimination at both the horizontal and vertical levels. Until December 1997 the prohibited grounds were race, tribe, place of origin or residence, political opinion, colour or creed. By amendment 'sex' was added as another ground.[100] In *Wadhwa v City Council of Nairobi*[101] a notice served by the City Council on Asian foreigners to quit their market stalls was invalidated due to its discriminatory nature. Again, in *Fernandes v Kericho Liquor Licensing Court*[102] the High court held that non-citizenship is not a disqualification in the granting of a liquor licence.

In *Re Maangi*[103] legislation which justified the refusal of granting of letters of administration of estates to Africans was struck down as being unconstitutional. Justice Farrel held:[104]

> [S]ection 9 of the . . . Act is discriminatory within the meaning of section 26(3) [now sections 82(2) and (3)] of the Constitution, and I do not think I need say more than that . . . the section . . . is discriminatory.

5.2 The case of socio-economic rights

Despite being a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (African Charter or Charter), the Kenyan Bill of Rights does not recognise socio-economic rights. These rights do not even, at the very least, appear as directive principles of state policy.

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97 Ojwang & Odek (n 68 above) 43.

98 High Court Miscellaneous Civil Case No 299 of 1983 (unreported).

99 Ojwang & Odek (n 68 above) 44. The same reasoning was applied in *Kuria v Attorney-General* High Court Miscellaneous Civil Case No 551 of 1988.

100 n 51 above.

101 n 53 above.

102 (1968) EA 640.

103 (1968) EA 637

104 As above, 639.

Upon independence, the government set out an African socialism manifesto which aimed to achieve 'political equality, social justice, human dignity, freedom from want, disease and exploitation, equal opportunities and growing *per capita* incomes, equally distributed'.[105] The policy priorities at that time were aimed at facilitating a firm basis for economic growth.[106] Over time it became evident that the government's African socialism agenda was nothing more than a convenient doctrine in explaining and justifying its involvement in the process of economic growth through involvement in active enterprise.[107]

The one sector grossly affected by the non-recognition of socio-economic rights is the agricultural industry which is the core of Kenya's economy. Operating in a system that has been described as a 'legal framework for agrarian oppression',[108] small-scale farmers are restricted in their personal economic decisions. Under the Coffee Act, for instance, the Coffee Board of Kenya is established to control the cultivation, processing and sale of coffee. In terms of section 21 of that statute, it is a criminal offence punishable with up to ten years' imprisonment for a farmer to roast coffee for sale or to export or sell it to any person other than the Board.[109]

Additionally, rural farming communities live under the immense administrative powers of chiefs. Acting under powers conferred by the Chiefs Authority Act, chiefs politically, socially and at times economically, control the villages. They may make discretionary orders controlling consumption of native liquor, planting of food crops, excessive dancing, grazing and use of water.[110]

The Kenyan view of human rights as expressed by the Bill of Rights is purely civil and political. The material welfare of the individual, which is crucial to human life and dignity, is left out.[111] However, in denying the legal protection of socio-economic rights and leaving them to the political will of the state, civil and political rights are rendered illusory.[112] This is because human rights are indivisible and interdependent.

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105 *African socialism and its application to planning in Kenya* Sessional Paper No 10 of 1965 (1965) 11–13.

106 A McChesney 'The promotion of economic and political rights: Two African approaches' (1979–80) 23–24 *Journal of African Law* 163 170.

107 As above 171. See also E Muriithi & C Mburu 'Economic and human rights issues' (1992) 43 *Nairobi Law Monthly* 18.

108 International Commission of Jurists (ICJ) *Democratisation and the rule of law in Kenya* (1997) 29.

109 For other laws subjugating farmers, see ICJ (n 108 above) Appendix A. These laws invariably have a colonial origin.

110 ICJ (n 108 above) 31.

111 SC Wanjala 'Law and the protection of dignity of the individual in the under-developed state: The Kenyan example' (1993) *University of Nairobi Law Journal* 1 2.

112 As above.

Gross captures this reality:[113]

> The reality of each of these rights will be secured only by the recognition, as otherwise, if social, cultural and economic rights are not effective, political rights will be reduced to a mere statement of form . . . without the reality of political and civil rights, and . . . freedom as understood in the broadest sense, economic and social rights have no real sense or significance.

5.3 Limitation

A dominant theme of the Bill of Rights is that rights are not absolute. It has a two-tiered mechanism of limiting the liberties it proclaims. On the one hand is a general limitation clause and on the other internal claw-back clauses in the provisions of the Bill.

Section 70 is the general limitation clause. It declares the enjoyment of individual rights and freedoms to be subject to respect for the rights of others and the public interest. In *Pattni v Republic*[114] it was held that the Constitution places the public interest above the interest of the individual.[115]

Internal limitations further restrict protected rights. The right to life, for example, is subject to the death penalty. Furthermore, the right is not contravened when one is killed in self-defence, to effect arrest, in the suppression of a riot or as a result of a lawful act of war.[116] Apart from the protection from slavery, servitude and torture, all other rights are accompanied by a claw-back clause. In effect, under normal circumstances, breach of an obligation to respect the rights protected is permissible for a specified number of reasons.

Although the point has never been authoritatively settled by the courts, it emerges from the case law that the onus is on the applicant to show that his rights have been infringed and for the respondent to show that such infringement is justified as being within the scope of the limitation clause or the various claw-back clauses.

5.4 Derogation

The Constitution permits the derogation or suspension of fundamental rights during an emergency.[117] Section 83(1) provides that 'when Kenya

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113 EH Gross 'The evolving concept of human rights: Western, socialist and third world approaches' in BG Ramcharan (ed) *Thirty years after the Universal Declaration* (1979) 44.

114 n 80 above.

115 This reasoning flows through the case law. See for example *Riungu v Republic* High Court Criminal Application No 232 of 1994 (unreported) and *Mazrui v Republic* High Court Criminal Application No 91 of 1985 (unreported).

116 See Peter (n 57 above) 65.

117 For an exposition on emergency powers, see generally K M'Inoti 'Emergency powers in Kenya: A study of extraordinary executive powers *vis-à-vis* the International Covenant on Civil And Political Rights 1966' unpublished LLM dissertation, University of Nairobi, 1989.

is at war', nothing contained in an Act of parliament or done under its authority shall be deemed to contravene the rights to liberty, freedom from arbitrary search or entry, freedom of expression, freedom of assembly and association, freedom of movement or freedom from discrimination.

Section 83(1) further provides that nothing done under the authority of part III of the Preservation of Public Security Act shall infringe those rights when its operation has been effected by an order made under section 85 of the Constitution. The provision empowers the President for purposes of preservation of public security to bring part III of the Act into operation by an order published in the Kenya Gazette. No criteria are given for determining what constitutes a threat to public security. That is left to the subjective decision of the President. What seems to be clear is that emergency powers may not be exercised during peacetime.

The most glaring abuse of emergency powers is the 25 year emergency in the North Eastern Province.[118] The North Eastern Province and Contiguous Districts Regulations, 1996, were promulgated under the Preservation of Public Security Act to enable the government to suppress the *shifta* secessionist movement. This Kenyan Somali movement sought to secede and join Somalia. The Regulations remained intact up to 1991 when they were repealed despite the fact that the secessionist movement had fizzled out in the early 1970s. During that period, fundamental rights were virtually suspended in the area and security forces grossly abused the emergency powers. For instance, in 1984 at Wajir security forces acting under the emergency regulations then in force, killed 2 000 civilians despite there being no threat to public peace and order.

It has been suggested that the criteria set out by the European Commission on Human Rights in *Lawless v Ireland*[119] for determining when a public emergency exists should apply.[120] That certain rights are non-derogable, even in times of emergency, is implicit in section 83(1), as it expressly sets out the rights affected in such situations.

5.5 Enforcement mechanisms

5.5.1 *Jurisdiction of courts*

There are two principal ways in which the Bill of Rights may be enforced. The first is through ordinary litigation, which will be subject to the rules set out in the Civil Procedure Act. The second is through the enforcement mechanism contained in section 84 of the Constitution.

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118 K M'Inoti 'Beyond the 'emergency' in the North Eastern Province: An analysis of the use and abuse of emergency powers' (1992) 41 *Nairobi Law Monthly* 37.

119 (1958–59) 2 *Yearbook of the European Convention on Human Rights* 308.

120 AO Mumma 'Preservation of public security through executive restraint of personal liberty: A case of the Kenyan position' (1988) 21 *Verfassung und recht in Ubersee* 445 450.

Under the first mode it would appear that even the subordinate courts established under the Magistrates Courts Act would have jurisdiction to indirectly give effect to the Bill of Rights when dealing with common law matters such as property disputes or trespass actions. This would then be subject to the normal appeal processes.

The procedure for enforcing the Bill is provided by section 84(2) of the Constitution. This section vests the High Court with original jurisdiction to hear applications alleging breach of the rights guaranteed and questions of their violation arising from proceedings in a subordinate court as may be referred to it by such court. Section 84(7) provides an avenue for appeal to the Court of Appeal for any person aggrieved by the decision of the High Court.

Section 84(6) provides that the chief justice may make rules of procedure under the section. The lack of rules in the 1980s created a crisis when the High Court held that it had no jurisdiction to hear human rights issues on that basis only.[121] These decisions were made notwithstanding earlier decisions recognising jurisdiction where no rules had been made, and which further held that in such instances the court could be moved by any procedure known to law.[122] After almost two decades of post-independence constitutional litigation, the decisions denying the High Court's jurisdiction were not only difficult to rationalise but also indefensible.[123] However, in 1990, at a time when there was intense local and international pressure for the restoration of multi-party democracy, the courts reaffirmed their jurisdiction to enforce the Bill.[124] This remains the position today. This position was also fortified on 17 September 2001 when the chief justice, pursuant to section 84(6) of the Constitution, made rules of procedure for enforcing the Bill of Rights, namely the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001.

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121 *Kuria v Attorney-General* (n 97 above); *Mbacha v Attorney-General* High Court Miscellaneous Civil Application 356 of 1989.

122 *Benoist Plantation v Felix* (1956) 21 EACA 104.

123 See GK Kuria & AM Vasquez 'Judges and human rights: The Kenyan experience' (1991) 35 *Journal of African Law* 142; AM Vasquez 'Is the Kenyan Bill of Rights enforceable after 4 July 1989?' (1990) 20 *Nairobi Law Monthly* 20; W Maina 'Justice Dugdale and the Bill of Rights' (1991) 34 *Nairobi Law Monthly* 27; K M'Inoti 'The reluctant guard: The High Court and the decline of constitutional remedies in Kenya' (1991) 34 *Nairobi Law Monthly* 17; FJ Viljoen 'The realisation of human rights in Africa through intergovernmental organisations' unpublished LLD thesis, University of Pretoria, 1997 293.

124 See eg *Imunde v Attorney-General* High Court Miscellaneous Civil Application No 180 of 1990 (unreported); *Matiba v Attorney-General* High Court Civil Application No 666 0f 1990 (unreported).

5.5.2 *Locus standi*

Section 84(1) recognises only two sets of individuals who may competently apply for redress under the Bill of Rights. These are a person alleging a contravention of his rights, and a person acting on behalf of a detained person in so far as he alleges a contravention of the detained person's rights.

This is restrictive as it leaves out the possibility of *actio popularis* and the position of persons without capacity to act for themselves is not clear. Suffice it to say that the point of *locus standi* has not been canvassed in the courts and most cases that have been dismissed at the threshold stage have been dismissed on jurisdictional grounds.

5.5.3 *Applicable law*

The Bill of Rights does not provide tools of interpretation to give effect to its provisions. This has had an impact on the effective enjoyment of fundamental rights and freedoms in Kenya. The courts have not hesitated to look at decisions of courts in other jurisdictions. The problem, however, has been that unswerving loyalty has been accorded to the principles of English constitutional law and judicial decisions. The problem that arises is that the English constitutional order is fundamentally different from Kenya's in that it is based on an unwritten constitution and that the doctrine of parliamentary supremacy prevails in England.[125] Its jurisprudence is therefore not of a comparable nature.

In *El Mann*[126] the court relied on English authorities and held that the Constitution must be interpreted like any other statute when the words are clear. That decision was followed in *Kariuki v Attorney-General,*[127] and in *Imanyara v Attorney-General*[128] the court applied the principles of ordinary interpretation of statutes in determining whether section 2A of the Constitution, which made Kenya a one-party state, was inconsistent with section 80 which guarantees freedom of association and assembly.

In most cases brought against the state, courts have been hostile to comparative jurisprudence of courts in jurisdictions with written constitutions. As a result constitutional remedies have declined immensely. In as far as most of the Bill of Rights provisions are concerned,

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125 The basis of Kenya's constitutional law is constitutional supremacy. Sec 3 of the Constitution reads: 'This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to sec 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

126 n 86 above.

127 High Court Miscellaneous Civil Application No 891 of 1993 (unreported).

128 High Court Miscellaneous Civil Application No 7 of 1991 (unreported).

the words of Justice Holmes have come alive. In *The Western Maid*[129] the judge warned:[130]

> Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to grasp.

5.5.4 *Remedies*

Section 84(1) provides that a person with *locus standi* who alleges a violation of any of the rights protected in the Bill of Rights may apply to the High Court for redress. No restrictions are imposed by section 84 on the type of remedies that a court may grant. The courts will therefore, in appropriate cases, award damages, *certiorari,* injunction, prohibition, declarations or other such remedy as they deem fit in the circumstances of a particular case.

6 Conclusion

The function fulfilled by a bill of rights in a constitutional order of checking arbitrary government and facilitating democratic processes cannot be gainsaid. But for any bill of rights to effectively limit governmental powers, it must in its very nature embody a social contract between the rulers and the governed. This is because legitimacy lies at the very heart of the proper functioning of any constitutional order. Unless a bill of rights is effectively located in such a place in any constitutional order, there exists the risk of considerably expanding the powers of the state and drastically reducing the scope of individual liberties.[131]

A bill of rights must then emanate from the people ceding powers of governance to the rulers. There must be some autochthonous input in such a bill, for it is the vision attending its formulation that must guide its interpretation. It is in light of the lack of this that the failure or dysfunctional state of most African bills of rights can be explained. Most of the bills in former British colonies such as Kenya were imposed on those states by the departing colonial authorities at independence.

An effective bill of rights must be a negotiated instrument among various interest groups in a body politic. Sachs observes:[132]

> An effective bill of rights in any country must relate to the culture, traditions and institutions of that country, at the historic moment when the bill of rights is considered necessary an effective bill comes from inside the historical

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129 257 US 419 (1922).

130 As above, 433.

131 J Jeffries 'The Bill of Rights' (1988) *New Zealand Law Journal* 97.

132 A Sachs 'Towards a bill of rights for a democratic South Africa' (1991) 35 *Journal of African Law* 21 30.

> process, not outside and reflects a set of values gained in the course of the struggle and rooted in the consciousness of the people, not one imported from other contexts.

One can easily trace the poor state of interpretation of the Kenyan Bill of Rights to the failure to define the nation's values at independence. Additionally, with the demise of one-party rule in 1991, constitutional mechanisms should have been put in place to facilitate the entrenchment of plural democracy. At that point in time a new legal order came into being and that order necessitated an autochthonous constitution.[133]

Autochthony ensures that the constitution principally legitimises the exercise of governmental power by the rulers and through a bill of rights regulates the use of that power against the individual. The experience of Western democracies, and after the end of the Cold War, the emerging democracies in the East, indicates that at the very least, an African bill of rights can and should espouse home-grown African values. Such an approach to constitutionalism would not be out of place.[134]

Certain deep-rooted realities in African social settings would greatly impact on constitutions. These would include group rights such as those of cultural, religious and linguistic minorities, socio-economic development and equitable access to natural resources, among other things. These realities need to be identified and addressed. A bill of rights that places too much emphasis on the individual is one that is not in touch with reality, since African nature is collectivist to the extent that in addition to individual rights, there is a need to recognise and guarantee larger societal rights.

Only when the Kenyan Bill of Rights takes into consideration these realities will its subjects be assured that in future government will not be irresponsible and unresponsive to their general welfare.

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133 This point is made with reference to Tanzania in HG Mwakyembe *Tanzania's eighth constitutional amendment and its implications on constitutionalism, democracy and the union question* (1995) 168.

134 Ojwang (n 6 above) 64.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African *Nevirapine* case

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1 Introduction

By the end of 2001, an estimated 28 million Africans were living with HIV/AIDS of which 2,4 million were children under the age of 15.[1] Parent-to-child-transmission of HIV (PTCT)[2] is responsible for over 90% of child infections.[3] HIV can be transmitted to an infant from an infected mother during pregnancy, labour, delivery or breastfeeding.

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1 AIDS epidemic update — December 2001 at <http://www.unaids.org/worldaidsday/2001/Epiupdate2001/Epiupdate2001_en.doc> (accessed 28 January 2002).

2 The use of the phrase 'mother-to-child-transmission' could convey a sense of blame to the mother as the one solely responsible for transmission of the virus to the child. This is despite the fact that the mother herself could have contracted the virus from the father of the child. The author prefers to use the phrase 'parent-to-child-transmission' (PTCT) which does not apportion blame unfairly to any of the parents. However, it should be noted that the phrase 'mother-to-child-transmission' is much more widely used. Of particular significance is the fact that even the judgment in the case under discussion in this contribution makes use of the phrase 'mother-to-child-transmission' (MTCT).

3 UNAIDS Global crisis-global action United Nations Special Session on HIV/AIDS Fact Sheets 25–27 June 2001 New York 25.

Reducing PTCT is a vital and indispensable component of the effective prevention and treatment of the disease.[4] A PTCT prevention programme would in the first instance entail protecting women against infection. The second line of defence would be to avoid unwanted pregnancies among HIV-infected women and women at risk of infection. The focus of this contribution is the third line of defence, the prevention of PTCT during pregnancy, labour, delivery and during breastfeeding.

Ordinarily the third strategy targets antenatal clinics and comprises voluntary counselling and HIV/AIDS testing of expectant mothers, the provision of anti-retroviral drugs, safe delivery practices and infant-feeding counselling.[5] Short-term anti-retroviral prophylactic treatment has been shown to be an effective and feasible method of preventing PTCT.[6] In instances where it has been combined with infant feeding counselling and support and the use of safer infant feeding methods, anti-retroviral therapy has been shown to reduce the risk of infant infection by half.[7]

The main anti-retrovirals used in PTCT prevention programmes are Zidovudine and Nevirapine.[8] Zidovudine is administered daily to the mother from the thirty-sixth week of pregnancy until and during delivery. Nevirapine on the other hand is administered in one dose to the mother at delivery and in one dose to the child within 72 hours of birth. Nevirapine is very cheap compared to other HIV/AIDS drugs.[9] The indicative cost of Nevirapine from the patent holder is about four US dollars per treatment of each mother/child pair.[10] Significantly, in July 2000 Boehringer Ingelheim, which is the patent holder of Nevirapine,

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4 According to Koffi Annan, the United Nations Secretary-General, the proper strategy for beating AIDS include first and foremost prevention of new infection above all by teaching young people how to avoid it and by providing medicines that can prevent transmission from mother to child. See Koffi Annan 'We can beat AIDS' *New York Times* (25-06-2001).

5 WHO 'Prevention of Mother-to-Child Transmission of HIV: Selection and use of Nevirapine' Technical Notes Geneva (2001) WHO/HIV_AIDS/2001.03WHO/RHR/01.21 <http://www.who. int/HIV_AIDS/MTCT> (accessed 20 February 2002).

6 As above.

7 UNICEF 'Prevention of mother-to-child transmission of HIV' <http://www.unicef.org/aids/mother.htm> (accessed 7 February 2002).

8 UNAIDS 'Sources and prices of selected drugs and diagnostics for people living with HIV/AIDS' (May 2001) 10; <http://www.unaids.org/acc_access/access_drugs/Sources0501.doc> (accessed 20 February 2002).

9 The availability of short course treatment to prevent PTCT is an affordable option for perhaps the majority of developing countries. Yet short course treatment is often not provided because of a lack of political commitment. See UN Division for Advancement of Women 'The HIV/AIDS pandemic and its gender implications' Report of the Expert Group Meeting Windhoek, Namibia 13–17 November 2000 EGM/HIV-AIDS/2000/Rep1 14.

10 UNAIDS (n 8 above) 11.

offered to supply the drug free of charge to developing countries for a five year period.[11]

Nevirapine was registered by the government of South Africa in April 2001 subject to the condition that the manufacturer continue to provide data on the performance of the drug.[12] Due to concerns over the safety of the drug, the government of South Africa decided to make Nevirapine available for the prevention of PTCT at only a limited number of pilot sites (also known as research sites or training centres), two for each of the nine provinces of South Africa.[13] When operating, these pilot sites serve about 10% of the population. The applicants filed an application in August 2001 requesting the Court to find that by failing to make Nevirapine available to all public health facilities the government had breached its constitutional obligations regarding, among other things, the protection of the right to healthcare. The applicants also asked the Court to order the government to plan and implement an effective and comprehensive national PTCT prevention programme.

Consequently, the case under discussion relates in particular to the use of Nevirapine in PTCT prevention programmes, and the realisation of the right to health care in general. The right to health care will be used as an entry point to a discussion of economic, social and cultural rights on a broader level. Predictably, the context in which this case should be viewed entails an examination of the legal basis for the protection of the wider corpus of socio-economic rights in Africa.

2 Protection of socio-economic rights in Africa: The right to health in African international law

An examination of the protection of socio-economic rights may be done at a continental or national level. At the continental level, the regional human rights instrument, the African Charter on Human and Peoples' Rights (African Charter)[14] recognises not only civil and political rights but also socio-economic rights and group rights such as the right to development. The African Charter provides for the following socio-

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11 B Gellman 'A turning point that left millions behind' *Washington Post* (28 December 2000). Also 'Boehringer Ingelheim offers VIRAMUNE (Nevirapine) free of charge to developing economies for the prevention of HIV-1 Mother-to-child Transmission' (7 July 2000) <http://www.boehringer-ingelheim. com/corporate/asp/archive/adetail.asp?ID=101> (accessed 20 February 2000).

12 Pat Sidley 'Nevirapine is registered by control council' *Business Day* (19 April 2001).

13 Department of Health ' Achievements 2000' *HIV/AIDS newsletter* (24 April 2001); <http://196.36.153.56/doh/aids/newsletter/2001/0424.pdf> (accessed 19 February 2002).

14 Adopted on 27 June 1981 and entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 Rev 5 reprinted in (1982) 21 *International Legal Materials* 58.

economic rights: the right to work under equitable and satisfactory conditions as well as to receive equal pay for equal work;[15] the right to enjoy the best attainable state of health;[16] the right to education[17] and right of children, women, the disabled and the aged to special measures of protection in keeping with their physical and moral needs[18]. The right to health is the focus of this contribution.

Article 16(1) of the African Charter states 'every individual shall have the right to enjoy the best attainable state of physical and mental health'. Article 16(2) states that 'state parties to the present Charter shall take measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. An even more comprehensive provision within the African system is article 14 of the African Charter on the Rights and Welfare of the Child[19] which deals with health and health services. The provisions of this article that are particularly relevant to this contribution are as follows:

> (2) State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
> a) to reduce infant and child mortality rate;
> . . .
> e) to ensure appropriate health care for expectant and nursing mothers.
> . . .

It should be noted that South Africa is a state party to both the African Charter and the African Charter on the Rights and Welfare of the Child.

The African Commission — a body charged with monitoring the implementation of the African Charter — has developed a jurisprudence around socio-economic rights in the African Charter. Odinkalu argues that more often than not violations of socio-economic rights in the African Charter have been presented as complaints to the African Commission not in their own right but in association with allegations of violations of civil and political rights.[20] Be that as it may, there are a few communications whose focus is primarily the violations of socio-economic rights. One of these is the communication against Zaire.[21]

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15 Art 15.

16 Art 16.

17 Art 17.

18 Art 18(4).

19 Adopted on 11 July 1990 by the Assembly of Heads of State and Government in Addis Ababa, Ethiopia. OAU Doc CAB/LEG/24.9/49, entered into force on 29 November 1999.

20 CA Odinkalu 'Analysis or paralysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 362. In his view the majority of the pronouncements by the African Commission on socio-economic rights have emanated in the consideration of nationality and deportation cases. For an examination of socio-economic aspects of these deportation and nationality cases see Odinkalu (2001) 362–365.

21 Renamed Democratic Republic of Congo in 1997.

In this communication, several NGOs alleged, among other things, that the Zairean government had breached its obligation under article 16 by failing to provide social services and that there was a shortage of medicine.[22] In its decision, the Commission stated that 'the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine constitute a violation of article 16'.[23]

At the national level there are various methods of protecting socio-economic rights. Some countries such as South Africa and Namibia have socio-economic rights enshrined as justiciable rights in their constitutions.[24] The constitutions of states such as Zimbabwe, Nigeria, Malawi and Tanzania mention certain socio-economic rights such as the right to education not as justiciable rights but as directive principles of state policy.[25]

Although the African continental system is unique in that it is the first to incorporate civil and political rights and socio-economic rights into a single binding document, this pioneering role has not translated into more effective implementation of socio-economic rights at the national level.[26] The potential of these rights has not been exploited sufficiently to improve the standard of living of Africans, particularly in the context of the HIV/AIDS pandemic, a source of grave concern on the continent. It is against this background that the recent decision of the South African High Court on the problem of PTCT should be welcomed. The following part of this contribution sets the stage of our analysis of the case by exploring the constitutional foundation of the protection of the right to health care in South Africa.

3 The legal background to the *Nevirapine* case: The protection of the right to health care under South African Constitution

The right to health care is provided for under section 27 of the South African Constitution.[27] The relevant provisions of article 27 are as follows:

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22 Communications 25/89, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire*, Ninth Annual Activity Report para 4.

23 As above, para 47.

24 See for example secs 26–29 of the South African Constitution Act 108 of 1996.

25 See for example sec 11 of the Constitution of the United Republic of Tanzania of 1977 (as amended).

26 For a review of the implementation of socio-economic rights guaranteed in the African Charter, see Odinkalu (n 20 above).

27 Act 108 of 1996.

(1) Everyone has the right to have access to —
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security . . .
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

The evolving practice in international law regarding socio-economic rights points to a growing consensus over three levels of obligations that these rights impose on states: the obligation to respect, to protect and to fulfil.[28] This consensus finds its domestic expression in article 7(2) of the South African Constitution which provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

From the above explanation it is clear that the duty of the state extends beyond merely refraining from violating socio-economic rights to include the additional requirement of positive action.[29] For socio-economic rights, positive action necessitates at least two forms of state action.[30] First, the creation of an enabling legal framework for individuals to pursue these socio-economic rights on their own. Second, the implementation of measures and programmes designed to assist individuals to realise these rights.

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28 A Eide 'Making human rights universal' in H Stokke & A Tostensen (eds) *Human rights in development yearbook 1999/2000:The millennium edition* (2001) 25. According to Eide at the primary level states must *respect* the resources owned by individual, her or his freedom to find a job of preference, and the freedom to take the necessary actions and to use the necessary resources to satisfy his or here own needs. At a secondary level, state obligation to protect entails the protection by state of the freedom of action and the use of resources against other, more assertive or aggressive subjects — more powerful economic interests, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. At the tertiary level the state has the obligation to fulfil socio-economic rights by way of facilitation or direct provision. The obligation to facilititate may take many forms. For example as regards the right to food, it entails the state taking measures to improve the production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian reform. The obligation to fulfil by way of direct provision may entail making available what is required to satisfy basic needs such as food or resources that can be used for food in situations where no other possibility exists. For example the government has the obligation to satisfy basic needs such as health care, housing and food during sudden situations of disaster. See generally Eide 25–26.

29 For more information on government obligations regarding socio-economic rights see P De Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67.

30 T Madala 'Opening remarks on socio-economic rights in South Africa-The right to food and nutrition' unpublished paper presented at the National Seminar on the Right to Food in South Africa (23–25 January 2002) 5.

The state is expected to fulfil its obligation to take positive action progressively, depending on the availability of resources. The jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights indicates that the term 'progressive realisation' is meant to reflect the reality that many countries face difficulties in ensuring the full realisation of socio-economic rights. What this phrase does is to impose an obligation on states to move as expeditiously and effectively as possible towards full realisation.[31] Regarding the phrase 'available resources' the Committee has stated that resource scarcity does not relieve states of fulfilling a minimum core obligation.[32] With this background, the discussion of the case follows.

4 The *Nevirapine* case

The *Nevirapine* case[33] focuses on the problem of PTCT. In South Africa, 24% of all pregnant women are HIV-positive and between 70 000 and 100 000 babies are born HIV-positive each year.[34] The government's response to PTCT was to set up limited pilot sites, at least two in each of the nine provinces, where a PTCT prevention programme was available.[35] Together, the pilot sites serve about 10% of the population.

The Treatment Action Campaign (TAC)[36] together with two other applicants brought an action in the Pretoria High Court attempting to compel the government[37] to provide free Nevirapine to all pregnant women with HIV/AIDS in order to prevent parent-to-child transmission of the disease. They alleged that the government had failed to fulfil

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31 UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) para 9.

32 As above, para 10.

33 *Treatment Action Campaign and others v Minister of Health and others* In the High Court of South Africa, Transvaal Provincial Division, Pretoria; Case No 21182/2001.

34 Economist 'One battle won, still losing the war' 14 December 2001. We would not wish to be drawn into the debate whether HIV causes AIDS. The paper adopts the mainstream view that HIV causes AIDS.

35 The government limited the use of Nevirapine in public sector in only those identified pilot sites. However, in the private sector the doctors could and actually did prescribe Nevirapine if indicated. It could be argued that the upshot of this policy was to discriminate people who rely on public sector. See Editorial 'Taking HIV to court' (2001) 358 *The Lancet* 681.

36 TAC is an NGO launched on 10 December 1998 to campaign for greater access to treatment for all South Africans, by raising public awareness and understanding about issues surrounding the availability, affordability and use of HIV treatments. For more information about TAC, visit their website at <http://www.tac.org.za> (accessed 7 February 2002).

37 The Minister of Health and nine other respondents, all of which are Members of the Executive Councils for Health in the provinces.

its constitutional obligations under sections 9, 10, 11, 12(2), 27(2) and 28.[38]

The Court chose to focus its attention on the state's obligation under section 27(2), read together with section 27(1)(a). The issue before the Court was whether the government had fulfilled its obligations under section 27(2) of the Constitution 'to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to health care services including the right to reproductive health care'. In this respect, just one aspect of governmental healthcare services was in question, namely the programme for the prevention of PTCT. The Court had to use the test of reasonableness developed in the *Grootboom* case[39] to decide whether the steps taken by the government with regard to the prevention of PTCT by establishing 18 pilot sites and confining the dispensing of Nevirapine to those sites, may be considered in compliance with the obligation of the state in terms of section 27(2).

There were also two secondary issues: first, whether the measures taken were reasonable, and second, whether in making a ruling on the reasonableness of these measures, the Court was prescribing policy to the government.

The applicants submitted evidence to establish that measures taken by the government were not reasonable. For its part, the government argued that the measures it had taken were reasonable and warned that the relief the applicants requested constituted a court making policy decisions and entailed a breach of the theory of separation of powers.

The Court found that the government's policy of prohibiting the use outside the pilot sites of Nevirapine in the public health sector, is not reasonable and that it is an unjustifiable barrier to the progressive realisation of the right to health care. The Court also found that there is no comprehensive and co-ordinated plan for a roll-out of PTCT prevention programme. In making a finding that the measures taken by government were not reasonable, Justice Botha stated:[40]

> Where section 27(2) obliges the state to take reasonable measures to achieve the progressive realisation of the right to health care, I do not think, if one has regard to the fundamental rights at stake, that the steps taken by the state to give the whole affected population access to a MTCT prevention programme can be regarded as reasonable.

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38 The content of these provisions is as follows: sec 9 (the right to equality), sec 10 (the right to dignity), sec 11 (the right to life), sec 12(2) (the right to bodily and psychological integrity), sec 27(2) (see above) and sec 28 (the right of the child to basic health services).

39 *Government of the Republic of South Africa and others v Grootboom and others* [2000] 11 BCLR 1169 (CC).

40 Judgment in *Nevirapine* case, 64.

On whether in granting relief to the applicant the Court would be breaching the separation of powers principle, the Court was of the view that it 'does not assume the task of the executive when it pronounces on the reasonableness of steps taken by the executive in the fulfilment of a constitutional obligation of the state'. In fact the opposite is true.[41]

> Where the court, being a part of the judicial arm of government, sits in judgment on the reasonableness of steps taken by the executive arm in the fulfilment of its constitutional obligations, it is exactly a perfect example of how the separation of powers should work.

In the end, the court ruled that the state's failure to distribute anti-retroviral drugs, specifically Nevirapine, to HIV-positive expectant women to prevent them from infecting their unborn babies, violated their constitutional right of access to health care.

The Court ordered state health authorities to make Nevirapine available to pregnant women and newborn babies in public health facilities to which the government's existing PTCT prevention programme has not yet been extended. This should be done in cases where, in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated. This should at least include that the woman concerned has been appropriately tested and counselled. The court also ordered health authorities to plan an effective and comprehensive national programme to prevent or reduce PTCT. This plan should include the provision of voluntary counselling and testing and, where appropriate, Nevirapine or other appropriate medicine and formula milk for feeding. The programme must also provide for its progressive implementation throughout South Africa and should be implemented in a reasonable manner. Health authorities were ordered to report to the Court before 31 March 2002 on the measures they have taken to put in place and implement this national programme.

The government has decided to appeal to the Constitutional Court against the decision of the High Court.[42]

5 Comment on the case

Of the two main issues that the case dwells on, one that has possibly the most ramifications for protecting socio-economic rights on the continent

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41 Judgment in *Nevirapine* case, 52.

42 Some of the reasons behind the decision of the South African government to appeal against the judgment in *Nevirapine case* are outlined in a press release issued after the judgment. See Ministry of Health 'Response of Dr Manto Tshabalala-Msimang, Minister of Health, and MECs to judgment on Nevirapine' (19 December 2001). In this press release the government expressed the intention not to let its decision to appeal against the judgment stand in the way of developing a dynamic and well-articulated PTCT Prevention Programme.

is whether courts should decide on government policy. The concern here is that issues of policy are considered to belong to the government as elected representatives of the people. Hence the court breaches the principle of separation of power when it adjudicates on matters with policy implications.[43]

It is significant that the South African Constitutional Court has already given guidance on this issue when deciding an application challenging the inclusion on socio-economic rights in the Constitution. The Court stated:[44]

> It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state beneficiaries of such benefits. In our view, *it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon them by a bill of rights that it can result in a breach of the separation of powers* (my emphasis).

The Constitutional Court gave its first decision on socio-economic rights contained in the Final Constitution of South Africa in the *Soobramoney* case.[45] In this case, the Constitutional Court had the following to say regarding the Court's responsibility concerning matters of government policy:[46]

> The provincial administration, which is responsible for health services in KwaZulu-Natal, has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult questions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

In the *Grootboom* case[47] the Constitutional Court indicated unambiguously that it would not prescribe to the state any particular policy option to give effect to socio-economic rights.[48] The Court recognised that there are 'a wide range of possible measures' that could be adopted by the state to meet its obligations, many of which would meet the constitutional requirement of reasonableness. However, in assessing

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43 On the government position in this issue as it applies to *Nevirapine* case, see M Tshabalala-Msimang 'Government, not courts must decide on HIV/Aids and other social policy' *Sunday Times* (30-12-2001).

44 *Certification Judgment of the South African Constitutional Court* [1996] 10 BCLR 1253 (CC) para 77.

45 *Soobramoney* v *Minister of Health, KwaZulu-Natal* [1997] 12 BCLR 1696 (CC).

46 As above, para 29.

47 See n 39 above.

48 See generally *Grootboom case* (n 39 above) para 41.

the measures put into place by government, the key question before the Court would be whether these measures are reasonable and not whether more desirable measures could have been adopted or whether public money could have been better spent.

In my view, the Court in the *Nevirapine* case did not show an inclination to depart from *Grootboom* and prescribe policy. Rather, it seems to me that the Court considered itself as having a constitutional duty to evaluate the rationality of the measures put in place by the government to realise the socio-economic rights contained in the Constitution.[49]

> I shall accept that the respondents had to make policy decisions, and that there need not be one objectively determinable road to the progressive realisation of the right to health care, but in the end the Court has to determine whether the steps taken by the respondents were, in the circumstances, reasonable. That is the constitutional imperative.

The Court argued that it has a constitutional duty to assess the reasonableness of measures taken by government to realise policy. The Court quoted *Mohamed and others v President of South African and others*[50] in which the South African Constitutional Court ruled that it would negate the supremacy of the Constitution if a court could not pronounce on the validity of executive action. The Court was of the view that the same would apply if the Court could not pronounce on the reasonableness of steps taken by the state in the fulfillment of its constitutional obligations. According to the Court:

> The argument that to make an order as prayed would be tantamount to a policy decision does not take account of the fact that the court is required to pass a value judgment as to whether steps taken in order to effect a gradual realisation of a constitutional right were reasonable.

The key issue here is that which has been referred to as the 'counter-majoritarian dilemma'. Can a judge, who is unelected, on the basis of human rights, rule against the democratically elected leaders who represent the majority? Heyns answers this question in the affirmative.[51] He advances two arguments in support of his view.

The first argument starts from the premise that human rights are unalienable. From this premise, Heyns argues that the concept of human rights should entail not only that there is a right of resistance against authoritarian rulers, but also that there could be a right of resistance against democratically elected rulers should they violate human rights. On the basis of the above, judges can rule against the majority if those elected by the majority violate human rights. In the case at hand, it appeared to the Court that the democratically elected government was violating human rights and therefore the Court felt entitled to make a

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49 Judgment in *Nevirapine case*, 53.

50 2001 (3) SA 893 (CC) paras 69–71.

ruling against this government, notwithstanding the fact that it represents the majority.

In the second place, Heyns argues that a judge who rules against the current majority on the basis of human rights principles embedded in history has the longer term majority — humanity throughout history — on her side. Since it is difficult to get past, present and future generations to vote in a single referendum, democratic society settles for the second best available alternative. Second best is to appoint those whom they consider the wisest members of their society as judges, give them the power in respect of human rights issues to overrule parliament and to isolate them from the pressures of the current situation and allow them to concentrate on the long-term picture.

I find the second argument appealing as it not only complies with the key tenet of democracy but it is also in line with the African world view. The African world view places the individual within the continuum of the dead, the living and the unborn.[52] In this context, society comprises not just the present but also past and future generations.

The present case embodies this scenario. If one imagines a referendum 30 years from now on whether Nevirapine should have been provided today or not, it is likely that a future generation, a substantial component of whom would be doomed if Nevirapine is not provided free today, would vote for the provision of free Nevirapine. This would not only guarantee their right to health care but also their most fundamental right, their right to life. I now turn to an analysis of the concrete implications of the case for the rest of the African continent.

6 Implications of the case for Africa

It is to be regretted that in arriving at its decision the Court did not make any reference to the jurisprudence of the African Commission on this right.[53] This may be explained by the fact that the African Charter and its jurisprudence are not well known and utilised in courts at the national level, either by the judges or by advocates. Secondly, the jurisprudence of the African Commission, particularly on socio-economic rights, is not very comprehensive and elaborate. In any case, at least in the South African situation, there already exists a set of precedents elaborately setting out government's obligations under socio-economic rights.

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51 See generally C Heyns 'A 'struggle approach' to human rights' in A Soeteman (ed) *Pluralism and law* (2001) 171, especially 185–186.

52 JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309 323, quoting JS Mbiti *African religions and philosophy* (1970) 141.

53 The 70 page judgment refers to the African Charter on Human and Peoples' Rights only once (at 9) in support for the applicant's case.

The *Nevirapine* case and its predecessors, particularly the *Grootboom* case, provide a rich jurisprudence on the issue of the realisation of socio-economic rights in Africa. There is the potential for the reverse flow of jurisprudence with South African decisions assisting the African Commission to develop its relatively underdeveloped jurisprudence on socio-economic rights. South African socio-economic rights jurisprudence could also inspire and enrich the jurisprudence of other African countries. One imagines the progress that Africa as a continent could make towards the realisation of socio-economic rights if civil society and individuals use these groundbreaking cases as tools to advocate and litigate for greater protection of socio-economic rights in their respective countries.

At this juncture it is perhaps apt to underscore the role of litigation as a means to facilitate the realisation of socio-economic rights. The *Nevirapine* case has highlighted the potential of litigation as a catalyst for progressive change. Litigation has been shown to be a useful advocacy tool. The applicants won the case and it is expected that the judgment will stimulate action on the part of the government towards a human rights compliant, comprehensive and coherent PTCT prevention programme. Even if the applicants were to lose the case, the application could still be regarded as successful in that it served to highlight the PTCT problem. This in turn generated public discussion and debate in the media and academic circles about, among other things, the human rights implications of the non-provision of anti-retrovirals to HIV positive pregnant women.[54]

All African countries that are members of the OAU are party to the African Charter. Given the prevalence of violations of socio-economic rights in the continent, there is ample opportunity to take cases dealing with socio-economic rights to the African Commission.[55] In this regard it would be useful for prospective applicants to consider making use of jurisprudence on socio-economic rights developed by South African courts in building their case and to persuade the African Commission to apply this jurisprudence.

Very few cases eventually find their way to international mechanisms such as the African Commission. Litigation at the national level offers more promise for the enforcement of socio-economic rights on the

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54 The impact of the case on the government is well captured by Zakie Achmat of TAC who has been quoted saying 'It is clear public pressure and TAC court action has made the government to listen'. See B Beresford 'Aids battle moves beyond drugs' *Mail and Guardian* (20-12-2001) 3.

55 For more information on litigating socio-economic rights in the African Commission, see KA Nana, J Busia & BG Mbaye 'Filing communications on economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (1996) 3 *East African Journal of Peace and Human Rights* 188.

continent. But in order for socio-economic rights to become justiciable nationally it is vital to have the appropriate legal framework in place.

Most often domestic courts enforce domestic law. Constitutions with justiciable socio-economic rights such as the South African Constitution provide a favourable environment for litigating socio-economic rights at the national level. Many African countries do not recognise socio-economic rights as justiciable rights. For these countries having an appropriate legal framework necessitates constitutional changes introducing justiciable socio-economic rights in their constitutions. Ongoing constitutional review in countries such as Swaziland, Congo and Kenya offers an opportunity to include socio-economic rights.

Another option is to lobby for the incorporation of socio-economic rights according to the Nigerian model.[56] In this connection it is useful to recall that state parties to the African Charter have an obligation to recognise the rights, duties as well as freedoms enshrined in the Charter and that they undertake to adopt legislative or other measures to give effect to them. Incorporation of the Charter into domestic law is one of the measures that can be taken to fulfil the obligations of all state parties to the African Charter. As the African Charter contains socio-economic rights, its incorporation would lead to justiciable socio-economic rights in the laws of the countries that incorporate it into their domestic law.

7 Conclusion

The judgment in the *Nevirapine* case is without doubt an important step in the right direction. It constitutes proof of the justiciability of socio-economic rights, the obligations of government to take measures towards the realisation of socio-economic rights, and the power of courts to assess the progress government makes in this regard. Most African countries are poor in economic terms. Therefore it will not be an easy task for them to fulfil their obligations regarding socio-economic rights under the African Charter. Nevertheless, by ratifying the Charter, African states undertook to take measures to give effect to all rights guaranteed therein. The *Nevirapine* case confirms the position that the government has to act towards the progressive realisation of socio-economic rights and that its policies can be questioned.

The *Nevirapine* judgment also reaffirms that courts have a duty to order government compliance with the Constitution. Implications of this

[56] Nigeria has shown leadership in fulfilling this obligation by incorporating the African Charter into the Nigerian law through African Charter (Ratification and Enforcement) Act. See ch 10 of the *Laws of the Federation of Nigeria 1990*. Subsequently in the case of *Abacha and Others v Gani Fawehinmi* the Nigerian Supreme Court ruled that the African Charter is part of the laws of Nigeria and like all other laws the courts must uphold it. See 2000 *Federation of Weekly Law Reports* 533.

finding for many African countries where governments do not comply with requirements of their constitutions, particularly in connection with the protection of socio-economic rights, are enormous. This progressive decision unquestionably provides ammunition in the struggle for the realisation of socio-economic rights in South Africa and on the continent in general.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The use of mechanical restraints by Correctional Services in South Africa and Namibia: *Namunjepo v Commanding Officer, Windhoek Prison* [2000] 6 BCLR 671 (NmS)

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1 Introduction

South Africa is currently suffering a major crime wave. The extent of the problem has reached such proportions that it affects not only the daily lives of the people of South Africa, but also the economy and South Africa's international image. The government is constantly under pressure from the public to take positive measures towards solving the problem. Criminals are not viewed sympathetically.[1]

With these facts in mind, it is understandable that public opinion on the human rights of prisoners is unfavourable. An example is the public outcry in 1999 when the South African Constitutional Court overturned an order of the Pretoria High Court and granted prisoners the right to vote.[2] Public opinion generally regards criminals negatively, requiring their removal from the community as punishment for their crimes.

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1 An example of the South African government's attitude towards crime is the tightening of bail requirements which became applicable with the coming into effect of the Criminal Procedure Second Amendment Act 85 of 1997 on 1 August 1998. Another example is the Parole and Correctional Supervision Amendment Act 87 of 1997 which was assented to by parliament, but which has not yet come into effect. In terms of this latter Act, a court sentencing an offender to a term of imprisonment of two years or longer will be entitled to fix a 'non-parole period' during which parole may not be granted to such an offender.

2 *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).

Prisoners are widely seen as having renounced their fundamental rights when they chose to break the law and endanger the community.

The conditions in South African prisons are, at the least, precarious.[3] In practice, these conditions differ greatly from the conditions envisaged by the international community; ideals encouraging not the punishment of societal outcasts, but the rehabilitation of prisoners who had made some wrong decisions. The main cause of the bad conditions in the prisons seems to be overcrowding. This in turn leads to a myriad of related problems including the obvious lack of cell space, food, clothing and blankets, as well as prison staff shortages and the consequent lack of sufficient supervision. This encourages prison violence, the establishment of prison gangs and an increase in jailbreaks, the much criticised placement of juvenile prisoners with adult prisoners,[4] presidential pardons to petty criminals and the release of prisoners on early parole in an effort to alleviate the overcrowding, to name but a few.[5] The Department of Correctional Services does not have the financial resources to address these and other growing problems sufficiently, even though efforts in this regard have been made in the past.[6]

In spite of the chaos that exists in our prisons, warders are expected to be in control of every situation and to maintain discipline among the inmates. This is often a difficult, if not impossible task, taking into account that the prisons are often understaffed, their staff overworked and underpaid. The public demands drastic measures to maintain order in the prisons and specifically to prevent those who have been apprehended for their crimes from escaping from detention. One solution to the latter problem is by means of mechanical restraints, which may even include chains.

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3 See, in general, Africa Watch Prison Project *Prison Conditions in South Africa* (1994).

4 Such placement of juveniles is also unconstitutional — see sec 28(1)(g)(i) Constitution of South Africa Act 108 of 1996.

5 See S Pete 'The politics of imprisonment in the aftermath of South Africa's first democratic election' (1998) 11 *South African Journal of Criminal Justice* 51–83 and S Pete 'The good, the bad and the warehoused': The politics of imprisonment during the run-up to South Africa's second democratic election' (2000) 13 *South African Journal of Criminal Justice* 1–56 for a general discussion on the problems faced by South Africa in this regard, as well as the reactions of the different groups involved in these problems.

6 These efforts include the building of more prisons and the establishment of the new maximum and super maximum prisons, stricter bail regulations, the introduction of correctional supervision and community service as an alternative punishment for petty criminals and a system of electronic tagging for those prisoners qualifying for parole.

2 The position with regard to mechanical restraints in South Africa

In South Africa the use of mechanical restraints is regulated by the Correctional Services Act of 1998 (1998 Act),[7] which repealed the Correctional Services Act of 1959 (1959 Act) as a whole.[8] Both Acts make provision for the use of mechanical restraints in certain circumstances.[9] Neither Act, however, gives a definition of mechanical restraints. Both these Acts make provision for the promulgation of regulations by the Minister of Correctional Services with regard to the permissible mechanical restraints and the manner in which they may be used.[10] The regulations currently in effect are those that have been issued under the 1959 Act, namely the Correctional Services Regulations published by Government Notice No R2080 of 31 December 1965 as amended. These regulations do not list the instruments of restraint that may or may not be used, and are quite vague. Regulation 102 states as follows:

> (1) Restraint shall be applied only in the circumstances and for the purpose prescribed in section 80 of the Act and shall in no circumstances whatsoever be used as punishment.
>
> (2) All forms of mechanical means of restraint and the manner in which they are applied, shall be as prescribed: Provided that chains exceeding five kilogram in mass shall not be used.

The only specific limitation has regard to the maximum weight of the chains.

Both Acts also limit the use of mechanical restraints to certain circumstances. The 1959 Act provides that mechanical restraints may only be used when a prisoner is detained in a single cell and if the use is reasonably necessary in the interests of the safety of that prisoner, other prisoners or correctional officials, or to prevent damage to any property or to prevent the prisoner's escape. The 1998 Act restricts the use of mechanical restraints to circumstances in which it proves necessary for the safety of a prisoner or any other person, the prevention of damage to property, when a reasonable suspicion exists that a prisoner may escape or if a court requests that a prisoner be restrained. The 1998 Act further prohibits the use of mechanical restraints, other than handcuffs

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7 Act 111 of 1998, as amended by the Correctional Services Amendment Act 32 of 2001.

8 Act 8 of 1959. Although the 1998 Act has already been assented to and some of its provisions came into effect on 19 February 1999, the date of commencement of the rest of the provisions, including those with regard to mechanical restraints, still has to be proclaimed. The amending Act (32 of 2001) affected numerous of these provisions, including secs 31, 32 and 33. The Amendment Act commenced on 14 December 2001.

9 Sec 80 of the 1959 Act and sec 31 of the 1998 Act respectively.

10 Sec 94(1)(q) of the 1959 Act and sec 134(1)(x) of the 1998 Act respectively.

or leg irons, when a prisoner is brought before a court, unless the court authorises such restraints. Both Acts forbid the use of mechanical restraints as a form of punishment or as a disciplinary measure. The 1998 Act, as a mended, also provides that mechanical restraints in addition to handcuffs or leg-irons may only be used when prisoners are outside their cells.[11]

A further restriction is with regard to the maximum period of time that mechanical restraints may be used. The 1959 Act sets the time limit to 30 days, extendable to 90 days without the permission of the Minister of Correctional Services. The 1998 Act calls for the use of mechanical restraints for the minimum period necessary and to a maximum of seven days. This period may be extended to 30 days, but only after consideration of a report by a medical officer or a psychologist.

Recently the Supreme Court of Namibia delivered judgment in a case involving the use of mechanical restraints in prisons. This case is relevant to the South African situation, because the Acts concerned, the (Namibian) Prisons Act 8 of 1959 (1959 Namibian Act) and its South African counterpart, the Correctional Services Act 8 of 1959, not only share the same number and year in its titles, but actually differ very little in their content. In fact, before 1991 the South African version was also known as the Prisons Act.[12] Section 80 of the 1959 South African Act and the 1959 Namibian Act, dealing with mechanical restraints, are identical. Therefore, while section 80 of the 1959 South African Act is still in force in South Africa, a ruling of Namibian courts on similar legislation is a handy guideline to our judiciary.

3 The facts of the *Namunjepo* case

The five appellants were awaiting trial and were detained at Windhoek prison. Four of the appellants had previously escaped from detention, but had been recaptured. After their recapture, they were put in 'chains'. The fifth appellant, who had not actually escaped, although he had allegedly attempted to, was also put in 'chains'. Their 'chains' consisted of two metal rings with a fastener that was welded closed. The two rings, connected with a metal chain of 30 cm, were then placed on the prisoner's legs, just above the ankle. The chains inhibited walking, exercising and sleeping. The appellants claimed that showering was also a problem, because the chains posed difficulties when removing their trousers. It was further alleged that the rings themselves caused pain, discomfort and abrasions through their constant bumping against the

11 Sec 17 of Act 32 of 2001, amending sec 31 of the 1998 Act.

12 The title of the 1959 South African Act was amended by sec 33(1) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

prisoners' ankles. Each of the appellants had been chained continuously for longer than five months.

4 The constitutionality of section 80 of the 1959 Namibian Act

The application was brought in terms of section 80 of the 1959 Namibian Act, which made provision for the placing of prisoners in irons or other mechanical restraints under certain conditions, subject to a time limit of one month (and in certain circumstances three months) and the restraints weighing no more than five kilograms.

The main question on which the Court had to decide was whether the Namibian Constitution tolerates the use of irons and chains with regard to prisoners under *any* circumstances.[13] The Court tested this practice against article 8 of the Namibian Constitution. This article deals with the right to human dignity. The Court came to the conclusion that, when faced with a question regarding the infringement of article 8(2)(b), the answer should involve a value judgment based on the current values of the Namibian people.[14] The current value test entails a 'value judgment based on the contemporary norms, aspirations, expectations and sensitivities of the Namibian people'.[15] No evidence was apparently led in this regard, and the court agreed with the court *a quo* that parliament, as the chosen representatives of the peoples of Namibia, is one of the most important institutions to express these 'current values'.[16]

The Court then proceeded to formulate such a value judgment by interpreting the Constitution. It was held that although imprisonment infringes on some of the human rights of a person, it does not follow that a prisoner may be deprived of every basic right. A prisoner cannot be regarded as a person without dignity.[17]

The court consequently concluded unanimously that the practice of placing prisoners in leg irons or chains was unconstitutional on the grounds, firstly, that it was a humiliating experience which reduced the person in question to 'the level of a hobbled animal whose mobility is limited so that it cannot stray'[18] and, secondly, that it was a reminder of the practice of slavery. The court held that[19]

13 *Namunjepo v Commanding Officer, Windhoek Prison* [2000] 6 BCLR 671 (NmS) 683C.
14 As above, 678F.
15 As above, 679B.
16 As above, 682B.
17 As above, 680D.
18 As above, 683D.
19 As above, 683E.

> [t]o be continuously in chains or leg irons and not to be able to properly clean oneself and the clothes one is wearing, sets one apart from other fellow beings and is in itself a humiliating and undignified experience.

Placing a prisoner in leg irons or chains therefore constitutes degrading treatment.[20] The court also pointed out that not even a general public outcry against the escalating incidence of crime could justify the chaining of a prisoner.[21]

5 Comments on the decision

The main point of criticism against this judgment is that the Supreme Court declared unconstitutional the use of leg irons or chains as such, without considering the possibility of a limited use of these restraints that would possibly not be in conflict with the Constitution. The court came to a hurried conclusion that was influenced by emotion based on the personal circumstances of the appellants in the case under discussion. The infringement does not lie in the restraint of a prisoner *per se*, but in the *manner* and *excessive length* of the restraint to which the appellants had been subjected in the particular case. Not being able to remove one's clothes for a period exceeding five months because of inhibiting and painful chains on one's ankles and subsequently being prevented from exercising, showering and sleeping are clearly infringements of that person's right to dignity. One can understand that the court was influenced by the fact that situations such as these still exist in modern democracies that espouse civilised methods of punishment. One can also understand the court's reasoning in declaring unconstitutional the treatment of the appellants in the particular case.

But what is more difficult to understand, is how the court could overlook the useful purpose served by the moderate use of leg irons and chains. In a society where crime is an everyday occurrence and jail breaks are not considered unusual any more, any strategy that does not infringe the dignity of a prisoner and is not unconstitutional but which can help to establish order in an overcrowded prison is, at the least, to be considered before being disposed. In my opinion the unconstitutionality *in casu* does not lie in the use of the leg irons and chains *per se*, but in the way in which the legislation dealing with the subject was transgressed. The use of leg irons or chains for a minimum period of time to contain a prisoner who is suspected of planning (another) escape should not be considered unconstitutional as long as the restraints are removable and, indeed, removed at certain times to enable the prisoner to sleep, exercise or shower. In other words, as long as the use of leg irons

20 As above, 683I.

21 As above, 683F.

and chains does not interfere with the dignity of the prisoner, such use should not be declared unconstitutional.

A fact which supports my conviction is that the application for an order declaring unconstitutional the relevant sections was dismissed by the High Court.[22] This ruling supports the idea that the matter is not straightforward and that a difference in opinion exists on the question whether or not the Supreme Court was correct in finding unconstitutional the use of placing prisoners in leg irons or chains.

The Namibian courts do not follow the two-stage enquiry that South African courts have adopted to constitutional interpretation, as the Namibian Constitution does not provide for a general limitation clause.[23] The court never asked the question whether it might be reasonable under certain circumstances to infringe a person's right to dignity by means of mechanical restraints.

Although the fundamental rights and freedoms contained in the Namibian Constitution and entrenched in the Bill of Rights may be limited subject to certain provisions,[24] article 24(3) of the Namibian Constitution expressly prohibits any derogation of a number of these rights and freedoms, including the right to dignity as entrenched in article 8.[25] In *Ex parte Attorney-General Namibia: In re Corporal Punishment by Organs of State*[26] the Namibian Supreme Court held that the protection afforded by article 8 is absolute and unqualified[27] and that no limitation of the right to human dignity is permitted. Mahomed AJA held that

> [a]ll that is therefore required to establish a violation of article 8 is a finding that the particular statute or practice authorised or regulated by a state organ falls within one or other of the seven permutations of art 8(2)(b),

and that 'no questions of justification can ever arise'.[28]

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22 As above, 673E–G.

23 For an example of the application of the two-stage enquiry in the South African courts, see *S v Williams* 1995 (3) SA 632 (CC) which dealt with corporal punishment. The approach was constitutionally required: see sec 33 of the 1993 South African Constitution and sec 36 of the 1996 South African Constitution. The Namibian Constitution does not contain a general limitation provision, although sec 21(2) provides for 'reasonable restrictions' to the 'fundamental freedoms' listed in sec 21(1).

24 Art 22 Namibian Constitution. See G Carpenter 'The Namibian Constitution — *ex Africa aliquid novi* after all?' in D Van Wyk *et al* (eds) *Namibia constitutional and international law issues* (1991) 39–40; J Diescho *The Namibian Constitution in perspective* (1994) 60–61 & GJ Naldi *Constitutional rights in Namibia: A comparative analysis with international human rights* (1995) 30–36 for interpretations of this clause.

25 According to Carpenter (n 22 above 41) the protection conferred in terms of art 24(3) can only be placed at risk if there is a total collapse of the Constitution.

26 1991 (3) SA 76 (NmS).

27 As above, 86D & 96G.

28 As above, 86D–E. Compare *S v Tcoeib* 1993 (1) SACR 274 (Nm) in which the Namibian court held that although the right to dignity is inviolable, art 8 has to be read as a whole and that the language of the article did not prohibit the violation of human dignity by a lawful sentence of court. See Naldi (n 22 above) 51.

It is to be debated whether, if this case had been heard by a South African court, the infringement of the right to dignity would not have been found to be justifiably limited in terms of our limitations clause. Could it not perhaps be reasonable to physically restrain a prisoner, who has already escaped from detention once, by means of leg irons, in order to prevent possible future escapes and maintain order in general in the prison?[29] A question which further comes to mind is: Should the limited use of mechanical restraints be an exception to the inviolability of the right to human dignity, which mechanical restraints classify as lawful? In the *Namunjepo* case the court did not answer this question directly, although it did refer in passing to handcuffs as excluded from the declaration of unconstitutionality.[30] The court made a ruling on leg irons and chains only. This means that the use of mechanical restraints *per se* was not included as constituting degrading treatment.

No comprehensive list of the admissible and prohibited forms of mechanical restraints exists.[31] The only definite prohibition as recognised internationally is stipulated in article 33 of the Standard Minimum Rules for the Treatment of Prisoners with regard to the use of chains or irons as means of restraint.[32] Article 33 further clearly states that even accepted instruments of restraint may never be applied as punishment and then only in certain circumstances (that is (a) as a precaution against escape during a transfer; (b) on medical grounds; and (c) to prevent a prisoner from injuring himself or herself or others or from damaging property) and for limited periods of time.[33] Permissible instruments of restraint include handcuffs, strait-jackets[34] and fetters. This once again supports

29 See *Blanchard and Others v Minister of Justice, Legal and Parliamentary Affairs and Another* 1999 (4) SA 1108 (ZSC) 1113E for the opinion of the Zimbabwe Supreme Court in this matter.

30 673G.

31 Although international documents and treaties, such as The Universal Declaration of Human Rights of 1948, The European Convention on Human Rights of 1949 and The International Covenant on Civil and Political Rights of 1966, do not specifically deal with the use of mechanical restraints, they do prohibit torture and cruel, inhuman and degrading punishment or treatment. Other international documents in this regard are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, The Inter-American Convention to Prevent and Punish Torture of 1985 and art 5 of the Code of Conduct for Law Enforcement Officials of 1979.

32 Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council on 31 July 1957.

33 Art 34.

34 Art 33 of the Standard Minimum Rules for the Treatment of Prisoners mentions not only handcuffs and strait-jackets, but also chains and irons. However, the same article specifically forbids the use of chains or irons as restraints. Thus it seems that not only may chains and irons not be applied as forms of punishment, but that it may not be used in any form at all.

the notion that the use of instruments of restraint is not prohibited *per se*, but if they are used in accordance with certain basic limitations and requirements, they do not constitute an infringement on a person's dignity.

6 The position in South Africa

The 1998 Act was rewritten from scratch to make it compatible with the new Constitution and the Bill of Rights.[35] The new Act contains many provisions to ensure that prisoners are not stripped of their human dignity and acknowledges the basic human rights of prisoners. With this in mind, it therefore might surprise someone who has read the *Namunjepo* decision to find that the South African legislator not only included the permissible use of mechanical restraints, but also went further and authorised the use of force[36] as well as non-lethal incapacitating devices.[37] One might ask oneself if these stipulations do not go against the grain of the Constitution and the idea that prisoners have human rights and dignity. The fact is that the 1998 Act takes into account the principle of human rights and especially human dignity. The provisions in the 1998 Act impose much stricter requirements than the 1959 Act.[38] The legislator did not leave out these stipulations, because these mechanisms are necessary to control the chaos that would otherwise exist in South African prisons.

7 Conclusion

Abhorrent prison practices are as old as humanity itself. It is not a phenomenon found only in medieval times or underground dungeons. In spite of the official recognition of human rights in most countries, the infringement of these rights still takes place every day. Prisons are by nature isolated from the rest of the community. Society is not interested in what goes on in prisons, as long as the criminals are kept inside and removed from the community. With the public turning a blind eye, prisoners are often at the mercy of their warders and are often subjected to cruel, inhuman and degrading treatment or punishment.

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35 See the Preamble of the 1998 Act.

36 Sec 32. Also see sec 18 of Act 32 of 2001, which allows the use of force only 'when it is necessary' for self-defence, the defence of another person, preventing an escape and protecting property.

37 Sec 33. Also see sec 19 Act 32 of 2001.

38 Examples are the allowed time period for the use of mechanical restraints, and the requirement that this period may only be extended after consideration of a medical or psychological report.

It is, however, important that we remember that prisoners have (human) rights and that we protect these (human) rights as diligently as we protect those of the rest of society. Perhaps the most important remark of the court in the *Namunjepo* case was not the conclusion that the uninterrupted chaining of a prisoner for five months is unconstitutional, but that imprisonment does not deprive a prisoner of all basic rights. This in turn implies that a prisoner's rights may be limited, as long as the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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Position as at 31 December 2001

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74		
Angola	02/03/90	30/04/81	11/04/92	
Benin	20/01/86	26/02/73	17/04/97	
Botswana	17/07/86	04/05/95		
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75		
Cameroon	20/06/89	07/09/85	05/09/97	
Cape Verde	02/06/87	16/02/89	20/07/93	
Central African Republic	26/04/86	23/07/70		
Chad	09/10/86	12/08/81	30/03/00	
Comoros	01/06/86			
Congo	09/12/82	16/01/71		
Côte d'Ivoire	06/01/92	26/02/98		
Democratic Republic of Congo	20/07/87	14/02/73		
Djibouti	11/11/91			
Egypt	20/03/84	12/06/80	09/05/01	
Equatorial Guinea	07/04/86	08/09/80		
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73		
Gabon	20/02/86	21/03/86		
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75		
Guinea	16/02/82	18/10/72	27/05/99	
Guinea-Bissau	04/12/85	27/06/89		
Kenya	23/01/92	23/06/92	25/07/00	
Lesotho	10/02/92	18/11/88	27/09/99	
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	
Madagascar	09/03/92			

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Malawi	17/11/89	04/11/87	16/09/99	
Mali	21/12/81	10/10/81	03/06/98	10/05/00
Mauritania	14/06/86	22/07/72		
Mauritius	19/06/92		14/02/92	
Morocco		13/05/74		
Mozambique	22/02/89	22/02/89	15/07/98	
Namibia	30/07/92			
Niger	15/07/86	16/09/71	11/12/96	
Nigeria	22/06/83	23/05/86		
Rwanda	15/07/83	19/11/79	11/05/01	
Sahrawi Arab Democratic Rep	02/05/86			
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Senegal	13/08/82	01/04/71	29/09/98	29/09/98
Seychelles	13/04/92	11/09/80	13/02/92	
Sierra Leone	21/09/83	28/12/87		
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75		
Togo	05/11/82	10/04/70	05/05/98	
Tunisia	16/03/83	17/11/89		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01
Zambia	10/01/84	30/07/73		
Zimbabwe	30/05/86	28/09/85	19/01/95	
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