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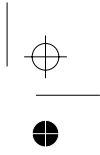
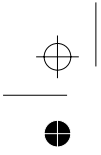
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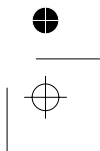
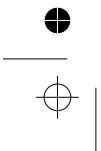
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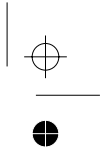
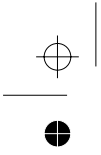
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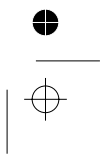
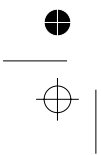
African Human Rights Law Journal

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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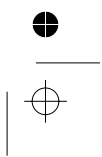
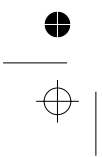
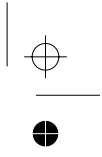
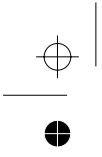
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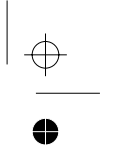
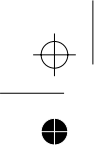
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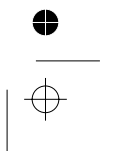
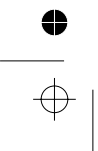
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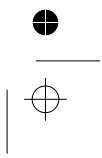
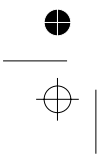
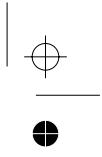
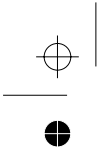
This volume covers aspects of the domestic human rights situation in three countries — Zimbabwe, Kenya and Egypt — and the influence of the international system on another two countries, namely the impact of the African Charter system in the Democratic Republic of Congo and international human rights law in Nigeria.

The *Journal* also explores the opportunities and problems that will be faced by the Pan-African Parliament of the African Union when it is constituted, as well as the operation of the emerging African Committee on the Rights of the Child.

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: Cedric de Coning; Victor Dankwa; John Dugard; Jean-Desiré Ingange-wa-Ingange; Ben Kioko; Justice Nwobike; Joe Oloka-Onyango; David Padilla; Nico Steytler and Geraldine van Bueren.

The next volume of the *Journal* will deal primarily with the Sierra Leone Special Court.





Human rights litigation in Zimbabwe: Past, present and future

*Adrian de Bourbon**

Senior Counsel in Zimbabwe; Chairperson of the Bar Council of Zimbabwe

Summary

This article examines the progress and difficulties experienced in litigating human rights in Zimbabwe, from independence in 1980 to the present day. The article begins by discussing the constitutional basis for human rights litigation and explains the various avenues to pursue issues relating to the Declaration of Rights in the Supreme Court. The article identifies certain time frames that influenced the development of human rights litigation in Zimbabwe and briefly outlines various cases that set precedents for future litigation. During the first five years after Zimbabwe had gained independence, the ability of the Supreme Court to hear litigation on human rights issues was severely limited due to a constitutional provision that determined that existing laws could not be challenged under the Declaration of Rights. Thereafter followed what has been described as the 'golden era of human rights litigation', from 1985–2001. Decisions were taken in almost every field of human rights specified in the Declaration of Rights and the vast majority of these decisions favoured the citizen. Post-2001 human rights litigation, however, has by March 2003 yielded only two Supreme Court decisions where the citizens' rights prevailed. The problems currently experienced by the judiciary in Zimbabwe are identified and it is argued that the future of the judiciary is intertwined with the future of the government of Zimbabwe.

* SC, LLB (London), FCIArb; lindadeb@zol.co.zw. Lecture delivered at the Centre for Human Rights, University of Pretoria, 19 March 2003.

1 Introduction

This contribution examines the situation of litigation lawyers in Zimbabwe. Lawyers in Zimbabwe have been in the news headlines for all the wrong reasons over the last couple of years, and to a great extent the real work that is being done by lawyers in Zimbabwe, whether in the field of human rights or not, has gone unnoticed. However, there is a large group of lawyers in Zimbabwe totally committed to the advancement of human rights, even in the face of the current difficulties imposed by both the executive and the judiciary. Human rights are very much alive in Zimbabwe, and the legal profession is doing its best in very difficult circumstances to ensure that a culture of human rights pervades the whole country.

Although there were technically justiciable Bills of Rights in both the 1961 Constitution of Southern Rhodesia and the 1979 Constitution of Zimbabwe-Rhodesia, no one would disagree that fundamental human rights became an issue in Zimbabwe only once independence was attained in 1980. The rights set out in the Declaration of Rights of the Constitution of Zimbabwe 1980 came to the forefront at that time.

2 Legal background: Constitutional basis for human rights litigation in Zimbabwe

The 1980 Constitution was agreed to by all parties following the Lancaster House conference at the end of 1979. It sets out a justiciable Declaration of Rights in chapter III. The Declaration of Rights includes many basic human rights, but nearly every right is subject to extensive derogations. The balance of the Constitution deals with the organs of state, and other matters that are not directly related to human rights. However, litigation in the field of human rights cannot ignore the other provisions of the Constitution, and they have been used on occasions as a basis of establishing the rights of persons in Zimbabwe.

The Declaration of Rights can only be amended by a two-thirds affirmative vote in parliament on its final reading.¹ Since 1980 there have been a great number of such amendments,² many of which sought to reduce or further restrict the rights of the individual. At present, the government does not have sufficient votes in parliament to further amend the Constitution, and therefore no amendments have been made since April 2000.

¹ Sec 52(2)(a) Constitution of Zimbabwe 1980.

² There have been 16 Acts of parliament between 1983 and 2000 which amended the Constitution.

It is worth mentioning that there is a safeguard which is meant to enforce the Declaration of Rights outside of the courts. Section 40A of the Constitution establishes the Parliamentary Legal Committee which is required to examine all legislation, both primary and subsidiary, to determine whether or not it offends against the Declaration of Rights. In practice, since it is the Speaker of parliament who appoints the Parliamentary Legal Committee, it has been dominated by ruling party members, and has not been effective in preventing legislative intrusion into the basic fundamental rights set out in the Declaration of Rights.

Although technically human rights can be litigated in any court, including the High Court and the various levels of the magistrate's court, decisions of importance relating to human rights, as opposed to the application of those decisions, are in reality made by the Supreme Court of Zimbabwe, either on appeal or sitting as a court of first instance (with no appeal from the court) for certain constitutional applications.

Section 24(1) of the Constitution of Zimbabwe provides as follows:

If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

Zimbabwe does not have a Constitutional Court as such, but section 24(1) of the Constitution gives the right of direct access to the Supreme Court on issues relating to the Declaration of Rights. Furthermore, in section 24(3) the Constitution allows constitutional issues to be raised in an appeal, rather than by way of direct application. Section 24(4) permits the Supreme Court to dismiss any application, without a hearing, which it considers to be merely frivolous or vexatious.

There is yet another way of getting issues relating to the Declaration of Rights decided by the Supreme Court. Section 24(2) of the Constitution provides:

If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

This provision gives every court in Zimbabwe the power to refer matters involving alleged breaches of the Declaration of Rights to the Supreme Court, unless the raising of the issue is considered frivolous or vexatious. The Supreme Court has held that where a lower court refuses to refer a matter to the Supreme Court under section 24(2), that in itself can be

a breach of the Declaration of Rights. In delivering the decision of the Court in *Martin v Attorney-General & Another*,³ Gubbay CJ said:⁴

Suppose that a judicial officer, solely due to animosity towards an accused, in bad faith and without any warrant, were to rule that the question raised by him was frivolous or vexatious and so order his remand in custody pending trial. Could it then be said that the accused was only entitled to approach the Supreme Court for relief under section 24(3)? I think not. Such action by the judicial officer concerned would, as mentioned before, itself constitute an infringement of the accused's entitlement to the protection of the law. Moreover, and most importantly, since at the conclusion of any remand proceedings there is no right of appeal, no remedy under section 24(3) would be available to that accused.

However, in some instances the Supreme Court has declined to exercise its jurisdiction under section 24(2) of the Constitution, on the basis that the referring court should first determine other issues.⁵

In effect, the Supreme Court has held that a referral under section 24(2) should not take place unless an answer is material to the decision that the lower court has to make. The Court has also held that the question must be raised in the lower court so that referral can be done.⁶ A referral cannot be done after the lower court has reached its decision; the avenue for dealing with the constitutional issue is then through the appeal process.⁷ In reality, the vast majority of matters taken to the Supreme Court are taken either as an appeal from a lower court, or by direct application under section 24(1).

The power of the Supreme Court in making an order where there has been a breach of the Declaration of Rights is contained in section 24(4) of the Constitution. The Supreme Court may '... make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights'. The Court has said:⁸ 'It is difficult to imagine language which would give this court a wider and less fettered discretion.'

This has led the Supreme Court to make a whole range of orders in relation to constitutional matters. It has used its power to invalidate laws,⁹ to set aside sentences and substitute lesser sentences,¹⁰ and to

³ 1993 1 ZLR 153 (SC).

⁴ At 158.

⁵ *Mandinwhe v Minister of State* 1986 1 ZLR 1 (A); 1981 1 SA 59 (ZA); *Zinyemba v Minister of the Public Service & Another* 1989 3 ZLR 351 (SC).

⁶ *S v Mbire* 1997 1 ZLR 579 (SC); *Jesse v Attorney-General* 1999 1 ZLR 121 (SC).

⁷ *Muchero & Another v Attorney-General* 2000 2 ZLR 286 (SC).

⁸ *In re Mlambo* 1991 2 ZLR 339 (SC) 355C; 1992 4 SA 144 (ZS) 155J.

⁹ *Eg Retrofit (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1995 2 ZLR 422 (SC).

¹⁰ *Eg Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

direct the executive as to how to deal with matters.¹¹ It has also used its power to postpone the enforcement of its orders to enable the executive to comply with the Declaration of Rights.¹² Usually it simply issues a declarator and lets the executive implement the decision.¹³ The Court held that the wide provisions of section 24(4) do not give it power to grant punitive damages.¹⁴

The approach of the Supreme Court as to the interpretation of the Constitution, and in particular with regard to the Declaration of Rights, has been founded on the judgment of the Privy Council in *Minister of Home Affairs (Bermuda) & Another v Fisher & Another*¹⁵ and the observations of Lord Wilberforce where he said:¹⁶

A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

In developing this approach, the Supreme Court said in *Smyth v Ushewokunze & Another*:¹⁷

In arriving at the proper meaning and content of the right guaranteed by (the Declaration of Rights), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people.

The Supreme Court has always had regard to international instruments relating to human rights,¹⁸ as well as to decisions throughout the world, including Commonwealth countries, the European Court of Human

¹¹ Eg *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Another* 1991 1 ZLR 105 (SC); 1992 (2) SA 56 (ZS).

¹² *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

¹³ As in *Holland & Others v Minister of the Public Service, Labour and Social Welfare* 1997 1 ZLR 186 (SC); 1998 1 SA 389 (ZS).

¹⁴ *Movement for Democratic Change & Others v Commissioner of Police & Others* 2001 1 ZLR 8 (SC).

¹⁵ [1980] AC 319 (PC); [1979] 3 All ER 21 (PC).

¹⁶ At 328–329 (AC).

¹⁷ 1997 2 ZLR 544 (SC); 1998 3 SA 1125 (ZS) 553 (ZLR); 1134 (SA).

¹⁸ Eg *S v A Juvenile* 1989 2 ZLR 61 (SC); 1990 4 SA 151 (ZS).

Rights and the United States Supreme Court. Whether this trend will continue under the present Supreme Court remains to be seen, and there is at present very little evidence that this will be the case.

The question of *locus standi* in constitutional cases has arisen on a number of occasions before the Supreme Court. The Court has granted *locus standi* to human rights organisations¹⁹ as well as to the Law Society.²⁰ The Court has said:²¹ 'It would be wrong . . . for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief . . .' It has denied *locus standi* to a political party where it was not the political party itself but its members whose rights stood to be infringed.²²

On the other hand, in a leading judgment on the issue, the Court held that a company that wished to provide cellular telephone services had the requisite *locus standi*, and commercial self-interest and advantage were held to be irrelevant to the issue of *locus standi*.²³

The Supreme Court, as presently composed, denied *locus standi* to challenge laws relating to the presidential election to the leading opposition candidate in that election in a majority judgment.²⁴ In his dissenting judgment, Sandura JA put the matter thus:²⁵

Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Constitution, embraces the right to require the legislature, which in terms of section 32(1) of the Constitution consists of the President and parliament, to pass laws which are consistent with the Constitution.

If, therefore, the legislature passes a law which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this Court in terms of section 24(1) of the Constitution.

Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the *locus standi* to file the application.

¹⁹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

²⁰ *Law Society of Zimbabwe & Others v Minister of Finance (Attorney-General Intervening)* 1999 2 ZLR 231 (SC).

²¹ *Catholic Commission case* (n 19 above) 250.

²² *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 2 ZLR 254 (SC); 1998 3 SA 85 (ZS).

²³ *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Another* 1995 2 ZLR 199 (SC); 1996 1 SA 847 (ZS); 1995 9 BCLR 1262 (ZS).

²⁴ *Tsvangirai v Registrar-General of Elections & Others* SC 20/2002 (not yet reported).

²⁵ At 15 of the cyclostyled judgment.

It is my view that the approach of the majority in the case to deny a candidate in the election the right to challenge laws which directly affected the manner in which the election was conducted, cannot be justified. The approach is too narrow and makes a mockery of the right of direct access to the Supreme Court by persons claiming equality under the law and the protection of the Declaration of Rights.

The question of the vertical or horizontal application of constitutional rights has not been dealt with in any detail by the Supreme Court. The existence of the argument has been recognised in two judgments, but in neither was it necessary for the Court to decide the issue.²⁶

On many occasions, the attitude of the executive towards the Supreme Court has been far from favourable. In one celebrated case a representative of the executive stated publicly that the executive would not comply with a ruling of the Supreme Court.²⁷ In many other cases the reaction of the executive has been to amend legislation which was being examined by the Supreme Court. In a recent case where the Attorney-General challenged the right of the courts to hold him in contempt of court,²⁸ the same person, now promoted to Minister of Justice, caused to be included in a General Laws Amendment Act a provision that prohibited the continuation of any contempt of court proceedings without the leave of the Attorney-General.²⁹ In other words, before the Attorney-General can be held guilty of contempt, he must give permission for such proceedings.

There have also been a number of occasions, particularly in relation to the mobile telephone litigation³⁰ and the private broadcasting litigation,³¹ where the executive has resorted to using emergency legislation to prevent the enforcement of the orders of the Supreme Court, thereby frustrating the rights of litigants.

3 The past: History of human rights litigation in Zimbabwe (1980–2001)

When looking at the history of human rights litigation in Zimbabwe, it is necessary to mention section 26(3) of the Zimbabwe Constitution. That provision, which has since been repealed, specifically provided that laws

²⁶ *Munyuki v City of Gweru* 1998 1 ZLR 182 (SC); *Chaduka NO & Another v Mandizvidza* SC 114/2001 (not yet reported).

²⁷ See the public statement of the Supreme Court judges published in 1989 3 ZLR 218–221.

²⁸ *In re Chinamasa* 2000 2 ZLR 322 (SC); 2001 2 SA 902 (ZS).

²⁹ Sec 14 General Laws Amendment (No 2) Act 2002 (Act 14/2002).

³⁰ See *TS Masiyiwa Holdings (Pvt) Ltd & Another v Minister of Information* 1996 2 ZLR 754 (SC); 1998 2 SA 755 (ZS).

³¹ *Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 2 ZLR 243 (SC).

that were in existence at the date of independence on 18 April 1980, could not be challenged under the Declaration of Rights for a period of five years. Thus, all repressive legislation introduced during the Rhodesian era was immune from challenge until April 1985. This savings provision severely limited the ability of the Supreme Court, in particular, to foster a sense of judicially enforced human rights in the early years after independence.

Bearing this in mind, and bearing in mind also the situation that pertained in Zimbabwe, the human rights position in Zimbabwe may be divided into three broad time frames. Firstly, there is the period between independence and roughly mid-1985, covering in the main the period when Chief Justices Fieldsend and Georges presided over the Supreme Court. The second period, which to my mind was the golden era of human rights in Zimbabwe, covers the period from mid-1985 to mid-2001 when the Supreme Court was headed by Chief Justices Dumbutshena and Gubbay. The third and current period commenced in mid-2001 when the Supreme Court fell to be headed by Chief Justice Chidyausiku.

3.1 Immediate post-independence era: 1980–1985

The first five or so years after independence offered very limited opportunities to apply the Declaration of Rights in enforcing human rights in Zimbabwe.

The very first case that was heard by the Supreme Court under the Constitution of Zimbabwe got the whole subject of human rights off to a bad start. A man named Mandirwhe had been arrested by state security officers and surrendered to officials in Mozambique without any formal extradition proceedings. He in fact spent 21 months in all in custody in Mozambique.³² A writ of *habeas corpus* was sought, and the trial judge referred to the Supreme Court asking it to determine what measures should be taken to secure the enforcement of the Declaration of Rights with regard to Mandirwhe. The Supreme Court declined to exercise its jurisdiction on the grounds that the High Court could still make an effective order without having any constitutional issue determined.³³

The next case that confronted the Supreme Court concerned the obligation of an army doctor to repay sums due under a cadetship upon his retirement from the army. The case was not concerned with the Declaration of Rights, but with other provisions of the Constitution. The Court decided in favour of the individual.³⁴

³² See *Makomboredze v Minister of State (Security)* 1986 1 ZLR 73 (HC), where his claim for damages was decided by the High Court.

³³ *Mandirwhe v Minister of State* 1986 1 ZLR 1 (A); 1981 1 SA 759 (ZA).

³⁴ *Pretorius v Minister of Defence (2)* 1980 ZLR 395 (A).

Similar considerations were applied by the Supreme Court in relation to a police officer who had signed a 'blood chit' before accepting promotion. It was held that his rights to his pension were not affected and the provisions of the Constitution prevailed.³⁵

In 1981, the Supreme Court had its first opportunity to deal with the constitutional guarantee against expropriation. It had to consider the issue of the repeal of a right to compensation, the state contending that the right had not been acquired, but merely extinguished. The decision in *Hewlett v Minister of Finance*³⁶ remains a controversial decision by the Supreme Court. The Court found in favour of the government that a distinction had to be drawn between the acquisition of rights and the extinction of rights. The Court held that since parliament had merely extinguished rights, the applicant had no right to be treated in terms of the compulsory acquisition procedures in terms of the Constitution.

There was extreme disappointment in Zimbabwe at the narrow approach taken by the Supreme Court in the *Hewlett* case. The decision was not favourably received in academic circles,³⁷ but was thereafter consistently applied by the Supreme Court. In particular, when dealing with the designation of rural land, the Court confirmed the distinction to be drawn between acquisition of rights and other acts relating to rights.³⁸

In 1982 the Supreme Court had occasion to deal with the application of the Emergency Powers Regulations that still existed in Zimbabwe, and in particular the right of persons detained without trial to have access to their lawyers. Prominent members of ZAPU had been arrested and tried for treason. They were acquitted of the charge of treason, but immediately detained in terms of emergency legislation. They were denied access to their lawyers, and sought an order from the High Court that such access was their right. This order was granted by McNally J, as he then was, after which the government appealed. The Supreme Court sat on a Saturday morning to hear the appeal, and immediately dismissed the appeal.³⁹ The government had argued that the legislation in question was pre-existing legislation, and therefore was saved by section 26(3) of the Constitution. The Supreme Court held that Schedule 2 to the Constitution, which sets out the powers of the executive to deal with an emergency, did not form part of the Declaration of Rights, and therefore afforded separate rights that were enforceable outside the provisions of section 26 of the Constitution.

³⁵ *Commissioner of Police v Wilson* 1981 ZLR 451(A); 1981 4 SA 726 (ZA).

³⁶ 1981 ZLR 571 (SC); 1982 1 SA 490 (ZS).

³⁷ G Linnington *Constitutional law of Zimbabwe* (2001) para 1142 456; M Chaskalson *et al Constitutional law of South Africa* (1996) 31-18.

³⁸ *Davies & Others v Minister of Lands, Agriculture and Water Development* 1996 1 ZLR 681 (SC); 1997 1 SA 228 (ZS).

³⁹ *Minister of Home Affairs & Others v Dabengwa & Another* 1982 1 ZLR 236 (SC); 1982 4 SA 301 (ZS).

This decision was the first major success in human rights litigation in Zimbabwe, but despite the clear pronouncements of the Supreme Court relating to the rights of access to lawyers, the executive regrettably chose, in a series of well reported cases, to ignore the rights of arrested persons.⁴⁰ The *Dabengwa* decision, in my view, was a landmark, in that it was the very first important human rights case decided in favour of the citizen over the state. Bearing in mind the personalities involved, and bearing in mind that the decision was taken at a time when the repression in Matabeleland was at its height, it was a significant decision for the Supreme Court to take. It became the hallmark by which other human rights decisions in Zimbabwe would be tested.

1982 saw the arrest of the two York brothers, and their detention under the Emergency Powers Regulations. Various applications were made to the High Court and the Supreme Court to secure their release. In the end the Supreme Court held that the executive had not acted in terms of the law, and the detentions were held to be illegal.⁴¹ In concluding the judgment, Fieldsend CJ said:⁴²

... [I]t is important to draw lessons from what has occurred in this case. It is vitally important that the greatest care be taken in the exercise of powers of detention in times of emergency. It has been stressed in every jurisdiction that has similar provisions how much power they give to the executive; that is why they are carefully hedged about to ensure that the freedom of the individual is preserved so far as is consistent with the national good. The other reason why great care is required is that a failure to observe the requirements of the law may result in the courts having to order the release of persons who may be a danger to the state.

In 1984, the first of the land invasions took place. This phenomenon came to be considered by the Supreme Court in the case of *Commissioner of Police v Rensford & Another*.⁴³ In that matter, Rensford had secured an order from the High Court directing the Commissioner of Police to provide such aid as was necessary to enable the messenger of the court to effect service and enforcement of a warrant of ejection and a warrant of execution against squatters. The police refused to assist, and the High Court directed the Commissioner of Police to give such assistance. The Commissioner of Police challenged the right of the High Court to direct him on how to conduct his duties. In fact, it was even argued on his behalf that the Constitution placed the Commissioner of Police above the law. This attitude was firmly rejected by the Supreme Court, and the appeal was dismissed. As a result, the Court upheld the rights of the individual to protection of their property, even though the matter was not argued as a protection of property case.

⁴⁰ See by way of example *Attorney-General v Slatter & Others* 1984 1 ZLR 306 (SC); *S v Slatter & Others* 1984 3 SA 798 (ZS).

⁴¹ *Minister of Home Affairs v York & Another* 1982 2 ZLR 48 (SC).

⁴² At 58–59.

⁴³ 1984 1 ZLR 202 (SC).

In July 1982 there was an attack on the Zimbabwe Air Force Base near Gweru. Nine aircraft were destroyed and other damage was caused. This resulted in the arrest of a number of Air Force officers who were charged with complicity in the attack. On their arrest they were subjected to torture and were refused access to their lawyers. Their lawyers called a press conference complaining about the manner in which their clients had been treated, and this led to the lawyers being prosecuted for contempt of court. They were duly convicted by a magistrate, and they appealed the decision to the Supreme Court.⁴⁴ Amongst other issues, the Supreme Court held that the right of freedom of expression set out in section 20 of the Constitution applied, and that the derogation to maintain the authority and independence of the courts did not arise because there was no real risk that a fair trial would be prejudiced. The appeal by the two lawyers was accordingly allowed. In due course, the Air Force officers were tried before Dumbutshena J, as he then was, and he held the confessions they had made to be inadmissible, *inter alia*, because they were refused access to their lawyers, and acquitted them in the absence of any other evidence.⁴⁵ The Attorney-General appealed the decision. The Supreme Court held that the manner in which the accused had been denied access to their legal advisors was a breach of rights to a fair trial given by the Constitution.⁴⁶

Another important case of that era concerned a lawyer who had been taking photographs of a motor accident scene, and who was accused of photographing a vehicle belonging to the intelligence agency. He was arrested and assaulted, and he then sued for damages for the unlawful arrest. The state sought to justify what had occurred on the basis of the existence of a state of emergency, and in particular an indemnity that was given in emergency legislation. The Supreme Court held that the indemnity contravened the rights set out in section 13(5) of the Constitution for a person who had been unlawfully arrested and detained to claim compensation, and that the provisions of the Constitution allowing measures to be taken during an emergency did not entitle the executive to grant that form of indemnity.⁴⁷ It is perhaps worth noting that the lawyer was never actually paid his compensation, and he had to resort to setting-off his claim against taxes that were due. Fortunately, the government did not challenge the set-off claimed by him.⁴⁸

⁴⁴ *S v Hartmann & Another* 1988 2 ZLR 186 (SC); 1984 1 SA 305 (ZS).

⁴⁵ The trial judgment is reported as *S v Slatter & Others* 1983 2 ZLR 144 (HC).

⁴⁶ *Attorney-General v Slatter & Others* 1984 1 ZLR 306 (SC); *S v Slatter & Others* 1984 3 SA 798 (ZS).

⁴⁷ *Granger v Minister of State* 1984 2 ZLR 92 (SC); 1984 4 SA 908 (ZS).

⁴⁸ Contrast the decision in *Commissioner of Taxes v First Merchant Bank Ltd* 1997 1 ZLR 350 (SC); 1998 1 SA 27 (ZS).

The decision of the Supreme Court in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd*⁴⁹ is of great importance to constitutional litigation in Zimbabwe. The judgment established that the onus is upon the litigant alleging unconstitutionality, including proof that legislation is not reasonably justifiable in a democratic society. The Supreme Court affirmed the principle of a presumption of constitutionality in the following terms:⁵⁰

In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere.

This somewhat restrictive approach to constitutional interpretation has coloured the approach of the Supreme Court in human rights litigation. It undoubtedly makes it more difficult for a litigant to establish his rights, and even more difficult to defeat a derogation from a right by showing that the derogation is not reasonably justified in a democratic society.

Generally speaking, the Supreme Court emerged with credit during the period of five years when its hands were tied by section 26(3) of the Constitution, using what limited powers it had to enforce human rights. But the comment must be made that there was a reluctance during that time to litigate human rights matters. Whether that was due to the state of emergency, or lack of experience in human rights matters, is hard to say. But in the main the government got away with many abuses of human rights, particularly in Matabeleland.

3.2 The golden era of human rights litigation: 1985–2001

Litigating human rights during the 16 years between 1985 and 2001 was a great pleasure and privilege. The court did not always find for the ordinary litigant, but one knew that whatever point was being raised was carefully considered, and one knew even when the court found for the government that the judgment represented the honest view of the judges who heard the matter. In that time, huge advances were made in the field of human rights in Zimbabwe, and I will deal with the major developments in the field of human rights litigation.

This era started while Zimbabwe was still under a state of emergency and the early cases were concerned with arrest and detention without trial.

⁴⁹ 1983 2 ZLR 376 (SC); 1984 2 SA 778 (ZS).

⁵⁰ At 383.

Starting in early 1986, two customs officers were arrested and charged with allegations of corruption. They were detained in terms of the Emergency Powers Regulations, and various cases came before the courts to secure their release. In particular, the Supreme Court held that their detention was unlawful. In *Bull v Attorney-General & Another*,⁵¹ the Supreme Court held that an arrest had to be justified by the presentation of facts from which the reasonable suspicion, that the person had committed or was about to commit an offence, could objectively be tested in order to conform with section 13(2)(e) of the Constitution. However, the customs officers remained in custody, leading eventually to the Supreme Court giving consideration to whether or not the manner in which the Detainees Review Tribunal operated conformed with the Constitution.⁵² The customs officers were eventually released without charges being laid against them, on condition they left the country.

The state of emergency expired in June 1990. During the state of emergency the Supreme Court had done what it could to protect detainees, but the Court recognised that in a state of emergency detention without trial was a necessary evil. Although the Emergency Powers Act remains on the statute books in Zimbabwe,⁵³ it has been replaced by the Presidential Powers (Temporary Measures) Act (Chapter 10:20). This Act has been used repeatedly to legislate in Zimbabwe, without the intervention of parliament, and in many instances to take away rights given by the Supreme Court. On at least three occasions the validity of the Presidential Powers (Temporary Measures) Act has been challenged as an improper delegation of the legislative power.⁵⁴ However, on each occasion the Supreme Court has avoided dealing with the issue, usually on the grounds that a decision could be reached on some other basis, or on one occasion on the ground that the applicant did not have *locus standi*.

It would take simply too long to give a summary of each major decision of the Supreme Court relating to human rights in Zimbabwe during this period. It would be of some use to look at the various provisions of the Declaration of Rights, and then to comment on the

⁵¹ *Bull v Attorney-General & Another* 1986 1 ZLR 117 (SC); 1986 3 SA 886 (ZS); *Bull v Minister of Home Affairs* 1986 1 ZLR 202 (SC); 1986 3 SA 870 (ZS).

⁵² See *Austin & Another v Chairman, Detainees' Review Tribunal & Another* 1988 1 ZLR 21 (SC).

⁵³ Emergency Powers Act [Chapter 11:04].

⁵⁴ *Forum Party of Zimbabwe & Others v Minister of Local Government, Rural and Urban Development & Others* 1997 2 ZLR 194 (SC); *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS); *Tsvangirai & Others v Registrar-General of Elections* SC 93/2002 (not yet reported).

major points that have been made through litigation in relation to each provision.

Section 11 was initially enacted under the heading 'Fundamental Rights and Freedoms of the Individual'. In an early judgment, the Supreme Court held section 11 to be merely a preamble, which did not confer any substantive rights.⁵⁵ However, the Supreme Court changed this approach, and, following the lead set by the Botswana Court of Appeal in *Dow v Attorney-General*,⁵⁶ decided that the section did indeed confer substantive rights.⁵⁷ This approach by the Supreme Court caused the government to re-enact section 11 in 1996 to make it a true preamble.⁵⁸

Section 12 gives protection to the right of life. Zimbabwe still maintains a death sentence, and we have yet to tackle the vexed issue of the right of the police to kill in order to effect an arrest.⁵⁹ This provision has not been the subject of any important decisions by the Supreme Court.

On the other hand, the right to personal liberty guaranteed by section 13 of the Declaration of Rights has been the subject of considerable litigation. In *Attorney-General v Blumears & Another*,⁶⁰ the Court held that the constitutional protection under section 13 was a necessary accommodation between the individual's fundamental right to personal liberty and the state's duty to control crime. It stated that the criterion of reasonable suspicion was a practical, non-technical concept which afforded the best compromise for reconciling those opposing interests.

The Court upheld the right of the Minister to issue a certificate denying bail.⁶¹

The Court has continued to emphasise the right of legal representation at the stage of the arrest.⁶² The Court has set aside a conviction where an accused was taken to court without informing his lawyer, who was also denied access to his client.⁶³

⁵⁵ *Austin & Another v Chairman, Detainees Review Tribunal & Another* 1988 1 ZLR 21 (SC) 39–40.

⁵⁶ 1994 6 BCLR 1; [1992] LRC (Const) 623 (Botswana).

⁵⁷ *In re Munhumeso & Others* 1994 1 ZLR 49 (SC); 1995 1 SA 551 (ZS); 1995 2 BCLR 125 (ZS). See also *Rattigan & Others v Chief Immigration Officer & Others* 1994 2 ZLR 54 (SC); 1995 2 SA 182 (ZS); 1995 1 BCLR 1 (ZS).

⁵⁸ Constitution of Zimbabwe Amendment (No 14) Act 1996 (Act 14/96), sec 6, in force on 6 December 1996.

⁵⁹ See *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 4 SA 613 (CC).

⁶⁰ 1991 1 ZLR 118 (SC).

⁶¹ See *Bull v Minister of Home Affairs* 1986 1 ZLR 202 (SC).

⁶² *S v Chaerera* 1988 2 ZLR 226 (SC); *S v Woods* 1993 2 ZLR 288 (SC).

⁶³ *S v Sibanda* 1989 2 ZLR 329 (SC).

In a quite unrelated matter, the Court has held that civil imprisonment for failing to pay a judgment debt does not contravene section 13.⁶⁴

Section 14 gives protection from slavery and forced labour, but to the best of my knowledge has not received judicial consideration.

Torture and inhuman or degrading punishment or treatment is prohibited by section 15 of the Constitution. Torture is a common occurrence in Zimbabwe, and Zimbabwe has neither signed nor ratified the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, nor has it enacted the Convention into domestic law, despite a resolution of parliament calling upon the government to do so.

Various forms of punishment have been outlawed. Solitary confinement and reduced diet, as punishments imposed by the courts, are no longer permissible.⁶⁵ Adult whipping was declared unconstitutional.⁶⁶ The finding by a majority of the Supreme Court that juvenile whipping was unconstitutional⁶⁷ was overruled by an amendment to the Constitution.⁶⁸ Minimum terms of imprisonment are not unconstitutional, especially where legislation allows a court to impose another or lesser punishment where special circumstances exist.⁶⁹

The rights of unconvicted prisoners not to be held in solitary confinement, in a cell with the light on all the time and not to be deprived of their own clothing, were held by the Court to be constitutional rights.⁷⁰ The deprivation of exercise was held to constitute inhuman and degrading punishment.⁷¹

The delay in carrying out sentences of death was held to be unconstitutional,⁷² but once again the government changed the Constitution to overrule the Court.⁷³ At present, the courts are precluded from issuing a stay, or altering a sentence or giving any remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of 15(1) of the Constitution.⁷⁴ In two subsequent decisions, the Supreme Court held that changes to

⁶⁴ *Chinamora v Angwa Furnishers (Pvt) Ltd & Others* 1996 2 ZLR 664 (SC); 1998 2 SA 432 (ZS); 1997 2 BCLR 189 (ZS).

⁶⁵ *S v Masitere* 1990 2 ZLR 289 (SC); 1991 1 SA 821 (ZS).

⁶⁶ *S v Ncube & Others* 1987 2 ZLR 246 (SC); 1988 2 SA 702 (ZS).

⁶⁷ *S v A Juvenile* 1989 2 ZLR 61 (SC); 1990 4 SA 151 (ZS).

⁶⁸ Sec 5 Constitution of Zimbabwe Amendment Act (No 11) 1990 (Act 30/90).

⁶⁹ *S v Anand* 1988 2 ZLR 414 (SC); *S v Arab* 1990 1 ZLR 253 (SC).

⁷⁰ *Blanchard & Others v Minister of Justice* 1999 2 ZLR 24 (SC); 1999 4 SA 1108 (ZS).

⁷¹ *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Another* 1991 1 ZLR 105 (SC); 1992 2 SA 56 (ZS).

⁷² *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

⁷³ Constitution of Zimbabwe Amendment (No 13) Act 1993 (Act 9/93), sec 2, with effect from 5 November 1993.

⁷⁴ Sec 15(6) Constitution of Zimbabwe.

the Constitution did not have retrospective effect, and therefore did not impinge on existing rights of condemned prisoners,⁷⁵ and the sentences of death were commuted to life imprisonment.

The provision in the criminal procedure law that allowed a 'mute confession' to be used, even if it was not obtained voluntarily, was held to be unconstitutional where such a 'mute confession' took place after the accused had been tortured.⁷⁶

Section 15 of the Constitution was amended by the government to ensure that the death sentence can be carried out by hanging. This amendment⁷⁷ arose because of an intended challenge in the Supreme Court to hanging as a method of carrying out capital punishment as being a cruel and unusual act. The challenge was pre-empted by the amendment to the Constitution.

One of the most contentious provisions in the Constitution is section 16, which, together with section 16A, deals with the protection from deprivation of property. This provision has been amended on many occasions to make it easier for the government to acquire land. Even then, the amendments have not always brought about the desired result, and the Constitution now has a number of deficiencies in the wording of section 16 due to hastily drafted amendments.

There have been surprisingly few decisions of great note in relation to the expropriation provision. The Court has held that a compulsory national pension scheme did not constitute expropriation of property.⁷⁸ The Court followed the *Hewlett*⁷⁹ approach set in 1981. However, in the *Law Society* case the Court would have held that it constituted a breach of section 16 to require a conveyancer to retain funds from the purchase price for the purposes of capital gains tax.⁸⁰ However, by the time the decision was made, the law had been amended.

In *Commissioner of Taxes v CW*,⁸¹ the Court held that a statutory provision that exempted from capital gains tax those persons who had not objected to the compulsory acquisition of their shares, but taxed those who had objected, offended the Constitution because it unfairly discriminated against those who had exercised their constitutional right to challenge the acquisition of their shares.

⁷⁵ *Nkomo & Another v Attorney-General & Others* 1993 2 ZLR 422 (SC); 1994 3 SA 34 (ZS); *Woods & Others v Minister of Justice, Legal and Parliamentary Affairs & Others* 1993 2 ZLR 443 (SC).

⁷⁶ *S v Nkomo* 1989 3 ZLR 117 (SC).

⁷⁷ Sec 5 Constitution of Zimbabwe Amendment Act (No 11) 1990 (Act 30/90).

⁷⁸ *Nyambirai v National Social Security Authority & Another* 1995 2 ZLR 1 (SC); 1996 1 SA 636 (ZS); 1995 9 BCLR 1221 (ZS).

⁷⁹ *Hewlett v Minister of Finance & Another* 1981 ZLR 571 (SC); 1982 1 SA 490 (ZS).

⁸⁰ *Law Society of Zimbabwe & Others v Minister of Finance (Attorney-General Intervening)* 1999 2 ZLR 231 (SC).

⁸¹ 1989 3 ZLR 361 (SC); 1990 2 SA 245 (ZS).

A fine imposed on a civil servant as a disciplinary measure by the Public Service Commission does not constitute expropriation of his property.⁸²

In a major decision relating to the ongoing land acquisition exercise, the Court held that the law offended the Constitution,⁸³ but subsequently the reconstituted Court under Chief Justice Chidyausiku reversed this decision to hold that the exercise was in accordance with the Constitution.⁸⁴

Section 17 protects persons against arbitrary search or entry. The right against arbitrary search or entry was considered by the Supreme Court in *MDC v Commissioner of Police*.⁸⁵ The Court maintained the position that before there could be a valid search, there had to be reasonable suspicion that the search was needed for the detection of crime.

The protection of the law, equality before the law and the basic requirements for fair criminal and civil trials are set out in section 18. This provision of the Constitution has attracted a great deal of litigation.

The Court has recognised that it is of fundamental importance to a democratic society that every person has the protection of the law, and the equal application of the law. In *Chavanduka & Another v Commissioner of Police & Another*,⁸⁶ Gubbay CJ said:⁸⁷

The entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Constitution, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator (provided the investigation so warrants) and the bringing of him or her to trial before a court of competent jurisdiction . . . [M]embers of the Police Force may not refuse to perform a duty imposed upon them by the law of the land.

The right to a fair hearing was underscored in *Smyth v Ushewokunze & Another*,⁸⁸ where it was held that if the prosecutor is not independent and impartial, then no fair trial can take place.

Several cases have emphasised the right of accused persons to call witnesses, subject to their evidence being material and favourable to the defence, and not unnecessarily prolonging the trial.⁸⁹

⁸² *Chairman, Public Service Commission & Another v Hall* 1992 2 ZLR 271 (SC).

⁸³ *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

⁸⁴ *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported).

⁸⁵ 2001 1 ZLR 8 (SC).

⁸⁶ 2000 1 ZLR 418 (SC).

⁸⁷ At 421–422.

⁸⁸ 1997 2 ZLR 544 (SC); 1998 3 SA 1125 (ZS); 1998 2 BCLR 170 (ZS).

⁸⁹ *Eg S v Beahan* 1989 2 ZLR 20 (SC); 1990 3 SA 18 (ZS).

The right to legal representation has been recognised,⁹⁰ and in one case, the Supreme Court rightly held that for an accused person to have a defence lawyer from the Attorney-General's office did not guarantee him a fair trial.⁹¹ The Supreme Court also considered the right of an unrepresented accused facing a mandatory minimum sentence for poaching to have legal representation. The Court held that section 18 of the Constitution might be infringed if an accused is unrepresented at his trial, but declined to go so far as to lay down a rule that every such accused person was entitled to legal aid.⁹²

Where additional charges were brought against an accused shortly before the trial was due to commence, the Supreme Court held that it was a breach of the right to a fair trial not to give the defence adequate time to prepare.⁹³

The Supreme Court has on several occasions examined the question of whether the delay in bringing a criminal matter to trial is a breach of the fundamental rights of an accused person.⁹⁴ The Court has adopted the American approach⁹⁵ that it is necessary to show:

- the length of the delay, which is treated as a trigger mechanism;
- the reason the government assigns to the delay;
- the accused's responsibility to assert his rights; and
- any prejudice to the defence.

Delay can amount to a contravention of section 18(2) of the Constitution. However, the Court has also held that a delay by a magistrate in handing down a judgment did not of itself infringe the Constitution, since other administrative remedies were available to the accused.⁹⁶ The Court has held that the time can only be calculated from the moment when the accused is formally charged, and not simply from when investigations commence.⁹⁷

The criminal procedure law in Zimbabwe recognises the right of an accused person not to give evidence. However, if he declines to give evidence he can still be questioned by the court and by the prosecutor, and an adverse inference can be drawn from his failure to answer those

⁹⁰ *S v Chaerera* 1988 2 ZLR 226 (SC); *S v Mushayandebvu* 1992 2 ZLR 62 (SC).

⁹¹ *S v Marutsi* 1990 2 ZLR 370 (SC).

⁹² *S v Chaerera* 1988 2 ZLR 226 (SC).

⁹³ *Wheeler & Others v Attorney-General* 1998 2 ZLR 305 (SC).

⁹⁴ *Fikilini v Attorney-General* 1990 1 ZLR 105 (SC); *In re Mlambo* 1991 2 ZLR 339 (SC); 1992 4 SA 144; 1992 2 SACR 245 (ZS); *Mlauzi v Attorney-General* 1992 1 ZLR 260 (SC); 1993 1 SA 207 (ZS); *In re Masendeke* 1992 2 ZLR 5 (SC); *S v Bourne* 1997 1 ZLR 514 (SC).

⁹⁵ *Barker v Wingo* 407 US 514 (1972).

⁹⁶ *S v Morrisby* 1995 2 ZLR 270 (SC).

⁹⁷ *Shumba v Attorney-General* 1997 1 ZLR 589 (SC).

questions. This procedure was held to be permitted in terms of the Constitution.⁹⁸

The right against self-incrimination in section 18(8) of the Constitution led to two decisions of the Supreme Court. The Court held that the constitutional right against self-incrimination was not violated by a requirement under exchange control laws to produce information to the exchange control authorities.⁹⁹ In another case, the Supreme Court held that the reverse onus imposed on the accused by statute was not prohibited by the Constitution.¹⁰⁰

In the field of civil litigation, the Court has held that the right to a fair hearing is both a constitutional right and a common law right. This right therefore applied where a minister sought to suspend the executive of a private voluntary organisation without giving any form of hearing¹⁰¹ and applied to disciplinary hearings both within the public service and at the university.¹⁰²

Another aspect of the right to a fair hearing was considered in *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd*¹⁰³ in which it was held that a private company had a constitutional right to be represented in court by its alter ego, and did not have to engage the services of a legal practitioner.

The question of a right to a fair hearing so far as parliament was concerned was dealt with in *Mutasa v Makombe*.¹⁰⁴ The Court held that the power of parliament to punish persons for contempt was a *sui generis* power, and therefore not subject to section 18(9) of the Constitution.

Freedom of conscience is provided for in section 19, and includes freedom of religion and freedom to establish and maintain schools. The Supreme Court had to consider the question of freedom of conscience and belief in regard to Rastafarianism.¹⁰⁵ An aspiring lawyer had been refused admission on the grounds that his dreadlocks made him unkempt, and he appealed that decision. Two members of the Supreme Court held that Rastafarianism was a religion, whilst the other held that it was a genuine philosophical and cultural belief, but all agreed that it was protected by section 19 of the Constitution. The Supreme Court

⁹⁸ *S v Mukungatu* 1998 2 ZLR 244 (SC).

⁹⁹ *Poli v Minister of Finance and Economic Development & Another* 1987 2 ZLR 302 (SC); 1990 1 SA 598 (ZS).

¹⁰⁰ *S v Chogugudza* 1996 1 ZLR 28 (SC).

¹⁰¹ *Holland & Others v Minister of the Public Service, Labour and Social Welfare* 1997 1 ZLR 186 (SC); 1998 1 SA 389 (ZS); 1997 6 BCLR 809 (ZS).

¹⁰² *Jiah & Others v Public Service Commission & Another* 1999 1 ZLR 17 (SC); *Vice-Chancellor, University of Zimbabwe & Another v Mutasah & Another* 1993 1 ZLR 162 (SC).

¹⁰³ 1999 2 ZLR 36 (SC); 1999 4 SA 1119 (ZS).

¹⁰⁴ 1997 1 ZLR 330 (SC); 1998 1 SA 397 (ZS); 1997 6 BCLR 841 (ZS).

¹⁰⁵ *In re Chikweche* 1995 1 ZLR 235 (SC).

accordingly ordered his admission as a legal practitioner. He later became a member of parliament for the MDC opposition, but has since been expelled from that party and his seat is vacant.

The right to freedom of expression in section 20 of the Constitution has been emphasised by the Supreme Court in a series of cases to be one of the most fundamentally important rights. The Court said:¹⁰⁶

The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man'.

The Court has held that it has four broad special purposes, namely:¹⁰⁷

- It helps an individual to attain self-fulfilment.
- It assists in the discovery of the truth.
- It strengthens the capacity of an individual to participate in decision making.
- It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

Freedom of expression has led to decisions allowing prisoners to write and receive letters,¹⁰⁸ requiring the setting up of a private mobile telephone service¹⁰⁹ and banning the monopoly on state broadcasting.¹¹⁰

The Court used this provision to set aside legislation which dealt with the public funding of political parties on the basis that the way in which the law applied the funds was unfair, and required parliament to enact a fairer law.¹¹¹

Freedom of assembly and association is guaranteed by section 21 of the Constitution. The Supreme Court recognised the right of persons to assemble for the purposes of a procession in the case of *In re Munhumeso*.¹¹² The law prohibiting such processions was declared unconstitutional. In the *CFU* case¹¹³ it was held to be contrary to section 21 to force farmers and farm workers to attend political meetings.

¹⁰⁶ *In re Munhumeso & Others* 1994 1 ZLR 49 (SC) 56; 1995 1 SA 551 (ZS) 557.

¹⁰⁷ *Retrofit (Pvt) Ltd v PTC & Another* 1995 2 ZLR 199 (SC) 212–213.

¹⁰⁸ *Woods & Others v Min of Justice & Others* 1994 2 ZLR 195 (SC); 1995 1 SA 703 (ZS); 1995 1 BCLR 56 (ZS).

¹⁰⁹ *Retrofit (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1995 2 ZLR 422 (SC); *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Another* 1995 2 ZLR 199 (SC); 1996 1 SA 847 (ZS); 1995 9 BCLR 1262 (ZS); *T S Masiyiwa Holdings (Pvt) Ltd & Another v Minister of Information* 1996 2 ZLR 754 (SC); 1998 2 SA 755 (ZS); 1997 2 BCLR 275 (ZS).

¹¹⁰ *Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 2 ZLR 243 (SC).

¹¹¹ *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 2 ZLR 254 (SC); 1998 3 SA 85 (ZS).

¹¹² *In re Munhumeso & Others* 1994 1 ZLR 49 (SC); 1995 1 SA 551 (ZS); 1995 2 BCLR 125 (ZS).

¹¹³ *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

Freedom of movement, including the right to reside in any part of Zimbabwe, and the right to enter and leave Zimbabwe, together with immunity from expulsion, is guaranteed by section 22 of the Constitution, but subject to many exceptions.

The obligation to carry a national identity card and the right of any police officer to stop and arrest a person not carrying such a card were held to be unconstitutional in the *Elliott* case.¹¹⁴ In another case, a passport was held to be an essential element of the right of freedom of movement.¹¹⁵

The right of freedom of movement and the right to reside in Zimbabwe have also fallen to be decided in relation to marriages between a citizen and a non-citizen. In a series of judgments, the Supreme Court held that the citizen spouse has a constitutional right to have his or her spouse reside with him and for that spouse to earn a living.¹¹⁶ However, that right does not extend where the non-citizen spouse has been declared to be a prohibited person.¹¹⁷

In an attempt by a non-citizen mother to remain in Zimbabwe, she claimed that her child had been born in Zimbabwe and therefore the child had a right for his mother to remain with him in Zimbabwe. The Supreme Court rejected this contention as the mother was seeking to promote her own interests under the guise of seeking to enforce the rights of the child, but since the child was under seven years of age, the child could not independently assert its rights.¹¹⁸

Section 23 of the Constitution gives protection from discrimination. It does not prohibit discrimination in general terms, but only discrimination that arises from the provisions of a law or from the application of a law.

I have already mentioned that the Supreme Court found in *Commissioner of Taxes v CW*¹¹⁹ that it was discriminatory to charge capital gains tax against persons who had challenged the acquisition of their shares, but to exempt from capital gains tax those who did not challenge the actions of the government. The decision was not founded on section 23, but it was a clear discrimination case.

¹¹⁴ *Elliott v Commissioner of Police* 1997 1 ZLR 315 (SC); 1998 1 SA 21 (ZS); 1997 5 BCLR 670 (ZS).

¹¹⁵ *Martin v Attorney-General & Another* 1993 1 ZLR 153 (SC).

¹¹⁶ *Rattigan & Others v Chief Immigration Officer & Others* 1994 2 ZLR 54 (SC); 1995 2 SA 182 (ZS); 1995 1 BCLR 1 (ZS); *Salem v Chief Immigration Officer & Another* 1994 2 ZLR 287 (SC); 1995 4 SA 280 (ZS); 1995 1 BCLR 78 (ZS); *Kohlhass v Chief Immigration Officer & Another* 1997 2 ZLR 441 (SC); 1998 3 SA 1142 (ZS); 1998 6 BCLR 757 (ZS); *Hambly v Chief Immigration Officer (3)* 1998 2 ZLR 285 (SC).

¹¹⁷ *Kenderjian v Chief Immigration Officer* 2000 1 ZLR 697 (SC); *Edwards v Chief Immigration Officer* 2000 1 ZLR 485 (SC).

¹¹⁸ *Ruwodo NO v Minister of Home Affairs & Others* 1995 1 ZLR 227 (SC); 1995 7 BCLR 903 (ZS).

¹¹⁹ *Commissioner of Taxes v CW (Pvt) Ltd* 1989 3 ZLR 361 (SC); 1990 2 SA 245 (ZS).

*S v Banana*¹²⁰ concerned the constitutionality of the crime of sodomy which penalises consensual acts of sodomy. The majority of the Court held that the crime of sodomy did not contravene any constitutional right. Gubbay CJ and Ebrahim JA dissented. In their view, because certain sexual acts, including sodomy, between consenting males and females did not invite a criminal sanction, similar consensual acts between two males should not be subject to a criminal prohibition. The distinction was one based solely on gender, and was accordingly unconstitutional.

Section 24 of the Constitution sets out provisions for the enforcement of the Declaration of Rights, and these I have already dealt with.

Section 25 deals with savings that can be made in the case of public emergencies, and in particular refers to Schedule 2, as to the provisions of the Declaration of Rights that can be derogated from during a state of emergency. The Court has jealously restricted those provisions to ensure that only the stipulated provisions can be impinged during an emergency.

The final provision of the Declaration of Rights is section 26, which defines certain terms, and sets out various savings.

It is not possible to discuss all the cases that were decided whilst Chief Justices Dumbutshena and Gubbay presided over the Supreme Court. An examination of the law reports will reveal that in almost every field of human rights specified in the Declaration of Rights decisions were made, and that the vast majority favoured the citizen.

It is also worth noting that in other cases involving the Constitution, the Supreme Court favoured the application of rights of fairness to matters, even if they did not fall within the Declaration of Rights.¹²¹ In the *Rushwaya* case,¹²² the Court held that the High Court could review advice given to the President in relation to the appointment of a chief, notwithstanding a provision in the Constitution that mandated the President to act on the advice of the Cabinet, which advice could not be inquired into by any court. Where legislation relating to an election was not referred to the Electoral Supervisory Commission, but only to the Chairperson of the Commission, the Supreme Court held that legislation to be invalid.¹²³

Zimbabwe as a nation can be proud of the reputation that its Supreme Court achieved in this period throughout the Commonwealth. Judgments of the Court are regularly referred to in South Africa, and other countries, including by the Privy Council.¹²⁴

¹²⁰ 2000 1 ZLR 607 (SC); 2000 3 SA 885 (ZS).

¹²¹ See eg *Patriotic Front — Zimbabwe African Peoples' Union v Minister of Justice, Legal and Parliamentary Affairs* 1985 1 ZLR 305 (SC); 1986 1 SA 532 (ZS).

¹²² *Rushwaya v Minister of Local Government and Town Planning & Another* 1987 1 ZLR 15 (SC).

¹²³ *Zimbabwe Unity Movement v Mudede NO & Another* 1989 3 ZLR 62 (SC).

¹²⁴ See *Pratt v Attorney-General for Jamaica & Another* (1993) 4 All ER 769 (PC).

In a recent article, Mubangizi,¹²⁵ having analysed judgments of the Supreme Court on the issue of the rights of prisoners, said this of constitutional rights in Zimbabwe:

The decisions illustrate the approach taken by the Supreme Court of Zimbabwe in interpreting the constitutional rights of prisoners in that country. It can be said that the interpretation has been hampered by the various limitations imposed by the Constitution on the various rights. Although the courts upheld and protected the fundamental rights of prisoners, even sometimes applying international law, the limitations imposed by the Constitution ensure that such rights can be guaranteed only to a certain extent.

I believe that this statement applies to all human rights in Zimbabwe. Some of the greatest difficulties encountered in litigating human rights in Zimbabwe are the various limitations imposed by the Constitution itself. This, together with the onus placed on the person asserting a breach of the Declaration of Rights, makes it a real challenge to foster a true culture of human rights, and makes much greater the difficulties in litigation to persuade a court to find in favour of the existence of a fundamental human right.

4 The present: Human rights litigation after 2001

So what of the present? There can be no doubt that the present composition of the Supreme Court bodes ill for human rights in Zimbabwe. The impression created by the government propaganda machine is that human rights litigation is an anti-government activity, and that those who engage in it, whether as litigants or as lawyers, are disloyal to the country.

I am only aware of one decision, *S v Tsvangirai*, in which the Supreme Court has held, whilst Chidyausiku CJ was sitting, that the constitutional rights of a citizen have been infringed. In the case of *Biti & Another v Minister of Justice, Legal and Parliamentary Affairs & Another*,¹²⁶ the General Laws Amendment Act 2002 (Act 2/2002) was declared to be unconstitutional, as having not been properly enacted in terms of the Constitution. This was a majority decision. The dissenting judge, who was one of the new appointees to the Supreme Court, held the law valid on a basis that had never been suggested on behalf of the state during argument. Chidyausiku CJ was not one of the judges who sat on that occasion.

¹²⁵ J Mubangizi 'The constitutional rights of prisoners in selected African countries: A comparative review' (2002) 35 *Comparative and International Law Journal of Southern Africa* 269 275.

¹²⁶ SC 10/2002 (not yet reported).

The *Tsvangirai* and *Biti* cases just mentioned are the only two Supreme Court judgments given since mid-2001 in which the citizen prevailed. *Stevenson v Minister of Local Government*¹²⁷ was a case on appeal from the High Court, and not strictly a constitutional case. Here the Supreme Court, by a majority, found in favour of Mrs Stevenson relating to the delay in holding elections. Again, Chidyausiku CJ was not a member of that Court.

In a case involving the rights of a pregnant student, the Supreme Court held that this was discrimination, but not discrimination prohibited by the Constitution. Fortunately, the Court found on common law grounds that the provision in the contract allowing the expulsion was *contra bonos mores* and set aside the expulsion.¹²⁸

Towards the end of 2002, the rights of persons to associate in a trade union was the subject of the decision in *Ngulube v ZESA*.¹²⁹ In that matter, Chidyausiku CJ held that a managerial employee had failed to show that any constitutional right of his had been infringed by a law that prevented him from being a member of a trade union.

The attitude of the Supreme Court can best be seen in a statement made by the present Chief Justice when an application was made for him to recuse himself and to reconstitute the Supreme Court to afford a fairer hearing to the Commercial Farmers Union. The application for the recusal of the Chief Justice and the reconstitution of the Court was refused, and the Chief Justice said of the application:¹³⁰

The unbridled arrogance and insolence with which the application for the reconstitution of this Court was made in this case is simply astounding and, to say the least, unacceptable. This is the first and the last time when such contempt of this Court will go unpunished. Legal practitioners are reminded that this Court has an inherent disciplinary power over legal practitioners as officers of this Court in matters of misconduct or unprofessional conduct — see *De Villiers and Another v McIntyre NO* 1921 AD at 435. This Court will in future deal with contempt of this Court firmly and decisively. The only reason why stern action was not taken *in casu* is that this case is of extreme national importance and distraction from the main issue was to be avoided at all costs.

As a trial lawyer, I have great difficulty in accepting that it is arrogant or insolent to do one's best to get a fair hearing for one's clients. Counsel do not personally identify themselves with the case of their clients, and are there merely to represent the rights and interests of their clients. I fear that this distinction is not understood.

¹²⁷ SC 38/2002 (not yet reported).

¹²⁸ *Chaduka NO & Another v Mandizvidza* SC 114/2001 (not yet reported).

¹²⁹ *Ngulube v Zimbabwe Electricity Supply Authority & Another* SC 52/2002 (not yet reported).

¹³⁰ *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported) at 6–7 of the cyclostyled judgment.

The Chief Justice echoed the same sentiments when he opened the legal year in the High Court at Harare on 13 January 2003. He warned certain unnamed lawyers that, whilst reasoned criticism of the courts would be tolerated, behaviour that went beyond that would be punished. This was undoubtedly an attempt to cower lawyers whose views do not coincide with those of certain judges.

The approach to human rights by the present Court can best be demonstrated by two of its decisions. In the first major judgment of that Court concerning the land invasions, the issue was decided against the Commercial Farmers Union. The Union had brought the original application to set aside the land acquisition exercise on the basis that it was unconstitutional.¹³¹ The former Supreme Court agreed with the farmers. The new Court acceded to an application by the Minister of Lands, Agriculture and Rural Resettlement to set aside the earlier order.¹³² The Court granted the relief sought by the Minister on the basis of a law which did not exist when the matter was argued, and without giving any opportunity to make submissions on the application or validity of that law.¹³³ The Court disregarded the statement of Dumbutshena AJA (the former Chief Justice of Zimbabwe), with whom the Chief Justice of Namibia concurred, in *Kauesa v Minister of Home Affairs & Others*,¹³⁴ where he said:¹³⁵

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the judge's point. It is undesirable for a court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.

The other case is that of *Tsvangirai v Registrar General*,¹³⁶ in which the Court raised for the first time during the oral hearing a particular interpretation of the legislation, which was not the case made by either of the parties. Senior counsel who appeared for the appellant then placed supplementary heads of argument before the Supreme Court, drawing attention to the principle that it is not for the Court to take points which have not been raised by any of the parties, and dealing with

¹³¹ See *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

¹³² *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported).

¹³³ *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported).

¹³⁴ 1996 4 SA 965 (NmS); 1995 11 BCLR 1540 (NmS).

¹³⁵ At 973–974 (SA); 1545 (BCLR).

¹³⁶ *Tsvangirai & Others v Registrar-General of Elections* SC 93/2002 (not yet reported).

the merits of the matter.¹³⁷ In giving its judgment, the Supreme Court considered this to be an 'unusual development' and expressed 'our extreme displeasure at this attempt to influence our determination of this appeal'. The Court refused to have any regard to the supplementary heads of argument.¹³⁸ Obviously, the arguments raised in them on behalf of the appellant formed no part of the reasoning in the judgment, which dismissed his appeal.

The other problem that has been encountered with the Supreme Court at present is the extremely long period between the hearing of a matter and the giving of judgment. In the time of Chief Justice Gubbay, judgments were usually given within a very short time. For example, in the *Catholic Commission* case,¹³⁹ dealing with delays in carrying out sentences of death, where the judgment traverses the law in many other countries, the delay between the close of argument and the giving of judgment was 34 days. In the two judgments relating to whipping, the judgment pertaining to adult whipping¹⁴⁰ was given just over two months after argument, and the one relating to juvenile whipping,¹⁴¹ which judgment had two dissenting judgments and three separate concurring judgments, was given just three months after argument.

At present that is not the position. A constitutional application concerning the right of private broadcasters was not only delayed until after the presidential elections before being set down for argument, but eight months have passed since argument took place and there is no sign of a judgment. Whatever the explanation for the delays, they are perceived to be a deliberate attempt to avoid making findings against the government on issues relating to human rights.

5 The future: Prospects of human rights litigation in Zimbabwe

The future is very difficult to predict. The Minister of Justice had publicly stated that 'any country that goes through a revolution should ensure that all tenets of governance like the judiciary reflect the country's norms, values and culture in composition and structure'.¹⁴² The Minister has often expressed the view that the courts must reflect the philosophy and policies of the elected government. The Minister sees any criticism

¹³⁷ See *Director of Hospital Services v Mistry* 1979 1 SA 626 (A) 635F-H.

¹³⁸ *Per* Gwaunza JA at 3-4 of the cyclostyled judgment.

¹³⁹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

¹⁴⁰ *S v Ncube & Others* 1987 2 ZLR 246 (SC); 1988 2 SA 702 (ZS).

¹⁴¹ *S v A Juvenile* 1989 2 ZLR 61 (SC); 1990 4 SA 151 (ZS).

¹⁴² *The Herald* 20 February 2003.

of the executive by the judges to be political, and therefore brands those judges for removal.

Recently a retired judge was arrested and charged with corruption, and a serving judge was arrested in his chambers at the High Court, detained in most inhuman circumstances, and also placed on remand on bail for alleged corruption. This judge, Justice Paradza, has now brought a constitutional application to the Supreme Court, challenging the way in which he was arrested and treated, and making specific allegations about the conduct of the Chief Justice and the Judge President.

The absence of any criticism of the way in which Judge Paradza was treated by the Chief Justice and the Judge President has been most unfortunate. Ten High Court judges issued a public statement deploring the arrest and treatment of Justice Paradza. On the other hand, the fact that eight other judges of the High Court did not join in that public statement is a cause for concern, and shows division in the High Court.

The future of the judiciary in Zimbabwe is intertwined with the future of the government of Zimbabwe. Should a democratically elected government take power in Zimbabwe, I have little doubt that two things will happen with the judiciary. Judges who are known to be supporters of the present government, and who have failed their judicial oath by serving the present government and the ruling party, will be removed from office in terms of the Constitution, if they do not resign. Many other judges will welcome the changed atmosphere in Zimbabwe when they can conduct their duties in terms of their judicial oath without fear of reprisals from the government. It is those judges who will lead the judiciary of the future in Zimbabwe, and it is those judges who will publicly pronounce in favour of the citizen to uphold the concept of human rights in Zimbabwe whenever the Constitution and law permits.

It is worth noting again that generally the legal profession in Zimbabwe is wholly committed to the concept of human rights, and to upholding those rights as against the state. Many of those lawyers will become the future judges of Zimbabwe, and Zimbabwe will be well served by them. I want to also recognise the brave work done by magistrates in Zimbabwe, who on a daily basis apply the decisions and the approach of the Supreme Court in human rights matters, even where the government clearly opposes what the magistrates are doing.

Human rights litigation in Zimbabwe is at present going through a difficult and unfortunate phase, but I firmly believe that the future of human rights litigation is assured, and that Zimbabwe will again take its place as one of those countries in which human rights are respected, and in which the judiciary upholds human rights for the benefit of the country and the region as a whole.

The Pan-African Parliament of the African Union: An overview

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Summary

This article discusses the future Pan-African Parliament, one of the organs of the AU provided for under its Constitutive Act. The OAU adopted the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament in March 2001. Its purpose is to ensure the full participation of African peoples in the development and economic integration of the continent. So far only 15 states have ratified the Protocol; 24 out of 47 AEC member states must ratify the Protocol before it can enter into force. The Parliament, consisting of members elected or designated by national parliaments, will have an advisory function in the 'first stage'. It will later also have legislative power, which will be needed if the Parliament is to provide a credible democratic foundation for the AU.

1 Introduction

The African Economic Community (AEC),¹ established by the Organization of African Unity (OAU), *inter alia* to promote economic

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¹ The AEC Treaty, otherwise known as the Treaty of Abuja, was adopted on 3 June 1991, and entered into force on 12 May 1994. Reproduced in (1991) 30 *International Legal Materials* 1241; GJ Naldi (ed) *Documents of the Organization of African Unity* (1992) 203. See GJ Naldi & KD Magliveras 'The African Economic Community: Emancipation for African states or yet another glorious failure?' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 601.

development and the integration of African economies,² envisaged the establishment of a Pan-African Parliament as one of its organs.³ The stated reason was to ensure the participation of the peoples of Africa in the running of the AEC.⁴ The details were to be defined in a protocol at a future date.⁵ However, no material progress was made until the OAU Assembly, meeting at its 4th extraordinary session in Sirte, Libya in September 1999 (adopting the Sirte Declaration), created the African Union (AU)⁶ to replace the OAU and called for the speedy establishment of the institutions provided for in the AEC Treaty. According to article 5(1)(c) of the Constitutive Act of the AU, the Pan-African Parliament is one of the organs of the AU, which is established by virtue of article 17 thereof.

The Constitutive Act fails to address the composition, powers, functions and organisation of the Pan-African Parliament, again leaving the details to a future protocol. These have since been set out in the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted by the 5th extraordinary OAU Assembly session in Sirte on 2 March 2001.⁷ Although the relationship between the Pan-African Parliament of the AEC and that of the AU is mentioned but briefly in the Constitutive Act,⁸ the Sirte Declaration envisaged the establishment of the AU in conformity with the objectives of the OAU and the AEC. It was accepted that a single parliament would ultimately serve both the AEC and the AU, with indisputable advantages in terms of cost and expediency. The implementing Protocol, which was drafted in the context of the AEC, was amended to incorporate the necessary changes in order to become additionally an AU organ.⁹

² Art 4(1)(a) AEC Treaty.

³ Art 7(1)(c) AEC Treaty.

⁴ Art 14(1) AEC Treaty.

⁵ Art 14(2) AEC Treaty.

⁶ OAU Doc EHAG/Dec 1(IV). The Constitutive Act of the African Union was adopted by the 36th ordinary session of the OAU Assembly on 11 July 2000; CAB/LEG/23.15, reproduced in (2000) 8 *African Yearbook of International Law* 479; available at <<http://www.africa-union.org>> (accessed 31 July 2003). It entered into force on 26 May 2001. The AU effectively replaced the OAU as from 9 July 2002. See further art 33(1) of the Constitutive Act. The AU seeks to deal comprehensively with the political, social and economic integration of the continent. See KD Magliveras & GJ Naldi 'The African Union — A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415.

⁷ OAU Doc EHAG/Dec 2(V). Available at <<http://www.dfa.gov.za/for-relations/multilateral/treaties/pap.htm>> (accessed 31 July 2003). The Protocol is not yet in force; discussed in more detail in para 5.1 below.

⁸ It should be observed that according to art 33(2) of the Constitutive Act, the provisions of the Constitutive Act prevail over any inconsistent or contrary provisions of the AEC Treaty.

⁹ This is made clear by art 3(1) of the Protocol. Note that art 99 of the AEC Treaty stipulates that this Treaty and the Protocols 'shall form an integral part of the OAU Charter'. It should be observed that the Protocol is one of the many OAU Treaties that have devolved to the AU.

2 Objectives, functions and powers

The purpose of the Pan-African Parliament is to ensure the full participation of African peoples in the development and economic integration of the continent.¹⁰ The expectation is that the Pan-African Parliament will provide a common platform for African peoples and grass-roots organisations to become more involved in discussions and decision-making on the problems and challenges facing Africa.¹¹ Its objectives include facilitating the implementation of the policies of the AU/AEC, promoting human rights and democracy, encouraging good governance, transparency and accountability in member states, promoting peace, security and stability, promoting economic recovery, facilitating co-operation among regional economic communities, and facilitating co-operation and stability in Africa.¹² To this end, the Pan-African Parliament has the power to discuss and make recommendations on issues relating to human rights, democracy and good governance, to harmonise the laws of member states, make recommendations contributing to the objectives of the AU/AEC, promote the AU/AEC in the member states, and to harmonise the policies and programmes of regional economic communities.¹³ The Pan-African Parliament exercises some democratic accountability over the AEC, not only by discussing the budget and making recommendations thereon,¹⁴ but also by drawing up the budget.¹⁵ In addition, it can question AU/AEC officials.¹⁶ The Pan-African Parliament may also perform such other functions as it deems appropriate to achieve its objectives.¹⁷ This is of enormous potential significance since, if used boldly, the Pan-African Parliament will be able to assume and exercise considerable powers.¹⁸

¹⁰ Art 17(2) of the Constitutive Act. It should additionally be noted that, according to art 4(c) of the Constitutive Act, one of the AU's founding principles is the 'participation of the African peoples in the activities of the Union'.

¹¹ Preamble para 4 of the Protocol.

¹² Art 3 Protocol.

¹³ Art 11 Protocol.

¹⁴ Art 11(2) Protocol.

¹⁵ Art 15(2) Protocol. This provision implies that the Pan-African Parliament will have the power to approve the budget, currently held by the Assembly, once it accrues legislative powers.

¹⁶ Art 11(5) Protocol.

¹⁷ Art 11(9) Protocol. Under art 12(13) thereof, the Pan-African Parliament may establish such committees as it deems necessary.

¹⁸ It should be noted, however, that if the Pan-African Parliament were to misuse its powers, then any member state or the Assembly could bring an action before the Court of Justice on grounds of lack of competence or abuse of powers under art 18(3)(a) of the AEC Treaty. Additionally, an action could be brought against the Pan-African Parliament before the Court of Justice of the African Union under art 19(1)(d) of the Protocol of the Court of Justice of the African Union.

The powers of the Pan-African Parliament have been enhanced by the Protocol of the Court of Justice of the African Union,¹⁹ adopted by the AU Assembly in Maputo in July 2003.²⁰ Under article 18(1)(b) thereof, the Pan-African Parliament is entitled to submit cases to the Court relating to, for example, the interpretation and application of the Constitutive Act, the interpretation, application and validity of all Union treaties, and acts, decisions, regulations and directives of Union organs.²¹

The Pan-African Parliament will not have legislative powers initially, but shall instead have consultative and advisory powers only.²² However, it is envisaged that it will evolve full legislative powers.²³ Although the staggered achievement of this objective appears dictated by considerations of pragmatism given the state of democracy in many African countries, its fulfillment nevertheless seems imperative, as the Pan-African Parliament confers democratic legitimacy to the AU project. Responsibility for the achievement of this end lies with the AEC, although the Protocol is not a model of clarity on this point. According to article 2(3), the onus appears to lie with the member states, since it provides that the Pan-African Parliament shall have consultative and advisory powers 'until such time as the member states [of the AEC] decide otherwise by an amendment to this Protocol'. However, according to article 11, the Pan-African Parliament 'shall be vested with legislative powers to be defined by the Assembly [of the AEC]'. It should be observed that, although it is true that the Assembly is composed of the member states, not all member states are at the same time contracting parties to the Protocol.

3 Composition

The Pan-African Parliament, which represents the peoples of Africa,²⁴ will be composed of five members per member state, at least one of whom must be a woman.²⁵ They shall either be elected or designated by national legislatures, that is national parliaments or other deliberative bodies, from among their members.²⁶ Holders of executive or judicial

¹⁹ AU Min/Draft/Prot/ACJ/2 (I).

²⁰ AU Assembly/AU/Dec 25 (II), not yet in force.

²¹ Art 19(1) Protocol of the Court of Justice of the African Union.

²² Arts 2(3)(i) & 11 Protocol.

²³ Arts 2(3) & 11 Protocol. The precise time scope is unclear, although art 11 does specify that its advisory powers are limited to its first term (probably five years), which is to be determined once the Parliament is in session.

²⁴ Art 2(2) Protocol.

²⁵ Art 4(2) Protocol. This reflects the AU's commitment to adequate gender representation; see art 4(l) of the Constitutive Act.

²⁶ Art 5(1) Protocol. No uniform procedure is envisaged. According to art 5(2), the term of a member of the Pan-African Parliament shall run concurrently with his or her term of office in the national legislature.

posts in a member state are specifically excluded from membership of the Pan-African Parliament.²⁷ It is ultimately envisaged that the Pan-African Parliament will be elected by universal adult suffrage,²⁸ but there is no guarantee that the Pan-African Parliament will evolve into a fully democratically elected body.²⁹ This calls into question the AU's own stated commitment to democracy, popular participation and good governance, enshrined in articles 3(g) and (h) of the Constitutive Act. Although the representation of each member state must reflect the diversity of political opinions in the national legislatures,³⁰ there appears to be no restraint on an autocrat manipulating the nomination process. Regrettably, Africa has witnessed too many elections that cannot be characterised as free and fair. Members will nevertheless vote in an independent capacity.³¹

The Protocol also makes provision for the vacancies of seats.³² These are through death,³³ resignation,³⁴ inability to perform one's duties for reasons of physical or mental incapacity,³⁵ removal on grounds of misconduct,³⁶ ceasing to be a member of the national legislature,³⁷ being recalled by the national legislature,³⁸ and withdrawal of the parliamentarian's member state from the AEC.³⁹ The filling of vacant seats is not addressed, but it should reasonably be expected that it would be covered in the Parliament's Rules of Procedure.

Parliamentarians enjoy immunity in the territories of the member states while exercising their functions in accordance with the General Convention on the Privileges and Immunities of the OAU and the Vienna Convention on Diplomatic Relations.⁴⁰ Parliamentarians shall therefore not be liable to civil or criminal proceedings, arrest, imprisonment or damages for anything said or done within or outside Parliament in the

²⁷ Art 7 Protocol.

²⁸ According to art 2(3) of the Protocol, the transition to universal suffrage is not automatic but will necessitate an amendment to the Protocol to this effect.

²⁹ Nevertheless, the European Court of Justice's *dictum* in Case 138/79 *Roquette Freres v Council* [1980] ECR 3333 para 33, that the 'fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly' appears to be met.

³⁰ Art 4(3) Protocol.

³¹ Art 6 Protocol.

³² Art 5(4) Protocol.

³³ Art 5(4)(a) Protocol.

³⁴ Art 5(4)(b) Protocol.

³⁵ Art 5(4)(c) Protocol.

³⁶ Art 5(4)(d) Protocol.

³⁷ Art 5(4)(e) Protocol.

³⁸ Art 5(4)(f) Protocol.

³⁹ Arts 5(4)(g) & 19 Protocol. On withdrawal, see further para 5.2 below.

⁴⁰ Art 8(1) Protocol.

discharge of their duties.⁴¹ However, immunity may be waived by the Pan-African Parliament in accordance with its Rules of Procedure.⁴²

The Pan-African Parliament shall meet in ordinary session at least twice a year⁴³ and in extraordinary session at the request of two-thirds of parliamentarians, the Assembly or the Council.⁴⁴ The quorum for a meeting is a simple majority.⁴⁵ Notwithstanding the fact that each parliamentarian has one vote, the general rule is that decisions shall be made by consensus.⁴⁶ Failing that, however, decisions are taken by a two-thirds majority of all the members present and voting.⁴⁷ The Pan-African Parliament reflects the position adopted by the AU, providing for a majority vote if consensus cannot be achieved.⁴⁸ Procedural matters are decided by a simple majority of those present and voting.⁴⁹ In the event of a tie, the presiding official has the casting vote.⁵⁰ The African commitment to consensus did not serve the OAU well, proving a recipe for inaction. It can only be hoped that the appropriate lessons will have been drawn from that experience.

4 The relationship between the Pan-African Parliament and the parliamentary organs of other African organisations

As has been mentioned, one of the objectives laid down in article 3 of the Protocol is to facilitate co-operation among the regional economic communities that are active on the African continent⁵¹ and their parliamentary fora. This objective is elaborated upon in article 18, which provides that the Pan-African Parliament shall work in close co-operation

⁴¹ Art 9(1) Protocol.

⁴² Arts 8(2) & 9(2) Protocol.

⁴³ Art 14(2) Protocol. These sessions may last a month. It should be noted that, according to art 16 of the Protocol, the Parliament may convene in the territory of any member state at its invitation.

⁴⁴ Art 14(3) Protocol.

⁴⁵ Art 12(11) Protocol.

⁴⁶ Art 12(12) Protocol.

⁴⁷ Unless stipulated to the contrary in the Rules of Procedure; art 12(12) Protocol.

⁴⁸ Art 7(1) Constitutive Act. It should be observed that the Rules of Procedure of the OAU provided for majority voting; see Rule 29 of the Council of Ministers and Rule 25 of the Assembly in Naldi (n 1 above) 23 and 29 respectively.

⁴⁹ Unless stipulated to the contrary in the Rules; art 12(12) Protocol.

⁵⁰ As above.

⁵¹ Note that the AEC envisages co-operation with regional economic communities. See eg arts 4(2)(a) & 6(2) of the AEC Treaty. Such co-operation was formalised by the Protocol on the Relationship between the African Economic Community and the Regional Economic Communities of 25 February 1998, reproduced in (1998) 10 *African Journal of International and Comparative Law* 157.

with the parliaments of the regional economic communities. It should be noted that the ambit of article 18 is considerably broader, as it envisages that the co-operation shall also cover national parliaments or other deliberative organs of member states. Currently, at supranational level, there are five parliamentary entities in Africa, four of which function in the context of regional economic communities: the East African Legislative Assembly operating within the East African Community (EAC),⁵² the Southern African Development Community (SADC) Parliamentary Forum,⁵³ the Economic Community of West African States (ECOWAS) Parliament,⁵⁴ and the Economic and Monetary Community of Central Africa (CEMAC) Parliament.⁵⁵ The fifth entity, the African Parliamentary Union (APU), is a continental interparliamentary organisation, which was set up in February 1976 and brings together 35 national parliaments.⁵⁶

The only qualification that the term 'close co-operation' has received in the Protocol is the possibility that the Parliament convene annual consultative meetings with the other entities to 'discuss matters of common interest'. To that extent, it would appear that the meetings will be among equal partners and that the Parliament will not assume a superior role. On the other hand, the scope of co-operation appears to be rather limited and it is doubtful whether in the long run any concrete results will come out of these meetings. The limited scope of co-operation envisaged is striking, considering that one of the Parliament's functions enumerated in article 11 is the promotion of the co-ordination and harmonisation of the regional economic communities' policies and activities.⁵⁷ Therefore, it could have been expected that the parliamentary organs of the regional economic

⁵² This organ, which commenced its operations on 30 November 2001 and convened its first session on 21 January 2002, is the continuation of the namesake organ, which was set up under art 56 of the Treaty for East African Co-Operation of 6 June 1967.

⁵³ Its Constitution was approved by the parliaments of the member states of SADC in May 1995 and it was launched in July 1996. The latest session met in November 2002.

⁵⁴ It was inaugurated in November 2000 and its last ordinary session was in May 2002.

⁵⁵ CEMAC was established in 1994. Its parliament has only a supervisory role.

⁵⁶ By virtue of Resolution 109/25/02 on the Establishment of the Pan-African Parliament, adopted at its 25th Conference on 24 October 2002, APU requested that the process of establishing the parliament be sped up in order to achieve the African integration objectives and to consolidate good governance and democracy.

⁵⁷ Note that pursuant to art 6(2)(f)(v) of the AEC Treaty, this harmonisation and co-ordination process was to be achieved during the Community's final (fifth) stage of establishment, which ought to be completed by 2034. However, the Cairo Agenda for Action, adopted by the OAU Assembly at its 31st ordinary session in June 1995 (OAU Doc AHG/Res 236(XXXI)), considered the achievement of regional economic integration a top priority. See further the Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities 1998 (n 51 above).

communities would have been invited to participate, at least as observers, at the Parliament's sessions discussing issues affecting them. However, there would appear to be no obstacle for the Parliament to increase their involvement in its operations.

5 Legal issues surrounding the Protocol

5.1 Signature, ratification and entry into force of the Protocol

Pursuant to article 21, the Protocol is open for signature by the member states of the AEC, which must ratify it in accordance with their respective constitutional provisions. The instruments of ratification are to be deposited with the Secretary-General of the AU. By mid-March 2002, 31 member states had signed the Protocol and only three had ratified it, while by November 2002 nine member states had ratified it. Currently, it has been signed by 34 member states and 15 countries have deposited their instruments of ratification.⁵⁸ Considering that article 22 stipulates that its entry into force requires ratification by a simple majority of the AEC membership,⁵⁹ currently numbering 47 states, it follows that 24 instruments of ratification must be deposited before the Protocol enters into force. Naturally, one cannot predict how soon the Protocol will enter into force. However, the fact that only 15 instruments of ratification have been deposited in the two years that have elapsed since its adoption is anything but encouraging.⁶⁰

Once the Protocol enters into force and the Pan-African Parliament commences its deliberations, it does not mean that all member states of the AEC will be represented in it, pursuant to article 4(1), but only those that have already ratified the Protocol. The drafters could have opted for the Protocol to enter into force when all member states had ratified it.⁶¹ This would have ensured that all member states would have been represented from its first session. Probably driven by considerations of pragmatism, the drafters chose a simple majority, which, however, means that only half the membership will be initially represented in the Parliament. Considering that, as has already been mentioned, the

⁵⁸ Namely Botswana, Ethiopia, Lesotho, Libya, Malawi, Mali, Mozambique, Namibia, Rwanda, Sahrawi Arab Democratic Republic, Seychelles, South Africa, Sudan, Tanzania and Togo. See *Report of the Interim Chairperson of the Commission on the Status of AU Treaties*, AU Doc EX/CL/14 (II) (3 March 2003).

⁵⁹ By way of comparison, note that art 101 of the AEC Treaty required a two-thirds majority for its entry into force.

⁶⁰ The AU Assembly has urged states to ratify the Protocol by the end of 2003 so as to enable the Parliament to meet in 2004, Assembly AU/Dec.12 (II) (10–12 July 2003).

⁶¹ Note that art 23 stipulates that, after its entry into force, any member state may notify the Secretary-General of its intention to accede to the Protocol. In such cases, accession requires that the instrument of accession be deposited.

Parliament has not been endowed with legislative powers during the first stage of its existence but only with advisory and consultative functions, the fact that not all member states shall be represented might not be that crucial. On the other hand, the meaning of the term 'first stage' has not been defined in the Protocol and indeed there is no provision to that effect. However, it could reasonably be expected that the first stage will not expire before all members have ratified the Protocol.

5.2 Withdrawal from the Protocol

Withdrawal is dealt with in article 19, which provides that the parliamentarians from a member state seceding from the AEC shall automatically cease being parliamentarians.⁶² The wording of this provision raises a number of pertinent questions. First, it does not specifically confer upon states the right to withdraw from the Protocol, but only sets out the consequences when a member state secedes from the AEC. The Protocol should be understood as a legal document separate from the AEC Treaty and this is confirmed by the fact that members may, if they wish to do so, not become contracting parties to it. Therefore, article 19 ought to have stipulated the possibility of withdrawal from the Protocol independent of secession from the AEC Treaty. Secondly, the Pan-African Parliament will also act as the parliamentary organ of the AU. This has apparently not been taken into account by the drafters and, consequently, if a member withdraws from the AU, this would not seem to affect the status of its parliamentarians. Indeed, participation in the AEC is quite distinct from participation in the AU and currently there are six countries that are member states of the latter but not of the former.⁶³ However, it is difficult to visualise a situation where a state that withdrew from the AU would nonetheless seek at the same time to maintain representation in the Pan-African Parliament.

This raises the broader question of whether the Protocol in its present form is properly drafted to allow the Parliament to act for both the AEC and the AU. The answer should be in the negative but this view seems academic. Although the Protocol fails to deal with such fundamental issues as to whether the Parliament shall hold separate sessions when dealing with issues pertaining to the AEC and when dealing with the AU,

⁶² Secession from the AEC is regulated in art 104 of the AEC Treaty, which provides that any member state wishing to withdraw must notify the Secretary-General in writing by giving one year notice. Upon expiration of this period, the membership of the state in question shall cease. So far, no member state has seceded from the AEC.

⁶³ Namely Djibouti, Equatorial Guinea, Eritrea, Gabon, Somalia and Swaziland; see List of Countries which have Signed, Ratified/Accessed to the Treaty Establishing the African Economic Community as at 26 September 2002, AU Doc CAB/LEG/28.1.

especially in view of the fact that the membership in both organisations does not presently coincide, perhaps the assumption was that this would indeed be ultimately the case, the practice of the OAU was that all the member states of the OAU participated in discussions relating to the AEC. Moreover, the Constitutive Act of the AU contains clauses permitting the organisation to suspend a member's right to participation in its activities if its government has come to power through unconstitutional means,⁶⁴ and to deny its right to speak at meetings, to vote and to present candidates for any position or post within the AU when it has defaulted in the payment of budgetary contributions.⁶⁵ It is submitted that the operation of this clause would result in the suspension of participation of a recalcitrant member state in the Parliament as well.

5.3 Interpretation of the Protocol

The question of the interpretation of the Protocol is laid down in article 20, which stipulates that the Court of Justice of the AEC shall be the competent organ to examine 'all matters of interpretation emanating from the Protocol'. This provision is in line with article 18(2) of the AEC Treaty, according to which the Court of Justice has the jurisdiction to interpret the Treaty. Pending its establishment, article 20 provides that any issues of interpretation shall be submitted to the AEC Assembly, which shall determine them by a two-thirds majority. Although this is a pragmatic approach, it fails to take into account the fact that the Assembly is composed of representatives of all member states, which may not be at same time contracting parties to the Protocol and, consequently would not have a manifest interest in voting for or against a specific mode of interpretation. It should also be observed that the Court of Justice of the African Union will have jurisdiction to interpret the Protocol.⁶⁶

5.4 Amendment, revision and review of the Protocol

Pursuant to article 24(1), the Protocol may be amended or revised by the decision of a two-thirds majority of the AEC Assembly. The procedure for amendment or revision is laid down in paragraphs (2) to (5) of article 24: Any member state, which is also a contracting party to the Protocol, or the Parliament itself, may propose in writing any amendment or revision and address the same to the Secretary-General. The latter shall notify the proposal to all other member states at least 30 days before the meeting

⁶⁴ See art 30 of the Constitutive Act of the African Union.

⁶⁵ As above, art 23(1). Both clauses are analysed in Magliveras & Naldi (n 6 above) 423–4.

⁶⁶ Art 19(1)(b) Protocol of the Court of Justice of the African Union.

of the Assembly, which shall consider the proposal.⁶⁷ If the proposal has not emanated from the Parliament, the Secretary-General is required to seek its opinion and, if one is delivered, to transmit it to the Assembly, which 'may adopt the proposal, taking into account the opinion of the Pan-African Parliament'.⁶⁸ This wording would signify that the Parliament is not required to offer its opinion and, if it does, the Assembly is not obliged to follow it. Finally, the adopted amendment or revision shall enter into force once two-thirds of the AEC membership has deposited their instruments of ratification. The latter provision should be considered problematic, because the entry into force of amendments becomes an issue also for those member states that have chosen not to become contracting parties to the Protocol. This is clearly an oversight by the drafters, since it is not possible for a state to ratify amendments to an international agreement to which it is not a contracting party. In conclusion, article 24 ought to have read that the amendments would enter into force once ratified by two-thirds of participating states.

The fact that the Parliament shall also act as a primary organ of the AU has once again not been taken into account, since there is no involvement of the AU Assembly in the amendment or revision procedure. Although this was to be expected (after all, the Protocol has been annexed to the AEC Treaty and not to the Constitutive Act as well), the fact remains that the need might arise for amendments to be made regarding solely the AU. Should this eventuality arise, it seems rather inappropriate to expect that the AEC Assembly will deliberate and decide on amendments concerning exclusively the AU. To that extent, it would have made more sense if the amendments or the revision were to be approved by the Assembly of the relevant organisation.

Article 25(1) envisages a compulsory procedure for the review of the Protocol. In particular, five years after its entry into force, a conference of state parties shall take place to review not only the operation and the effectiveness of the Protocol, but also the system of representation in the Parliament. The aim of this exercise is to ensure that the objectives and purposes as well as the vision underlying the Protocol⁶⁹ are being achieved and 'that the Protocol meets with the evolving needs of the African continent'.⁷⁰ While the holding of this review is mandatory, the holding of further review conferences is optional. According to article 25(2), these further conferences may be convened at intervals of

⁶⁷ Note that, according to art 9(1) of the AEC Treaty, the Assembly meets once a year in regular session.

⁶⁸ Art 24(4) Protocol.

⁶⁹ Note that the realisation of the vision underlying the Protocol, a vague term probably referring to the promotion of democratic principles and popular participation, was not included in the draft of November 2000.

⁷⁰ Art 25(1) Protocol.

ten years or at shorter periods, if so decided by the Parliament itself. Article 25 fails to lay down what form the conclusions of the review conferences shall take, whether the adoption of the conclusions will require unanimity, consensus or some type of majority voting, how they are to be implemented and to be given effect, etc.⁷¹

What appears to be certain is that the review mechanism is distinct from the process of amending or revising the Protocol. The former occurs by operation of the Protocol itself and is materialised through the conference of the state parties (ie irrespective of the wishes of individual participating countries), whereas the latter remains a matter for the AEC Assembly. Although the existence of a compulsory review mechanism after five years is welcomed, one cannot but wonder on its practical significance, because it is a moot point whether the Parliament would have commenced exercising its legislative powers, the *raison d'être* of its existence. As will be recalled, article 11 stipulates that during the (temporally undefined) first term of existence, the Parliament will only exercise advisory and consultative powers.

6 Conclusion

The Pan-African Parliament gives further impetus to the desire and vision of some Africans to provide a democratic foundation to the AU. The Pan-African Parliament ought to have a significant role to play in shaping an organisation that has elements of a people's union. In this context, the Pan-African Parliament must realistically acquire some legislative powers in the near future if it is to have any credibility with the people. Perhaps it will even help to encourage and develop democratic reforms in some countries. Much will depend on the quality of the delegates. Will the members of the Pan-African Parliament be independent and courageous or will they turn out to be yes-men? In an ideal world it might exercise some democratic oversight over the institutions of the AU. It should also contribute to the adoption of common policies coming within the scope of the AEC and the AU, probably acquiring at some stage certain supranational powers. Will this prove too much for some of Africa's 'strong men'?

⁷¹ The provisions of the Vienna Convention on the Law of Treaties are not of assistance in this instance, since they do not envisage the review as a means of treaty modification but only refer to amendment (arts 39–41). See art 109(2) of the UN Charter providing that a Review Conference may recommend alterations by a two-thirds vote, which will take effect when ratified by two-thirds of the membership, including all permanent members of the Security Council.

From the perspective of legal drafting, it seems that the Protocol would have benefited from greater precision. It seems curious, given the imminent demise of the OAU, that the Protocol was drafted in its shadow. Nevertheless, the Protocol is now an AU treaty and all references to the OAU in the Protocol should now be read as referring to the AU. This appears to have been anticipated by the drafters of the Protocol, who envisaged the Parliament assisting the AU in the achievement of its policies.⁷²

⁷² Art 3(1) Protocol.

The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter

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Summary

This article analyses the causes, nature and settlement of the conflict in the Democratic Republic of Congo (DRC), a conflict that has left four million people dead. The problems of implementing the Lusaka Ceasefire Agreement of 1999 are discussed. This is followed by a discussion of the Inter-Congolese Dialogue that led to the adoption of the Global Agreement and the Interim Constitution in April 2003. Though the Interim Constitution recognises a wide range of human rights, no provision for the enforcement of these rights exists. A complex power-sharing system has been set up to integrate the various former rebel groups into the interim government. An effective state is essential for the protection of human and peoples' rights. Lasting peace will not be possible without a state built on democracy, constitutionalism and human rights.

1 Introduction

In his famous encyclical *Populorum Progressio*, Pope Paul VI emphatically stressed that development was 'the new name for peace'.¹ Development is unlikely without peace and *vice versa*. On the other

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¹ Encyclical of Pope Paul VI on the Development of Peoples, 26 March 1967, available at <http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html> (accessed 31 July 2003).

hand, as evidenced by the situation in a number of African countries such as Côte d'Ivoire, Liberia, Zimbabwe and the Democratic Republic of Congo (DRC), peoples are denied peace wherever there is no democracy or respect for human rights. Democracy promotes and ensures popular participation in political and public affairs, development and peace. Development and peace are particularly interrelated in the African context. They feature among the rights enshrined in the African Charter on Human and Peoples' Rights (African Charter or Charter),² which was ratified by the DRC and is therefore binding on that country.

Ever since its independence from Belgium on 30 June 1960, the DRC has represented the full range of African maladies, from colonial domination and exploitation through corruption, authoritarian rule and ethnic conflicts, to military regimes and mismanagement.³ The political and constitutional history of the Congo has been a vicious circle of *coups* and counter-*coups*, rebellions, mutinies, round-tables, national conferences or dialogues and unconstitutional regimes, the whole unfolding as tragedy and farce.⁴ Some 40 years on, we have gone from one crisis to another crisis, with actors nearly identical to the ghosts of the past.⁵ In 1996, after three decades of authoritarian rule, Mobutu was terminally ill and unable to serve his Western patrons. Laurent-Désiré Kabila, a former Lumumba disciple turned businessman, was traced to Eastern Africa, reconverted to active politics, and appointed to lead a rebellion against Mobutu by the US-proclaimed 'new breed' of African leaders. On 17 May 1997, Kinshasa fell to Kabila's *Alliance des Forces Démocratiques de Libération* (AFDL). Kabila proclaimed himself President. On 2 August 1998, some of Kabila's comrades from the Banyamulenge ethnic group rebelled against Kabila, accusing him of authoritarianism, corruption, mismanagement, nepotism and tribalism.

² Arts 13, 22 & 23. Other peoples' rights in the African Charter are equality of peoples (art 19); self-determination (art 20); the right to freely dispose of their wealth and natural resources (art 21); and the right to a favourable environment (art 24). Individual and collective rights enshrined in the Charter include non-discrimination (art 2); equality (art 3); life (art 4); dignity and freedom from slavery, torture and inhuman punishment (art 5); liberty and security of person (art 6); fair trial and access to courts (art 7); freedom of religion and conscience (art 8); freedom of expression and information (art 9); freedom of association (art 10); freedom of assembly (art 11); freedom of movement of nationals and right of asylum (art 12); the right to participate in the political and public affairs (art 13); property rights (art 14); equal pay for equal work (article 15); the right to attainable health (art 16); the right to education (art 17); and family rights and non-discrimination against women (art 18). Peoples' rights encompass equality of peoples (art 19); self-determination (art 20); the right to freely dispose of their wealth and natural resources (art 21); the right to development (art 22); national and international peace and security (art 23); and the right to a favourable environment (art 24).

³ T Mkandawire 'Introduction' in K Mbaya (ed) *Le Zaïre vers quelles destinées?* (1992) IX-X.

⁴ As above.

⁵ As above.

They created a rebel movement named *Rassemblement Congolais pour la Démocratie* / Congolese Rally for Democracy (RCD), with backing from some of Kabila's former allies, notably Rwanda and Uganda. The *Mouvement pour la Libération du Congo* / Movement for the Liberation of Congo (MLC) joined the rebellion against Kabila. The RCD later split into RCD-Goma, which remained the main rebel group, RCD-National (RCD-N) and RCD-*Mouvement de Libération* (RCD-ML).

The most recent conflict in the DRC involved several foreign rebel groups allegedly based in the DRC and launching attacks against their respective governments.⁶ At the climax of the conflict, at least seven other African countries had regular troops in the DRC. Angola, Namibia, Zimbabwe and Chad lent support to President Kabila, while Rwanda and Uganda backed the rebels. This conflict is probably the most important crisis Africa has experienced in its post-colonial history, and one of the most complex and perplexing events that the post-Cold War world has seen,⁷ with 'effects beyond the sub-region to afflict the continent of Africa as a whole', according to UN Secretary-General Koffi Annan.⁸ In the words of Howard Wolpe, the US Special Envoy to Africa's Great Lakes region, the DRC war was 'the most widespread interstate war in modern African history'.⁹ It was also considered by some analysts the 'African equivalent of World War I' and labelled 'African War'.¹⁰ The conflict resulted in the violation of virtually all the rights in the African Charter. Over four million people reportedly died during the conflict. This is a figure much higher than the national population of many African countries and several times superior to the number of victims of the Rwandan, Yugoslav and Sierra Leonean conflicts that attracted so much attention that the Security Council eventually resolved to set up three international tribunals to prosecute and judge those persons responsible for the violation of international human rights law and humanitarian law.¹¹

⁶ These included the FDD (Forces for the Defence of Democracy in Burundi), the Interahamwe, the ex-FAR (*Forces Armées Rwandaises*, Former Rwandan Army of the late President Habyarimana), the Ugandan ADF (Allied Democratic Forces), LRA (Lord's Resistance Army), UNRF II (Uganda National Rescue Front II), NALU (National Army for the Liberation of Uganda), FUNA (Former Ugandan National Army), and WNBK (West Nile Bank Front) as well as the Angolan rebels of UNITA (National Union for the Total Independence of Angola).

⁷ W Breytenbach *et al* 'Conflicts in the Congo: From Kivu to Kabila' (1998) 8 *African Security Review* 33.

⁸ 'Extract from the Report of the UN Secretary-General on UN Deployment in the DRC' (2000) 7 *South African Journal of International Affairs* 183.

⁹ H Wolpe 'The Great Lakes crisis: An American view' (2000) 7 *South African Journal of International Affairs* 27.

¹⁰ S Naidoo 'Rebels without a pause: Diplomacy in the DRC conflict' (1999) 6 *South African Journal of International Affairs* 155.

¹¹ See UN Doc S/RES/808 of 22 February 1993 (Security Council Resolution authorising the establishment of the International Criminal Tribunal for the Former Yugoslavia

Despite calls from the belligerents themselves and human rights organisations, it is unlikely that an international criminal tribunal will ever be established for the DRC. All in all, the international response to human rights violations in the DRC was an unsatisfactory one. Even worse was the response of the African Commission on Human and Peoples' Rights (African Commission).¹² Anyone concerned with the protection of human rights should be interested in the DRC conflict which impacted so negatively on the rights of more than 50 million African people and the resolution of which constitutes a step forward in the promotion of human and peoples' rights in Africa. Peace and democracy in the DRC are critical for peace, democracy, and development in Central Africa, the Great Lakes region and Africa as a whole. This is not only a Congolese but also an African affair. The resolution of the DRC conflict is essential if the vision on an African Renaissance or African political and economic renewal is to be realised.¹³ The resolution of the conflict is also instrumental for the success of initiatives such as the New Partnership for Africa's Development (NEPAD), whose main objective is to place African countries individually and collectively on the path to sustainable growth and development that require peace, security and good governance.¹⁴

The present paper briefly examines the causes and the nature of the DRC conflict. It reviews the efforts made at settling the conflict, starting from the signing of the Lusaka Agreement, to the organisation of the Inter-Congolese Dialogue (ICD) that ended with the adoption of the Global and Inclusive Agreement and an interim Constitution for the Congo. It also highlights some crucial challenges ahead on the road to sustainable peace and development in the Congo.

2 Causes and nature of the conflict

The causes of the conflict, as should be its solutions, were both internal and external.¹⁵

(ICTY) and UN Doc S/RES/827 of 25 May 1993 establishing the ICTY; UN Doc S/RES/955 of 8 November 1994 establishing the International Criminal Tribunal for Rwanda; Security Council Resolution 1315 of 14 August 2000 on the establishment of the Special Court for Sierra Leone.

¹² Arts 30–59 African Charter.

¹³ Wolpe (n 9 above) 27–33.

¹⁴ See NEPAD documents available on <<http://www.avmedia.at/nepad/indexgb/html>> (accessed 7 September 2003).

¹⁵ MB Mangu 'Maintenance and restoration of peace in the Great Lakes region: A reflection on the crisis in the Democratic Republic of Congo' (2000) Paper read at the 12th Annual Conference of the African Society of International and Comparative Law, Accra, Ghana, 7–12 August 2000.

2.1 Internal causes: Authoritarianism, human rights violations, ethnicism, the national question and rebellions

The rebellion against Mobutu owed much of its success to the support it received from the people, the political opposition and civil society that were dissatisfied with the corrupted and dictatorial regime. They welcomed Kabila with high expectations that he would work with everybody to rebuild the country. Unfortunately, their expectations were too high, as one dictatorship replaced another. Kabila managed to amend the AFDL's charter and to confiscate all its powers. He committed some of his former comrades to prison, creating frustration in his own movement. Power was progressively ethnicised. The majority of the members of the cabinet, senior officers in the administration, the security services and the army were appointed along ethnic lines among the Balubakat. The tribalisation or ethnicisation of power was even faster than it was under Mobutu's rule. Tribute should be paid to Kabila for having succeeded in a very short time — just a few months, where Mobutu spent years — to build up his ethnically-based power and dictatorship. As Bernardin Mungul Diaka, a well-known Congolese politician, rightly puts it: 'Only the driver changed but the car (country), road, methods and techniques of driving it remained all the same.'¹⁶ After Belgium's King Léopold II and Mobutu, Kabila was the Congo's new 'King' and the 'rightful' owner of the country and its abundant resources.

His sense of ownership was so strong that he found it fit to unilaterally change the country's name from Zaire to the DRC as Mobutu had done the reverse of in 1971. The DRC had no constitution other than Kabila's word. The 'Bill of Rights' only consisted of those rights Kabila was willing to give his subjects.

Under Kabila, the Congolese people lost the few rights and freedoms gained in the struggle against the Mobutu's authoritarian regime. The rights curtailed were not only individual rights, but also collective rights, including the rights of minorities such as the Banyamulenge, who were denied their Congolese citizenship. In 1996 a violent inter-ethnic conflict broke out, in the form of the expulsion of Congolese Tutsi from the Masisi region. This conflict was the backdrop to the Banyamulenge-dominated rebellion that led to the clearing of the refugee camps and eventually to Mobutu's ousting.¹⁷ Laurent-Désiré Kabila, who benefited from the Banyamulenge revolt against Mobutu, turned out to be their new target, as his regime engaged in a manhunt against the

¹⁶ MB Mangu 'State, conflict and reconstruction in the Democratic Republic of Congo' (2002) Paper read at the General Assembly of the Council for the Development of Social Sciences in Africa (CODESRIA), Kampala, Uganda, 5–8 December 2002 22.

¹⁷ Wolpe (n 9 above) 31.

Banyamulenge and other Tutsi, who were compared with 'vermin',¹⁸ to be squashed throughout the country. However, the Kabila regime did not create any paradise of rights. In fact, it froze all individual and collective rights of the Congolese. Accordingly, like Mobutu, Kabila himself called for a rebellion against his own power. He could not count on the massive popular support he enjoyed against Mobutu. Nor could he rely on a national army strong enough to defend his power and the integrity of the Congolese territory against the rebels who were backed by some foreign powers with vested interests in the DRC.

2.2 External causes of the conflict: Foreign interventions

External factors contributed to the Congolese conflict. As already emphasised, the conflict in the Congo was also externally driven and involved troops of several other African countries, siding with either the rebels or the DRC government, all providing official justifications for their interventions, but acting on a common hidden agenda.

2.2.1 Official justifications for foreign interventions

In September 1996, the Banyamulenge, many of whom had served with their kinsmen in the Rwandan army, were prompted by Zairean persecution and the (Tutsi-led) Rwandan government's anticipation of an increase in attacks by Hutu militias from their bases in the refugee camps of Eastern Zaire, to launch a counter-strike, partly retaliatory but in the main pre-emptive, against the Mobutu and thereafter the Kabila regime that reportedly backed them.¹⁹ It is the repeated failure of the international community to take effective action against the *génocidaires* of 1994 that provided the major justification for Rwandan unilateral intervention in the DRC.²⁰ Uganda also made it clear that its army was in the Congo to fight Ugandan rebels allegedly based in Eastern Congo.

¹⁸ The word was used by Abdoulaye Yerodia Ndombasi, the DRC Foreign Affairs Minister under President Laurent-Désiré Kabila. On 11 April 2000 a Brussels magistrate, Damien Vandermeersch, had issued an international arrest warrant against him on charges of crimes against humanity. The prosecution was based on statements made by Mr Yerodia in August 1998 when he was head of the Presidential Office. He denied that he referred to the Banyamulenge or Congolese Tutsi as 'vermin', but rather to the 'aggressors' of the DRC. The Belgian public prosecutor Benoit Dejemeppe told Reuters that Mr Ndombasi was liable to arrest if he entered a country willing to execute the warrant. However, the International Court of Justice, seized by the DRC government, nullified the warrant in 2002 on the ground that it was issued in violation of immunity enjoyed by Mr Ndombasi as DRC Minister of Foreign Affairs. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* <<http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>> (accessed 7 September 2003).

¹⁹ R Cornwell & J Potgieter 'Africa Watch: A large peace of Africa?' (1998) 7 *African Security Review* 74.

²⁰ Wolpe (n 9 above) 31.

Rwanda and Uganda referred to international law and justified their cross-border raids and interventions in the DRC as 'hot pursuit'. This was, however, an unfortunate misuse of the term. The right to hot pursuit belongs to the law of the sea. According to Dugard, if a state wishes to justify cross-border raids, it must do so in terms of the right of self-defence or, possibly reasonable reprisal action.²¹

Dugard noted that, unlike self-defence, which is authorised in modern international law,²² reprisals remain illegal *de jure* in view of article 2(4) of the United Nations (UN) Charter.²³ Even if the argument of hot pursuit and self-defence or anticipatory self-defence could stand by default, it would not hold. Hot pursuit or self-defence cannot be invoked to acquire title to the territory of a foreign state. Nor can it be used to justify the occupation of the Congolese territory, the exploitation of the Congolese natural resources, the commission of gross human rights violations and the establishment of a puppet government in Kinshasa under the false pretence of helping the Congolese people establish democracy.

Ugandan and Rwandan leaders also justified their campaign in the DRC on the basis that they wanted to help the Congolese people get rid of Kabila and establish an all-inclusive democratic regime in the DRC. Such a justification was really surprising and made a mockery of democracy. At no time did we hear that the people of the DRC called upon Rwanda and Uganda for assistance in ousting their dictator and establishing a genuine democratic regime. Rwanda and Uganda, who pretended to help 'free' or 'liberate' the Congolese people from dictatorship and establish a more human-rights friendly regime in the Congo, are not known as fully-fledged democratic countries respectful of these rights.

Such arguments, as recently advanced by 'Big Brothers' Bush and Blair to wage war on Iraq, are unjustifiable in modern international law. It is inconsistent with the principles of non-aggression, non-interference in the internal affairs of another state, development of friendly relations among nations, equality of states, self-determination of peoples and respect for the political independence of a foreign state that should govern the civilised world.²⁴

²¹ J Dugard *International law: A South African perspective* (2000) 421.

²² See art 51 of the UN Charter; *Nicaragua v USA* 1986 ICJ Reports 14 99–100 (the court held that self-defence was a rule of customary international law); Dugard (n 21 above) 418.

²³ Dugard (n 21 above) 420.

²⁴ See art 1(7) UN Charter; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations 1970 (GA Res 2625 (XXV) 1970); Resolution on the Definition of Aggression, Preamble and art 7.

Just weeks after the outbreak of the rebellion initiated by Banyamulenge-dominated regiments in Kivu on 2 August 1998, the rebel troops had already advanced across the country from the east to the western seaboard. They had captured the Kitona and Mbanza-Ngungu military bases in the Bas-Congo, where they recruited a number of soldiers of Mobutu's past army and were heading for Kinshasa. Faced with this rapidly deteriorating military situation, Kabila denounced the rebellion as an invasion by Uganda and Rwanda in an effort — in which he ultimately succeeded — to mobilise the Congolese people around an anti-Tutsi banner and to secure his own political survival.

Kabila also appealed to other SADC members for assistance to a fellow SADC member state under external aggression.²⁵ Following a meeting of their defence ministers in Harare on 17 to 18 August 1998, Angola, Namibia and Zimbabwe agreed that the government of Laurent-Désiré Kabila required the full support of the SADC to guarantee its survival. Speaking in his capacity as head of the SADC Organ on Politics, Defence and Security, President Mugabe announced that the meeting had agreed that military aid should be sent to secure Kabila's position.

Although President Mandela, who was the chairperson of the SADC, disagreed that it was a proper SADC decision, since he was not consulted and all SADC members did not attend the meeting Angola, Namibia and Zimbabwe later sent troops to the DRC. Chad also joined them.

In line with the principle of political independence or sovereignty, people are free to choose their own political system or government.²⁶ This is an internal affair, an exercise of self-determination, which allows no interference by any foreign state. However, there are circumstances where interventions by foreign governments to support a friendly incumbent government are permissible under international law. This is the case, for instance, when the rebels are supported by another or other states and such support is sufficiently substantial to amount to an armed attack or an aggression.²⁷

2.2.2 *Hidden agenda for foreign interventions*

With the end of the Cold War, President Mobutu, who had served the American and Western interests in Africa, was no longer of use and was regarded a man of the past. America had now to bank on a new generation of leaders represented by Presidents Museveni and Kagame in the Great Lakes region, and the new American 'boys' were asked or just too willing to assume leadership in the region. To better serve their interests, the Rwandan and Ugandan leaders realised that they had to

²⁵ The DRC became SADC member state at its Blantyre summit in 1997.

²⁶ *Nicaragua v USA* (n 22 above) 108.

²⁷ Dugard (n 21 above) 426–428.

maintain control over the exercise of power in the DRC. By dismissing the Rwandan and Ugandan officers who commanded the Congolese army and were accredited with him to look after the interests of their governments, Kabila's days were numbered, and according to the logic of his former patrons he no longer qualified to remain in power in the DRC.

Rwanda and Uganda sought to replace him with a more pliant client. Angola, Chad, Libya, Namibia and Zimbabwe reacted by sending troops or providing some kind of assistance to President Kabila in an attempt to restore the regional balance of power and help maintain their own influence in the region.

As Howard Wolpe stressed, the interests at stake in the Congolese crisis were enormous.²⁸ They were political, military but also, and even mostly, economic ones. The recent UN report on the plundering of the resources of the DRC in which the Congolese warring parties and their respective allies were involved, bears testimony to this. Foreign countries involved in the Congolese conflict became exporters of diamonds, gold, copper, timber and other natural resources from the DRC. The fighting between Rwandan and Ugandan armies on the Congolese territory of Kisangani, for instance, may only be understood as a fight for leadership and control over diamonds, the gold mining industries and other natural resources.²⁹ On the other hand, the Zimbabwean battle for Mbuji-Mayi was mostly a war over the control of diamonds. Economic interests were important for the rebels' allies and Kabila's supporters as well.³⁰

²⁸ Wolpe (n 9 above) 27.

²⁹ Dugard (n 21 above) 126.

³⁰ The management of *Gécamines*, the leading Congolese mining company, was given to Billy Rautenbach, a Zimbabwean businessman very close to President Mugabe, in compensation for the role played by the latter in Kabila's political survival. Zimbabwe entered into a joint venture with the DRC in the diamond industry through Zimcon operating in Mbuji-Mayi. Senior officers within the Zimbabwe Defence Force, through a Harare registered company, Osleg, also embarked on a partnership with a Congolese company, Comiex. This company had links with Sengamines, an alluvial diamond-mining project in the DRC. Zimbabwe was even poised to take over MIBA, the *Minière des Bakwanga*, in Kasai. Meanwhile Zimbabwe, through the Zimbabwe Defence Industries, entered into a partnership with the DRC through Congolese Strategic Reserves to form Congo Duka (Pty) Ltd. The Zimbabwean parliament ratified this agreement in 1999. To name but a few theatres of conflict, internal wars in Angola, Sierra Leone and DRC were also diamond-fueled. Ironically, the precious stone and oil have turned out to be a curse of many African peoples. The real motivation of the recent British and US war on Iraq also demonstrates how oil may be a misfortune for Iraq and other Arab countries around Israel.

3 Nature of the conflict: Rebellion and foreign aggression

One of the very crucial questions about the Congolese conflict concerns its nature. Up to the signing of the Lusaka Agreement, the rhetoric of the Kinshasa government and its allies tended to deny the internal dimension of the Congolese crisis. According to them, there was no rebellion in the DRC. The country was rather a victim of aggression by Rwanda, Uganda and Burundi.³¹ On the other hand, the RCD, MLC and their supporters argued that what was raging in the DRC was a rebellion of the Congolese people against the authoritarian rule of President Kabila and not a foreign aggression. In fact it was a rebellion and a foreign aggression.³² A rebellion, as any insurrection, civil war or revolution, is a conflict under domestic or national law.

One of its prominent features is that an organ of the state, generally the army or part thereof, revolts or takes up arms against the government in an ultimate effort to obtain regime change. The rebels are citizens or claim the citizenship of a state. In the DRC conflict, those who took up arms against Kabila were advised and equipped by foreign countries, but the majority of them were Congolese citizens. The Bugera, Karaha, Ondekane and the like who formed the RCD were previously state minister, foreign affairs minister and commandant of the Congolese Armed Forces under the AFDL government of President Kabila. Like many other Congolese warlords, Jean-Pierre Bemba, who headed the second rebel faction backed by Uganda, the MLC, is a Congolese citizen whose father was even appointed minister in the Kabila government. Rebellion is outlawed in domestic law where it is generally considered a crime of high treason against the security of the state. Should they succeed in overthrowing the government of the day, the rebels would then be acclaimed as liberators and impose themselves as the new leaders of the country. This is a strange paradox.

In terms of international law, article 2(7) of the UN Charter in principle prevents the world body from intervening in matters under the domestic jurisdiction of states, but things are changing in African international law. It was decided during the 1999 OAU summit in Algiers that leaders who came to power by use of force should no longer be welcomed in any assembly of democratically elected heads of state.³³ The

³¹ Wolpe (n 9 above) 34.

³² Mangu (n 15 above) 12–16.

³³ Surprisingly, most of those who took the decision did not qualify as 'democratically elected heads of state'. However, it was enforced against Côte d'Ivoire when the government of General Robert Guei was not invited and failed to participate in the 2000 OAU summit. It is highly expected that the AU 2003 summit in Maputo will make the same decision against the government of General Bolize who overthrew the democratically elected government of President Ange Patassé in the Central African Republic.

Constitutive Act of the African Union (AU) prohibits the use of force to bring about regime change. UN Secretary-General Kofi Annan, who suggested that it should inspire the UN General Assembly, welcomed the decision of the 1999 OAU summit.³⁴ There was an internal dimension of the Congolese conflict that could not be ignored.

However, analyses such as the study by Geldenhuis,³⁵ addressing the DRC crisis as a rebellion and ignoring its external dimension as a foreign aggression, were partial and partisan. The conflict involved a complex mix of ethnicity, politically alienated militia and foreign troops that were not easily distinguishable from the rebels they supported. The efforts furnished by Rwanda and Uganda in particular were really extensive and their intervention could be depicted as a kind of invasion of the DRC.³⁶ It was an aggression and as such a flagrant violation of universal and African international law.³⁷

4 Conflict settlement

Diplomatic efforts within the SADC, OAU/AU and the UN culminated in the signing of the Lusaka Agreement and the holding of the inter-Congolese political negotiations that ended with the adoption of the global Agreement and an interim Constitution for the DRC.

4.1 Lusaka Agreement

The 1999 Lusaka Ceasefire Agreement was negotiated within the framework of the SADC.³⁸ It consisted of three articles and three annexes. Article I dealt with the ceasefire, the date of its entry into force, its meaning and implications for the parties. Article II addressed the security concerns of the DRC and its neighbouring countries. Article III embodied the 'Principles of Agreement'. Annexe A, which comprised 13

³⁴ K Annan 'Durable peace and sustainable development in Africa' (2000) 7 *South African Journal of International Affairs* 2.

³⁵ D Geldenhuis 'Rebuilding the DRC' (2000) 7 *South African Journal of International Affairs* 43–50.

³⁶ C de Coning 'Peacekeeping in the DRC: A new role for the United Nations' (1999) *Conflicts Trends* 17.

³⁷ See arts 1 & 2 UN Charter; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV) 1970); art III OUA Charter; arts 3(b), 4(a), (b), (e), (f), (g), (i), (o) & (p) Constitutive Act of the AU; Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV) 1960); and 1974 UN General Assembly Resolution GA Res 3314 (XXIX) 1974 on the Definition of Aggression; Statute of the International Criminal Court (UN Doc A/CONF183/9 of 17 July 1998), arts 5(1)(d) & (2).

³⁸ 'DRC ceasefire agreement' (2000) 7 *South African Journal of International Affairs* 165–181.

chapters, concerned the different modalities for the implementation of the Agreement. Annexes B and C related to its framework and defined the key words of the Agreement respectively. Although it was clear that nothing could be achieved without prior ceasefire, the titling of the Agreement as 'DRC Ceasefire Agreement' was misleading, since it was designed to achieve far more than the official designation suggested.

Taking stock of all the diplomatic efforts undertaken since the outbreak of the conflict, the Lusaka Agreement was an important document because for the first time, the regional states themselves agreed upon a framework for the region's political reconstruction.³⁹

Nevertheless, by authorising the Rwandan and Ugandan armies to stay on Congolese soil, hundreds of miles away from their borders, to administer part of the Congolese territory, it regrettably condoned the Rwandan and Ugandan aggression and 'legalised' their violation of the sovereignty and territorial integrity of the DRC, and their interference in the Congolese internal affairs. On the other hand, the disarmament and tracking down of various armed groups, some of which were Congolese, Rwandan, Burundian or Ugandan, were to be a tremendous task not only for the DRC, but also for Rwanda, Burundi and Uganda. The rebels remained successful in carrying out their deadly operations against their respective countries. All the same, by providing that 'all parties — including Rwanda and Uganda — commit themselves to the process of locating, identifying, disarming and assembling all members of armed groups in the DRC', the Lusaka Agreement left the door open to further foreign adventure in the Congo.

The implementation of the Agreement was to pose far more formidable challenges.⁴⁰ Firstly, there was too much suspicion and mistrust among the parties. This caused them to regularly send mixed messages about the Agreement. They were not genuinely committed to complying with it. Secondly, the interests at stake were enormous for the foreign states involved, the multinationals, mercenaries, arms dealers and suppliers of ammunition and other military equipment. The Congolese warlords themselves looked very comfortable with war and were involved in what Arthur Abraham could have termed 'state conspiracy in perpetuating armed conflict'.⁴¹ Thirdly, there was little commitment of the so-called international community to ending the Congolese conflict.

The Security Council unfortunately decided to deploy to the DRC a 520 600 man peacekeeping force only and this force was not concerned with the operations of peace-enforcement, tracking down and

³⁹ Wolpe (n 9 above) 28.

⁴⁰ As above, 41–42.

⁴¹ A Abraham 'War and transition to peace: A study of state conspiracy in perpetuating armed conflict' (1997) XXII *Africa Development* 101–116.

disarming of armed groups, screening mass killers, perpetrators of crimes against humanity and other war criminals, and handing over of *génocidaires* to the International Criminal Tribunal for Rwanda. Kofi Annan previously recognised that '[t]he problem of armed groups . . . lies at the core of the conflict in the sub-region and undermines the security of all states concerned. Unless it is resolved, no lasting peace can come.'⁴² Months before the vote of Resolution 1279, establishing a UN force for the DRC under the code name of MONUC, Wolpe anticipated that it was unlikely that a UN peacekeeping force could be granted a mandate that extended beyond the tasks of monitoring and observation, thereby reducing the substance of the Lusaka Agreement, which provided for such an extensive mandate. The Security Council actually rejected an initial proposition by the UN Secretary-General, who declared in a speech at Georgetown University on 23 February 1999 that a UN force should not be deployed in the DRC unless given sufficient strength and firepower to carry out its assignment.⁴³ Nobody would ever imagine an American or European-led UN force sent to Afghanistan, Iraq, Ireland, Kosovo or the Middle East without being fully equipped as required by the situation. A well-funded and equipped AU force would have been more useful and more effective than MONUC in preventing or stopping the killings and protecting human rights in the DRC. Without dismissing the Security Council Resolution 1484, authorising the deployment of a European or French-led force in the African country, one must acknowledge that this is a terrible lesson taught by the former colonial masters to a continent unable to enforce peace on its own soil more than 40 years after independence.

The importance of the European force cannot be exaggerated. It should be welcomed to help restore peace to the Eastern part of the DRC, where an ethnic conflict exploited by political leaders and neighbouring countries has been raging between the Lendu and the Lema and resulted in the killing of thousands and the displacement of many more.

However, the mission of this force is very limited both *ratione temporis* (up to 1 September 2003) and *ratione loci* (the city of Bunia). As a gentleman's agreement between the Anglo-Americans and the French, who supported the Security Council Resolution 1483 which provided for the US-British 'recolonisation' of Iraq, they occupied against all the norms and principles of international law, the French-sponsored Resolution 1484 on the DRC authorised the members of the multinational force to use force to protect themselves and the Congolese population. One of the reasons for granting such firepower to this force as different from MONUC seems that, unlike was the case with MONUC,

⁴² n 8 above 185.

⁴³ K Annan, quoted by De Coning (n 36 above) 16.

whose elements were contributed by third world countries, the Europeans themselves and a permanent member of the Security Council lead the force. One should understand that Europeans could not be deployed to Africa without allowing them to use force against Africans likely to use fire against them. The same would have applied were the US government of the view that the African continent deserved the 'Boys' to die for its peoples, soil and sub-soil. The full implementation of the Lusaka Agreement required commitment and good faith from all the parties and sustained assistance and pressure by other countries acting individually and collectively through the UN, the European Union (EU), the OAU/AU and the SADC.⁴⁴

4.2 Inter-Congolese dialogue

In terms of an agreement reached by the Congolese parties during their August 2001 meeting in Gaborone, Botswana, the ICD was set to take place in Addis Ababa, Ethiopia, in October 2001. It was finally held in Sun City, South Africa, in February to April 2002 and April 2003.

4.2.1 *Sun City I and Mbeki Plans I and II*

Five components participated in the ICD, namely the DRC government, RCD, MLC, the opposition and the *Forces Vives* (Civil Society), which were joined by the RCD-ML, RCD-N, and the Mai Mai (Congolese militia). Around 360 delegates participated in the ICD after its adjournment in Addis Ababa in October 2001 and its reopening in Sun City on Monday 25 February 2002 in the presence of the facilitator, Sir Ketumile Masire, Presidents Mbeki, Muluzi and Mwana Lesa of South Africa, Malawi and Zambia in their respective capacities as the president of the host country, SADC Chairperson and President of the country where the Agreement was signed. Thirty-seven resolutions were adopted, but a few days ahead of the closing, there was no agreement on the critical issue of the establishment of a consensual political dispensation for the country during the transition. This issue remained the main stumbling block up to the last day of the talks that were to close on 11 April 2002. An RCD request for an extension of the negotiations to close on a better note was considered by both the facilitator and the South African government. The ICD was therefore extended for seven days, namely to 18 April 2002. To break the deadlock, the Congolese parties and Sir Ketumile Masire requested the President of the Republic of South Africa to assist in the process of reaching an agreement. President Mbeki suggested two plans of power sharing during the transition in the post-war DRC. Mbeki Plan I proposed a presidency to be

⁴⁴ Wolpe (n 9 above) 33.

held by Joseph Kabila and a second executive organ to be named 'High Council of the Republic' and to consist of the President, the RCD and MLC leaders as well as a prime minister to be appointed by the political opposition. Civil society was offered the presidency of parliament, which was meant to act both as a legislative and a constitutional assembly during the transition.

A special court was to serve as the Constitutional Court. Independent institutions, such as the Human Rights Commission, the Truth and Reconciliation Commission, the National Electoral Commission and the High Authority of the Media were also considered of critical importance during the transition. The defence, police, security and intelligence services and the Reserve Bank were to be neutral, apolitical and autonomous. The RCD and the *Union pour la Démocratie et le Progrès Social* (UDPS), the leading Congolese party, blamed Mbeki Plan I for favouring the Kabila government. Mbeki Plan II attempted to address this criticism by putting the MLC and RCD leaders at the level of vice-presidents, also holding important ministerial portfolios. The first vice-president was to be in charge of economy and finances, while the second was to be responsible for defence, internal affairs and elections. The delegates, still busy discussing Mbeki Plan II, were surprised that the DRC government and the MLC had entered into an agreement according to which Joseph Kabila remained President of the Republic while the MLC leader Jean-Pierre Bemba became Prime Minister and head of the transitional government.

The RCD, UDPS and some other parties rightly opposed this agreement on the basis that it was concluded outside the ICD and violated both the spirit and the letter of the Lusaka Agreement. When the ICD was to be adjourned on Friday 19 April 2002 after 52 days of negotiations, the delegates had not reached any agreement. Sir Ketumile Masire then recommended the constitution of a follow-up committee to deal with the issue of the formation of a broad and consensual government of national unity for the transition. He suggested that each of the components should select its delegates and leave them behind in South Africa so that the negotiations could continue without any delay. The RCD, UDPS and a number of other parties agreed and complied with this request. They met in Sun City on 22 April 2002 and set up the *Alliance pour la Sauvegarde du Dialogue Intercongolais* (Alliance for the Defence of the Inter-Congolese Dialogue) (ASD).

The aim of the ASD was to undertake anything possible to bring the DRC government and the MLC back to the negotiation table in order to achieve an inclusive and consensual agreement on the transitional government. The DRC government, the MLC and their respective allies disagreed and left South Africa. Yet, as emphasised elsewhere, there was no alternative to the ICD as to which form it could take. An inclusive and sincere political dialogue resulting in power sharing based on a

constitutional act that protects and promotes human rights was and remained the best way of addressing the crisis of constitutionalism and democracy in the DRC.⁴⁵ After the failure of the ICD in Sun City in April 2002, the Congolese people and international community within the SADC, the AU and the UN kept on pressing the Congolese parties to return to the negotiation table. In the meantime, the DRC government and the MLC failed to implement their own agreement, as Joseph Kabila, advised by his supporters, had come to realise that he had conceded too much and could not be a figurehead president. This paved the way for a return to the negotiations and the reopening of the ICD.

4.2.2 *Final Mbeki Plan, Sun City II and global agreement*

An amended Mbeki plan for power sharing during the transition in the DRC was presented to the Congolese parties in August 2002. This plan provided for a presidency consisting of President Joseph Kabila and four vice-presidents (RCD, MLC, Kabila government and unarmed opposition), each supervising several governmental commissions, the famous formula 'One plus Four', a bicameral parliament (National Assembly and Senate), an independent judiciary and a number of institutions to support democracy.

The new Mbeki plan was accepted by the DRC government and endorsed by the RCD, the MLC and the political opposition subject to a number of amendments. In October and November 2002, the representatives of all the components that participated in the ICD were back to the negotiation table in South Africa. The talks were facilitated by Thabo Mbeki, South Africa's President and Chairperson of the AU, and Ambassador Moustapha Niasse, Special Envoy of the UN Secretary-General. On 17 December 2002, the representatives of all the components of the ICD signed a global and inclusive agreement on the transition in the DRC. On 6 March 2003, the Congolese parties adopted a Draft Constitution for the transition in line with the Global Agreement. The two instruments were referred to Sir Masire for their formal adoption by the ICD. This took place on 1 April 2003 in Sun City.

The Pretoria Agreement consisted of seven parts. Part I dealt with the cessation of hostilities. The parties renewed their commitment to cease their hostilities and seek a peaceful and fair solution to the crisis facing their country in accordance with the Lusaka Agreement, the different disengagement plans and relevant Security Council resolutions. The parties with fighting forces agreed to commit themselves to the process of forming a national, restructured and integrated army in line with a resolution adopted during the ICD on 10 April 2002. All the parties

⁴⁵ MB Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) 467.

agreed to combine their efforts in the implementation of the UN Security Council resolutions on the withdrawal of the foreign troops from the DRC, the disarmament of the armed groups and militia and the safeguard of the sovereignty and the territorial integrity of the DRC. They also committed themselves to taking the necessary measures to ensure the security of the population and transitional leaders. Part II related to the objectives of the transition.

These included the reunification, pacification and reconstruction of the DRC; the restoration of its territorial integrity and the re-establishment of the authority of the state throughout its national territory; national reconciliation; the formation of a national, restructured and integrated army; the organisation of free and transparent elections; and the establishment of a new political dispensation in the DRC. Part III contained the eight basic principles for a peaceful transition in the DRC. The first principle was that of 'appropriate representation' of all the 11 provinces and the political and social forces of the Republic, especially the women. This was a very important principle although it did not define what 'appropriate representation' meant and how it could be achieved. The second principle related to the stability of transitional institutions and provided that the President, the Vice-Presidents of the Republic, the President of the National Assembly and the President of the Senate should remain in office for the period of the transition, except in the case of resignation, embezzlement or corruption. In terms of the third principle, the parties committed themselves to establishing a system that could be respectful of the values of democracy and fundamental rights as embedded in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter and other international conventions duly ratified by the Republic. The fourth principle was the separation of powers between the executive, the legislature and the judiciary. According to the fifth principle, the parties were required to abide by the rule of consensus, inclusiveness and peaceful cohabitation during the transition. The sixth principle referred to the equal sharing of responsibilities amongst all the components of the ICD, taking into account the criteria of competence, credibility and honorability.

Closely related to the above was the seventh principle that required a fair and balanced sharing of responsibilities amongst the parties in the transitional government and particularly in the governmental commissions. To achieve this, careful attention was to be paid to the number and weight of ministerial portfolios. The last principle aimed at achieving national reconciliation and recommended the enactment of an amnesty law by the transitional National Assembly, or temporarily by a presidential decree-law. The amnesty was to be granted for acts of war and political and opinion offences, excluding genocide, war crimes and crimes against humanity. Part IV fixed the duration of the transition to

24 months, starting with the appointment of the transitional government to end with the election of the President. This duration could be extended for six months and renewed once for the same period. Part V concerned political institutions and other institutions supporting democracy. The transitional institutions were the President of the Republic, the government, the National Assembly, the Senate and the judiciary. Under the President as executive authority, a distinction was made between the President as the head of state and the Presidency, made up of the President and four Vice-Presidents to co-ordinate the political commission, the economic and financial commission, the reconstruction and development commission and the social and cultural commission respectively. The government was to comprise the President, Vice-Presidents, ministers and vice-ministers. The National Assembly and the Senate were to consist of 500 and 120 members respectively. Like the members of the government, they were to be appointed or nominated by the different components of the ICD. Particularly interesting for constitutionalism and the rule of law was the reaffirmation of the principle of the independence of the judiciary. The five institutions that were set up to support democracy during the transition included the Independent Electoral Commission, the High Authority of the Media, the Truth and Reconciliation Commission, the Human Rights National Observatory and the Commission on Ethics and Fight against Corruption.

Part VI of the Global and Inclusive Agreement related to the formation of an integrated and restructured national army and the establishment of a supreme defence council. Part VII comprised the final provisions. According to the first of these provisions, the transitional constitution was to be based on the Global and Inclusive Agreement and became part thereof. This provision was somehow problematic, since it made the Agreement the supreme law during the transition and not the Constitution. Part VIII related to the implementation of the Agreement, which was to come into effect on the date of its adoption by the ICD, and to the commitment of the parties to abide by it fully. It introduced five appendixes or schedules as integral part of the Agreement. Appendixes I and II concerned the sharing of responsibilities in the political institutions and in the public enterprises respectively. Appendixes III and IV related to the monitoring of the implementation of the Agreement by a national commission (Appendix III) and an international committee (Appendix IV). Appendix V dealt with security issues and especially with the interim measures to ensure the safety of the political leaders in Kinshasa.

4.2.3 *Interim Constitution*

The Preamble to the interim Constitution stressed the commitment of the Congolese parties to building a sovereign nation and establishing a

society healed of the divisions of the past, based on democratic values, social justice, the rule of law and fundamental human rights enshrined in international instruments already referred to in the Pretoria Agreement. Women's and children's rights featured prominently among the rights and freedoms to be guaranteed in the Republic. The Preamble reaffirmed the attachment of the Congolese parties to the UN and the AU, the relevant resolutions adopted by the ICD in Sun City earlier and to the principles of the Global and Inclusive Agreement. Part I dealt with the general provisions.

Article 1 reiterated that the Constitution was drawn on the Global and Inclusive Agreement and both instruments were the only source of power during the transition. Article 2 provided for the supremacy of the Constitution. Article 3 entitled every Congolese citizen to defend the nation and its territorial integrity and to resist any individual or group of persons who could use force to seize power or yield it in violation of the Constitution. It also outlawed the use of power to serve personal interests and prohibited the interference of any state institution or service in the functioning of another. Part II concerned the state, its independence, subdivision and sovereignty. The DRC was to be a unitary decentralised state comprising 10 provinces and Kinshasa, the capital city of the Republic (article 5). All the central, provincial and local authorities were bound to safeguard the integrity of the territory, the national unity of the people of the Congo and the sovereignty of the Republic (article 6). The democratic principle was embodied in article 10, which stressed that national sovereignty belonged to the people and all power emanated from the people who exercised it directly by way of referendum and indirectly through their representatives. Political pluralism was recognised through the right of every Congolese citizen to form a political party or join a political party of their choice freely. The imposition of a single party was outlawed and considered a 'crime of high treason' (article 11). The Congolese citizenship, a single and exclusive one, was granted to anyone whose ethnic group inhabited the DRC at independence (article 14).

Part III was the Bill of Rights. It entrenched a very wide range of rights and freedoms as enshrined in the African Charter and other international and African human rights instruments ratified by the DRC. The main problem with this Bill of Rights is that it contains neither an application nor an enforcement clause, but only enumerates the rights. There is no specific mandate for the courts of law and other state organs to respect or enforce human rights and the Constitution does not provide any guidance as far as their interpretation is concerned.

Part IV dealt with the organisation and exercise of power. The executive power was vested in the President who enjoyed the traditional authority of the head of state (articles 65–79), the Presidency consisting of the President (articles 80–82) and four Vice-Presidents (articles 83–88), and the government composed of the same plus the ministers and

vice-ministers nominated by the different components of the ICD (articles 89–96). The Presidency of the Republic was an original executive organ (articles 80–82), a sort of collegial presidency unknown in the constitutional post-colonial history of the Congo. In light of the Global and Inclusive Agreement, the Constitution provided that each Vice-President should head and co-ordinate one of four governmental commissions, consisting each of a number of ministries. It clearly designated the components of the ICD to supervise the four commissions and therefore hold the four Vice-Presidencies, namely the RCD (Political, Defence and Security Commission), the MLC (Economic and Financial Commission), the DRC government (Commission for Reconstruction and Development), and the Political Opposition (Social and Cultural Commission) (articles 80, 83, 86 and 87). The President was bound to consult with the Vice-Presidents regularly on almost all the matters relating to the management of the government. The legislative authority was bestowed on the National Assembly and the Senate (articles 97–109). The ministers were accountable before these two legislative chambers (article 91). However, these chambers could not censure the government and remove it from office (article 112). The relationship between the executive and the legislature was regulated by the Constitution (articles 110–136) which also determined the regime of incompatibilities and immunities and provided for the conditions under which the members of the government and the national legislature could be prosecuted and arrested (articles 137–145). Based on the principle of the separation of powers, the Constitution established a presidential regime *sui generis*.

Like the President, the Vice-Presidents of the Republic, the President of the National Assembly and the President of the Senate (article 197), the Presidents and members of the institutions supporting democracy (article 159), the members of the National Assembly (Deputies) and the Senate (Senators) were to be appointed for the whole duration of the transition (articles 100, 102 and 106), except in the case of resignation, death, permanent incapacity, or conviction for high treason, embezzlement and corruption by the Supreme Court of Justice (articles 66, 84, 89, 100, 106 and 159). The National Assembly and the Senate could not be dissolved. Nor could they remove the President, the Vice-Presidents and the Ministers from office. However, the separation of powers gave the executive a net advantage over the legislature, as the former could interfere in the legislative domain with the power granted to the President to exercise statutory power by way of decrees (article 71) or to legislate by decree-laws deliberated in the Council of Ministers, even though the authorisation of the National Assembly was needed to enact such decrees (article 119). The judicial authority was vested in the Supreme Court of Justice, the Courts of Appeal and civil and military courts and tribunals, as well as the public prosecutors attached to them (articles 146–153). According to the French constitutional tradition, the

President — not the Constitution — unfortunately was made the guarantor of the independence of the judiciary (article 147). Only the Supreme Court of Justice, the highest judicial institution of the Republic, was competent to decide on the constitutionality of the laws and other legislative acts, to interpret the Constitution, and to judge the members of the government, the National Assembly, the Senate and the different institutions supporting democracy (articles 150–153). Its composition, organisation and functioning were to be determined by an organic law and its decisions were final and binding. The Independent Electoral Commission, the Human Rights National Observatory, the High Authority of the Media and the Commission on Ethics and Fight against Corruption were established to support democracy (articles 154–160). Part IV also dealt with financial matters and institutions, such as the Reserve Bank (articles 161–172), the national police and armed forces (articles 173–186) and the Superior Defence Council (articles 187–190). Part V was missing in the draft Constitution.

Part VI of the draft Constitution related to treaties and international agreements. The Constitution adopted a monist approach to international law in the sense that treaties and international agreements duly concluded were directly binding on the Republic. Moreover, they were to prevail over the laws of the Republic other than the Constitution, subject to the application of each treaty or international agreement by the other party (article 193). Part VII comprised the final and transitional provisions. These provisions concerned the duration of the transition (article 196); the terms of office of the President, the Vice-Presidents of the Republic, the President of the National Assembly and the President of the Senate (article 197); the appointment of new governors, vice-governors, ambassadors and chief executive officers of public and mixed economy enterprises (article 198); the adoption of an amnesty law by the transitional National Assembly (article 199); the termination of office of all the previous political institutions with the exception of the President of the Republic (article 200); the amendments to the Constitution (article 201); the repeal of the previous Constitution and legislation (articles 202 and 203); the adoption of the transitional Constitution, its coming into operation and the period of its validity (articles 204 and 205). Article 204 of the Constitution provided that ‘it comes into force on its promulgation by the President of the Republic within the three clear days that follow its adoption’. Accordingly, President Joseph Kabila promulgated the transitional Constitution on 4 April 2003 and it has been in operation since then. On 7 April, he was sworn in as DRC President for the transition, while the transitional government and parliament were only inaugurated in July and August 2003 respectively. It was clear that the process was fraught with many dangers.

5 Challenges to sustainable peace, democracy, national reconstruction and human rights promotion

5.1 Internal challenges

The first challenge concerns the state in the DRC. Generally presented as an illuminating study case of a 'failed', 'disintegrated' and 'collapsed' state, the DRC even became the epitome of 'statelessness' in Africa.⁴⁶

Crawford Young, undoubtedly one of the most famous experts on the Congo, became ironically one of the renowned champions of 'statelessness' or 'state collapse' in Zaire/Congo. In 1983 Young questioned: 'Zaire, is there a state?'⁴⁷ Two years later he agreed with Turner on the 'Decline of the Zairean state'.⁴⁸ In 1993, Joseph also wrote:⁴⁹

There are cases in which something calling itself the 'state' still stands but is unable to conduct any of the normal functions of statehood. Zaire is not the only country in which the 'state' disappears a short drive outside its capital or the area of residence of its presidency. Where civil servants are irregularly paid, and funds for normal functions are absent, government offices may exist in various localities but nothing of consequence takes place within them. The governing structures of the state have thus joined the hospitals and infirmaries that lack medicines and equipment and schools that lack books and chairs . . . In addition to the 'failed or collapsed states,' there are many cases in Africa of the advanced erosion or atrophy of the state.

Elsewhere,⁵⁰ I dealt with the empiricist and political scientist theories of state collapse, which are based on faulty premises while, at worst, ignoring, or at best, disregarding constitutional and international law and are also contradicted by the survival of the very same states considered 'weak',⁵¹ 'failed',⁵² 'disintegrating',⁵³ 'collapsed',⁵⁴ or *fantômes* (ghosts).⁵⁵

⁴⁶ L Sindjoun 'Politics in Central Africa: A reflective introduction to the experience of states and region' (1999) 4 *African Journal of Political Science* 11.

⁴⁷ C Young 'Zaire, is there a state' (1993) Paper for the Annual Conference of the Canadian Association of African Studies (copy with author).

⁴⁸ C Young & T Turner *The rise and decline of the Zairean state* (1985).

⁴⁹ R Joseph 'The reconfiguration of power in late twentieth century Africa' (1999) in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 68.

⁵⁰ Mangu (n 45 above) 48–59.

⁵¹ RH Jackson & CG Rosberg 'Why Africa weak states persist: The empirical and the juridical in statehood' (1982) 35 *World Politics* 1–24.

⁵² J Herbst 'Responding to state failure in Africa' (1996) 21 *International Security* 120–144.

⁵³ L Villalon & P Huxtable (eds) *Critical juncture: The African state between disintegration and reconfiguration* (1997).

⁵⁴ IW Zartman *Collapsed states* (1995).

⁵⁵ See P Quantin 'L'Afrique centrale dans la guerre: Les Etats-fantômes ne meurent jamais' (1999) 4 *African Journal of Political Science* 106–125.

In many respects these Afro-pessimist theories are problematic. In case we might agree with Sindjoun that 'collapsed states are conflictualised states',⁵⁶ no state is immune to conflict.

The Western literature on Northern Ireland, Eastern European and other non-African states, for many years confronted with a number of conflicts, never emphasises state collapse in Europe, Latin America or in Asia. 'Responding to the state failure in Africa',⁵⁷ 'malignant minds in the service of imperialism', including Ali Mazrui, called for radical, neo-colonial and questionable solutions such as 'self-colonisation' or 'benign recolonisation'.⁵⁸ Archie Mafeje,⁵⁹ Bangura,⁶⁰ Wanyonyi⁶¹ and this author⁶² rejected such neo-colonialist views shared by many policy makers in Europe and the USA. This is not denying the fact that the Congolese state has been suffering a terrible crisis, as demonstrated by the existence of several 'governments' in the DRC. However, the state still exists in the DRC. One of the primary challenges relates to its rehabilitation and its reconstruction on the foundations of constitutionalism and the rule of law. On the other hand, the political history of the Congo is littered with political agreements and constitutions that were never honoured fully by those who signed them or formally committed to respecting them.

Accordingly, another challenge, and even the most urgent after Sun City, was, and still remains, to make the Global Agreement and the interim Constitution work and ensure that all the Congolese parties and people unreservedly abide by them. According to Nwabueze, wars and conflicts are the first forces that work against reconstruction, development, constitutionalism and democracy.⁶³ At the national level, there is no way the DRC can be reconstructed if the conflict is not terminated, without peace and security within its borders and with its neighbours. Another internal challenge is therefore to achieve and consolidate peace in the DRC and the sub-region.

However, the establishment and consolidation of peace and security in the DRC would require the disarmament of all other armed groups

⁵⁶ Sindjoun (n 46 above) 11.

⁵⁷ Herbst (n 52 above) 120–144.

⁵⁸ A Mazrui 'Towards a benign recolonisation of the disintegrating states of Africa' (1995) 2 *CODESRIA Bulletin*.

⁵⁹ A Mafeje 'Recolonisation or self-colonisation and malignant minds in the service of imperialism' (1995) 2 *CODESRIA Bulletin*.

⁶⁰ Y Bangura 'The pitfalls of recolonization: A comment on the Mazrui-Mafeje exchange' (1995) 4 *CODESRIA Bulletin*.

⁶¹ PK Wanyonyi 'The notion of self-colonisation: Is it an appropriate solution in the 21st century?' (1996) 1 *CODESRIA Bulletin* 19–21.

⁶² MB Mangu 'Conflict settlement in post-colonial Africa: Recolonisation or decolonisation? A reflection on the Mafeje/Mazrui debate' (1996) 1 *CODESRIA Bulletin* 21–30.

⁶³ BO Nwabueze *Constitutionalism in the emergent states* (1973) 174.

and the formation of a national army. This army should be capable of protecting the sovereignty and territorial integrity of the Congo against all forms of aggression. It should also ensure that the Congolese territory is no longer used as a sanctuary by foreign armed forces fighting for control of power in the neighbouring countries. The demilitarisation of these armed groups and the formation of a new national army feature among the issues that should be taken into account. The army should be educated to become the army of and for the entire people of the Congo and not an instrument for the conquest and exercise of power by some political leaders or even by its own commandants. Military-led authoritarianism has been an important ingredient in the decay of the state and the disintegration of the military itself.⁶⁴ The military has proved to be a wild card in the transition process, sometimes intervening to hasten, but generally to impede reform. The capacity of the military to obstruct or roll back the political reform process should not be underestimated.⁶⁵ Another important challenge relates to ethnicity or the national question that is generally presented as one of the major obstacles to nation building in Africa. Some scholars tend to see ethnic conflicts and problems everywhere in Africa. Ronen argued that '[m]ost conflicts in African states, whether political or armed ones, could not have reached their high intensity without the underlying ethnic factor'.⁶⁶ According to Wiseman, '[p]erhaps the greatest problem African states face is their cultural heterogeneity . . . states without nations'.⁶⁷ Busia held that '[o]ne of Africa's most intractable problems is how to integrate different tribes into a modern nation within a democratic framework. All African states have this problem'.⁶⁸ Ottaway also contended that:⁶⁹

The challenge for African countries, as for the rest of the world, is to accept the inevitability, and indeed the legitimacy of different ethnic identities and to find ways to manage the conflicts that arise, particularly when political movements manipulate these identities for political purposes.

⁶⁴ E Hutchful & A Bathily 'Introduction' in E Hutchful & A Bathily (eds) *The military and militarism in Africa* (1998) IV.

⁶⁵ See M Bratton & N Van de Walle 'Popular protest and political reform in Africa' in JE Nyang'oro (ed) *Discourses on democracy: Africa in comparative perspective* (1996) 220; A Olukoshi 'State, conflict and democracy in Africa: The complex process of renewal' in Joseph (n 49 above) 460; D Ronen 'The challenges of democracy in Africa: Some introductory observations' in D Ronen (ed) *Democracy and pluralism in Africa* (1986) 4.

⁶⁶ D Ronen 'The state and democracy in Africa' in Ronen (n 65 above) 198.

⁶⁷ JA Wiseman *Democracy in black Africa. Survival and revival* (1990) 14.

⁶⁸ KA Busia *Africa in search of democracy* (1967) 111.

⁶⁹ M Ottaway 'Ethnic politics in Africa: Change and continuity' in Joseph (n 49 above) 316.

Clapham and Wiseman suggested that 'it is autocracy rather than ethnic variety that has posed the most important threat to the maintenance of African states'.⁷⁰

Even in a state as ethnically divided as Nigeria, democratisation may plausibly be regarded as an integrating rather than a centrifugal force.⁷¹ The challenge is how to accommodate that heterogeneity.⁷² It is about nation building.⁷³ The possibility of an authoritarian solution not only appears remote, but in our view unworkable.⁷⁴ The problem may be addressed through peace agreements and all-inclusive negotiations leading to some agreed upon a form of power sharing, which is through democratisation.⁷⁵

The Preamble to the Lusaka Agreement and article 14 of the interim Constitution provide that '[a]ll ethnic groups and nationalities whose members and territory constituted what became the Congo on independence must enjoy equality of rights and be protected by law as citizens'. This is a very important provision, given the role played by the ethnic question in the armed conflict that mainly developed because people from some ethnic groups, namely the Banyamulenge, were denied their human rights, especially their political rights as citizens of the Congo. Although ethnic conflicts should not be surprising in this multi-ethnic country, bringing and consolidating peace among the various ethnic groups inhabiting the Eastern and Kivu Provinces, including the Hema, Lendu and Banyamulenge, will constitute a serious test of national reconciliation during the transition and beyond.

Related to ethnicity is citizenship. In Africa, the concept of citizenship continues to be more closely associated with kinship than with territory.⁷⁶ Moreover, the organisation of the citizenry — autonomously and pluralistically from the roots — both inside and outside the formal polity, is an indispensable condition for the development and maintenance of a secure democracy.

As stakeholders in the democratic transition, civil society organisations are key actors in the transformation process. Political culture also plays a major role in the values-learning process and is an important factor affecting both the establishment and the consolidation

⁷⁰ C Clapham & JA Wiseman 'Conclusion: Assessing the prospects for the consolidation of democracy in Africa' in JA Wiseman (ed) *Democracy and political change in sub-Saharan Africa* (1995) 224.

⁷¹ As above, 223.

⁷² Busia (n 68 above) 17–20 32–33.

⁷³ As above, 17–20.

⁷⁴ Ottaway (n 69 above) 315.

⁷⁵ See D Rothchild 'Ethnic insecurity, peace agreements and state building' in Joseph (n 49 above) 319–337.

⁷⁶ Busia (n 68 above) 19.

of constitutional and democratic institutions.⁷⁷ It has to be 'nursed by teaching and by precepts diffused among children at school, among the members of various organisations and associations, and among the society generally'.⁷⁸ Therefore, building a viable, strong, autonomous, development-oriented civil society and promoting the political culture of the people are among the challenges that must be overcome to win the struggle against authoritarianism, underdevelopment and conflicts in Africa.⁷⁹ A further challenge relates to the leadership that is needed, both politically and intellectually, to reconstruct the DRC and the continent.

As far as the political leadership is concerned, its role in reconciling the people, rebuilding the country and implementing political and constitutional agreements is of the utmost importance. Some peoples may have been fortunate, but not the people of the Congo. Rulers have come to power to serve their own interests, ready to destroy what they never built, disrespectful of the rule of law and the Constitution, if any, preaching the language of war, conflict and exclusion rather than peace and national reconciliation. The challenge in the DRC and much of the continent is to get a new breed of leaders truly committed to democracy, peace, national reconciliation and reconstruction. However well crafted a legal order may be, its net value mainly depends on the qualities of men and women to make it work.

Most of the prospective Presidents and heads of state would hardly agree that the Robben Island cell once occupied by Nelson Mandela might be the best training camp for leaders who would care for their people and preach the language of constitutionalism, democracy, human rights, peace, national reconciliation and reconstruction instead of violence, abuse, division, exclusion, authoritarianism, war and revenge. The implementation of the Global Agreement as well as the transitional Constitution and the achievement of national reconciliation will first of all depend on the commitment of the Congolese political leaders to abide by these instruments and make peace amongst themselves. However, one should not expect that people who fought for power for so many years should become good friends overnight. There is a great deal of distrust and suspicion among the parties. Therefore, combating the 'belligerent syndrome' is another challenge for democratic transition in the Congo. On the other hand, as Adama put it, when we speak of democracy and rule of law, the key question is that of

⁷⁷ See DP Franklin & MJ Baun 'Conclusion' in DP Franklin & MJ Baun (eds) *Political culture and constitutionalism. A comparative approach* (1994) 225 226 231; Nwabueze (n 63 above) 304; Busia (n 68 above) 104 109.

⁷⁸ Nwabueze (n 63 above) 304.

⁷⁹ On the role civil society may play in the process of renewal, see L Diamond 'Introduction: Persistence, erosion, breakdown and renewal' in L Diamond *et al* (eds) *Democracy in developing countries: Africa* (1988) 50.

the independence of the judiciary expected to uphold the law and ensure the respect for human rights.⁸⁰ The principle of division and checks of powers must be welcomed as a step towards democratisation.⁸¹ The respect of the separation of powers and the independence of the judiciary will definitely be another test during the transition. A further challenge for sustainable peace in the DRC relates to the reconstruction of the country, which was destroyed during several years of authoritarian rule and rebellions under Mobutu and Kabila. Where they still exist, hospitals are running out of medicines, doctors and nurses. Schools, roads and railways were bombed in many regions. The communications are very poor amongst the different provinces and regions of this vast country.

The achievement of national unity and reconciliation and the re-establishment of the state authority over the whole Congolese territory require that the DRC be functioning effectively as a single entity with its various parts interconnected and linked to the seat of the government in Kinshasa. Furthermore, credible elections cannot be held at the end of the transition without adequate infrastructures or an efficient administration.

The fundamentals of the economy must be put in place and resources generated. The Congolese people must return to work in order to rebuild their country. The end of the armed conflict, as heralded by the signing of a global and inclusive agreement and the adoption of the transitional Constitution, cannot alone resolve all the problems of the Congo. People do not eat agreements. The Congolese leaders and people should now embark on a massive programme of reconstruction and development.

6 External challenges

External challenges for democratic and peaceful transition in the DRC concern the situation in the neighbouring countries, the commitment of other African leaders and the international community, including the rich Western countries. There cannot be sustainable peace and democracy in the DRC without peace and democracy in its neighbourhood, without the leaders of the neighbouring countries stopping their interference in the Congolese affairs, and without the

⁸⁰ D Adama 'Démocratie et primauté du droit' (1993) in G Conac (ed) *L'Afrique en transition vers le pluralisme politique* (1993) 467.

⁸¹ M Mamdani 'Social movements and constitutionalism in the African context' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 243. See also IG Shivji 'Contradictory class perspectives in the debate on democracy' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 255.

commitment of other African and Western countries to helping rebuild the Congo. Many analysts and politicians are quick to forget that without Western and mainly American support, Mobutu would not have come to power and ruled us for over 32 years, Laurent-Désiré Kabila would not have seized the reigns of power in Kinshasa, and the rebellion would probably not have erupted or would have been rapidly contained.

After so many years of war, conflict and destruction, the commitment of the Congolese people alone would hardly suffice. It is important that some countries, which have been part of the problem or the conflict, become part of its resolution and participate in the reconstruction of the DRC and the Great Lakes region.

7 Conclusion

The conflict that unfolded in the DRC in the late 1990s was the most serious crisis in Africa since the end of the Cold War, and even since independence in the early 1960s. The Congolese conflict was both an internal rebellion against an authoritarian regime that did not care for the rights of the people and also a foreign aggression of the DRC by some of its Eastern neighbours, namely Rwanda and Uganda, with the complicity of the most powerful actors on the international scene. From a human rights perspective, the war in the DRC resulted in the violation of nearly all human and peoples' rights in the African Charter that is the cornerstone of the African human rights system. Regrettably, while it was clear that massive human rights violations were being committed by all parties involved in the conflict as well as by their respective allies, no communication was filed with the African Commission that therefore played no significant role in the protection of the rights of the peoples of the Congo. As stressed earlier, war being a violation of the right to peace and resulting in the negation of almost all human and peoples' rights, a first step in the promotion and protection of these rights is to achieve peace. On the other hand, it appears that when the survival of the state itself is at risk, the protection of human and peoples' rights becomes a minor issue. An effective state is needed to promote human rights. State rehabilitation would require the foundation on the state on the values of constitutionalism and democracy.

Human rights cannot flourish in a country without a supreme constitution that enshrines the rights of all the people and provides for their enforcement by independent organs, especially courts of law. The adoption of the Global and Inclusive Agreement and an interim Constitution with a Bill of Rights for the DRC was a step forward in the right direction and should be welcomed by all those interested in the promotion of human and peoples' rights on our continent. Peace, democracy and development are human and peoples' rights and

constitute the future of man all over the world, including in the DRC and the rest of the African continent. Nothing condemns us to embrace the Afro-pessimist discourse so much triumphant in the Western media and literature.

Despite the challenges ahead, there is a future for human and peoples' rights in the DRC. It is anticipated that one of the first acts of the newly appointed transitional government will be the ratification of the Protocol on the Establishment of an African Court on Human and Peoples' Rights, which should contribute to putting an end to massive violations of human rights and to improving the life conditions in Africa, transforming it from a land of 'human wrongs' into a continent more respectful of human and peoples' rights, for which a Charter was adopted in 1981. Hopefully, the DRC will also adhere to NEPAD's African Peer Review Mechanism (APRM), which takes human rights and governance issues very seriously. True peace is impossible without democracy, respect for human and peoples' rights and the rule of law. To paraphrase and borrow once more from Pope Paul VI's *Populorum Progressio*, democracy and human rights are prerequisites for enduring peace and development. Although conflicts and wars are inherent to social life in any society, the best way to save our peoples from these scourges, which brought untold sorrow and misery, is to unreservedly embark on the road to democracy, constitutionalism and human rights.

Enforcement of international humanitarian law in Nigeria

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Summary

This article examines the implementation of international humanitarian law in Nigerian law. It is clear from Nigerian jurisprudence that a treaty remains unenforceable under domestic law unless it has been enacted into law by parliament. The four Geneva Conventions of 1949 have been incorporated into Nigerian legislation. This is, however, not the case with the Additional Protocols to the Geneva Conventions, which were adopted in 1977 and ratified by Nigeria in 1988. This poses a problem, especially with regard to the protection of international humanitarian law in an internal armed conflict.

1 Introduction

Over the years, there have been moves to ensure that wars are waged in a humane manner. Nations involved in wars are consequently enjoined to protect the sick, the wounded, prisoners of war, civilians as well as civilian structures.¹ The questions that legal writers and humanitarians have posed are: To what extent can international humanitarian law be enforced² within a municipal jurisdiction; when may international humanitarian law be applied to a conflict; and was a crime against humanity committed within its jurisdiction?

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¹ T Osipitan *Nigerian criminal law and the Geneva Conventions. Current themes in Nigerian law* (1997) 376.

² For the purpose of this paper, the broad concept definition of enforcement, which includes 'the act of putting something, such as law, into effect', will be adopted. See *Black's law dictionary* 528.

A remarkable feature of present-day Africa is the proliferation of armed conflict, leaving in its wake an unimaginable carnage.³ Therefore, the question to be answered is: Can fundamental international rules intended to resolve matters of humanitarian concern, arising directly from armed conflicts, remain unenforceable simply because a municipal jurisdiction would not so permit? Can a state enact laws which amount to a derogation of her obligations under international agreements?

This paper examines the existing municipal legal framework *vis-à-vis* the enforcement of international humanitarian law, its strength and weakness and the conflict presented thereunder, with the focus on Nigeria (being the most populous African state).

2 Constitutional limitation

International law norms in general, and of treaties⁴ in particular, are not as a matter of course enforceable in Nigeria. For a very long time, the appropriate approach to be adopted by Nigerian courts as a matter of principle when faced with a situation of conflict between international law and Nigerian law remained unresolved. This is so because section 1 of the successive Nigerian Constitutions⁵ usually suggests that the Constitution as a whole prevails over international law. For instance, section 1(1) of the 1999 Constitution provides that 'the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria'.⁶ To this extent, '[I]f any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.⁷

However, the most important constitutional limitation in the applicability of a treaty or any such international instruments by Nigerian courts is to be found in section 12(1) of the Constitution,⁸ which provides as follows:

³ Such conflict spots include Burundi, the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, Somalia and Sudan.

⁴ The 1969 Vienna Convention on the law of treaties defines a treaty as an international agreement or by whatever name called, eg act, charter, concordant, convention, covenant, declaration, protocol or statute concluded between states in written form and governed by international law, whether embodied in a single instrument or in one or more related instruments and whatever its particular designation. See Halsbury's *Law of England* Vol 18 para 1769. See also *Black's law dictionary* 1502.

⁵ 1963, 1979 and the current 1999 Constitution.

⁶ Constitution of the Federal Republic of Nigeria 1999.

⁷ As above, sec 1(3). See also eg sec 1(2) of the Constitution of Ghana 1992; sec 2 of the Constitution of the Republic of South Africa 1996; and sec 3 of the Constitution of Zimbabwe 2000.

⁸ n 6 above.

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

This no doubt attests to the prevalence of the transformation theory⁹ (with respect to treaty rules) in Nigeria.¹⁰

This position seems to have been effectively reaffirmed by the Supreme Court of Nigeria in the case of *Abacha v Fawehinmi*,¹¹ when the Court held as follows:

An international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in our courts. This was the tenor of section 12(1) of the 1979 Constitution, now re-enacted in section 12(1) of the 1999 Constitution.

The Supreme Court further explained that, where a treaty has been enacted into law by the National Assembly, such a treaty becomes binding and the court must give effect to it, as is the case with all other laws falling within the judicial powers of the courts. This is the case with the African Charter on Human and Peoples' Rights (African Charter or Charter), which is incorporated into domestic law via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.¹²

It is therefore manifest that, no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable unless it is enacted into the law of the country by the National Assembly.¹³ This is so because, in

⁹ The application of international law in a municipal jurisdiction has given rise to two theories, namely the theory of incorporation and that of transformation. According to the transformation theory, a rule of international law will not *ex proprio vigore* (ie by its own force) apply in a municipal sphere: It has to undergo a transformation whereby it is admitted into the municipal corpus of law (ie domesticated). Whereas with the incorporation theory, international law automatically forms part of municipal law, without requiring any specific act of adoption; it applies directly and immediately in the municipal sphere so that the courts and other adjudicative agencies of the land can apply it.

¹⁰ The same position also prevails in England: See *R v Chief Immigration Officer, Ex Parte Bibi* [1976] 1 WLR 976 where Lord Denning succinctly concludes that '... treaties and declarations do not become part of our law until they are made law by parliament'. See also the recent decision of the Privy Council in *Higgs & Another v Minister of National Security & Others*; *The Times* of 12 December 1999 where it was held that '[i]n the law of England and Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the crown. Treaties formed no part of domestic law unless enacted by the legislative ...'

¹¹ May (2000) 6 NWLR (Pt 660) 228 SC.

¹² Cap 10 Laws of the Federation of Nigeria 1990.

¹³ Pursuant to this constitutional provision, the presidency has introduced ten separate bills, sent to the National Assembly in order to bring into effect the following international treaties: (1) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Ratification and Enforcement) Bill 2002; (2) the Convention against Torture and other Cruel, Inhuman or Degrading

accordance with the Constitution, a person shall not be convicted of any criminal offence unless that offence is defined and the penalty prescribed in a written law. The same provision states that '... in this subsection a written law refers to an Act of the National Assembly or a law of the state, any subsidiary legislation or instrument under the provisions of the law'.¹⁴ The above position is generally in accord with the practice in other countries.¹⁵

3 The Geneva Conventions and the Additional Protocols¹⁶

International humanitarian law¹⁷ was significantly reviewed and updated in 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. This conference was held in Geneva from April to August 1949, after which four conventions on the laws of war were adopted.¹⁸ The four 1949 Conventions are:

Treatment or Punishment (Ratification and Enforcement) Bill 2001; (3) the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Ratification and Enforcement) Bill 2001; (4) the Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tomé and Príncipe on the Joint Development of Petroleum and Other Resources in the Areas of Exclusive Economic Zone of the Two States (Ratification and Enforcement) Bill 2001; (5) the United Nations Convention against Transnational Organized Crime (Ratification and Enforcement) Bill 2001; (6) the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Ratification and Enforcement) Bill 2001; (7) the Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2001; (8) the Treaty to Establish the African Union (Ratification and Jurisdiction) Bill 2001; (9) the African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba) Bill 2001; (10) the United Nations Convention on the Carriage of Goods by Sea (1978) Bill 2001. See Assembly Watch (CRP) vol.3 No13, July 2002.

¹⁴ Sec 36(12) Constitution of the Federal Republic of Nigeria 1999.

¹⁵ Eg, sec 111B of the Constitution of Zimbabwe provides that '[a]ny convention, treaty or agreement acceded to, concluded or executed by or under the authority of the president with one or more foreign states or government or international organisations (a) shall be subject to approval by parliament, and (b) shall not form part of the law of Zimbabwe unless it has been incorporated into law by or under an Act of parliament'. Equally, sec 75 of the Constitution of the Republic of Ghana states that '[a] treaty, agreement or convention executed by or under the authority of the president shall be subject to ratification by (a) Act of parliament (b) resolution of parliament supported by vote of more than one half of all members of parliament'. See further sec 231(4) of the Constitution of the Republic of South Africa, the Constitution Sierra Leone Act 6 of 1991, etc.

¹⁶ The Conventions and the Protocols alone account for a total of about 560 articles and jointly remain the most prominent source of international humanitarian law.

¹⁷ Also known as the law of armed conflict or law of war.

¹⁸ The bitter experience of the Second World War, coupled with certain observable inadequacies in certain areas of the law and the growing regard for the rights of individuals informed the need for renewed efforts to codify and develop the law.

- 1 the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- 2 the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- 3 the Geneva Convention Relative to the Treatment of Prisoners of War; and
- 4 the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

Although the central aim of all four the Conventions is the protection of victims of war, each Convention focuses on specific categories of victims of war in accordance with its title. The Conventions generally seek to introduce humanitarian rules as to the treatment of prisoners of war, the protection of the civilian population and the care of wounded and sick members of the armed forces. The four Geneva Conventions were intended primarily to apply to international or inter-state conflicts. However, certain minimal provisions are contained in article 3 (common to the four Conventions) which apply to armed conflict that is not of an 'international character'.

Nevertheless, the scheme of article 3 is skeletal and because of the increase in wars of liberation and other internal armed conflict (which abound in many African states),¹⁹ the two Protocols,²⁰ additional to the Geneva Conventions signed in 1977, were intended to extend the scope of the Conventions.

Protocol I extends the provisions of the Conventions to armed conflict fought against colonial domination and alien occupation and against racist regimes in the exercise of the right to self-determination. While Protocol II, for example, aims at extending the humanitarian provisions of the Conventions to domestic armed conflicts, it makes the humane provisions of the Conventions applicable to non-international armed conflict that takes place in the territory of a party, between its armed forces and dissident armed forces.²¹

However, the question that often arises is whether these provisions apply only in cases of full-scale wars or whether they extend to other minor internal conflicts.

Conflicts envisaged under these provisions are genuine armed conflicts between the armed forces of a state and dissident armed forces

¹⁹ Then, eg, internal armed conflicts in Angola, Ethiopia, Nigeria, South Africa, to mention but a few.

²⁰ Namely Protocol I; Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts; Protocol II, Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts; both of 8 June 1977.

²¹ Art 1(1) Additional Protocol II.

under responsible command.²² They would not cover internal disturbances and tensions such as riots, isolated and sporadic acts of violence²³ and other acts of a similar nature.²⁴

4 Statutory status of the Geneva Conventions and the Additional Protocols in Nigeria

There is no gainsaying the fact that, as a contracting party to the Geneva Conventions and Additional Protocols, there is an obligation incumbent upon Nigeria²⁵ to respect and ensure respect for the humanitarian provisions of the Conventions and the Protocols.²⁶

However, whether these provisions are binding on individuals or members of the armed forces engaged in armed conflict in Nigeria, depends on whether these international treaties have been embodied in Nigeria's municipal law. As noted earlier, section 12(1) of the Constitution²⁷ provides as follows:²⁸

No treaty between Nigeria and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

While it is so that the four Geneva Conventions of 1949 have been incorporated into Nigeria's municipal laws via the Geneva Conventions Act,²⁹ the same cannot be said of the two Additional Protocols — despite their ratification by Nigeria.

²² For instance, the conflicts in Liberia, Sierra Leone, Somalia, Sudan, etc, including Nigeria's civil war.

²³ Which may include communal and inter-communal clashes, civil strikes and other internal disturbances amounting to breaches of public peace. Of course, these are usually regulated by the municipal legal framework. In Nigeria, for instance, the criminal code (n 37 below) imposes criminal liability for offence against public order (which includes inter-communal war, inciting mutiny, etc) under ch 6, and for any breach of public peace (which includes riot, unlawful procession and threatening violence, etc) under ch 10.

²⁴ See art 1(2) Additional Protocol II. Also, the United Kingdom takes the view that for these conventions to be implicated in non-international conflicts, a 'high level of intensity of military operations' is required. See Shaw *International law* (1986) 582-583.

²⁵ Nigeria became a party to all four Conventions by accession on 9 June 1961, and ratified the Additional Protocols in 1988.

²⁶ See eg art 1 Geneva Convention Relative to the Treatment of Prisoners of War.

²⁷ Constitution of the Federal Republic of Nigeria 1999.

²⁸ This constitutional provision was upheld by the Supreme Court of Nigeria in *Abacha v Gani Fawehinmi* (n 11 above), when it said: 'Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.'

²⁹ Cap 162 Laws of the Federation of Nigeria (LFN) 1990. See sec 2(1) of the Act.

The effect of the Act is that it incorporated the provisions of the Geneva Convention into Nigeria's municipal law. The Act also prescribes punishment for acts classified as grave breaches of the Conventions. It constitutes an offence for any person, whatever his or her nationality, to commit such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the first schedule to the Act. These articles are:

- article 50 of the First Geneva Convention 1949;
- article 51 of the Second Geneva Convention 1949;
- article 130 of the Third Geneva Convention 1949; and
- article 147 of the Fourth Geneva Convention 1949.

Such person(s) shall on conviction, in the case of a grave breach involving the wilful killing of a person protected by the Convention in question, be sentenced to death. In the case of other grave breaches, the offender will on conviction be liable to imprisonment for a term not exceeding 14 years.³⁰

The Act also allows a person to be tried in Nigeria and sentenced for an offence committed outside Nigeria as if that offence had been committed within Nigeria.³¹ Section 3(2) of the Act provides that:

A person may be proceeded against, tried and sentenced in the Federal Capital for an offence under this section committed outside Nigeria as if the offence had been committed in the Federal Capital, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital.

However, there is no domestic law which gives effect to the provisions of the Additional Protocols I and II to the 1949 Conventions. Consequently, the Additional Protocols lack the force of law in Nigeria.³² However, some of the provisions of the Additional Protocol, for example those dealing with the right of an accused person to a fair trial, are protected under the Constitution of the Federal Republic of Nigeria 1999.³³ The Constitution, like the Additional Protocols, guarantees persons charged with an offence the right to be presumed innocent until proven guilty according to law³⁴ and to be fairly and publicly tried.³⁵ Furthermore,

³⁰ As above, sec 3(1).

³¹ As above, sec 3(2).

³² There is an urgent and compelling need for Nigeria's domestication of the Additional Protocols, in view of the alarming increase in local armed conflict within the country and their geographical spread, eg Ife/Modakeke in the West, Agulerie/Umulerie in the East, Zango Kataf/Fulani and Christain/Muslim in the North, Ijaw/Itshekiri in the Niger-Delta Area, etc.

³³ See sec 36(5)–(6). This is mainly a restatement of similar provisions contained in the 1979 and the stillborn 1989 and 1995 Constitutions.

³⁴ See sec 36(5) of the Constitution, which is *in pari materia* with art 6(1)(d) of Additional Protocol II.

³⁵ See sec 36(3) of the Constitution. See also, generally, the provisions of art 6 of Additional Protocol II.

persons accused of a crime are entitled to adequate time and facilities to prepare their defence, to defend themselves in person or to be defended by a legal practitioner of their choice, to cross-examine prosecution witnesses and to secure the attendance of those witnesses in court, on the same conditions as those applying to the prosecution's witnesses.

The Constitution (as is the case with the Additional Protocols) expressly prohibits retroactive penal legislation. Accordingly, no person shall be held guilty for a criminal offence on account of any act or omission that did not at the time it took place constitute an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.³⁶

Nevertheless, it should be conceded that the absence of a municipal penal statute on the Additional Protocols is a fundamental drawback to the implementation of these Protocols. Nigeria, in view of her ratification of the provisions of the Protocols, is still duty-bound to respect and ensure respect for the humanitarian provisions of the Protocols.

Moreover, it cannot be concluded that Nigeria's municipal penal laws are criminally silent on inhumane conduct during conflict. The Nigerian Criminal Code,³⁷ for example, outlaws some inhuman conduct similar to that outlawed by the Conventions and the Additional Protocols. The code prohibits murder,³⁸ arson,³⁹ rape,⁴⁰ assault,⁴¹ indecent assault,⁴² slave dealing,⁴³ kidnapping,⁴⁴ attempts to destroy property by explosives,⁴⁵ and others.

The Nigeria Army Act,⁴⁶ which applies to members of the Nigerian Army, contains offences relating to the conduct of warfare and peace-time activities of the army. For instance, looting,⁴⁷ conduct prejudicial to military discipline,⁴⁸ scandalous conduct,⁴⁹ disgraceful conduct⁵⁰ and mutiny⁵¹ are proscribed.

³⁶ See sec 36(8) of the Constitution, which is *in pari materia* with art 6(2)(b)–(c) of Additional Protocol II.

³⁷ Cap 77 Laws of the Federation of Nigeria (LFN) 1990.

³⁸ As above, secs 306 & 315.

³⁹ As above, sec 443.

⁴⁰ As above, sec 358.

⁴¹ As above, secs 351 & 355.

⁴² As above, secs 352, 353 & 360.

⁴³ As above, sec 369.

⁴⁴ As above, sec 364.

⁴⁵ As above, sec 452.

⁴⁶ Cap 294 Laws of the Federation of Nigeria (LFN) 1990.

⁴⁷ As above, sec 36.

⁴⁸ As above, sec 71.

⁴⁹ As above, sec 66.

⁵⁰ As above, sec 68.

⁵¹ As above, secs 37–38.

The Act also makes provision for 'civil offences'. It provides that any person subject to military law under the Act, who commits a civil offence, whether in Nigeria or elsewhere, shall be guilty of a 'civil offence'.⁵² In the Act, the expression 'civil offence' means any act or omission punishable by any law enacted by the National Assembly or having effect as if it were so enacted.⁵³ A person convicted by court martial of an offence against this section shall, if the corresponding civil offence is treason or murder, be liable to suffer death.⁵⁴

Varieties of punishment for the violation of provisions contained therein are prescribed in the Act. These include death, imprisonment, cashiering, dismissal from the service, reduction in rank, fine and severe reprimand.⁵⁵

No doubt, these penal provisions of the Army Act (which are similar to those contained in the Navy⁵⁶ and Air force Acts⁵⁷) are limited in scope and thus fail to meet the aspirations of the framers of the Additional Protocols *vis-à-vis* the humane prosecution of wars. Nevertheless, the Nigerian Armed Forces have always consciously acknowledged the importance of humane waging of war. For instance, the few cases involving members of the Nigerian Army who were tried on the basis of the 'Operational Code of Conduct of the Nigerian Armed Forces'⁵⁸ clearly reveal a trend towards criminalisation of certain types of conduct that violate the rules of humanitarian law (especially applicable in internal conflicts).

5 International obligation and municipal law

As the activities of people become increasingly internationalised and as international co-operation increases, there is a growing interaction between the internal and external policies of states. This in turn produces a growing interaction between municipal law and international law.

However, in the quest to fulfil the reasonable expectation of the citizenry, to assure and guarantee their worth as human beings within the territorial jurisdiction of states (both in peace time and conflict time), states are presumed to submit themselves to an international legal order under which they assume various obligations for the common good.

⁵² As above, sec 72(1).

⁵³ As above, sec 72(2).

⁵⁴ As above, sec 72(3)(a)(b).

⁵⁵ As above, sec 73.

⁵⁶ Navy Act Cap 288 Laws of the Federation of Nigeria (LFN) 1990.

⁵⁷ Air Force Act Cap 15 Laws of the Federation of Nigeria (LFN) 1990.

⁵⁸ Adopted in 1967 during the civil war against the Biafran military group. See also paras 106, 125 & 130 of the *Tadic* case decision.

Thus, anything done under a municipal system which undermines the guaranteed rights under an international legal order becomes nugatory. This view is buttressed by the Vienna Convention on the law of treaties, which provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁵⁹

The Nigerian courts in certain instances have attempted to draw a clear distinction between international law and municipal law⁶⁰ in order to situate the fundamental rights of the citizenry and to shield them from the whims and caprices of municipality. This commendable attempt was bolstered by the court's decision in *Oshievire v British Caledonia Airways Ltd*⁶¹ when it stated that:

An international treaty is an expression of agreed compromise principles by the contracting states and in general autonomous of the municipal laws of contracting states as regards its application and construction. It is useful to appropriate that an international agreement embodied in a convention or treaty have submitted themselves to be bound by its provisions which are thereafter above domestic legislation.

This position, when viewed in the light of article 1,⁶² common to all the four Geneva Conventions and Additional Protocol I, suggests that the aim of these fundamental international agreements is to ensure respect for human personality and dignity. As this is the very essence of humanity, the interest of the citizens therefore becomes a common objective, either under international or municipal jurisdiction. Thus neither of the jurisdictions should be allowed to constitute a clog in the pursuit of the common objective.⁶³

⁵⁹ Art 27 Vienna Convention on the Law of Treaties 1969.

⁶⁰ This is akin to the dualist theory with respect to the relationship between international law and municipal law. Dualism holds the view that international law and municipal law are two separate and different legal systems, in both their contents and scope. The Appeal Court of Nigeria in *Fawehinmi v Abacha* (1996) 9 NWLR (Pt 470) 710 exemplified this theory when it held that 'no government will be allowed to contract out by local legislation international obligations and that ouster clauses cannot affect the operation of the African Charter on Human and Peoples' Rights in Nigeria'. See for comparison the subsequent position of the Supreme Court, *May* (2000) 6 NWLR (Pt 660) 228 (n 11 above).

⁶¹ (1990) 7 NWLR (Pt 163) 489.

⁶² Which states that 'the high contracting parties undertake to respect and to ensure respect for the present Convention in all circumstances'.

⁶³ The trend, especially in the area of human rights, is that 'the citizen of a particular state is no less a citizen of all other states and each citizen is entitled to equal protection of laws from all state governments'. See IO Smith 'Enforcement of human rights treaties in a military regime: Effect of ouster clauses on the application of the African Charter on Human and Peoples' Rights in Nigeria' in the review of the African Commission on Human and Peoples' Rights Vol 9 Pt2 2000 202. Although, when confronted with the problem of enforcement of human rights, one has to rely on the well established fact that implementation of human rights is achieved best through agency of municipal or national law of each state member of the world community of nations. See M Singh *Human rights and future of mankind* (1981) 66.

6 Conclusion

Nigeria, like many other Commonwealth countries, inherited the English common law rules governing the municipal application of international law. The practice of the Nigerian courts on the subject matter is still in the process of being developed, and the courts will continue to apply the rules of international law, provided they are found not to be overridden by clear rules of the domestic law, especially the Constitution, although section 12(1) of the 1999 Constitution is clear and the interpretation adopted by the court in *Abacha v Fawehinmi*⁶⁴ apposite. However, in view of the reality of our world today, and in accordance with modern trends, a more responsive approach seems to be favoured by the Nigerian courts. Such an approach is envisaged by Wali JSC in *Ibidapo v Lufthansa Airlines*,⁶⁵ when he said:

Nigeria, as part of the international community, for the sake of political and economic stability cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.

Therefore, mindful of the fact that in this century millions of children, women and men have been victims of unimaginable atrocities that deeply shocked the conscience of humanity, and recognising that such grave crimes threaten the peace, security and well-being of the world, there is a compelling need to ensure that the enforcement of international humanitarian law is positively liberated from the shackles of national limitations.⁶⁶ In this way, an end may be put to impunity by ensuring that the most serious crimes of concern to the international community do not go unpunished.⁶⁷

⁶⁴ n 11 above.

⁶⁵ May (1997) 4 NWLR (Pt 498) 124 SC 136.

⁶⁶ Especially on the continent of Africa. This will prevent leaders with despotic tendencies from stultifying the application of international humanitarian law via municipal legislation.

⁶⁷ See Preamble to the Rome Statute of the International Criminal Court of 17 July 1998.

Police accountability in Kenya

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Recently the police shot eight gangsters, which means that eight of them have been sent out of the streets for life. We believe that law enforcement officers should continue doing the same in a bid to reduce crime.

— *Hon Marsden Madoka, Minister for Internal Security
(Office of the President), Kenya, 3 April 2000*

I have word from the President that there shall not be orders from anywhere else except your immediate superiors.

— *Hon Chris Murungaru, Minister for Provincial Administration
and National Security, Kenya, 20 February 2003*

Summary

This article examines the Kenya Police Force and how the current 'constitutional moment' may be seized for much needed reform. The police have been at the nexus of the most serious problems facing Kenyan society: corruption, crime, inter-ethnic violence and vigilantism. Institutional arrangements are needed to ensure police accountability. Accountability has the following components: popular accountability, legal accountability and transparency. It is essential that the police be insulated from extralegal or illegal political interference and that internal and external supervisory and complaints mechanisms holding members of the police accountable, exist. The article discusses police accountability in Kenya. Brief comparative sketches of Uganda, Nigeria, South Africa and Northern Ireland are given. These countries have taken steps to broaden the range of actors and institutions to which the police are accountable and to have the executive

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share the power of appointing and removing senior officers of the police. The article ends with six recommendations on how to enshrine popular accountability, legal accountability and transparency as the central values in Kenyan law enforcement.

1 Introduction: Kenya's constitutional moment

According to the legal theorist Bruce Ackerman, constitutional democracy in the United States has evolved along two distinct tracks of lawmaking. On one track, that of 'normal politics', the executive, legislative and judicial branches of government make decisions on behalf of citizens in the absence of high levels of citizen engagement. However, during 'constitutional moments' — moments of sustained citizen engagement and mobilisation — a second track of 'higher' lawmaking emerges. During these moments, the people themselves assert their supremacy, and sweeping changes in the structure of constitutional democracy are thereby legitimated. When American democracy has functioned on this second, higher track of lawmaking — as when the Constitution itself was framed, when the country emerged from its civil war and brought an end to slavery, and when the federal government dramatically expanded its intervention in the national economy during the New Deal — governing institutions have been fundamentally reshaped.¹

In the past year, Kenya has entered its own 'constitutional moment'. This is self-evident in the sense that Kenyans are in the process of rewriting their Constitution. It is also true in the deeper sense that Ackerman describes: Kenyan citizens are reshaping their society through debate, activism and political participation.

The Kenyan people have elected a new government. For many months, they have also engaged in a spirited debate about the substance of the new Constitution and about the proper structure of the new government. After more than a decade of activism for democratic reform, civic engagement and mobilisation are at a peak. There has, in short, been no better opportunity since independence for the people of Kenya to revise the principles underlying Kenyan democracy and to reshape government institutions in accordance with those principles.

The Kenya Police Force (KPF) must be among the institutions that are reshaped during Kenya's constitutional moment. For the past decade, and despite the best efforts of committed reformers within the KPF itself, the police have been at the nexus of the most serious problems facing

¹ B Ackerman *We the people: Foundations* (1993).

Kenyan society: rampant government corruption, unacceptably high levels of crime, inter-ethnic violence and vigilantism.

During this period, the police have not been properly accountable to the Kenyan people. They have often placed the demands of the ruling party and of powerful individuals ahead of the rule of law and ahead of the needs of citizens. In the service of powerful interests, the police have established a record, documented by the media and by non-governmental organisations (NGOs), of extrajudicial killings, torture, arbitrary detention, suppression of dissent and fomenting ethnic violence. In 2002 alone, for example, the police killed more than 100 people under circumstances that suggested an extrajudicial execution.²

David Bayley's conceptual distinction between democratic policing and regime policing can be applied usefully to the Kenyan context.³ For the past decade, the KPF have been a regime police, dedicated ultimately to the preservation of the government's power and to the protection of vested interests, rather than to the advancement of the public interest.

Through corrupt practices, many police officers have also profited during this period at the public's expense. Thus, the police have not only failed to control corruption, a problem so widespread that it appears to be the chief cause of Kenya's economic stagnation,⁴ but an unsettling number of the police force have themselves succumbed to corruption. According to Transparency International, Kenya, seven out of ten Kenyans report having paid a bribe to the police on the understanding that a failure to pay would result in mistreatment or denial of service, and the average Kenyan reports paying 4,5 bribes to police officers per month.⁵ Kenya's survey results put the total *per capita* cost of bribes to police officers alone — the police 'bribery tax' — at 1 270 Kenyan shillings (more than \$15) per person per month.⁶

A majority of Kenyans indicate that, at best, they lack confidence in the impartiality and effectiveness of the police, and that, at worst, they fear the police. In a society with one of the highest crime rates in the world, the average Kenyan citizen believes that half of the members of the police force are corrupt and that over one-third of all crime committed in the country is attributable to police criminality.⁷

² See Amnesty International *Amnesty International Report 2003: Kenya* (2003).

³ See DH Bayley *Patterns of policing: A comparative international analysis* (1985).

⁴ Kenya's gross domestic product contracted by an average of 0,5% per year from 1990 to 2000. See United Nations Development Programme *Human Development Report 2002*.

⁵ Transparency International — Kenya, Kenya Bribery Index 2002 7, 10 (2002), available at <<http://www.tikenya.org/documents/BribIndex02.pdf>> (accessed 31 July 2003).

⁶ As above, 9.

⁷ UN Habitat *Crime in Nairobi: Results of a citywide victim survey* (2002) 35.

In an emerging democracy, police reform cannot be accomplished by making slow inroads from the margins of police operations. Rather, institutional arrangements designed to ensure police accountability and adherence to the rule of law, and to engender an institutional *culture* of respect for these values, must be put in place before other, more targeted reforms can take hold.⁸ Programmes to enhance specific police operational capacities, to provide fora for engagement between the police and the community, to train police personnel on principles of human rights, and to increase the pay of the constabulary — all badly needed — cannot have their maximum impact in the absence of reforms at the institutional level.

As Philip Heymann has written, efforts to build strong criminal justice systems by slowly building competent institutions, while postponing any treatment of corruption and other crimes of the powerful, are very unlikely to succeed. Such piecemeal approaches are 'based either on extreme optimism or on deep cynicism'.⁹

What must be acknowledged at the outset, however, is that an institutional approach to police reform — an approach that views institutional accountability as the paramount objective of reform, and as the foundation for further reform — requires that some of the most substantial obstacles to reform be surmounted first. According to Bayley:¹⁰

[T]he police reforms that are the easiest to achieve . . . have the least effect on democratic development, and the reforms that are the hardest to achieve . . . have the greatest effect on democratic development.

The institutional approach to police reform aims to reform the management and culture of the police force, neither of which can easily be altered even in developed democracies with well-entrenched constitutional traditions.

In view of the difficulty of achieving institutional reform, the importance of acting during this constitutional moment can easily be grasped. During times of normal politics, institutions do not readily reconsider the fundamental principles underlying their operations and do not readily open themselves to increased public scrutiny and accountability. If Kenyans want their police institution to transform from a 'force' to a 'service,' to practice democratic policing rather than regime policing, now is the time.

⁸ DH Bayley *Democratizing the police abroad: What to do and how to do it* (2001) 20–23 42.

⁹ PB Heymann Principles of democratic policing, in *policing in emerging democracies: Workshop Papers and Highlights* (National Institute of Justice, 1995), available at <<http://www.ncjrs.org/pdffiles/177024.pdf>> (accessed 31 July 2003).

¹⁰ DH Bayley 'Who are we kidding? Or developing democracy through police reform' in Heymann (n 9 above) 62.

This paper attempts to provide a starting point for a discussion about reform of constitutional and legislative provisions that govern police accountability. Part two disaggregates the concept of police accountability and suggests that it encompasses at least three core values: popular accountability, legal accountability and transparency. Part three assesses the institutional arrangements for police accountability that exist in Kenya, which are few in number and generally weak in functioning. Part four provides brief sketches of the law in four other Commonwealth jurisdictions, focusing mainly but not exclusively on three sets of institutional arrangements that bear heavily on accountability: arrangements for the appointment, dismissal, transfer and tenure of the head of the police and other top officers; for the supervision and control of the police force; and for the investigation of police misconduct. Drawing on these sketches, part five identifies four common aspects of the trend toward enhanced police accountability in police reform legislation. Part six offers a few concrete recommendations for constitutional and legislative reform during Kenya's constitutional moment.

2 The dimensions and limits of police accountability

The word 'accountability' does not lend itself to simple definition in the context of police reform. It refers both to *processes* — chains of command, complaint procedures, oversight mechanisms, courts of law, freedom of information laws, among others — and to institutional *values* — openness, responsiveness, responsibility, adherence to the law. Moreover, like democracy, the concept of accountability does not refer to a particular process but to a variety of kinds of processes, and does not reflect the ascension of a particular value within the police force but rather a cluster of related values.

The objective here is to begin to develop a common vocabulary for discussing police accountability. It is not to undertake the substantially more difficult task of offering a comprehensive definition of accountability. Indeed, Jean-Paul Brodeur, in developing a theoretical framework for accountability, conceded his doubts that 'such a complex notion, which overlaps the meanings of several related concepts, can be encapsulated in one neat formula'.¹¹ Nonetheless, a meaningful call for greater accountability in the police force must take cognisance of the 'intricate conceptual network' from which accountability emerges.¹²

¹¹ J-P Brodeur 'Accountability: The search for a theoretical framework' in Mendes *et al* (eds) *Democratic policing and accountability: Global perspectives* (1999) 129.

¹² As above, 126.

2.1 Values

This paper emphasises three distinct strands of accountability: popular accountability, legal accountability and transparency. These three values overlap in significant ways and tend to reinforce one another. Yet they do represent distinct values and, as such, can also be in tension with one another. Together, these three will ensure the practice of democratic policing in a police force. No one of them, by itself, is sufficient to do so.

2.1.1 *Popular accountability*

Popular accountability means holding the police accountable to the will of the people through electoral processes, through mechanisms that subordinate the police to elected officials, and through regular structured engagement between the police and the community.

No governmental actor in a democracy, and particularly no actor as critical to the physical and material wellbeing of the people as the police, can operate without the underlying consent of the governed.¹³ The primary mechanism for gauging consent in a democracy, and for ensuring the sovereignty of the people, is, of course, the electoral process. Therefore, the people's elected representatives must have ultimate responsibility for making policy with respect to law enforcement. Town meetings and community police forums provide a secondary means of ensuring popular accountability. As will be discussed, an extremely weak form of popular accountability prevails under current Kenyan law: The Commission of Police appears to answer to the President of Kenya on all matters.

Popular accountability is a relative, not absolute, value in democratic policing. For good reason, most police leaders in democratic societies are not themselves elected officials, and law enforcement policy is almost never directly subject to popular vote. However, where police leaders are popularly accountable, they are generally appointed by elected officials, subject to removal by elected officials, and accept policy-level guidance from elected officials. Through these mechanisms, as well as through structured engagement with the community, the police are accountable to citizens, albeit indirectly so.

2.1.2 *Legal accountability*

Legal accountability here means ensuring police compliance with legal rules through judicial processes and other enforcement mechanisms. There can be no rule of law in a society where those who enforce the law are not themselves subject to the law. When police can disobey the law with relative impunity, they lose legitimacy as law enforcers, and

¹³ As above.

they become a highly visible and therefore highly corrosive example of law's inefficacy. A police force that does not itself follow the law encourages citizen disobedience of the law.

Human rights enforcement is primarily a matter of legal accountability. Human rights norms are codified in Kenyan law, as in the law of most countries. In a democratic society, processes must exist through which the police are held to account if they violate these norms, and through which citizens whose rights have been violated can obtain redress. These processes must be well-publicised, transparent, fair, efficient, and not prohibitively expensive. If mechanisms for accountability do not exist, then the rights themselves effectively do not exist.

2.1.3 *Transparency*

Transparency here means the establishment of mechanisms through which the police are required, as a matter of course, to provide information about all but the most sensitive areas of operation.

Openness is a prerequisite to accountability. Citizens cannot hold police accountable if they do not have information with which to do so. Subject to narrowly drawn exceptions, the police must make available, among other things, the names and locations of persons they have arrested, the details of incidents involving the use of force, copies of departmental rules, policies and procedures, the data they compile about the occurrence of crime and the particulars of budgetary allocations and procurements.

Secret and semi-secret police have fortified authoritarian regimes throughout the world, but they are fundamentally inconsistent with the norms of democratic policing. In Kenya, the task of addressing violent crime has apparently been delegated, at least in part, to secretive units like Flying Squad and Alfa Romeo, whose command structure is shrouded in mystery, who have been given a broad but not clearly defined discretion to use lethal force in carrying out their mandates, and who may have authority to give orders to other police officers regarding the detention of suspects. It is rumoured that arbitrary detention, torture and extrajudicial execution are part of their *modus operandi*.¹⁴ The existence of these secretive units is the most dramatic example of how a lack of transparency has contributed to a climate in which citizens fear the police. Too many Kenyans view any interaction with a police officer as an event with unpredictable consequences, and therefore as a thing to be avoided.

¹⁴ See eg People Against Torture *Torture in Kenya: A status report* (2001) 17 42–43; N Waweru 'Flying squad boss strangled suspect' *East African Standard* 31 January 2003.

2.1.4 *Partially overlapping, mutually reinforcing*

Popular accountability, legal accountability and transparency overlap significantly and reinforce one another. Yet they represent distinct values and distinct institutional states of being. All three are necessary for the practice of democratic policing to take root.

Although legal accountability is the foundation of democratic policing, alone it is not sufficient. Law derives its legitimacy from popular consent, and obedience by the police to a system of laws that were not enacted democratically reflects only an efficient, bureaucratised authoritarianism. Popular accountability, in turn, depends both on political freedom and on institutional transparency. Citizens of a society cannot genuinely be said to hold the police to account if they are prevented from meaningfully taking part in the political process and if they are denied access to information about what the police are doing.¹⁵ A system of laws that does not respect fundamental rights and that shrouds the police in secrecy defeats popular accountability and delegitimises the legal regime under which the police are functioning.

Moreover, as the Kenyan situation illustrates, the police cannot be seen as popularly accountable merely because they answer to elected officials. Rather, accountability demands both that the police answer only to the particular elected officials who are identified in law as having a legitimate role in shaping law enforcement policy, and that the police answer to these officials, not through back channels, but through processes that are transparent and set forth in law.

2.1.5 *Points of tension*

It must be acknowledged here that legal accountability and popular accountability, at least according to simplistic understandings of these concepts, can be seen to be in tension under certain circumstances. Human rights law provides a good example of this apparent, but perhaps illusory, tension. A majority of citizens may, particularly at moments of high public insecurity and low confidence in the judicial sector, support law enforcement policies that violate human rights laws.¹⁶ These might include 'shoot to kill' orders, arrest and detention of 'suspicious' persons without probable cause, the use of third degree methods to extract confessions and the like. In democratic societies, police must obey the law, not the popular mood, and must be held accountable for all human rights abuses.

The apparent tension between legal accountability and popular accountability under these circumstances can be lived with, and arguably resolved at the conceptual level, if one recalls that laws in a democratic society are themselves products of the popular will. Human

¹⁵ See Bayley (n 8 above) 14–15.

rights norms have not been incorporated into positive law by anti-democratic fiat, but rather by the people's own representatives (in the case of legislation and treaty ratification) or by the people themselves (in the case of constitutions). Where laws have been enacted through democratic processes, it cannot be said that obedience to the law, even when momentarily unpopular, represents a rejection of the popular will. Moreover, the laws in a democratic society generally are the product of deliberative processes (town meetings, legislative debates, constitutional assemblies) and therefore can be seen to reflect the popular will more accurately than, for example, opinion polls conducted in the absence of informed debate.

2.1.6 *Insulation from illegitimate interference*

Nonetheless, because adherence to the rule of law is the *sine qua non* of democratic policing, police reformers throughout the world have often spoken of the need to insulate the police from 'political interference'.¹⁷ In fact, the experience of developing democracies bears this out: elected officials and other powerful individuals have often exerted influence over the police that has been extralegal or illegal in nature. *Extralegal political interference* here refers to influence exerted by powerful individuals over the police through informal channels. A degree of extralegal influence is probably unavoidable even in the most mature democracies, but too much of it will slowly undermine the rule of law. *Illegal political interference* refers to influence exerted over the police either through legally proscribed means or for legally proscribed ends. It is acutely corrosive to the rule of law. Notwithstanding the centrality of popular accountability to democratic policing, extralegal interference and illegal interference are not legitimate merely because the person exercising such influence is an elected official. Any accountability regime must take as one of its primary objectives the elimination of illegal interference and the minimisation of extralegal interference.

This important objective has sometimes been described as 'police independence'. Independence, however, may not be the most accurate description of what is actually sought. 'Police independence' may call to mind the American FBI under J Edgar Hoover, a law enforcement agency that engaged in a campaign of harassment against activists in the civil rights and anti-war movements. Because the FBI under Hoover was able to operate in secrecy and to make itself partially independent of political control — because, in other words, it lacked transparency and popular

¹⁶ As above, 25 40.

¹⁷ See eg *Report of the Independent Commission on Policing in Northern Ireland* (1999) 23 (Report of the Patten Commission).

accountability — the process of fully exposing these patterns of harassment and rooting them out took decades to complete.¹⁸

Democratic policing does require, however, that the police be insulated from political control in two significant respects. The first respect has already been discussed above. Political control over the police that controverts or undermines the rule of law is, by definition, illegitimate. Protection of human rights sometimes depends crucially on the availability of institutional space for the police to resist political pressure to perpetrate or condone human rights violations.

Second, insulation from political control will also be desirable in subject areas where the police as an institution possess operational expertise that civilians lack. Among other things, police know better than civilians how to address issues of tactics and deployment. They generally know better than civilians the relative urgency of various budgetary needs within the police force. Even in the most dysfunctional police forces, police officers themselves often know better than any outsider the causes of institutional dysfunction. Any accountability regime must afford due deference to police operational expertise. This does not mean that the police are allowed total discretion in operational matters. Rather, the police chain of command must have authority to make operational and tactical decisions in the first instance, but must also be required to account for those decisions to the people's elected representatives and to the people themselves.

Insulating the police from interference in regard to operational matters requires that a conceptual distinction be made between operations, on the one hand, and policy, on the other. Police and policymakers 'should be encouraged to institutionalise the distinction between the making of policy and the conduct of operations, otherwise the rule of law becomes a casualty of politics'.¹⁹ Elected officials must be responsible for policy. The police leadership must be responsible, in the first instance, for operations.

In developing a blueprint for the reconstruction of the police force in Northern Ireland in the wake of the Good Friday peace agreement, the Patten Commission recognised the necessity of this distinction between policy and operations. To preserve the proper division of labour, the Patten Commission recommended the creation of an intermediate supervisory mechanism, which it called the Policing Board. In the proposed Policing Board, the Patten Commission sought to establish an institutional mechanism that would, on one hand, insulate the police leadership from political interference with operational matters, but that would, on the other hand, strengthen, channel and regularise the police

¹⁸ See eg DJ Garrow *Bearing the cross: Martin Luther King Jr and the Southern Christian Leadership Conference* (1986).

¹⁹ Bayley (n 10 above) 62.

institution's ultimate accountability to political actors. The Commission recommended:²⁰

In essence, we believe that the [political executive] should be able to set long-term governmental objectives or principles; the Policing Board should set medium-term objectives and priorities; and the police should develop the short-term tactical plans for delivering these objectives.

2.2 Processes

I earlier described police accountability as referring both to ends and to means, to a set of values and to a set of processes or mechanisms. Thus far, I have focused mainly on values. The remaining sections of this paper focus on the specifics of processes. In the present conceptual discussion, however, a few preliminary thoughts on accountability processes are warranted.

At the outset, a conceptual distinction must be drawn between external mechanisms and internal mechanisms. *Internal accountability mechanisms* are the basic building blocks of a disciplined police force — chains of command, standing orders, systems for the enforcement of discipline, procedures for handling internal grievances, procedures for addressing citizen complaints, etc. On their own, of course, these mechanisms can be as supportive of an authoritarian police force as of a democratic police service. Both kinds of police require discipline to function efficiently.

Nonetheless, those who advocate police reform must keep in mind that, in the absence of internal discipline, the basic values of democratic policing — popular accountability, legal accountability, and transparency — cannot take hold. There is little use in creating mechanisms to hold the police leadership accountable to the people's elected representatives when the police leadership, in turn, cannot transmit the policy directions and values of the people's representatives to the lower ranks of the police force. Moreover, where junior police officers do not in practice answer to senior police officers, powerful individuals from outside the police force will fill the power vacuum.

Without understating the importance of internal accountability, it must be recognised that the trend in the democratic world has been toward establishing accountability through a mix of internal and external mechanisms. As Andrew Goldsmith has written:²¹

The history of policing has shown repeatedly the inadequacies of an exclusive reliance upon police self-regulation. Police internal controls, for very good reason, do not enjoy the confidence or support of many ordinary citizens. The trend to external regulation of police activity has emerged from repeated

²⁰ Report of the Patten Commission (n 17 above) 28.

²¹ A Goldsmith 'Better policing, more human rights: Lessons from civilian oversight' in Mendes (n 11 above) 35.

episodes of police failures to respond adequately, or in some cases, at all, to a variety of forms of police misconduct.

External accountability mechanisms here mean both traditional and non-traditional mechanisms through which the police are held to account by individuals and institutions outside the police force, including formal oversight by the legislative branch, litigation and other judicial processes, human rights commissions, supervisory entities like the Patten Commission's proposed Policing Board, and civilian oversight panels like South Africa's Independent Complaints Directorate (ICD).

Within this category of external accountability mechanisms, a few additional conceptual distinctions might usefully be drawn. First, one could distinguish between supervisory mechanisms and complaints mechanisms. By *external supervisory mechanisms*, I mean entities, like the Policing Board in Northern Ireland, that have actual supervisory and disciplinary authority over the police force. Such entities, among other powers, often have significant control over the appointment and dismissal of police officers, and over the terms and conditions of service in the police force.

By *external complaints mechanisms*, I mean entities, like the ICD in South Africa, that do not have formal authority to command the police force, but that do have the power both to investigate individual instances of police misconduct and to audit police functioning as a whole, particularly with a view to rooting out systemic misconduct and corruption and to rendering police functioning more transparent. These external complaints entities, when properly empowered, adequately funded, and capably led, can often have substantial influence over police functioning despite lacking formal supervisory authority.

The distinction between supervisory and complaints mechanisms is not a neat one. Oversight entities may combine certain supervisory and disciplinary powers with other powers that seek to establish transparency through audit and investigation. Yet, in considering whether certain kinds of accountability mechanisms are appropriate for the Kenya, the conceptual distinction between supervisory and complaints mechanisms will be useful.

3 Accountability in Kenya

No research has been undertaken into the extent of police accountability in Kenya during the past decade. Yet there are certain matters beyond serious dispute. First, the President of Kenya possesses extraordinary power to control police operations. This power is derived in part from key legislative enactments. Second, due to restrictive laws and to a well-entrenched culture of secrecy, it is exceptionally difficult for a citizen of Kenya to obtain information about the most basic aspects of police functioning or the occurrence of crime in Kenya. Third, internal and

external mechanisms for holding the police accountable are few in number and weak in functioning. Fourth, powerful outside actors have exerted a substantial illegitimate influence over police operations. Here, I will highlight a handful of legal and institutional arrangements that contribute substantially to this state of affairs. Where possible, I will also discuss some of the often tragic consequences of the absence of appropriate mechanisms of accountability.

3.1 Presidential control

In Kenya, the executive branch of government possesses power disproportionate to that of the legislature and the judiciary.²² The law regarding the supervision and control of the police force both reflects and reinforces this state of affairs. The Kenyan system, which one might call a system of *presidential control*, effectively vests the President with complete authority over the police force. Presidential control over the police, one of the key coercive arms of the state, in turn strengthens presidential control over all other aspects of government operation.

Under Kenya's Constitution, '[t]he power to appoint a person to hold or act in the office of Commissioner of Police shall vest in the President'.²³ The President of Kenya thus possesses unbounded authority both to appoint and to remove the top-ranking officer in the Kenya Police Force.

Three other factors solidify the President's authority over the Commissioner of Police. First, Kenyan law affords parliament no role whatsoever, even as a consultative body, in appointing or removing the Commissioner of Police. No other body is established for presenting a slate of candidates for the office to the President, for adjudicating the merits of a dismissal, or for consulting with the President regarding appointment or dismissal.

Second, Kenyan law enumerates no criteria that the President must follow in making an appointment to, or ordering a removal from, the office of Commissioner of Police.

Third, The Commissioner serves no fixed term of office and is allowed no security of tenure. Instead, the Commissioner of Police in Kenya serves entirely at the pleasure of the President and can be removed by the President even with an unblemished record of obedience to the law and service to the community.

This constitutional provision seems to ensure that the Kenyan police answer officially only to the single individual who holds the office of

²² See SK Akivaga 'Towards a national movement for democratic change in Kenya' in Mute *et al* (eds) *Building an open society* (2002); PH Okondo *A commentary on the Constitution of Kenya* (1995).

²³ Para 108(1) Constitution of Kenya.

President. In a recent interview with the *Sunday Nation*, Bernard Kiarie Njiinu, a former Commissioner of Police, vividly described the circumstances of his own appointment to the top job in the police force:²⁴

The night before his appointment, he [Njiinu] received a call summoning him to State House first thing in the morning. 'On arrival, I was abruptly ushered into an empty room and left alone for almost an hour. For once I thought I was under arrest and headed for detention.' Then he was ushered into the President's office and found the Head of State and Chief Secretary Jeremiah Kierini waiting.

Without any ado, the President handed him a one-paragraph letter that read: 'Owing to the confidence I have in you, I have appointed you the Police Commissioner with immediate effect. I hope you won't betray my trust.'

The air was heavy and the room tense. Mr Njiinu answered: 'Thank you, Sir. I'll work hard and won't betray your trust.'

As the new Police Commissioner made to leave, the President beckoned him to sit down. 'You are going to wait here until I give you the green light to go to your office,' the President said. Then he turned to Mr Kiereini and ordered: 'From here you go and have Geth [Ben Geth, then the Commissioner of Police] arrested and telephone me to say he is on the way to Kamiti.'

The President and Mr Njiinu remained silent in their seats. None spoke to the other.

In less than half an hour, Mr Kiereini telephoned back to say Mr Gethi had been arrested from his office by Sokhi Singh, head of operations at the CID headquarters, and was on his way to Kamiti Maximum-Security Prison. The President turned to Mr Njiinu and said: 'You will now go straight to the office and start working.'

As Mr Njiinu's story illustrates, past Commissioners of Police have found that their job security, and even their personal liberty, depended crucially on the patronage of the President.

Another former government minister, speaking anonymously to the press, described the pervasive reach of presidential authority in the Kenyan system as follows:²⁵

You are in the office working on something, then you hear on radio that the President, who was out in the field, has announced changes on the thing you were putting together. You had to implement the changes without question. Initially, we had problems telling what was [the President's] personal opinion from government policy. We learnt late, and at a high cost for some of us.

Under the previous government, law enforcement policy appears to have been formulated and transmitted to KPF in the precise manner described above, that is, through the public pronouncements of the President and his aides. In April 2000, a minister in the office of the President publicly applauded the killing by police of eight suspected

²⁴ K Ngotho 'Former police chief speaks out on the "Mwakenya" crackdown' *Sunday Nation* 2 March 2003.

²⁵ D Onyango 'Fear of Moi still grips top officials of the Kanu regime' *Sunday Nation* 15 June 2003.

criminals, saying that the suspects had 'been sent out of the streets for life', and that 'law enforcement officers should continue doing the same'.²⁶ In August 2001, in the midst of public outcry over an incident in which members of the Kenya Police Reserve shot seven criminal suspects in the backs of their heads, President Daniel arap Moi warned, 'All those with hidden agendas who complain when we kill criminals will sooner or later be required to tell Kenyans what they know.'²⁷ The Kenya Human Rights Commission reports that, according to the best available evidence, there were 143 extrajudicial executions in Kenya in 2000²⁸ and 251 extrajudicial executions in 2001.²⁹

Kenyan law further ensures presidential control over the police force by empowering the President, solely at his own discretion, effectively to displace the Commissioner of Police and give operational direction to the police force. The vehicles for this further consolidation of presidential control are section 85 of the current Constitution and the Preservation of Public Security Act. Pursuant to section 85, 'the President may at any time . . . bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act.'³⁰ Part III of the Preservation of Public Security Act, in turn, makes it 'lawful for the President . . . to make regulations for the preservation of public security'.³¹

The range of subject matters upon which the President is explicitly authorised to make regulations is extraordinarily broad and incorporates the entire range of ordinary police functioning. These subject matters include:

- 'detention of persons';
- 'restriction of movement (into, out of or within Kenya)';
- 'compulsory movement of persons';
- 'imposition of curfews';
- 'censorship, control or prohibition of the communication of any information';
- 'prohibition of any . . . meeting';
- 'compulsory acquisition . . . of any . . . property';
- 'suspending the operation of any law'; and
- any other 'matter . . . expedient for the preservation of public security'.³²

²⁶ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 2 No 4 (2000) 1.

²⁷ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 3 No 3 (2001) 10.

²⁸ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 2 No 4 (2000) 2.

²⁹ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 3 No 4 (2000) 10.

³⁰ Para 85 Constitution of Kenya.

³¹ Cap 57 Preservation of Public Security Act, para 4(1).

³² As above, para 4(2).

No standards for presidential invocation of these powers are established, other than the President's own determination that 'public security,' as defined by the President himself, necessitates their invocation. When they are invoked, as they have been on numerous occasions since Independence, these powers include the entire range of police functioning — arrest and detention, search and seizure, control of public meetings and assemblies.

Section 85 does provide that a presidential order bringing Part III of the Act into operation shall expire after 28 days without parliamentary approval.³³ However, this provision is rendered meaningless in two separate ways. First, the President is empowered to issue a new order bringing Part III of the Act into effect immediately upon the expiration of any prior order ('The expiry . . . of an order . . . shall be without prejudice . . . to the making of a new order.'³⁴ Second, the 28-day period does not run during any period in which parliament has been dissolved,³⁵ and, under the Constitution, the President 'may at any time dissolve parliament'.³⁶ Thus, either by the serial issuance of orders, or by the long-term dissolution of parliament, the President is empowered to establish himself as the final and essentially permanent authority in the legality of all arrests, all detentions, all searches and seizures, and as the final arbiter of whether any public meeting or assembly can take place. Part III of the Public Security Act was last invoked in 1997, an election year.

Yet, even if these public security provisions were never invoked, their mere existence would be sufficient to ensure presidential control over the police force. In a system where the president has complete authority over the appointment and tenure of the head of the police force, and where the president can, at any time, essentially arrogate command of police operations to himself, presidential control will be, in practice, complete.

3.2 Official secrecy

To the extent that institutional accountability flows from KPF to elected officials, it is secret accountability. There is no obligation on the President to consult with other officials in making policy for the police force or to disclose the nature and contents of his instructions to the police. No mechanism exists through which Kenyan citizens can observe the exertion of presidential control.

³³ Para 85(2) Constitution of Kenya.

³⁴ As above, para 85(6).

³⁵ As above, para 85(2).

³⁶ As above, para 59(2).

Moreover, the Official Secrets Act establishes a regime of official secrecy entirely contrary to the practice of transparent government. Under current law, it is a crime, punishable by up to 14 years' imprisonment, to possess a government document, or to transfer a government document to any person, for 'any purpose prejudicial to the . . . interests of the Republic', if that document 'might be . . . directly or indirectly useful to a . . . disaffected person'.³⁷ In prosecuting an individual under the Official Secrets Act, the government need not show that the defendant obtained or transferred the document for a purpose 'prejudicial to the interests of the Republic' if it 'appears' that this was the purpose, based on the defendant's 'conduct' or 'character'.³⁸ If the government prosecutes one of its officials for making a government document available to another person, the government need not show that the official lacked authority to make that document available. Rather, if the official claims that he had legal authority to make the document available, it is the official's burden to prove the existence of this authority.³⁹ Unsurprisingly, under this legal regime, most officials of the Kenyan government, including senior police officers, have been reluctant to reveal even the most basic government documents.

Among other things, the Kenyan government has not made public the annual reports by the police force to the office of the President, the statistics compiled by the police on the occurrence of crime and the standing orders under which police operations are conducted. There are, in short, no effective means for an ordinary Kenyan to get official information about the government's long-term law enforcement policy, about the day-to-day operations of the police, or about the occurrence of crime in Kenya.

The situation is further exacerbated by a proliferation of police agencies both within and without KPF. As discussed above, numerous secretive units, who have extensive powers to use force against Kenyan citizens and whose placement within the police hierarchy is deliberately kept secret, apparently exist. Outside KPF, Kenyan law establishes an entirely separate police agency, the Administration Police, who also answer to the President by way of presidentially-appointed district commissioners, who serve no identifiable purpose other than to bolster the coercive strength of the political executive, and whose functioning is, if anything, even more opaque than that of the Kenya Police Force. Indeed, the various coercive arms of the state are sometimes unable to coordinate among themselves due to internal confusion arising from the lack of institutional transparency. According to press reports, a 'bitter row' recently erupted between the Administration Police and KPF's

³⁷ Cap 187 Official Secrets Act of 1968 para 3.

³⁸ As above, para 14.

³⁹ As above, para 16.

Criminal Investigations Division when the Administration Police ordered the release of a politically connected suspect whom the CID had intended to interrogate.⁴⁰

3.3 Internal accountability mechanisms

The creation of 'effective disciplinary systems within the police should be a first-order priority in democratic reform'.⁴¹ When properly functioning, mechanisms of internal accountability both prevent the violation of human rights and, by sustaining productive relations between the police and the public, enhance the ability of the police to prevent and investigate crime. In Kenya, several factors have rendered dysfunctional KPF's internal accountability mechanisms.

First, in practice the police frequently refuse to give P3 forms, the basic document for filing a complaint of police misconduct, to potential complainants.⁴² Second, the Force Standing Orders make no provision for the sharing of information with the complainant on the progress of the investigation. The Orders merely require that the complainant be told of the result of the investigation, without 'necessarily indicating the disciplinary action that has been taken'. The Orders state that '[w]here a fault or an offence by a police officer has been disclosed, a suitable apology will be made'. In practice, as senior police officers now concede, KPF has not consistently adhered even to this requirement.⁴³ Very few complainants ever learn the outcome of their complaints. Third, the police do not make available to the public even general statistics regarding disciplinary proceedings or the prosecution of police criminality.

In its 2002 Report, the Standing Committee on Human Rights made the following observation concerning KPF's systems of internal accountability.⁴⁴

Despite public statement from the Commissioner of Police on efforts to reform the Police Department and to deal firmly and effectively with police officers who have committed abuses, the disciplinary sanction imposed on officers found guilty of brutality are frequently inadequate. Officers are rarely prosecuted for using excessive force. Investigations of numerous cases alleging torture . . . revealed that the 'Code of Silence', in which officers fail to report brutality, destroy evidence or threaten witnesses in an effort to cover up abuses, commands widespread loyalty, contributing to a climate of impunity.

⁴⁰ S Muiruri 'Police row as graft suspect is released from cells' *Daily Nation* 4 February 2003.

⁴¹ Bayley (n 8 above) 40–41.

⁴² See People Against Torture (n 14 above) 38–39.

⁴³ Remarks of Superintendent GM Kibunja at 'Police as a service organisation: An agenda for change' 24–25 April 2003, Nairobi, Kenya.

⁴⁴ Standing Committee on Human Rights, Sixth Report to the Appointing Authority 24 (2002).

3.4 External mechanisms of accountability: The Standing Committee

The Standing Committee on Human Rights was established by presidential order in 1996. The Committee reported solely to the president. All of its members were appointed by the President and were removable at his discretion. The Standing Committee's functions and powers were determined solely by the President.

The Standing Committee had the power to investigate complaints of human rights violations, injustices, abuses of power, and unfair treatment by public officers. It could not enforce its own recommendations. For the first five years of its existence, it was prohibited from publishing its findings and reports.

Because the Standing Committee existed only by virtue of a presidential order, it lacked the permanency of a body established by statute or constitutional enactment. Its powers were limited. According to Human Rights Watch, the Standing Committee often seemed to view its role as one of defending the government against allegations of human rights violations, rather than impartially investigating such allegations.⁴⁵

In March 2003, the Kenya National Commission on Human Rights Act was enacted. The statute establishes the KNCHR as an independent body with the power to investigate instances of human rights abuse and to take action against any person found guilty of human rights violations.

3.5 Illegitimate interference with police operations

As discussed in part two above, illegitimate interference with police operations here refers to (1) the exertion of influence over the police; (2) by actors outside the chain of command; (3)(a) through extralegal or illegal means; or (3)(b) for the achievement of extralegal or illegal ends. It is the nature of such illegitimate interference to take place away from public scrutiny, and it is therefore difficult to gauge the precise extent of its exercise. Yet illegitimate interference is believed to be widespread. Chris Murungaru, Minister for Provincial Administration and National Security, recently acknowledged as much when he formally instructed police commanders to resist pressure from outside the police chain of command. He is reported to have assured the police, 'I have word from the President that there shall not be orders from anywhere else except your immediate superiors.'⁴⁶

⁴⁵ Human Rights Watch 'Protectors or pretenders? Government human rights commissions in Africa (2001)', available at <<http://www.hrw.org/reports/2001/africa/kenya/kenya.html>> (accessed 31 July 2003).

⁴⁶ M Munene 'Better pay and gear for police on the way' *Daily Nation* 21 February 2003.

On a regular basis, the Kenyan press has reported irregularities that are likely attributable to illegitimate interference with police operations. Recent examples include: the release of a politically-connected suspect in February by a provincial police chief, who said he ordered the suspect's release on instructions from 'above', but who declined to specify from whom these instructions had come;⁴⁷ the blocking by the police of opposition political rallies just prior to the elections in December, presumably on orders from the ruling party;⁴⁸ the order given to anti-riot police in October 2002 — again, presumably by the ruling party — to cordon off the venue of the cancelled National Constitutional Conference;⁴⁹ and the firing of three police officers in October 2002 for stating, while off-duty, that they supported what was then the opposition party.⁵⁰

Nowhere have the consequences of illegitimate interference with police operations been more stark than in the ethnic clashes that took place in connection with the 1992 and 1997 elections. According to the Report of the Judicial Commission chaired by Justice AM Akiwumi, the Kenyan police repeatedly, consistently and deliberately failed to take action prior to, during and in the aftermath of politically motivated violence throughout the 1990s. The Akiwumi Commission found that the Kenyan police had been ordered by powerful individuals in the ruling party to condone, and perhaps even to help foment the violence.⁵¹ According to the Kenya Human Rights Commission, 1 500 people were killed and 300 000 were left homeless in politically motivated violence between 1991 and 1996.⁵² In incidents connected with the 1997 elections, 2 000 people were killed and 400 000 displaced.⁵³

These, of course, are only some of the more dramatic and visible examples of the exertion of illegitimate influence over the police. More typically, illegitimate influence manifests itself away from the public eye, on matters that, in isolation, may not be of acute public concern — the solicitation of a small bribe, the arrest and detention of an individual citizen, a decision not to investigate a particular crime. The constant repetition of these small acts of corruption has contributed substantially to the economic stagnation of the country and to the undermining of the public's confidence in the police force.]

⁴⁷ Muiruri (n 40 above).

⁴⁸ 'Police block Narc rally at Uhuru Park' *Daily Nation* 19 December 2002.

⁴⁹ F Openda 'Police block CKRC delegates' meeting' *East African Standard* 29 October 2002.

⁵⁰ J Kamau 'Dismissals a violation of human rights' *Daily Nation* 1 November 2002.

⁵¹ Report of the Judicial Commission to Inquire into Tribal Clashes in Kenya (2002).

⁵² Kenya Human Rights Commission *Killing the vote: State sponsored violence and flawed elections in Kenya* (1998).

⁵³ Kenya Human Rights Commission *Internally displaced persons and the right to return in Kenya* (2001).

4 Accountability abroad

Nearly every writer on the subject of police reform in developing democracies has cautioned that the effectiveness of a particular law, system, or practice in enhancing police accountability in one country does not guarantee its effectiveness in another country. The success of any particular reform will obviously be dependent on its cohesion with the geography, culture and institutional context within which it is implemented.

Yet the opposite position has also been rejected. A substantial body of literature supports the notion that the experience of police reform in one society does have relevance to the process of police reform in other societies — even, as Goldsmith has argued, ‘in societies with very different cultural, political, social and economic traditions and realities’.⁵⁴

The laws of four other jurisdictions are described here: Uganda, Nigeria, South Africa and Northern Ireland. All are Commonwealth countries and therefore share with Kenya a similarity in legal architecture. All have experienced significant civil strife in recent decades. In all four countries, as in Kenya, deep patterns of mistrust exist in between the police and segments of the community.

This section focuses particularly on constitutional and legislative arrangements in these jurisdictions for the appointment, removal, and tenure of the head of the police force, and for the establishment and functioning of civilian oversight mechanisms, both *external supervisory mechanisms*, which have powers of supervision and control over the police force, and *external complaints mechanisms*, which have the power to audit and investigate allegations of police misconduct.

4.1 Uganda

Under Uganda’s Constitution, both the Inspector-General of Police and the Deputy Inspector-General are appointed by the President, ‘with the approval of parliament’.⁵⁵ Both ‘may be removed from office by the President’.⁵⁶ Ugandan law enumerates no criteria for appointment or removal to these positions and establishes no fixed term of office.

The Police Statute of 1994 establishes a Police Authority, the chief functions of which are ‘to advise the government on policy matters relating to the management, development and administration of the Force’, ‘to advise the President on the appointment of the Inspector-General of Police and the Deputy Inspector-General’, ‘to recommend to

⁵⁴ Goldsmith (n 21 above) 47.

⁵⁵ Art 213(2) Constitution of the Republic of Uganda (1995).

⁵⁶ As above, art 213(5).

the President appointments and promotions of police officers above the rank of Assistant Superintendent of Police', and 'to determine the terms and conditions of service in the Force'.⁵⁷ By direction of the Act, the members of the Police Authority are the Attorney-General, the IGP, the Deputy IGP, the police officer in charge of administration at police headquarters, and three other persons appointed by the President.⁵⁸

In 1999, in response to several allegations of high-level police corruption and misconduct, parliament established the Judicial Commission of Inquiry into Corruption in the Uganda Police Force and named High Court Justice Julie Sebutinde as its chairperson. The Sebutinde Commission, in its May 2000 report, exposed what it described as 'institutionalised' corruption in the police force. It found 'widespread and flagrant indiscipline' among police officers of all ranks and spoke gravely of 'a culture of impunity whereby officers get away with flagrant violations of human rights under their superiors' noses'.⁵⁹ In the wake of the report, the President replaced most of the top officers of the UPF.

The Sebutinde Commission recommended that the government develop guidelines for the appointment of the IGP and Deputy IGP, that these guidelines be incorporated into the Police Statute, and that the IGP be appointed on a performance contract of three years, renewable on merit.⁶⁰

The Sebutinde Commission found that the composition of the Police Authority (described above) ensures that it lacks sufficient distance from senior police leadership, on the one hand, and from the political executive, on the other. According to the Commission, this lack of distance results in the Police Authority frequently functioning as a rubber stamp for decisions of the senior police leadership and renders the appointment process within the force vulnerable to tribalism, nepotism, 'empire building' and discrimination.⁶¹ The Sebutinde Commission recommended the creation by parliament of a Police Service Commission, which would be composed predominantly of prominent citizens outside of the government, and which would assume many of the present functions of the Police Authority.⁶²

The Constitution establishes the Uganda Human Rights Commission (UHRC), which is empowered to investigate and redress violations of human rights, to inspect detention facilities, to make recommendations

⁵⁷ Para 10 Police Statute 1994.

⁵⁸ As above, para 9.

⁵⁹ Report of the Judicial Commission of Inquiry into Corruption in the Uganda Police Force (2000) 255–56.

⁶⁰ As above, 239.

⁶¹ As above, 240–41.

⁶² As above, 241–42.

to parliament regarding the promotion of human rights and the compensation of victims, and to promote research, education, and civil awareness in the field of human rights.⁶³ Like many national human rights commissions, UHRC has extensive powers of investigation.⁶⁴ In addition, unlike most of its counterpart institutions, UHRC, upon a finding of 'an infringement of a human right or freedom,' may 'order the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress.'⁶⁵ The UHRC consists of a judge of the Uganda High Court or a person of equivalent qualification and at least three other persons 'of high moral character and proven integrity'.⁶⁶ They are appointed by the President with the approval of parliament and serve terms of six years.⁶⁷ The Constitution mandates that 'the Commission shall be independent and shall not, in the performance of its duties, be subject to the direction or control of any person or authority'.⁶⁸

4.2 Nigeria

The police in Nigeria continue to be governed by pre-independence legislation, the Nigeria Police Act of 1943.

Pursuant to the Nigerian Constitution, the Inspector-General of Police is appointed by the President 'on the advice' of the Nigeria Police Council. Only 'serving members of the Nigeria Police Force' are eligible for appointment.⁶⁹ Before removing an individual from the position of IGP, the President must also 'consult' the Police Council.⁷⁰

In 2001, the Nigerian parliament established the Police Service Commission (PSC), a body composed of civilians, most of whom are not public officeholders. The PSC is, in the terminology adopted here, an *external supervisory mechanism*. The PSC's functions include (1) making appointments or awarding promotions to all vacant offices in the Nigeria Police Force other than Inspector General of Police; (2) ordering dismissals from any office in the NPF other than IGP; and (3) exercising disciplinary control over all officers other than the IGP.⁷¹ The PSC is mandated to 'formulate policies and guidelines' on personnel matters and on matters of 'efficiency and discipline'.⁷² The PSC may also

⁶³ Art 52 Constitution of the Republic of Uganda (1995).

⁶⁴ As above, art 53(1).

⁶⁵ As above, art 53(2).

⁶⁶ As above, art 51.

⁶⁷ As above.

⁶⁸ As above, art 54.

⁶⁹ Art 215 Constitution of the Federal Republic of Nigeria (1999).

⁷⁰ As above, art 216.

⁷¹ Para 6(1) Police Service Commission (Establishment) Act 2001.

⁷² As above.

'perform such other functions, which in the opinion of the Commission are required to ensure the optimal efficiency of the Nigeria Police Force'.⁷³ In performing these functions, '[t]he Commission may, with the approval of the President make regulations, generally for the purposes of giving full effect to this Act'.⁷⁴ The PSC is one of the few civilian oversight mechanisms worldwide with power actually to impose discipline on police officers, rather than merely recommend discipline.

The Act apparently seeks to ensure that the PSC's membership is broadly representative of Nigerian society and is not dominated by persons closely associated with the ruling party. The membership consists of 'a Chairman', 'a retired Justice of the Supreme Court or Court of Appeal', 'a retired Police Officer not below the rank of Commissioner of Police', a representative of 'women interest', a representative of 'the Nigerian Press', a representative of 'non-governmental human rights organisations in Nigeria', a representative of the 'organised private sector', and a 'Secretary'.⁷⁵ All members are 'appointed by the President subject to the confirmation by the Senate', serve four-year terms, and must be 'persons of proven integrity and ability'.⁷⁶ The members of the PSC are subject to removal 'by the President if he is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office'.⁷⁷

In each Nigerian state, the police are under the direction of a Commissioner of Police, subject to the overall direction of the IGP. Pursuant the Constitution, the Commissioner in each state is now appointed, not by the President or the IGP, but by the Police Service Commission.⁷⁸

4.3 South Africa

The South African police are governed by laws enacted in the wake of that country's transition to democracy. The two principal enactments are the Constitution, adopted in 1996, and the South African Police Service Act of 1995.

Pursuant to the Constitution, a member of the national cabinet must be assigned overall responsibility for policing. This cabinet member 'must determine national policing policy after consulting the provincial governments and taking into accounts the policing needs and priorities of the provinces as determined by the provincial executives'.⁷⁹ The

⁷³ As above.

⁷⁴ As above, para 25.

⁷⁵ As above, para 2(1).

⁷⁶ As above, paras 2-3.

⁷⁷ As above, para 4(2).

⁷⁸ Art 215(1)(b) Constitution of the Federal Republic of Nigeria (1999).

⁷⁹ Art 206(1) Constitution of the Republic of South Africa Act 108 of 1996.

Police Service Act assigns these responsibilities to the Minister of Safety and Security.⁸⁰

The ranking officer in the Police Service, the National Commissioner, 'must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing'.⁸¹ The President holds power of appointment to the office of National Commissioner.⁸²

Under the Police Service Act, the President must, at the time of appointment of the National Commissioner, specify a term of office of up to five years for the Commissioner.⁸³ The President also has the power to remove the National Commissioner prior to the expiration of the Commissioner's term, but the President must first establish a 'board of inquiry consisting of judge of the Supreme Court as chairperson, and two other suitable persons'.⁸⁴ This board must 'inquire into the circumstances that led to the loss of confidence' in the National Commissioner, 'compile a report', and 'make a recommendation'.⁸⁵ The President may remove the National Commissioner from office only upon receipt of this board's recommendation.⁸⁶

As in Nigeria, policing power in South Africa is partially devolved to provincial actors. The National Commissioner, 'with the concurrence of the provincial executive', appoints a Provincial Commissioner for each province.⁸⁷

The Police Service Act creates an *external complaints mechanism*, the Independent Complaints Directorate (ICD),⁸⁸ which is specifically charged with ensuring that citizen complaints of police misconduct are investigated in an effective and efficient manner.⁸⁹ The Act mandates that the ICD 'shall function independently from the [Police] Service'.⁹⁰

The ICD may, upon its own initiative or upon receipt of a complaint, 'investigate any misconduct or offence allegedly committed by any member' of the Police Service or 'any death in police custody or as a result of police action'.⁹¹ The ICD may conduct these investigations itself or may, at its own discretion, refer any matter to the police for internal investigation.⁹²

⁸⁰ Art 1 South Africa Police Service Act 68 of 1995.

⁸¹ n 79 above, art 207(2).

⁸² As above, art 207(1).

⁸³ n 80 above, art 7.

⁸⁴ As above, art 8(1).

⁸⁵ As above.

⁸⁶ As above, art 8(7).

⁸⁷ n 79 above, art 207(3).

⁸⁸ n 80 above, art 50.

⁸⁹ As above, art 53(1)(a); art 222 Constitution of the Republic of South Africa 200 of 1993.

⁹⁰ n 79 above, art 50(2).

⁹¹ As above, art 53(2).

⁹² As above, art 53.

Some commentators have argued that the use of the word 'complaint' in this context may lead to some confusion about the scope of the ICD's mandate.⁹³ In fact, the ICD will not consider any 'complaint' against the police, but rather limits its reach to complaints or allegations relating to (1) deaths of persons in custody or deaths which are a result of police action; (2) the involvement of police members in criminal activities such as robbery, theft of motor vehicles and assault; and (3) police misconduct or behaviour which is prohibited by the Police Regulations, such as neglect of duties or failure to comply with the Code of Conduct.⁹⁴ Other complaints are generally handled by police internal mechanisms.

Under the Police Service Act, ICD investigators are given the same powers as police officers to investigate allegations of misconduct.⁹⁵ The Executive Director of the ICD may 'request and obtain information from any police officer as may be necessary for conducting an investigation' and 'request and obtain the co-operation of any member [of the police service] as may be necessary to achieve the object of the directorate'.⁹⁶ The Executive Director may also 'monitor the progress of', 'set guidelines regarding' and 'request and obtain information regarding' any matter referred by the ICD to the police for internal investigation.⁹⁷ The Executive Director of the ICD lacks power to compel final police action with regard to any matter the ICD has investigated but may 'submit the results of an investigation to the attorney-general for his or her decision' and may 'make recommendations' to the appropriate National or Provincial Commissioner, to the Minister for Safety and Security, or to other executive branch officials, regarding any matter investigated by the ICD.⁹⁸

The Police Service Act provides that the Executive Director shall submit a report on the activities of the ICD to the Minister on an annual basis. The Minister, in turn, must table the report in parliament either within 14 days of receiving it or, if parliament is not in session, within 14 days of the commencement of the next session.⁹⁹

⁹³ Centre for the Study of Violence and Reconciliation, Submission Regarding the Proposed Independent Complaints Directorate White Paper (1999), available at <<http://www.csvr.org.za/papers/papicdsb.htm>> (accessed 31 July 2003).

⁹⁴ About the ICD, available at <<http://www.icd.gov.za/about/brochure.htm>> (accessed 31 July 2003).

⁹⁵ n 80 above, art 53(3)(b).

⁹⁶ As above, art 53(6).

⁹⁷ As above, art 53(6)(c).

⁹⁸ As above, art 53(6).

⁹⁹ As above, art 54.

The Minister for Safety and Security nominates the Executive Director. If confirmed by the parliamentary committees responsible for safety and security, the Executive Director serves for a renewable term of five years.¹⁰⁰

4.4 Northern Ireland

In the Police (Northern Ireland) Act of 2000, the UK Parliament re-constituted the Northern Ireland police, which had been known as the Royal Ulster Constabulary, as the Police Service of Northern Ireland.¹⁰¹ The Act substantially adopts the recommendations of the Independent Commission on Policing in Northern Ireland, also known as the Patten Commission, which had been set up as part of the Good Friday peace agreement of April 1998. In keeping with the Patten Commission's emphasis on accountability as the cornerstone of police reform, the Police Act of 2000 represents one of the most detailed plans for establishing police accountability enacted into law in any jurisdiction. The following discussion describes many, but not all, of the accountability processes and mechanisms for which the Act provides.

The Act establishes an *external supervisory mechanism*, the Northern Ireland Policing Board.¹⁰² The Policing Board is empowered to appoint the head of the police force (the 'Chief Constable'), 'subject to the approval of the Secretary of State'.¹⁰³ The Board also appoints all other senior officers, 'subject to the approval of the Secretary of State and after consultation with the Chief Constable'.¹⁰⁴ The Secretary of State has power to force the retirement of the Chief Constable. An officer whose retirement is sought has the right under the Act to seek a formal inquiry and have the report of the inquiry considered by the Secretary of State prior to being retired.¹⁰⁵

The Policing Board's functions are to 'secure the maintenance of the police in Northern Ireland' and to 'secure that the police . . . are efficient and effective'.¹⁰⁶ In carrying out these functions, the Board is mandated to:¹⁰⁷

- 'hold the Chief Constable to account for the exercise of his functions and those of the police';
- 'monitor' the performance of the police in carrying out their general duties under the Act, complying with the Human Rights Act of 1998, and carrying out the policing plan developed by the Board;

¹⁰⁰ As above.

¹⁰¹ Art 1 Cap 32 Police (Northern Ireland) Act 2000.

¹⁰² As above, art 2.

¹⁰³ As above, art 35(1).

¹⁰⁴ As above, art 35(2).

¹⁰⁵ As above, art 35.

¹⁰⁶ As above, art 3.

¹⁰⁷ As above, art 3(3).

- 'keep itself informed as to' all aspects of the operations of the police, including the handling of citizen complaints, recruitment of police officers, and the trends and patterns in crimes committed in Northern Ireland;
- 'assess' the effectiveness of measures taken to ensure that the membership of the police is representative of the community, the level of public satisfaction with the performance of the police, the effectiveness of community policing programs, and the effectiveness of the code of ethics issued under the Act; and
- 'make arrangements for obtaining the co-operation of the public with the police force in the prevention of crime'.

Upon the devolution of powers to the Northern Ireland Assembly, the Policing Board will consist of 19 members, ten 'political members' and nine 'independent members'. The 'political members' will be members of the Assembly, nominated by their respective political parties, and will serve during their terms of office in the Assembly. Parties will be empowered to nominate 'political members' of the Board in rough proportion to the number of seats held by the party in the Assembly.¹⁰⁸ The nine 'independent members' of the Board will be appointed by the Secretary of State for the Union in consultation with other ministers, local district councils and other bodies deemed appropriate.¹⁰⁹ The Secretary 'shall exercise his powers of appointment . . . to secure that as far as is practicable the membership of the Board is representative of the community in Northern Ireland'.¹¹⁰ The appointed members serve terms of not more than four years.¹¹¹ Police officers are ineligible for appointment.¹¹² The Secretary of State may remove any person from membership on the Board, but only on grounds carefully defined in the Act, for example, if the member 'has been convicted of a criminal offence . . . after the date of his appointment' or if the member 'is not committed to non-violence and exclusively peaceful and democratic means'.¹¹³

Prior to devolution, the Secretary of State has authority to appoint the entire membership of the Policing Board.¹¹⁴

In setting forth the institutional architecture for supervision and control of the Northern Ireland Police Service, the new Act reflects careful attention to the apportionment of responsibility among the political executive (as represented by the Secretary of State), police

¹⁰⁸ As above, Schedule 1 art 7.

¹⁰⁹ As above, Schedule 1 art 8.

¹¹⁰ As above, Schedule 1 art 8(1).

¹¹¹ As above, Schedule 1 art 8(6).

¹¹² As above, Schedule 1 art 10(1)(b).

¹¹³ As above, Schedule 1 art 9.

¹¹⁴ As above, Schedule 1 art 3.

leadership (as represented by the Chief Constable), and the new Policing Board. As recommended by the Patten Commission, the Act explicitly assigns responsibility for developing long-term objectives and principles to the Secretary of State, for setting medium-term objectives and priorities to the Policing Board, and for making shorter-term tactical and operational plans to the Chief Constable.¹¹⁵ The Act requires the Chief Constable, in fulfilling this latter role, to submit on an annual basis a draft 'policing plan' setting forth 'proposed arrangements for the policing of Northern Ireland'.¹¹⁶ The Policing Board, in consultation with both the Secretary of State and the Chief Constable, may either adopt the Chief Constable's draft of the policing plan or adopt an amended plan.¹¹⁷

The Act further provides that the Policing Board shall, on an annual basis, develop a 'performance plan' that assesses its own performance and that of the Chief Constable during the previous year according to identified 'performance indicators' and that sets performance standards for the coming year.¹¹⁸ This 'performance plan' shall then be subject to an audit by the Comptroller and the Auditor-General, at the conclusion of which the Secretary of State may direct the Board to revise the 'performance plan' or take any other action that the Secretary of State considers necessary to ensure improvement in the functioning of the Board or the Chief Constable.¹¹⁹

Not later than three months after the end of each financial year, the Chief Constable shall 'submit to the Board a general report on the policing of Northern Ireland during that year'.¹²⁰ Not later than six months after the end of each financial year, the Board shall issue and publish a report assessing 'the performance of the police' in all of the areas, listed above, for which the Board is mandated to hold the Chief Constable accountable.¹²¹

The Act directs the Chief Constable to submit to the Policing Board a code of ethics, which shall 'lay down standards of conduct and practice for police officers' and 'mak[e] police officers aware of' human rights and obligations arising in law.¹²² The Board, working in consultation with government and civil society actors, and others, may then adopt the draft code of ethics submitted by the Chief Constable or an amended code.¹²³ The Secretary of State shall then 'ensure that the provisions of

¹¹⁵ As above, arts 25 & 26.

¹¹⁶ As above, art 26(4).

¹¹⁷ As above, art 26.

¹¹⁸ As above, art 28.

¹¹⁹ As above, arts 29–31.

¹²⁰ As above, art 58(1).

¹²¹ As above, art 57.

¹²² As above, art 52(1).

¹²³ As above, art 52.

the code . . . are reflected in' police conduct and disciplinary regulations.¹²⁴

The new Act strengthens the Office of the Ombudsman, an entity set up by its predecessor statute, the Police (Northern Ireland) Act of 1998. The function of the Ombudsman is to 'secure the efficiency, effectiveness and independence of the police complaints system . . . and the confidence of the public and of members of the police force in that system'.¹²⁵ The Ombudsman, like South Africa's ICD, is an *external complaints mechanism*.

The Ombudsman has responsibility for overseeing complaints made by or on behalf of members of the public about the conduct of any member of the police force, except for complaints relating to the 'direction and control of the police force by the Chief Constable'.¹²⁶ The Chief Constable must also refer to the Ombudsman 'any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person'.¹²⁷ In addition, the Secretary of State may refer to the Ombudsman any other matter in which it appears that a police officer may have committed a criminal offence or 'behaved in a manner which would justify criminal proceedings'.¹²⁸

Having received an appropriate complaint, the Ombudsman may, among other things, refer the matter for informal resolution or mediation, refer the matter for initial investigation by the police, or institute a formal investigation by the Office of the Ombudsman.¹²⁹ To conduct a formal investigation, the Ombudsman appoints an 'officer of the Ombudsman'.¹³⁰ Such an officer shall have 'all the powers and privileges of a constable' in conducting the investigation.¹³¹ The 2000 Act provides that, in addition, '[t]he Chief Constable and the Board shall supply the Ombudsman with such information as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of his functions'.¹³²

At the conclusion of an investigation, the officer appointed to investigate the matter, whether a police officer or an officer of the Ombudsman, 'shall submit a report on the investigation to the Ombudsman'.¹³³ The Ombudsman shall then, if appropriate, refer the matter for

¹²⁴ As above, art 52(10).

¹²⁵ Art 51(4) Cap 32 Police (Northern Ireland) Act 1998.

¹²⁶ As above, art 52.

¹²⁷ As above, art 55(2).

¹²⁸ As above, art 55(1).

¹²⁹ As above, art 53–54.

¹³⁰ As above, art 56(1).

¹³¹ As above, art 56(3).

¹³² Art 66 Cap 32 Police (Northern Ireland) Act 2000.

¹³³ Art 56(6) Cap 32 Police (Northern Ireland) Act 1998.

criminal proceedings and/or disciplinary proceedings. The Ombudsman must refer the matter for criminal proceedings if the report of investigation indicates 'that a criminal offence may have been committed by a member of the police force'.¹³⁴ In all cases, the Ombudsman must make a recommendation to the appropriate disciplinary authority as to whether disciplinary proceedings should be brought and as to any matter relating to the disciplinary proceedings.¹³⁵ If, after the Ombudsman has recommended that disciplinary proceedings be brought, the Chief Constable declines to do so, the Ombudsman may direct the Chief Constable to bring disciplinary proceedings.¹³⁶

The Ombudsman also has an obligation under the statutes to provide statistics and other information to the Secretary of State and to the Policing Board to assist them in carrying out their supervisory functions.¹³⁷

5 The accountability trend

The fact that lawmakers in Kenya and the other Commonwealth jurisdictions described above have devised substantially different institutional arrangements reflects, in part, general differences in the culture, history, and politics of the five countries. Yet the variety of arrangements also reflects the fact that lawmakers in these countries have arrived at substantially different answers to a very particular set of questions: To whom should the police be held accountable? Through what mechanisms? On what subjects?

Among the five countries discussed, South Africa and Northern Ireland have undertaken the most thorough reforms of their law enforcement sectors. The new institutional arrangements in these jurisdictions for the appointment and removal of top police officers, for the supervision and control of the police force, and for the handling of allegations of police misconduct, reflect the emphasis that lawmakers placed on achieving greater popular accountability, legal accountability, and transparency. I will here highlight four common aspects of institutional change initiated by police reform legislation in South Africa and Northern Ireland, shared to a lesser extent by legislation in Nigeria and Uganda.

First, lawmakers have sought to broaden responsibility for controlling the police force beyond the executive branch of government by carving

¹³⁴ As above, art 58.

¹³⁵ As above, art 59.

¹³⁶ As above, art 59(5).

¹³⁷ As above, art 61A.

out significant supervisory and oversight roles for legislators and for other civilians from outside government.

Second, lawmakers have attempted to protect the operational autonomy of the police force and at the same time strengthen and regularise the accountability of the force to civilian leadership on matters of policy and in the handling of police misconduct.

Third, lawmakers have designed external accountability mechanisms that are mandated to work *in co-operation* with the internal accountability mechanisms in the police force rather than to displace those internal accountability mechanisms.

Fourth, lawmakers have opted to establish police-specific accountability mechanisms, rather than to rely on accountability mechanisms with responsibility for general oversight of the entire government.

5.1 Broadening the scope of accountability

The most important common theme that has emerged from police reform legislation in Northern Ireland and South Africa, and to a lesser extent in Nigeria and Uganda, has been the attempt by lawmakers to broaden the range of actors and institutions to whom the police are accountable. In Kenya, the narrow channel of accountability — a single, subterranean flow between the police force and the office of the President — has facilitated illegitimate interference with police operations and has given rise to a state of affairs in which law enforcement imperatives have been subordinated to the objectives and priorities of the ruling political party.

In Uganda, Nigeria, South Africa and Northern Ireland, lawmakers have expanded the process for appointing and removing the head of the police force and other senior officers. Each has moved in the past decade to a system in which the political executive shares powers of appointment and/or removal with other actors or institutions. In Kenya, however, the executive monopolises this power.

Meanwhile, all of the jurisdictions, including Kenya, have established institutions that allow civilians to play some role in overseeing the work of the police. In Northern Ireland and Nigeria, civilian entities have been established with actual supervisory powers over the police and with some measure of independence from the political executive. These *external supervisory mechanisms* have been established with the intention of broadening the range of actors to whom the police are accountable, insulating the police from illegitimate political interference, supporting police obedience to the rule of law, and increasing transparency. The 2000 Northern Ireland Police Act, for example, empowers the civilian Policing Board, through various mechanisms and processes, to set objectives and make plans for the police service, and to hold the police leadership accountable for the overall performance of the service. In

Nigeria, the Police Service Commission has ultimate responsibility for exercising disciplinary control over all officers except the Inspector General of Police.

An external supervisory body that lacks sufficient distance from the executive branch, on the one hand, or from senior police leadership, on the other, cannot substantially enhance police accountability. Such a supervisory body simply functions to reinforce control by the executive. At worst, such a body could function as a mechanism for conferring false legitimacy on the subordination of the police force to the ruling political party. In Northern Ireland and Nigeria, executive branch officials and active duty police officers are ineligible for service on the civilian supervisory bodies.

All five countries discussed here have, in the last decade, established *external complaints mechanisms* — independent institutions that allow civilians to play a role in investigating allegations of police misconduct. In South Africa and Northern Ireland, these new institutions, the ICD and the Police Ombudsman, have mandates that are specific to the police. In Kenya, Uganda and Nigeria, human rights commissions have been established whose jurisdictions include the investigation of complaints against the police. The establishment of these entities reflects the recognition by lawmakers of at least two separate points: first, that a system in which the police themselves are solely responsible for investigating allegations of police misconduct may not be sufficiently impartial or effective; second, that regardless of its actual impartiality and effectiveness, a system under which only the police are permitted to investigate the police may be *perceived* by the public as self-interested and as a result may lack legitimacy.

Incidents involving alleged police misconduct are often highly visible and politically sensitive. Any entity tasked with overseeing the investigation of police misconduct depends for its credibility and legitimacy in part on its independence from the political executive, from the police force, and from popular pressure. In all of the jurisdictions described above, the political executive takes a primary role in appointing the membership of the investigative entity, but all jurisdictions at least purport to provide some security of tenure for those who have been appointed. In many jurisdictions, such as Uganda and South Africa, the legislation explicitly stipulates that the investigative entity shall be 'independent'.

The importance of institutional independence, even in the context of external mechanisms of accountability, can perhaps be over-emphasised, however. According to South African reform advocates, 'the 'independence' of an oversight mechanism does not necessarily enable it to win public trust. Rather, '[a]n approach that emphasises public credibility and public confidence above all else is likely to prove to be counterproductive'. In this view, a complaints entity can best win public respect by demonstrating its 'effectiveness' and by developing 'a

reputation for impartiality which is recognised by both the police and members of the public'.¹³⁸

5.2 Channeling accountability, enhancing operational autonomy

A second common theme has been the effort to delineate more sharply the division of decision-making responsibility between senior police officers, on the one hand, and civilian leadership, on the other. Police commanders should have responsibility for making operational and tactical decisions and should be insulated from illegitimate external interference in making these decisions. Civilian leaders should have responsibility for holding police officers accountable for the consequences of their operational decisions, for setting broad objectives for the police force, and for making law enforcement policy.

The external supervisory mechanisms established in Northern Ireland and Nigeria seek to support and to reinforce this division of responsibility. Northern Ireland's Policing Board and Nigeria's Police Service Commission each supervise the police force at an intermediate level, above that of operations and tactics but below that of policy-making. If these new entities succeed in their mandates, they will insulate police leadership from external interference with operational decisions while at the same time providing a strong, constant, and transparent channel for holding the police accountable to the public and to the rule of law.

Rules governing the appointment, removal and tenure of senior police officers also play a crucial role in determining whether police leaders are actually insulated from interference with operational decisions and whether they are ultimately accountable to civilian authorities. If these processes are transparent, objective, and impartial, police commanders will be afforded greatly expanded space for operational autonomy and will, at the same time, be more clearly subject to the policy direction and general oversight of civilian authorities.

Security of tenure for the head of the police force increases his or her ability to resist illegitimate political interference, to act in obedience to the law even when doing so might be momentarily unpopular, and to make operational decisions in accordance with his or her own best judgment. In South Africa, the head of the police force serves a fixed term of office. In South Africa and Northern Ireland, the political executive may remove the head of the police force from office only after receiving the recommendation of an independent board of inquiry.

¹³⁸ n 93 above.

5.3 Blending internal and external accountability

The external accountability mechanisms established in Northern Ireland and South Africa are not intended to displace mechanisms of accountability already existing within the police force. Rather, the new external mechanisms of accountability are directed to work co-operatively with internal accountability mechanisms. The new Police Act for Northern Ireland, for example, requires the Policing Board and the Chief Constable to share responsibility in a series of areas of decision-making.

The proper handling of allegations of police misconduct requires a particularly careful balance between external and internal mechanisms of accountability. External complaints bodies must have sufficient powers and resources to do their work effectively. In particular, external complaints mechanisms with no independent investigative capacity are likely to be weak accountability mechanisms. Goldsmith has argued that the incorporation of an independent investigative capacity ought to be 'the paramount consideration' in the establishment of an external complaints body, and that any such body 'should be able to reassure citizens that its role can extend beyond the *ex post facto* review of investigations of complaints undertaken by the police themselves'.¹³⁹ South Africa's Independent Complaints Directorate and Northern Ireland's Police Ombudsman, unlike many less successful agencies of external oversight elsewhere in the world, do have this independent investigative capacity.

On the other hand, charging an external agency with the handling of *all* complaints against the police, and thereby altogether removing the police from the process of investigating such complaints, may be self-defeating. Such an agency is likely to develop a strictly adversarial relationship with the police, limiting the amount of co-operation it will get from the police and the level of acceptance its recommendations for reform will receive. As Joel Miller has written in a recent review of the academic literature on civilian oversight mechanisms, '[h]ostility by police departments and police officers to civilian oversight is probably one of the most significant factors that helps explain the failures and underperformance that have afflicted civilian oversight agencies'.¹⁴⁰ 'Conversely, in some contexts the engagement of police departments with the process of oversight has been an important basis for their success.'¹⁴¹

¹³⁹ Goldsmith (n 21 above) 55.

¹⁴⁰ J Miller Civilian 'Oversight of police: Lessons from the literature' 11 (Vera Institute 2002) available at <http://www.vera.org/publication_pdf/178_338.pdf> (accessed 31 July 2003).

¹⁴¹ As above, 12.

Vesting an external complaints body with exclusive investigative jurisdiction may also have the unintended effect of actually reducing internal police accountability. Displacing responsibility for misconduct to an external agency may encourage neglect by the police both of their own complaints management capacities and of the underlying problems that are giving rise to complaints.¹⁴²

For these reasons, both the ICD and the Ombudsman undertake the initial investigation of only a limited and carefully-defined set of serious complaints, leaving the balance of investigative work to the internal affairs unit of the police force.

5.4 Sharpening the focus through specialised institutions

A final common aspect of institutional change has been the establishment of accountability mechanisms with an exclusive focus on the police. Rather than relying only on institutions with more general mandates, such as human rights commissions, inspectors general of government, and public service commissions, lawmakers in South Africa, Northern Ireland, and Nigeria have opted to create entities — the ICD, the Policing Board, the Police Ombudsman, the Police Service Commission — with focused mandates and with special competence regarding the police.

There are compelling reasons for the establishment of specialised oversight entities for police. Because the police are more present in the lives of ordinary citizens than other agencies of government, the volume of complaints against police is likely to be particularly high. Because, unlike most other agencies of government, the police are authorised to use force against citizens, the nature of complaints against police are often highly sensitive and occasionally explosive. Police officers are regularly called upon to make complex decisions at high speed that must take into account both law enforcement needs and the rights of citizens. Any agency charged with reviewing these decisions must have both expertise in law enforcement practice and legitimacy in the eyes of those whom its actions affect. Finally, if the aim is to reform a police force, as it ought to be in Kenya, then only a specialised entity can provide the constant oversight and flow of instruction that is necessary to implement lasting change.

¹⁴² n 93 above.

6 Recommendations

To whom should the police be accountable? Through what mechanisms? On what subjects? Kenyans have the opportunity to engage these questions directly. The following six recommendations seek to enshrine popular accountability, legal accountability and transparency as the central values in Kenyan law enforcement.

6.1 Define the government's obligation with respect to police service

There is no statement in current law that describes the kind of police service to which Kenyan citizens are entitled or that imposes any particular obligation on the government to provide police service. A new constitutional or legislative provision could correct that deficiency and, in so doing, define the standard against which the police will henceforth be judged. The language might be as follows: It is an obligation of the government of Kenya to maintain a police service that provides security to the people of Kenya, that protects the fundamental rights recognised in the Constitution, and that adheres to the rule of law at all times.

6.2 Establish a broad-based process for the appointment and removal of the Commissioner of Police

The approval of parliament should be required before any individual can be appointed by the President to the office of Commissioner of Police. As in South Africa and Northern Ireland, the President should be required, prior to seeking the removal of a Commissioner before the expiration of the Commissioner's term of office, to convene a commission of inquiry into the performance of the Commissioner and receive its findings.

6.3 Provide security of tenure and a fixed term of office for the Commissioner of Police

With job security, the Commissioner of Police would be able to prioritise the rule of law and the interests of the Kenyan people over the demands of political figures and other powerful individuals outside the regular chains of command and accountability. Kenyan law should establish a fixed term of office for the Commissioner of Police in the range of three to five years, renewable once. During the duration of the term, the Commissioner should be removable by the President only 'for good cause'.

6.4 Establish specialised institutions of civilian oversight

Kenya should embrace the worldwide trend toward the establishment of independent institutions that allow citizens from outside the

government to participate in overseeing the functioning of police force. Kenyan lawmakers should consider the establishment of both an *external supervisory mechanism*, modeled on Northern Ireland's Policing Board or Nigeria's Police Service Commission, and an *external complaints mechanism*, modeled on Northern Ireland's Ombudsman or South Africa's ICD.

6.5 Repeal the Preservation of Public Security Act and the Official Secrets Act

These two parliamentary enactments, at least as currently drafted, are absolute impediments to the achievement of police accountability. The Preservation of Public Security Act has ensured effective domination by the President over all law enforcement matters in Kenya. The Official Secrets Act puts public officials who would share basic government information with Kenyan citizens at risk of criminal sanction.

6.6 Create a unitary police force

Whatever arguments may once have existed for maintaining both the regular Kenya Police Force and the Administration Police, the purpose of the dual structure of policing in Kenya is no longer clear. Not only are most Kenyan citizens uncertain of the relationship between the two police forces, it appears that police officers themselves are often confused about the division of labor and about their answerability to provincial and district authorities. Moreover, it appears that the Administration Police have been more vulnerable to illegitimate political control, and consequently more implicated in past abusive practices, than the regular Kenya police. Kenyan lawmakers should unify law enforcement under the command of the Commissioner of Police.

These recommendations are, of course, only starting points for police reform: I do not mean to suggest that all or even most of the specific objectives of reform can be achieved through legal revision alone. For the short term, even with the enactment of appropriate constitutional and legislative provisions, corruption, brutality, arbitrariness and indiscipline will continue to hamper the practice of law enforcement in Kenya.

All of these problems, however, are hallmarks of a regime police force, of a police force that lacks accountability to the people it serves and to the law it enforces. In Kenya, as in many other developing democracies, the problems of police corruption, brutality, arbitrariness and indiscipline cannot be effectively addressed without first transforming the institutional environment that gave rise to these problems. Institutional values and relationships must be reoriented before managerial changes and capacity-building exercises can have a sustainable impact on the day-to-day practice of law enforcement.

Yet an institutional approach will encounter determined resistance. There will be constant temptation to ascribe the failures and abuses of the past to individual 'bad apples', and to leave aside the task of institutional transformation.¹⁴³ Once Kenya's 'constitutional moment' passes, this resistance will grow only stronger and more determined.

The present moment therefore represents a vanishing opportunity. By defining the principles according to which law enforcement will be conducted in the new Kenya, by broadening the scope of institutional actors to whom the police are accountable, by ensuring that police leaders will be able to make operational decisions free of illegitimate interference from outside the chain of command, by strengthening existing channels of accountability, and by establishing new, specialised institutions for holding the police accountable, Kenyans can create a legal and institutional environment within which the day-to-day problems of policing in Kenya can be effectively addressed. In so doing, Kenyans can perhaps initiate a long-deferred renaissance in the relationship between the police and the public.

¹⁴³ Brodeur (n 11 above) 155; n 17 above, 26.

The case of *The State of Egypt v Saad Eddin Mohammed Ibrahim*

Curtis FJ Doebbler*

International human rights lawyer

My work antagonised the state. I spoke out for the rights of Egypt's minorities at a time of internal strife in Egypt. I criticised the conduct of elections in 1995, and I was arrested as I prepared to monitor the 2000 elections. I caused them embarrassment, so they charged me to discredit me and to send a message to other intellectuals not to speak out. They wanted to make me into a lesson for Egyptian intellectuals and academics — do not embarrass the state.¹

— Professor Saad Eddin Ibrahim speaking after his acquittal

Summary

This note discusses the action against the Egyptian Professor Saad Eddin Mohammed Ibrahim who was arrested in 2000 and charged, together with others, with bribery, receiving illegal funds and spreading false rumours. The defendants were tried before the Supreme State Security Court. Professor Ibrahim was sentenced to seven years in prison. On appeal, the Court of Cassation returned the case to the Supreme State Security Court for retrial. Professor Ibrahim and his co-defendants were again found guilty. In March 2003, they were finally acquitted after the Court of Cassation had retried the case on appeal.

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¹ Quoted in P Baty 'I was a lesson: Don't speak out' *The Times Higher Education Supplement* (21 March 2003).

1 Introduction

On 18 March 2003, the Egyptian Court of Cassation delivered judgment on the case of *Saad Eddin Ibrahim and Others*, overturning the judgment of the Supreme State Security Court and acquitting all the defendants.² This case marked a victory of human rights protection in Egypt through judicial means, but also ended a long debacle that had almost exhausted the life of its central actor, Egyptian-American Professor Saad Eddin Ibrahim.

This discussion of the case briefly recaps its background and then its procedural history, before turning to a discussion of the 18 March 2003 opinion, and concludes with some brief remarks on the aftermath of this case.

2 Background to a debacle

For years Professor Ibrahim had been campaigning for a greater role for Egyptians in their own government. He is an academic, a former government advisor and prominent human rights defender. He undertook lecturing, advocacy and academic study of the highest quality of social phenomena relevant to civil society in Egypt. He was respected by his peers and his students at the American University in Cairo. He was looked upon as almost an icon of civil society by the small community of Arab human rights defenders for having been involved in the founding of some of their most prominent institutions. The Muslim brotherhood respected his forthright call for greater political participation for all political fractions while the government was suppressing their leaders. Even the government respected Professor Ibrahim because of the integrity of his work.

This changed substantially on 30 June 2000 when, as Professor Ibrahim was sitting in his study late in the evening, more than two dozen armed men — whom he was later to learn were Egyptian government security agents — raided his house, blind-folded him and abducted him. At the same time, more than two dozen of his co-workers were being arrested. Some of the arrestees were brought to the Ibn Khaldun Centre for Development Studies, a development think-tank where they worked together. Professor Ibrahim, who was among those brought

² *Saad Eddin Ibrahim v Egypt* Judgment of 18 March 2003, prosecution docket No 39725/2002 and court docket No 39725 of the 72nd judicial year. The citations to and quotes from this case that appear in this contribution are taken from an English translation of the original Arab text which has been supplied to the author by the Egyptian Organisation of Human Rights. The author also had a copy of the Arabic judgment with which he was able to compare the translation.

there, witnessed the atrocities committed to some of his colleagues. He recalls a young Sudanese woman who was the accountant for the Centre:³

She was in hysterics — screaming and sobbing. She thought she was being kidnapped and that she would be raped. She had come to Egypt to escape oppression in Sudan, but here she was facing the worst kind of oppression in Egypt.

The nature of the arrests, the refusal to allow contact with both family and lawyers, and the late-night interrogations that ensued and continued for several days are similar to strategies of intimidation employed against political opponents by the most repressive regimes.⁴ Moreover, the arrest came as Professor Ibrahim's Ibn Khaldoun Centre for Development Studies was preparing to monitor the 2002 general elections. In 1995 he had criticised the fairness of the elections, concluding that the election results had been 'marred by violence and the official arrest of supporters of the opposition and independent candidates'.⁵

He was arrested as he was organising civil society's monitoring of the 2000 elections and, ironically, shortly after the Egyptian Supreme Court had agreed with his assessment that the 1990 and 1995 elections were not held as required by law and ordered judges to monitor the upcoming elections.⁶

In the trial court, evidence of interrogations that had taken place without legal counsel present was admitted and, although the 19 defendants were all released on bail at the trial, they were held in an iron cage that is usually only used for dangerous criminals.⁷ The prosecution also relied on evidence to which defence counsel had no access, including papers allegedly taken from the Ibn Khaldoun Centre. The views of the European Union (EU) were ignored, despite the fact that some of the most serious charges concerned the acceptance and misuse of EU funds.⁸ At the same time, the judges in the case discussed the

³ n 1 above.

⁴ See eg Chief Counsel for Prosecution of Axis Criminality *Nazi Conspiracy and Aggression: The Slave Labor Program* Vol I Ch X (1946) 892 893. Also see Human Rights Watch *Egypt — The State of Egypt v Free Expression: The Ibn Khaldun Trial* Vol 14 No 1(E) (January 2002) (criticising the Egyptian government for using such repressive measures in other circumstances) (*The State of Egypt v Free Expression*).

⁵ The Supreme State Security Court cited a communication by Prof Ibrahim to a German non-governmental organisation in which this statement was made.

⁶ *Garida Rasmiya* Vol 29, 22 July 2000 3–15. Judgment of the Egyptian Constitutional Court delivered on Saturday 8 July 2000. The Egyptian government responded to the judgment of its Supreme Court by making prosecutors judges for purposes of monitoring the elections and thereby undermining the independence of the monitoring.

⁷ *The State of Egypt v Free Expression* (n 4 above).

⁸ See First Judgment of the Court of Cassation on 6 February 2002 6–8.

judgment with the media before it had been made available in writing to defence counsel.⁹ Even the Decree 4/1992, under which some of the most serious charges were brought — receiving money without permission, which carries a seven year prison sentence — had rarely been used before and itself was a highly politicised provision of law. The conviction of Professor Ibrahim and 26 others was therefore no surprise, as many observers believed it had been preplanned to stifle freedom of expression that was critical of the government.

Indeed, Professor Ibrahim's criticism of the lack of democracy and the violations of human rights in Egypt had been longstanding. He had been engaged in these activities both as a highly respected professor of sociology at the American University in Cairo and as a human rights defender in several Egyptian non-governmental organisations (NGOs). Just before his arrest, he had written an article sharply criticising Egyptian President Hosni Mubarak's intention to groom his son for succession to the presidency, comparing him to a hereditary monarch.¹⁰ This criticism of Egypt's powerful President was not usually welcomed and such utterances had previously drawn the wrath of the state security apparatus.¹¹

An unusual twist was the dual nationality of Professor Ibrahim. He is both Egyptian and American, but has chosen to live with his American wife in Cairo. This gave the case a tint of international flavour that caused both pressure on the Egyptian government and jealousy or suspicion among Professor Ibrahim's peers. The United States government, for example, applied some pressure on the government of Egypt, but less than it has recently done when Egypt refused to sign an agreement to exempt American soldiers from war crimes, although the agreement would have probably violated Egypt's existing international legal obligations.¹² The EU, who had provided the funding that the Egyptian government complained had been taken illegally, also made statements indicating that Professor Ibrahim and his co-defendants were innocent. But again, the EU only issued occasional weak statements,¹³ despite the fact that the MEDA Framework Convention, to which Egypt is a party,

⁹ See *Al-Mussawaar* (1 June 2001) 18–21.

¹⁰ Saad Eddin Ibrahim, *al-Majalla* (Arabic newspaper) (2–8 July 2000) at <<http://www.sunnah.org>> (accessed 3 July 2002).

¹¹ DJ Warr *The State of Freedom of Expression in Egypt* Canadian Committee to Protect Journalists (7 November 1997) at <<http://www.cjfe.org>> (accessed 2 July 2002).

¹² G Dinmore 'US freezes aid to allies that withhold war crime immunity' *Financial Times* 2 (2 July 2003).

¹³ See eg Joint motion for a resolution on human rights in Egypt, EU Docs No B5-0440/2001, B5-0450/2001, B5-0466/2001, B5-0471/2001 adopted 14 June 2001.

contains an explicit requirement that Egypt allows the funding of non-state entities.¹⁴

3 The procedural history

After more than a month of detention, on 24 September 2000, charges were brought against Professor Ibrahim and others in a written indictment by the office of the Public Prosecutor, referring the case to trial before the Supreme State Security Court (*Makamaat Amin al-Dawla al-Ulya*).¹⁵ The charges stated that he had (1) participated in a criminal agreement to bribe public officials in violation of articles 40(2) and (3) and 48 of the Criminal Law; (2) received funds from the EU without the permission of the government of Egypt in violation of articles 1(6) and 2(1) of the Military Decree No 4 of 1992; (3) spread false rumours that could damage the Egyptian state by claiming that the 1995 elections had been marred by violence, that the Egyptian state was interfering with NGOs, and that religious discrimination existed in violation of article 80(d) of the Penal Code; and (4) fraudulently obtained and used funds of the EU in violation of article 336(1) of the Criminal Law.

This Supreme State Security Court had previously been established in accordance with article 1(3) of Law 105.¹⁶ This Law declared a state of emergency in Egypt, which has been in effect ever since.¹⁷ This has been widely criticised by international human rights groups who have pointed out that as a consequence of this law:¹⁸

¹⁴ Art 7 of the Framework Convention on the Implementation of Financial and Technical Co-operation Under the MEDA Programme as well as Other EIB's Financial Agreements in Mediterranean Countries, signed 19 July 1997, entered into force 1998.

¹⁵ Charges of espionage had also been brought on 6 August 2000, but no action has been taken to prosecute these charges after the prosecutor stated in his opening statement that these charges were being referred to a competent court. The charges arose from statements made by Prof Ibrahim in Washington DC in 1994 at an academic conference in which he described his research about the Islamic movement. See The National Academies (of the United States), Committee on Human Rights at <<http://www4.nas.edu>> (accessed 5 July 2002). For more details of the lower court cases, see CF Doebbler 'The rule of law v staying in power, *The State of Egypt v Saad Eddin Mohammed Ibrahim*' (2003) 8 *Yearbook of Islamic and Middle Eastern Law 2001-2002* 353-363.

¹⁶ Law 105 of 1980 on the Establishment of State Security Courts, which came into force on 21 May 1980.

¹⁷ Law 162 of 1958 State of Emergency Law (as amended and renewed).

¹⁸ Quoted at <<http://jurist.law.pitt.edu/world/egypt.htm>> (accessed 2 July 2002), which in turn cites the United States Department of State as its source. Also see UN Doc CCPR/C/79/Add.23 (9 August 1993) (expressing the view of the United Nations Human Rights Committee that the 19-year-long state of emergency is 'one of the main difficulties impeding the full implementation of the Covenant' in Egypt).

[I]n 1993 the Supreme Constitutional Court ruled that the President may invoke the Emergency Law to refer any crime to a military court. This use of Military and State Security Emergency Courts under the Emergency Law since 1993 has deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge.

In this instance the Court did contain three civilian judges. Although the President has the discretionary power to name two military officers to the Court at any time,¹⁹ he did not exercise this power.

The trial, meeting periodically, lasted several months during which Professor Ibrahim's defence team called several prominent witnesses.²⁰ Although most of the evidence against their clients was not shared with the defence team, on 19 March 2001 the defence team was allowed three hours to examine the documents upon which the State Security Prosecutor was basing his case, but only in the presence of prosecution lawyers.

On 21 May 2001, the Supreme State Security Court gave its judgment, finding that the allegations relating to bribing a television station to publicise the work of the Ibn Khaldoun Centre were not proven and convicting the defendants on the other charges.²¹ Professor Ibrahim was sentenced to seven years in prison for illegally receiving EU funds, defaming the state, and the misuse of EU funds. The other defendants received punishments ranging from one-year prison sentences to suspended sentences. In addition, alleged falsified documents — including some not shown by the prosecution at the trial — were confiscated.

An appeal was filed against the sentence with the Court of Cassation and after postponing its judgment several times, on 6 February 2002, the Court of Cassation granted the appeal. The Court ruled that the Supreme State Security Court's judgment had not been supported by the evidence, had failed to take into account the right of the defendants, and had erroneously applied the law.²² No explicit reasoning was given concerning the charges of defaming the state, although it is clear that all the charges were struck out and the trial court was ordered to rehear the

¹⁹ Art 2 of Law 105 (1980).

²⁰ See *Al-Ahram Weekly Newspaper* (25–31 January 2001) at <<http://www.ahram.org.eg>> (accessed 1 July 2002), listing the some of the prominent Egyptian scholars and statespersons who testified on behalf of the defense.

²¹ Just days after the trial court's judgment, art 48 of the Criminal Law was found to be unconstitutional and in violation of arts 41 (freedom from arbitrary arrest and detention), 65 (supremacy of the rule of law), 66 (requirement that crimes be specified by law and personal), and 67 (the right to be presumed innocent until proven guilty and the right to legal defence) of the Egyptian Constitution. *Al-Sa'id 'Eid Taha Nour v the President of the Republic, the Minister of Justice, the President of the People's Assembly and the Prosecutor General* Supreme Constitutional Court Ruling No 114 of Judicial (Constitutional) Year 21.

²² First Judgment of the Court of Cassation, n 8 above.

case in its entirety.²³ Neither was any reference made to the provisions of the Egyptian Constitution²⁴ or international law.²⁵ The Court of Cassation also criticised the trial court's consideration of the evidence, stating that gross mistakes had been made in evaluating the evidence that rendered the judgment invalid.²⁶ According to Egyptian law, a conviction must be based on a full consideration of evidence that proves guilt beyond a shadow of doubt.²⁷ Mistakes in evaluating the evidence included the trial court's failure to consider inconsistencies between the testimony of witnesses;²⁸ the failure to take into account the specific particulars of the contract between the EU and the Ibn Khaldun Centre;²⁹ and the failure to sufficiently consider claims of moral coercion.³⁰

The Court of Cassation stated that the trial court's judgment had lacked supporting evidence because it had failed to give adequate consideration to the contracts with the EU.³¹ The trial court had described the funds received from the EU as donations; the Court of Cassation found them to be funds received for contracted services. The Court of Cassation distinguished between a registered commercial company and a non-profit non-governmental organisation (NGO). As both the Ibn Khaldun Centre and the Association to Support Women Voters were registered as commercial companies and not NGOs, the funds received by them, according to the Court, should have been treated as commercial transactions.³² This being the case, the funds should be considered to be revenue governed by the terms of the contract between the organisations and the EU. The Court did not indicate whether the funds had been declared as revenue, nor did the Court appear aware of the fact that the government of Egypt had consented, both in the earlier mentioned MEDA Framework Convention³³ and by its support of the Human Rights Defenders

²³ As above, 14.

²⁴ Art 47 (freedom of opinion); art 48 (liberty of press); art 49 (freedom to conduct research); and art 57 (freedom of person) of the Egyptian Constitution.

²⁵ By virtue of art 151 of the Egyptian Constitution, duly ratified treaties have the force of law in Egypt.

²⁶ First Court of Cassation Judgment 7.

²⁷ Art 310 of the Criminal Procedure Law.

²⁸ First Court of Cassation Judgment 8. The Court of Cassation pointed out that the trial court relied on statements by prosecution witnesses Abdel Hadi El Sayed Abdel Fattah and Khalid Mohamed Fayyad that were not found anywhere in the prosecution's investigation and that the trial court failed to reconcile contradicting statements from these same two witnesses as concerns the use of funds that were allegedly misappropriated.

²⁹ First Court of Cassation Judgment 7 8.

³⁰ As above, 8–10.

³¹ As above, 7.

³² As above.

³³ n 14 above.

Declaration,³⁴ to allow NGOs to receive funding from abroad for human rights activities. The judgment, therefore, left unresolved the position of registered NGOs that receive funding from abroad. NGOs have been placed on even more precarious ground by the recently adopted NGO law which imposes more restrictions on them than any previous law.³⁵ The Court also failed to refer to the fact that the EU had repeatedly stated that it was satisfied that the funds had been legitimately obtained and spent.³⁶ These views of the EU have also been suppressed by the Egyptian government subsequent public reports about the case.

The Court found that the allegations concerning the misuse of funds were not proven beyond a shadow of doubt,³⁷ because the trial court had failed to make an appropriate evaluation of the evidence linking Professor Ibrahim to other defendants, and had failed to take into account the particulars of the contracts between the EU and Professor Ibrahim's Ibn Khaldoun Centre.³⁸ Furthermore, there had been conflicting testimony by two witnesses that the trial court had failed to reconcile by its reasoning.³⁹

When presented with evidence that one of the confessions had been obtained by the use of moral coercion, the trial court had not properly investigated this allegation and had in fact relied on the confession, which would be invalid if not freely given.⁴⁰ The Court of Cassation

³⁴ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 144 UN Doc 53/144 (9 December 1998) (adopted by consensus). See art 6(a): 'Everyone has the right, individually and in association with others: To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems'; art 6(b) 'Everyone has the right, individually and in association with others: As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms'; and art 6(c) 'Everyone has the right, individually and in association with others: To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.'

³⁵ Law of 3 June 2002.

³⁶ Statement from the European Union Presidency 'Declaration by the Presidency on behalf of the European Union on the sentences against Dr Saad Eddin Ibrahim/Ibn Khaldoun Centre' (27 May 2001) at <<http://www.geocities.com/lrrc.geo/Saad/eustatementmay2001.htm>> (accessed 2 July 2002) and Statement from the European Union Presidency 'Declaration by the Presidency, on behalf of the European Union, on the trial in Egypt against Dr Saad Eddin Ibrahim and the employees of the Ibn Khaldoun Centre and Hoda Association' EU Doc No 11415/02 (Presse 225), P 100/02 (Brussels, 30 July 2002).

³⁷ Art 310 of the Criminal Procedure Law.

³⁸ First Court of Cassation Judgment 8.

³⁹ As above, 11.

⁴⁰ As above, 9 10.

affirmed that the confession of one defendant was coerced by referring to the fact that the witness had been imprisoned for three days without access to legal counsel and had been promised procedural benefits if he co-operated with a confession indicting other co-defendants.⁴¹

Finally, the Court of Cassation found that the trial court had been inappropriately lenient in sentencing the government officials who were also convicted for their part in the crime of bribery. However, their sentences could not be changed because this would be to the disadvantage of these defendants.⁴²

The judgment of the Court of Cassation meant that Professor Ibrahim and his co-defendants were released pending a retrial. However, it was accompanied by a travel ban that prohibited Professor Ibrahim from seeking medical treatment abroad before the retrial.⁴³ The Court of Cassation's judgment returned the case to the Supreme State Security Court for trial by another panel of judges.

On 27 April 2002, the retrial began and several hearings were being held. On 29 July 2002, however, after barely two hours of deliberation, the Supreme State Security Court again found Professor Ibrahim guilty of the same charges and again sentenced him to seven years in prison. The Court responded to the Court of Cassation's decree by mentioning more relevant facts and by failing to mention some of the facts for which the first judgment had been criticised for mentioning. The concluding evaluation of the facts and the application of the law was, however, similar to that of the first judgment.

On 3 December 2002, after Professor Ibrahim and his co-defendants had spent an additional four months in prison, the Court of Cassation agreed to retry the case and ordered their release pending a rehearing of the case. Around the same time, a petition was filed with the Egyptian Constitutional Court, a judicial body whose jurisdiction is limited to judicial review of legislation, but which is well-respected among lawyers of comparative constitutional law for a series of judgments during the 1990s, upholding the rule of law in politically unpopular cases. The case before the Constitutional Court challenged the constitutionality of applying Military Decree No 4 of 1992 to this matter. The case before the Court of Cassation was based on a request to hear the case *de novo*, as was permitted by law when a case was returned to Court of Cassation for

⁴¹ As above, 10.

⁴² Art 35(2) of the Law Concerning Appeals to the Court of Cassation prohibits interference with a flawed judgment of a trial court except when it is in the interest of the appellant.

⁴³ After his release, Prof Ibrahim underwent extensive medical tests that indicated that his degenerative neurovascular disease had become worse as a consequence of a series of small strokes that he had suffered in detention. Several medical experts also provided uncontroversial written statements claiming that no adequate medical treatment for his condition could be obtained in Egypt.

a second time. Thus the Court of Cassation reviewed both the law and the facts of the case — including re-evaluating all the evidence.

4 The final judgment of the Court of Cassation⁴⁴

The second judgment of the Court of Cassation was handed down on 18 March 2003. It exonerated Professor Ibrahim as well as the other defendants of all wrongdoing, with the exception of one defendant who was punished for the misuse of voting registration materials and who received a suspended sentence.

Because it had heard the case *de novo*, the bulk of the judgment of the Court of Cassation considered issues of evidence, in essence finding the evidence to be faulty or inadequate. Nevertheless, the judgment contains some important statements of law as concerns each of the three charges against Professor Ibrahim and these will be discussed.

First, the charge of receiving funds in violation of Military Decree 4/1992 was dismissed because the funds were found to be contractual payments, not donations. The Military Decree had been promulgated to protect the government against the embarrassment it had suffered when the Muslim brotherhood mounted a more organised and comprehensive humanitarian response to the earthquake that devastated Egypt in 1992. The government had been caught off-guard by the significant funds and humanitarian supplies that the Muslim brotherhood had available to assist Egyptians. Many of these funds had come from abroad to support the Muslim brotherhood's efforts to assist people in countries such as Bosnia and Herzegovina. To ensure that it was not caught in such a situation again, the government passed Military Decree 4/1992, requiring all Egyptian charities to report funds received from abroad. Dealing with the charges under this Decree, the Court of Cassation found that the funds that had been paid by the European Commission (European Union) to the Ibn Khadoun Centre and to the Organisation for Women Voters for encouraging voter awareness, were paid on the basis of a contract for services to be preformed by these organisations. As such, the Decree did not apply. In so holding, the Court avoided questioning the constitutionality of the Military Decree — part of which had already been struck down — and also set a favourable precedent for human rights defenders in Egypt that may allow them to operate as individuals and companies on contract to foreign or international organisations. This would allow them to receive

⁴⁴ The excerpts and references to the Court of Cassation's judgment of 18 March 2003 are from the English language translation of the original Arabic that was provided to me by the Egyptian Organisation of Human Rights. This decision is referred to as *Saad Eddin Ibrahim v Egypt* (Court of Appeal) 18 March 2003. No reliable page or paragraph numbers are available to the author at the time of this publication.

much needed funding from abroad for their human rights work. As indicated below, this goes some way towards implementing the rights of human rights defenders that the government of Egypt has recognised in several international instruments.

Second, as concerns the charge of fraud or swindle, the Court rested its finding that Professor Ibrahim was innocent on two general determinations about the evidence. The Court found that the trial court had failed to appreciate that the required constituents of the crime of swindle were not present, because the witnesses against Professor Ibrahim had admitted that he had paid the money to others and had not deposited it into his account for his own benefit as the prosecution had alleged. Moreover, the Court found that the trial court had erred in relying on weak evidence provided by a witness who had changed his story during the investigation and trial and who was mistreated during the course of the investigation. Somewhat oddly, the Court did not examine more closely the claims of mistreatment and coercion that may have in fact amounted to torture.

Third, the Court of Cassation determined that the charge of false and maligning statements was not one that could be brought against an academic researcher conducting research in accordance with established academic practices. The Court held⁴⁵

that a sociologist who monitors the society's developments to record any prevailing negative aspects and address them by study and analysis for the purpose of discussing them should not be taken as harboring intentions other than his objectives insofar as he did not deviate from scientific approach based on true statistics, steady inference, and logical analysis and no evidence of bad intent was proved.

After reviewing some of the statements of Professor Ibrahim concerning discrimination against Copts and his criticism of election practice, as well as the statements of numerous persons defending his academic integrity, the Court concluded as follows:⁴⁶

In view of the foregoing, the Court has made sure that Saad Eddin Mohamed Ibrahim, a scientist in his field of specialty, has not given up his affiliation to his country, Egypt. According to article (47) of the Constitution, freedom of opinion is ensured. Every person has the right to express and publish his opinion by saying, writing, depiction, or any other means of expression within the limits of the law.

Out of his belief that self-criticism and constructive criticism, as provided in the Constitution, is an assurance of the safety of the national fabric, the defendant employed his science in studying the negative aspects of the Egyptian civil society in its democratisation. After he mentioned and historically listed these negative aspects as published and established without forgery or counterfeit, he analysed and found solutions for them. He was motivated by a desire to eliminate these negative aspects. To this end, he

⁴⁵ *Saad Eddin Ibrahim v Egypt* (Court of Cassation) 18 March 2003.

⁴⁶ As above.

availed himself of the contributions and contracts permitted by the international agreements to which Egypt has joined.

The information contained in his reports or research projects on rigging the elections and the minorities' obsessions are a mere echo of the published material in a book or newspapers or a lawsuit. With the communication revolution, it is not impossible that this sort of information be accessible to any person abroad who seeks to know this information. Therefore, sending information or research by the defendant, whether originally prepared by him or by any other person, to a certain body abroad on the occasion of proposing a project related to the society development with the purpose of achieving the project's objectives does not mean spreading false statements or disseminating malignant rumours abroad.

Thus, the requirements of the crime provided under article (80-d) [of the Penal Code] are not fulfilled, with the result that the defendant should be acquitted of this crime like the previous crime, pursuant to article (304) of the Penal Procedure Code. With this finding, there is no need to discuss the plea to an exception of non-constitutionality.

Directly after this, the Court went on to conclude the portion of its judgment concerned with Professor Ibrahim with curious *obiter dicta*, restating the claims of the Coptic community in Egypt. The Court stated:⁴⁷

Needless to say that the Copts obsessions are still discussed in some Egyptian newspapers. In October magazine, issue No 1365 on 22 December 2002 under the title 'Copts problems in Egypt on their way to solution', an interview was conducted with Dr Nabil Luqa Bebawi. In this interview, Dr Bebawi talked about discrimination against Copts in Egypt by the Christian Romans. The Othman rule deprived the Christians from being treated on equal footing with Moslems. It imposed on them certain restrictions [relating to] walking on the streets, wearing types of clothes, riding horses, and carrying weapons. All this is history now and Copts at present call to broadcast their Sunday service from a church like what happens in Moslems' Friday prayers.

The Copts demand that they should be represented in leadership, political, administrative, executive, and judicial posts in proportion to the ration between their number to the number of the population. The Copts also demand that the procedures for returning their *waqfs* (or endowments) be completed and that the education syllabuses do not ignore their history. They also call for purifying the religious Islamic and Christian discourse from fanaticism. All this, in fact, is no more than what Saad Eddin Ibrahim has called for.

These brief references to human rights — first to the human right of freedom of expression of academics and second to the human rights of the Coptic minority in Egypt — are of some consolation to Arab and international human rights defenders who have long battled for minority rights in Egypt.⁴⁸

⁴⁷ As above.

⁴⁸ See eg AE Wakin *Lonely minority: The story of Egypt's copts* (1963). Also see Minority Rights *The copts of Egypt* (1996) (Prof Ibrahim and others were the authors of this report).

Finally, although the Court of Cassation did not refer to international human rights law, it is obvious from its judgment that human rights were at least in mind and it is likely that a communication filed with the African Commission on Human and Peoples' Rights (African Commission) played a role in the Court's and the government's response to this case. Therefore, it is valuable to briefly examine the international human rights law that is relevant to his case.

5 The relevance of international human rights law

Egypt is party to several international treaties providing for rights to life, humane treatment, free expression, fair trial and health. Among these are the widely ratified International Covenant on Civil and Political Rights,⁴⁹ the International Covenant on Economic, Social and Cultural Rights,⁵⁰ and the African Charter on Human and Peoples' Rights (African Charter).⁵¹ Although all of these treaties provide for legally binding human rights, only the African Charter⁵² provides for an international procedure to which the Egypt government has agreed to submit.⁵³ This procedure became particularly relevant to this case, when on 24 December 2001, the Arab Organisation for Human Rights, an Egyptian NGO, filed a communication on behalf Professor Ibrahim and six other defendants with the African Commission.⁵⁴ The communication argued that all regular domestic remedies were exhausted or would cause undue delays in light of the poor state of Professor Ibrahim's health.⁵⁵

⁴⁹ 999 UNTS 171 (1966).

⁵⁰ 993 UNTS 3 (1966).

⁵¹ African Charter on Human and Peoples' Rights, adopted at Nairobi on 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3/Rev 5 (1981), reprinted in (1982) 21 *International Legal Materials* 59; (1986) 7 *Human Rights Law Journal* 403.

⁵² Egypt is legally bound by its obligations under the African Charter. Egypt deposited its ratification to this human rights treaty on 3 April 1984. Furthermore, according to art 151 of the Egyptian Constitution, this treaty is part of Egyptian law.

⁵³ Arts 55 & 56 African Charter. The first article provides for inter-state complaints, thus another state could bring a case against the government of Egypt. While such complaints are unlikely, art 56 provides for the more realistic and more frequently used possibility that an individual — either Prof Ibrahim, his legal representatives or anyone having detailed knowledge of a violation of his human rights — could bring a case.

⁵⁴ Communication No 244/2001, *Arab Organisation for Human Rights v Egypt*, filed 24 December 2001. (The communication was apparently discussed at the Commission's 31st session in May 2002 and deferred while further information concerning the ongoing proceedings before the Court of Cassation was obtained.)

⁵⁵ While another appeal to the Court of Cassation is possible, as well as an appeal to the Constitutional Court concerning the legality of Decree 4/1992, these remedies are extraordinary and limited in scope and do not constitute domestic remedies that need to be exhausted. There is also the possibility of an appeal to the President of Egypt for a pardon, but again this is an extraordinary remedy.

Although the exact influence of the communication on the case before the Egyptian courts is unclear, it is relevant to note that the communication was pending and had been discussed by the African Commission with representatives of the Egyptian government when the Egyptian Court of Cassation decided the case. The possibility that the communication to the African Commission persuaded the Court of Cassation to pay greater attention to human rights must not be discounted, as in the past the Egyptian government had reacted to filings before the African Commission by quickly resolving cases.⁵⁶ In any event, as the international human rights obligations of Egypt remain legally binding on the government, they are of relevance to any case coming before the Egyptian courts. And thus for a practitioner, reliance on these international human rights treaties should be an important part of their legal arguments.

Both the arrest and the trial of Professor Ibrahim raise relevant human rights issues. Also raised before the African Commission was the government of Egypt's refusal of permission for him to travel abroad to obtain medical treatment after his release pending the appeal. This refusal was challenged as violating Professor Ibrahim's right to life (article 4), right to humane treatment (article 5) and right to health (article 16). The arrest was challenged as an arbitrary arrest (article 6) and the trial was challenged as a violation of Professor Ibrahim's right to a fair trial (article 7). Finally, the prosecution was challenged as violating his right to freedom of expression (article 9), in so far as he was charged for expressing his opinion about an important social issue. All of these rights, as the articles in parentheses indicate, are protected by the African Charter, to which Egypt is a party.

6 Conclusion

While the exoneration of Professor Ibrahim and his co-defendants and the references by the Court of Cassation to human rights in the Constitution are positive developments for human rights in Egypt, there is also much to be disappointed about. First, both the Egyptian court and the lawyers ignored international human rights law. Even the Arab Organisation for Human Rights only begrudgingly agreed to file a communication with the African Commission, despite clear grounds for such an action. The implicit evidence that this complaint might have contributed to resolving this case, however, might encourage lawyers to

⁵⁶ In the matter of Mohammed el-Ghanam, the government of Egypt resolved the case to the satisfaction of the petitioner within days of a communication to the Commission. This case is on file with the author who represented the petitioner in his communication to the African Commission.

consider such efforts more seriously in the future. Second, the Egyptian government has appeared to have only learnt a partial lesson. While Professor Ibrahim and his co-defendants are free and Egypt is even considering abolishing the security tribunals, NGOs continue to be harassed by the government's strict control. Recently, several Egyptian human rights NGOs have been refused registration under a new law that requires them to submit to close state supervision. Finally, the arrest and prosecution of Professor Ibrahim has had a chilling effect on free speech in Egypt and the Arab world. Despite his acquittal, which many Arabs attribute to American pressure based on his dual nationality, some other human rights defenders will undoubtedly be less willing to challenge social injustices being perpetrated by governments out of fear of reprisals. They reason that if such a public figure as Professor Ibrahim could be arrested and treated as he was, they are much more vulnerable and have much less protection because they are not international figures. Indeed, the clouds remain over the North African and Arab world's attempts to achieve respect for human rights. The case of Professor Saad Eddin Ibrahim was a unique storm with a silver lining that ended with partly cloudy skies. But throughout the region thunderstorms continue to rage.

Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child

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Summary

The African Committee of Experts on the Rights and Welfare of the Child was established in July 2001 to monitor the implementation of the African Children's Charter which entered into force in 1999. The report examines the work of the Committee with the focus on its 2nd session held in February 2003. Rules of Procedure and Guidelines on State Reporting were adopted at the session. The Committee's relations to the African Union, the African Commission on Human and Peoples' Rights and other actors dealing with children's rights are discussed. Lack of resources is a serious problem and a permanent Secretary to the Committee has not yet been recruited. Three of the 11 members of the Committee had resigned and two of the posts remained vacant, impairing the work of the Committee.

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1 Introduction

The Organisation of African Unity (OAU)'s Charter on the Rights and Welfare of the Child (African Children's Charter or Children's Charter) of 1990 came into force on 29 November 1999. To date 31 out of 53 OAU/African Union (AU) member states have ratified this regional treaty and 13 more are signatories to the Children's Charter.¹

The African Committee of Experts (Committee) was established by the Heads of State and Government at the 37th OAU Assembly on 10 July 2001 in Lusaka, Zambia. The Committee comprises 11 members of 'high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child'.² The members are to serve in their *personal* capacity to promote and protect children's rights and welfare in Africa.³ The Committee decided at the 1st session to hold two meetings *per annum*. The Committee's working year begins in July.

The composition of the first serving Committee is as follows:

Mr R Soh	Cameroon	4 year term	1st Vice-Chairperson
Mr D Dore	Guinea	2 year term	
Lady Justice Aluoch	Kenya	4 year term	Chairperson
Mr KK Mohau	Lesotho	2 year term	3rd Vice-Chairperson
Mr S Nsanza-baganwa	Rwanda	4 year term	Deputy Rapporteur
Prof L Tshiwulu	South Africa	4 year term	
Mme DF Sow	Senegal	5 year term	
Mme N Motoyam	Chad	4 year term	
Mme S Aho	Togo	2 year term	2nd Vice-Chairperson
Dr R Nyonyintono	Uganda	2 year term	Rapporteur
Mr LPR Ahnee	Mauritius	4 year term	

The 1st ordinary (inaugural) session of the Committee was convened from 29 April to 3 May 2002 in Addis Ababa, Ethiopia. This meeting dealt with the formal appointment of the Committee members who took their

¹ The Status of Ratification of the Children's Charter is indicated at the back of this *Journal*.

² Art 33(1) Children's Charter.

³ As above, arts 33(2) & 32 respectively.

oaths of office,⁴ the handing over of the programme of the Special Committee on Children in Situations of Armed Conflicts, the adoption of the Rules of Procedure, the Guidelines for Initial State Reports, and consideration of the modalities for co-operation between the Committee and other stakeholders.⁵

In accordance with Rule 2 of the preliminary draft Rules of Procedure, the Committee convened to discuss progress of the Committee *per se* and also of its partners, donors and stakeholders in a predominantly public forum. The principal reasons for this meeting were to ensure the credibility of this fledgling human rights body and to ensure the transparency of the Committee's decisions, work programmes and other tasks, in compliance with article 42 of the Children's Charter.

2 Second ordinary session

The 2nd ordinary session of the Committee convened between 17 and 21 February at the AU/Inter-African Bureau of Animal Resources (IBAR) Conference Room in Nairobi, Kenya.

The opening ceremony of the 2nd session was elaborate and well-organised. The press were invited and various newspapers attended and published editorials on the meeting. The ceremony was opened by the Chairperson of the Committee, Lady Justice Aluoch, who stated the background to the Children's Charter and the current situation concerning ratification. Participants were made aware that the Chairperson had been elected to also sit on the UN Committee on the Rights of the Child. This was stated as a role complementary to that on the Committee of Experts.

The UNICEF Regional Director addressed the participants and delegates. The speech detailed historical notions about and developments of human rights in general and spoke of the relationship between the subject and object of human rights.

The Interim Commissioner of the African Union (AU), Ambassador Mahamat Habib Doutoum, addressed the delegation, emphasising the interim period of the AU as 'ongoing', all organs of the AU are being put in place and the organisation is being restructured to ensure that it

⁴ All of the members took this oath of office at the 1st session, except for Mr Ahnee (Mauritius), as he was absent from this session.

⁵ For a more comprehensive discussion of the inaugural session, see A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 179; A Lloyd 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 320. The Guidelines for Initial State Reports are reprinted on 347–353 of this *Journal*. For the reports of the sessions, see <<http://www.uwe.ac.uk/law/research/acr/>> (accessed 31 July 2003).

operates more effectively.⁶ It was further stated that the Secretariat to the Committee is one of the new organs under the AU structure. Those member states that had not already done so were urged to ratify the Children's Charter. Those member states that had ratified were urged to submit their now overdue initial state reports, as the Rules of Procedure and the Guidelines for State Reports had been formally adopted. The Interim Commissioner also acknowledged the need to adopt the GA Common Position 2001, Lusaka, at the national level.

The Minister of Home Affairs of the Republic of Kenya, the Honourable Mr AA Moody Awori, was invited as the guest of honour and in his speech he referred to the Plan of Action adopted at the 1990 World Summit for Children. Thirteen years had passed since its adoption and the overall assessment of children's rights and welfare was still bleak. He further stated that children are still forced to work, to go into the army, to live on the street, to have no education and to be orphans and HIV/AIDS orphans, and to become heads of households. These socio-economic conditions had negatively impacted on the wellbeing and welfare of the child.

Eight out of the 11 members were in attendance at the meeting. The three absent members had valid reasons for not attending. The Committee member from Togo, Mme Aho, had tendered her resignation due to her becoming the Minister of Health, Social Affairs, Promotion of Women and Protection of the Child, a position which threatened conditions of independence and impartiality under article 33 of the Children's Charter and is contrary to Rule 11 of the Rules of Procedure. The Committee member from Guinea, Mr Dore, was elected to take the role of Second Vice-Chairperson, formally a role undertaken by the Togo member.

The Committee members from Chad, Mme Motoyam, and Senegal, Mme Sow, resigned because they had secured new employment. Mme Motoyam has joined UNICEF and Mme Sow has joined the UN International Criminal Tribunal for Rwanda. Again, in accordance with the letter and spirit of Rule 11(2) of the Rules of Procedure, such roles are incompatible with the independence and impartiality of Committee members. By virtue of article 37 of the Children's Charter, Chad and Senegal will have to propose alternative candidates to serve the remainder of the respective terms of office of four and five years in total, thus two and three years remaining.

⁶ See the decisions of the AU: AHG/Dec 177 (XXXVIII) Decision on the Place of the OAU Labour and Social Affairs Commission in the African Union. It is to this Commission that the Committee must report. See also ASS/AU/Decl 1-2 (I), Decision on the Interim Period; CM/Dec 655, Decision on the Draft Programme Budget for the 2002-2003 Financial Year, <<http://www.africa-union.org>> (accessed 31 July 2003).

3 Decisions taken at the first session

The Committee members decided that the principal areas to work on over the next year had to be:

- the need to secure ratification;
- the need to improve children's situation in terms of the Children's Charter;
- to promote the domestic implementation and harmonisation of the Charter;
- to use 16 June, the Day of the African Child (DAC), as a means of popularising the Children's Charter;
- to adopt the draft Rules of Procedure; and
- to adopt the draft Guidelines for Initial State Reports.

The Assembly of Heads of State and Government at the Durban Summit in July 2002 decided on the Report of the African Committee on the Rights and Welfare of the Child.⁷ The Assembly took note of the report and the recommendations of the inaugural meeting and recognised the importance of the Committee. The Assembly called upon the Secretary-General to urgently appoint a Secretary to the Committee, as per article 40 of the Children's Charter, in order to enable the Committee to function effectively.

Due to budgetary constraints, the Secretariat to the Committee was still to be established, as required by Rule 22 of the Rules of Procedure, and many activities that had to be carried out in the first year of operation could not be realised. This was evident when the Committee members submitted their activity reports.

4 Activity reports of the Committee since the first ordinary session

Lady Justice Aluoch (Kenya)

The Chairperson successfully lobbied the AU to recruit a Secretary. A temporary Secretary was appointed on a three-month contract to oversee the 2nd ordinary session and the follow-up work.

Other activities included a keynote speech addressed to attendees at a regional Coalition of Child Soldiers' workshop. Non-governmental organisations (NGOs) and other partners were requested to assist the Committee in the popularisation of the Children's Charter.

⁷ AHG/Dec 172 (XXXVIII), <<http://www.africa-union.org>> (accessed 31 July 2003).

Mr Soh (Cameroon)

The report of the 1st session of the Committee was presented to the Cameroon Ministry at the level of the office of the President. The Ministry in charge of the Welfare of Children was requested to become involved in programmes for the improvement and advancement of children's rights and welfare in Cameroon. Mr Soh advocated for the conclusion of Legal Codes in Cameroon and the co-ordination of the implementation of all international and regional legal instruments ratified by Cameroon.

Links have been forged between the Ministry of Social Affairs, UNICEF and NGOs, and collaboration established with UNICEF and the International Labour Organisation (ILO) to develop a programme for the protection of children, with particular reference to the issue of child trafficking.

Mr Soh participated in the last meetings of the African Commission on Human and Peoples' Rights (African Commission or Commission) in Pretoria and Banjul respectively. Contact was made with some of the commissioners and he started a dialogue between the Chairperson of the Committee and the commissioners to discuss modalities. Due to other commitments, the Chairperson was unable to attend the Commission's session. Also, he participated in two study tours in Burkina Faso and Ghana, mandated by the Cameroon government.

The Committee was briefed on the activities of the Commission and its Action Plans. It was reiterated that the Committee would benefit from the experience of the Commission, especially in the consideration of state reports.

Prof Tshiwula (South Africa)

A paper was prepared and presented at an international conference on youth in conflict with the law, organised by UN HABITAT⁸ (Kenya) and the National Department of Social Development in South Africa. A further paper was presented on South African youth in conflict with the law for the belated celebration of the Day of the African Child (DAC) 2002. Popularisation activities were undertaken, involving the local community and, in particular, children themselves.

Dr Nyonyintino (Uganda)

Uganda is currently undergoing a constitutional review process and children have had the opportunity to participate in this process. Uganda is looking at child advocacy for the promotion of children's rights.

Popularisation activities were undertaken, involving a variety of committees for children's rights and also welfare issues.⁹ Furthermore,

⁸ UN HABITAT — UN Human Settlements Programme <<http://www.un-habitat.org>> (accessed 31 July 2003).

⁹ These were not elaborated on by the member.

the press and media were used to assist in the popularisation. Dr Nyonyintono noted that a popularisation kit needs to be developed so that all members of the Committee could speak with the same voice, promoting the same issues and highlighting areas of priority to target in the short term.

The Ministers in Uganda have been briefed on the Children's Charter and the functions of the Committee were outlined. Sensitisation campaigns are being launched.

Mr KK Mohau (Lesotho)

The 'training of trainers' has been carried out at the national level and in conformity with the Children's Charter and the United Nations (UN) Convention on the Rights of the Child (CRC).

A national monitoring body for children has been proposed, yet has been opposed by the government. A steering committee was established to assist in the establishment of such an organ. A Draft Concept Paper on the Establishment of a Children's Commission was circulated. In essence it makes a strong argument for the establishment of an independent institution for children, in line with the UN Committee's concluding observation on the establishment of such a structure.¹⁰

Mr Dore (Guinea)

Mr Dore participated in the UN General Assembly Special Session on Children (UNGASS) in New York.

Sensitisation and advocacy work was undertaken, university students were educated about the Children's Charter and the Committee and resource mobilisation campaigns to help needy children were carried out.

The Child Parliament had its first session in October 2002. This Parliament is non-political; its function is to facilitate children's participation in issues affecting them.

Meetings took place between the Minister of Social Affairs and UNICEF to establish a framework for Parliament.

Mr Ahnee (Mauritius)

Preparation to harmonise legislation with the Children's Charter had been instigated and is in the process of adopting a Bill on Children in Conflict with the Law. A Children's Parliament had been proposed, but the Ministry opposed this motion.

¹⁰ CRC/C/15/Add 147, 21 February 2001, <<http://www.un.org>> (accessed 31 July 2003).

Mr Nsanzabaganwa (Rwanda)

Mr Nsanzabaganwa stated that the Committee and the Children's Charter are still not well known, and that there exists a need for the advocacy and the popularisation of both.

Three documents were distributed during the DAC 2002: the UN Convention, which had been translated into local languages; the Children's Charter, which had been translated into English and French; and the National Law on the Rights of the Child against Violence. Sensitisation campaigns were launched in four districts and children's drawings of the DAC were published.

5 Update on activities relating to children by the African Union

The representative of the AU explained the new structure of the AU and stated that children's issues would fall under the remit of the Social Affairs Directorate and Division of Social Welfare. The following activities have been undertaken, in collaboration with relevant partners:

- Operationalising the African Committee of Experts on the Rights and Welfare of the Child:
- Short-term recruitment of a temporary secretary to work with the AU Children's Unit on a part-time basis. It is anticipated that a regular budget for the Committee would be approved in the interim budget being considered by the AU;
- Advocacy to encourage member states to ratify the Children's Charter.
- Preparation of a child-friendly version of the Children's Charter. English copies have already been printed and it was anticipated that French versions would follow soon. The Committee was called upon to discuss the launching and dissemination of the booklet.
- The AU participated in the Rabat, Morocco Regional Meeting on the theme 'Child Labour: Prevention and Eradication of the Worst Forms in the Middle East and North Africa'.
- Active participation in drafting of the Plan of Action to Combat Trafficking in Humans, especially Women and Children, adopted by the Second Africa-Europe Ministerial Conference in Ouagadougou, December 2002.
- 2002 celebrations to mark the DAC. Only a few countries forwarded reports. Thus, it was impossible to prepare an evaluation report. Preparation for 2003 would begin after an appropriate theme is chosen during the course of the second meeting.
- An introductory course conducted by UNICEF for AU staff on Child-INFO, a computer programme for quick access and analysis of data on goals and indicators on global and continental commitments on children and other vulnerable groups in November 2002.

- In collaboration with partners, preparations were underway to formulate Africa's contribution to the commemoration of the International Year of the Family in 2004.

6 Day of the African Child, 16 June¹¹

The OAU Council of Ministers resolved at the 52nd ordinary session in Addis Ababa in July 1990 that 16 June is to be commemorated every year in every member state with a special programme.¹² This is an optimal date for the Committee to popularise the Children's Charter, and is a means to ensure that its objectives are translated into reality. Celebrations are carried out at all levels: the AU; governmental; NGOs; and at grass-roots level — for example within schools, children's clubs and at village festivals.

Suggestions were made that the theme of DAC should be anchored to certain articles of the Children's Charter. Professor Tshiwula stated that a relevant theme would be 'Peace and Healing'. The Charter is aimed at protecting children by virtue of their inherent vulnerability, yet within this group of people there are even more vulnerable people, such as the girl child. The impact of any action in improving the position of the girl child would implicitly provide for all provisions of the Children's Charter and all problems children face. Birth registration was highlighted as a very significant area of children's rights, as this is the first step to obtaining a legal entity. It was suggested that the Committee keep a 'Portfolio of Ideas' for reflection on the variety of themes available for the DAC.

The following themes were suggested for the DAC:

- | | |
|----------------------------------|------------------------------|
| ● Who is a child? | ● Refugee children |
| ● Name and nationality | ● Children and war |
| ● Non-discrimination | ● Harmful social practices |
| ● Care and protection by parents | ● Harmful cultural practices |
| ● Health | ● Sexual exploitation |
| ● Languages | ● Torture |
| ● Education | ● Orphans |
| ● Freedom of expression | ● Handicapped children |
| ● Separation of children | ● Children and the law |
| ● Child labour | ● My duty as a child |

¹¹ Council of Ministers 52nd ordinary session, 3–8 July 1990; 'Resolution on African Decade for Child Survival, Protection and Development', CM/Res 1290 (LII), <<http://www.africa-union.org>> (accessed 31 July 2003).

¹² The Council of Ministers decided on 16 June in memory of the killing of children in Soweto.

The agreed theme for DAC 2003 was 'The Right to Registration at Birth'. This was celebrated at the level of the AU at the headquarters in Addis Ababa, Ethiopia. NGOs, UNICEF, international organisations, members of the Diplomatic Corps, AU representatives and staff members, the media, students and teachers and child performers attended.

7 Popularisation strategies

It was decided that the Chairperson should write a letter to each of the 14 Regional Economic Communities (RECs), requesting them to include an item on the popularisation of the Children's Charter on the Agenda of the Summit Sessions.

The media, 'goodwill' ambassadors and icon personalities are to be utilised to advocate and promote the Children's Charter and the Committee.

Communities, families, the army, law enforcement personnel, as well as school children are to be sensitised and trained on the Children's Charter, which is to be included in the school curricula.

Each Committee member will be responsible for approximately four focal areas. These have been divided according to geographic location and linguistic considerations. No member shall be responsible for monitoring and evaluating his or her own country.¹³ The Committee shall also use these focal areas to designate one of its members to review a state party's report.

¹³

Member	Focal Points
Kenya	Uganda, Tunisia, Ethiopia and Eritrea
Mauritius	Seychelles, Madagascar, Comores
Lesotho	Botswana, Mozambique, Swaziland, South Africa, Zambia
South Africa	Angola, Lesotho, Malawi, Mauritius, Namibia, Zimbabwe
Uganda	Kenya, Egypt, Tanzania, Rwanda
Rwanda	Burundi, Sudan, Djibouti, Algeria, Libya, Somalia
Cameroon	Chad, Equatorial Guinea, Guinea, Central African Republic, Gabon, Nigeria
Guinea	Cameroon, Cape Verde, Burkina Faso, The Gambia, Ghana, Benin
Togo	Niger, Côte d'Ivoire, Mali
Chad	DRC, Liberia, Guinea Bissau, Senegal, Liberia
Senegal	Mauritania, Sierra Leone, Sao Tome & Principe, Togo

Only one country, the Sahrawi Arab Democratic Republic (SADR), is to be confirmed.

8 Schedule for the coming year

The Committee discussed the schedule during the inaugural meeting. The issues of armed conflict, child labour, child trafficking, sexual abuse and exploitation of children, orphans affected and infected by HIV/AIDS, children's right to education, formulation of national plans for children where it does not exist and resource mobilisation were identified. The popularisation of the Children's Charter and also how to secure further ratification for the Charter from member states, and reporting by member states were priority issues.

The following priorities were identified for 2003–2004:¹⁴

- Popularise the Charter at local, national and international levels. This is to be achieved by translating the Charter into all local African languages, by advocacy and awareness raising, dissemination of all information, focal points are to be used and documentation need to be requested. Committee members are primarily responsible for overseeing this task and will call for the assistance of RECs, UN Agencies, NGOs, Civil Society Organisations (CSOs), media and other stakeholders. This task is viewed as immediate and ongoing.
- Mobilise communities to raise awareness on the rights and welfare of the African child.
- Sensitise member states to ratify and implement the Charter in collaboration with the RECs and other relevant partners.
- Mobilise resources in collaboration with the African governments, UN agencies and other stakeholders. This will be achieved by elaborating and submitting the budget, projects, and funding proposals. This exercise is regarded as immediate and ongoing.
- Promote sub-regional, regional and international networking for sustainable promotion of the rights and welfare of the African child.
- Establish an effective secretariat for the Committee to ease communication and co-ordination of activities.
- Follow-up and monitor the implementation by African governments of their commitments under the Children's Charter.

¹⁴ The Committee discussed the work plan for 2003–2004 in a closed session. They reported back to the observers their conclusions and recommendations, which were formally noted by the Rapporteur for the Report to be submitted to the AU Summit in July 2003. The work plan was presented in a table format, identifying the priority areas, strategic activities for each area, the actors responsible, the time frame, the means of verification and the budget required to fulfil the proposed activities.

- Collaborate with the UN Committee in Geneva in implementing the provisions of the Convention on the Rights of the Child.
- Advocate and follow up on the goals of the African Common Position on Children (ACP), the World Fit for Children and other global and continental commitments on children.
- Collaborate with the AU Social Affairs Directorate to promote child welfare issues in the AU Commission in general and the relevant Specialised Technical Committees dealing with children and youth matters, in particular:
 - Advocate the incorporation of a children and youth agenda in the New Partnership for Africa's Development's (NEPAD) priority programme and the inclusion of the ACP into the African Peer Review Mechanism (APRM).
 - Give special attention to children in difficult circumstances in accordance with the criteria enshrined in the Children's Charter and the CRC, follow up and report on non-compliance thereof.
- In relation to the control of HIV/AIDS and other major causes of ill health and death of Africa's children:
 - Monitor and report on the impact of HIV/AIDS, and other pandemics on children, particularly orphans, in the context of child rights, the ACP, World Fit for Children, Abuja Declaration and Plan of Action of HIV/AIDS and the UN Declaration of Commitments on AIDS;
 - Monitor the activities of governments to ensure the rights of AIDS orphans and children affected by HIV/AIDS in collaboration with the UN agencies and other related partners.

A one-year work plan was agreed upon, with a vision to adopt a longer term strategy at the next meeting when budgets and structures would be better established. The following areas were discussed:

- A consultant needs to be hired to finalise the work plan and draft project proposals for the implementation with the assistance of partners and donors.
 - The UNICEF agreed to sponsor a short-term consultant to work on the work plan and the proposal. Two focal persons from the Committee would be designated to liaise with the consultant.
 - There was a need to have clear terms of reference for the consultant. The Committee agreed to work on a draft with the AU team before the end of the session. The members from Uganda and Rwanda worked on the details of the terms of reference and the work plan for the consultant.
- A need to have a permanent Secretary to assist the work of the Committee was raised.
- The author offered to assist the Committee from May to September 2003, if local costs in Addis Ababa were met.
- Ms Victoria Kioko Nzisa offered to assist the Chairperson in Nairobi.

- The African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN)¹⁵ reiterated its willingness to assist with the popularisation of the Charter.
- The International Organisation for Migration (IOM) representative expressed a willingness to assist the Committee, and in particular in popularising the Charter.

9 State reporting

In accordance with article 43(1) of the Children's Charter and paragraph 1 of the Guidelines, state parties are obliged to submit their initial reports within two years of ratification.¹⁶ Thereafter they are obliged to submit reports every three years.¹⁷

Twenty-six out of 31 reports are now overdue.¹⁸ The Committee decided to distribute the Guidelines on state reporting to the respective governments by mid-March 2003,¹⁹ with additional information highlighting the differences between the provisions articulated in the CRC and the Children's Charter. Paragraph 24 of the Guidelines was designed to alleviate the dual-reporting burden on state parties. It states specific provisions for the reporting process: If a state party has already submitted an initial report to the UN Committee, whether that report has been reviewed by the UN Committee or not, that state party will be invited to update the information already submitted and add information on the extra provisions contained in the Children's Charter. If a state party's initial report has been reviewed by the UN Committee, recommendations may be considered by the Committee when preparing a list of issues for the government and when adopting its own concluding observations and recommendations. If a state party has not yet submitted an initial report to the UN Committee, the state party will be invited to prepare a complete report on all of the provisions of the Children's Charter to the Committee.

The following strategies were identified for state reporting:

¹⁵ <<http://www.anppcan.org>> (accessed 31 July 2003).

¹⁶ Following the entry into force of the Children's Charter.

¹⁷ As opposed to every five years, as required under the UN CRC.

¹⁸ The following reports were due in 2001: Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Lesotho, Malawi, Mali, Mauritius, Niger, Senegal, Seychelles, Togo, Uganda and Zimbabwe. The following reports were due in 2002: Chad, Eritrea, Guinea, Kenya, Libya and South Africa. The following reports were due by July 2003: Botswana, Egypt, The Gambia and Rwanda. Ethiopia and Sierra Leone will be required to submit in 2004 and Equatorial Guinea, Nigeria and Tanzania will be required to submit by 2005.

¹⁹ It has not been communicated by the Committee or AU whether this has actually taken place.

- The Chairperson should write to member states to request that they submit their reports.
- Guidelines for preparations of initial reports should be distributed to all member states to enable them to prepare their reports.
- Member states should be made aware of the differences between the Children's Charter and the CRC for the purposes of reporting under the Charter.
- The AU should be given the mandate to finalise the Rules of Procedure and the Guidelines for initial state reports and send them to the member states.
- A time frame of six months for obtaining the states' reports was proposed and agreed upon.
- A document on the differences between the Children's Charter and the CRC is to be attached to the guidelines and sent to the member states when it is requested.
- The Guidelines are to be translated into all the AU official languages, although initially only the English and French versions would be forwarded to member states.

The Guidelines adopted by the Committee are almost identical to their UN counterpart. The main difference relates to the additional provisions contained in the Children's Charter,²⁰ some of which have provoked criticism from UN agencies.²¹

The Guidelines reflect the different approach taken by the OAU in the drafting of the Children's Charter, as compared to the CRC, albeit to a limited extent. The Guidelines regard African society as a resource and paragraph 3 states that the process of preparing a report should encourage and facilitate popular participation and public scrutiny of government policies, private sector practices and generally the practices of all sectors of society towards children. The UN CRC guidelines only go so far as scrutinising government policies.

Under the General Measures of Implementation section of the Guidelines, the Children's Charter requests states to provide relevant information²² on the measures taken to realise the rights and welfare of the child in the law of the state party or in any other international convention or agreement in force in that state. States should also include measures taken to promote positive cultural values and traditions and discourage those that are inconsistent with the rights, duties and obligations contained in the Children's Charter. These measures are not required by the state reports of the CRC.

²⁰ Namely arts 1(3), 14(2)(g), (i) & (j), 20(1)(b) & (c), 23, 26, 31 & 44 of the Children's Charter.

²¹ UNICEF, 2nd session. The main criticisms were directed at the addition of Responsibilities and Duties of the Child.

²² Pursuant to art 1 of the Children's Charter.

Under the General Principles section, the Guidelines include an additional sub-paragraph²³ relating to the provision of information to children and the promotion of their participation. This is omitted from the UN CRC guidelines.

Under the Special Protection Measures section, the Guidelines call for states to include relevant information on the principal legislative, judicial, administrative and other measures in respect of children of imprisoned mothers, drawing particular attention to articles 30, 30(d) and 30(f). Furthermore, the Guidelines state that information should be provided on child victims of harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, directly referring to the betrothal of girls and boys, early and forced marriage, any form of female genital mutilation and any other form of harmful social and cultural practices.²⁴

Generally, the Guidelines adopted by the Committee are more detailed than the UN guidelines. For example, under the section on Family Environment and Alternative Care, the African Committee elaborated on the provision for the separation from parents, expressly stating separation from parents, separation caused by a state party, caused by internal displacement arising from armed conflicts, civil strife or natural disasters,²⁵ thus, explicitly asking state parties to submit information on issues particularly apparent in Africa.

If either of the Committees intends to change its guidelines, a consultative process should be developed between them.²⁶ The African Committee and the UN Committee need to establish modalities for co-operation, otherwise there will be a lot of repetition on state reporting, which could affect the credibility of the Committee and squander sought-after resources.

10 Modalities for the co-operation with partners

A co-ordination mechanism between the partners and the Committee needs to be formulated. This would be accomplished easiest through a website. It was decided that, while awaiting the construction of a website, the partners and Committee members should communicate directly with each other. Two further proposals were made for the co-ordination mechanism: A task force could be established with all partners based in Addis Ababa, and secondly, a meeting with all partners should be scheduled one day before the Committee's meeting to discuss collaboration between the Committee and partners.

²³ Para 11(e).

²⁴ Arts 21(2), 21(1)(a), 21(1)(b) & 26 respectively.

²⁵ Para 14(c) Guidelines of the Committee and para 16(c) UN CRC Guidelines.

²⁶ Para 24(d) Guidelines.

Save the Children (Sweden) reconfirmed its commitment to continue to support the work of the Committee and pledged financial support. The ICRC also expressed its willingness to collaborate with the Committee and to bring in technical support.

UNICEF pledged technical and financial support for the Committee at continental, sub-regional and national levels. The modalities for this assistance would be worked out with the AU. It was explained that assistance could be given on two levels: on co-functioning and on projects. It was stressed that UNICEF was ready to provide financial assistance on well-articulated and implementable projects.

11 Conclusion

The Committee was advised that in the report to be submitted to the Maputo Summit in July 2003,²⁷ the Chairperson could raise crucial issues affecting children on the continent. In this regard, it was agreed the Chairperson would prepare a draft which will be circulated to Committee members for their input.²⁸ The draft comprised six points:

- The Rules of Procedure for the Committee have been formally adopted and are now being translated into the official languages of the AU.
- The Guidelines for Initial Reporting by State Parties have also been formally adopted and are being translated into the official languages of the AU.
- The AU Secretariat engaged a Secretary for the Committee on a temporary basis, yet the Committee still urges for a permanent Secretary.
- The Committee had its 2nd session in February 2003 and produced a budget and plan of action.
- The Committee requested that funds be allocated to it so that it can undertake its activities contained in its plan of action.
- The Committee continues to urge member states who have not yet done so, to urgently ratify the Children's Charter.

The next meeting is scheduled to take place during the second fortnight in October 2003 in Cameroon, to fit in with the meeting of the African Commission, in order to forge a close working relationship between commissioners and Committee members. Should this prove impossible, a meeting will be convened during the same period at the AU headquarters in Addis Ababa. The AU and the Committee have not confirmed the date and venue of the next meeting.

²⁷ AU Doc EX/CL/Dec 57 (III), <<http://www.africa-union.org>> (accessed 31 July 2003).

²⁸ Circulated by e-mail on 10 June 2003 and requesting members to raise additional points to be included in the report.

Following the 2nd ordinary session, the terms of office of four of the Committee members expired in July 2003. The initial term of these members was two years. Elections took place at the AU Summit, held from 4 to 12 July 2003 in Maputo, Mozambique. Four members were elected:²⁹

- Professor Peter Onyekwere Ebigbo — Nigeria
- Dr Asseffa Bequela — Ethiopia
- Mr Jean Baptiste Zoungrana — Burkina Faso
- Ms Nakpa Polo — Togo

Currently there are four women and five men representing the Committee. The election of the new members has not jeopardised the gender, linguistic or geographic balance. There remain two unconfirmed places on the Committee, those of Senegal and Chad, serving five and four-year terms respectively. According to Rule 14(4) of the Rules of Procedure, pursuant to sub-paragraphs 1 and 2 of this Rule, the Chairperson of the Commission of the AU requests the state party which had nominated the original member to appoint another expert from among its nationals within *two* months of the position becoming vacant to serve for the remainder of the predecessor's term of office. With reference to article 39 of the Children's Charter, the new appointee is subject to the approval of the Assembly. The vacancies have been known by the AU and the Committee since at least February 2003 and replacements have not yet been provided. The Committee should comprise 11 members; currently there are only nine members. This could impair the credibility of the Committee and it is difficult to perceive how it can operate effectively when it is two people short.

The composition of the second serving Committee is as follows:

Lady Justice Aluoch	Kenya	4 year term	Expiry 2004
Mr R Soh	Cameroon	4 year term	Expiry 2004
Mr S Nsanzabaganwa	Rwanda	4 year term	Expiry 2004
Prof L Tshiwula	South Africa	4 year term	Expiry 2004
Mr LPR Ahnee	Mauritius	4 year term	Expiry 2004
Prof PO Ebigbo	Nigeria	5 year term	Expiry 2008
Dr A Bequela	Ethiopia	5 year term	Expiry 2008
Mr JB Zoungrana	Burkina Faso	5 year term	Expiry 2008
Ms N Polo	Togo	5 year term	Expiry 2008
Member 10 — to be nominated	Chad	4 year term	Expiry 2004
Member 11 — to be nominated	Senegal	5 year term	Expiry 2005

²⁹ AU DOC EX/CL/58 (III).

The terms of office for the officers of the Committee³⁰ is for two years, thus the terms expired in July 2003. The 3rd session of the Committee should deal with the nomination of the new officers; those who have already served can be re-elected.

³⁰ The Chairperson, the First Vice-Chairperson, the Second Vice-Chairperson, the Rapporteur and the Deputy Rapporteur; Rule 17 of the Rules of Procedure.

Annexure:
Guidelines for initial reports of state parties to the African Charter on the Rights and Welfare of the Child

Prepared by the African Committee of Experts on the Rights and Welfare of the Child pursuant to the provision of article 43 of the African Charter on the Rights and Welfare of the Child. Adopted at the Second Meeting of the African Experts on the Rights and Welfare of the Child, Nairobi, Kenya, 17 to 21 February 2003.

Cmttee/ACRWC/2 II Rev 2

I Introduction

- 1 Article 43 paragraph 1 of the African Charter on the Rights and Welfare of the Child (Children's Charter) states that:
'Every state party to the Children's Charter shall undertake to submit to the Committee through the Chairperson of the Commission of the African Union, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:
 - (a) within two years of the entry into force of the Children's Charter for the state party concerned; and
 - (b) thereafter, every three years.'
- 2 Article 43 paragraph 2 further states that:
'Every report made under this Article shall:
 - (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Children's Charter in the relevant country; and
 - (b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Children's Charter.'
- 3 The African Committee believes that the process of preparing a report for submission to the African Committee offers an important

occasion for conducting a comprehensive review of the various measures undertaken to harmonise national law and policy with the Children's Charter and to monitor progress made in the enjoyment of the rights set forth in the Children's Charter. Additionally, the process should be one that encourages and facilitates popular participation, national introspection and public scrutiny of government policies and programmes, private sector practices and generally the practices of all sectors of society towards children.

- 4 The African Committee further considers that the reporting process entails an ongoing reaffirmation by state parties of their commitment to respect and ensure observance of the rights set forth in the Children's Charter and serves as the essential vehicle for the establishment of a meaningful dialogue between the state parties and the African Committee.
- 5 The African Committee intends to formulate guidelines for the preparation of periodic reports that are to be submitted pursuant to article 43 of the Children's Charter in due course.
- 6 Reports should be accompanied by copies of the principal legislative and other texts as well as detailed statistical indicators referred to therein, which will be made available to members of the African Committee. It should be noted, however, that for reasons of economy, they will not be translated or reproduced for general distribution. It is desirable, therefore, that when a text is not actually quoted or annexed to the report itself, the report should contain sufficient information to be understood without reference to those texts.
- 7 The provisions of the Children's Charter have been grouped under different sections, equal importance being attached to all the rights and welfare recognised by the Children's Charter.

II General measures of implementation

- 8 Under this section, state parties are requested to provide relevant information pursuant to article 1 of the Children's Charter, including information on:
 - (a) necessary steps undertaken, in accordance with their constitutional processes and with the provisions of the Children's Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Children's Charter;
 - (b) measures taken to realise the rights and welfare of the child in the law of the state party or in any other international convention or agreement in force in that state;
 - (c) measures taken to promote positive cultural values and traditions and to discourage those that are inconsistent with

- the rights, duties and obligations contained in the Children's Charter;
- (d) existing or planned mechanisms at the national or local level for co-ordinating policies relating to children and for monitoring the implementation of the Children's Charter.
- 9 In addition, states are requested to describe the measures that have been taken or are foreseen to:
- (a) make the principles and provisions of the Children's Charter widely known to adults and children alike;
- (b) widely disseminate their reports to the public at large in their own countries.

III Definition of the child

- 10 State parties are requested to provide information, in conformity with article 2 of the Children's Charter, regarding the definition of a child under their laws and regulations.

IV General principles

- 11 Relevant information, including the principal legislative, judicial, administrative or other measures in force or foreseen; factors and difficulties encountered and progress achieved in implementing the provisions of the Children's Charter, and implementation priorities and specific goals for the future should be provided in respect of:
- (a) Non-discrimination Articles 3 and 26
- (b) Best Interests of the child Article 4
- (c) The right to life, survival and development Article 5
- (d) Respect of the views of the child Article 7
- (e) Provision of information to children and promotion of their participation Articles 4, 7 and 12
- 12 In addition, state parties are encouraged to provide relevant information on the application of these principles in the implementation of articles listed elsewhere in these guidelines.

V Civil rights and freedoms

- 13 Under this section, state parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures in force; factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Children's Charter and implementation priorities and specific goals for the future in respect of:
- (a) Name, nationality, identity and registration at birth Article 6
- (b) Freedom of expression Article 7
- (c) Freedom of thought, conscience and religion Article 9

- (d) Freedom of association and of peaceful assembly Article 8
- (e) Protection of privacy Article 10
- (f) Protection against child abuse and torture Article 16

VI Family environment and alternative care

- 14 Under this section, state parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures in force, particularly how the principles of the 'best interests of the child' and 'respect for the views of the child' are reflected therein: factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Children's Charter and implementation priorities of the Children's Charter and implementation priorities and specific goals for the future in respect of:
- (a) Parental guidance Article 20
 - (b) Parental responsibilities Article 20(1)
 - (c) Separation from parents, separation caused by state party, separation caused by internal displacement arising from armed conflicts Articles 19(2), 19(3), 25
 - (d) Family reunification and children deprived of a family environment Article 25(2)(b)
 - (e) Recovery of maintenance for the child Article 18(3)
 - (f) Adoption and periodic review of placement Article 24
 - (g) Abuse, neglect, exploitation including physical and psychological recovery and social integration Articles 16 and 27
- 15 In addition, state parties are requested to provide information on the numbers of children per year within the reporting period in each of the following groups, desegregated by age group, sex, ethnic or national background and rural or urban environment: homeless children, abused or neglected children taken into protective custody, children placed in foster care, children placed in institutional care, children placed through domestic adoption, children entering the country through inter-country adoption procedures and children leaving the country through inter-country adoption procedures.
- 16 State parties are encouraged to provide additional relevant statistical information and indicators relating to children covered in this section.

VII Health and welfare

- 17 Under this section, state parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures particularly programmes and projects, etc; the institutional infrastructure for implementing policy in this area, particularly monitoring strategies and mechanisms; factors

and difficulties encountered and progress achieved in implementing the relevant provisions of the Children's Charter, in respect of:

- (a) Survival and development Article 5
- (b) Children with handicap Article 13
- (c) Health and health services Article 14
- (d) Social security and child-care services and facilities Article 20(2)(a–c)
- (e) Care for orphans Article 26

- 18 In addition to information provided under paragraph 8(d) of these guidelines, state parties are requested to specify the nature and extent of co-operation with local, national, regional and international organisations, concerning the implementation of this area of the Children's Charter. State parties are encouraged to provide additional relevant statistical information and indicators relating to children covered in this section.

VIII Education, leisure and cultural activities

- 19 Under this section, state parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures such as projects, programmes etc; the institutional infrastructure for implementing policy in this area, particularly monitoring strategies and mechanisms; factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Children's Charter, in respect of:

- (a) Education, including vocational training and guidance Article 11
- (b) Leisure, recreation and cultural activities Article 12

- 20 In addition, to information provided under paragraph 8(d) of these guidelines, state parties are requested to specify the nature and extent of co-operation with local, national, regional and international organisations, concerning the implementation of this area of the Children's Charter. State parties are encouraged to provide additional relevant statistical information and indicators relating to children covered in this section.

IX Special protection measures

- 21 Under this section, state parties are requested to provide relevant information, including the principal legislative, administrative or other measures such as projects, programmes etc; factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Children's Charter and implementation priorities and specific goals for the future in respect of:

- (a) Children in situations of emergency:
 - (i) Refugee, returnee and displaced children Articles 23 and 25
 - (ii) Children in armed conflicts, including specific measures for child protection and care Article 22
 - (b) Children in conflict with the law:
 - (i) The administration of juvenile justice Article 17
 - (ii) Children deprived of their liberty, including any form of detention, imprisonment or placement in custodial setting and compliance with provisions of article 5(3) of the Children's Charter prohibiting death sentences on children Article 17(2)(a)
 - (iii) Reformation, family reintegration and social rehabilitation Article 17(3)
 - (c) Children of imprisoned mothers:
 - (i) Special treatment to expectant mothers and to mothers of infants and young children who have been found guilty by law Article 30
 - (ii) A mother shall not be imprisoned with her child Article 30(d)
 - (iii) Reformation, integration of the mother into the family and social rehabilitation Article 30(f)
 - (d) Children in situations of exploitation and abuse:
 - (i) Economic exploitation including child labour Article 15
 - (ii) Drug abuse Article 28
 - (iii) Abuse and torture Article 16
 - (iv) Sexual exploitation and sexual abuse Article 27
 - (v) Other forms of abuse and exploitation such as begging, early pregnancy, etc Article 29(b)
 - (vi) Sale, trafficking and abduction Article 29
 - (e) Children victims of harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child:
 - (i) Betrothal of girls and boys Article 21(2)
 - (ii) Early and forced marriage Article 21(2)
 - (iii) Any form of female genital mutilation Article 21(1)(a)
 - (iv) Any other form of harmful social and cultural practices Article 21(1)(b)
 - (f) Children belonging to a minority group Article 26
 - (g) Children who need special protection on account of being in risky or vulnerable conditions and situations such as street children or HIV/AIDS orphans Article 26
 - (h) Any other emerging or unforeseen problem Article 26
- 22 Additionally, state parties are encouraged to provide specific statistical information and indicators relevant to the children covered by paragraph 21.

X Responsibilities of the child

- 23 Under this section, state parties are requested to provide relevant information, including the principal practices, legislative, judicial, administrative and other specific measures in force; factors and difficulties encountered and progress achieved in implementing the relevant provisions of article 31 of the Children's Charter. The Child's duty:
- (a) towards the parents, the family and the community; Article 31
 - (b) towards the superiors; Article 31
 - (c) towards the state and the continent Article 31

XI Specific provisions for the reporting process

- 24 A state party that has already submitted its report to the UN Committee on the Rights of the Child is required to re-submit such report to the African Committee together with a supplementary report devoted to the provisions of the Children's Charter not duplicated in the CRC.
- 25 The supplementary report must specify the action taken by the state party in response to any recommendations made to it by the UN Committee on the Rights of the Child.
- 26 If a state party has not yet submitted an initial report to the UN Committee on the Rights of the Child, the state party shall be invited to prepare a complete report on all the provisions of the Children's Charter.

XII Amendments

- 27 These guidelines may be amended by the African Committee from time to time.



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Elize Delport

Project Manager: Gender Project

Isabeau de Meyer

Programme Manager: LLM (Human Rights and Constitutional Practice); Administrator

Michelo Hansungule

Professor of Human Rights Law

Christof Heyns

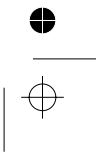
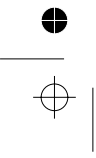
Director; Professor of Human Rights Law in the Faculty of Law

Gill Jacot Guillarmod

Senior Programme Manager; Liaison Officer

Boogie Khutsoane

Project Manager: Gender Project





Magnus Killander

Researcher

Rose Lee

Student Assistant

Lirette Louw

Project Manager: HIV/AIDS in Southern Africa

Meriam Maboya

Financial Officer

David Mmbi

Project Officer: Southern African Student Volunteers

Lebo Mosupye

Financial Officer

Simon Nedohe

Project Manager: South African Student Volunteers

Melton Netshiombo

Project Officer: Gender Project

Martin Nsibirwa

Programme Manager: LLM (Human Rights and Democratisation in Africa); Moot

Sarita Pienaar-Erasmus

Deputy Financial Manager

Charmaine Pillay

Deputy Financial Manager

Pheeha Rambau

Assistant Project Officer: Pretoria Good Governance Academy

Shane Stoffels

Financial Manager

Norman Taku

Assistant Director

Deborah Theron

Programme Officer: LLM (International Trade and Investment Law in Africa)

Happy Tshiluna

Administrator: Southern African Student Volunteers

Jeremie Uwimana

Programme Manager: LLM (Human Rights and Democratisation in Africa); Moot

Morné van der Linde

Project Manager: Pretoria Good Governance Academy; Human Rights Law in Africa Project; Researcher





Carole Viljoen

Office Manager; Project Manager: Integrated Bar Project

Frans Viljoen

Director of Academic Programmes; Professor of Law in the Faculty of Law

Stu Woolman

Research Associate; Senior Lecturer in the Faculty of Law

Honorary Professors

John Dugard

Professor of Law, University of Leiden, The Netherlands; Member, International Law Commission

Tiyanjana Maluwa

Legal Adviser, Office of the High Commissioner for Human Rights, Geneva, Switzerland

Extraordinary Professors

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Mary Robinson

Director, Ethical Globalisation Initiative, New York, USA

Board

Kader Asmal

Minister of Education

Duad Kleyn

Dean, Faculty of Law, University of Pretoria; Chair

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Shirley Mabusela

Former Deputy Chairperson, South African Human Rights Commission

Yvonne Mokgoro

Justice of the Constitutional Court of South Africa

Johann van der Westhuizen

Justice of the High Court, Transvaal Provincial Division

Projects

African Human Rights Moot Court Competition

Database on Human Rights in Africa

Gender Project





HIV/AIDS and Human Rights in SADC Research Project (with the
Centre for the Study of AIDS, University of Pretoria)
Integrated Bar Project (IBP)
Master's Programme (LLM) in Human Rights and Constitutional
Practice
Master's Programme (LLM) in Human Rights and Democratisation
in Africa
Master's Programme (LLM) in International Trade and Investment
Law in Africa
Pretoria Good Governance Academy
Socio-Economic Rights Research Project
Southern African Student Volunteers (SASVO) (with the Centre for
the Study of AIDS)

Regular publications

African Human Rights Law Journal
African Human Rights Law Reports
Constitutional Law of South Africa
Human Rights Law in Africa
Occasional Papers



**CHART OF RATIFICATIONS:
OAU/AU HUMAN RIGHTS TREATIES**

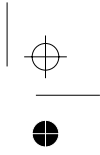
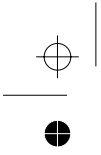
Position as at 31 July 2003

Compiled by: I de Meyer

Source: http://www.africa_union.org (accessed 31 July 2003)

	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		22/04/03
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	10/07/01	
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75		02/04/03
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		07/01/03
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	20/12/02	
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73	02/10/02	
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	

	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
Madagascar	09/03/92			
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	03/03/03
Mozambique	22/02/89	22/02/89	15/07/98	
Namibia	30/07/92			
Niger	15/07/86	16/09/71	11/12/99	
Nigeria	22/06/83	23/05/86	23/07/01	
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03
Sahrawi Arab Democratic Republic	02/05/86			
São Tomé and Príncipe	23/05/86			
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	13/05/02	
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	03/07/02
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75	16/03/03	
Togo	05/11/82	10/04/70	05/05/98	23/06/03
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	
TOTAL NUMBER OF STATE PARTIES	53	44	31	12



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