

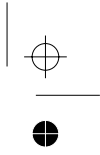
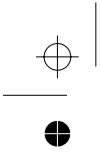
AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 4 No 1 2004

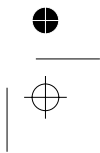
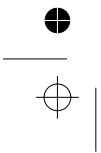


University of Pretoria





blank page for outside front cover



Editors

Christof Heyns
*Professor of human rights law and
Director, Centre for Human Rights,
University of Pretoria*

Frans Viljoen
*Editor-in-chief, Professor of law,
Centre for Human Rights and
Faculty of Law, University of Pretoria*

Assistant editor

Annelize Nienaber
*Lecturer, Faculty of Law, University
of Pretoria*

Publication manager

Isabeau de Meyer
*Programme Manager, Centre for
Human Rights, University of Pretoria*

Assisted by

Lilian Chenwi, Magnus Killander,
Martin Nsibirwa, Morné van der
Linde
*Researchers, Centre for Human
Rights, University of Pretoria*

International editorial advisory board

Gudmundur Alfredsson
*Professor of law and Director, Raoul
Wallenberg Institute for Human
Rights and Humanitarian Law, Lund,
Sweden*

Jean Allain
*Professor of law, Department of
Political Science, American University
in Cairo, Egypt*

Victor Dankwa
*Professor of law, University of Ghana
and Member, African Commission
on Human and Peoples' Rights*

John Dugard

*Professor of law, University of Leiden
and Member, International Law
Commission*

Cees Flinterman

*Professor of human rights law and
Director, Netherlands Institute of
Human Rights (SIM), University of
Utrecht*

Abdul G Koroma

Judge, International Court of Justice

Edward Kwakwa

*Acting legal counsel, World
Intellectual Property Organisation*

Pius Langa

*Deputy Chief Justice, Constitutional
Court of South Africa*

Sandy Liebenberg

*Professor of law, Faculty of Law,
University of Stellenbosch*

Tiyanjana Maluwa

*Professor of law, Dickinson School of
Law, Pennsylvania State University,
USA*

Joe Oloka-Onyango

*Associate professor of law, Faculty of
Law, Makerere University, Uganda*

Fatsah Ouguerouz

*Secretary of the International Court
of Justice*

Michael Reisman

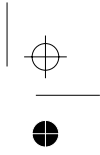
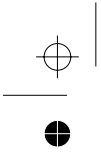
*Myres S McDougal Professor of inter-
national law, Yale Law School, USA*

Geraldine van Bueren

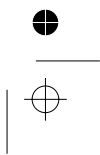
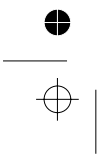
*Professor of international human
rights law, University of London*

THIS JOURNAL SHOULD BE CITED AS (2004) 4 AHRLJ

The *African Human Rights Law Journal* aims to publish contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. In the process, the *Journal* hopes to contribute towards an indigenous African jurisprudence. The *Journal* appears twice a year, in March and October.



blank page for title (Juta to supply)





The financial assistance of the European Union
is gratefully acknowledged.

First published 2001

© JUTA Law
PO Box 24299
Lansdowne
7779

This book is copyright under the Berne Convention. In terms of the Copyright Act 98 of 1978 no part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system, without permission in writing from the Publisher.

ISSN 1609-073X

Cover design: Colette Alves

Typeset in 10 on 12 pt Stone Sans by Wyvern Publications CC, Cape Town
Printed and bound by Creda Communications, Eliot Avenue, Eppindust 7460



CONTENTS

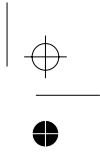
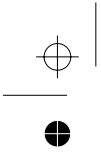
Editorial. vii

Articles

The death penalty in Africa <i>by Dirk van Zyl Smit</i>	1
A framework law on the right to food — An international and South African perspective <i>by Fons Coomans and Kofi Yakpo</i>	17
A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development <i>by Christopher Mbazira</i>	34
The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament <i>by Tsegaye Demeke</i>	53
The African Union Convention on Preventing and Combating Corruption: A critical appraisal <i>by Kolawole Olaniyan</i>	74
Towards a new approach to the classification of human rights with specific reference to the African context <i>by John C Mubangizi</i>	93
The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence <i>by Robert P Barnidge Jr</i>	108

Recent developments

Reflections on the African Court on Human and Peoples' Rights <i>by N Barney Pitso</i>	121
The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development <i>by Chris Stals</i>	130
The Third Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child <i>by Amanda Lloyd</i>	139

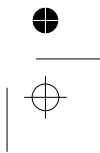
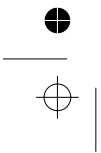


Recent publications

Manfred Nowak *Introduction to the international human rights regime*

Christian Tomuschat *Human rights: Between idealism and realism*

by Frans Viljoen 159



Editorial

The launch of this *Journal*, in 2001, roughly coincided with the transformation of the Organization of African Unity (OAU) into the African Union (AU). By embracing the realisation of human rights as a guiding principle and objective, the AU marks a clear break with its predecessor. Most significantly, the AU Constitutive Act allows for AU-sanctioned intervention in a member state to address the occurrence of genocide and crimes against humanity.

The architecture of the AU includes a number of institutions that are relevant to the promotion and protection of human rights. With the entry into force of the Protocol on the Establishment of an African Court on Human and Peoples' Rights, the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament and the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the process of converting paper guarantees into reality is underway. A number of contributions in this issue discuss some of these institutions, such as the Pan-African Parliament and the African Court on Human and Peoples' Rights, focusing on their potential role to further human rights on the continent. Any such discussion should also deal with the New Partnership for Africa's Development (NEPAD), which has been described as the developmental programme of the AU, and the concomitant African Peer Review Mechanism (APRM). Conscious that corruption is a significant impediment to Africa's development, the AU in 2003 adopted the AU Anti-Corruption Convention, which is also discussed in this issue.

Criticism has been expressed that the AU and its institutional framework has been imposed onto Africans without prior popular debate or participation of civil society. It is therefore necessary that these institutions and instruments be subjected to academic analysis and scrutiny, and that their human rights potential be highlighted.

Other contributions deal more directly with human rights issues of relevance to Africa. The death penalty in Africa is dealt with in this issue, while its constitutionality is being challenged in Uganda, and while the decision of the African Commission on Human and Peoples' Rights in

the matter against Botswana concerning the execution of Marietta Bosch is being awaited. One of the rights that has been prominent in the jurisprudence of the African Commission on Human and Peoples' Rights, the right to a fair trial (article 7), is also considered. An exploratory article investigates the operationalisation of the right to food. The appropriateness of the 'three generations' of human rights is also critically examined from an African perspective.

Some of the communications finalised by the African Commission are cited from a source that may be unfamiliar to readers — the *African Human Rights Law Reports* (AHRLR). The first volume of the AHRLR (2000) has just been launched. It contains cases decided by UN human rights treaty bodies in respect of African states, and cases decided by the African Commission up to the end of 2000. This publication is edited by the Centre for Human Rights, Pretoria, in collaboration with the Institute for Human Rights and Development, Banjul, The Gambia, and is also published by Juta.

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: Jean Allain, Evarist Baimu, Gina Bekker, Mary Crewe, Edward Dankwa, Mosunmola Imasogie, Anton Kok, Philip Kunig, Edward Kwakwa, Pius Langa, Olajobi Makinwa, George William Mugwanya, Joe Oloka-Onyango, David Padilla, Julie Soweto and Nico Steytler.

The death penalty in Africa

*Dirk van Zyl Smit**

Professor of Comparative and International Criminal Law, University of Nottingham; Professor of Criminology, University of Cape Town

Summary

This article examines the situation of the death penalty in Africa. It does so by addressing three main questions: First, to what extent is the death penalty in Africa in fact an issue about which one should be particularly concerned? Second, what are the restrictions on the death penalty in Africa? Third, what is to be done to strengthen the restrictions on the death penalty in Africa? In addition, the article examines the question whether article 4 of the African Charter on Human and Peoples' Rights and its related provisions will inspire the abolition of the death penalty. It is suggested that challenging mandatory death sentences, advancing procedural challenges, open debate on alternatives to the death penalty, and improving the national criminal justice system will strengthen restrictions on the death penalty in Africa. The article concludes that positive criminal justice reform rather than moralistic condemnation is the most effective route to the eventual abolition of the death penalty in Africa.

1 Introduction

In many regions of the world, the battle lines around capital punishment are clearly drawn. Moral arguments, both for and against, have been developed against a background of settled legal principle and hard facts that have been established in intense debates supported by claims and counterclaims. In Africa as a whole, however, the situation of the death penalty, both legally and in fact, is less than entirely clear. This paper seeks to contribute to remedying this situation by posing a series of

* BA LLB (Stellenbosch), PhD (Edinburgh); Dirk.van-Zyl-Smit@Nottingham.ac.uk or dvzs@law.uct.ac.za. An earlier version of this paper was presented at the Centre for Death Penalty Studies at the University of Westminster in March 2003.

questions. In the first instance, these questions address the factual issues of the prevalence of the death penalty in Africa and the official stance adopted towards it by African governments. They then turn to restrictions, both international and regional, on the widespread use of the death penalty that may be in force in some parts of Africa. Finally, the questions consider steps that may be taken to limit, if not abolish, the death penalty in Africa as a whole. The answers to many of these questions are of necessity only preliminary, but it is hoped that addressing them in a continent-wide perspective will reveal patterns and trends that might be obscured by a focus on a single nation or region.

2 Factual issues

The first question is simply: To what extent is the death penalty in Africa in fact an issue about which one should be particularly concerned? The factual basis of an answer to this question is that 11 African countries are abolitionist for all crimes and another 10 are abolitionists in practice.¹ That leaves 32 countries that retain the death penalty. Not all of these latter countries perform official executions every year. In 2001, death sentences were imposed in 23 countries, but executions took place in only six. However, at least one African country not included amongst these six resumed executions in 2002.²

There is no escaping the reality that the majority of the inhabitants of Africa live in countries where official policies support the maintenance of the death penalty and which are prepared to implement it from time to time. The extent to which most African countries are prepared to profess a pro-death penalty policy internationally is clear from the fact that in 2002 only two African states, Mauritius and South Africa, were prepared to sponsor the cautiously abolitionist resolution of the United Nations (UN) Commission on Human Rights on 'The question of the death penalty',³ while 23 states signed a formal statement of disassociation.

¹ The figures referred to were derived from information provided to the author by Eric Prokosch of Amnesty International and Nicola Browne of the Centre for Death Penalty Studies at the University of Westminster in March 2003. I am very thankful to both of them. To the figures they provided, I added one country, Malawi, to the number of countries that are abolitionist in practice, as there have been no executions in Malawi for a decade. The states that are abolitionist for all crimes are Angola, Cape Verde, Djibouti, Guinea-Bissau, Ivory Coast, Mauritius, Mozambique, Namibia, Sao Tomé and Príncipe, Seychelles and South Africa. The states that are abolitionist in practice are Burkina Faso, Central African Republic, Congo (Republic), The Gambia, Madagascar, Malawi, Mali, Niger, Senegal and Togo. (In 2004, Amnesty International recognised Algeria, Benin and Tunisia as abolitionist states as well: See <<http://web.amnesty.org/pages/deathpenalty-abolitionist3-eng>> (accessed 2 April 2004).)

² Uganda; see <<http://web.amnesty.org/report2003/2af-index-eng>> (accessed 2 April 2004).

³ E/CN 4/RES/2002/77.

Add to this that only six African states are parties (and a further two signatories only) to the Second Optional Protocol to the International Covenant on Civil and Political Rights (CCPR), aiming at the abolition of the death penalty. It is clear that at the international level most African states appear to be committed to the retention of the death penalty.

Official policies are not the only factors that determine the imposition and implementation of the death penalty in Africa. While in all countries in the world there are mechanisms of informal justice and while in many there are gangland killings or even political assassinations in which persons are 'sentenced to death' by unofficial tribunals and then executed by criminal gangs or political movements, this is particularly widespread in some parts of Africa. Informal 'justice' has manifested itself in brutal killings, mass executions and even genocide, not only in Rwanda, Sierra Leone and Liberia, but also in the more conventional civil wars in the Congo, Angola and Côte d'Ivoire and, in a variant form, in Algeria and Sudan. But even where there is not formally an internal or an external armed conflict, weak, if not failed, states have major problems of their own that impact directly on the death penalty. In many parts of Africa there is not just a temporary breakdown of law and order, but the fatal weakening and subsequent criminalisation of the state itself by the deep institutionalisation of corruption.⁴ In such circumstances, abolitionist stances (Côte d'Ivoire, for example, is listed as an abolitionist state), or even restrictions on the death penalty to which many states adhere, may be of little significance to their citizens. There is much reason for people to be worried about the death penalty in many African countries, not only as an abstract moral issue but also as something that may be capriciously applied to them, either by the state or by their fellow citizens.

3 Restrictions on capital punishment

The picture is, however, not entirely gloomy, for there are limits on capital punishment in Africa that are peculiar to Africa. What are these restrictions on the death penalty in Africa? This question can be answered at various levels.

The first is at the level where direct international intervention intersects with African law enforcement. A good example of this happening is through the International Criminal Tribunal for Rwanda (ICTR). Its influence on the place of the death penalty is fraught with paradox. After the genocide in Rwanda, the government of Rwanda formally requested the UN to set up an international tribunal to try the perpetrators. The Security Council of the UN, shamed perhaps by its

⁴ J-F Bayaart, S Ellis & B Hibou *The criminalisation of the state in Africa* (1999).

failure to take action earlier, agreed. When the Council came to debate the details of the provisions governing the new tribunal, however, the government of Rwanda, which had a seat on the Council as a non-permanent member, opposed the creation of the new tribunal in the form that it was put forward. The reason for its opposition was that the new tribunal did not have the power to impose the death penalty, while the death penalty would remain a competent sentence in Rwanda.⁵ Nevertheless, the Security Council persisted and the ultimate penalty that the ICTR can impose remains life imprisonment.⁶

The continued interaction between the stances adopted by the Tribunal and the Rwandan authorities has been interesting. In 1996 Rwanda adopted Organic Law 8/96, which excluded the death penalty for all except the instigators, planners and organisers of genocide.⁷ The ICTR, which is required by its Statute 'to have recourse to the general practice regarding prison sentences in the courts of Rwanda',⁸ is not technically bound by this law, which was passed after its Statute was adopted. Nevertheless, the Tribunal has referred to it on a number of occasions, most recently in the case of *Elizaphan and Gérard Ntakirutimana*, the priest father and doctor son both convicted of genocide.⁹ In their case, the fact that they would not have qualified for the maximum penalty in Rwanda may have played a part in ensuring that the maximum penalty that the ICTR can impose, life imprisonment, was not imposed on them either.

In Rwanda, the practical effect of the 1996 law is most probably that the courts will not impose the death penalty for ordinary murders as, if it cannot be imposed on ordinary *genocidaires* but only on the ringleaders, its applicability to domestic murder must be suspect. However, the Penal Code has not been amended to reflect this. At least for the time being, the death penalty remains part of Rwandan life. Public executions of persons convicted of genocide were held in Kigali in 1998. There have

⁵ P Akavahan 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 *American Journal of International Law* 501; D van Zyl Smit 'Punishment and human rights in international criminal justice' (2002) 2 *Human Rights Law Review* 1 8.

⁶ Art 23 (1) Statute of the International Criminal Tribunal for Rwanda.

⁷ WA Schabas *The abolition of the death penalty in international law* (2002) 250.

⁸ Art 23(1) Statute of the International Criminal Tribunal for Rwanda.

⁹ *Prosecutor v Elizaphan & Gérard Ntakirutimana* ICTR-96-10-T & ICTR-96-17-T, 21 February 2003 paras 885 & 886. The Tribunal referred to the Rwandan Organic Law in several earlier cases too, although the outcome was not always a lesser sentence: See *Prosecutor v Kambanda* ICTR 97-23-S, 4 September 1998 paras 18–22; *Prosecutor v Serushago* ICTR 98-39-S, 5 February 1999 para 17 & ICTR 98-39-A, 6 April 2000 paras 29–31; *Prosecutor v Kayishema & Ruzidana* ICTR 95-1-T, 21 May 1999 para 6; *Prosecutor v Rutaganda* ICTR 96-3-T, 6 December 1999 para 453; *Prosecutor v Musema* ICTR 96-13-T, 27 January 2000 paras 983–984; *Prosecutor v Ruggio*, ICTR 97-32-T, 1 June 2000 paras 28–31.

been no executions since then and the President indicated in 2002 that consideration would be given to the abolition of the death penalty. Until that happens, the impact of the ICTR on the politics of the death penalty in Rwanda remains open, but it is at least plausible to argue that it has had a restraining influence.

One can be cautiously optimistic about the potential restraining influence of the new quasi-international tribunal in Sierra Leone.¹⁰ The Special Court for Sierra Leone is a hybrid institution, in the sense that it was created by the UN to try both offences under international criminal law and domestic offences. It has been established in Sierra Leone with the active co-operation of the government of Sierra Leone and is staffed by a mixture of international and Sierra Leonean judges. Most importantly for the purposes of this paper, the Special Court will not be able to impose the death penalty, but will be limited to imposing imprisonment.¹¹ In practice, there have been no executions in Sierra Leone since 1999. The thinking is that since this new Court, with at least equivalent status to the highest domestic courts of Sierra Leone, will not be able to impose the death penalty, the death penalty will cease to be imposed by purely municipal courts for ordinary murder. Whether it will have this effect without formal changes to the law allowing the death penalty in Sierra Leone, remains to be seen, but the fuller integration of the Special Court into the legal fabric of Sierra Leone than is the case for the equivalent Tribunal for Rwanda is a cause for optimism.

The second limit is to be found in the African Charter on Human and Peoples' Rights (African Charter or Charter), which is undoubtedly the most important pan-African human rights instrument.¹² The key provision of the Charter for purposes of evaluating the death penalty is article 4. It provides: 'Human beings are inviolable. Every human shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

On its face, the reference to arbitrary deprivation of the right to life in article 4 mirrors article 6(1) of CCPR, which allows, subject to substantive and procedural objections, for the imposition of the death penalty. The allusion to article 6 of CCPR is important because it indicates that the African Charter can be interpreted in the light of the Covenant, all the more so since the vast majority of African states are parties to the Covenant. This view is strengthened by the provision in the Charter itself that provides that the Charter 'shall draw inspiration from international

¹⁰ R Cryer 'A "Special Court" for Sierra Leone?' (2001) 50 *International and Comparative Law Quarterly* 435–446; S Beresford & AS Muller 'The Special Court for Sierra Leone: An initial comment' (2001) 14 *Leiden Journal of International Law* 635.

¹¹ Art 19 Statute of the Special Court for Sierra Leone.

¹² One could also find limits on the death penalty in the African Charter on the Rights and Welfare of the Child (OAU Doc CAB/LEG/24 9/49 (1990)).

law on human and people's rights', including international instruments such as the Universal Declaration of Human Rights.¹³

Article 6 of CCPR goes on to lay down procedural and substantive standards that must be followed in those countries that retain the death penalty. Article 4 of the African Charter, in contrast, does not refer to the death penalty directly. However, the specific safeguards in respect of the death penalty contained in article 6 of CCPR can easily be read into the African Charter, a process which is aided by other provisions of the Charter — article 3(2), which grants every individual equal protection of the law; article 5, which prohibits torture and cruel, inhuman or degrading punishment and treatment; and article 7, which guarantees fair trial rights, for example.

The bigger question is whether article 4 of the African Charter and its related provisions will inspire the abolition of the death penalty. International human rights scholars have been on hand to provide such inspiration. Thus, William Schabas argues that the African Charter should be interpreted in the light of the underlying abolitionist trend that he discerns in UN instruments that deal with the death penalty.¹⁴

Manfred Nowak goes further. He suggests that the declaration by the South African Constitutional Court that the death penalty is inconsistent with the right to life, as contained in article 11 of the 1996 South African Constitution, might be a precedent for the interpretation of the African Charter as an abolitionist text, as neither the Charter nor the South African Constitution mentions the death penalty directly.¹⁵ As I will argue later, there is much that can be learnt throughout Africa from the value system implicit in the South African death penalty judgment. Nowak, however, goes too far when he draws a direct parallel between article 4 and the South African constitutional provision. Although neither the African Charter nor the South African Constitution refers directly to the death penalty, the latter is even terser than the former. The South African Constitution provides without qualification that '[e]veryone has a right to life'.¹⁶ Had the South African provision paralleled the African Charter more closely, some South African Constitutional Court judges may well have found that provision for the

¹³ Art 60 African Charter.

¹⁴ Schabas (n 7 above) 256.

¹⁵ M Nowak 'Is the death penalty an inhuman punishment?' in TS Orlin, A Rosas & M Scheinin (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 42–43.

¹⁶ Art 11 of the 'final' Constitution of the Republic of South Africa, Act 108 of 1996. The death penalty was declared unconstitutional by the South African Constitutional Court in *S v Makwanyane & Another* 1995 3 SA 391 (CC) because it infringed against the so-called 'interim' Constitution of the Republic of South Africa, Act 200 of 1993. Art 9 of the latter Constitution recognised the right to life in virtually identical terms, so that nothing turns on differences in the wording of the two Constitutions.

non-arbitrary deprivation of the right to life allowed the retention of the death penalty.¹⁷

In parentheses, it should be noted that bolder South African judges may also, of course, have found their way round this obstacle. At least two options present themselves. The one would have been to argue, as at least one South African judge did, that in its imposition in South Africa and elsewhere, the death penalty is inherently arbitrary.¹⁸ The second option would be to go even further and to argue that, if the exception for non-arbitrary deprivation of life meant that the death penalty should be allowed, it should, in modern constitutional jargon, be read down. The death penalty, the argument would run, infringes against the rights to life and human dignity, which are the fundamental values of the African Charter from which there can be no derogation. A similar bold argument was adopted by the Hungarian Constitutional Court, when it was faced by a clause in the Hungarian Constitution which provided, like the African Charter but unlike the South African Constitution, for an exception to the right to life when deprivation of it was not arbitrary. Notwithstanding this provision, the Hungarian Court held that the rights to life and human dignity did not allow the death penalty, as to recognise it would be to deny the essence of these rights.¹⁹

Inspired boldness has not been the hallmark of the African Commission on Human and Peoples' Rights (African Commission or Commission), which is the body responsible for propagating the principles of the African Charter and enforcing them. Indeed, several scholars have commented generally on the relative inefficacy hitherto of

¹⁷ O'Regan J remarks specifically in her concurring judgment in *Makwanyane* (n 16 above) that the terse formulation of the right to life in the South African Constitution 'is not one which has been used in the constitutions of other countries or in international human rights conventions. In choosing this formulation, the drafters have specifically avoided either expressly preserving the death penalty, or expressly outlawing it. In addition, they have not used the language so common in other constitutions, which provides that no one may be deprived of life arbitrarily or without due process of law.* To the extent that the formulation of the right is different from that adopted in other jurisdictions, their jurisprudence will be of less value. The question is thus left for us to determine whether this right, or any of the others enshrined in chapter 3, would *prima facie* prohibit the death penalty.' (At 505F–506A para 324. A footnote in the original at the point indicated by the asterisk refers *inter alia* to article 4 of the African Charter.) I do not wish to imply that this finding would necessarily have led to O'Regan J not following a bold course, had the South African Constitution been worded differently.

¹⁸ See the separate concurring judgment of Ackermann J in *Makwanyane* (n 16 above) 453D paras 153 et seq.

¹⁹ Decision of the Hungarian Constitutional Court No 23/1990 (X 31) AB. See, in particular, in addition to the rather formulaic decision of the Court, the fully argued concurring judgment of Sólyom P.

the Commission.²⁰ This may change. For the moment, though, one must recognise that the Commission has never been presented with a direct challenge to the death penalty in an individual case. The closest that the Commission has come to addressing the question of abolition generally was at its meeting in Kigali in 1999, where it adopted a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty'.²¹ A close reading of this resolution suggests, however, that the Commission did not regard the death penalty as inherently contrary to the African Charter. Instead, its concern was primarily with it being implemented without the necessary due process safeguards being in place. The wording is very careful. States that maintain the death penalty are urged to comply fully with their obligations under the Charter. The closest that the resolution comes to requiring specific action is when it calls upon state parties that still have the death penalty to —

- (a) limit the imposition of the death penalty only to the most serious crimes;
- (b) consider establishing a moratorium on executions of the death penalty; [and]
- (c) reflect on the possibility of abolishing the death penalty.

Even this mild resolution was not unanimously adopted and seems to have had relatively little effect.²²

The African Commission potentially may have had more impact where the challenge to the death penalty was on procedural grounds. For example, the Commission held that the trial of the Nigerian activist Ken Saro-Wiwa violated the due process provisions of article 7 of the African Charter and was thus arbitrary and in contravention of article 4 as well.²³ The difficulty was that the Commission only released this well-reasoned judgment in October 1998. Saro-Wiwa had, however, been executed in November 1995 and the Nigerian authorities had ignored the request of the Commission for his execution to be stayed while it considered his petition. Similarly, in 2001 the authorities in Botswana went ahead with the execution of Mariette Bosch before she could fulfil her intention of appealing to the Commission.²⁴

²⁰ See the summary of these views and the critical re-evaluation of them in GJ Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986–2000* (2002) 10–12; CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice 1986–2000* (2002) 178.

²¹ Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, OAU Doc AHG/Dec 153 (XXXVI) annex IV.

²² For a fuller account of the resolution, see Schabas (n 7 above) 359–60.

²³ *International Pen & Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

²⁴ 'Bosch hanged in secret' *Mail & Guardian* 3 April 2001.

The failure of the Commission to achieve results in these high-profile cases should not be seen as total failures because they have set procedural benchmarks in capital cases. These have been underlined in other decisions that have held that expedited appeal procedures²⁵ and, of course, summary executions²⁶ infringe both articles 7 and 4 of the Charter. The impact of the Charter may be stronger when it comes to be interpreted by the future African Court on Human and Peoples' Rights, as the Protocol on the establishment of the Court provides specifically for provisional measures to be adopted in cases of extreme gravity and urgency.²⁷

Thirdly, there may be limits on the death penalty at the national constitutional level. In this regard, the first prize from the point of view of an abolitionist is undoubtedly a constitution that specifically outlaws the death penalty. Instances of such constitutions are those of Namibia²⁸ and Mozambique.²⁹ In both cases the political dynamics at the time these post-independence constitutions were drafted, favoured outright and explicit abolition of the death penalty in the constitution as a counterpoint to what was seen as a symbol of colonial repression.

Even at such historic moments when a constitution is setting down new national values, explicit espousal of an abolitionist position is often seen as carrying high political costs. This was the case in South Africa, where in the early 1990s the then government and the liberation movements engaged in a careful egg dance around the question of capital punishment. Thus it was President De Klerk in his historic speech of 2 February 1990 who first signalled real change.³⁰ The speech was noteworthy, not only because he underlined effectively for the first time his government's commitment to radical political change by announcing the unbanning of the liberation movements and the release from prison of its leaders, but also because he coupled this with an announcement that the question of the death penalty would be revisited. This did not mean abolition, however. Although no further executions took place after November 1989, the law relating to capital

²⁵ *Constitutional Rights Project v Nigeria (II)* (2000) AHRLR 248 (ACHPR 1999).

²⁶ *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

²⁷ Art 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights. There is no equivalent provision in respect of the Commission, except for Rule 111 of the Rules of Procedure of the Commission. That less direct rule has, however, not proved to be effective.

²⁸ Art 6 Constitution of Namibia.

²⁹ Art 7(2) Constitution of Mozambique.

³⁰ *Cape Times* 3 February 1990.

punishment was amended in 1990.³¹ It retained the death penalty but did away with mandatory sentences of death and restricted the potential application of the death penalty to the most serious crimes. No major party seems to have pushed for inclusion, on the Namibian model, of a clause outlawing the death penalty in the Constitution, nor did the new government move to use its large majority in parliament to abolish the death penalty.

The strategy instead was to leave the matter to the Constitutional Court. For the politicians, this had the advantage that they would not have to take direct responsibility for a decision to outlaw the death penalty. The Court would be responsible. This may be why Chaskalson P prefaced his leading judgment in the *Makwanyane* case, where the court eventually decided that the death penalty was unconstitutional, with the following comment:³²

It would undoubtedly have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the Constitution.

In the end the strategy was highly successful. The Court articulated the abolitionist arguments carefully and very fully, and anchored them in the fundamental values of the right to life, human dignity, equality and legality that are the cornerstones of the whole constitutional order.³³ Because of this, the *Makwanyane* decision is a strong precedent that will be very hard to overturn. Its deep roots in fundamental principles also make it relatively invulnerable to being upset by a constitutional amendment — more so perhaps than a simple provision outlawing the death penalty that could be replaced by its converse. Also, it seems that South African politicians have found it easier to support the Court in general terms than to defend explicitly abolitionist positions in public.³⁴

However, this strategy is not always successful. In Tanzania, the constitutionality of the death penalty was upheld and a judgment of a lower court overturned on the basis that, while the death penalty was an

³¹ See the Criminal Law Amendment Act 107 of 1990. The formal abolition of the death penalty was effected by the Criminal Law Amendment Act 105 of 1997, which followed the decision of the Constitutional Court discussed below.

³² *Makwanyane* (n 16 above) 402B para 5.

³³ For a particularly perceptive comment on the value of the way in which the principles underlying the decision in *Makwanyane* are spelled out, see BE Harcourt 'Mature adjudication: Interpretative choice in recent death penalty cases' (1996) 9 *Harvard Human Rights Journal* 255.

³⁴ Opportunistically the National Party, of which (by now) former President De Klerk was the leader, subsequently called for a referendum on the death penalty, but the new government of President Mandela used its parliamentary majority to defeat this call: See J Hatchard & S Coldham 'Commonwealth Africa' in P Hodgkinson & A Rutherford (eds) *Capital punishment: Global issues and prospects* (1996) 155–192.

inherently cruel, inhuman and degrading punishment,³⁵ it was saved by a constitutional limitations clause that allowed derogations for legitimate purposes.³⁶ If society decided the death penalty was a legitimate form of deterrence, that was sufficient.³⁷

Finally, on the subject of the current constitutional realities in Africa, it should be noted that even a constitution that specifically endorses the death penalty might in another provision provide a basis for restricting its use. An example of such a constitution is that of Zimbabwe, which was specifically amended in 1990 to ensure that the death penalty could not be challenged directly.³⁸ Nevertheless, in *Catholic Commission of Justice and Peace in Zimbabwe v Attorney-General Zimbabwe and Others*³⁹ the Zimbabwean Supreme Court considered the continued validity of the death sentences of four men who had been held on death row in terrible conditions for long periods. In coming to its decision, the Court relied extensively on international case law, including innovative decisions based on instruments that, like the Constitution of Zimbabwe, made specific provision for the death penalty. Thus, for example, it referred with approval to the decision of the European Court of Human Rights in the *Soering* case.⁴⁰ In that decision the European Court had prevented the extradition of the applicant to the United States, notwithstanding the explicit exception to the right to life in the European Convention on Human Rights 'for the execution of a sentence of a court following conviction of a crime for which the penalty is provided by law'.⁴¹ The European Court held that if the applicant were to be sentenced to death in the United States he might, because of a delay in his execution, suffer from the death row syndrome, which would be a form of inhuman and degrading treatment outlawed by the European Convention. Similar interpretations have been given to the constitutions of Caribbean states, which recognise the death penalty and prohibit inhuman and degrading punishments.⁴² Following similar precedents, the Supreme Court of Zimbabwe went on to interpret the prohibition on inhuman or degrading punishment or treatment in

³⁵ Thus offending arts 13(6)(d) & (e) of the Tanzanian Constitution.

³⁶ See *Mbushuu v Republic* [1995] 1 LRC 216.

³⁷ See the discussion in R Hood *The death penalty: A worldwide perspective* (2002) 41. In *Makwanyane* (n 16 above) 441D–F para 115, Chaskalson P disagrees with the conclusion and argues that the state would need to prove that the death penalty is a more effective deterrent than, say, life imprisonment for this argument to succeed.

³⁸ *Hatchard & Coldham* (n 34 above) 170.

³⁹ 1993 4 SA 239 (ZSC).

⁴⁰ *Soering v United Kingdom* (1989) 11 EHRR 439.

⁴¹ Art 2(1) European Convention on Human Rights and Fundamental Freedoms.

⁴² *Pratt & Morgan v The Attorney General of Jamaica* [1994] 2 AC 1; *Lewis & Others v The Attorney General of Jamaica & Another* [2001] 2 AC 50.

the Constitution of Zimbabwe in the same way and set aside the death sentences that had been challenged before it.⁴³

4 Strategic initiatives

My third question is: What is to be done to strengthen the restrictions on the death penalty in Africa?

Certainly, to follow on immediately from the Zimbabwean judgment, much can be achieved by arguing by analogy with other jurisdictions. Since that decision, there have been further developments in the law relating to the death penalty in the Caribbean and Central America, suggesting fresh arguments about restricting the implementation of the death penalty, even where technically it still may be imposed. This can be done by challenging mandatory sentences of death, ensuring that the death penalty is limited only to the most serious crimes and advancing procedural challenges not only in respect of delays, but also on matters such as adequacy of legal representation and the manner in which the prerogative of mercy is exercised.⁴⁴

It may be particularly valuable to strengthen the jurisprudence of the African Commission and the future African Court that will interpret the African Charter, by drawing their attention to the jurisprudence of the Inter-American Commission on Human Rights. The latter should be seen as a body applying, like its African counterparts, a regional instrument that restricts rather than denies outright the application of the death penalty.⁴⁵ For this strategy conducted at the level of ideas to be effective, the institutions that support the African Charter will themselves have to operate speedily and efficiently. It is to be hoped that recent developments, such as the replacement of the OAU by the new African Union, will lead to reorganisation of the delivery mechanisms in this regard — although precisely what form this will take is not yet clear.

Secondly, restriction of the death penalty can occur best if there is an open debate on alternatives to the death penalty. In my view, such a debate must be informed by the same concern for human rights as the debate about the death penalty itself. This is particularly important when as an alternative life imprisonment is considered. American abolitionists have been prepared to support Life Without Parole — referred to as

⁴³ n 38 above.

⁴⁴ See in general L Blom-Cooper 'The Privy Council and the death penalty in the Caribbean: A study in constitutional change' (1998) 4 *European Human Rights Law Review* 368–418.

⁴⁵ See, eg, *Michael Edwards, Omar Hall, Brian Shorter & Jeronimo Bowleg v The Bahamas* (2002) 9 IHRR 383, which declares that mandatory death penalties, inadequate mercy procedures, delays in trials and unavailability of legal aid all violate various provisions of the American Declaration on Human Rights and the Duties of Man.

LWOP or even LWOP + R (Life Without Parole plus Restitution) — as the only alternative to the death penalty that the public is likely to accept. Such support is a desperate gamble on the part of the abolitionists, for a true LWOP sentence, even under ideal prison conditions, comes close to being a death sentence in instalments. In many, if not most African contexts, the possibility exists that a life sentence may in a literal sense be a fate worse than death. In the late 18th century, Beccaria wrote approvingly about the life sentence in contrast to death:⁴⁶

A great many men contemplate death with a steady, tranquil gaze; some out of fanaticism, some out of vanity, which attends us again and again to the very edge of the grave, some out of a last desperate effort to free themselves from life and misery; but neither fanaticism nor vanity can subsist among the fetters and the chains, under the rod, or under the yoke or in the iron cage, where the desperate man rather begins than ends his misery.

This may be an accurate description of life imprisonment in many African states, but not one that can easily be squared with an argument that a life sentence so implemented would meet the standards of the African Charter or indeed of any other international human rights instrument or national bill of fundamental rights. A similar challenge to life imprisonment was raised in Namibia. In a little known judgment in the High Court of that jurisdiction, *S v Nehemia Tjijo*, Levy J robustly expressed the view that life imprisonment was unconstitutional. Life imprisonment was simply a sentence of death and therefore prohibited by the Constitution. Moreover, it was also to be outlawed as a 'cruel, inhuman and degrading punishment'.⁴⁷ As Levy J explained: 'It removes from a prisoner all hope of his or her release . . . Take away his hope and you take away his dignity and all desire he may have to continue living.' Nor could one rely on possible release to ameliorate life sentences. Levy J continued sternly:⁴⁸

The fact that [a life prisoner] may be released on parole is no answer. In the first place, for a judicial officer to impose any sentence with parole in mind, is an abdication by such officer of his function and duty and to transfer his duty to some administrator probably not as well equipped as he may be to make judicial decisions. It also puts into the hands of the Executive, where the sentence is life imprisonment, the power to detain a person for the remainder of his life irrespective of the fact that the person may be reformed and fit to take his place in society . . . Life imprisonment makes a mockery of the reformatory end of punishment.

⁴⁶ C Beccaria *Dei Delitti e Delle Pene* (1764) published as *Of crimes and punishments* (translated by J Grigson) collected with A Manzoni *The column of infamy* (1964) 47. For a discussion of Beccaria's contradictory attitude to life imprisonment, in spite of his support for the abolition of the death penalty, see D van Zyl Smit, *Taking life imprisonment seriously in national and international law* (2002) 5–7.

⁴⁷ *S v Nehemia Tjijo*, unreported, but reproduced in *S v Tcoeb* 1996 1 SACR 390 (NmS) 396.

⁴⁸ As above.

In the face of this broadside, other prisoners argued that the life sentences imposed on them were unconstitutional. In *S v Tcoelib*⁴⁹ the Supreme Court of Namibia was forced to consider carefully whether life imprisonment was a constitutionally acceptable alternative to the death penalty. Its answer was carefully nuanced. The Supreme Court did not reject the notion that a life sentence could be unconstitutionally severe if it were enforced without concern for the human dignity of the offender. Following the leading German case on life imprisonment,⁵⁰ the Court found that human dignity required that every prisoner, including those serving life sentences, had to have a reasonable prospect of release. This meant that there had to be a mechanism for considering the release of each prisoner serving a life sentence and the operation of this mechanism had to meet constitutional standards of due process. The existing regime for lifers and the mechanism for considering their release had to be remodelled in the light of these constitutional imperatives. With these caveats, however, life imprisonment remained a constitutionally viable ultimate penalty in Namibia.

The importance of this decision is that it defends a modified form of life imprisonment as an alternative to the death penalty, while casting the debate about both the death penalty and its acceptable alternatives in the framework of the underlying values of the Namibian Constitution. In this respect, it highlights also the importance of engaging in the debate about values. Like the South African Court in its death penalty decision, *Makwanyane*, it also engages with fundamental values.

Such a general engagement with the values that might lead to a re-evaluation of the death penalty, is a third way in which the scope of the death penalty may eventually be restricted. As has already been suggested, arguments by analogy with other human rights systems outside Africa have their place. However, there is a need also to engage with indigenous value systems, including those of the Islamic North. This is happening to some extent with the challenges from within Africa to the death penalty that has been imposed in terms of Shari'a law in Northern Nigeria on a woman convicted of adultery.⁵¹

In the *Makwanyane* judgment, engagement with wider African values was attempted in at least two ways. The one, adopted by a number of judges, was to emphasise the concept of *ubuntu*, of communal humanity,⁵² as a concept underlying both the right to life and to dignity

⁴⁹ 1996 1 SACR 390 (NmS).

⁵⁰ BVerfGE 45 187, discussed in D van Zyl Smit 'Is life imprisonment constitutional? The German experience' (1992) *Public Law* 263–278.

⁵¹ 'SA lawyers to help save Nigerian mother' *Cape Argus* 25 August 2003 10; 'Mbeki urges Obasanjo to intervene' *Independent Online* 10 September 2003; 'Nigeria's Bauchi state slams adultery stoning' *Independent Online* 18 September 2002.

⁵² See *Makwanyane* (n 16 above) *per* Langa J 482B para 224. See also *per* Chaskalson P 446F para 131, *per* Madala J 483I–484A para 237, *per* Mohamed J 488G para 263, *per*

and as an overarching idea in the new South African Constitution. The other, adopted by Sachs J in particular, was to engage with those African critics who argued that abolitionism was un-African and to show that, although pre-colonial Africa had had its share of bloody wars, historically the systematic use of the death penalty was not part of indigenous Southern African culture.⁵³ Both strategies run the risk of being conceptually shallow and ahistorical, but they need not be either. What is required is a more careful scholarly investigation of both strategies.

Finally, a fourth way in which the death penalty can be restricted in Africa is by improving national criminal justice systems as well as human rights compliant mechanisms and making them more efficient. In many African countries, rulers retain the death penalty, even if they do not use it, because they fear that the time will come when using their power to implement the death penalty will be the only way to demonstrate their authority. This tendency may be most obvious in coup-ridden, politically unstable states. However, it is equally a problem in countries where there is a perception that the state is powerless to act with other means against crime and corruption. Human rights activists may find it hard to see their function as making a vital arm of the state, ie the criminal justice system, more efficient. However, this can be done in a way that makes the system more compatible with human rights norms and standards at the same time.

An efficient criminal justice system and a strong and prosperous state are not sufficient to ensure that the issue of the death penalty will be addressed, as the example of the United States indicates all too clearly. However, the converse is true. In a state that is failing to exercise its authority, there is unlikely to be opportunity for reform in this area. Only in a stable and relatively prosperous state is there a real prospect of the civic confidence necessary seriously to apply the human rights principles that underlie any move towards restricting or abolishing the death penalty. Particularly where elected politicians have expressed their personal opposition to the death penalty — the President of Malawi,⁵⁴ and more recently the Minister of Justice of Kenya⁵⁵ are two examples — their ability to act on their beliefs may be influenced

Mokgoro J 500h–501F paras 307–308, and *per* Sachs J at 516G para 374. For further scholarly analysis of *ubuntu*, see R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal on Human Rights* 641–8.

⁵³ *Makwanyane* (n 16 above) *per* Sachs J 516I–519C paras 376–385. See also the comments of Hatcher & Coldham (n 34 above) 155–157 on the relationship between existing African practices and the death penalty.

⁵⁴ Letter from the President of Malawi, Dr Bakili Muluzi, to the World Council of Churches 5 December 1998; reported in *e-jubilee* 7 on 11 December 1998 and quoted by Paralegal Advisory Services Malawi in unpublished paper 'The quality of justice: Trial observations in Malawi' presented to the First World Congress on the Death Penalty (not dated).

⁵⁵ 'Kenya death row prisoners freed' *CNN.com* 25 February 2003.

crucially by such wider political circumstances. If they are unable or unwilling to act on their beliefs, the danger is all too real that the state will revert to applying the death penalty actively again. It may well be that positive criminal justice reform rather than moralistic condemnation is the most effective route to the eventual abolition of the death penalty in Africa.

A framework law on the right to food — An international and South African perspective

*Fons Coomans**

Senior Researcher, Centre for Human Rights, Maastricht University,
The Netherlands

Kofi Yakpo†

Southern Africa Co-ordinator of FIAN International (Foodfirst Information & Action Network), human rights organisation working towards the realisation of the right to adequate food, Heidelberg, Germany

Summary

It is a well-known fact that millions of people all over the world do not have access to food on a daily basis or face hunger, malnutrition and starvation, despite the fact that their governments have ratified international treaties in which the right to food takes a prominent place. There is thus a big gap between rhetoric and reality, between theoretically having the right to food and enjoying it in practice. The present contribution deals with ways in which to realise the right to adequate food. It suggests the adoption of a framework law as a means of strengthening the implementation of the right to food at the domestic level. In the first part, the article discusses the right to adequate food from an international human rights perspective. It deals, amongst others, with the background, aim and contents of a national framework law on the right to food. In the second part, attention is given to the role of civil society in the promotion of a framework law. This is illustrated by using the example of South Africa, where the lack of availability and accessibility of food to the poor would justify the adoption of a framework law.

* MPol (Amsterdam), PhD (Maastricht); Fons.Coomans@ir.unimaas.nl

† MA (Cologne), MBA (Geneva); Kofi@fian.org. The authors would like to thank Sibonile Khoza for his comments on an earlier draft of this work.

1 Introduction

The right to food has a solid basis in international human rights law. It is part of the right to an adequate standard of living which has been laid down in the Universal Declaration of Human Rights (Universal Declaration) (article 25), and in treaties such as the United Nations (UN) Convention on the Rights of the Child (article 27) and the African Charter on the Rights and Welfare of the Child (articles 14 and 20). However, the key international provision on the right to food is article 11 of the International Covenant on Economic, Social and Cultural Rights (CESCR). This treaty was concluded in 1966 and came into force in 1976.¹ Article 11(1) stipulates that state parties recognise the 'right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and to the continuous improvement of living conditions'. State parties shall take appropriate steps to ensure the realisation of this right. In addition, article 11(2) provides that state parties recognise the fundamental right of everyone to be free from hunger. Moreover, states shall take measures to improve methods of food production, conservation and distribution. Within the context of the UN, the meaning of the right to food, as contained in article 11, has been clarified. The first UN Special Rapporteur on the right to food has given substance and meaning to article 11 by identifying the nature of states' obligations (positive and negative obligations to respect, protect and fulfil).² In addition, the UN Committee on Economic, Social and Cultural Rights (Committee or Committee on ESCR), which monitors the implementation of CESCR by state parties, has given an authoritative interpretation of article 11 in its General Comment on the right to adequate food.³ According to the Committee, 'the right to food is realised when every man, woman and child, alone or in community with others, has physical and economic access to adequate food or means for its procurement'.⁴ A second UN Special Rapporteur on the right to food has further developed the definition of this right. He defines the right to food as⁵

¹ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, entered into force 3 January 1976, 993 UNTS 3. 148 states have ratified or acceded to this treaty (status as at 2 November 2003). South Africa is not yet a state party to CESCR. For the reasons for the delay in the ratification process, see C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 546.

² See below. See A Eide *The right to adequate food as a human right*, UN Doc E/CN4/Sub2/1987/23, and an update study on the right to food, UN Doc E/CN4/Sub2/1999/12.

³ General Comment No 12 on the right to adequate food, UN Doc E/C12/1999/5.

⁴ As above, para 6.

⁵ J Ziegler Preliminary report of the Special Rapporteur of the UN Commission on Human Rights on the right to food UN Doc A/56/210 (2001) para 22.

the right to have regular, permanent and unobstructed access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free from anxiety.

In terms of entitlements and obligations, this international framework on the right to food must inspire and guide the implementation of this right at the domestic level.

2 Background of the proposal for a framework law

As part of the process of strengthening the implementation of the right to food, the Committee suggested in its General Comment on the right to adequate food that state parties to CESCR adopt a national strategy to ensure food and nutrition security for all, based on human rights principles, that defines the objectives, the formulation of policies and corresponding benchmarks.⁶ The process of drawing up such a strategy requires compliance with the principles of accountability, transparency, people's participation, decentralisation of decision-making and implementation⁷ and the protection of vulnerable groups.⁸ Prerequisites for implementing a national strategy on the right to food include political will, organisational and managerial capacity and allocation and appropriate use of adequate resources.⁹ Particular attention should be given to guaranteeing non-discrimination in access to food or resources for food production, such as guaranteeing equal access to land, property, credit and technology for women.¹⁰ Part of this strategy is the need to have reliable information on the nature and extent of under-nourishment, the identification of those in need, their socio-economic and demographic characteristics (income, age, gender, ethnicity), the factors which place people at risk of suffering from starvation and the means people have to cope with these risks. Currently, work is being done, with the support of the UN Food and Agriculture Organisation (FAO), to develop standards for food security information systems, which should contribute to setting up Food Insecurity and Vulnerability Information Mapping Systems (FIVIMS) that could provide the necessary information on hunger and malnutrition.¹¹

⁶ Para 21.

⁷ Decentralisation means allocation of responsibility and budgets for the delivery of services and reaching food-insecure population groups to local authorities. See Report on the Third Expert Consultation on the Right to Food UN Doc E/CN4/2001/148 para 28.

⁸ n 3 above, para 23.

⁹ n 7 above, para 20.

¹⁰ n 3 above, para 26. See also art 14 UN Convention on the Elimination of All Forms of Discrimination Against Women.

¹¹ For more information, see <<http://www.fivims.net>> (accessed 31 May 2004).

Furthermore, the Committee is of the view that:¹²

States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievements of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organisations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures.

From a general legal perspective, a framework law is meant to cover the whole spectrum of cross-sectoral issues related to a specific subject (such as food security) and to facilitate a more cohesive, co-ordinated and holistic approach to a specific issue. Such legislation lays down the basic legal principles and competences without a detailed codification. Usually it includes a declaration of objectives and policies, the establishment of relevant institutions and a definition of procedural principles. It may also lay down rules and principles for responsibility and accountability of actors involved.

Although a state party to CESCER must decide for itself which means are most appropriate to implement each of the substantive rights of the Covenant, it should be emphasised that national legislation may be desirable and sometimes indispensable.¹³ Article 2(1) of CESCER explicitly mentions legislative measures as suitable means to realise the rights listed in the Covenant. Legislation may be indispensable to comply with the obligation to take steps towards the full realisation of rights, as provided for in article 2(1), and to eliminate discrimination *de jure* and *de facto*. Measures taken should produce results that are consistent with the discharge of a state party's obligations under the Covenant.¹⁴ Part of such a national strategy could also be to repeal or amend laws incompatible with the right to adequate food, for example limitations on land ownership of women. The UN Special Rapporteur on the right to food has also given attention to the adoption of domestic legislation on the right to food.¹⁵ He is of the view that every government should develop a national framework law conforming to the need to respect, protect and fulfil the right to food, thereby recognising obligations under international human rights law.¹⁶

¹² n 3 above, para 29.

¹³ General Comment No 3 on the Nature of States Parties Obligations (1990), UN Doc E/1991/23 para 3.

¹⁴ General Comment No 9 on the Domestic Application of the Covenant (1998), UN Doc E/C12/1998/24 para 5.

¹⁵ Ziegler (n 5 above) paras 89–96, discussing the proposals made by FIAN International.

¹⁶ As above, para 124.

3 The aims of a framework law

A limited number of countries explicitly recognise the right to adequate food in their constitutions, while a few other countries have a reference to the responsibility of the state for the provision of basic necessities of life, such as food, in their constitutions. In the majority of countries, however, the right to food is not part of the constitution.¹⁷ It has been argued by some governments and commentators that a normative expression of the right to food in national legislation is not necessary, because promotion of the right to work and the right to social security is already sufficient to guarantee that people have access to food. In other words, if a person is employed, or is supported by a social security scheme, the threat of hunger should not arise. It has also been argued that recognising the right to food at the domestic level as a normative legal expression would bring to light the often stark contrast between government rhetoric and social reality, constituting a potential danger for governments. It could lead to social unrest and food riots when the masses face hunger and malnutrition. Seen from this perspective, governments do not feel a need to adopt the right to food as a legal norm in the domestic legal order.

This kind of reasoning fails to appreciate that providing for the right to food at the national legal level could serve the purpose of establishing and accentuating relationships between rights, such as the right to life, the right to water, the right to health, to work, land, social security and the right to food. It could show that guaranteeing access to food is a complex matter, underscoring the need for an integrated nutritional and health care-based approach that is mutually supportive. In other words, it would highlight the interdependence of rights and reflect a holistic human rights-based approach to food availability and accessibility issues. Legislation constitutes the foundation for more specific implementation measures. Legislation is required by the principle of the legality of administration by government and is a cornerstone of the rule of law. It is also of particular importance for the recognition and status of economic, social and cultural rights in domestic law. However, the adoption of a framework law should not be abused for window-dressing purposes: It should not be an excuse for a lack of more specific implementation measures. On the contrary, the law should inspire and stimulate the drawing up of implementation policies and measures.

A framework law would cover a broad spectrum of subjects, related directly or indirectly to the right to an adequate standard of living, of

¹⁷ See the brief overview in the brochure *The right to food in theory and practice*, published by the FAO, Rome (1998) 40–45.

which access to food through production or access to the market is a central element. Another aim of a framework law is to harmonise existing, often fragmented, national regulations, policy and administrative measures on food availability and accessibility from an overall perspective in order to achieve coherence and transparency. A framework law could also serve as a formal safeguard against abrupt and sudden changes in governmental policy, because the law would stipulate the basic principles of the national food policy that may only be amended with the legislature's approval. It should contribute to the entrenchment of the right to food in the domestic legal order and help to strengthen the justiciability of the right to food in individual cases.

4 The content of a framework law

Prior to drafting a framework law, an accurate and comprehensive analysis of the causes of hunger and malnutrition should be undertaken as part of a national strategy to ensure food availability and accessibility. A national framework law on the right to food would 'translate' the constitutional and international provision on the right to food into concrete targets, concepts and definitions, guidelines, powers and policies for implementation in terms of food availability and accessibility. Such a framework law would start by reaffirming the commitment to the right to food as a human right. It would make the right to food operational by identifying target groups, relevant sectoral issues, relevant governmental and non-governmental actors, minimum levels of nutrition and minimum income levels. As a basic requirement, a framework law should give effect to the *core content* of the right to food. The core content of a right should be understood as the minimum essential level without which a right loses its significance as a human right. According to the UN Committee on ESCR, the core content of the right to food includes¹⁸

the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.

This definition of the core content has two key elements. The first one is the availability of food. This might be secured by either feeding oneself directly from productive land or other natural resources, or by well-functioning processing, distribution and market systems.¹⁹ The second element is access to food, which may be interpreted further as economic access and physical access.²⁰ Economic access relates to

¹⁸ n 3 above, para 8.

¹⁹ As above, para 12.

²⁰ As above, para 13.

personal or household financial costs for the acquisition of food for an adequate diet. Physical access implies that adequate food must be accessible to everyone, including the most vulnerable groups.

The core content of the right to food gives rise to minimum core obligations for states.²¹ As a minimum, states have a core obligation, regardless of their level of economic development, to ensure subsistence rights for all. This means an obligation on a state to secure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger.

The normative content of the right to food should be translated into concrete targets and related benchmarks to be achieved on the national and local level. Time-frames for achieving targets should be set in the law. In addition, the law should give an overview of the measures to be used (subsidiary legislation, administrative decisions, income policy, agricultural and agrarian policy, financial grants, tax policy, etc). It is also crucial that the framework law creates a legal basis for the allocation of legal powers to central and local authorities. It is thus important that the law identifies duty holders at the central and local level. It could provide for co-ordination of responsibility for the implementation of the law by assigning responsibility to the different government agencies involved, and define overall responsibility for one particular organ that could perform an overarching function.²² Political monitoring mechanisms (by parliament), to hold these duty holders accountable, and legal mechanisms (by administrative and/or judicial bodies) for review of their decisions, should be provided for. A framework law would also include the type and nature of government obligations that would give substance to implementation of the right to food (see below). This may also entail identifying the concrete steps to be taken immediately and progressively.

Furthermore, a framework law should take stock of existing sectoral legislation and policy on food related issues. This may be a very broad spectrum of sectoral areas, such as land reform legislation, land tenure regulations, agricultural policy, access to credit regulations and programmes, access to water regulations, employment policy, housing policy, environmental policy, regulations on food production, food marketing, food quality and food safety, food prices, wage policy and social safety nets. These regulations and policies should be scrutinised from a rights-based perspective. Possible conflicts and gaps should be

²¹ n 13 above, para 10 and D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002).

²² See M Vidar (Legal Officer FAO) 'Implementing the right to food achievements, shortcomings and challenges: Advantages of framework law' (February 2003) 11 at <<http://www.fao.org/Legal/rf/state-e.htm>> (accessed 31 March 2004).

identified with a view to harmonisation and filling these gaps. Such a stock-taking exercise should ideally identify the major structural obstacles, such as unequal access to land, an uneven income distribution, high food prices, marginalisation and vulnerability of specific social groups (landless peasants, agricultural workers, rural women, urban poor) or a lack of training opportunities in the agricultural sector. It could also highlight a lack of adequate implementation of existing legislation.

In order to strengthen the justiciability of the right to food in individual cases, it is important that the framework law provides for a reference to effective recourse procedures in case of alleged violations and which specifies those aspects of the right to food that are actionable under the law.²³ One may think of court proceedings, administrative review procedures, ombudspersons or national human rights institutions.²⁴ Finally, the framework law should include mechanisms for participation of civil society organisations in policy and planning on food-related issues.²⁵

It should be recognised that a framework law on the right to food includes elements that are alien to an ordinary framework law that usually relates to the allocation of legal powers and responsibilities and lays down procedural principles and concepts. These alien aspects include such non-legal elements as benchmarks, time frames, policy goals and targets that are usually and traditionally part of policy frameworks instead of legal frameworks. The point here is that these elements need periodic review and adjustment in order to assess progress and provide for policy changes. This is problematic if these dynamic concepts are part of a static instrument, which a framework law actually is. This would require that a framework law should provide for a mechanism for periodic review of achievements and goals, but it is doubtful whether a text could be drafted that is flexible enough to deal with this. It may also be questioned whether a framework law is the proper instrument to deal with such policy issues. Finally, there is a risk that a framework law will develop into a complex legal construction, because it tries to deal with a great number of different matters in a comprehensive way in one single document. As a consequence, it may become obscure and unworkable in practice. However, we think that these disadvantages and uncertainties do not outweigh the advantages of a law that is meant to make the human right to food more tangible in the domestic legal order.

²³ As above.

²⁴ See B von Tigerstrom 'Implementing economic, social and cultural rights: The role of national human rights institutions' in I Merali & V Oosterveld (eds) *Giving meaning to economics social and cultural rights* (2001) 139–159.

²⁵ See below.

5 The role of civil society in the promotion of a framework law on the right to food

5.1 A broad civil society coalition as a precondition²⁶

For activists from non-governmental organisations (NGOs), but even more so for those belonging to mass-based organisations and social movements, international human rights law and its workings within the UN system are often far removed from their own level of work, irrespective of how strongly international human rights law legitimises national struggles for a better livelihood. Promoting a framework law can therefore only be embedded in a wider process of mobilisation towards the right to food within civil society, in which education about human rights in general, and the right to food in particular, plays a primordial role. The process leading towards a national framework law must be driven by civil society and involve a broad coalition of different actors and stakeholders — community and mass-based organisations, NGOs and academia. The objective of the effort is not only to get such a law through parliament, although the final support of the legislature is of course the *sine qua non* of the success of such a process. Also, large sectors of the administration must lend their support to the framework law in order to ensure its implementation once it is passed. Strategies on how to trigger the process may vary from country to country. In states in which the right to food has a strong legal status or is even constitutionally entrenched, people working for the right to food may find it easier to find representatives of NGOs (with a particular emphasis on community and mass-based organisations), activist-lawyers, politicians, representatives of state or semi-state institutions (such as national human rights commissions), and, most importantly, people affected by violations of the right to food, to form a national task force or steering group.

5.2 Four phases of civil society involvement

Such a task force would be able to secure broader societal and political acceptance of the objectives, bring together the necessary expertise and foster political acceptance of the idea of a framework law. The concrete tasks of the steering group would involve action on different levels: In the first phase, public awareness about the right to food and the pertinent issues surrounding it need to be raised through a broad campaign of sensitisation and *human rights mobilisation*. Factors such as the

²⁶ The authors rely on Rolf Künemann, General Secretary of FIAN International, who first developed the following four-phased model of civil society mobilisation in his FIAN International Working Paper 'From legislative framework to framework legislation' (2002).

distribution of agricultural land, access to social programmes, or the impact of a state's trade policies on the availability and price of staple foods within the country might serve as concrete examples around which civil society can be mobilised with the aim of heightening awareness about the right to food. Educational activities related to the right to food of people threatened by violations, workshops for decision-makers in civil society and the political sphere, rallies and protest actions against violations, a co-ordinated media strategy, intense lobbying with government authorities are all elements of a civil society strategy of mobilisation for the right to food, setting the stage for the second phase of the framework law process: *stock-taking*.

The actual task of shaping the contents of a framework law begins with a *stock-taking* exercise. During this phase, all social groups that have an interest in the implementation of the right to food are called upon to assess the realisation of this right in the country when measured against the three state obligations: to respect, to protect and to fulfil. The 'respect' and 'protect' obligations address violations of the right to food, such as the destruction of certain groups' ability to feed themselves, that have occurred, are occurring or are imminent. The violation that is being committed is committed either directly by a state organ or by a third party, for example a large landowner or a private company. The 'fulfil' obligation goes beyond that, by compelling the state to proactively design and implement laws, policies and programmes towards the eradication of hunger (for example effective agrarian reform, a basic income grant, enforcing minimum wage legislation), while ensuring the accessibility of any such programme to every vulnerable²⁷ individual. Accessibility entails an additional criterion — justiciability, the availability of redress in a court of law in the event of a *prima facie* violation of an individual's right to food. Accordingly, the following non-exhaustive list of criteria could be used as a yardstick in measuring the state's compliance with the obligations emanating from CESCR:²⁸

Obligation to *respect*:

- the prohibition of forced evictions of vulnerable groups from their lands, homes, fishing-grounds;
- mechanisms for compensation in cases where forced evictions have taken place;

²⁷ 'Vulnerable' refers to individuals and groups of individuals whose right to food is particularly prone to violations due to their legally, socially and economically insecure position. Examples of vulnerable people are small-holders, landless people, farm workers, day labourers. Examples of cross-cutting categories are gender, ethnicity, caste and geographical isolation.

²⁸ The authors thank Martin Wolpold-Bosien, Central America & Mexico Coordinator of FIAN International for providing many of the elements of the list of criteria.

- the establishment of transparent, fair and reasonable procedures for state appropriation of land or water resources;
- the revision of all forms of discrimination of vulnerable groups in legislation and budgetary policies.

Obligation to *protect*:

- creating mechanisms for the protection of vulnerable groups against evictions from their bases of subsistence by third parties;
- creating mechanisms of sanction and compensation for evictions already effected;
- implementing the security of land tenure and other productive resources in accordance with cultural preferences such as communal use or ownership;
- effective protection of workers' rights and enforcement of minimum wage legislation;
- effective protection of women against discriminatory practices and institutional structures at the workplace and as regards the ownership and use of productive resources;
- guaranteeing indigenous communities their traditional rights of ownership, use and access to their natural and productive resources;
- guaranteeing vulnerable and disadvantaged ethnic groups access to, use and ownership of natural and productive resources.

Obligation to *fulfil*:

- identification of vulnerable groups and establishing the causes of their vulnerability;
- ensuring the long-term application and enforcement of legislation for a minimum wage which covers the basic food basket;
- enforcing the payment of a basic income grant to every citizen, and vulnerable groups in particular, irrespective of his or her employment status;
- enforcing legislation that guarantees the maximum use of available resources to improve access to productive resources (for example through agrarian reform) of social groups affected by malnutrition (for example the landless rural population);
- applying social security legislation;
- ensuring the application of legislation that guarantees food aid or other direct material support to groups threatened by or suffering from malnutrition and hunger during food emergencies.

Finally, an essential part of any framework law should deal with the modalities of progressive realisation — the establishment of concrete steps to achieve coherence in national legislation with the requirements of the obligations resulting from the right to food.

During the *legislative process* the third phase of mobilising civil society sets in. The legislative process begins with the formulation of a draft law

on the basis of the stock-taking exercise. Once again, a broad coalition of civil society organisations, especially community based organisations and those representing vulnerable sections of society, should participate in the process by scrutinising draft versions of the bill before they are tabled, by educating the public about how the framework law would give more latitude to exercising one's right to food, and, most importantly, by exerting constant pressure on the legislature to pass the bill in due course.

Once the bill has been passed, a fourth phase sets in. During this phase, civil society is called upon to *monitor its application* — a phase in which the pressure on every level of the executive and judiciary (national, regional, and local levels) needs to be sustained. Firstly, the institutional arrangements that have been created by the framework law need to be tested against the real-life situation as to their actual ability to guarantee long-term accountability, transparency and people's participation. Secondly, weaknesses of the substantive and procedural provisions of the framework law might transpire soon after its coming into effect and would need to be remedied through a constructive engagement between civil society and the state. For example, such an engagement would demand the creation of precedents by litigating right to food cases to do justice to people whose right to food had been violated. In this way, the effectiveness of the protection guaranteed by legislation created through the framework law is tested. In addition, periodic assessment by NGOs, possibly co-ordinated by the task force mentioned above, of the actual impact of such legislation on the right to food on vulnerable groups, could underline the necessity of amending subsidiary legislation and the framework law itself. As can be seen, the drafting, application and implementation of a framework law demand permanent and long-term monitoring and vigilance by all sectors of civil society.

6 The right to food in South Africa

In South Africa the right to food is entrenched in several sections of the Bill of Rights in the Constitution,²⁹ not surprisingly, given the comprehensiveness of the catalogue of rights contained in the Constitution, and the references in it to international human rights law.³⁰ In fact, the wording of section 27, the principal section dealing with the right to

²⁹ Sections 27 & 28 Constitution of the Republic of South Africa Act 108 of 1996.

³⁰ South Africa is not yet a state party to CESCR. However, according to sec 39(1)(b) of the Constitution, a South African court must consider international law when interpreting the Bill of Rights.

food, mirrors that of article 11 of CESCR.³¹ According to section 7(2) of the Constitution, the South African state must respect, protect, promote and fulfil the rights contained in the Bill of Rights.

The right to food is of increasing importance due to a widespread and growing feeling of discontent amongst the South African poor that the end of the racist apartheid regime in 1994 has not ushered in a new era of peace and prosperity for the African masses. In fact, the extent of poverty, malnutrition and hunger has reached alarming proportions.³² In particular, the daunting task of rectifying the massive dispossession of Africans during a century of land evictions and forced removals has proven to be a failure. The land reform policy, while not being the only element of the ANC programme aimed at empowering the African people, certainly has the strongest symbolical value of the reform programme of the ANC. Yet, of the targeted 30% announced by the first democratically elected government in the history of South Africa, less than 1,2% of farm land currently used for commercial agriculture was redistributed or restituted to black South Africans from 1994 to 2001.³³ Some 14 million rural Africans are still crowded into the infertile badlands of South Africa, the former homelands, while some 60 000 white commercial farmers own over 80% of the prime agricultural land.³⁴ Against such a background, the right to food is emerging as a powerful legal concept capable of lending legitimacy to the gathering call for an effective solution to the land question that will guarantee Africans lasting access to their lands.

Other policy areas show similar deficiencies in dealing with destitution and hunger. South Africa has a social security system that is extensive by the standards of developing countries. However, a high percentage of those qualifying for cover does not access social security payments. The majority of these are the poorest of the poor, particularly those residing in the rural areas — exactly those vulnerable groups that

³¹ Section 27(1)(b) reads: 'Everyone has the right to have access to sufficient food and water.' Section 27(2) stipulates that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

³² Between 45% and 55% of South Africans are estimated to be poor, while 70% of rural South Africans live in poverty; see Aliber 'Chronic poverty in South Africa' (2003) 31(3) *World Development*. Additionally, ethnic inequality has risen since the end of apartheid: The average income of white South Africans has grown from four times in 1995 to six times that of black South Africans in 2000. Within the same period, the number of people below the poverty line also grew substantially (Department of Statistics South Africa, 2002). In 1994, 39% of the population could not meet the daily energy requirement of 2000 calories per day (Project for Statistics on Living Standards and Development, South African Labour and Development Research Unit). Given the growth of poverty, this figure should be higher by now.

³³ South African Department of Land Affairs (2002).

³⁴ Sustainable livelihoods in Southern Africa (2001) *Research Briefing 1 'The politics of land reform in Southern Africa'*.

suffer most from hunger and malnutrition. A combination of factors is the cause of this, some of which are the lack of money for transport to payment points, geographical isolation due to spatial planning inherited from the apartheid era, organisational inefficiencies in the payment system and presumptuousness and arbitrariness by civil servants in means testing and disbursement.³⁵ The failings of the system were a major impetus for the formation of a civil society coalition in favour of a universal Basic Income Grant, the BIG campaign.³⁶ Under the BIG scheme, a sum of R100 (\$15) per month would be paid to every South African, irrespective of his or her employment status, age or income, while payments to salary earners above a certain threshold would be recouped through taxation. Proponents of the scheme argue that it would immediately alleviate the poverty of the poorest quartile and significantly improve the food situation of the most vulnerable groups. Given the poor delivery of the existing social security system based on means testing, the BIG campaign has considerable support throughout South African civil society.³⁷

The situation is equally gloomy with regard to the application of minimum wage legislation. Although collective bargaining mechanisms constitute an important element of the post-apartheid political set-up and have been given effect through legislation, agreements struck at the negotiation table are often not adhered to by employers. This holds true particularly for the commercial agriculture sector. The five million strong, nearly exclusively African army of agricultural workers is arguably the poorest and most deprived segment of the South African working class. The owners of large commercial farms are notorious for their total disregard for workers' rights and their use of oppression, intimidation, violence and illegal evictions in subduing the workforce and preventing unionisation — regardless of the existence of laws destined to protect farm workers against such human rights abuses.³⁸

³⁵ See the final report of the Committee of Inquiry into a Comprehensive Social System for South Africa (2002), the so-called 'Taylor Committee', which outlines some of the inadequacies mentioned above.

³⁶ In fact, one of the findings of the Taylor Committee was that a basic income grant would be an effective means of reducing destitution and poverty.

³⁷ More information on the BIG campaign can be obtained at <<http://www.Blacksash.org.za>> (accessed 31 May 2004).

³⁸ The Inquiry into Human Rights Violations in Farming Communities (2003) by the South African Human Rights Commission (<<http://www.sahrc.org.za>>) documents the extent of these practices.

7 Towards a framework law in South Africa

The deficiencies described above attest to the peculiar South African combination of a progressive constitutional text that entrenches the right to food, a Constitutional Court that has tended towards a constructive interpretation of socio-economic rights,³⁹ and the existence of social programmes with a potentially positive impact on the food situation, on the one hand, and the near total lack of actual, effective availability of these dispositions for those affected daily by hunger and malnutrition, on the other. The lack of coherence in legislation and policies with an impact on the food situation, the fragmentation, poor implementation and inadequacy of existing programmes and measures, their inaccessibility to vulnerable groups, who should be the prime beneficiaries — these are factors that make a strong case for a framework law as an additional legal *and* political commitment to the implementation of the right to food in the country. It should be recalled that the South African Constitutional Court endorsed the notion of framework legislation as part of a comprehensive and reasonable programme to implement socio-economic rights in the *Grootboom* case.⁴⁰ The Court said that national framework legislation may be required to meet obligations under section 26 of the Constitution. In the *TAC* case, the Constitutional Court restated the progressive realisation obligation by noting that '[t]he state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society'.⁴¹ With regard to the South African perspective, we think a framework law is necessary to comply with the requirement of comprehensive and reasonable measures as interpreted by the Court. In this respect, the case law of the Court is more compelling than the persuasive nature of the recommendations of the UN Committee.

South African civil society is gradually beginning to develop awareness for the significance of the strong constitutional position of the right to food as a justiciable, individual entitlement. So far, the term 'food security' has been dominating both the language of government and of civil society when discussing solutions to hunger and malnutrition in South Africa. 'Food security' simply implies the general 'availability' of food in a given region, country or household. But the notion of 'food security' does not confer rights on individuals with the corresponding obligation of states to guarantee every vulnerable citizen access to the

³⁹ In the well-known *Grootboom* case on housing rights, see *The Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46; 2000 11 BCLR 1169 (CC).

⁴⁰ *Grootboom* judgment, para 40.

⁴¹ *Minister of Health v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721; 2002 10 BCLR 1033 (CC).

means to feed herself and her family.⁴² It is therefore a term that can serve to distract from the rights approach to the struggle against hunger, hence its popularity in official discourse. Nevertheless, sectors of the South African state apparatus are well aware of the magnitude of the hunger problem and government has been planning to propose a 'Draft Food Security Bill' to parliament for quite some time now.⁴³

The well-intentioned bill, which was drafted at the behest of the Ministry of Agriculture, exemplifies the trappings of policies and legislative measures intended to combat hunger that have been shaped uniquely within the state apparatus without the participation of civil society. Essentially, the draft bill limits itself to creating three government appointed institutions with advisory, monitoring and managerial responsibility for 'food security implementation and management plans' as well as outlining the institutional procedures of co-operation between different government departments and delineating competences. These food security plans consist in policies, the details of which are to be elaborated by the relevant government departments, aimed at achieving 'food security'. The draft bill therefore falls short of the purpose of a framework law, the central elements of which are, on the one hand, the scrutiny of existing legislation with regard to its compliance with the respect-, protect- and fulfilment-bound obligations of the South African state and if found to be in breach, the repealing thereof, and, on the other hand, a commitment to the drafting of additional legislation to further the implementation of the right to food, all of which within clearly set time frames.

Beyond that, any institutionalised process of consultation of civil society is conspicuously absent from the draft bill. Knowledge is superficial about the draft bill, even within sectors of civil society directly involved in work linked to the right to food. If the bill is one day passed in its current form, it is likely that the institutions created by it are doomed to play an insignificant role within the labyrinth of overlapping competences of government offices, whose functions are opaque to all but the most informed outsider. Since there has been little movement in the legislative process on the 'Food Security Bill' since it was first proposed, it must, however, be suspected that there is little political will to even pass this piece of legislation, which already leaves much to be desired.⁴⁴

⁴² See R Künnemann 'Food security — Evading the human right to food?' (2002/01) *Hungry for what is right*, FIAN Magazine 3–4.

⁴³ The bill has not yet been published in the *Government Gazette* and the Ministry of Agriculture, which commissioned its drafting, has been reluctant to disclose information about when it will be tabled.

⁴⁴ Compare the Report of a Seminar on *Critical Issues in the Realisation of the Right to Food in South Africa*, hosted by the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, 14 November 2003 7; available at <http://www.communitylawcentre.org.za/docs_2003/foodseminar.doc> (accessed 31 March 2004).

8 Concluding remarks

In March 2003, a seminar organised by several civil society organisations took place in Johannesburg, South Africa, in which the concept of a framework law for South Africa was explored.⁴⁵ During the seminar, it transpired that any future framework law would have to result from a broad consultation within civil society and constructive debate and engagement with the state and be grounded in a bottom-to-top approach to the strengthening of the right to food. It would also have to be embedded in a political campaign involving diverse forms of action, ranging from constitutional litigation in an exemplary right to food case to mass mobilisation towards an effective agrarian reform. So far, the obligations of the South African state under the right to food have mainly been of interest to South African academic jurists. Yet, the Treatment Action Campaign (TAC), which was launched in 1998 and has since then been mobilising for greater access to HIV treatment, has already set standards with respect to what a concerted and well-organised campaign for the implementation of a Constitutional right can achieve on the ground.

A national right to food campaign might also go a long way in disseminating knowledge about the right to food amongst vulnerable groups and the general public. Under its umbrella, it could unite sections of civil society with an interest in the implementation of the right to food and channel otherwise fragmented activities towards clearly determined objectives. In such a context, the need to debate and spell out the contents of a framework law might be useful in structuring demands and directing the strategies of a broad civil society campaign for the right to food. In fact, such a campaign appears to be necessary on the path to a better implementation of socio-economic rights. With the deficiencies regarding the realisation of socio-economic rights that have been outlined above, South Africa is no different from other states with an extensive and far-reaching body of national human rights law. However, the disparity between the 'the most admirable constitution in the history of the world'⁴⁶ and an increasingly harsh reality for common South Africans is probably as wide as it can get. The limitations of exclusive lobbying for new legal instruments in the face of inertia indicate that civil society and popular mobilisation remain the most important means to move the state apparatus into action. Such mobilisation could take place within a right to food campaign, in which the call for a framework law would play an important role.

⁴⁵ The seminar entitled *Implementing the Right to Food in South Africa — Towards a Framework Law on the Right to Food* was organised by FIAN International in co-operation with the Black Sash, NALEDI, NKUZI, NLC, SAHRC and TRALSO, 7–8 March 2003.

⁴⁶ Quote from Cass Sunstein, a US constitutional lawyer who was involved in the South African Constitution-making, in *Designing democracy — What constitutions do* (2001).

A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development

*Christopher Mbazira**

Advocate of the High Court of Uganda; Assistant Lecturer, Faculty of Law, Makerere University; Research Fellow, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape

Summary

The article first sets out the legal framework for the protection of socio-economic and cultural rights in Africa. Some of the reasons that have been advanced for the non-realisation of socio-economic rights as compared to civil and political rights are discussed. Thereafter the article highlights the background of New Partnership for Africa's Development (NEPAD) and gives a brief description of its objectives and framework. It proceeds to look at the institutional set-up of NEPAD, including the operation of the African Peer Review Mechanism as an implementation strategy of NEPAD's objectives. The article examines how NEPAD intends to address the issue of socio-economic rights through, for instance, ensuring an end to conflicts, democracy and good governance, and improvement of infrastructure and education. The article looks at NEPAD's commitment to ensure improved health and protection of the environment. It discusses NEPAD's approach to the advancement of culture and makes a critique of NEPAD's human rights component. NEPAD is Africa's hope for sustainable development and is a programme that commits African leaders to a number of positive undertakings, but NEPAD needs to be integrated with the African human rights system.

* LLB (Hons) (Makerere), Dip LP(LDC), LLM (Pret), LLD Candidate (UWC); cmbazira@uwc.ac.za

1 Introduction

The realisation of socio-economic rights on the African continent, even at a minimum level, remains poor. The majority of Africans live in poverty, disease and ignorance; they lack food and other basic necessities such as water. These conditions have been exacerbated over the last few decades by the HIV/AIDS epidemic in Africa. Historically, the colonisers of Africa were interested in the maximum exploitation of her natural resources without concern for the socio-economic development of the people. Economic and social infrastructures were erected to facilitate economic exploitation in those areas where natural resources existed.

At the time of independence in the 1960s, though the African nationalists appeared to be committed to socio-economic transformation, the consolidation of Africa's independence and sovereignty was at the centre of this commitment. The Charter of the Organisation of African Unity (OAU Charter), formed in 1963, proclaimed the principle of respect for the sovereignty of African states and the principle of non-interference in the affairs of states.¹ Though the OAU Charter was conscious of the responsibility to harness the natural and human resources of the continent for the total advancement of the people in all spheres of human endeavour,² this was never an objective of the OAU. What followed were military dictatorships, poor leadership, corruption, political conflicts, globalisation and structural adjustment policies, all of which have acted to hamper Africa's development. The provision of social services broke down, the debt burden increased to unacceptable levels; the state withdrew from the provision of essential services such as education and health; and retrenchment aggravated unemployment and household poverty. HIV/AIDS has also affected the labour market and the quality of life.

A new Africa has, however, emerged and this century was declared the 'African century'³ with a leadership committed to the transformation of Africa. The OAU has been transformed into the African Union (AU), expanding its objectives to include the promotion of peace, security and stability; the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter)⁴ and other relevant human rights instruments; the

¹ Article III Charter of the OAU, sourced at <<http://textus.diplomacy.edu/Thina/txtGetXDoc.asp?IDconnv=2830>> (accessed 15 September 2003).

² As above, para 4 of Preamble.

³ See Message from the Chairperson of the AU, the President of South Africa, Thabo Mbeki, on the occasion of the 40th Anniversary Celebrations of the OAU, 25 May 2003; <<http://www.au2002.gov.za/docs/speeches/mbeki030523.htm>> (accessed 15 August 2003).

⁴ Adopted by the Eighteenth Assembly of Heads of State and Government of the OAU at Nairobi in July 1981, entered into force on 21 October 1986.

promotion of sustainable development at the economic, social and cultural level; and to include working with relevant international partners in the eradication of preventable diseases and the promotion of good health.⁵ To achieve these objectives, African leaders have designed a programme and plan of action, the New Partnership for Africa's Development (NEPAD).⁶

This paper examines the implications of NEPAD for the realisation of economic, social and cultural rights in Africa. The paper is divided into four sections. The first section sets out the legal framework for the protection of these rights in Africa. Section two highlights the background of NEPAD and gives a brief description of its framework. This is followed by an outlay of NEPAD's socio-economic development programmes and their relationship to the realisation of socio-economic rights. The last section provides a critique of NEPAD's possible contribution to the realisation of socio-economic rights. This is followed by a conclusion.

2 The legal framework for the protection of economic, social and cultural rights in Africa

2.1 Introduction

The legal framework of protection of economic, social and cultural rights in Africa derives from the universal and regional levels and filters down to the domestic level. At the universal level, socio-economic rights are protected in a number of instruments. The first important instrument to proclaim this protection was the Universal Declaration of Human Rights (Universal Declaration), which incorporated a wide range of economic, social and cultural rights, without distinguishing them from the civil and political rights. However, this declaration is not a treaty and does not impose binding legal obligations. The promulgation of binding treaties was called for and 1966 saw the adoption of the International Covenant on Civil and Political Rights (CCPR),⁷ incorporating civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (CESCR),⁸ incorporating economic, social and cultural rights. In addition to CESCR, socio-economic rights are protected in a number of

⁵ Art 3 Constitutive Act of the African Union, adopted at Lomé Togo, 11 July 2002, at <http://www.au2002.gov.za/docs/key_oau_act.htm> (accessed 25 August 2003).

⁶ Adopted at Abuja, October 2001, the NEPAD document can be accessed at <http://www.avmedia.at/cgi-script/csNews/news_upload/NEPAD_2dCORE_2dDOCUMENTS_2edb.NEPAD%FRAMEWORK%20D> (accessed 16 August 2003).

⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 200A (XXI) of 16 December 1966.

⁸ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

other universal instruments which have been ratified by most of the African countries. These instruments include: the Convention on the Rights of the Child (CRC),⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹¹ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CPMWF).¹²

At the regional level, the African Charter¹³ protects economic, social and cultural rights together with civil and political rights. Though it was drafted at the time of the ideological controversies of the Cold War (which had led to the adoption of CESCRC separately from CCPR),¹⁴ the African Charter recognises the indivisibility and interrelatedness of civil and political rights and economic, social and cultural rights. It is recognised that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality, and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.¹⁵ This author is of the opinion that the inter-dependence of the rights creates a symbiotic relationship. One category of right cannot survive without the other.

Despite such international and regional protection, economic, social and cultural rights continue to be relegated to the status of secondary rights and are considered unjusticiable. In the subsection that follows, this issue is discussed in detail.

2.2 Relegation of socio-economic rights to secondary status

For many decades, socio-economic rights have been relegated to the status of secondary rights. Civil and political rights are thought to be 'absolute' and 'immediate', whereas economic, social and cultural rights are held to be programmatic; to be realised gradually, and therefore not

⁹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1990.

¹⁰ Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979.

¹¹ Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

¹² Adopted and opened for signature, ratification and accession by General Assembly Resolution 45/158 of 18 December 1990.

¹³ African Charter (n 4 above).

¹⁴ The 'Cold War' had led to the division of the world into the eastern and western blocs, with the belief that the eastern bloc was more committed to economic, social and cultural rights and the western was more committed to civil and political rights, and that putting those classes of rights would lead to the non-ratification of such incorporating instrument. But these assumptions were wrong.

¹⁵ Preamble para 8 African Charter.

to be 'real' rights.¹⁶ Despite the fact that the African Charter recognises the idea that civil and political rights cannot be dissociated from economic, social and cultural rights,¹⁷ in practice the latter rights have not materialised.¹⁸ A number of arguments have been advanced to support the view that socio-economic rights are not justiciable. This rejection may be partly associated with a failure to recognise phenomena such as poverty, malnutrition, illiteracy and unemployment as human rights problems.¹⁹ It has been argued that, unlike civil and political rights, socio-economic rights are not real rights.²⁰ They do not pass the *practicability test*. This is based on the conception that these rights require vast resources for their implementation. This view, however, is blind to the fact that not all the duties under CESCRR are to be implemented immediately.²¹ CESCRR requires that states 'take steps to the maximum of [their] available resources, with a view to progressively achieving the full realisation of the rights . . .'.²² Although the UN Committee on Economic, Social and Cultural Rights (the Committee) has said that some of the obligations are of immediate effect,²³ this does not mean that states are compelled to do the impracticable. This argument is also blind to the fact that some civil and political rights may be equally impracticable. The right to life, for example, imposes an obligation on the state to provide security to its citizens. But this does not mean that murders are not committed. It is impracticable to provide every citizen with a policeman at his or her guard.

It has also been argued that socio-economic rights lack the essential characteristics of *absolutism* and *universality*, which are the hallmarks of human rights.²⁴ However, international law discourse has interpreted the term *universality* in connection with cultural relativity, which takes into account the different cultures and customs prevalent in the different

¹⁶ A Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause & A Rosas (eds) *Economic social and cultural rights. A text book* (2001) 9 10.

¹⁷ n 15 above, Preamble para 8.

¹⁸ The practice of the international financial institutions exacerbated this division by requiring that countries improve their records of civil and political rights, for instance, by holding elections and guaranteeing all the political rights like freedom of association. Nothing was done in the area of economic, social and cultural rights; instead, expenditure geared towards these rights was discouraged.

¹⁹ P Baehr *Human rights: Universality in practice* (2001).

²⁰ See M Cranston 'What are human rights' (1973) as quoted by K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* (1999) 58.

²¹ Arambulo (n 20 above) 59.

²² Art 2(1) CESCRR.

²³ General Comment No 3 (Fifth session, 1990) [UN doc E/1991/23] *The nature of the states' obligations* (art 2, para 1 of the Covenant) para 1.

²⁴ M Cranston 'Human rights real and supposed' in D Raphael (ed) *Political theory and rights of man* (1967) as quoted by M Craven *The international Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 10.

states.²⁵ Yet, most of the rights in CESCRR are universal in nature. The right to food, the right to health and the right to education may be considered universal. All people, irrespective of gender, race, social status or nationality, require the realisation of these rights. In addition, this argument does not appreciate the interconnectedness between these rights and some of the civil and political rights such as the right to life and the right to human dignity.²⁶

Another argument advanced is that socio-economic rights are not justiciable because their implementation has cost implications. Also, these rights oblige the state to provide welfare to the individual.²⁷ These views, however, ignore the fact that even civil and political rights have cost implications.

These arguments lack merit. It is clear that socio-economic rights cannot be disassociated from civil and political rights and that development cannot be achieved unless it embraces both categories of rights. This calls for a human rights-based approach to development. The UN Independent Expert on the Right to Development has described a rights-based approach as one which embraces the interdependence of rights — civil, political, economic, social and cultural rights — and which follows procedure and norms of human rights laws, and is transparent, accountable, participatory and non-discriminatory, with equity in decision making and sharing the fruits of the process.²⁸

There is therefore a need for concerted international efforts to realise these rights. The international community has a duty to ensure the realisation of these rights since the arguments against their realisation have been demystified. It has been argued, rightly in the opinion of this author, that efforts of some African states with respect to the enforcement of civil and political rights would not have materialised without the pressures of the international community, NGOs and civil society, and that similar efforts with respect to socio-economic rights might have achieved similar results.²⁹ This compels all inter-governmental organisations to co-operate with NGOs and civil society organisations in order to realise these rights.

²⁵ Arambulo (n 20 above) 62.

²⁶ As above.

²⁷ Eide (n 16 above) 9–28.

²⁸ Fourth Report of the UN Independent Expert on the Right to Development, A Sengupta, E/CN 4/2002/WG.18/2, 20 December 2001 sourced at <<http://www.unhchr.ch/Huridocda/Hurida.nsf/TestFrame/0469e91a828bdeec125bdf004f004f325e?Opendocument>> (accessed 25 August 2003).

²⁹ See SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 202.

3 The New Partnership for Africa's Development is born

3.1 Introduction

Initiatives similar to NEPAD have been undertaken on the African continent, in particular the Lagos Plan of Action (LPA) of 1980.³⁰ LPA was a plan of action born out of the recognition by African Heads of State and Government of the need to take urgent action to provide the political support necessary for the success of measures to achieve self-reliance and self-sustaining development and economic growth.³¹ However, though LPA laid out a number of strategies for the development of agriculture, it was based on macro-economic factors and reflected a continuing passion for large infrastructure projects that had been the emphasis of development planning in the early years of independence.³² In the view of the World Bank, LPA did not give enough room to the private sector and did not concede to reforms necessary in the public sector to stimulate growth.³³ Also notable is the fact that LPA did not say anything about peace, security and good governance, and was for all purposes an 'economistic' document.³⁴ LPA did not in fact take off. It was overtaken by the International Monetary Fund (IMF) and World Bank development programmes.³⁵ These programmes saw the introduction of Structural Adjustment Programmes (SAPs), which required countries to undertake structural adjustments in their economies.

After two decades of SAPs, African leaders recognised that the African continent was not benefiting from these programmes, and that Africa's marginalisation in the global economy, bad governance and insecurity were adversely affecting the development of the African economy. This called for a new plan of action. The need for a new programme of action was born as the Millennium Africa Recovery Plan (MAP), conceived in 2000 by Presidents Mbeki of South Africa, Obasanjo of Nigeria and

³⁰ Adopted at Lagos, July 1980, as Lagos Plan of Action for Economic Development of Africa, 1980–2000 and the Final Act of Lagos 1980, at <<http://www.uneca.org/adfiii/riefforts/ref/other2.htm>> (accessed 16 August 2003).

³¹ The Monrovia Declaration of Commitment of Heads of State and Government of the OAU on the Guidelines and Measures for National and Collective Self-Reliance in Economic and Social Development for the Establishment of a New International Economic Order, adopted at the 16th ordinary session of the OAU Heads of State and Government at Monrovia, Liberia, July 1979.

³² J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle and cultural rights in Africa' (1995) 26(1) *California Western International Journal* 1.

³³ See P Anyang'Nyong'o 'From the Lagos Plan of Action to NEPAD: The dilemmas of progress in independent Africa' at <<http://www.anc.org.za/ancdocs/pubs/umbrabulo15plan.html>> (accessed 15 August 2003).

³⁴ As above.

³⁵ As above.

Boutefilka of Algeria. This was later merged with President Wade of Senegal's OMEGA plan,³⁶ to produce the New African Initiative (NAI) in 2001,³⁷ with its name being changed to NEPAD in the same year.

3.2 What is NEPAD?

NEPAD is a pledge by African leaders, based on a common vision and a firm and shared conviction that they have a pressing duty to eradicate poverty and place their countries, both individually and collectively, on a path to sustainable development and, at the same time, to participate actively in the world economy and body politic.³⁸ Through NEPAD, African leaders have set an agenda for the renewal of the continent. This agenda is based on national and regional priorities and development plans that must be prepared through a participatory process involving the people of Africa.³⁹ It is a framework intended, among others, to define the nature of the interaction between Africa and the rest of the world, including the industrialised countries and multilateral organisations.⁴⁰ This is born out of the realisation that the continued marginalisation of Africa from the globalisation process and the social exclusion of the vast majority of its people constitute a serious threat.⁴¹

To achieve NEPAD's objectives, African leaders take responsibility for: strengthening the mechanisms for conflict prevention, management and resolution; promoting and protecting democracy and human rights; restoring and maintaining micro-stability through fiscal and monetary policies; regulating financial markets and private companies; promoting the role of women in social and economic development by reinforcing their capacity in the domains of education and training, revitalising health training and education with high priority to HIV/AIDS; maintaining law and order; and promoting the development of infrastructure.⁴²

It is believed that, unlike prior endeavours, NEPAD is realistic in the sense that it recognises the dynamics of the current global economy and its inevitability, and suggests a partnership with the outside world, based on mutual commitments and obligations.⁴³ NEPAD incorporates

³⁶ See E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal* 301 302.

³⁷ NAI was approved by the 37th OAU Assembly of Heads of State and Government held in Lusaka, July 2002.

³⁸ n 6 above, para 1.

³⁹ n 6 above, para 47.

⁴⁰ n 6 above, para 48.

⁴¹ n 6 above, para 2.

⁴² n 6 above, para 49. The strategies as highlighted in para 69 are expected to lead to economic, growth and increased employment; reduction of poverty and diversification of productive activities, enhanced international competitiveness and increased exports; and increased Africa integration.

⁴³ J Ohiohenuan 'NEPAD and dialectics of African underdevelopment' (2002) 7 *New Agenda* 9 10, quoted by Baimu (n 36 above) 303.

democracy and good governance and, unlike LPA, NEPAD is conscious of the 'political economy'.⁴⁴ Issues of peace, security and the protection of human rights are considered important to the achievement of NEPAD's objectives.⁴⁵

3.3 The institutional set-up of NEPAD

The implementation of the NEPAD programme is to be overseen by a Heads of State Implementation Committee (HSIC), composed of 14 heads of state.⁴⁶ The functions of the HSIC consist of identifying strategic issues that need to be researched, planned and managed at the continental level; setting up mechanisms for reviewing the progress in the achievement of mutually agreed targets and compliance with mutually agreed standards; and reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays.⁴⁷ To achieve effective implementation, HSIC, with a sense of innovation, established the African Peer Review Mechanism (APRM).

3.3.1 The operation of APRM as an implementation strategy

APRM is an instrument voluntarily acceded to by member states of the AU as an African self-monitoring mechanism.⁴⁸ The mandate of APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.⁴⁹ APRM is the mutually agreed instrument for self-monitoring by the participating member governments.⁵⁰ According to APRM's base document:⁵¹

The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, and sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building.

⁴⁴ Anyang'Nyong'o (n 33 above).

⁴⁵ n 6 above, para 49.

⁴⁶ n 6 above, para 201.

⁴⁷ As above.

⁴⁸ Was created at the first meeting of HSIC, held on 23 October 2001.

⁴⁹ New Partnership for Africa's Development, Declaration on Democracy, Political, Economic and Corporate Governance, Assembly of Heads of State and Government, 38th ordinary session of the OAU, 8 July 2002, Durban, South Africa, AHG/235 (XXXVIII) Annex 1, at <http://europa.eu.int/comm/development/body/eu_africa/docs/NEPAD_Declaration_07072000.pdf> (accessed 20 August 2003).

⁵⁰ 49 NEPAD, the African Peer Review Mechanism (APRM), NEPAD documents at <http://www.avmedia.at/cgiscrypt/csNews/news_upload/NEPAD_2dCORE_2DOCUMENTS_2edb.APRMNEPAD250902.doc> (accessed 15 August 2003).

⁵¹ African Peer Review Mechanism, base document, para 3, at <<http://www.touchech.biz/nepad/files/document/49.pdf>> (accessed 30 March 2004).

APRM has been described as 'the mechanism that is likely to have the most far-reaching implications'.⁵² This is because it entrenches a mechanism of accountability by the state. By requiring states to account on how far they have gone to achieve the objects of NEPAD, APRM will be enhancing these rights indirectly. This is because, as will be seen, some of the programmes have a direct bearing on the realisation of certain socio-economic rights. It should be noted, however, that APRM is optional and will apply only to those states that have acceded to it. In fact, so far only 16 countries have acceded to the APRM document.⁵³ This is in addition to the absence of any enforcement mechanisms to enforce its proposals. However, the importance of APRM as a tool of diplomacy cannot be under-estimated. This will, however, be based on its implementation beyond its being a mere paper tiger.

3.4 NEPAD and socio-economic rights

One of the long-term objectives is to eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable development.⁵⁴ This is done by the adoption of the Millennium Declaration's International Development Goals (IDGs).⁵⁵ This includes the reduction of the proportion of people living in extreme poverty by half by 2015, the enrolment of all children of school-going age in primary school by 2015, progress towards gender equality, the reduction of infant mortality ratios, maternal mortality rates and the provision of access to reproductive health care.⁵⁶ Strategies include increased employment and African integration.⁵⁷

It is acknowledged that peace, security, democracy and human rights are among the conditions for sustainable development,⁵⁸ and commitments are made to guarantee this. When many African countries emerged from colonialism, hopes were high that the era of liberty had dawned. But the current realisation of human rights in Africa has been disappointing, and replicas of authoritarian regime dominate African

⁵² Baimu (n 36 above).

⁵³ The countries are Algeria, Burkina Faso, Cameroon, Republic of Congo, Ethiopia, Gabon, Ghana, Kenya, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa and Uganda (March 2004).

⁵⁴ n 6 above, para 67.

⁵⁵ See United Nations Millennium Declaration, adopted by UN General Assembly Resolution A/RES/55/2, 18 September 2000, at <<http://www.un.org/millennium/ares552e.pdf>> (accessed 26 August 2003).

⁵⁶ n 6 above, para 67.

⁵⁷ n 6 above, para 70.

⁵⁸ n 6 above, para 71.

⁵⁹ See C Dlamini *Human rights in Africa: Which way South Africa?* (1995) 7.

leadership.⁵⁹ According to the UN Secretary-General,⁶⁰ since 1970 more than 30 wars have been fought in Africa, the vast majority of them intra-state in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts. Armed conflicts not only disrupt the provision of socio-economic services, but also consume a large percentage of countries' national budgets. For instance, Uganda spends two per cent of its Gross General Product (GDP) on defence,⁶¹ and less than one per cent on education.

Efforts to manage conflict in NEPAD are directed towards the prevention, management and resolution of conflict, peacemaking and peace enforcement, post-conflict reconciliation, rehabilitation and reconstruction, and combating the illicit proliferation of small arms, light weapons and landmines.⁶² To further these objectives, a subcommittee on peace and security has been established within NEPAD.⁶³ If these commitments are fulfilled, then it will promote peace and security and reduce the occurrence of conflicts. Income previously spent on wars and conflicts may be diverted to the realisation of socio-economic rights. A peaceful environment for the enjoyment of socio-economic goods and services may be created.

A commitment is made to democracy and good governance as conditions for sustainable development. The core components of democracy and good governance that have been identified include political pluralism that, among others, allows for the existence of workers' unions.⁶⁴ This initiative is to take the form of an administrative framework in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and the promotion of the rule of law.⁶⁵ Human rights include socio-economic rights, and the promotion of the rule of law nourishes avenues for enforcement of these rights, not only administratively, but also judicially. This is relevant to the realisation of socio-economic rights, because corruption, lack of accountability and bad leadership are some of the factors that have affected the realisation of socio-economic rights in Africa.

⁶⁰ Secretary-General 'The causes of conflict and promotion of durable peace and sustainable development in Africa' at <<http://www.un.org/ecosocdev/geninfo/afrec/sgreport/>> (accessed 26 August 2003).

⁶¹ A Mutumba-Lule 'Uganda defence budget "too little" '! *East Africa* 1 July 2003 at <<http://www.nationaudio.com/News/EastAfrican/08072002/Regional/Regional140.html>> (accessed 25 August 2003).

⁶² n 6 above, para 74.

⁶³ See Communiqué issued at the end of the first meeting of the HSIC, Abuja, 23 October 2001.

⁶⁴ n 6 above, para 79.

⁶⁵ n 6 above, para 80.

As rightly observed, some African states have had corrupt governments that exploit their own people as viciously as any outsider.⁶⁶ For example, the former President of Zaire (now the Democratic Republic of Congo), Mobutu Sese Seko, is believed to have amassed a fortune far in excess of his country's national debt, impinging upon the people of Zaire's economic and social rights to adequate health care, sufficient food and appropriate shelter.⁶⁷ This has been the trend in most African countries, where resources that could have been used to achieve socio-economic rights, are siphoned into individual pockets and smuggled into offshore bank accounts.

Military leadership and dictatorship have been the order of governance in most African countries. The military dictatorships in Uganda,⁶⁸ the Central African Republic,⁶⁹ Ethiopia⁷⁰ and Nigeria⁷¹ are fresh in our minds. Nigeria, in particular, presents us with a good case study of how dictatorship and bad leadership can impact on socio-economic rights, as exemplified by the African Commission case of *The Social and Economic Rights Action Center & Another v Nigeria (SERAC case)*.⁷² In this case, the African Commission found that the conduct of the Nigerian government by allowing an oil consortium with which it was in partnership, to exploit oil in such a manner that affected the Ogoni peoples' environment and health, amounted to a violation of the provisions of the Charter. The state placed the military at the disposal of the private actors. Peaceful demonstrations were confronted with force, resulting in the destruction of houses and sources of food. Rights violated included the right to the best attainable state of health, clean and healthy environment, right to adequate food and right to shelter.⁷³

In addition to enhancing accountability and reducing incidents of corruption, the commitment in NEPAD to pluralism will improve the realisation of the rights of workers, as enshrined in CESC and the African Charter.⁷⁴ This is relevant because, in so many African countries,

⁶⁶ G Kent 'Globalisation and food security in Africa' at <<http://www.hawaii.edu/7ekent/globalFeb99.htm>>, quoted by Agbakwa (n 29 above) 195.

⁶⁷ Oloka-Onyango (n 32 above).

⁶⁸ Under Idi Amin 1971–1979.

⁶⁹ Jean-Bedel Bokassa 1966–1979.

⁷⁰ Haile Mariam Menghistu 1975.

⁷¹ Sani Abacha 1993–1998.

⁷² Communication 155/96.

⁷³ On the implications of this case, see J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) *American International Law Review* 852.

⁷⁴ Art 15 of the African Charter is very vague and needs elucidation; it is not clear what exactly it guarantees, because it does not appear to go beyond the guarantee of the right to work under favourable conditions. It provides: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.'

workers' unions have been suppressed because of their incessant demands for socio-economic reforms.⁷⁵

The sectoral priorities identified for improvement have diverse implications for the realisation of socio-economic rights. All infrastructure sectors are to be worked on with the objective of improving accessibility and affordability.⁷⁶ Energy, not only for commercial use, but also for domestic use, is acknowledged as a necessity for sustainable development, and commitment is made to reverse environment degradation associated with the use of traditional fuels in rural areas.⁷⁷ This will enhance the realisation of the right to a clean and healthy environment.⁷⁸ Sustainable access to water and sanitation, with attention to the poor, will improve the quality of life of people. Although the right to water is not guaranteed by the African Charter, it is by CDESCR, and just as the rights to food and shelter have been read into the Charter by the African Commission, so may the right to water.⁷⁹

A commitment is made to bridge the gap in education by ensuring realisation of universal primary education, curriculum development, expanded access to education and promoting networks of specialised research and institutions of higher education.⁸⁰ The implication of this is also that it may be used to elaborate on the vague right to education as guaranteed in the African Charter.⁸¹ This is important, because the right to education is a right that has not received adequate attention; it is a right that has not been enforced even by the African Commission, despite the fact that many Africans are illiterate.

It is noted that one of the major impediments facing African development efforts is the widespread incidence of communicable diseases, in particular HIV/AIDS, tuberculosis and malaria. Unless these epidemics are brought under control, real gains in human development will remain impossible.⁸² An estimated one million people die from

⁷⁵ Lesotho presents a good example of the suppression of workers' unions and the role of trade unions in championing not only political reforms but socio-economic transformation as well. The proliferation of Export Processing Zones (EPZ) and Special Economic Zones (SEZ), by which companies negotiate with states to exclude certain labour regulations, has made the formation of trade unions impossible in those areas. See J Oloka-Onyango & D Udagama 'Globalisation and its impact on the full enjoyment of human rights' Preliminary report to the UN Sub-Commission on the Protection and Promotion of Human Rights <<http://www.globalpolicy.org/socecon/un/wtonite.htm>> (accessed 1 September 2003).

⁷⁶ n 6 above, paras 96–102.

⁷⁷ n 6 above, para 108.

⁷⁸ Art 24 African Charter.

⁷⁹ By the African Commission in the *SERAC* case, discussed later in this paper.

⁸⁰ n 6 above, para 117.

⁸¹ Art 17 African Charter.

⁸² n 6 above, para 125.

malaria in Africa⁸³ every year and five Africans die every minute as a result of HIV/AIDS.⁸⁴ Combating HIV/AIDS is vital for any serious poverty alleviation effort in Africa. For instance, in Botswana, where one out of every three adults is living with HIV/AIDS, one quarter of the households is expected to lose a breadwinner within 10 years and *per capita* income of the poor will fall by 13%.⁸⁵ Africa compares very poorly in the health sector. Only 16 doctors are available per 1 000 inhabitants, as against 253 in the industrialised countries.⁸⁶ Commitments are made by NEPAD to ensure improved health by, among others, mobilisation of resources and committing them to this cause. Particular attention is focused on the struggle against HIV/AIDS.⁸⁷

These efforts have, however, been criticised as being based on foreign support without an indigenous focus.⁸⁸ Indeed, this criticism is well founded. Part of the actions to be taken is to lead the international campaign for increased financial support for the struggle against HIV/AIDS and other communicable diseases.⁸⁹ Africa should begin to eradicate its problems by making use of the locally available resources. Over-dependence on foreign aid has for a number of decades retarded Africa's socio-economic development mainly because of the conditions attached to such aid.

An initiative to protect the environment is also to be taken, as the environment is accepted as a prerequisite to sustainable development.⁹⁰ The core objective of this measure is 'to combat poverty and contribute to socio-economic development in Africa'.⁹¹ A healthy environment is believed to greatly contribute to employment, socio-economic empowerment and the reduction of poverty.⁹² This initiative cannot be undermined, considering the weak nature of the right to a clean environment. At a global level, neither the Universal Declaration nor CESCRR lends support to the idea of the existence of a substantive right to a clean environment.⁹³ Africa has taken the lead to strengthen this right,

⁸³ World Health Organisation Africa Malaria Report at <http://www.rbm.who.in/amd2003/amr2003_toc.htm> (accessed 25 August 2003).

⁸⁴ G Neville The millennium development goal: Towards a civil society perspective on reframing poverty reduction strategies in Southern Africa' paper presented at the Southern Africa MDGs Forum, Johannesburg, 2-4 July 2003 (on file with author); see also 5 per minute campaign 2003 at www.actsa.org.

⁸⁵ C Akuke 'Africa and NEPAD: What about HIV/AIDS' at <<http://www.web.ca/7Eicoef>> (accessed 23 August 2003).

⁸⁶ n 6 above, para 126.

⁸⁷ n 6 above, paras 123 & 124.

⁸⁸ Akuke (n 85 above).

⁸⁹ n 6 above, para 124.

⁹⁰ n 6 above, para 135.

⁹¹ n 6 above, para 1 36.

⁹² As above.

⁹³ See G Hindi 'Human rights and protection of the environment' in Eide *et al* (n 16 above) 303 306.

and NEPAD's efforts to give it content should be commended. A clean and healthy environment not only lends a hand to the reduction of poverty, but also to the realisation of the right to health. The violation of the right to a clean environment inevitably leads to a violation of the right to health because of the health hazards that are caused.

It is hard to discern from the NEPAD document whether it really advances the right to culture. It provides as follows:⁹⁴

Culture is an integral part of development efforts on the continent, it is essential to protect and affectively utilise indigenous knowledge that represents the major dimensions of the continent's culture, and to share this knowledge for the benefit of human kind. The New Partnership for Africa's Development will give special attention to the protection and nurturing of indigenous knowledge, which includes traditional-based literacy, artistic and scientific works, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other traditional-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The term also includes genetic resources and associated knowledge.

This paragraph does not advance culture in a holistic manner as understood. In Africa, culture is understood to encompass not only knowledge, but practices as well. Despite the inclusion of the right to culture in CESCRR and the African Charter, cultural practices have received more condemnation than protection. It is true that most cultural practices infringe on a number of rights, especially those of children and women. However, the wholesale dismissal of African culture is unwarranted. One author has observed that this results in a disavowal of culture both as a human right and as a context for the enjoyment of all other rights, and that excluding culture from references of human rights reinforces the marginalisation of the poor and under-privileged.⁹⁵

The realisation that Africa has been marginalised in the process of globalisation and the strategy to achieve African integration is well directed.⁹⁶ This is because the realisation of economic, social and cultural rights in Africa has suffered in the past because of the globalisation trend.⁹⁷ One of the effects has been domination of world

⁹⁴ n 6 above, para 140.

⁹⁵ CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 326 331.

⁹⁶ n 6 above, para 69.

⁹⁷ The UN Secretary-General, Kofi Annan, has pointed out that '[g]lobalisation has an immense potential to improve people's lives, but it can disrupt — and destroy — them as well. Those who do not accept its pervasive, all-encompassing ways are often left behind.' See K Annan Partnership for Global Community: Annual Report of the Working Organisation, New York, United Nations, 1998 para 168, 59 sourced at <<http://www.un.org/ecosocdev/geninfo/afrec/sgreport>> (accessed 26 August 2003).

trade by Transnational Corporations (TNCs), leading to the growth of international capitalism driven by market forces,⁹⁸ perpetuating an ideology of selfishness and exploitation of resources.⁹⁹ According to Udombana:¹⁰⁰

Globalisation has both enriched and endangered people's lives. In some parts of the world, it has created opportunities to create or expand wealth, acquire knowledge and skills, and improve access to goods and services; in short it has improved the quality of life of millions of people out of poverty. However, Africa cannot give such positive testimony regarding the benefits of globalisation, as its citizens have been buffeted by the storm of globalisation . . . [T]here is nothing inherent in the process that automatically reduces poverty and inequality.

From the early 1980s, the IMF and the World Bank embarked on a move to jumpstart Africa's economies so as to overcome underdevelopment.¹⁰¹ Africans were required to reform their economy by adopting the SAPs. With these policies, African countries had to reduce their imports; devalue their currencies; deregulate capital movements; privatise state utilities;¹⁰² dismantle social programmes by cutting government expenditures on social services, such as health care and education; remove subsidies on market staples; and be receptive to foreign investors.¹⁰³ The basic and fundamental right of the state to decide its future was undermined.¹⁰⁴ This culminates in a violation of the right to self-determination.¹⁰⁵

⁹⁸ NJ Udombana 'How should we then live? Globalisation and the New Partnership for Africa's Development' (2003) 20 *Boston University International Law Journal* 293. This, however, is not to say that any particular market ideology is favourable for the realisation of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has said that in terms of the political and economic systems, the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of, a socialist or a capitalist system, or a mixed or other system; that the rights are susceptible to realisation within the context of a wide variety of political and economic systems. See General Comment No 3 (Fifth session, 1990) UN Doc HRI/GEN/1/Rev 1 para 8.

⁹⁹ As above.

¹⁰⁰ As above.

¹⁰¹ Anyang'Nyong'o (n 33 above).

¹⁰² On the effects of privatisation, see Oloka-Onyango & Udagama (n 75 above).

¹⁰³ See SC Agbakwa 'A path least taken: Economic and social rights and the perspective of conflict prevention and peace building in Africa' (2003) 47(1) *Journal of African Law* 38.

¹⁰⁴ A Adedeji 'From Lagos Plan of Action to the New Partnership for African Development and from the Final Act of Lagos to the Constitutive Act: Wither Africa?' Keynote address presented at the African Forum for Envisioning Africa held in Nairobi, Kenya, 26–29 April 2002, sourced at <<http://www.worldsummit2002.org/texts/AdebayoAdedeji2.pdf>> (accessed 25 August 2003).

¹⁰⁵ Oloka-Onyango (n 32 above).

3.5 A critique of NEPAD's human rights component

Church leaders meeting at the Southern African Catholic Bishops Conference stated that, whereas NEPAD's analysis of the nature of Africa's socio-economic and political developments was on the mark, the whole plan was ambitious and its proposals relating to economic globalisation dubious.¹⁰⁶ According to Rights and Democracy,¹⁰⁷ while a number of NEPAD's objectives are laudable, its core strategies strengthen and consolidate many of the same factors that have created obstacles to a sustainable and equitable development in Africa. They stressed that it fails to adequately define democracy or to examine the relationship between development, peace, democracy and the realisation of human rights. They stressed further that it fails to address effectively the external constraints which impede national and regional initiatives to alleviate poverty and promote growth in Africa. The most important criticism that has been directed towards NEPAD is its failure to take a rights-based approach. Economic, social and cultural rights are vaguely referred to in terms of greater access to services instead of as concrete, inherent rights.¹⁰⁸ There is nothing in the NEPAD document about integrating human rights in the development process.¹⁰⁹ This is contrary to the understanding that, if human rights are to be realised, they have to be streamlined in all activities, including development. According to the UN Secretary-General, Kofi Annan,¹¹⁰ human rights are integral to the promotion of peace and security, economic prosperity and social equity. This is particularly relevant to the enforcement of socio-economic rights, because of their recognition as non-justiciable rights in so many constitutions of African countries.¹¹¹

NEPAD differs from its predecessors such as the LPA in that it considers peace, security and human rights as critical to Africa's development. It is, however, in the same way as the African Charter for Popular Participation,¹¹² an initiative of the Heads of State and Government. As a

¹⁰⁶ Wisani Wa Ka Ngobeni 'Bishops blast NEPAD's plan' *Mail & Guardian* 8 March 2002, sourced at <<http://www.web.ca/7Eiccaf>> (accessed 22 August 2003).

¹⁰⁷ Rights & Democracy 'Human rights and democratic development in Africa: Policy considerations for Africa's development in the new millennium' at <<http://www.ichrdf.ca>> (accessed 27 August 2003).

¹⁰⁸ As above.

¹⁰⁹ Baimu (n 36 above) 310.

¹¹⁰ Secretary-General Report to the General Assembly, *Renewing the United Nations: A Programme of Reform A/51/950*, 14 July 1997, para 78.

¹¹¹ See the Constitutions of Ghana and Nigeria which include them as Directive Principles of State Policy.

¹¹² Adopted by the International Conference on Popular Participation in the Recovery and Development Process in Africa, Arusha, Tanzania, 12-16 1990. This conference was organised by the Economic Commission for Africa together with the UN. The Charter acknowledged the importance of citizens' participation in the process in decision making. Participation was also given a definition and strategies set to

result of this, it has encountered some problems in gaining legitimacy.¹¹³ This is a serious shortcoming, because by its nature, the realisation of rights requires the participation of beneficiaries. It is for this reason that NEPAD has in many circles been viewed as dubious economic globalisation.¹¹⁴

It is also important to note that, despite its commitment to human rights, NEPAD does not in any manner establish a direct nexus with the African human rights system. One author has argued that NEPAD is part of the human rights system because it is subordinate to the AU.¹¹⁵ This is only a derived link which does not in any manner define with precision, if at all, the relationship of the two. There is need for the APRM to make reference to the African Commission on matters relating to human rights, this is because the African Commission is in a better position to conduct a human rights audit based on impartial evidence.¹¹⁶ This would also avoid the problem of creating parallel institutions, which poses a danger of conflicting conclusions on questions of human rights. Special reference should have been made to the African human rights system and a commitment made to strengthen it. It is hard to resist the temptation to conclude that the reference to human rights in NEPAD is rather perfunctory and not a genuine commitment.

Despite such shortcomings, NEPAD cannot be dismissed as having no positive influence on the realisation of socio-economic rights. Socio-economic rights, unlike the civil and political rights, are couched in very vague and wide language in international instruments, which makes their enforcement difficult.¹¹⁷ In addition to the elaboration of the legal obligations deriving from these rights, there is a need to establish institutions to realise these rights, and NEPAD is one such institution and administrative set-up. It cannot, however, be concluded that NEPAD follows a holistic and logical elucidation of socio-economic rights in the African Charter. The failure to streamline human rights in the development process is another important shortfall. Reference to the

achieve it. See K Oteng Kufor 'The African Charter of Popular Participation in Development and Transformation: A critical review' 2000 18(1) *Netherlands Quarterly of Human Rights* 1.

¹¹³ See Anyang'Nyong'o (n 24 above), who, however, adds that this critique need not be carried to its absurd conclusion because it is the nature of leaders that they must lead first and foremost in ideas.

¹¹⁴ n 92 above.

¹¹⁵ Baimu (n 36 above) 312.

¹¹⁶ By art 45 of the African Charter it is the African Commission that is charged with the duty to promote human rights, which it has done, among others, through its promotional visits.

¹¹⁷ Compare the right to be heard under sec 7 of the African Charter and the right to health under sec 16 for a detailed discussion of the nature of socio-economic rights provisions. See M Scheinin 'Economic and social rights as legal rights' in Eide *et al* (n 16 above) 29.

African Charter and other human rights instruments is in itself not sufficient.

NEPAD's failure to address head-on some of the external factors that are impacting on the full realisation of the right to health cannot go without comment. In particular, the idea of compulsory licensing to ensure the production of cheap generic drugs stands out in the debate.¹¹⁸ The recent successful pressure on the World Trade Organisation to allow developing countries to import cheap generic drugs should have been spearheaded by African leaders and merely by pressure from civil society.¹¹⁹

4 Conclusion

More than 15 years have passed since the African Charter came into force, but there is no evidence of the full realisation of all the rights in the Charter. Socio-economic rights have suffered the most. This is due to a number of reasons, as has been discussed above. NEPAD is viewed as Africa's hope for sustainable development, and as a programme that allows Africa to benefit from the forces of globalisation that have left Africa marginalised. The new programme commits the African leadership to a number of undertakings which, if effected, would have positive implications for the realisation of socio-economic rights. However, if human rights are to be advanced through NEPAD, they need to be streamlined in all the programmes. The NEPAD programme needs to be integrated with the African human rights system. APRM should prioritise the realisation of socio-economic rights. Endeavours to improve health and to eradicate diseases should be internally focused, instead of relying on external sources. This applies to all the initiatives to provide funding for NEPAD's programmes. Heavy reliance should be placed on the exploitation of African vast resources for such funding.

On the whole, NEPAD has positive implications for the realisation of socio-economic development in Africa, but its success is dependent on being enforced in a holistic manner. As seen above, initiatives similar in nature to NEPAD have not been enforced.

¹¹⁸ It is believed that in international commerce, countries are permitted to use patents without permission of the patent holder in return for a reasonable royalty on sale, and this principle is believed to be part of the Trade-Related Aspects of Intellectual Property Rights (TRIPS). See Human Development Report 2001, at <<http://hdr.undp.org/reports/global/2001/en/>> (accessed 28 August 2003).

¹¹⁹ See WTO decision 'Implementation of paragraph 6 of the Doha Declaration on Trips and Public Health' at <http://www.wto.org/english/tratop_e/implem_para6_e.htm> (accessed 2 September 2003).

The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament

*Tsegaye Demeke**

First Secretary, Ministry of Foreign Affairs, Ethiopia

The decision to build society on the basis of reason and justice is the beginning of a never-ending process: it will never be completed because neither reason nor justice can ever be satisfied.

Jean Guéhenno (1939)¹

Summary

This article starts by tracing the history of the establishment of the Pan-African Parliament through the OAU/AU system. It proceeds to look at the main features of the Pan-African Parliament. It focuses on its functions and powers, appointment and composition of the Parliament. It also pays attention to the question of immunity, multilingualism and the not yet decided question of where the Pan-African Parliament will be situated.

While looking at the development of the Pan-African Parliament, the article also looks at the stages of development that the European Parliament has gone through, especially with regard to how the Pan-African Parliament could benefit from its experience.

* LLB (Addis Ababa); studying European Law and Policy at the University of Portsmouth, United Kingdom and The Hague University of Professional Education, Institute of Higher European Studies, the Netherlands; tsegayedemeke@yahoo.com or tsegadememe@hotmail.com. The ideas put forward in this article are entirely those of the author and do not in any way reflect the position of any government or private institution.

¹ Directorate General For Research and the Human Rights Unit *The European Parliament and human rights* (1994) 5.

1 Introduction

The inaugural session of the Pan-African Parliament took place at the United Nations Economic Commission for Africa Conference Centre in Addis Ababa, Ethiopia on 18 March 2004. The establishment of the Pan-African Parliament will enable all the peoples of Africa to get involved in discussions and decision-making on the problems and challenges which beset Africa.² It also represents a common continental vision that will strengthen the African Union (AU).³

The Pan-African Parliament dates back to the Abuja Treaty, which was signed by African leaders in Abuja, Nigeria, in June 1991, and which came into force in May 1994. Following this treaty, the 4th extraordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) held in Sirte, Libya in September 1999, adopted the Sirte Declaration, calling for the speedy establishment of the institutions provided for in the Treaty Establishing the African Economic Community signed earlier in Abuja, Nigeria. Later on, the 36th ordinary session of the Assembly the OAU held in Togo in July 2000 adopted the Constitutive Act of the AU with the Pan-African Parliament as one of the organs of the AU.

The process took a giant step forward when the 5th extraordinary session of the Assembly of Heads of State and Government of the AU, held from 1 to 2 March 2001 at Sirte, Libya, adopted the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (Protocol). So far, 41 countries have accepted the Protocol relating to the Pan-African Parliament and deposited their instruments of ratification at the AU Commission. The Protocol entered into force on 14 November 2003, after having obtained the necessary 24 ratifications. Accordingly, the Pan-African Parliament has now become one of the eight main organs of the AU.⁴

In the wake of this important development, it would be appropriate to ask what the citizens of Africa should expect from the Pan-African Parliament and how this vital organ of the AU may in the future transform itself. This article attempts to consider some of the salient features of the Pan-African Parliament. It focuses, in particular, on its composition, functions and powers as they are enshrined in the

² <http://www.africa-union.org/news_Events/> (accessed 11 March 2004).

³ The African Union was launched in South Africa, Durban at the Summit Meeting of African Heads of State and Government, 8 to 10 July 2002.

⁴ The eight organs of the AU include the Assembly, the Executive Council, the Pan-African Parliament, the African Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committees to handle specialised sectoral issues and the African Central Bank (with the African Monetary Fund and the African Investment Bank).

provisions of the Protocol. In many respects, not only the current structure of the AU seems to resemble the European Union (EU), but also a few characteristics of the European Parliament⁵ in its early stage of formation are shared by the new Pan-African Parliament.

This article compares and contrasts the Pan-African Parliament with the European Parliament, which precedes the former by half a century, with the hope that it would give better insight on the prospects and challenges that lay ahead of the Pan-African Parliament before it becomes a fully-fledged regional institution. Questions regarding the determination of the permanent seat and languages of the Pan-African Parliament will also be raised and be compared to the experience of the European Parliament. Finally, concluding remarks will restate some of the findings of the study.

2 Functions and powers

There are certain important characteristics that most parliaments, national or regional, share regarding their mandate. They exercise legislative, budgetary and supervisory powers that enable them to play a fundamental political role at the national or regional level. In light of this, the scope of the powers of the Pan-African Parliament shall be considered in comparison to that of the European Parliament, whose decision-making role has been growing steadily.

2.1 Legislative power

During the first term of its existence, the Pan-African Parliament shall have only consultative and advisory powers. Later it will be vested with legislative powers as may be defined by the Assembly.⁶ Hence, it does not possess important legislative and supervisory powers to participate in important decision-making processes in the AU pertaining to the budget of the organisation. It will merely advise and consult with other organs of the AU with a view to promoting the objectives of the AU, including the promotion of human rights and democracy, good governance, transparency and peace, security and stability in Africa.⁷

⁵ The European Coal and Steel Community Treaty (ECSC) of 1952 established the European Parliament (originally named the Assembly) and it was given few powers under the 1957 EEC and Euratom Treaty.

⁶ Arts 2(3)(i) & 11 Protocol.

⁷ Arts 2(3)(i) & 3(2) & (3) Protocol.

2.1.1 The European Parliament

In the same way, the European Parliament has come a long way from being a purely consultative assembly to being co-legislator with the Council of the European Union (Council). The development of the legislative powers of the European Parliament can be said to have passed through three stages, namely, *consultation*, *co-operation* and *co-decision*.

The original European Parliament (then named the Assembly), as its current African counterpart, was a classical consultative body intended to follow only *consultative* or *advisory* procedure. The opinions it gave were non-binding and were mostly ignored by the true decision makers in the Council.⁸ It neither had power of control over the budget of the European Communities (now the EU), nor an effective ability to influence legislative outcomes.⁹ It has, however, achieved more legislative and supervisory and even litigation powers, both in its own practice and through successive treaty amendments.¹⁰

The introduction of the *co-operation procedure* by the Single European Act in 1987, some 35 years after its creation, represented a major step forward in the development of the legislative power of the European Parliament, marking the beginning of a new 'triangular relationship' between the Council, the Commission and the European Parliament. According to the co-operation procedure, the European Parliament has the power to reject a legislative text. This can only be overruled through unanimous agreement of the Council and with the agreement of the Commission (which may decide to withdraw the proposal altogether). Besides, the European Parliament can propose amendments to a text, which the Council can only modify through unanimous vote, whereas a qualified majority is needed to adopt the amendment proposed by the European Parliament.¹¹ Neuhold noted that the introduction of the co-operation procedure by the Single European Act constituted the beginning of the 'flexing of the legislative muscles' of the European Parliament.¹² The European Parliament did not at this stage possess the right to veto proposed legislations.

The Maastricht Treaty, which came into force in 1993, introduced a *co-decision* procedure, in which the final legislative act requires

⁸ C Neuhold 'Into the new millennium: The evolution of the European Parliament from Consultative Assembly to co-legislator' (2000) <<http://eipa.nl>> 3; see also S Hix *et al* 'Fifty years on: Research on the European Parliament' (2003) 41 *Journal of Common Market Studies* 191.

⁹ A Maurer 'The legislative powers and impact of the European Union' (2003) 41 *Journal of Common Market Studies* 227; see also G de Búrca & P Graig *EU law: Text, cases and materials* (2003) 79.

¹⁰ E Andrew *A textbook on European Union law* (1998) 47.

¹¹ F Jacobs *et al The European Parliament* (1992) 185.

¹² Neuhold (n 8 above) 4; see also B Rittberger 'The creation and empowerment of the European Parliament' (2003) 41 *Journal of Common Market Studies* 217.

Parliament's explicit approval. Here, the European Parliament appeared to gain more control over the legislative process as its powers also included the power to veto in several policy areas.¹³ Another innovative element of the co-decision procedure lies in the option to convene a conciliation committee in cases where the Council and the European Parliament are unable to reach a compromise on a proposed legislative text.¹⁴ This change marked the point at which in the Community's development, Parliament became the first chamber of a real legislature; the Council is obliged to act like a second legislative chamber from time to time rather than a ministerial directorate.¹⁵ Corbett and others described the change as 'a classic two-chamber legislature: in which the Council represents the states and the European Parliament represents the citizens'.¹⁶ Subsequently, the Treaty of Amsterdam, signed in 1997 and which entered into force in May 1999, considerably altered the institutional balance between the Union's main actors and increased the European Parliament's powers in several ways. It extends the areas where the co-decision and assent procedure apply, simplifying the co-decision procedure, recognising Parliament's involvement within the field of home and judicial affairs, and changing the procedures for the nomination of the Commission President and the other commissioners.¹⁷

However, this does not mean that the European Parliament has been put on a completely equal footing with the Council. There are still some important policy areas in which the Council has the possibility, should conciliation with the European Parliament fail, to pursue with its common position by qualified majority.¹⁸ The European Parliament was then left with a 'take it or leave it' option of either rejecting the text by an absolute majority, which it should do within six weeks, or, otherwise, the decision of the Council is upheld.¹⁹ The powers of the European Parliament have not been extended to cover the whole of legislation and of the budget of the Community. There are still important policy areas, such as taxation and the annual farm price review,²⁰ in which the role of the European Parliament is limited to simply giving an opinion, and the Council is free to pursue its own decision, even if agreement is not reached with the European Parliament.²¹ In other words, the European

¹³ Neuhold (n 8 above) 4.

¹⁴ As above.

¹⁵ Maurer (n 9 above) 227.

¹⁶ R Corbett *et al* 'The European Parliament at fifty: A view from the inside' (2003) 41 *Journal of Common Market Studies* 353.

¹⁷ Maurer (n 9 above) 228.

¹⁸ Neuhold (n 8 above) 5.

¹⁹ As above.

²⁰ The European Parliament, <http://www.europarl.eu.int/abc/default_en.htm> (accessed 11 March 2004).

²¹ As above, 5.

Parliament has not fully assumed the powers of the 'federal house of the people'.²²

2.1.2 The Pan-African Parliament

Considering its current consultative mandate, one may be tempted to conclude that the Pan-African Parliament is not a powerful institution. It may, of course, also be argued that a schedule is made to transform the Pan-African Parliament into a legislative body by the year 2007. It remains to be seen whether this is a realistic timetable. Be that as it may, the Pan-African Parliament should be prepared to endure bottlenecks that may be unfolding in the future as it strives to acquire more decision-making power. Also, the members of the Pan-African Parliament should be prepared to continue to make a relentless effort to enable their institution to achieve an effective legislative authority.

2.2 Budgetary power

It has been stated in the Protocol that the annual budget of the Pan-African Parliament shall constitute an integral part of the regular budget of the AU. It shall be drawn up in accordance with the financial rules of the AU and approved by the Assembly until the Pan-African Parliament starts to exercise legislative powers.²³ In other words, the Pan-African Parliament prepares a draft budget proposal and takes part in its discussion only to give an opinion or a recommendation.²⁴ That means that the purse strings still remain under the control of the Assembly who will ultimately approve the budget. This arrangement does not allow much freedom to the Pan-African Parliament to prepare an independent work plan in keeping with the priorities it sets for itself.

On the contrary, the European Parliament has significantly wider budgetary powers. The European Parliament and the Council are two arms of the budgetary authority. In other words, they share the power of the purse, just as they share legislative power. By exercising its budgetary power, the European Parliament expresses its political priorities. It has the last word on most expenditure in the annual budget, such as spending on less prosperous regions and spending on training to help reduce unemployment. The European Parliament can also reject the budget if it believes that it does not meet the needs of the Union, and it has actually exercised this power on at least two occasions so far. Budgetary power is, therefore, one of the crucial instruments to any

²² J Pinder 'Steps towards a parliamentary democracy for Europe: The development of the European Parliament' in F Breuss *et al Vom Schuman-Plan zum Vertrag von Amsterdam Entstehung und Zukunft der EU* (2000) 218.

²³ Arts 15(1) & 15(2) Protocol.

²⁴ Art 11(2) Protocol.

parliamentary institution, national or regional, alike, which the Pan-African Parliament deserves to attain in the future.

2.3 Supervisory power

The Protocol provides that the Pan-African Parliament may on its own initiative examine, discuss or express an opinion on any matter, *inter alia*, matters pertaining to respect of human rights, the consolidation of democracy, the promotion of good governance and the rule of law.²⁵ Whether this important provision could be construed to include the power to establish committees of inquiry is not, however, evident in the text of the Protocol.

By contrast, the European Parliament exercises democratic oversight of all Community activities. This power, which was originally applied to the activities of the Commission only, has been extended to the Council and the bodies responsible for foreign and security policy. To facilitate this supervision, the European Parliament can set up temporary committees of inquiry. This important supervisory mandate has not only been a longstanding practice, but has also acquired a treaty base.

The European Parliament has set up committees of inquiries on several occasions.²⁶ In 1998, the European Parliament, concerned about mismanagement of expenditures by the Commission (the executive body of the EU), decided not to endorse the 1997 report of the Court of Auditors. Instead, it set up an independent *ad hoc* 'Committee of Experts' to investigate irregularities in the report. The Committee produced a devastating report, exposing mismanagement, corruption and fraud. Accordingly, the European Parliament made it clear that it would be using its power of dismissal against the Commission, which resulted in the resignation of the entire Commission, including its President, Jacques Santer, for the first time in the history of the EU, in March 1999, pre-empting the vote of censor by the European Parliament which could have otherwise brought about the same result.²⁷ The events of March 1999 showed that the European Parliament, securing the removal of its executive, was coming of age as the principal organ of democratic control over the other institutions of the EU.²⁸

By the same token, it may be argued that the Pan-African Parliament needs to be given a supervisory mandate that would enable it to effectively ensure proper checks and balances among the different institutions of the AU. This may be one of the most important issues

²⁵ Art 11(1) Protocol.

²⁶ n 20 above.

²⁷ Pinder (n 22 above) 218.

²⁸ As above, 219.

during the drafting of the rules of procedure of the Pan-African Parliament.

2.4 Litigation power

The progressive recognition of the right of the European Parliament to institute litigation against the other institutions of the EU and to respond to litigation that may be brought against it, is significant. The recognition of the *locus standi* of the European Parliament before the European Court of Justice, indeed, illustrates the speed at which the European Parliament is moving towards acquiring significant status and influence.²⁹

The Protocol on the Pan-African Parliament is silent on this matter. But, if one considers the problem of violations of human rights and the low level of development of democracy and good governance on the continent, it may be suggested that the Pan-African Parliament needs to be granted *locus standi* to bring a case against the other institutions of the AU before the two regional courts.

In fact, the Constitutive Act³⁰ of the AU has established the African Court of Justice as one of the eight main organs of the AU. Besides, the Protocol Establishing the African Court on Human and Peoples' Rights grants automatic access to African intergovernmental organisations to institute litigation before this regional Human Rights Court.³¹

It can therefore be argued that the Pan-African Parliament should have access to the African Court of Justice, as well as to the African Court on Human and Peoples' Rights. The Protocol on the Pan-African Parliament should have reflected clearly whether the Pan-African Parliament enjoys standing before these two regional courts. The fact that this is not mentioned seems to have been an oversight. Thus, ensuring the right to litigation of the Pan-African Parliament is one of the issues that need to be addressed explicitly during the drafting of the forthcoming Rules of Procedure for the Pan-African Parliament.

2.5 The right to petition

The functions and powers of the Pan-African Parliament do not include the right to receive complaints from citizens, whereas the right of citizens of member states to petition the European Parliament on issues of alleged human rights violations that directly and personally concern them is guaranteed.³²

²⁹ De Búrca & Graig (n 9 above) 84–85.

³⁰ Adopted by the 36th ordinary session of the Assembly of Heads of State and Government of the AU which convened in Togo from 10 to 12 July 2000.

³¹ Art 5(1) Protocol Establishing the African Court on Human and Peoples' Rights <<http://www.africa-union.org>> (accessed 11 March 2004).

³² UK Office of the European Parliament 'The Right of petition to the European Parliament' <<http://www.europarl.org.uk/publications>> (accessed 10/05/04).

The European Parliament is not, however, a judicial authority and hence cannot pass judgment on, or annul legal decisions taken by member states. Instead, depending on the circumstances, the European Parliament may forward the petitions to the European Commission, the Council of Ministers or to the appropriate national authorities, requesting their further action or opinion. In addition, the European Parliament appoints the European Ombudsman to which citizens can appeal in respect of cases of misadministration by EU institutions. Accordingly, there are several instances in which the European Parliament has achieved results in influencing member states and the Community to alter their legislation to redress situations that caused the infringement leading to the petitions.³³

Thus, the Pan-African Parliament may also envisage guaranteeing the rights of citizens to petition before it as well as the power to establish an African Ombudsman, which would investigate complaints of misadministration by other institutions of the AU that may affect the rights of individual citizens.

2.6 Human rights

2.6.1 The European Parliament

The original intention behind the establishment of the EU (then the EEC) was essentially economic — the promotion of economic integration among the member states. Accordingly, the founding treaties — the Treaty of Paris (1952) and the Treaty of Rome (1957) — did not explicitly refer to human rights.³⁴ The European Parliament has, however, attached great importance to the protection of fundamental human rights, both inside and outside the EU, especially since the beginning of the 1980s. It has done so using the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe as a valuable, and indeed unique, source of inspiration and as a reference point.³⁵

Basically, the human rights-related activities of the European Parliament can be said to be threefold. The first is *deliberation*, in which the European Parliament adopted several texts, mostly in the form of annual resolutions, on human rights. The second is *monitoring*, in which the European Parliament exercises vigilance on what its rules of procedures describe as 'topical and urgent subjects of major importance'. On several occasions, the European Parliament has adopted passionate and strongly worded resolutions that condemned specific cases of grave violations, which contributed towards the

³³ As above.

³⁴ n 1 above, 7.

³⁵ As above.

practical and effective implementation of individual and collective freedoms.³⁶ The third is *supervision*, in which the European Parliament is asked for its opinion on agreements between the Community and third countries. This empowers the European Parliament to exercise, if necessary, a genuine right of veto to reject the proposed agreement on human rights grounds. It has actually been able to ensure the release of political prisoners by refusing to subscribe to a series of financial protocols signed with third countries on the ground of human rights protection.³⁷

Similarly, the Cotonou (previously the Lomé) Convention signed between the EU and the 77 African, Caribbean and Pacific Group of States (ACP) countries contain provisions for the suspension of aid to states guilty of serious human rights violations, mainly as a result of unyielding effort of the European Parliament despite persistent and obvious lack of interest on the part of the Council and the Commission to take up the matter giving primacy to the political as well as strategic exigencies of the Cold War period.³⁸

Besides, in 1988, the European Parliament established the Sakharov Prize, awarded annually to one or more individuals or group who have distinguished themselves in the struggle for human rights. Nelson Mandela and Anatoï Marchenko were the first to win the prize in 1988.³⁹ The European Parliament also made a major contribution to the drafting of the Charter of Fundamental Rights of the European Union and it is now calling for its incorporation as an integral part of the treaty of the European Union, which originally contained no reference to human rights.⁴⁰ As mentioned above, the European Parliament promotes the protection of the rights of EU citizens through its complaints procedure, as well as using its power to appoint the European Ombudsman.

2.6.2 The Pan-African Parliament

Fortunately, at the outset, the Protocol gives an explicit mandate to the Pan-African Parliament, which the European Parliament lacked, to promote human rights. Accordingly, the Pan-African Parliament can play a significant role in the promotion and protection of human rights and democracy on the continent.

In this regard, the Pan-African Parliament may issue resolutions as well as annual reports on human rights and democracy on the continent that

³⁶ As above, 7–8.

³⁷ As above.

³⁸ D Frisch (1998) 'The political dimension of Lomé, The ACP-EU' Courier No 166, Nov–Dec 1997 78–82.

³⁹ n 1 above, 10.

⁴⁰ Europarl <http://www.europarl.eu.int/presentation/default_en.htm> (accessed 12 May 2004).

could bring serious human rights abuses on the continent to the attention of member states as well as the other institutions of the AU, in particular the Assembly, thereby influencing them to take appropriate action that would improve the situation. The Pan-African Parliament may also adopt a parliamentary questions procedure, which would enable it to undertake direct consultation with national parliaments of the concerned member states to verify the alleged violation in order to find an appropriate solution that would rectify the situation.

Finally, the Pan-African Parliament may also be empowered to introduce procedures that would guarantee citizens the right to petition the Pan-African Parliament, as well as to appoint the African Ombudsman. The last two procedures are particularly relevant, as they would bring the Pan-African Parliament closer to the public, whose interests it mainly aspires to defend and promote.

3 Appointment and composition

In the Pan-African Parliament, each country shall be presented by five parliamentarians from its national parliament (at least one of whom must be a woman).⁴¹ Members of the Pan-African Parliament shall be elected or designated by the respective national parliaments or any other deliberative organ of the member state, from among their members.⁴² During the nomination of representatives to the Pan-African Parliament, the national parliaments shall have due regard to the diversity of political opinions.⁴³

3.1 Gender representation

One of the strong points of the Protocol is the emphasis it gives to ensuring gender representation. The seats allocated to women members of the Pan-African Parliament now stand at 20% and it can be said to be a good beginning. It indicates significant recognition of the need of improving the situation of African women at the continental level. By contrast, the representation of women in the European Parliament grew in time. In 1979, 16,5% of members of the European Parliament were women, and this figure has risen steadily over successive parliamentary terms, reaching 27,5% on 1 January 1996 and 29,7% after the 1999 elections.⁴⁴

⁴¹ Art 4 Protocol.

⁴² Art 5(1) Protocol.

⁴³ Art 4(3) Protocol.

⁴⁴ The European Parliament, <http://www.europarl.eu.int/abc/default_en.htm> (accessed 11 March 2004).

Despite the positive gesture of the Protocol to tip the gender balance in the Pan-African Parliament, the lack of participation of African women seems to be a profound problem. For several reasons, in the majority of African states, the representation of women in national parliaments and other political bodies is very limited. Similarly, their representation at important regional intergovernmental political organs, such as the Assembly of the AU and the Executive Council, is, at best, not satisfactory or, at worst, non-existent. Hence, due emphasis should be given to enhancing the political involvement of women at the national parliament and other political bodies in order to ensure their effective participation in the Pan-African Parliament.

3.2 Fair and balanced representation

The composition of the Pan-African Parliament poses certain difficulties and dilemmas, one of which is the acceptability of the principle of representation by an equal number of delegates from each member state, irrespective of their population size. By contrast, the European Parliament gives some recognition to differences in the relative population sizes of the various members with a view to ensuring appropriate representation of the peoples of the member states. However, the division of seats in the European Parliament was not based on strict mathematical proportionality, as that would also have meant that smaller member states would have enjoyed negligible representation or would have been denied representation altogether.⁴⁵

Hence, ensuring fair and balanced representation that will take into account the population size of all the member states should be one of the issues that the Pan-African Parliament needs to address in the future.

3.3 Political groupings

Since its inception, the European Parliament has had political groupings rather than national groupings. When the Common Assembly (CA) first convened on 10 September 1952, there were no ideologically based groups and members sat in alphabetical order, as was the case in other international assemblies. The first draft of the Rules of Procedure of the CA made no mention of political or ideological affinity, while national identity was mentioned in a number of key rules.⁴⁶

Nevertheless, political groupings in the CA soon became both a factual and legal reality. During the discussion and debate over the definitive draft version of the new Assembly's Rules of Procedure it was suggested that the nomination of committee members attempt to

⁴⁵ A Evans *A textbook on European Union law* (1998) 47.

⁴⁶ S Hix *et al* 'The Party System in the European Parliament: Collusive or Competitive?' (2003) 41 *Journal of Common Market Studies* 312.

balance both representation of the various member states and 'the various political traditions'. On 16 June 1953, the Assembly, recognising the crucial role of political parties in the internal organisation of the Assembly, unanimously adopted the proposal.⁴⁷ Accordingly, the three predominant party families of Western Europe at the time, namely Christian Democrat, Socialist and Liberal, soon formed their groupings in the CA. New party groupings, such as the Greens and non-attached members, came later.⁴⁸ Thus, the European Parliament party system became more able to structure transnational ideological positions and to translate these into competition over policy outcomes.⁴⁹

On the contrary, many African countries do not have distinctly clear national alignment of political forces, let alone cross-boundary party coalitions, as is commonly the practice in the European context. In other words, while the European Parliament has a well-developed alignment of political forces within its structure, this is not the case in the African context. In the African political milieu, the alignment of national political groupings does rarely subscribe to the conventional alignment of political parties based on ideologies, such as the Liberal, the Socialist, the Social Democrat, the Green, Conservative and the like, which is prevalent in Europe and other parts of the world. More often than not, political parties in Africa organise themselves along religious or ethnic affiliations.⁵⁰ The religious, tribal or ethnic origin of political leaders or election candidates matters more to their constituencies than their political ideologies and the policies they promise to pursue once they come to power or are elected to the national parliaments or other political organs.

Clearly, the dilemma as to what kind of cross-boundary political or ideological alignment, if any, can be created to bring members of the Pan-African Parliament into clearly defined groupings, remains difficult to answer at this moment. This would be interesting to observe in the future. Yet the representation of political groupings with numerous backgrounds which possess hardly any common political platform, may render reaching a compromise and prompt decision-making in the Pan-African Parliament difficult, if not impossible, at least for the near future.

Let us remain optimistic that this problem will not endure longer than expected and that the political parties that will be represented in the Pan-African Parliament will manage to unite themselves along certain commonly defined political programmes, transcending the prevailing

⁴⁷ As above.

⁴⁸ As above, also 327; see also Evan (n 45 above) 47.

⁴⁹ As above, 328.

⁵⁰ S Makinda 'Democracy and multi-party politics in Africa' (1996) 34 *Journal of Modern African Studies* 557.

diversity among the African political cultures. In the meantime, the Pan-African Parliament, like the European Parliament, should spur the process of formation of continent-wide political groupings in Africa through its rules of procedures. Only then would such highly diversified national political systems leave space for emerging cross-national party coalitions that would be formed within the Pan-African Parliament.

3.4 Representation of opinions

The Protocol provides that the representation of each member state must reflect the political opinion in each national parliament.⁵¹ Yet, there are no common rules of procedure that will be applied by the national parliaments in the appointment of their representatives to the Pan-African Parliament. It can, however, be observed from the experience of the European Parliament that the representation of all national opinions may involve an unforeseen predicament.

Initially, the mode of appointment of delegates to the European Parliament from among their own members was left to be determined in accordance with a procedure adopted by each individual member state, ensuring appropriate representation of the various political ideologies.⁵² In other words, the political breakdown of Parliament depended on the policy of national parliaments in nominating their delegations.⁵³ However, this did not prevent the exclusion of a number of parties, which had in effect made the Assembly less representative.⁵⁴ During the 1950s and the 1960s, the French and the Italian Parliaments selected members only from majority parties, or else allocated a token representation to some opposition parties, and above all excluded their powerful opposition parties — the Communists.⁵⁵ The election of members of the European Parliament through direct universal suffrage has helped to change the situation.⁵⁶

As we all know, the process of democratisation is a recent phenomenon in Africa, starting at the end of the Cold War. Yet the resurgence of democracy since the late 1980s has not produced a clear-cut division between democratic and non-democratic countries, but rather a wide spectrum of semi-democratic or semi-autocratic regimes with an extensive 'grey area' in between.⁵⁷ Monkam observed that

⁵¹ Art 4(3) Protocol.

⁵² G van Oudenhoove *The political parties in the European Parliament. The first ten years (September 1952–September 1962)* (1965) 12.

⁵³ J Fitzmaurice *The European Parliament* (1978) 15.

⁵⁴ M Wastlake *A modern guide to the European Parliament* (1994) 185; see also Van Oudenhoove (n 52 above) 12.

⁵⁵ Fitzmaurice (n 53 above) 15.

⁵⁶ Van Oudenhoove (n 52 above) 12.

⁵⁷ C Santiso 'Promoting democracy by coordinating aid? Towards a more effective EU development assistance' (2003) abbreviated version of a large study in the *European Journal of Development Research* 203:7.

sub-Saharan Africa still has 'sham democracies', in which the rule of the single party, the state party, operates under cover of democracy.⁵⁸ Under circumstances where the ruling parties dominate the overwhelming majority of African national parliaments and the role of the opposition is hindered or weakened, the practical implementation of ensuring the representation of the various political opinions and opposition political parties in the Pan-African Parliament will definitely encounter problems, unless governed by some form of a standard procedure that the national parliaments will be bound to keep during the selection of their delegates to the Pan-African Parliament.

3.5 Direct elections

The Protocol envisages that the Pan-African Parliament will ultimately evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage at a time that may be decided by the member states.⁵⁹ However, no specific time schedule is set as to when direct elections would begin.

Here, it is clear that the peoples of Africa are not going to elect the representatives to the Pan-African Parliament, at least not in the near future. Similarly, the European Parliament had no direct popular legitimacy, that is, the European Parliament members were not directly elected but delegated by the national parliaments of the member states, until the situation changed when the first direct elections to the European Parliament were held in June 1979. That means that, although direct popular participation ensures more transparency, legitimacy and participation, the direct election of members of the European Parliament by universal suffrage was introduced after a quarter of a century of existence of the European Parliament.

However, as far as the European Parliament is concerned, the achievement of its own direct election by universal suffrage in 1979 was in itself a major constitutional change that paved the way for subsequent changes which were far-reaching. Direct elections were expected to offer the prospect of a strong parliament,⁶⁰ a more politicised community with more powers and a wider role, with greater popular control and greater popular impact.⁶¹ Indeed, direct elections have transformed the European Parliament into a full-time body and created a new class of elected representatives in Europe.

⁵⁸ A Monkam 'The political dimensions of the future ACP-EU Partnership: How to promote human rights, democracy and governance dimensions' (1997) (ECDPM Working Paper No 41), Maastricht: ECDPM.

⁵⁹ Art 2(3) Protocol.

⁶⁰ Fitzmaurice (n 53 above) 93.

⁶¹ As above, 138.

On the other hand, despite the significant and growing role of the European Parliament, in recent years low voter turnout in European elections has remained a chronic problem. In the 1999 elections, the participation of the electorate declined to 50%. Several reasons can be attributed to this, but the major reason is the fact that national issues are more immediate concerns to citizens than what happens at the EU level, and that the European Parliament elections receive less media focus.⁶²

The Pan-African Parliament may also consider the merit of introducing the same principle of direct election in the future so that its members would have greater legitimacy that would enable them to win better trust and confidence of their electorates. At the same time, raising awareness of the general African public with a view to enhancing its interest in the day to day activities of the Pan-African Parliament would need serious attention in order to prevent similar citizen apathy towards participating in future elections of candidates to the Pan-African Parliament.

4 Waiver of immunity

The Protocol enshrines the freedom to vote in a personal and independent capacity and parliamentary immunities are guaranteed to the members of the Pan-African Parliament.⁶³ The term of office of a member of the Pan-African Parliament may be terminated if the national parliament or other deliberative organs recall him or her.⁶⁴ Also, the Pan-African Parliament shall have the power to waive the immunity of a member in accordance with its rules of procedure.⁶⁵ It is not, however, clear from the text of the Protocol whether the sending state's national parliament has the power to seek a waiver of immunity of its national delegate in the Pan-African Parliament. This legal *lacuna* may render the practical application of immunity provisions of the text difficult.

Requests by national authorities of the member states for a member's immunity to be waived were not uncommon in the European Parliament. The European Parliament has established a number of basic principles through practice, the most important of which is not to waive immunity if the acts of which a member is accused form part of his political activities.⁶⁶ In important exceptions to this general rule, the European Parliament has twice (in December 1989 and March 1990, respectively) taken decisions to waive the immunity of Jean Marie Le Pen,

⁶² Corbett *et al* (n 16 above) 359.

⁶³ Arts 6 & 9 Protocol.

⁶⁴ Art 5(f) Protocol.

⁶⁵ Art 8(2) Protocol.

⁶⁶ Jacobs *et al* (n 11 above) 42-3.

which were justified by the particularly obnoxious nature of the remarks he made in expressing his political opinion. A similar controversy arose in 1991, when the Greek government requested the lifting of the immunity of two Greek MEPs, who had been ministers in the former Papandreou government, in which cases no waiver was granted by the Parliament.⁶⁷

It is, therefore, anticipated that similar requests for waiver of immunity of a parliamentarian may come from member states. The Pan-African Parliament needs to prepare itself, in advance, and address them properly. A situation where a parliamentarian lives under fear of being recalled or his immunity unreasonably stripped should be prevented as far as possible. Indeed, this fear appears to be genuine as long as a national parliament is allowed to use these provisions to get rid of its political opponents on unjustified and dubious political grounds. Thus, the merit of putting 'safeguard clauses' in the rules of procedure of the Pan-African Parliament, that would effectively thwart the possible abuse of recall and waiver provisions of the Protocol, should be considered in the light of these unforeseen dangers. In this respect, the rules of procedure of the Pan-African Parliament may learn and adapt to the established principles of the European Parliament discussed above.

5 Multilingual parliament

The Protocol envisages that, apart from the existing four working languages, namely Arabic, English, French and Portuguese, 'African languages', if possible, will be the working languages of the Pan-African Parliament.⁶⁸ The phrase 'African languages' involves not only a tricky question of interpretation, but also a difficulty in practical application. The phrase 'other African languages' is not only broad but also undefined in the Protocol. How will the selection of African languages be agreed upon in the Pan-African Parliament? What criteria of selection would be applied? Would it be practically possible to allow as many African languages as possible to be used in the Parliament?

The European Parliament is unique amongst parliaments in the number of languages used. Following the recent enlargement of the EU which brought ten new member states from the former Eastern and Central European countries, raising the EU member countries from 15 to 25, the EU now has 20 official languages.⁶⁹

⁶⁷ As above.

⁶⁸ Art 17 Protocol.

⁶⁹ H Mahony 'EU to wrestle with 20 official languages' <<http://www.euroobserver.com/index.php?aid=15369&sid=9>> (accessed 14 May 2004).

The assumption is that elected members should not be expected to be competent linguists as they are not career diplomats, and the electorate should be free to elect any person he thinks would represent him or her, irrespective of his or her language abilities. Besides, the issue of language has another important aspect in that countries are eager to promote their national culture and language.⁷⁰

However, the use of many languages will require an interpretation service at any Parliament meeting, or at least to the formal ones. The same is true as regards the translation of all documents into all languages. The constraints of multilingualism in terms of delay in proceedings and cost are becoming self-evident. In 1990 alone, the costs of multilingualism have been estimated at the equivalent of £11 million or around 35% of the total budget of the European Parliament. After the recent EU enlargement, the cost of the EU's translation service is set to rise to around €800 million a year.⁷¹ Besides, Corbett and others remarked that the plurality of languages in the European Parliament makes the debates far from spectacular. They also get lesser media coverage than do most national parliaments.⁷²

On the other hand, the prospects of a reduction in the number of working languages of the EU are slim. If anything, they are likely to expand as the members of the Community increase, making the conflict between democratic fairness and logistical practicality ever more acute. Owing to this difficulty, it has increasingly become the practice to use English, French and German as 'working languages', as opposed to 'official languages', to hold internal meetings and to prepare documents for internal use by the European Parliament.⁷³

In any case, one important lesson may be drawn from the experience of the European Parliament. Whatever democratic flavor it may contain at face value, the idea of allowing as many national languages to be working languages in the Pan-African Parliament may not work in practice. It will require a huge financial outlay, which the continent can ill afford at the moment.

6 Permanent seat

The Protocol provides that, although the Pan-African Parliament will be able to convene in any location in the AU for its regular sessions, the permanent seat of the Pan-African Parliament will be decided by vote of the AU Assembly of Heads of State and Government.⁷⁴ Accordingly,

⁷⁰ Jacobs *et al* (n 11 above) 35.

⁷¹ Mahony (n 69 above).

⁷² Corbett *et al* (n 16 above) 358.

⁷³ Mahony (n 69 above).

⁷⁴ Art 16 Protocol.

Africa's Heads of State are scheduled to meet in July 2004, where a decision will be taken on the host country.

Initially three countries, namely South Africa, Egypt and Libya, were vying to host the Pan-African Parliament. The government of Libyan Arab Jamahiriya has made a tactical withdrawal of its bid for the seat of the Pan-African Parliament in anticipation of its plans to host the upcoming Pan-African Stand-by Forces headquarters, leaving Egypt and South Africa as the only remaining contenders.⁷⁵

South Africa's President Mbeki has been engaged in an intensive campaign to persuade his fellow African leaders to accept his country's offer of hosting the continent's Parliament. His efforts seem to be bearing fruit, as a lot of countries promised support and some members of the Southern African Development Community (SADC) have tacitly endorsed the idea that the permanent seat of the headquarters of the Pan-African Parliament be in South Africa. All indications are that South Africa will be the seat of the Pan-African Parliament.⁷⁶

In what appears to be a somehow belated effort, the Speaker of the Parliament of Egypt, Dr Ahmed Fathy Srorr, in an exclusive interview with *Sub-Saharan Informer*, stated that if the seat of the Pan-African Parliament is in Egypt, it will be of paramount benefit to Africa. However, he acknowledged that last year Egypt was more concerned with the problems of the Middle East than those of Africa.⁷⁷ The announcement of the host country during the forthcoming AU summit will, undoubtedly, be testing the ability of Africa's diplomats and statesmen to reach consensus in order to promote continental interests.

In the case of the European Parliament, this issue has been more controversial. Since the member states have failed to agree on a single place of work for the Parliament, the work of the institution remains divided between Brussels, Luxembourg and Strasbourg.⁷⁸

7 The capacity dilemma

Finally, a few words regarding the influence of limited capacity on the effectiveness of the Pan-African Parliament will be in order. It is obvious that the financial and logistical capacity of many African states to effectively implement decisions at national or continental level is limited. As a result, consideration of the financial implications of any initiative or proposal, both at national and continental level, has become a common

⁷⁵ <[Http://www.afrika.no/Detailed/4911.html/news](http://www.afrika.no/Detailed/4911.html/news)> (accessed 31 May 2004).

⁷⁶ As above.

⁷⁷ <<http://www.subsaharaninformer.com/news/news.asp?cat=6&subcat=>> (accessed 10 May 2004).

⁷⁸ Evans (n 45 above).

practice in Africa. It may, thus, be important to consider the arrangements put in place in the Protocol regarding the financial implications on member states of the Pan-African Parliament. The Protocol provides that an allowance shall be paid to the members of the Pan-African Parliament to meet expenses in the discharge of their duties provided in the Protocol. However, the Protocol is silent as regards the sources of finance for the allowance of members of the Pan-African Parliament.

It may rightly be assumed that each member state will be covering the full cost, including allowance and transport, of its own delegates to the Pan-African Parliament, in accordance with its own national practice as far as the determination of the amount of allowance is concerned. This would definitely put significant financial pressure on many African states. Sending five national representatives from each member state twice in a year for a duration of up to one month each to attend the Pan-African Parliament's session will obviously be a costly enterprise for many of them. Sooner or later this may result in reduced interest in participation. For the time being, an immediate solution that would resolve the problem of resource capacity of African states will not be found.

It has been suggested that the Pan-African Parliament be a permanently functioning body instead of its current *ad hoc* arrangement, and that the number of members of the Pan-African Parliament be raised to 1 080 delegates, who shall be drawn from among the African states on the basis of proportional geographical and population representation.⁷⁹ No doubt, a permanent Pan-African Parliament with an increased number of members is better than an *ad hoc* body with only a nominal number of members. Yet, proliferation of institutions or expansion of the existing ones should be matched with the capacity to run them effectively. Thus, when a proposal of this sort is forwarded, it should simultaneously address the basic dilemma of where such capacity will come from.

8 Conclusion

As mentioned above, the official launching of the Pan-African Parliament is an important event that should be celebrated by the African people. However, as we celebrate the birth of this important continental institution, we should not lose sight of the fact that the current mandate of the Pan-African Parliament is not adequate. There are additional steps that need to be taken in order to continue building on such a positive move.

⁷⁹ Update 2004 'Pan-African Parliament: Size, structure and elections' <<http://www.africafront.com/gage7000.php>> (accessed 09 March 2004).

There are a few important issues that we need to reflect upon with a view to further improving and strengthening the Pan-African Parliament. These are: paving the way for the direct election of the members of the Pan-African Parliament by universal suffrage; enhancing the legislative and budgetary powers of the institution to enable it to fully take part in important decision-making in the AU; enhancing its supervisory and even litigation mandates and providing detailed rules of procedure that would encourage the formation of political groupings in the Pan-African Parliament. These issues need to be considered carefully in the future. The Pan-African Parliament should also endeavour to ensure the representation of all national voices, in particular opinions of opposition parties.

We should, at the same time, take into account that whatever the powers of the Parliament may be, the national parliaments remain the decisive fronts where the resolve and commitment to democratic changes are tested. The effort of strengthening democracy, good governance and human rights and ensuring accountability, transparency and participation of the grassroots in political decision-making should start at the national level, in the national parliaments. Thus, having strong national parliaments is an important precondition for the creation of a strong Pan-African Parliament. Developments at the national level must support and complement developments at the regional level and *vice versa*. It is also crucial to bear in mind that taking a continental initiative of this magnitude and making it successful may seem an ambitious and expensive venture. Initiatives at the political front, such as the creation of the AU and its institutions, including the Pan-African Parliament, would not be sustainable unless buttressed by parallel progress in the economic front. The African continent can ill afford to do this and we need to avoid reckless spending and utilise institutions that we finance effectively. This should also be the case as far as the Pan-African Parliament is concerned. The question of using African languages in the Pan-African Parliament should also be considered in the light of the cost of its implementation and other practical problems it is going to pose.

Finally, the strength of the AU depends on the strength of its institutions and the strength of these institutions depends on the strength of the people who created them. As noted above, though the prospects of the AU and its institutions appear to be obvious, it would be naive to underestimate the obstacles and enormous challenges that lie ahead. At the same time we should remain confident that, despite the daunting challenges, the Pan-African Parliament would prevail over all the hurdles. Above all, the peoples of Africa should demonstrate their resolve and determination to assist the AU in surmounting the challenges of accomplishing the lofty goals of durable peace, greater democracy and sustainable development it has set for itself.

The African Union Convention on Preventing and Combating Corruption: A critical appraisal

*Kolawole Olaniyan**

Legal Adviser (Africa), International Law and Organisations Programme,
Amnesty International, London

Summary

This article analyses the Convention on Preventing and Combating Corruption that was adopted at the African Union summit in Maputo in July 2003. While recognising that the Convention represents a significant step in the efforts to counteract corruption across Africa, the author argues that the strong link between corruption and the violation of human rights is not sufficiently emphasised in the Convention. The Convention also suffers from excessive use of claw-back clauses and lacks a serious and effective mechanism for holding states accountable. The author suggests that the Convention should be amended to become a protocol to the African Charter on Human and Peoples' Rights, thus bringing the provisions under the supervision of the African Commission and the African Human Rights Court.

1 Introduction

The adoption by the African Union (AU) Assembly of Heads of State and Government of the Convention on Preventing and Combating Corruption (Anti-Corruption Convention)¹ on 11 July 2003, marked an

* LLB, BL (Lagos) LLM JSD (Notre Dame); KOlaniya@amnesty.org

¹ African Union Convention on Preventing and Combating Corruption, 11 July 2003, at <<http://www.africa-union.org/Officialdocuments/Treaties%20Conventions%20Protocols/Convention%20on%20Combating%20Corruption.pdf>>. For the drafting history of the Anti-Corruption Convention, see eg K Olaniyan 'Introductory note to African Union (AU): Convention on Preventing and Combating Corruption (2004) 43 *International Legal Materials* 1.

event of great importance regionally and nationally in the fight against corruption.² The Convention criminalises corruption in the public and private sector, obligating state parties to adopt legislative, administrative and other measures to tackle corruption, which is reported to cost Africa approximately \$148 billion annually.³ State parties agree to implement the provisions of the Convention in their national law and practice. The Convention will enter into force 30 days after the date of the deposit of the fifteenth instrument of ratification or accession.⁴

The Anti-Corruption Convention aims to achieve four objectives: first, to promote and strengthen the development in Africa of anti-corruption mechanisms;⁵ second, to promote, facilitate and regulate co-operation among state parties;⁶ third, to remove obstacles to the enjoyment of human rights, including economic, social and cultural rights;⁷ and fourth, to establish conditions necessary to foster transparency and accountability in the management of public affairs.⁸ However, while the Anti-Corruption Convention brings some striking novelties to international efforts against corruption specifically by linking corruption and human rights, it does not spell out the precise content of this relationship or reflect a coherent framework of remedies for individuals or groups whose human rights are violated as a result of corruption. Rather, it focuses on criminal sanctions, and leaves out victims, especially vulnerable and excluded individuals or groups, thus denying them direct access to remedies, such as compensation and restitution. The large-scale corruption of Africa's resources and wealth for safe havens abroad by those entrusted with its control and management has seriously limited governments' ability to fulfil their human rights

² Although there have been a number of noteworthy developments in relation to corruption at sub-regional level, such as the Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS), the Convention is the first regional agreement on corruption adopted by the AU since its establishment in July 2000, following the adoption of the Constitutive Act of the AU to replace the Charter of the Organization of African Unity (OAU), in existence since 1963. See eg Southern African Development Community (SADC), Protocol Against Corruption (14 Aug 2001), at <<http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p>> (accessed 31 May 2004).

³ Olaniyan (n 1 above).

⁴ Art 23(2) Anti-Corruption Convention. The Convention received its first ratification (Comoros) in April 2004. As at 1 June 2004, 27 other countries had signed the document. These are Algeria; Benin, Burkina Faso, Burundi; Côte d'Ivoire, Congo, Democratic Republic of Congo (DRC); The Gambia; Ghana; Guinea; Kenya; Lesotho, Libya; Liberia; Madagascar, Mali; Mozambique; Namibia; Nigeria; Rwanda; Senegal; Sierra Leone; South Africa, Tanzania; Togo; Uganda and Zimbabwe; <<http://www.Africa-union.org>> (accessed 31 May 2004).

⁵ As above, art 2(1).

⁶ As above, art 2(2).

⁷ As above, art 2(4).

⁸ As above, art 2(5).

obligations, locking individuals and groups into cycles of dependency and despondency. Moreover, governments generally abhor the idea of transposing anti-corruption initiatives into the human rights framework.

Yet, the link between corruption and human rights, especially economic, social and cultural rights, is direct and strong and can hardly be contested. While human rights law grants to individuals basic rights to live with dignity, and freedom to explore ways towards development and prosperity, corruption, especially large-scale corruption,⁹ impedes the full realisation of these fundamental objectives. Corruption systematically drains the state's 'maximum available resources',¹⁰ precipitating poverty, unnecessary debt burden, and economic crisis which inevitably magnify dispossession, hunger, disease, illiteracy, and insecurity. Corruption brings about unfair consequences for the vulnerable groups of the society, including the poor, women and children, perpetrating and institutionalising discrimination. By exploiting a nation's natural resources and wealth for the personal gain of leaders, rather than socio-economic development of a country, corruption jeopardises the needs and well-being of future generations.

The approach adopted by the Anti-Corruption Convention appears to presume the adequacy and effectiveness of the accountability institutions and the systems designed to protect human rights; or that state interest and those of individuals or groups are the same, and will always coincide. However, in practice this is rarely the case. The absence of provisions in the Convention for adequate compensation for individuals or groups whose human rights are violated as a result of corruption means the interests of states and their agents would continue to predominate.

Nevertheless, it is clear that a human rights approach to corruption would not only help to increase the implementation of the Convention, but also enhance international accountability in respect of human rights, especially in Africa where respect for those rights are the exception, rather than the rule. In the absence of an adequate legal response, the

⁹ This type of corruption has been called 'indigenous spoliation', defined as '[the theft] by national officials of the wealth of the states of which they are temporary custodians'. Kofele-Kale describes it as 'a systematic looting and stashing, largely in foreign banks, of the financial resources of a state; the arbitrary and systematic deprivation of the economic rights of the citizens of a nation by its leaders, elected and appointed, in military regimes as well as civilian governments'; N Kofele-Kale *International law of responsibility for economic crimes* (1995) 13.

¹⁰ See art 2(1) International Covenant on Economic, Social and Cultural Rights. The article provides: 'Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical assistance, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures' (my emphasis).

adoption of an alternative remedial strategy becomes of paramount importance, if only to shift attention to the economically and socially vulnerable sectors of the population. This article appraises the Anti-Corruption Convention and argues that its overall effectiveness will depend in the main on the possibility of its being firmly placed within the framework of the African Charter on Human and Peoples' Rights (African Charter)¹¹ and its implementation mechanisms.

2 Content of the AU Anti-Corruption Convention

Given the events in the United States (US) in the 1970s¹² and the subsequent adoption of international conventions¹³ (after initial opposition by some countries, including Germany and France), and

¹¹ See African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58 (entered into force 21 October 1986), at <http://www.africa-union.org/Official_documents/Treaties%20Conventions%20Protocols/Banjul%20Charter.pdf> (accessed 31 May 2004).

¹² Instances of illegal campaign contributions and laundering of such money through foreign countries, and of the use of campaign funds to bribe foreign officials in the 1970s resulted in the promulgation of the Foreign Corrupt Practices Act 1977. The Act aims to, among others, criminalise and regulate extraterritorial bribery. The 1988 amendment to the Act requires the US President to seek international cooperation in suppressing business bribery. See Foreign Corrupt Practices Act 1977, Pub L No 95-213, 91 Stat 1494 as amended by International Anti-Bribery and Fair Competition Act of 1998, Pub L No 105-366, 112 Stat 3302.

¹³ In 1996, the Inter-American Convention against Corruption was negotiated under the auspices of the Organisation of American States (OAS) (1996) 35 *International Legal Materials* 724 (entered into force 6 March 1997). The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was negotiated a year after, in 1997, by the Organisation for Economic Co-operation and Development (OECD) S Treaty Doc No 105-43, (1998) 37 *International Legal Materials* 1 (entered into force 15 February 1999); the Criminal Law Convention on Corruption by the Council of Europe (COE) in 1999; <<http://www.coe.fr/eng/legaltxt/173e.htm>> and Civil Law Convention on Corruption (1999), Euro TS No 174; Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 OJ (C 195) 1; UN Convention against Corruption, adopted by the UN General Assembly in 2003 (see UN Doc A/58/PV50 19 (31 October 2003)). See generally A Posadas 'Combating corruption under international law' (2000) 10 *Duke Journal of Comparative and International Law* 345; N Kofele-Kale 'The right to a corruption-free society as an individual and collective human right: Elevating official corruption to a crime under international law' (2000) 34 *International Law* 149 157; BC Harms 'Holding public officials accountable in the international realm: A new multi-layered strategy to combat corruption' (2000) 33 *Cornell International Law Journal* 159; M Sperber 'Foreign Corrupt Practices Act' (2002) 39 *American Criminal Law Review* 679; JT Noonan *Bribes* (1984) 656.

declarations¹⁴ to deal with the problem of corruption globally, the impetus for the elaboration of norms specifically dealing with corruption shifted to Africa. This shift generated intense activity at the regional non-governmental organisations (NGOs) level and within the framework of the AU. In 1998 the decision was made to draft a regional convention on corruption when the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at its 34th ordinary session held in Ouagadougou, Burkina Faso, adopted Decision AHG-Dec 126 (XXXIV) in which it expressed its determination to tackle impunity and corruption. The process leading to the drafting and adoption of the Anti-Corruption Convention included two 'experts' meetings in Addis Ababa, Ethiopia from 26 to 29 November 2001 and 16 to 17 September 2002, respectively. Following the approval in March 2003, by the Executive Council of the AU meeting in N'djamena, Chad, the text of the Anti-Corruption Convention was finally completed, and recommended to the AU Assembly for adoption.

The overall structure of the Anti-Corruption Convention is similar to that of the Inter-American Convention against Corruption. Its text comprises of a Preamble and 28 articles. The Preamble clearly places the Convention in the context of the Constitutive Act of the AU,¹⁵ the African Charter and the Plan of Action Against Impunity adopted by the 19th ordinary session of the African Commission on Human and Peoples' Rights (African Commission).¹⁶ It recalls the human rights obligations imposed on states by these instruments;¹⁷ recognises the

¹⁴ See UN Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, GA Res 3514, UN GAOR, 2441st plenary meeting (1975), United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, GA Res 51/191, UN GAOR, 51st Sess Agenda Item 12, Annex, UN Doc A/RES/51/191 (1996); International Co-operation Against Corruption and Bribery in International Commercial Transactions, GA Res 52/87, UN GAOR, 52d Sess, 70th Meeting, Agenda Item 103, UN Doc A/RES/52/87 (1997); Action Against Corruption and Bribery in International Commercial Transactions, GA Res 53/176, UN GAOR, 53d Sess, 91st Meeting, Agenda Item 92, UN Doc A/RES/53/176 (1998). Also in 1998, the UN (through its Centre for International Crime Prevention) initiated a Global Programme Against Corruption to promote anti-corruption measures in transitional economies and to make public sector action more transparent and accountable. Its principal aims include promoting democratic reform; building a strong civil society to monitor the state; strengthening the rule of law, and building partnerships to ensure the implementation of anti-corruption policies and laws. See UN Global Programme Against Corruption, <<http://www.undcp.org/corruption.html>>; United Nations Manual on Anti-Corruption Policy, <<http://www.odccp.org/pdf/crime/gpacpublications/manual.pdf>>. See also the 25 Principles to Combat Corruption in Africa adopted in 1999 by Benin, Botswana, Ethiopia, Ghana, Malawi, Mali, Mozambique, Senegal, South Africa, Tanzania and Uganda, at <<http://www.gca-cma.org/epastact.htm>> (accessed 31 May 2004).

¹⁵ Constitutive Act of the AU, 11 July 2000, OAU Doc CAB/LEG/23 15 (entered into force 26 May 2001) <http://www.africa-union.org/About_AU/Constitutive_Act.htm> (accessed 31 May 2004).

¹⁶ As above, Preamble paras 3 & 5.

¹⁷ As above, Preamble para 5.

need to promote and protect human rights, including economic, social and cultural rights,¹⁸ noting that freedom, equality, justice, peace, good governance and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples.¹⁹ The Preamble also enjoins state parties to 'co-ordinate and intensify their co-operation, unity, cohesion and efforts to achieve a better life for the peoples of Africa'.²⁰

Furthermore, the Preamble acknowledges that corruption undermines accountability and transparency in the management of public affairs²¹ and requires state parties to build partnerships between governments and civil society organisations.²² In addition to criminalisation, the Anti-Corruption Convention also focuses on preventive measures. It spells out the objectives, obligations and mechanisms to implement those obligations, provisions on international co-operation and technical assistance, provisions on information exchange, public awareness and education, research and final legal provisions relevant to the operation of the Convention on issues such as entry into force and reservation. The Convention attacks both the demand and supply sides of corruption in that it requires state parties to criminalise both the solicitation or acceptance, and the offering or granting of bribes.²³ It prohibits foreign bribery²⁴ and obligates state parties to take measures to combat the illicit enrichment of government officials.²⁵ If they have not already done so, state parties are required to criminalise 'acts of corruption and other related offences', outlined in article 4 of the Convention.

Article 1 of the Convention defines corruption as 'acts and practices including related offences proscribed in this Convention', and illicit enrichment as 'the significant increase in the assets of a public official or any other person, which he or she cannot reasonably explain in relation to his or her income'. Accordingly, article 4 enumerates what the Convention considers 'acts of corruption and related offences' to include the offering of illicit payments;²⁶ acts or omissions by government officials for the purpose of obtaining a bribe;²⁷ the fraudulent diversion by a public official or any other person of any property belonging to the state or its agencies;²⁸ the offering or giving, promising, soliciting or

¹⁸ As above, Preamble paras 3 & 4.

¹⁹ As above, Preamble para 1.

²⁰ As above, Preamble para 5.

²¹ As above, Preamble para 7.

²² As above, Preamble para 10.

²³ As above, art 4(a)(b)(e)(f).

²⁴ As above, art 19(1)(2).

²⁵ As above, arts 5(1), 8(1)(2).

²⁶ As above, art 4(b).

²⁷ As above, art 4(c).

²⁸ As above, art 4(d).

accepting, undue advantage to or by any person in a private sector entity;²⁹ the use or concealment of proceeds derived from the acts enumerated in the Convention;³⁰ and participation as a principal, co-principal, agent, instigator, accomplice, accessory after the fact, in a conspiracy to commit enumerated acts.³¹

Further, state parties agree to adopt legislative and other measures to establish these acts as offences, and to strengthen national control measures in order to ensure that the setting up and operations of foreign companies in their territories are subject to national legislation.³² State parties also agree to adopt measures to establish, maintain and strengthen independent national anti-corruption authorities or agencies, and internal accounting, auditing and follow-up systems.³³ Moreover, the Anti-Corruption Convention obligates state parties to strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption.³⁴

The Convention obligates state parties to ensure the right of access to any information that may be required to assist in the fight against corruption.³⁵ State parties agree to consult and seek the full participation of the media in the implementation of the Convention and to create an enabling environment that will enable the media and other civil society organisations to hold governments to the highest levels of transparency and accountability in the management of public affairs, for example by giving them access to information in cases of corruption.³⁶ However, the dissemination of such information must not adversely affect the investigation process and the right to a fair trial.³⁷ Additionally, they are required to adopt measures to protect informants and witnesses in corruption, including protection of their identities, so that citizens can report instances of corruption without fear of consequent reprisals.³⁸ State parties must punish anyone who makes false and malicious reports against innocent persons in corruption offences.³⁹

According to the Convention, state parties must establish as criminal offences: the conversion, transfer or disposal of property, which is the proceeds of corruption,⁴⁰ and the concealment or disguise of the true

²⁹ As above, art 4(e)(f).

³⁰ As above, art 4(h).

³¹ As above, art 4(i).

³² As above, art 5(1)(2).

³³ As above, art 5(3).

³⁴ As above, art 5(8).

³⁵ As above, art 9.

³⁶ As above, art 12(1)(2)(3)(4).

³⁷ As above, art 12(4).

³⁸ As above, art 5(5).

³⁹ As above, art 5(7).

⁴⁰ As above, art 6(a).

nature, source, location, disposition, movement, ownership of or the use of such property.⁴¹ State parties also agree to ensure that public officials declare their assets at the time of assumption of office, during and after their term of office.⁴² In this respect, they are required to create an internal committee which would establish a code of conduct and monitor its implementation, sensitise and train public officials on matters of ethics; develop disciplinary measures and investigation procedures in corruption offences.⁴³ According to article 7, 'subject to the provisions of domestic law, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials'.⁴⁴

Moreover, the Anti-Corruption Convention requires state parties to prevent and tackle acts of corruption by agents of the private sector, and to establish mechanisms to: encourage participation by the private sector in the fight against unfair competition; respect tender procedures and property rights; and prevent companies from paying bribes to win tenders.⁴⁵ Furthermore, each state party is required to exercise jurisdiction over 'acts of corruption' contained in the Convention (and enumerated above) in cases where: the breach is committed wholly or partially inside its territory; the offence is committed by one of its nationals outside its territory or by a person who resides in its territory, and it does not extradite such person to another country; or when the offence, although committed outside its jurisdiction, affects its vital interests or consequences of such offence impact on the state party.⁴⁶ However, the Convention asserts that a person shall not be tried twice for the same offence.⁴⁷

The Anti-Corruption Convention also requires each state party to adopt measures to, among others, enable its competent authorities to search, identify, trace, administer, freeze or seize the 'instrumentalities and proceeds of corruption' pending a final judgment; and to confiscate and repatriate proceeds of corruption.⁴⁸ State parties are also obligated to adopt measures to empower their courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents with a view to implementing the Convention.⁴⁹ The Convention prohibits the invocation of banking secrecy with

⁴¹ As above, art 6(b).

⁴² As above, art 7(1).

⁴³ As above, art 7(2)(3).

⁴⁴ As above, art 7(5).

⁴⁵ As above, art 11(1)(2)(3).

⁴⁶ As above, art 13(1)(a)(b)(c)(d).

⁴⁷ As above, art 13(3).

⁴⁸ As above, art 16(1)(a)(b)(c).

⁴⁹ As above, art 17(1).

respect to offences it establishes or pursuant to it.⁵⁰ Further, state parties express their commitment to enter into bilateral agreements to waive banking secrecy on doubtful accounts and to allow competent authorities the right to obtain from banks and financial institutions, under judicial cover, any evidence in their possession.⁵¹

State parties agree to apply extradition provisions in the Anti-Corruption Convention to the corruption offences that they must criminalise.⁵² They must also include such offences in every extradition treaty that may be concluded between or among them.⁵³ Further, a state party that makes extradition conditional on the existence of a treaty may consider the Convention as the legal basis for extradition with respect to any offence to which the Convention applies.⁵⁴ On the other hand, state parties that do not make extradition conditional on the existence of a treaty must recognise offences to which the Anti-Corruption Convention applies as extraditable offences among themselves.⁵⁵ If a state party refuses extradition on the basis that it has jurisdiction, the requested state must submit the case to its competent authorities for prosecution.⁵⁶

State parties are also required to provide each other with technical co-operation and assistance in dealing with requests from national authorities with a mandate to prevent, detect, investigate and punish 'acts of corruption'.⁵⁷ In addition, state parties agree to provide technical assistance in drawing up programmes and codes of ethics or organising joint training courses involving one or several states in tackling corruption.⁵⁸ They also agree to co-operate among themselves, including by conducting and exchanging studies, expertise and researches on how to address corruption.⁵⁹ The Convention requires state parties to co-operate and encourage each other in taking measures to prevent corrupt public officials from enjoying ill-acquired assets by freezing their foreign accounts and facilitating the repatriation of stolen monies to the countries of origin.⁶⁰

Further, they are required to collaborate with countries of origin of multi-nationals to criminalise and punish the practice of secret commissions during international trade transactions; and foster regional

⁵⁰ As above, art 17 (3).

⁵¹ As above, art 17(4).

⁵² As above, art 15(1).

⁵³ As above, art 15(2).

⁵⁴ As above, art 15(3).

⁵⁵ As above, art 15(4).

⁵⁶ As above, art 15(6).

⁵⁷ As above, art 18(1).

⁵⁸ As above, art 18(4).

⁵⁹ As above, art 18(3).

⁶⁰ As above, art 19(3).

and international co-operation to prevent corruption in such transactions.⁶¹ Moreover, state parties are required to work closely with international, regional and sub-regional financial organisations to eradicate corruption in development aid and co-operation programmes by defining strict regulations for eligibility and good governance of candidates within the general framework of their development policy.⁶² Finally, the Convention requires that state parties provide mutual assistance in criminal matters with respect to the covered offences.⁶³

3 Implementation mechanism

The Convention establishes an oversight or monitoring mechanism.⁶⁴ Thus, article 22 creates an Advisory Board on Corruption within the AU (the Board).⁶⁵ The Board shall comprise 11 members, elected by the Executive Council of the AU from among a list of experts of the 'highest integrity, impartiality, and recognised competence in matters relating to preventing and combating corruption, proposed by the state parties'.⁶⁶ In the election of the members of the Board, the Executive Council 'shall ensure adequate gender representation, and equitable geographical representation'.⁶⁷ Further, members of the Board are supposed to serve in their personal capacity, for a period of two years, renewable only once.⁶⁸

The functions of the Board are to promote and encourage the adoption and application of anti-corruption measures on the continent;⁶⁹ collect and document information on the nature, scope, and extent of corruption;⁷⁰ develop methodologies for analysing the problem of corruption in Africa;⁷¹ and disseminate information and sensitise the public on the negative effects of corruption.⁷² The Board will also advise governments on how to deal with corruption in their domestic jurisdictions;⁷³ collect information and analyse the conduct and behaviour of multi-national corporations operating in Africa, and disseminate

⁶¹ As above, art 19(1)(2).

⁶² As above, art 19(4).

⁶³ As above, art 18(6).

⁶⁴ As above, art 22(1).

⁶⁵ As above.

⁶⁶ As above, art 22(2).

⁶⁷ As above.

⁶⁸ As above, art 22(3)(4).

⁶⁹ As above, art 22((5)(a).

⁷⁰ As above, art 22(5)(b).

⁷¹ As above, art 22(5)(c).

⁷² As above.

⁷³ As above, art 22(5)(d).

such information to national authorities;⁷⁴ develop and promote the adoption of harmonised codes of conduct of public officials;⁷⁵ build partnerships with the African Commission, African intergovernmental organisations and NGOs in order to facilitate dialogue on corruption.⁷⁶

The Advisory Board is required to submit a report to the Executive Council 'on a regular basis' on the progress made by each state party in complying with the provisions of the Convention,⁷⁷ and to 'perform any other task relating to corruption that may be assigned to it by the policy organs of the African Union'.⁷⁸ State parties are obligated to communicate to the Board within a year after the coming into force of the instrument, on the progress made in the implementation of the Convention.⁷⁹ Thereafter, each state party shall ensure that its national anti-corruption authorities or agencies report to the Board at least once a year before the ordinary sessions of the policy organs of the AU.⁸⁰

4 Strengths and weaknesses of the Anti-Corruption Convention

As noted above, the Anti-Corruption Convention represents a significant step in the efforts to develop international standards to counteract the systemic corruption across Africa. In effect, the Convention imposes obligations on African countries to take a leadership role in the international fight against corruption in the public and private spheres. The Convention has the potential to reduce or even eliminate opportunities for heads of state and other top state officials to exploit the global banking system to conceal or launder the proceeds of political corruption from their countries. Indeed, the Convention imposes considerably detailed obligations on state parties to take action to identify such proceeds and to facilitate their return.

The ratification of the Convention by member states of the AU also means that state parties would need to comprehensively reform their substantive municipal laws in order to deny safe haven to funds. By imposing obligations on governments to tackle bank secrecy, the Convention would reduce the attractiveness of jurisdictions that often serve as a destination for stolen funds. In addition, it could serve as a tool to bring criminal complaints against those suspected to have been

⁷⁴ As above, art 22(5)(e).

⁷⁵ As above, art 22(5)(f).

⁷⁶ As above, art 22(5)(g).

⁷⁷ As above, art 22(5)(h).

⁷⁸ As above, art 22(5)(i).

⁷⁹ As above, art 22(7).

⁸⁰ As above.

involved in acts of corruption, no matter where the offence is committed. It could also make offshore jurisdictions to be more accountable, in terms of co-operating with requests for mutual legal assistance and to limit bank secrecy in criminal cases. The Anti-Corruption Convention represents a multilateral framework to deal with corruption. Because of its nature and impact beyond a state border, corruption requires a multilateral approach if it is to be tackled effectively and comprehensively. Overall, if fully ratified and implemented, the Convention would commit African governments to remove safe havens not only for bribers but also for corrupt government officials and private individuals.

However, whether broad and effective compliance can be achieved, even if the Convention is widely ratified, is an open question. Beyond ratification, African governments would need to establish and strengthen institutional and legal mechanisms on the domestic fronts if the fight against corruption is to be won. Also, the Convention faces some significant shortcomings.

First, as stated above, apart from a general and excessively vague reference to economic, social and cultural rights in its Preamble, the Anti-Corruption Convention does not characterise corruption as a massive and direct violation of human rights. It therefore fails to comprehensively address the critical link between corruption, especially large-scale corruption and those rights, and to provide effective remedies for victims of corruption.

Second, the Anti-Corruption Convention, like the African Charter, suffers from excessive use of claw-back clauses which tend to limit or undermine some of its progressive provisions.⁸¹ For example, article 7 provides that any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and prosecution of such officials, 'subject to the provisions of domestic legislation'. Under article 8, state parties are required to establish under their laws an offence of illicit enrichment 'subject to the provisions of their domestic laws'. Similarly, article 14 provides for the right to a fair trial for those suspected to have committed acts of corruption 'subject to domestic law'. These clauses can permit a state, in its almost unbounded

⁸¹ However, one must note the progressive attitude of the African Commission towards giving the claw-back clauses in the African Charter a narrow reading. For example, in a case against Nigeria, involving the government's retroactive decree creating a new institution to control the Bar Association and its lawyer members, the African Commission held that both art 7, dealing with the right to fair trial, and art 10, dealing with freedom of association, had been violated, despite the claw-back clause contained in art 10. As the Commission suggested, the right enunciated in art 10 entails 'first and foremost a duty of the state to abstain from interfering with the free formation of association'; *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).

discretion, to restrict its treaty obligations to eradicate corruption within its territory. By granting supremacy to national laws, the clauses also could seriously emasculate the effectiveness of the Convention as well as its uniform application by member states. If not properly construed, the clauses could defeat, frustrate, or annul the fundamental objectives of the Convention: eradication of corruption and promotion and protection of internationally recognised human rights, including economic, social and cultural rights.

Third, the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among state parties, including a potential claim by one party that another is failing to properly carry out its obligations. Also, the Convention merely requires members of the Board to be experts with 'recognised competence in matters relating to preventing and combating corruption'. There is no requirement in the Convention that members of the Board possess recognised competence in the field of human rights. Thus, it cannot be assumed that the Board would be able to deal with the human rights concerns of corruption. The Board is merely to advise governments 'on how to deal with the scourge of corruption'. Clearly, such advice may carry little weight or be completely ignored by governments, since its legal authority may be questioned. Its limited mandate means that there is little chance for the Advisory Board to translate the norms of the Convention into reality or provide important clarifications of the obligations imposed by the Convention. Without a meaningful implementation system for the Convention, it cannot be assumed that states would take seriously their obligations to end corruption let alone afford legal recourse and compensation to individuals or groups whose human rights are violated as a result of corruption.

5 Toward adjusting the Anti-Corruption Convention as a protocol to the African Charter

The transformation of the Anti-Corruption Convention into a coherent and consistent body of international human rights law to address corruption, especially large-scale corruption, is vital if it is to achieve its desired end. To give content and effect to its principles, the Anti-Corruption Convention should be amended in order to place it firmly in the framework of the African Charter. This could easily be accomplished by strengthening the Convention in the light of the Charter, and adding it as a protocol to the Charter. Such a protocol would transform the provisions of the Anti-Corruption Convention into a coherent and workable body of human rights law.

The foundation for implementing this proposal has already been laid in several articles of the African Charter and the jurisprudence of the African Commission. It is beyond the scope of this article to comment in detail on the framework of the African regional human rights system in this respect. It is fair to mention, though, some central, defining elements of the African Charter. The African Charter, like many other human rights instruments, reflects the principle that human beings cannot enjoy freedom from fear and want unless conditions are created whereby everyone may enjoy his or her human rights. Its fundamental aim is to protect all people against poverty by guaranteeing them rights to food, education, shelter, health and water, among other rights, and by imposing legal obligations on states to respect, protect and fulfil those rights. In addition, the Charter recognises that peoples have a right to economic self-determination, by virtue of which they may freely dispose of their natural resources and wealth.⁸² Thus, the national community in which resources are found must be a significant beneficiary of their exploitation.⁸³ Further, the norms of non-discrimination and equality, which lie at the heart of international protection of human rights,⁸⁴ demand that particular attention be given to vulnerable groups and individuals in such groups, including the poor, women and children. In sum, the central objective of the African Charter is to ensure that all citizens live freely and with dignity and enjoy equal protection of the law. Achievement of this objective is subject to resource availability and may be realised progressively, but human rights law also establishes a core or minimum obligation for states to ensure the satisfaction of essential levels of basic needs.⁸⁵ Also, states must move as expeditiously and effectively as possible towards the full realisation of these rights.⁸⁶

⁸² See WM Reisman 'Comment, harnessing international law to restrain and recapture indigenous spoliation' (1989) 83 *American Journal of International Law* 56. See also Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803, 17 UN GAOR Supp (No 17) 15, UN Doc A/5217 (1962).

⁸³ Reisman (n 82 above) 57.

⁸⁴ See eg art 2 of the African Charter to the effect that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status': The African Commission has expressed that art 2 'lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings'; *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

⁸⁵ See UN Committee on Economic, Social and Cultural Rights General Comment No 3 (1990) para 10.

⁸⁶ As above, para 9.

Against this background, a protocol to the African Charter that clearly articulates principles that address the human rights dimension of corruption and provide victims of corruption with effective remedies would give added significance and enforceability with respect to progressive provisions of the Anti-Corruption Convention. The proposed protocol should incorporate provisions that would ensure that financial institutions acting as havens to stolen funds can be held directly accountable with respect to such funds.

Similarly, a protocol devoted to a rights-based approach to corruption would help to attract international attention to the effects of corruption on the enjoyment of basic human rights. No other approach will adequately address the problem of corruption in Africa. Moreover, adjusting the Anti-Corruption Convention to the African Charter as a protocol would give the legal regime governing corruption the enforcement mechanism it needs to be effective, that is, the African Commission and the African Court on Human and Peoples' Rights (African Court)⁸⁷ when the Court is fully established, and would provide effective remedies to individuals and groups. It would also avoid the necessity of having to draft a distinct human rights treaty on corruption and create an acceptable enforcement mechanism. The human rights obligations and enforcement of the African Charter have already been negotiated and established. Thus, transforming the Anti-Corruption Convention into a protocol would save time and resources, and not require separate structures and institutions.

Although the African Charter enforcement mechanism at the moment may be less than optimal, it nonetheless offers in several respects, not least the fundamental utility of the Charter itself, the best option for the creation of a regional human rights framework to tackle corruption. Indeed, the African Charter offers an established mechanism by which to monitor, file complaints, and report on states' efforts to eliminate human rights violations arising from acts of corruption. Whatever its present inadequacies may be, the African Commission and the African Court, if adequately supported and resourced and independently managed, could in the long run develop into institutions with considerable potential and indeed promise to contribute to developing standards and jurisprudence on the rights-based approach to corruption being suggested here. By expanding the parameters of the African Charter broadly and inclusively to accommodate the prohibition of corruption, the African Commission and the African Court can best

⁸⁷ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 9 July 1998, Doc OAU/LEG/MIN/AFCHPR/PROT1Rev2 (1997), at <<http://www.africa-union.org/Officialdocuments/Treaties%20Conventions%20Protocols/africancourt-humanrights.Pdf>> (accessed 31 May 2004).

contribute to the promotion and protection of human rights in Africa. The energy and conviction that have so far been demonstrated by the African Commission concerning the development of its individual communication procedure, including through its recent decision in the *Ogoni case*⁸⁸ and the potential contribution of an African Court, would seem to suggest that the prospects for the future are positive.

Additionally, by reinforcing the connection between corruption and human rights, the proposed protocol may serve as a valuable experience for other regional human rights systems as well as the United Nations (UN) system, which are lagging behind in this respect. In addition, it may spur on the UN to take steps to promote awareness of the human rights concerns raised by corruption, especially large-scale corruption, and foster respect for the principles delineated in the proposed protocol. Through the African regional human rights system, the proposed human rights framework for corruption may become established international human rights law.

The African Commission possesses great promise in terms of clarifying and developing the standards that might be applied to ensure compliance with its foundational instrument, the African Charter. Similarly, the Commission is capable of assessing the degree to which state parties are in reality acting in conformity with their obligations under the Charter. In sum, it could take remedial or preventive action to ensure compliance with treaty obligations. However, the Commission cannot serve as an effective tool for addressing the human rights dimension of corruption in Africa without the willingness of states to comply with their treaty obligations and a demonstration of expertise and independence by its members. A region-wide ratification of the Protocol Establishing the African Court and adoption of declarations by state parties that would allow individuals or NGOs direct access to the Court is vital to strengthen the ability of the African Charter and its implementation mechanisms.

From a human rights viewpoint, adjusting the Anti-Corruption Convention to the African Charter as a protocol would help to reinvigorate the institutions of states necessary to achieve the eradication of corruption, highlighting the failure or deliberate refusal of governments to live up to their human rights obligations. Such a course would also emphasise the abiding obligations of governments to work towards elimination of corruption, and to commit themselves to address its corrosive impact on the human rights of the citizens.

The idea of providing effective remedies to victims of official corruption is not a new one. Indeed, the Council of Europe recognised in 1999, through the adoption of its Civil Law Convention on Corruption

⁸⁸ Communication 155/96, *Social and Economic Rights Action Centre & Another v Nigeria*, Fifteenth Annual Activity Report 2000–2001.

(Civil Law Convention), the need to 'provide fair compensation to persons who have suffered damage as a result of corruption'.⁸⁹ The Convention complements the Council's Criminal Law Convention on Corruption designed to criminalise corruption in the public and private sector. The Civil Law Convention, which allows no reservation entered into force on 1 November 2003. It is the first attempt to address the remedies aspect of corruption problem.⁹⁰ The Civil Law Convention deals with such issues as compensation for damage, state liability for acts of corruption committed by public officials and contains provisions that promote international co-operation and assistance in providing remedies to victims of corruption. It requires state parties to provide in their domestic law 'for effective remedies for persons who have suffered as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage'.

In order to obtain compensation under the Civil Law Convention, the plaintiff must show the following: occurrence of damage, whether the defendants acted with intent or negligently, and the causal link between the corrupt behaviour and the damage.⁹¹ Furthermore, article 5 provides that state parties 'shall provide . . . appropriate procedures for

⁸⁹ According to art 2 of the Civil Law Convention, 'For the purpose of this Convention corruption means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other under advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe, the undue advantage or the prospect thereof.'

⁹⁰ It was at the 1994 Malta Conference of the European Ministers of Justice that the Council of Europe began to deal with the problem of corruption more directly. At the Conference, the ministers considered that corruption was a threat to human rights, rule of law and democracy. They believed that given its pre-eminent position, and the fundamental values that it champions, the Council should respond effectively to the problem. At their meeting in Prague in 1997, the European Ministers of Justice recommended speeding up the implementation of the Programme of Action against corruption and to complete the preparation of an international civil law instrument that would deal with the issue of compensation for damage caused by corruption. This was followed by the adoption of resolution by the Summit of the Heads of State and Government of the Council of Europe instructing the Committee of Ministers to secure the completion of international legal instruments on the basis of the Programme of Action against Corruption. In 1996, the Committee of Ministers asked the Multidisciplinary Group on Corruption (GMC) 'to start a feasibility study on the drawing up of a convention on civil remedies for compensation for damage resulting from acts of corruption'. The study, completed in 1997, deals with the following issues: accessibility and effectiveness of civil law remedies; determination of the main potential victims of corrupt behaviours; the problems of evidence and of proof of the causal link between acts and damage; and international cooperation. The study concludes that international convention on remedies against corruption is both possible and necessary. After extensive work and consultation, the GMC finalised a draft Civil Law Convention on Corruption and on 24 June 1999, transmitted it to the Committee of Ministers for adoption.

⁹¹ Art 4 Civil Law Convention.

persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the state or, in the case of a non-state party, from that party's appropriate authorities'. The Civil Law Convention also establishes a monitoring mechanism, the 'Group of States against Corruption', to supervise the implementation of the Convention by state parties. Furthermore, article 13 of the Convention provides that state parties

shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are party, as well as with their internal law.

The Civil Law Convention indicates the Council's intent not only to tackle the criminal aspects of corruption, but also to repair any harm that corruption causes. Therefore, the Convention sends a hopeful note about the possibilities offered by the human rights framework, and offers one example at least of how to confront the impact of corruption on the human rights of individuals and groups and how to find a way through. African governments could consult and take lessons from the Civil Law Convention on Corruption in their efforts to draft a protocol on the human rights aspects of corruption.

6 Conclusions

One of several defects noticeable in the Anti-Corruption Convention is that it is devoid of human rights content, rendering it almost entirely a toothless tiger. By focusing strictly on the criminal aspects of corruption, without entrenching its human rights dimensions, the Convention excludes the possibility of remedies for victims of official corruption. The drafters of the Convention missed an important opportunity to build on developing international statements, such as the Council of Europe Civil Law Convention on Corruption, in this area.

The apparent reluctance of the drafters of the Anti-Corruption Convention to place it squarely within the framework of human rights law is not only manifestly distorted, but inconsistent and incompatible with African governments' human rights obligations. In short, it inevitably makes hollow and meaningless those obligations, ultimately undermining the fundamental principle of international accountability. It is unacceptable from the perspective of the relevant international standards, not being reconcilable with the voluntary assumption of international human rights obligations. Recognising the indissoluble link between acts of corruption and the human rights of groups as well as individuals would have a beneficial effect, not only in terms of improving

the protection of those rights offered by the international law of human rights, but also in developing a more effective legal framework to deal with corruption.

Furthermore, the conceptualisation of corruption as a violation of human rights would immediately recognise state and international responsibility, not only to terminate the practice, but also to furnish effective remedies. It could provide a comprehensive tool to establish connections between law, policy planning, resource allocation, advocacy and community mobilisation and support, inject principles of accountability and transparency into the existing national anti-corruption laws, and give priority attention to comprehensive solutions to the human rights impact of corruption, thereby protecting the most vulnerable, who are its principle victims. Accordingly, a rights-based approach to corruption could engage the responsibility of the state in a way that other approaches cannot.

The potential and promise of the human rights framework to address corruption cannot be overstated. Rights-language was used to criticise and challenge the egregious abuses by the Nazi regime and to put perpetrators to trial at Nuremberg after the victory of the Allied Powers in World War II; and to fight colonial rule in Africa and elsewhere. However, it is essential to bear in mind that while a rights-based approach is a virtual necessity for dealing with the problem of corruption in Africa, it cannot in itself solve the multidimensional problems presently afflicting Africa any more than the human rights framework can solve the declining social, economic and political conditions being witnessed in other parts of the world. The progress to be made will depend largely on the willingness of governments to honour international human rights obligations and to ensure not a rhetorical commitment to human rights, but a practical one.

Towards a new approach to the classification of human rights with specific reference to the African context

*John C Mubangizi**

Associate Professor, Faculty of Law, University of KwaZulu-Natal (Westville Campus)

Summary

Departing from the premise that human rights are those rights possessed by virtue of being human, this contribution revisits the traditional classification of human rights into three 'generations' of rights. The author criticises aspects of this division from an African perspective, such as the prioritisation of civil and political ('first generation') rights above other 'generations', as well as the inappropriate classification of the right to culture with other socio-economic ('second generation') rights and the right to development as a 'third generation' right. A proposal is then made for the reconfiguration of rights into the following four categories: civil and political rights, social and survival rights, economic, developmental and environmental rights and cultural and spiritual rights.

1 Introduction

Human rights are usually referred to by various names and phrases. These include 'fundamental' rights, 'basic' rights, 'natural' rights or sometimes even 'common' rights.¹ Although these phrases do not mean the same thing, they are usually used interchangeably and sometimes

* LLB (Hons) (Makerere), DipLP (LDC), LLM (Cape Town), LLD (Durban-Westville); mubangizij@ukzn.ac.za

¹ See PS Jaswal & N Jaswal *Human rights and the law* (1996) 3.

rather confusingly. It could, however, be said that 'fundamental' or 'basic' rights are those rights which must not be taken away by any legislation or act of the state and which are often set out in the fundamental law of the country, for example in the bill of rights in a constitution. 'Natural' or 'common' rights, on the other hand, are seen as belonging to all men and women by virtue of their human nature. These are rights which all men and women should share. This perhaps explains why human rights were initially referred to as 'the rights of man' until the 1940s, when Eleanor Roosevelt promoted the use of the expression 'human rights' after discovering, through her work in the United Nations (UN), that the rights of men were not understood in some parts of the world to include the rights of women.² The term 'rights of man' had in fact replaced the original term 'natural rights', which had arisen as a result of its connections with natural law.

It would be futile to attempt a definition of human rights. In any case, there is far from universal agreement on definitional issues, let alone theorising about the definition of a concept like human rights. However, the UN has described human rights as follows:³

Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings . . . Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.

The description further states the following:⁴

The denial of human rights and fundamental freedoms is not only an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations. As the first sentence of the Universal Declaration of Human rights states, respect for human rights and human dignity is the foundation of freedom, justice and peace in the world.

Clearly, then, human rights are those rights one possesses by virtue of being human. One need not possess any other qualification to enjoy human rights other than the fact that he or she is a human being. It can therefore be inferred that human rights should be enjoyed by all people, regardless of their social status or their geographical or regional location. Political, economic and cultural differences cannot and should not be used as an excuse for the denial or violation of human rights. It is against this background that this article seeks to revisit the traditional classification of human rights, particularly in the African context, as the

² See VT Thamilmaran *Human rights in third world perspectives* (1992) 17.

³ United Nations *Human rights: Questions and answers* (1987) 4.

⁴ As above.

traditional approaches hardly take into account African (and other third world) aspirations and priorities.

2 Traditional categorisations of human rights

There are a number of different ways in which human rights are traditionally classified. Sometimes human rights are classified in terms of those that are fundamental or non-fundamental, those that are violable or non-violable, those that are collective or individual and those that are justiciable or non-justiciable. Some classifications even go as far as categorising human rights in terms of those which are procedural and those that are substantive. The European Community's *Human rights handbook* classifies human rights into two categories, namely, classic rights and social rights.⁵ According to this classification, classic rights include civil and political rights, which generally restrict the power of the state in respect of actions affecting the individual. By contrast, social rights include cultural and economic rights, which require the state to act in a positive, interventionist manner so as to create the necessary conditions for human development.

A classification that is more generally accepted, however, is that in terms of which human rights fall into three categories, namely; first, second and third generation rights.⁶ This classification follows the historical development of human rights.

The first generation consists of civil and political rights. These are the traditional rights of the individual as against the state and they reflect the *laissez-faire* doctrine of non-interference.⁷ These rights are aimed at the protection of the citizen against arbitrary actions of the state and they include the right to life, the right to liberty and security, the right to privacy, the right to a fair trial, the right to equality and the right to dignity. They also include freedom from torture and inhuman treatment, freedom from slavery and forced labour, freedom of religion, belief and opinion, freedom of expression, freedom of association and freedom of movement. Also included in this category are political rights, which guarantee individuals the right to participate in their government either directly or through elected representatives.

The second generation consists of economic, social and cultural rights. This category is, relatively, a later growth and contains rights founded on the status of an individual as a member of the society.⁸

⁵ Netherlands Ministry of Foreign Affairs *Human rights handbook* (1995) 4–7.

⁶ See eg Jaswal & Jaswal (n 1 above) who categorically state that the modern notion of human rights describes them as 'three human rights generations'. See also S Davidson *Human rights* (1993) 39–45 and C Dlamini *Human rights in Africa: Which way South Africa* (1995) 5.

⁷ DD Basu *Human rights in constitutional law* (1994) 82.

⁸ As above.

Unlike first generation rights, social, economic and cultural rights require more positive action on the part of the state to provide or at least create conditions for access to those facilities, which are considered essential for modern life.⁹ These rights include, but are not limited to, the right to work, the right to fair remuneration, the right to collective bargaining, the right to property, the right to housing, the right to education, the right to health care services, the right to social security and the right to participate in cultural life of one's choice.

The third generation rights belong to a category that is quite recent in origin.¹⁰ The emergence of this category of rights is closely associated with the rise of third world nationalism and the realisation by developing states that the existing international order is loaded against them.¹¹ Also known as solidarity rights, these rights are collective in nature and they depend upon international co-operation for their achievement.¹² Their achievement also depends on a collective effort between the government and the people. Included in this category are the right to peace, the right to development and the right to a clean environment.

3 A critique of the traditional approaches

While the above classification (according to the three generations) has proved to be a useful typology for conceptualising human rights, and has helped to extend the idea of human rights beyond a narrow western liberal construction, it is submitted that it is rather limited and inconsistent. A new approach is therefore called for, an approach that would be more conceptually consistent and one that would achieve a broader perspective on human rights. This calls for a critique of the traditional approaches.

It has to be first acknowledged, however, that any categorisation of human rights inevitably leads to some problem or other. Firstly, allocating human rights to particular categories inevitably creates artificial distinctions that tend to compartmentalise human rights. This has the effect of eroding the notions of indivisibility, universality and

⁹ Dlamini (n 6 above) 5. It should be noted, however, that some first generation rights also impose positive duties on the state. For example, the state has a duty to ensure a fair and prompt trial for anyone accused of an offence.

¹⁰ Kéba M'Baye introduced the concept of the 'right to development' (Inaugural lecture, third teaching session, International Institute of Human Rights, Strasbourg, July 1972; text in (1972) 13 *Revue des Droits de l'Homme* 505. Vasak later classified it, together with other rights, as a 'third generation of rights'; see K Vasak 'Pour une troisième génération des droits de l'homme' in C Swinarski (ed) *Studies and essays in international humanitarian law and Red Cross principles in honour of Jean Picet* (1984) 837.

¹¹ See S Davidson *Human rights* (1993) 43.

¹² As above.

interdependence of human rights, as will be explained further below. Secondly, there is a danger of perceiving different categories of human rights as static rigid definitions rather than simple divisions with permeable conceptual boundaries between them.¹³ Categories of human rights might thus be seen as representing distinct definitions of different types of rights rather than different aspects of the totality of rights.

That is not to say that classification of human rights is a bad thing. It obviously has its own merits. Not only does it encourage people to think about the breadth and complexity of the field encompassed by the idea of human rights; it is also useful in helping people to see beyond the narrow traditional civil and political conceptions of human rights, and also to think about rights from different conceptual perspectives.¹⁴ The following critique mainly focuses on the three generations classification, although it can easily apply to any classification that adopts a similar approach.

The main problem with the three generations classification, as has already been mentioned, is that it is inconsistent with the principles of universality, indivisibility and interdependence of human rights. It has to be remembered that there is a growing international recognition of these three principles of human rights.¹⁵

The principle of universality of human rights is founded on the notion that all human rights apply uniformly and with equal force throughout the world. The principle of interdependence of all human rights holds that the full and meaningful enjoyment of a particular right is dependent on the possession of all the other rights. And the principle of the indivisibility of human rights is founded on the assumption that all human rights have the same basic characteristics and should be upheld through the medium of equally potent enforcement mechanisms. Accordingly, it has been suggested that:

Promotion of the principles of universality, interdependence and indivisibility collectively represents an attempt to invalidate sectional pretences as an excuse for the violation of certain human rights and seek to upgrade all

¹³ J Ife 'Human rights beyond the "three generations"' Paper presented at Activating Human Rights Conference, Byron Bay, Australia, July 2003.

¹⁴ As above.

¹⁵ Indeed, the UN World Conference on Human Rights held in Vienna in June 1993 emphasised the universality, interdependence and indivisibility of all human rights by adopting the following as part of the Vienna Declaration and Programme of Action (art 5): 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner on the same footing, and with the same emphasis. While the significance of natural peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights.'

human rights as a uniform set of equally compelling conditions for better living conditions and a human existence for all.¹⁶

The inference from the principles outlined above is that human rights are universal and should apply to all persons at all times without distinction. Categorising rights into 'generations' creates the wrong impression that some rights are available and exclusive to certain categories of people and not to others. It also tends to imply that human rights are not inter-related, a notion that ignores the universally accepted holistic approach towards the protection of human rights.

Some commentators have argued that the most obvious problem with the three generations is their labels of 'first', 'second' and 'third'. According to Jim Ife:¹⁷

The three are named in that way simply because that is the order in which they emerged in post-enlightenment western thought, and by assuming and privileging this context, the 'three generations' typology still locates the human rights discourse firmly within the modern western intellectual tradition. It thus does little to address the critiques that human rights need to be understood from other cultural traditions than the western.

Ife further argues that denoting the generations of human rights as first, second and third can be seen as to imply a priority for civil and political rights, as if they somehow come first in any consideration of human rights, and that a hierarchy is therefore assumed which reinforces the tendency to marginalise other categories of human rights.¹⁸ Attempts to resolve this 'generations' problem by labeling human rights in terms of colours (blue, red and green) hardly achieve the intended objective, as this tends to create other problems. For example, it has the effect of associating rights with particular ideologies. Blue rights can easily be associated with western liberalism, red rights with socialism or communism and green rights with third world nationalism that lays emphasis on developmental and environmental priorities.¹⁹

The question of implementation is another problem that arises from the three generations categorisation. This problem has its genesis in the drafting history of international human rights instruments. Although the Universal Declaration of Human Rights (Universal Declaration)²⁰ does not have a categorical classification of human rights, it recognises two sets of rights, namely, civil and political rights and social and economic rights. During the drafting of the Universal Declaration, some states — particularly the United States and the United Kingdom — took

¹⁶ JD van der Vyver 'The doctrine of human rights: Its historical and philosophical foundation' in D Brand *et al* (eds) *From human wrongs to human rights — Part IV* (1995) 48.

¹⁷ Ife (n 13 above).

¹⁸ As above.

¹⁹ As above.

²⁰ Adopted by the UN General Assembly on 10 December 1948.

the view that, whereas civil and political rights were immediately enforceable and justiciable, other rights depended upon positive, programmatic implementation.²¹ Those states contended that socio-economic and cultural rights, for example, were not amenable to immediate protection and were best fulfilled through a progressive reporting system.²² The drafting of the International Covenant on Civil and Political Rights (CCPR)²³ and the International Covenant on Economic, Social and Cultural Rights (CESCR),²⁴ separately dealing with the two broad categories of human rights, would seem to support the contentions of those western states.²⁵ While CCPR provides for immediate protection of the rights therein, CESCR, on the other hand, only requires the progressive realisation of the rights 'to the maximum of [the states'] available resources'.²⁶ It could be argued, therefore, that only first generation (civil and political) rights are regarded as 'real' rights, as they require immediate protection and implementation. Other categories of rights, on the other hand, may be seen as not deserving that status.

The other problem associated with categorising human rights into three generations is that some rights do not adequately fit into any of the categories. Alternatively, it can be argued that some rights fall into more than one category. The right to self-determination, for instance, is classified by some as a first generation right, whereas others regard it as a third-generation right.²⁷ In fact, it could also be seen as a second-generation right as both CCPR and CESCR provide for it.²⁸ In the particular African (or developing world) context, classifying the right to development is also rather problematic. While it is generally agreed that the right falls under the third generation, it could be argued that the concept of development is usually associated with advancement in social and economic terms. Hence, the right to development could easily be classified as a socio-economic (second generation) right.

The three generations categorisation may also be seen as fuelling the debate on individualism and collectivism. It is often assumed that the first generation (civil and political) rights are individual rights, which can easily be enforced through domestic courts of law. Second and third generation rights, on the other hand, are seen as collective rights based on notions of international solidarity and therefore not justiciable in

²¹ Davidson (n 11 above) 41.

²² As above.

²³ Adopted by the UN General Assembly on 16 December 1966.

²⁴ Adopted by the UN General Assembly on 16 December 1966.

²⁵ Davidson (n 11 above) 41.

²⁶ Art 2(1).

²⁷ See Dlamini (n 9 above) 5.

²⁸ See art 1 of both Covenants.

domestic courts.²⁹ This is not necessarily correct, as has been demonstrated in South Africa where the Constitutional Court has, over the last decade, handed down several decisions which demonstrate that socio-economic rights are in fact justiciable and enforceable through domestic courts.³⁰ It would therefore be more useful to accept that all human rights can have both individual and collective dimensions instead of marginalising so-called collective rights by placing them in a separate category.

4 An 'African' typology

In view of the above critique, it is submitted that a new typology of classifying human rights is called for, particularly in the African context. As was mentioned earlier, however, no classification of human rights can claim to be flawless. Nevertheless, it can be argued that suggesting new approaches of classifying human rights can be a useful form of intellectual inquiry and can encourage critical analysis, especially in a region such as Africa, where the human rights system is more recent in origin.

The African Charter on Human and Peoples' Rights (African Charter or Charter)³¹ lies at the heart of the African human rights system. The Charter is a unique regional instrument, which differs considerably from its regional counterparts (the European and the American Conventions on Human Rights). One of the most distinguishing features of the African Charter is that it provides for several rights that are not recognised by other international human rights instruments. In addition to the usual rights laid out in those other instruments, the African Charter recognises the right to development,³² the right to peace,³³ the right to a satisfactory environment,³⁴ and the right of people to dispose of their wealth and natural resources.³⁵ It also recognises family rights,³⁶ the rights of women and children,³⁷ and the rights of the aged and the disabled.³⁸

²⁹ See the discussion on the justiciability of socio-economic rights in J de Waal *et al* *The Bill of Rights handbook* (2000) 400–404.

³⁰ See eg *First Certification Judgment* 1996 4 SA 744 (CC); *Government of the Republic of South Africa v Grootboom & Others* 2001 1 SA 46 (CC); and *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 703 (CC).

³¹ Adopted by the 18th Assembly of Heads of State and Government of the Organisation of African Unity on 17 June 1981 and came into force on 21 October 1986.

³² Art 22.

³³ Art 23.

³⁴ Art 24.

³⁵ Art 21.

³⁶ Arts 18(1) & (2).

³⁷ Art 18(3).

³⁸ Art 18(4).

In determining a suitable 'African' human rights typology, regard has to be had to the philosophy underpinning the African Charter. According to the Organisation of African Unity, the drafting of the Charter was predicated upon the following principles:³⁹

- the specificity of African problems with regard to human rights;
- the importance of economic, cultural and social rights in developing countries;
- the total liberation of Africa from foreign domination;
- the need to eradicate apartheid;
- the link between human and peoples' rights; and
- the need for a new economic order, particularly the right to self-determination.

A typology that takes into account the above principles and all the rights in the African Charter with its aspirations and objectives, would therefore see the rights falling into four reconfigured categories, rather than the traditional three. These are:

- civil and political rights;
- social and survival rights;
- economic, developmental and environmental rights; and
- cultural and spiritual rights.

4.1 Civil and political rights

The rights under this category would be fairly obvious. However, not all rights that are traditionally known as civil and political rights would be included. Some would be more appropriately placed in other categories. To begin with, articles 2 and 3 of the African Charter respectively provide for non-discrimination and equality before the law. These rights would naturally fall into the civil and political category. So would the right to life and the right to inherent dignity respectively provided for under articles 4 and 5 of the Charter. Another important right under this category is the right to freedom of expression. Provided for under article 9 of the Charter, the importance of this right in the African context cannot be over-emphasised. In keeping with the Charter principles mentioned above, 'the basic functions that this right serves in a democratic society underlie the intimate relationship between the concepts of human rights and democracy'.⁴⁰ Other civil rights that would fall into this category include the right to free association,⁴¹ the

³⁹ Rapporteur's Report OAU Doc CM/1149 (XXXVII) Annex 1. See also KA Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights' (2001) 1 *African Human Rights Law Journal* 186.

⁴⁰ Acheampong (n 39 above) 198.

⁴¹ Art 10.

right to assemble,⁴² the right to freedom of movement⁴³ and other article 12 rights, which include the right to leave and return to one's country, the right to asylum and the prohibition of mass expulsion of non-nationals. Also included in this category would be security and due process rights. Article 6 of the African Charter guarantees every individual the right to liberty and to the security of his person. Due process rights are provided for under article 7.

Political rights naturally form the other brand of rights that fall into the civil and political category. Under article 13 of the African Charter, every citizen has the right to participate freely in the government of his country. This obviously goes beyond the mere right to vote or to run for political office. It goes to the very heart of democracy, an ideal that has lately been cherished and emphasised by the new African Union (AU). Without democracy there can be no political freedom. That is why, it is submitted, the right to self-determination should also fall under this category. Article 20 does not only guarantee the right to self-determination; it also calls upon 'all peoples' to freely determine their political status and to free themselves from the bonds of colonial domination and oppression. It will be remembered that the total liberation of Africa from foreign domination was mentioned earlier as one of the principles that predicated the drafting of the African Charter. So too was the right to self-determination.

4.2 Social and survival rights

First of all, there is no rational reason why social rights should have been originally banded together with economic and cultural rights, as they have very little in common. The concept of social rights is founded on the status of the individual as a member of the society.⁴⁴ Social rights thrive on the positive contribution of the society 'particularly because they represent an ever-growing ideal of a decent living for man as a social being'.⁴⁵ This ideal is clearly brought out in article 11(1) of CESC, wherein one can also find the definition of social rights. It states:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. . . .

This provision echoes article 25(1) of the Universal Declaration, which states as follows:

⁴² Art 11.

⁴³ Art 12(1).

⁴⁴ See Basu (n 7 above) 82.

⁴⁵ As above.

Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . . .

Through these two articles, one can clearly recognise a distinctive call for the protection of social rights, not only for survival but also for an adequate standard of living.

While social rights deal with social and survival needs, which is why the term social and survival rights is deemed appropriate, economic rights deal with economic needs. While the object of social rights is human needs such as food, shelter and health, the object of economic rights is economic needs such as land, labour and capital. One could even say that social rights relate to present entitlements (for lack of a better word), while economic rights relate to future wealth.

It is for these reasons that social and economic rights should be desegregated. So too should cultural rights which, as will be seen further below, deal with culture. Culture, it will be seen, has its own significance and should belong to a different category of human rights.

The term 'survival rights' is used alongside social rights because some social rights are necessary for human survival, for example the right to food, water and shelter. Some would not categorise these as rights, but rather as basic human needs.⁴⁶ However, it all depends on which part of the world you are living in. In the so-called developed world (for example Europe and North America), such things are taken for granted, while in Africa and other third world underdeveloped countries, they are not only basic needs, but sometimes luxuries. In the African context, therefore, the classification of social and survival rights is even more appropriate.

Under the African Charter, most social and survival rights are notable by their absence. Only a few are mentioned. They include article 16, which provides for 'the right to enjoy the best attainable state of physical and mental health', article 17(1), which provides for the right to education, and articles 18(1) and (2), which provide for family rights. The absence of rights to food, housing, clothing, medical care and other amenities necessary for an adequate standard of living is out of keeping with other international human rights instruments.⁴⁷ One would have hoped that Africa would strive to attain a higher standard of living for its peoples by ensuring the protection of such rights. However, factors such as availability of resources seem to have dictated otherwise.

⁴⁶ See eg L Doyal & I Gough *A theory of human need* (1991) (generally).

⁴⁷ See, however, the African Commission on Human and Peoples' Rights' finding in Communication 155/96, *SERAC & Another v Nigeria*, Fifteenth Annual Activity Report, in which the Commission holds that the African Charter implicitly guarantees the right to housing and food (paras 59 & 64).

4.3 Economic, development and environmental rights

Although article 22(1) of the African Charter views development as a comprehensive economic, social and cultural process,⁴⁸ it can be argued that any type of development largely depends on the economic resources of a particular community. The goal of development is to create an environment that enables people to exercise a range of choices that enable the expansion of human functioning and capabilities.⁴⁹ Such choices, it is submitted, cannot be exercised in an environment of limited economic resources. That is why economic and development rights should be classified together, as the two categories are inevitably tied to each other.

As mentioned earlier, the object of economic rights is economic need such as land, labour and capital. In that sense, and in the context of the relationship between economic resources and development, a number of rights in the African Charter would conveniently fall into this category. Article 11, guaranteeing the right to property, is one such right. Article 15, providing for the right to work under equitable and satisfactory conditions and the right to equal pay for equal work, is another example. Both property and work are two important aspects that contribute not only to an individual's economic status, but also to his or her development and that of the community he or she lives in. Article 21, providing for peoples' rights to freely dispose of their wealth and natural resources, would also fall into this category. So too would article 22 mentioned earlier, in particular article 22(2) which obliges state parties to the Charter to ensure the exercise of the right to development.

Another right that would fall into this category is the right to a sustainable and healthy environment. The relationship between the environment and development was most aptly expressed by one commentator in his thoughts about meeting the challenge of worldwide concern for the environment:⁵⁰

It is an awesome challenge, requiring us to find and keep a sensible balance between development and environmental protection, in order to achieve both sustainable development and quality of the environment in a world comprising some rich and technologically advanced nations, but many poor nations claiming for development.

⁴⁸ Art 21(c) of the African Charter provides that '[a]ll people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.

⁴⁹ See *Human Development Report 2000*, United Nations Development Programme 19.

⁵⁰ See DV Cowen 'Towards distinctive principles of South African environmental law: Some jurisprudential perspectives and a case for legislation' (1989) 52 *Journal for Contemporary Roman-Dutch Law* 4.

The relationship between the environment and development is also emphasised by the fact that many natural resources needed for economic development, such as petroleum and other minerals, timber, sources of hydro-electric and geothermal energy, and land for agricultural expansion are often located in areas that are especially valuable for conservation of biological diversity and that are also inhabited by resource dependent communities.⁵¹ This is particularly pertinent in Africa and other third world economies.

Unfortunately many international human rights instruments, including CCPR, CESC and the Universal Declaration, barely mention the relationship between environmental protection and human rights. The first major international law instrument to link human rights and environmental protection was the Stockholm Declaration of 1992. Its Principle 1 states as follows:

Man has the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears solemn responsibility to protect and improve the environment, for present and future generations.

The African Charter was the first regional human rights instrument to recognise the link between environmental protection and human rights. Article 24 provides for 'the right to a general satisfactory environmental favourable to . . . development'. The link between the environment and development is well articulated.

4.4 Cultural and spiritual rights

The scope of cultural rights depends on the understanding of the very term 'culture'. Culture has been defined as 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group'.⁵² From this definition, the nexus between culture and spirituality is clear. So too is the relationship between cultural rights and spiritual rights.

As a starting point, spiritual rights would ordinarily include freedom of religion, belief, conscience, thought and opinion. It is not as easy, however, to give a definitive list of cultural rights, although both the Universal Declaration and CESC recognise the following as cultural rights:⁵³

- (a) the right to take part in one's cultural life;
- (b) the right to enjoy the arts and to share in the benefits of scientific advancement; and

⁵¹ See G Maggio & OJ Lynch 'Human rights, environment and economic development: Existing and emerging standards in international law and global society' <<http://www.ciel.org/Publications/olp3i.html>> (accessed 31 March 2004).

⁵² World Conference on Cultural Policies (1982).

⁵³ Art 27 Universal Declaration and art 15 CESC.

- (c) the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author.

Language rights, it is submitted, may also be added to this list.

The inclusion of cultural rights with economic and social rights in a single category seems to have little conceptual justification. This is why a new category that incorporates cultural and spiritual rights is more appropriate. The relationship between cultural rights and spiritual rights is properly conceptualised in the wording of article 27 of CCPR, which stipulates that persons belonging to ethnic, religious or linguistic minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language'.

The African Charter formulates both the right of every individual to freely take part in the culture of his community,⁵⁴ and it also provides for the rights of all peoples to their cultural development, with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.⁵⁵ Freedom of conscience and the profession and free practice of religion are guaranteed under article 8.

Clearly there are certain cultural aspects to the experience and expression of spirituality. Certain cultural practices, such as music, poetry and art, can be a profound expression of spirituality.⁵⁶ And although spirituality is a deeply personal and individual matter, the simple experience of human community and connectedness with others is essentially spiritual.⁵⁷ As the African Charter emphasises community values and the promotion of the moral well-being of society, it is submitted that cultural and spiritual rights should be subsumed together.

5 Conclusion

It was earlier acknowledged that any sort of classification of human rights inevitably leads to problems, including the fact that it is inconsistent with the principles of indivisibility, universality and interdependence of human rights. It was also mentioned, however, that classifying human rights could be a useful tool that encourages critical analysis in the intellectual inquiry of the meaning and purpose of human rights.

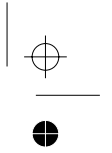
⁵⁴ Art 17(2).

⁵⁵ Art 22(1).

⁵⁶ See *Ife* (n 13 above).

⁵⁷ As above.

Compared to the other two established human rights systems, the African regional human rights system is unique and more recent. The African Charter, around which the African system revolves, differs considerably from its other regional counterparts, both in the types of rights protected and in the means of implementation and protection. It is the argument of this contribution that since the African human rights system is more recent in origin, the rights under the African Charter should be classified differently, as the Charter contains certain distinctive rights that were not envisaged by the earlier international and other regional human rights instruments. The classification suggested is by no means flawless. If anything, it is meant to serve as a motivation for further debate and an encouragement for people to think about the uniqueness and complexity of human rights, particularly under the African regional human rights system.



The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence

*Robert P Barnidge Jr**
Attorney, Missouri, USA

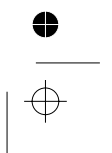
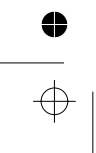
Summary

Due process rights include the right to an impartial hearing, trial within a reasonable time and the presumption of innocence. This contribution considers the interpretation of these rights by two regional human rights treaty bodies, the African Commission Human and Peoples' Rights and the Inter-American Commission on Human Rights. The author concludes that the two bodies have developed a jurisprudence appropriate to the particular situation in Africa and the Americas, respectively.

1 Introduction

The human rights movement of the last 50 years has operated on many levels. To further the cause of human rights, it has crafted mechanisms at the global level, has acted through regional human rights regimes in

* BA (Notre Dame), JD (North Carolina), LLM Public International Law Candidate, University of Amsterdam, 2004; rbarnidge@yahoo.com



Africa, the Americas, and Europe, and has influenced the actions of states internally.¹

This article addresses the way in which the African Commission on Human and Peoples' Rights (African Commission) and the Inter-American Commission on Human Rights (Inter-American Commission) have understood due process rights. Specifically, it focuses on the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence under the African Charter on Human and Peoples' Rights (African Charter),² the American Convention on Human Rights (American Convention),³ and the American Declaration of the Rights and Duties of Man (American Declaration).⁴

2 The right to an impartial hearing on detention and trial within a reasonable time

2.1 The African experience

The question of the compatibility with the African Charter's article 7(1)(d) of trials before special tribunals dominated by the police and military arose in *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria*.⁵ In this case, Wahab Akamu, Gbolahan Adegga and others were sentenced to death under the terms of the Robbery and Firearms (Special Provision) Decree No 5 of 1984, which established special three-member tribunals composed of one member of the police, one current or former judge, and one member of the military.⁶ According to

¹ At the state level, '[i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights — both civil and political rights and social and economic — generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to *respect, protect, promote, and fulfil these rights*. These obligations universally apply to all rights and entail a combination of negative and positive duties.' Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Fifteenth Annual Activity Report (2003) 10 IHRR 282 287 para 44.

² African Charter on Human and Peoples' Rights in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 3.

³ American Convention on Human Rights in *Basic documents pertaining to human rights in the Inter-American system* (updated to 2003) 27.

⁴ American Declaration of the Rights and Duties of Man in *Basic documents pertaining to human rights in the Inter-American system* (updated to 2003) 17. For a general discussion of the presumption of innocence, the principle that judges must be impartial and independent and the principle of expeditious and fair trial within the context of international criminal law, see A Cassese *International criminal law* (2003) 389–400.

⁵ *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995). See also *Constitutional Rights Project v Nigeria (II)* (2000) AHRLR 248 (ACHPR 1999) paras 19 & 20.

⁶ As above, para 1. Incidentally, two of those who were sentenced to death, Akamu and Adegga, according to the complaint, confessed after they were allegedly tortured while in custody (para 2). It is unclear how, if at all, this alleged torture factored into the African Commission's decision.

Nigerian law, '[n]o appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation nor dismissal of such decision by the Governor'.⁷ Effectively, this excluded the possibility of judicial appeal. The complaint alleged violations of article 7(1)(a) of the African Charter,⁸ because of the lack of judicial review by 'competent national organs against acts violating fundamental rights'⁹ and article 7(1)(d), because of the composition of the special three-member tribunals.¹⁰

After finding that the rule under article 56(5) of the African Charter requiring the exhaustion of local remedies¹¹ did not preclude consideration by the African Commission because the governor's power was a 'discretionary extraordinary remedy of a non-judicial nature'¹² and 'neither adequate nor effective',¹³ the African Commission reached the merits. It noted that the decision by the special three-member tribunals effectively amounted to judgment being rendered by the executive branch without the guarantee of sufficient legal expertise,¹⁴ and that the special three-member tribunals' composition created the appearance of partiality, if not partiality in fact.¹⁵ Thus, the special three-member tribunals violated the African Charter's article 7(1)(d).¹⁶

The African Commission also confronted article 7(1)(d) of the African Charter in *The Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria*.¹⁷ In this case Nigeria imposed capital sentences on seven men

⁷ Robbery and Firearms (Special Provisions) Act ch 398 sec 11, para 4.

⁸ According to art 7(1)(a) of the African Charter, '[e]very individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.'

⁹ n 5 above, para 3.

¹⁰ n 5 above, para. 4.

¹¹ According to art 56(5) of the African Charter, '[c]ommunications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they . . . 5. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.'

¹² n 5 above, para 5.

¹³ As above.

¹⁴ n 5 above, para 12.

¹⁵ As above.

¹⁶ As above. Note that the African Commission found that Nigeria had also violated the African Charter's art 7(1)(a) because there was no right to an appeal or provision to sufficiently protect 'the fundamental rights in question, [namely] . . . those to life and liberty provided for in articles 4 and 6 of the African Charter'; n 19 above, 133 para 7. It based its finding of a violation of the right to an appeal at least in part on the belief that failure to find a violation would 'increase the risk that severe violations may go unredressed'. In this way, it acted proactively against future, and potentially far more serious, human rights violations. Nigeria had also violated the African Charter's art 7(1)(c), although the African Commission did not give specific comments in reaching its conclusion; n 19 above, 133.

¹⁷ *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995).

under the terms of the Civil Disturbances (Special Tribunal) Decree No 2 of 1987 for unlawful assembly, culpable homicide and breach of the peace.¹⁸ According to the terms of the Decree, there was no allowance for judicial appeal from decisions reached by the special tribunals, composed of members of the police and the military and judges.¹⁹ In addition to alleged violations of article 7(1)(d) of the African Charter, because of the composition of the special tribunals, the complaint also alleged violations of the African Charter's articles 7(1)(a) and 7(1)(c).²⁰

After finding that article 56(5) of the African Charter did not preclude an examination of the merits because 'the remedy available is not of a nature that requires exhaustion',²¹ the African Commission reached the merits. It found that the special tribunals that imposed capital sentences on the seven men fell short of the requirements of article 7(1)(d) of the African Charter because they were composed mostly of executive branch officials.²² In language exactly like paragraph 8 of *Constitutional Rights Project (in respect of Akamu & Others)*, the African Commission stated that the special tribunal's 'composition alone creates the appearance, if not actual lack of impartiality'.²³

The African Commission further explored what is meant by the right to an impartial hearing in *Law Office of Ghazi Suleiman v Sudan*.²⁴ Specifically, it addressed the trial of 26 civilians before a military court 'accused of offences of destabilising the constitutional system, inciting people to war or engaging in the war against the state, inciting opposition against the government and abetting criminal or terrorist organisation under the law of Sudan'.²⁵ Executive decree had established the military court, and out of its four members, three were active servicemen.²⁶

In its decision, the African Commission held that such a court constitutes a prima facie violation of the right to an impartial hearing.²⁷

¹⁸ As above, paras 1–2.

¹⁹ As above, paras 1 & 5.

²⁰ As above, paras 3–5. According to art 7(1)(c) of the African Charter, '[e]very individual shall have the right to have his cause heard. This comprises . . . (c) the right to defence, including the right to be defended by counsel of his choice.'

²¹ n 17 above, para 10.

²² As above, para 14. According to the terms of the Civil Disturbances (Special Tribunal) Act's Part II, Section 2(2), the special tribunals consisted of four members of the military and a judge.

²³ Note that the African Commission also found that Nigeria had violated the African Charter's arts 7(1)(a) and 7(1)(c); n 17 above, para 14.

²⁴ Communications 222/98 & 229/99, *Law Office of Ghazi Suleiman v Sudan* Sixteenth Annual Activity Report, <http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity16_en.pdf> 39 (2003) (accessed 31 May 2004).

²⁵ As above, para 5.

²⁶ As above, para 63.

²⁷ As above, para 64 (stating that '[t]his composition of the military court alone is evidence of impartiality [*sic*]').

According to the African Commission, '[c]ivilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial'.²⁸ It cited its Resolution on the Right to a Fair Trial and Legal Aid in Africa during the adoption of the Dakar Declaration and Recommendations in stating that military courts should try civilians 'in no case'.²⁹ The African Commission found a violation of the African Charter's article 7(1)(d).³⁰ The enunciation by the African Commission of such an absolute rule provides clarity and contributes to the principle of legality.

Thus, an examination of the African Commission's decisions in *Suleiman, Constitutional Rights Project (in respect of Akamu & Others)* and *The Constitutional Rights Project (in respect of Lekwot & Others)* reveals that the 'impartial court or tribunal' language of the African Charter's article 7(1)(d) requires *bona fide* judicial process, not trial by military courts. The African Commission raised concerns of partiality and fairness in reaching its conclusions. Courts or tribunals, to qualify as 'impartial court[s] or tribunal[s]' under article 7(1)(d) of the African Charter, must be independent of the political branches of government, not part of them.

Outside the criminal context, the African Commission dealt with the right to a hearing within a reasonable time in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*.³¹ The complainant, Halidou Ouédraogo, cited several incidents, including an assassination attempt and death threats made against him and suspicious killings by state security forces of student activists, in which Burkina Faso had allegedly failed to provide an adequate forum for redress within a reasonable time.³²

In addressing the right to be heard within a reasonable time, the African Commission dealt with the retirements, dismissals and suspensions of magistrates that took place on 10 June 1987.³³ Burkina Faso subsequently adopted a law to rehabilitate those removed from office, but the complainant and another magistrate, Compaoré Christophe, were not affected by the law and demanded compensation

²⁸ As above.

²⁹ As above, para 65 (noting that military courts 'should not deal with offences which are under the purview of ordinary courts').

³⁰ n 24 above, para 67 (stating that 'article 7(1)(d) of the Charter requires the court to be impartial. Apart from the character of the membership of this military court, its composition alone gives an appearance, if not, the absence of impartiality, and this therefore constitutes a violation of article 7(1)(d) of the African Charter.').

³¹ Communication 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* Fourteenth Annual Activity Report (2002) 9 IHRR 250.

³² As above, paras 1–14.

³³ As above, para 38.

in kind.³⁴ While the facts given by the African Commission are somewhat unclear, Burkina Faso's Supreme Court had not resolved Compaoré's claim over 15 years after it had been filed.³⁵

The African Commission found that 15 years without a decision on the relief sought or the fate of the people concerned or any action at all on the case amounted to a denial of justice and a violation of the right to an impartial trial within a reasonable time.³⁶ Given the African Commission's failure to extensively comment on article 7(1)(d) of the African Charter,³⁷ and the significant length of time without action at all in the case, few would disagree with the African Commission's conclusion. One might have hoped for facts that would have allowed for a more nuanced clarification of the law, but given what many would regard as the blatant nature of the human rights violation, the decision is certainly positive.

2.2 The Inter-American experience

In *Dayra María Levoyer Jiménez v Ecuador*,³⁸ the Inter-American Commission addressed the right to a hearing on detention and trial within a reasonable time. On 21 June 1992, a group of 15 unidentified individuals, in both civil dress and uniforms, detained Jiménez without an arrest warrant.³⁹ The police failed until 30 and 31 July 1992 to issue an arrest warrant for illicit enrichment, drug trafficking, asset laundering and acting as a 'front'.⁴⁰ Nearly half a month later, between 11 and 13 August 1992, the court issued arrest warrants for Jiménez.⁴¹ Although Ecuador detained her until June 1998, the state eventually dismissed the four charges against Jiménez and released her.⁴²

The Inter-American Commission noted that the reasonableness of the duration of a trial must be determined on a case-by-case basis.⁴³ It applied a two-part test:⁴⁴

First, whether the deprivation of liberty without a conviction is justified in the light of relevant and sufficient criteria, determined objectively and reasonably by pre-existing legislation; and second, whether the judicial authorities have acted with due diligence in the advancement of the judicial proceedings.

³⁴ As above.

³⁵ As above.

³⁶ As above, para 40.

³⁷ Art 7(1)(d) of the African Charter states that '[e]very individual shall have the right to have his cause heard. This comprises . . . (d) the right to be tried within a reasonable time by an impartial court or tribunal.'

³⁸ *Dayra María Levoyer Jiménez v Ecuador* Inter-American Commission on Human Rights Case 11.992, rep n 66/01 (2003) 10 IHRR 512.

³⁹ As above, para 26.

⁴⁰ As above.

⁴¹ As above.

⁴² As above, para 19.

⁴³ As above, para 49 (fn omitted).

⁴⁴ As above.

On the facts, the Inter-American Commission found that Ecuador had violated Jiménez's right to trial within a reasonable time under article 7(5) of the American Convention.⁴⁵

After finding a violation of the right to trial within a reasonable time, the Inter-American Commission examined whether Ecuador had also violated article 8(1) of the American Convention, which guarantees the right to a hearing within a reasonable time.⁴⁶ As it had for its assessment of article 7(5), the Inter-American Commission applied a reasonableness test, a test that considers 'the complexity of the matter, the procedural activity of the individual concerned, and the conduct of the judicial authorities'.⁴⁷ It found that the almost eight years that had elapsed since the start of the investigation against Jiménez, coupled with the fact that Ecuadorian law allowed the case to remain open even after the charges had been dismissed, was an unreasonable amount of time in which to hear Jiménez's case.⁴⁸ The Inter-American Commission's language suggests that a trial that has not concluded after almost eight years will *prima facie* violate article 7(5) of the American Convention.⁴⁹

The Inter-American Commission also addressed the right to judicial decision within a reasonable time in *Milton García Fajardo & Others v Nicaragua*.⁵⁰ According to the petition, 142 customs service workers went on strike on 26 May 1993.⁵¹ Nicaragua's Ministry of Labour declared the strike illegal on the next day.⁵² In response, the workers petitioned the Court of Appeals for *amparo*, or a ruling by the Supreme Court of Justice asserting the supremacy of Nicaragua's Constitution over its labour laws, on 7 June 1993.⁵³ The Court of Appeals ordered the

⁴⁵ As above, paras 61 & 63. According to art 7(5) of the American Convention, '[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.'

⁴⁶ According to art 8(1) of the American Convention, '[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'

⁴⁷ n 38 above, para 91 (fn omitted).

⁴⁸ n 38 above, paras 95–96 (fn omitted).

⁴⁹ The Inter-American Commission stated that '[t]he Commission is of the view that the nearly eight years that have elapsed since the investigation began is well beyond the principle of reasonable time within which to resolve a case, especially in light of the fact that according to Ecuadorian law, even when a provisional dismissal has been issued, the case remains open for six years, a period during which the investigation may be reopened if fresh evidence is produced.' n 38 above, 527 para 95 (fn omitted).

⁵⁰ *Milton García Fajardo & Others v Nicaragua*, Inter-American Commission, Case 11.381, rep n 100/01 (2003) 10 IHRR 531.

⁵¹ As above, paras 1–2 (fn omitted).

⁵² As above, para 2.

⁵³ As above, para 3.

Ministry of Labour to rescind its dismissal of the workers pending final decision, but the customs authorities ignored the order.⁵⁴ Despite the fact that Nicaraguan law required that petitions for *amparo* be decided within 45 days, the Supreme Court did not reach a decision until 2 June 1994.⁵⁵

Clearly incensed by the Supreme Court's inaction, the Inter-American Commission found that there was 'no reasonable cause'⁵⁶ for the Supreme Court's delay and that it had acted with 'clear negligence'⁵⁷ with respect to both Nicaraguan and international procedural requirements 'by issuing a ruling that was vital to the jobs and financial security of a large number of workers and to the effectiveness of other human rights long after the respective petition in question was filed'.⁵⁸ It applied the three-part reasonableness test of article 8(1) of the American Convention⁵⁹ and found that the petitioners had satisfied each part of the test.⁶⁰ Finding 'no justification whatsoever'⁶¹ for the Supreme Court's delay in responding to the petition for *amparo* and stressing the workers' 'legal defenselessness',⁶² the Inter-American Commission found a violation of the right to judicial decision within a reasonable time.⁶³ Because *Fajardo* must be viewed within the context of a labour strike and its crippling effect on striking workers and their families, however, it would probably be inaccurate to assert that a wait of approximately one year will *always* violate article 8(1) of the American Convention. Nonetheless, from a human rights perspective, the Inter-American Commission's decision is to be welcomed.

A final Inter-American Commission decision worth exploring with regard to the right to a hearing on detention and trial within a reasonable time is *Waldemar Gerónimo Pinheiro and José Víctor Dos Santos v Paraguay*.⁶⁴ Paraguay had arrested Pinheiro in 1985 and held him in preventive detention without judicial justification until Pinheiro escaped on 27 October 1996.⁶⁵ Dos Santos was imprisoned from 1988 until

⁵⁴ As above, para 3, 540 para 49.

⁵⁵ As above, paras 52–53. (The Nicaraguan law at issue was art 47 of the Law on *Amparo* number 49.)

⁵⁶ As above, para 50.

⁵⁷ As above, para 53.

⁵⁸ As above.

⁵⁹ n 47 above and accompanying text.

⁶⁰ n 50 above, paras 54–58 (footnotes omitted).

⁶¹ As above, para 58.

⁶² As above.

⁶³ As above.

⁶⁴ *Waldemar Gerónimo Pinheiro and José Víctor Dos Santos v Paraguay*, Inter-American Commission, Case 11.506, rep n 77/02 <<http://www.cidh.oas.org/annualrep/2002eng/Paraguay.11506.htm>> (2002) (accessed 31 May 2004).

⁶⁵ As above, para 61.

9 June 1995 without judicial justification, 'logical grounds, [or] . . . cause of any kind'.⁶⁶

The Inter-American Commission found that Paraguay's use of preventive detention against Pinheiro and Dos Santos violated the American Convention's article 7(5) and the American Declaration's article XXV(3).⁶⁷ The Inter-American Commission interpreted these articles as meaning that, as a rule, preventive detention must be⁶⁸

special in nature, or in other words it must occur on an exceptional basis. Secondly, at the time it is ordered, it must be justified by the state, based on the special circumstances of each case. In the third place, excessive prolongation of pre-trial detention must be prevented.

The Inter-American Commission stated that preventive detention can only be used for the purpose of guaranteeing trial.⁶⁹ Since it did not satisfy the limited circumstances under which preventive detention could be justified, the Inter-American Commission found that Paraguay's use of preventive detention against the petitioners violated the American Convention and the American Declaration.⁷⁰

The Inter-American Commission had little difficulty in finding that Paraguay had also violated the right to a hearing within a reasonable time under the American Convention's article 8(1) and the American Declaration's article XXV.⁷¹ It noted that the 'mere passage of time does not necessarily mean that a reasonable time has been exceeded'⁷² and relied on the three-part reasonableness test⁷³ in assessing the matter.⁷⁴ The Inter-American Commission found that Paraguay had failed to satisfy each part of the reasonableness test and, therefore, had violated the right to a hearing within a reasonable time under the American Convention and the American Declaration.⁷⁵

⁶⁶ As above.

⁶⁷ As above, para 72. According to art XXV(3) of the American Declaration, '[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.'

⁶⁸ n 64 above, para 64 (footnote omitted).

⁶⁹ As above, para 66.

⁷⁰ As above, para 72.

⁷¹ As above, paras 73–80. According to art XXV of the American Declaration, '(1) No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. (2) No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character. (3) Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.'

⁷² n 50 above, para 76.

⁷³ n 47 above and accompanying text.

⁷⁴ n 50 above, paras 76–80.

⁷⁵ As above, para 80.

The case-by-case approach and reasonableness test used by the Inter-American Commission in addressing the right to a hearing on detention and trial within a reasonable time in these decisions, while empowering the Inter-American Commission to develop the law over time, suffer from its flexibility and potential uncertainty. Put differently, depending on the composition of the Inter-American Commission, the case-by-case approach and reasonableness test could be used to expand human rights or restrict them. While this may be the only feasible way forward, one hopes that such an approach and test will be applied in a conscientious and consistent manner. This will both reaffirm human rights expectations and bring further legitimacy to the human rights movement.

3 The presumption of innocence

3.1 The African experience

In addition to exploring the right to an impartial hearing, *Suleiman* also examined the presumption of innocence. The complainant alleged that high-ranking government officials and investigators had publicly asserted the defendants' guilt.⁷⁶ Furthermore, alleged government-orchestrated publicity stated that the defendants were behind a *coup* attempt against the state.⁷⁷ Sudan did not conceal its bias against the defendants, showing 'open hostility towards the victims by declaring that 'those responsible for the bombings' will be executed'.⁷⁸ Because Sudan had publicly pre-judged the defendants before a proper court had established their guilt, the African Commission found that the state had violated the right to be presumed innocent under article 7(1)(b) of the African Charter.⁷⁹

The decision, although helpful in a general sense, fails to state the exact level of negative state publicity that triggers an infringement of the right to be presumed innocent under the African Charter and leaves unanswered whether *any* negative state publicity suffices to find a violation. Furthermore, the decision does not define 'negative state publicity' precisely.

⁷⁶ n 24 above, para 54.

⁷⁷ As above.

⁷⁸ As above.

⁷⁹ As above, para 56. Art 7(1)(b) of the African Charter states that '[e]very individual shall have the right to have his cause heard. This comprises . . . (b) the right to be presumed innocent until proven guilty by a competent court or tribunal.' Note that the African Commission has also found a violation of the right to be presumed innocent based on a state's negative pre-trial publicity and overly broad exclusion of the press and public from viewing a trial on national security grounds. See *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) paras 47–48.

Although the complaints in *Constitutional Rights Project (in respect of Akamu & Others)* and *The Constitutional Rights Project (in respect of Lekwot & Others)* did not allege violations of article 7(1)(b) of the African Charter, an argument could be made that special tribunals dominated by the executive branch, particularly by members of the police and the military, violate the right to be presumed innocent *in and of themselves*. This could be the case especially when the charges at trial involve issues of national security, as the executive could find it expedient to prejudge the defendant or defendants out of concern for maintaining law and order. It can at least be said that such special tribunals do not reinforce the right to be presumed innocent.

3.2 The Inter-American experience

The Inter-American Commission examined the two main presumption of innocence provisions under the Inter-American human rights regime, the American Convention's article 8(2)⁸⁰ and the American Declaration's article XXVI(1),⁸¹ in *Pinheiro*. Pinheiro and Dos Santos had been preventively detained without judicial justification for 11 years and seven years, respectively, during which time both men were 'legally innocent'.⁸²

In finding a violation of the right to be presumed innocent, the Inter-American Commission cited the Inter-American Court of Human Rights for the proposition that depriving someone of his or her freedom for a disproportionate amount of time 'would be the same as serving a sentence in advance of the judgment'.⁸³ The Inter-American Commission stated that preventively detaining someone to sanction him or her before judgment had been reached amounted to criminal punishment and a violation of the right to be presumed innocent under the American Convention and the American Declaration.⁸⁴

The Inter-American Commission emphasised a similar interpretation of the presumption of innocence right under the American Convention's article 8(2) in *Jiménez*. Taking into account the facts of Jiménez's detention,⁸⁵ it held that 'universally accepted general principles of law

⁸⁰ According to art 8(2) of the American Convention, '[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law'.

⁸¹ Art XXVI(1) of the American Declaration states that '[e]very accused person is presumed to be innocent until proved guilty'.

⁸² n 64 above, para 83.

⁸³ As above, para 85 (citing Inter-American Court of Human Rights, *Suárez Rosero* case, judgment of 12 November 1997, series C No 35, para 77).

⁸⁴ As above, para 86.

⁸⁵ nn 40–43 above and accompanying text.

prohibit anticipating the punishment before sentencing'.⁸⁶ Stressing the interrelatedness of anticipatory punishment and violation of the presumption of innocence, the Inter-American Commission found that Ecuador had violated Jiménez's right to be presumed innocent.⁸⁷ Stating this principle in *Giménez v Argentina*,⁸⁸ the Inter-American Commission noted that '[t]he guarantee of the presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably'.⁸⁹

These decisions demonstrate how the violation of a single human rights provision, the right to a hearing on detention and trial within a reasonable time, can lead to the violation of a different human rights provision, the right to be presumed innocent. In so doing, these decisions illustrate the holistic nature of human rights. A human rights jurisprudence that appreciates the connections between and overlap of human rights provisions is better able to assist the complainant in her quest for justice.

4 Conclusion

Regarding the right to an impartial hearing on detention and trial within a reasonable time, the African Commission has found that trial by special tribunals dominated by the executive branch, as well as failure to act for a significant length of time, violate the right to be tried by an impartial court or tribunal within a reasonable time. The Inter-American Commission has adopted a case-by-case approach and reasonableness test to the issue of a hearing on detention and trial within a reasonable time. On the issue of the presumption of innocence, the African Commission in *Suleiman* found that negative state publicity may violate article 7(1)(b) of the African Charter, but left unanswered the question of the exact level of negative state publicity that triggers an infringement of the right to be presumed innocent and whether *any* negative state publicity suffices to find a violation. The Inter-American Commission has found that excessively long preventive detention or pre-trial imprisonment can violate the right to be presumed innocent.

⁸⁶ n 38 above, para 100 (reference to footnote omitted). The Inter-American Commission noted that '[i]gnoring these rules would run the risk, as in the instant case, of restricting for an unreasonable time the liberty of a person whose guilt has not been proven'.

⁸⁷ n 38 above, para 101.

⁸⁸ *Giménez v Argentina*, Inter-American Commission, Case 11.245 (1996).

⁸⁹ As above (as cited in JL Hafetz 'Pretrial detention, human rights and judicial reform in Latin America' (2003) 26 *Fordham International Law Journal* 1754 1760).

It should not come as a surprise that the work of the African Commission and the Inter-American Commission reflects, respectively, the human rights situations in Africa and the Americas.⁹⁰ Compared with the human rights situation in Europe, the human rights situation in the Americas, for example, differs significantly.⁹¹ The same holds true for the human rights situation in Africa. Nonetheless, despite the blatant nature of many human rights violations heard by the African Commission and the Inter-American Commission, the contribution of both Commissions to the development of international human rights law is to be welcomed.

⁹⁰ For a similar argument, see DS Sullivan, 'Effective international dispute settlement mechanisms and the necessary condition of liberal democracy' (1993) 81 *Georgetown Law Journal* 2369 n 139 (internal citation omitted).

⁹¹ As above (stating that '[t]he Inter-American Commission . . . has had to deal with problems of a quite different order: arbitrary arrests on a massive scale, systemic uses of torture, scores or hundreds of 'disappeared persons', total absence of judicial remedies, and other flagrant violations of civilized standards. In dealing with such cases it has found the governments concerned more like antagonists than willing partners').

Reflections on the African Court on Human and Peoples' Rights

*N Barney Pityana**

Principal and Vice-Chancellor of the University of South Africa

1 Introduction

In June 1998, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol) was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso. With the deposit of the 15th instrument of ratification by the Union of Comoros on 26 December 2003, the requisite number of ratifications were received by the Chairperson of the African Union (AU) Commission in Addis Ababa, allowing the Protocol to enter into force on 25 January 2004.¹

It is fair to observe that there has been a significant level of reluctance on the part of member states to ratify the Protocol. It took five years for the African Charter on Human and Peoples' Rights (African Charter or Charter) to come into effect. It took nearly six years before the Protocol came into effect, and it may take even longer for the African Human Rights Court to be established. It is necessary to examine the reasons for this prevarication.

As a way of addressing the issue, it may be necessary to recall that the pressure for the establishment of the Court came first, back in 1961, from African jurists via the Law of Lagos process. Although it was envisaged at the beginning that the African Charter would have a commission and a court, it was later decided to concentrate on the establishment of an African Commission on Human and Peoples' Rights (African Commission or Commission). Further activity was generated by

* BA, BProc (UNISA), Hons BD (London) PhD (UCT); Attorney of the High Court of South Africa and Professor of Law; Pityanb@unisa.ac.za

¹ See <<http://www.africa-union.org>> (accessed 31 January 2004).

international human rights non-governmental organisations (NGOs) such as the Geneva-based International Commission of Jurists (ICJ), who prepared the early drafts of the Protocol, the first of these actually tabled in 1993. The driving force was the view, widely held among NGOs and human rights experts and a result of observing the work of the African Commission over the five years of its existence, that the Commission was largely ineffectual, and that a court would give it teeth and a higher degree of effectiveness. It is noticeable that the African Commission, itself, did not initiate any of these activities, although the Commission was apparently being consulted by the ICJ in its activities in this regard. The Commission, however, adopted the Addis Ababa draft of 1993, but I can find no resolution of the African Commission committing itself to the Court before 1998.²

At the 30th Ordinary Summit of the OAU in 1994, the Assembly of Heads of State and Government of the OAU adopted a resolution calling on the Secretary-General to establish a Committee of Government Experts to 'ponder in conjunction with the African Commission on Human and Peoples' Rights over the means *to enhance the efficiency* of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights'.³ Consequent upon some rather rapid moves, the first direct OAU involvement was noticed at the Cape Town Meeting of Government Experts in September 1995. Further reluctance was manifested, however, when only three states made comments on the Cape Town draft. Further meetings of experts were convened, and in 1997 the Addis Ababa draft was presented to the Assembly. It was adopted at Ouagadougou on 9 June 1998. Thereafter, a very slow process led to the adoption of the Protocol. As observed above, the African Commission, itself, showed no signs of enthusiasm for this project and they may have contributed to the mood of grudging acceptance of the concept and, later, of the Protocol itself.

The Protocol was quickly signed by some 30 states within the year following its adoption. Despite being urged annually by resolutions of the Summit, ratifications of the Protocol were very hard to come by.

2 Human rights developments in Africa

2.1 The Constitutive Act of the African Union

Some promise was beginning to be shown on the continent by further developments. The Constitutive Act of the African Union was adopted at

² Its first resolution in this regard is an appeal to states to ratify the 1998 Protocol. See Resolution on the ratification of the Additional Protocol on the Creation of the African Court on Human and Peoples' Rights, adopted at its 24th session in October 1998.

³ Resolution on the African Commission on Human and Peoples' Rights in C Heyns (ed) *Human rights law in Africa 1999* (2002) 139.

Lomé, Togo, in 2000. Ratifications of the Act were swift to the point that the inaugural session of the AU was held in Durban, South Africa, in July 2002. Significantly, the Constitutive Act, 2002, is very strong on the human rights principles set out in the African Charter. One of its objectives is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments . . .'⁴ and among its principles it entrenches 'respect for democratic principles, human rights, the rule of law and good governance . . .'.⁵ One can, therefore, argue that the adoption of the Constitutive Act was a significant contributor to establishing an environment conducive to the adoption of the Protocol.

But that was not to be. One suggestion may be that, ironically, the Constitutive Act itself was confusing to states regarding the relationship between the Act and its agencies, and the place of the African Commission and, by extension, the Court itself. The Act establishes a Court of Justice whose jurisdiction is set out in the Protocol on the African Court of Justice adopted at the Maputo Summit in July 2003.⁶ The Act is silent on the African Commission and on the proposed African Court on Human and Peoples' Rights.⁷ It is, however, generally accepted that the court of justice will become the main instrument for the interpretation of the Constitutive Act and for the resolution of disputes arising between states in terms of the Act. It is a situation akin to the relationship between the European Court of Human Rights and the European Court of Justice, which can be said to be complementary as regards human rights matters. But to many African states this relationship is not easy to comprehend. For example, the relationship between the African Court and the Court of Justice will have implications on which jurisdiction has bearing on the domestic situation and which court can be accessed, and under what conditions. They can conceive of a conflict of laws within the same legal jurisdiction. For that reason, many states are agitating for clarification and are holding back on ratifying the Protocol on the Establishment of the African Court.

As if that was not enough, the Constitutive Act is silent on the African Commission and the African Human Rights Court. Questions have been asked as to whether the institutions established under the African Charter ought to have been reflected in the Constitutive Act.⁸ So vocal were these questions that the Assembly, both in Lusaka in 2001 and in

⁴ Art 3(h) AU Constitutive Act.

⁵ Art 4(m) AU Constitutive Act.

⁶ See <<http://www.africa-union.org>>. By 31 March 2004, no ratification has been secured.

⁷ See below.

⁸ Note comments by E Baimu 'The African Union: Hope for a better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 312.

Durban in 2002, urged the African Commission to 'propose ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union, and submit a report thereon at the next session of the Assembly'.⁹ To the best of my knowledge, the African Commission has never submitted such a report.

2.2 The lack of enthusiasm of the African Commission about the African Court

The truth is that opinion among members of the African Commission is also mixed. There are some who believe that, as the African Commission was established as a treaty body made up of independent experts under the African Charter, and as the Charter in turn was adopted by the Summit of the OAU under its own rules, the African Commission should have been provided for specifically in the Constitutive Act. Another view is that the African Commission can best serve its tasks inherent in the African Charter and the Constitutive Act by remaining an independent body of experts that accounts for its activities and decisions to the AU, but remains independent as regards its decisions and processes. To be established as a specialised body within the AU, so the argument goes, might compromise its independence.¹⁰

2.3 Questions about sovereignty and constitutionalism

A more serious concern, however, is the relationship of the African Human Rights Court to the domestic situation. There is concern that the Court will undermine domestic courts and as such would be 'unconstitutional', viewed from the domestic perspective. The introduction of an extra-territorial jurisdiction is a concept that has not yet received wide acceptance in Africa. In the European context, it has now become widely established that state parties to the European Convention undertake to abide by the decisions of the European Court and, generally, the orders of the Court are observed.

⁹ Resolution AHG/Dec 171 (XXXVIII). Note also that the Kigali Declaration, adopted by the Second African Ministerial Conference on Human Rights in Kigali, Rwanda on 8 May 2003, reinforced these constant appeals and went on to express the hope that the Protocol would 'come into force by July 2003 as required by Dec AHG/Dec 171 (XXXVIII)'.

¹⁰ See Resolution of the Assembly of Heads of State and Government of the OAU at the 37th ordinary session held in Lusaka, Zambia in July 2001 which 'encourages the African Commission to continue to pursue its reflection on the ways and means of reinforcing the African human rights system within the framework of the African Union . . . '.

3 Understanding the jurisprudence of the African Commission

The situation, once the African Human Rights Court has been established, will not be substantially different from that which obtains currently with respect to the African Charter of which all African states, members of the AU, are parties. Although the African Commission does not enjoy the authority of a court, the Commission nonetheless has had to remind states in recent judgments that, in terms of article 1, states undertook to 'recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'.¹¹ Much earlier, the African Commission recommended a formula for consideration by states on how they could introduce into their constitutions, laws, rules, regulations and other acts relating to human and peoples' rights, the provisions in articles 1 to 29 of the African Charter.¹²

It should also be noted that, according to the Vienna Convention, states cannot legitimately resort to domestic law in order to avoid their obligations in terms of international treaties they are party to. At the same time, a treaty body does not have a duty to interpret municipal law as that remains the competence of the domestic courts. What the treaty body can do is simply to determine whether a state party to the Charter has complied with its treaty obligations. In *Legal Resources Foundation v Zambia*,¹³ the African Commission ruled that 'international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on state parties . . .'. The jurisdiction of the African Commission therefore is that state parties to the Charter are bound by their treaty obligations as interpreted by the African Commission in the execution of its mandate.

¹¹ Art 1 African Charter.

¹² By resolution at the 5th ordinary session in 1989. In the communications against Zambia, in the *Amnesty International* matter, the Commission ruled that states should not easily resort to claw-back clauses as 'recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter'.

¹³ Communication 211/98, Fourteenth Annual Activity Report. See also the Mauritania cases (*Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000)) where the Commission found that '[i]t is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter'. In a series of cases against Nigeria, the Commission found that the ouster clauses and the prevailing military regime meant that domestic remedies were not available to be exhausted.

4 Ensuring a more effective African human rights system

The African Commission's decisions lack enforceability as they are not judicial decisions. Also, too many of the Commission's decisions are ignored routinely by states. The Commission lacks not only the authority to enforce its own decisions, it also does not have the resources to undertake follow-up activities and monitor compliance with its decisions. The matter could be placed before the Assembly, but the Assembly itself has not so far had any legislative framework by which it can demand compliance from member states.

To some degree, the Constitutive Act provides just such a framework. This is even more so if the Constitutive Act is read with the New Partnership for Africa's Development (NEPAD), especially the African Peer Review Mechanism.¹⁴ The Constitutive Act, especially in article 4, not only affirms the 'sovereign equality and interdependence' of states and the sanctity of national boundaries and 'non-interference by any member state in the internal affairs of another . . .',¹⁵ but also, as mentioned, requires the promotion and protection of human rights as one of its objectives. Of course, these positions are contradictory, but they do reflect some of the ambiguities of current international law where national jurisdiction has been severely tempered by international treaty law. The Constitutive Act provides for relevant sanctions against states that fail to comply with the Act and, in article 30, 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.

5 The African Court: Its powers and jurisdiction

The Protocol clearly asserts that the African Human Rights Court will *complement* the protective mandate of the African Commission. 'Complement' must surely be understood to mean that it will reinforce and make more complete the objectives of the Charter. That suggests

¹⁴ The Declaration on the Implementation of NEPAD (AHG/235 (XXXVIII)), dated 18 June 2002, expresses support for 'the African Charter, the African Commission and the Court on Human and Peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights . . .' and among the stages of the African Peer Review Mechanism it includes a fifth stage where 'six months after the report of the APRM has been considered by the Heads of State and Government of the participating member countries, it should be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, . . . and the envisaged Peace and Security Council and the Economic, Social and Cultural Council (ECOSOCC) of the African Union . . .'.

¹⁵ Arts 4(a) & (g) Constitutive Act.

that both the Court and the Commission will coexist as independent bodies but within a mutually reinforcing relationship. By reason of its status as a court, the African Court will be the final arbiter and interpreter of the African Charter.¹⁶ The jurisdiction of the Court is confined to the interpretation and application of the African Charter and any other international human rights instruments *ratified by the states concerned*.¹⁷ For me this serves as a limitation. It means that the Court will only entertain hearing matters that are demonstrably and *prima facie* within the mandate of the Court. It does not hear matters or disputes relating to the Constitutive Act, nor does it entertain disputes between states, say border disputes, unless such disputes can be categorised as human rights disputes, as was the case in the communication from the *Democratic Republic of Congo v Rwanda, Burundi, Uganda*.¹⁸ It would not be within the competence of the court to impose a treaty obligation on states that have not assumed the duty by themselves.¹⁹

The provision on *locus standi* has been one of the most debated issues. Although NGOs have played a very critical role in supporting the work of the African Commission over the years and can claim responsibility for many of the Commission's most progressive initiatives, it is noticeable that individuals and NGOs do not have direct recourse to the Court. When it comes to the right of direct recourse to the Court of NGOs *with observer status before the Commission* and individuals (article 5(3)), state parties must have made a declaration to that effect in terms of article 34(6) of the Protocol. This provision states that 'at the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol . . .'. In the absence of any such declaration, individuals have to submit their complaints first to the African Commission, as in the past. The effect is to limit access to the Court over and above the prevailing limitations, such as exhaustion of domestic remedies, which already serve to keep out of the ambit of the Court any matters which could have been dealt with domestically. This device in international law, however, should not serve to frustrate

¹⁶ See Ibrahim Ali Badawi el Sheikh 'The future relationship between the African Court and the African Commission' (2002) 2 *African Human Rights Law Journal* 252.

¹⁷ Art 7 Protocol (my emphasis).

¹⁸ Communication 227/99. Two other similar communications were regrettably camouflaged as art 55 communications instead of the inter-state communications under art 47. These are Communication 233/99, relating to the Ethiopia/Eritrea dispute, and Communication 157/96, against Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, relating to the sanctions imposed by these states against Burundi following the declaration of a military *coup d'état* in that country.

¹⁹ See RW Eno 'The jurisdiction of the African Court of Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223 and K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234.

legitimate access to the treaty body but to give an indication of the state party's effort and opportunity to address the matter within its own legal jurisdiction. In addition, the treaty body should not be used as a court of first instance, especially on matters it is not competent to determine, such as matters of evidence. It is interesting to note that only one state has made such a declaration to date.²⁰ In any event, these provisions make the advocacy role of the Commission very prominent.

Having outlined the ways in which the jurisdiction of the Court is limited ostensibly so as not to unduly violate the sovereignty of member states, it is now necessary to address the question of the domestic application of its rulings, orders and judgments. It is a trite principle of international law that the rulings of any trans-national jurisdiction cannot have any 'cassation effect, nor may it directly annul or repeal any law or judgment or administrative acts by the state concerned which it considers inconsistent with, or in violation of, any international instrument'.²¹ Such rulings could be declaratory in nature, or mere denunciations, but they cannot by themselves directly set aside or nullify the rulings of domestic courts. It is not the duty of the international body to substitute its own opinion for that of any domestic court. It is not a court of appeal from national courts. Insofar as the states are parties to the Charter, the rulings of a transnational tribunal are directed at the state. It is the state that must abide by its treaty obligations and it is the state that must bring its domestic laws into conformity with its international treaty obligations. International human rights law, accordingly, plays a powerful persuasive and authoritative role in domestic jurisprudence.

It is very important that the judgments of the African Court be obeyed and its rulings given effect to. The state parties to the Protocol undertake, in terms of article 30, 'to comply with the judgment in any case where they are parties within the time stipulated by the Court and to guarantee its execution'.²² In other words, the states take primary responsibility for the execution of the judgments of the Court. Should the affected states fail to do so, other persuasive and coercive means are available to the AU. The Court submits its reports to the regular session of the Assembly,²³ and the provision goes on to state that the report must 'in particular, specify the cases in which a state has not complied with the Court's judgment'.²⁴ This is an important provision, because it transfers

²⁰ Burkina Faso has made the art 34(6) declaration.

²¹ See NB Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' Inaugural Lecture as Professor of Law at the University of South Africa, 12 August 2003; see (2003) 28 *South African Yearbook of International Law* 110.

²² Art 30 Protocol (my emphasis).

²³ Art 31 Protocol.

²⁴ As above.

the secondary responsibility for ensuring compliance with the rulings of the Court to the collective body of the Heads of State and Government. This could serve as a kind of peer review mechanism.²⁵ As a monitoring mechanism, the judgments of the Court are notified not only to the parties in the dispute but also to the Council of Ministers who shall 'monitor its execution on behalf of the Assembly'.²⁶

6 Concluding remarks

International obligations are binding on all states and states cannot retreat behind their domestic laws to avoid their duties under international law. The decisions of the African Commission have all along been just as binding on states, as article 1 of the Charter demands. The Commission, however, lacks the enforcement mechanisms necessary for monitoring and executing its decisions of the magnitude provided for in the Protocol for the African Court. This has been a major limitation on the effectiveness of the African Commission.

The establishment of the Court comes at a time when the human rights, good governance and democracy landscape in Africa is underpinned by an appreciable framework of African instruments such as the Constitutive Act, 2000, NEPAD and especially the African Peer Review Mechanism. Yet there has been reluctance on the continent to ratify the Protocol, and it is yet to be seen how far the political will of the Assembly will go, especially when the election of judges to the Court takes place, resources for the effective functioning of the Court are allocated and judgments of the Court are executed. Some of the reluctance, I believe, has been due to a lack of adequate understanding of the role of the Court in domestic jurisdictions. It is argued that the Court will not be a court of appeal from municipal courts, as domestic remedies must be exhausted before a matter can be admissible before the African Court. The Protocol also limits direct access to NGOs with observer status in the African Commission (that itself being a limitation on NGOs who can approach the Court) and individuals, provided that the state party concerned has complied with the provisions of article 34(6) of the Protocol.

²⁵ Note that the African Peer Review Mechanism provides that once the report has been submitted to the Heads of State and Government, and the government makes a commitment to rectify the faults identified, the state will receive assistance. If, however, the state shows reluctance or unwillingness to correct the blemishes identified, constructive dialogue will be engaged in with the state concerned, failing which 'the participating Heads of State and Government may wish to put the government on notice of their collective intention to proceed with appropriate measures by a given date . . . '.

²⁶ Art 29(2) Protocol.

The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development

*Chris Stals**

Chancellor, University of Pretoria; Member of the Panel of Eminent Persons of NEPAD

1 The institutional framework

In September 1999, the Heads of State and Government of member countries of the Organisation of African Unity (OAU) decided to transform the OAU into a new African Union (AU), in which a strong emphasis was to be placed on an African development programme.¹ The Constitutive Act of the new AU, to replace the OAU as a political body for all the countries of the African continent, was accepted in July 2000 at a meeting of the Heads of State and Government held in Lomé, Togo.² The Constitutive Act also incorporated the Treaty of the existing African Economic Community (AEC). A transition period of one year was provided for to enable the existing organisations to give effect to the transformation, and to enable member states, where necessary, to provide in national legislation for the acceptance of the new structure.

The Constitutive Act of the AU provides for the following institutional framework:

* BComm, MComm, DComm (Pret); clstals@iafrica.com. Address delivered at the Africa Dialogue Lecture Series, arranged by the Centre for International Political Studies, University of Pretoria, 21 April 2004.

¹ Sirte Declaration, OAU Doc EAHG/Draft/Decl (IV) Rev 1.

² Decision on the Establishment of the African Union and the Pan-African Parliament, OAU Doc AHG/Dec 143 (XXXVI) para 3.

- The Assembly composed of the Heads of State and Government of all the participating countries. The Assembly is the supreme organ of the AU and its annual meetings are referred to as 'Summit Meetings'.
- The Executive Council composed of the Ministers of Foreign Affairs of all participating countries. It is the function of the Executive Council to co-ordinate and take decisions on policies in areas of common interest to the member states. A number of Specialised Technical Committees were formed to assist the Executive Council in areas such as rural economy and agricultural matters; monetary and financial affairs; transport, communication and tourism; health, labour and social affairs; and education, culture and human resources. Ministers of national cabinets responsible for these functions in their own countries would serve as members of these Technical Committees. The top structure of the AU is therefore by definition a truly body politic.
- The Pan-African Parliament (established recently) is provided for.
- The Constitutive Act in addition sanctioned the establishment of a number of other specialised Pan-African institutions, including
 - a Court of Justice;
 - an African Central Bank;
 - the African Monetary Fund;
 - the African Investment Bank; and
 - the Economic, Social and Cultural Council.

The AU Commission was established with a Secretariat to provide administrative services to the various institutions within the structure. The headquarters of the AU was placed in Addis Ababa in Ethiopia.

To justify the importance attached to the development objectives of the AU, the Heads of State of five countries were given a mandate to develop an integrated socio-economic development framework for Africa. These five countries, consisting of Algeria, Egypt, Nigeria, Senegal and South Africa, became known as the 'Initiating Countries'.

2 The creation of the New Partnership for Africa's Development (NEPAD)

As a number of schemes for a new initiative for African development already existed at that time, the Initiating Countries could make quick progress and in July 2001, a draft for a Strategic Policy Framework of the New African Initiative³ and a Programme of Action was presented to a

³ Soon thereafter renamed New Partnership for Africa's Development (NEPAD). See Communiqué Issued at the End of the Meeting of the Implementation Committee of Heads of State and Government of the New Partnership for Africa's Development, Abuja, Nigeria, 23 October 2001, available at <<http://www.nepad.org>> (accessed 31 March 2004).

Heads of State and Government meeting in Lusaka, Zambia. The proposals were accepted and a Heads of State and Government Implementation Committee (HSGIC) was created, consisting of the Heads of State of the five Initiating Countries plus two (subsequently increased to three) Heads of State for each of the five recognised Regional Economic Communities on the continent (development areas such as the Southern African Development Community (SADC)). This HSGIC with its 20 members functions as the controlling body for NEPAD. At this stage, HE Chief Olusegun Obasanjo, President of Nigeria, chairs the HSGIC.

The HSGIC constituted a Steering Committee with a personal representative for each one of its members, and established a Secretariat as support structures for the implementation of the NEPAD objectives. Both the Steering Committee and the Secretariat are headed by Professor Wiseman Nkuhlu and operate from Midrand in South Africa. In the longer term, there is a possibility that the headquarters of NEPAD will be transferred to Addis Ababa to join the rest of the AU administration.

The AU Commission, operating from Addis Ababa in Ethiopia, therefore functions as the Secretariat and supportive organisation for the *political* activities of the AU, and NEPAD with its Steering Committee and Secretariat in South Africa represents the *development* arm of the AU.

3 Objectives of and programmes for NEPAD

In a 'Declaration on Democracy, Political, Economic and Corporate Governance' issued in Durban on 8 July 2002 (the inaugural meeting of the new AU Assembly),⁴ all African countries committed themselves to the NEPAD objectives by endorsing a wide-ranging pledge to eradicate poverty and to place their countries on a path of sustainable growth and development. This must be pursued within a framework of active participation in the world economy and the global body politic.

To achieve its objectives, the AU identified the following priorities for NEPAD:

Establishing conditions for sustainable development by ensuring:

- peace and security;
- democracy and good political, economic and corporate governance;
- regional co-operation and integration; and
- capacity building.

NEPAD further aims at policy reforms and increased investment in the following priority sectors:

⁴ AHG/235 (XXXVIII) Annex I.

- agriculture;
- human development with a focus on health, education, science and technology and skills development;
- building and improving infrastructure, including information and communication technology (ICT), energy, transport, water and sanitation;
- promoting diversification of production and exports, particularly with respect to agro-industries, manufacturing, mining, mineral beneficiation and tourism;
- accelerating intra-African trade and improving access to markets of developed countries; and
- the environment.

Under NEPAD, mobilising resources is to be achieved by:

- increasing domestic savings and investments;
- improving management of public revenue and expenditure;
- improving Africa's share in global trade;
- attracting foreign direct investment; and
- increasing capital flows through further debt reduction (and increased Official Development Assistance (ODA) flows).

In support of these objectives and programmes, the Steering Committee of NEPAD and its Secretariat are at this juncture actively involved in a great number of projects, particularly of a trans-boundary nature and involving the co-operation of Regional Development Communities. These include:

- a Comprehensive Africa Agriculture Development Programme;
- an Action Plan for the Environment Initiative of NEPAD;
- a Comprehensive Health Strategy;
- an Education programme (Education for All); and
- a number of trans-boundary infrastructure projects in energy, transport, ICT, water, sanitation and tourism.

4 The African Peer Review Mechanism (APRM)

In the 'Declaration on Democracy, Political, Economic and Corporate Governance', agreed to by members of the AU at the Summit Meeting held in Durban in July 2002, provision was also made for the introduction of the African Peer Review Mechanism (APRM). Through the APRM, progress made by individual countries with the implementation of the NEPAD programme should be assessed from time to time. An 'APRM Base Document' was attached to the Declaration in which the APRM is defined as 'an instrument voluntarily acceded to by member states of the African Union as an African self-monitoring mechanism'.⁵

⁵ The New Partnership for Africa's Development (NEPAD) — The African Peer Review Mechanism, AHG/235 (XXXVIII) Annex II.

In the 'Base Document', the purpose of the APRM is defined as follows:

The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building.

It was also decided that participation in the APRM would not be obligatory for all members of NEPAD, but would be subject to a voluntary participation agreement signed by the Head of State of a country (the Memorandum of Understanding on the APRM). Initially, 16 countries agreed to participate, two more have since taken the decision to join and there are indications of a few more that may shortly come on board.⁶

After the Durban Summit Meeting in July 2002, further documents were prepared by the NEPAD Steering Committee on the 'Organisation and Processes of the APRM', and on 'Objectives, Standards, Criteria and Indicators for the APRM'. These documents were approved by the NEPAD Heads of State and Government Implementation Committee in Abuja, Nigeria in March 2003, and the stage was now set for the introduction of a monitoring system of progress made by individual countries with the implementation of the NEPAD programme.⁷

5 The Panel of Eminent Persons

The task for doing the reviews is delegated to a Panel of Eminent Persons, consisting of five to seven members, to be selected and appointed by the Heads of State of countries participating in the Review Mechanism (the Forum). In the 'Base Document', the required qualifications for members of the Panel are described as follows:

The members of the Panel must be Africans who have distinguished themselves in careers that are considered relevant to the work of the APRM. In addition, members of the Panel must be persons of high moral stature and demonstrated commitment to the ideals of Pan-Africanism.

Eventually, in May 2003, the following seven persons were appointed to the Panel:

⁶ Participating countries as of April 2004 are Algeria, Angola, Burkina Faso, Cameroon, Congo (Brazzaville), Ethiopia, Gabon, Ghana, Kenya, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa and Uganda.

⁷ African Peer Review Mechanism — Organisation and Processes, NEPAD/HSGIC/03-2003/APRM/Guidelines/O&P; Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism, NEPAD/HSGIC/03-2003/APRM/Guidelines/OSCI, 6th Summit of NEPAD Heads of State and Government Implementation Committee, 9 March 2003, Abuja, Nigeria, available at <<http://www.nepad.org>> (accessed 31 March 2004).

- Ms Marié-Angélique Savané (Senegal) — Chairperson
- Prof Adebayo Adedeji (Nigeria)
- Ambassador Bethuel Abdu Kiplagat (Kenya)
- Dr Graça Simbine Machel (Mozambique)
- Mr Mourad Medelci (Algeria)
- Dr Dorothy L Njeuma (Cameroon)
- Dr Chris Stals (South Africa)

Panel members do not represent countries or national governments or any other vested interests. Members of the panel are elected in light of their individual backgrounds and experience. Care was apparently taken to select persons from each one of the five Regional Economic Communities, and also to include members with experience in all the basic disciplines of policies that the Panel will have to review.

During the past nine months, the Panel held six meetings to orientate itself and to work out a practical programme for the implementation of its mandate. Not all of the objectives and programmes of NEPAD will be covered by the APRM process. The Peace and Security Initiative, for example, is being pursued in a separate structure more aligned to the political arm of the AU. Many of the more specific programmes, which are run and managed by NEPAD on a multi-country, cross-border, regional or continent basis will not be reviewed by the Panel. These programmes are of vital importance for the work of the Panel. Peace and Security is, for example, a precondition for sustainable growth and development, and the successful implementation of the priority projects of NEPAD will provide the indispensable vehicles for the development process. In the APRM, constant notice will be taken of progress with these projects, but no detailed overviews will be made.

After deliberation and consideration, the Panel came to the conclusion that overviews of countries should cover the following four basic policy disciplines:

- the democratisation process and good governance at the political level;
- socio-economic development providing in the basic needs of people, such as education, shelter and health care;
- macro-economic policies including fiscal, monetary, trade and labour policies; and
- corporate governance including licensing, regulation, competition policy, ownership protection, solvency and liquidation rules and good corporate governance.

The Panel appointed its own Secretariat with Dr Kerfalla Yansané, a former governor of the Central Bank of Guinea, as Chief Executive Officer, and four co-ordinators with a research assistant for each one of the four basic disciplines.

The Panel had to ask itself what kind of policies a country should apply in each one of the four basic disciplines in order to put it on the right

course for the ultimate attainment of the goals of NEPAD. Standards and norms had to be set, taking account of the ideal of best practice and, of course, of the realities of Africa. Objective criteria and nominal indicators had to be defined to ensure that comparable and consistent assessments will be made for different countries.

The Panel also entered into extensive negotiations with a number of multinational institutions, such as the United Nations (UN), and a number of its agencies, the Economic Commission for Africa (ECA) and the United Nations Development Programme (UNDP), the African Development Bank, the International Monetary Fund and the World Bank, to seek their assistance for the APRM process. The Panel does not want to become just another hassle for countries by collecting basic information that is already available within some other institution.

A programme has now been worked out with the participating countries for procedures that will be followed with the reviews. The Panel approaches the APRM basically as a self-assessment process where each country should in the first instance decide for itself whether it is on the right track and what adjustments would be necessary in the implementation of its own national policies to ensure that it will be moving in harmony with other African countries on the defined path to a common destiny.

For this reason, the Panel has issued a document entitled 'Guidelines for Countries to Prepare for and to Participate in The African Peer Review Mechanism'.⁸ Furthermore, the Panel drafted a very comprehensive document now being referred to as the 'Questionnaire', which contains a more detailed statement of the objectives of NEPAD, and of the standards, norms, criteria and nominal indicators for each of the four identified disciplines to be used in the assessment process. A great number of examples of questions to be asked by the Panel have been included to enable countries, even before review missions will visit with them, to proceed with the self-assessment process.

The Panel places a high premium on a very broad and general participation in the review process by all stakeholders within a country. Not only ruling governments but also opposition parties, government officials, non-governmental organisations, private sector business representatives and civil communities must be given the opportunity to express their views. This requires the creation of a well-structured institutional framework within each country to involve as many stakeholders as will be possible.

In the end, however, the Panel of the seven Eminent Persons will be responsible for drafting the final report on their views of the country's policies, deficiencies and need for assistance, for example in capacity

⁸ NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, available at <<http://www.nepad.org>> (accessed 31 March 2004).

building. In the execution of its functions, the Panel will have to remain objective and independent, free of any political pressures or outside intervention.

6 The APRM report of the Panel

The final report of the Panel will be submitted to the Heads of State and Government of the countries participating in the APRM (the Forum). It is not required of the Panel to do any follow-up work on the review. The APRM is after all a *peer* review mechanism — peers, that is, Heads of State and Government of participating countries must talk to their peer, that is the Head of State of the country concerned. The APRM ends where it begins — as part of the political process of the AU. It is a requirement, however, that at some stage reports of the Panel will be released to the public, for example by tabling them in the Pan-African Parliament. This may only take place after the Forum has dealt with the recommendations, but not later than six months after they have been finalised by the Panel.

Available documentation provides for no penalties or sanctions against countries that do not, in terms of Panel opinion, apply acceptable policies. The 'Base Document', however, contains the following clear instruction for the follow-up procedure:

If the government of the country in question shows a demonstrable will to rectify the identified shortcomings, then it will be incumbent upon participating governments to provide what assistance they can, as well as to urge donor governments and agencies also to come to the assistance of the country reviewed. However, if the necessary political will is not forthcoming from the government, the participating states should first do everything practicable to engage it in constructive dialogue, offering in the process technical and other appropriate assistance. If dialogue proves unavailing, the participating Heads of State and Government may wish to put the government on notice of their collective intention to proceed with appropriate measures by a given date. The interval should concentrate the mind of the government and provide a further opportunity for addressing the identified shortcomings under a process of constructive dialogue. All considered, such measures should always be utilised as a last resort.

It is indeed the intention of the APRM and therefore of the Panel to act as a catalyst for African countries to discover for themselves best policies and practices that will lead them on a collective basis to the longer-term objectives of NEPAD. Countries that do get good reports from the Panel will automatically attract the attention of the international donor community, potential international investors and foreign governments.

7 Present status of the APRM

Members of the Panel and its Secretariat are now proceeding to the implementation stage. Information is being collected for a supportive database for each one of the 16 original participating countries and for the few subsequent late joiners. Members of the Secretariat recently visited some of the countries that have made good progress with the implementation of their internal APRM programmes. On the basis of their findings and recommendations, the following four countries were selected by the Panel for the first APRM reviews: Ghana, Kenya, Mauritius and Rwanda.

A Panel member has been designated to lead the Review Team for each one of these four countries. It is planned to finalise reports for these pioneers by the end of this year, and at the same time also to proceed to other countries as soon as they make satisfactory progress with their own internal activation programmes.

At this stage, it is a challenging learning process, both for the Panel and for the participating countries. In the process, procedures, standards and norms, criteria and indicators will undoubtedly be adjusted, in the light of our experiences and of our efforts to establish more appropriate formulae for our vast continent with all its poverty, backlogs and desperate needs. The established best practices and policies of other parts of the globe, and particularly of advanced industrial countries, do not always fit the needs of and circumstances prevailing in African countries.

The Third Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child

*Amanda Lloyd**

University of the West of England, Bristol; Lecturer in Law, Researcher in International Human Rights Law

1 General information

The 3rd ordinary session of the African Committee of Experts on the Rights and Welfare of the Child (Committee) took place from 10 to 14 November 2003 at the African Union (AU) headquarters in Addis Ababa, Ethiopia. This meeting was convened under article 37(3) of the African Charter on the Rights and Welfare of the Child (Children's Charter) and in accordance with Rule 2(1) of the Rules of Procedure of the Committee. The 3rd ordinary session was to consider the Progress Report of the Chairperson of the Committee; the Activity Reports of all Committee members; to provide an update on activities related to children within the AU; to discuss the recommendations of the last two meetings; to hold presentations and discussions on polio eradication; to assess the implementation of the recommendations of the First Continental Conference on Children in Situations of Armed Conflict; and to assess the impact of HIV/AIDS on children. Other issues deliberated upon during the session were the work plan and funding proposal; country visits; the Day of the African Child; the status of the submission of initial state reports; modalities for co-operation with partners; and finally, the adoption of the session report.

* LLB (Hons), LLM (UWE, Bristol); PhD candidate; Amanda2.Lloyd@uwe.ac.uk. I would like to extend my thanks to the Faculty of Law and the Research Committee for providing funds to make it possible for me to attend the 3rd ordinary session.

The session was formally opened in the new AU Conference Centre by the Vice-Chairperson of the Committee, Mr Rudolphe Soh. The Chairperson of the Committee, Lady Justice Aluoch, was unable to be present at this session. Seven out of eleven members of the Committee attended the session.¹ In addition to the Committee Members, the session was attended by the AU Commissioner for Social Affairs; the representative for the United Nations Children Fund (UNICEF), as well as many ambassadors to the AU;² AU legal counsel and other AU representatives; United Nations (UN) Education, Scientific and Cultural Organisation; UN High Commissioner for Refugees; International Committee of the Red Cross (ICRC); World Health Organisation (WHO); Save the Children (Sweden); African Network for the Prevention and Protection of Child Abuse and Neglect (ANPPCAN); International Action Centre; International Organisation for Migration (IOM); *Organisation Internationale de la Francophonie* (OIF); World Association for Girl Guides and Scouts (WAGGS); and other non-governmental organisations (NGOs) and international organisations based in Ethiopia.

2 Opening statements

Mr Soh, the Vice-Chairperson of the Committee, opened the session with a statement outlining the agenda of the session and welcoming new members. Because the terms of four of the members were for two years,³ they expired in July 2003. Three of the four new members elected at the AU Summit in July 2003 were in attendance. Mr Soh reiterated the fledgling status of the Committee and stated that it required continual support and sustained help from member states and partners. The Committee's commitment to improving the situation of children and creating a sustainable life for all was emphasised. Mr Soh referred specifically to realising the socio-economic rights of children and to development conditions. He reminded AU member states that initial reports on the measures taken to implement the Children's Charter since ratification were due. Mr Soh stressed the necessity of co-ordinating and monitoring children's rights in Africa by assisting member states to ensure that the rights and welfare of children are protected and to account for progress made thus far. Furthermore, concrete programmes and strategies needed to be developed to help in the everyday lives of

¹ Mr Ahnee (Mauritius); Prof Lullu Tshiwula (South Africa); Dr Assefa Bequele (Ethiopia); Mr Soh (Cameroon); Mr Zoungrana (Burkina Faso); Mr Nsanzabaganwa (Rwanda); and Mme Polo (Togo).

² Algeria, Benin, Botswana, Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Senegal, South Africa, Zambia and Zimbabwe.

³ See art 37(1) Children's Charter.

children. This can be achieved partly through the continued constructive dialogue with the AU and national organisations. The work of the Committee should not only be an exercise in diplomacy.

Mr Abdul Mohammed, representative for UNICEF, opened with an acknowledgement that health, education and security are fundamental components in a society where two-thirds of the people are children. He stated that the AU, the international community and the African community have made commitments to children through the adoption of the Children's Charter, the African Common Position (Cairo Declaration) and the UN Convention on the Rights of the Child (CRC) to ensure survival and development through legal and programmatic means. As this is the era of accountability, commitments of member states need to be measured and monitored to ensure compliance with the Children's Charter. Under the auspices of the Committee, the bi-annual 'Status of African Children' report will be produced by the AU and UNICEF, ensuring that all governments have fulfilled their commitments. The first report is due in 2004. The AU and the New Partnership for Africa's Development (NEPAD) were commended for bringing children's issues onto their agenda. Mr Mohammed reiterated the importance of children's rights and universal and continental rights, which are centrally located in African culture and heritage. These rights are non-negotiable, as children and youth are the greatest resource of all.

Advocate Bience Gawanas, the AU Commissioner for Social Affairs, congratulated the new members who were elected at the Maputo Summit and commended the existing members for their achievements thus far. She recognised the special efforts of, among others, UNICEF, Save the Children (Sweden), International Labour Organisation (ILO), International Monetary Fund (IMF) and OIF. She thanked all guests for attending. She reiterated that African children have high expectations of the Committee members, both individually and collectively.

Advocate Gawanas's statement was devoted to the challenges facing children in Africa: HIV/AIDS, resulting in an ever-increasing number of orphans, neglect, having to live as street children, having to be child soldiers, trafficking in children, sexual exploitation and prostitution, arms smuggling and other illicit activities. Children in Africa face a life of hunger and starvation, leading to a voluntary upsurge in the above-mentioned activities.

Member states were urged to speed up ratification of the Children's Charter if they have not already done so, and those which have, to develop legal mechanisms for the implementation of the Children's Charter. As at November 2003, 32 states out of 53 have ratified the Children's Charter. This is a low number, considering all states, except Somalia, have ratified the CRC. The Commissioner reiterated that children's rights are human rights and that human rights are inter-related and interdependent. The Committee was implored to draw from other international treaties such as the Universal Declaration on Human Rights, the International

Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights (African Charter or Charter), as well as from values and traditions which are consistent with the Charter's provisions. The challenges facing children are enormous, yet surmountable.

The Committee was urged to take into consideration additional commitments during the session, such as the African Common Position, the Abuja Declaration 2001, the Maputo Declaration 2003, the Kigali Document 2001 and the Draft Declaration on Human Trafficking 2002. Advocate Gawanas referred to the principles on which the AU is predicated: a return to democratic culture, good governance, the rule of law and respect for human rights. Everyone needs to take advantage of this strong mandate to deal with the political and socio-economic challenges facing Africa.

3 Adoption of the agenda

The agenda and programme of work were formally adopted after deliberations and suggestions by the Committee and additional input. The new Committee member, Dr Bequele, stated that he was handicapped by three things: Senior members of the Committee were not present for the start of the session; they were in attendance but were not participating in this item of the agenda. He wished to point out the implications of the absence of senior members. New members needed to experience from senior members' wisdom gained in serving on the Committee for the past two years. As the agenda had only just been presented to members, they needed time to consider the issues.

Major concern was raised about the agenda, specifically in relation to monitoring the Children's Charter. This was raised by all three speakers during the opening ceremony. Two aspects were mentioned specifically: firstly, the importance of sharing and disseminating information in respect to the application of the Children's Charter and, secondly, a suggestion by UNICEF that there should be a biannual report on the status of children in Africa, to serve as a platform for the promotion of the Children's Charter and as a monitoring tool for the Children's Charter and for the promotion of the mandate of the AU. It was asserted that more information was required on this report, such as preparatory work on the contents. Deliberations continued between Committee members, the Vice-Chairperson and AU representatives, and eventually it was decided to include as a sub-item the discussion on the report of the status of the African child.

Mr Zoungrana, the Committee member from Burkina Faso, raised concerns regarding the Rules of Procedure and Guidelines for Initial and Periodic State Reports. He wished to know when new members would be briefed on these documents and when they would be available in

French. Dr Kalimugogo, Director of the Social Affairs Department at the AU, stated that new members should read through these documents and that the AU would brief them on the details afterwards. The fact that French documents were missing was due to the heavy agenda at the AU, including the heavy work-load of translators. The AU would brief new members as the session proceeds, as and when necessary.

Clarification was required on the bi-annual 'Status of Children in Africa' report. Dr Kalimugogo stated that the Pan-African Forum was held in May 2001 and the report is a product of this Forum. As it is due every two years, it should have been supplied to the Maputo Summit in July 2003. The Committee was responsible for the preparation of the report, which would supplement the work already carried out in member states by partners, such as UNICEF and WHO. The production of the report was too heavy a burden for Committee members to bear alone. The members would be required to read the report, which would be based on the principles laid down in the Children's Charter. They would have to decide on the contents and modalities for follow-up work. Members appeared to be unaware of this report and what was expected of them. The report had not been mentioned at the previous two ordinary sessions. The AU was in a position to elaborate on the draft format, but not the report itself, as this was contingent on the work of the Committee and what they believed should be included. The Director of Social Affairs reiterated the importance of the Committee in finalising their part of this report as soon as possible, as the Labour and Social Affairs session meets in April 2004 where the report must be endorsed in order to be considered at the Summit in July 2004. Consequently, the report needed to be ready in March 2004.

4 Officers

The terms of office of officers of the Committee last for two years.⁴ Thus, those elected at the 1st ordinary session to the positions of the Chairperson, Vice-Chairperson, Rapporteur and Deputy Rapporteur had to be replaced or re-elected. This was mentioned at the beginning of the session, but no elections were held and those already elected continued in their roles. It was stated that these elections would be considered at the 4th ordinary session. There was no explanation given for this. Thus, despite the Rules of Procedure, officers were now serving for a three-year period.

⁴ Rule 17 Rules of Procedure; art 38(2) Children's Charter.

5 Progress and activity reports

5.1 Lady Justice Aluoch, Chairperson of the Committee (Kenya)

The Vice-Chairperson, Mr Soh, presented the progress report submitted by Lady Justice Aluoch. She convened a meeting with a UNICEF-appointed consultant to elaborate on the work plan for 2003–2005, and on the funding proposal in Nairobi as recommended and agreed upon during the Second ordinary session. Mr Robert Ahnee represented the Committee at the First session of the AU Labour and Social Affairs Commission in Mauritius in April 2003, where he urged member states to ratify the Children's Charter. Mr Straton Nsanzabaganwa represented the Committee at the Second Ministerial Conference on Human Rights in Africa in Kigali, Rwanda, in May 2003. His presentation focused on the rights of children and the work of the Committee. Lady Justice Aluoch attended the Third Meeting of the AU Executive Council and Second Assembly of Heads of State and Government in Maputo in July 2003. She reported on the challenges facing children in Africa, the work of the Committee and the need to strengthen its capacity. The Chairperson also participated in the meeting of the International Board of Trustees of the African Child Forum in October 2003, of which she is a member.

The Chairperson, by proxy, also raised issues concerning the election of new members of the Committee, Rules of Procedure, Guidelines for the Initial Report of State Parties and consultation with civil society organisations. In her statement, she also advised the Committee to select priorities from its work plan for immediate action. The Chairperson further stated that she was in the process of developing a website for the Committee, in collaboration with UNICEF. Committee members were requested to submit their personal details for inclusion in the website. Her statement concluded with an apology for her absence.

5.2 Mr Straton Nsanzabaganwa, Deputy Rapporteur (Rwanda)

Mr Nsanzabaganwa opened his statement by referring to the restraints members faced as they were unable to work outside their own countries due to financial and other resource constraints. His activity report therefore related only to Rwanda. At the end of January 2003, a national policy on orphans and other vulnerable children was adopted by the Council of Ministers in Rwanda. Mr Nsanzabaganwa was the Chairperson for this programme and was the central force behind its adoption. It ran on two levels: central government and a decentralised structure. This strategic policy had legal status and it was hoped that it would be adopted at district levels. The aim was to incorporate this policy into development plans at the local level. At the end of January 2003, the President of Rwanda announced a measure to free all children suspected of having committed genocide, aged between 14 and 18 years when those crimes had been perpetrated and who had confessed

to such crimes. A measure had previously been taken to free all those under 14 years of age by declaring them not liable criminally.

As mentioned previously, Mr Nsanzabaganwa attended the Second Ministerial Conference on Human Rights in Africa, held in Kigali in May 2003, on behalf of the Chairperson. He gave a presentation on the rights of the most vulnerable groups of children. The conference was attended by representatives from different ministries of Africa, the AU Commission and the African Commission on Human and Peoples' Rights (African Commission). The conference examined the development of the promotion of human rights in Africa and formulated a plan of action.

In May 2003, Mr Nsanzabaganwa attended a conference in Stockholm on children in custody. The conference examined the problem of children in custody and aimed to discuss strategies to adopt a more community-based approach for taking care of children. The results of this conference and the decisions emanating from it may have a massive impact on children in such institutions. For example, in Rwanda there is a system of 'organised fostering'. This system started in 1995 with the national policy: 'One child, one family'.

With reference to the Day of the African Child (DAC), 16 June 2003, the theme was 'Birth Registration'. The DAC was celebrated officially in a rural district, under the patronage of the Prime Minister, who was escorted by several Ministers. Children also participated. A countrywide campaign was launched to promote the registration of children under five years and to promote the legalisation of marriages and cohabitation. 'Mass marriages' were organised in different sectors to solve the problem of some marriages not being legally recognised.

The National HIV/AIDS Control Commission organised a campaign to combat discrimination against, and stigmatisation of HIV/AIDS affected and infected children, in partnership with state and non-state organisations.

The Deputy Rapporteur attended an international conference on HIV/AIDS (ICASA) in Nairobi from August to September 2003. Over 8 000 people were present, of whom many were eminent figures and experts. The conference focused on access to drugs and care for sufferers from HIV/AIDS. Mr Nsanzabaganwa gave a presentation on Rwanda's experience. Another 'expert' meeting was convened by UNICEF on the framework document on combating HIV/AIDS infections in children. This document was distributed during the 3rd ordinary session for comments and deliberation.

Mr Nsanzabaganwa noted that the government of Rwanda was completely committed to the protection and promotion of children's rights, particularly through wide publicity of three basic legal instruments, namely CRC, the Children's Charter and domestic Law No 27/2001 of 28 April 2001.

Mr Nsanzabaganwa will also take part in the mid-term review of the UNICEF/Rwanda (2001–2006) country programme.

5.3 Mr Rudolphe Soh, Vice-Chairperson (Cameroon)

Mr Soh attended the session of the AU Commission, which took place in Addis Ababa from 24 August to 6 September 2003, on behalf of the Chairperson. Actions to date were assessed and most of the problems confronting this Committee were also felt at the level of the African Commission, such as a lack of financial means and human resources, and concerns regarding the follow-up and implementation of the African Charter through state reports between the Secretariat and the African Commission itself. Specific issues regarding collaboration between the African Commission and the Committee were addressed. Advocacy was the principal tool for this, reinforcing the link between the African Commission and the Committee. The two bodies needed to share experiences, disseminate documents and provide a platform for consultation.

The Cameroonian government decided that Mr Soh would be included in all government activities relating to children. He had been involved in a number of issues relating to children, such as the elaboration and implementation of a special protection programme in co-operation with UNICEF, the development of a socio-economic reintegration programme for victims of child trafficking and a project to combat child labour in industrial plantations in co-operation with the ILO. He assisted in the launch of a pilot programme initiated by Save the Children (Belgium) for the prevention of the 'street children' phenomenon, and for socio-economic reintegration of children living and working on the street. Furthermore, he directed a study for the establishment of co-ordination and monitoring structures aimed at the implementation and realisation of legal instruments for the promotion and protection of children. A Code of Personal Status is being considered by the government in Cameroon. One of the main concerns regarding this was the assurance that the new text was in conformity with the Children's Charter and CRC. The Code included provisions on family benefits, succession, adoption, and gender discrimination. When eventually adopted, it would therefore be one way in which Cameroon had implemented the letter and spirit of its international obligations.

Mr Soh was involved in producing a compendium of legal texts relating to children, which attempt to solve the problem of duality of laws, bridging the gap between Roman-Germanic and Anglo-Saxon law. Cameroon would endeavour to narrow the gap between international and national law and eventually to bring about a code for children, including both civil and criminal aspects. The Committee's contribution to the process was to ensure that there was a harmonisation between the Children's Charter and national law.

Cameroon participated in the DAC. It was celebrated in an area known as a 'marginalised population zone', where legitimacy of children at birth was poor.

Mr Soh was involved in the national plan to instigate a study on violence against children; such violence was prevalent in Cameroon, as had been demonstrated by international organisations. The Committee was charged with the responsibility of bringing authorities to account and carrying out investigations on the magnitude and ensuring better protection of children's rights.

The Vice-Chairperson also assisted in supporting a Tunisian initiative to organise a forum of associations concerned with the protection of children's rights and welfare.

At the international level, Mr Soh aided in the drafting of a sub-regional convention to combat child trafficking in the francophone countries of West and Central Africa. He also drafted statutes of the African group of associations and NGOs on the rights of the child, whose Constitutive Assembly was scheduled to take place in Tunisia in November 2003. He attended the UN Special Committee's session on the drafting of an international, comprehensive and integrated convention on the protection of the rights and dignity of disabled people. This session was held in April 2003 in New York. Twenty-seven countries participated, seven of which were African. Cameroon was elected as part of the Committee for the elaboration of such a convention, following the implementation of a process to revise the law on handicapped people in Cameroon. Mr Soh headed the committee for the socio-economic integration of children and social re-integration of children.

5.4 Mr Robert Ahnee, Committee member (Mauritius)

Following the 2nd ordinary session in Nairobi, Mr Ahnee briefed the Minister in charge of children's rights in Mauritius on the outcome of this meeting. He represented the Chairperson of the Committee at the AU session of the Labour and Social Affairs Commission, which was held in Mauritius in April 2003. He briefed the members on the work of the Committee and emphasised the importance for all AU member states to ratify the Children's Charter.

He participated in meetings with Ministries in charge of child issues and noted the adoption of several laws pertaining to the protection of children. The Mauritian government has passed the following laws: the National Children Council Act; the Residential Care Homes Act 2003; and the nomination of an Ombudsperson for children to safeguard their rights and in particular to investigate cases of abuse or violence against children.

Several activities have been organised in Mauritius to mark the DAC. The theme 'Birth Registration', however, was not relevant in the Mauritian context due to legislation making it compulsory to register every child within a stipulated period after birth. UNICEF has closed its office in Mauritius as all objectives have been achieved.

5.5 Prof Lullu Tshiwula, Committee Member (South Africa)

The Gender and Child Rights Unit at the University of Port Elizabeth has initiated a programme to 'train the trainer', run by student volunteers. This programme is aimed at equipping Grade 10 children with 'life skills' and the objective is that high school pupils will be able to train their peers on the principles and contents of the Children's Charter.

Professor Tshiwula was involved in a programme organised by children from primary and high schools in the Eastern Cape, entitled 'Hear our voices'. This programme covered 60 schools and children demonstrated their views through music and dance, using their own language.

A Children's Parliament was held in Johannesburg. There was a young president and nine ambassadors from other provinces. This is part of an initiative to encourage children to be responsible for the popularisation of the Children's Charter in their own province.

Professor Tshiwula addressed a workshop in Cape Town, organised by the Community Law Centre at the University of the Western Cape. She promoted the Children's Charter with the aim of motivating NGOs to take the process forward. She emphasised how important it was for NGOs to become active in the promotion of the Children's Charter. As there was no funding for individuals, NGOs needed to bid for funding to aid the ratification process. In the course of this work, she was involved in resiliency research in high-risk areas in Port Elizabeth, exploring the views of children between the ages of 14 and 16. This work was aimed at assisting professionals who work with children who are in conflict with the law. The Community Law Centre also ran a workshop on litigating for children's rights; this is a public interest area, thus involving group actions, not individual disputes.

With regard to the DAC, South Africa had to reach a compromise, as June is the month of youth and some government departments saw this as a clash between the two commemorations. South Africa is deciding whether to call this the 'Day of the Child and Youth' and have it on a different date. Prof Tshiwula is vehemently against this motion, especially as the DAC is a continent-wide initiative and cannot be derogated from. Lots of programmes were planned for 16 June and some outreach programmes to the rural areas; 'Child Protection Week' was initiated to ensure that children were registered.

Finally, it was noted that the work undertaken had been very fragmented and Prof Tshiwula was unsure of how to address this fragmentation due to limited resources.

6 Comments on the activity reports

The reports given by the members varied in detail and in formality. Some had written notes, others had prepared formal papers for dissemination.

It was urged that the reports were to be organised in a formal and structured manner, each seeking to achieve the same objectives. The information given was descriptive and lacked substance. The reports should seek to analyse the prevailing problems and make recommendations. They should reference all documents and legal instruments correctly and indicate the status of these documents. Reports should be distributed to all members prior to the session. National level initiatives need to be shared and experiences exchanged. The Committee members asked for the AU to compile all the conventions and instruments adopted on children at the UN and AU levels.

The issue of Child Parliaments was debated at length as an issue emanating from some of the inter-session activity reports. Due to the success of some of the schemes, it was stated that member states should be encouraged to follow such good practices and provide a forum for children to exchange views on their rights.

It was stressed that the role of NGOs and civil society should be enhanced in children's issues. These institutions could be requested to submit supplementary reports, which could form part of a pre-session forum.

The Committee made it very clear that it did not have the required resources to allow it to carry out its activities. The AU department dealing with children's issues was inadequately staffed and only a limited budget was provided for the implementation of activities on children. At present, there was one person dealing with children's issues at the AU, but the new structure did include a second officer. With regard to the budget, the AU representative made it clear that when the Committee planned activities, it could put a request in for funding. There were also funds available from other sources, such as Save the Children (Sweden). The Committee was not yet at the stage for having a firm budget, as the sessions bordered on brainstorming, rather than dealing with concrete issues, state reports and other communications; as well as investigations, organisation of meetings and the commission of inter-disciplinary assessments of situations on African problems regarding the rights and welfare of the child.⁵

7 Update on activities relating to children within the AU

Mme Rahim presented activities relating to children on behalf of the AU Commission since the 2nd ordinary session. She made reference to finance offered by Save the Children (Sweden) to enable the Committee to undergo on-site visits. There were caveats attached to this proposal,

⁵ Art 42 Children's Charter.

such as the countries to be visited and when the funding would need to be expended. This was primarily the end of 2003, which seemed too short notice, as this session was convened in November, and December was a busy month in respect of various festive engagements. The outcome of this proposal was not known at the time of writing.

A progress report on the 'Way Forward in Implementing Renewed Continental and Global Commitments on Children' was presented to the 1st session of the Labour and Social Affairs Commission in April 2003 in Mauritius. Numerous recommendations were endorsed by the Executive Council and Assembly of Heads of State and Government in Maputo.⁶

At the AU Commission, the commemoration of the DAC was marked by a children's programme. The programme included drama, a recital on the Children's Charter, and song and dance. Mementoes were distributed to children and adolescents from local schools and participants included permanent representatives of member states as well as representatives of international organisations.

The theme of the 2003 World Health Day was 'A Healthy Environment for Children'. The objective was to raise awareness of the risks faced by children in their environments and to mobilise action to protect children from preventable diseases and risks. The AU Commission joined the international community in this regard.

During the 1st AU session of the African Ministers of Health, held in April 2003 in Libya, issues such as child growth, survival and development were considered and the recommendations from this meeting were endorsed by the Executive Council at the Maputo Summit.⁷

The Plan of Action on the Family in Africa is in the process of being drafted. This plan of action will constitute Africa's contribution for marking the Tenth Anniversary of the International Year of the Family.⁸

Another temporary secretary has been recruited to serve until a permanent secretary is secured for the Committee by the AU.

8 Relationship between the Committee and other AU organs

The Committee is charged with finding its own role and a plan of collaboration with the new organs of the AU which are particularly related to children's rights and welfare issues. Among the new AU institutions, the Peace and Security Council, the Pan-African Parliament, the

⁶ See AU Website <<http://www.africa-union.org>>.

⁷ See AU Docs: EX/CL/Dec 50 (III), Decision on the Report of the 1st ordinary session of AU Conference of African Ministers of Health, Doc EX/CL/49 (III).

⁸ See AU Docs EX/CL/Dec 65 (III), Decision by the 3rd session of the Executive Council.

African Court on Human and Peoples' Rights, the Court of Justice and the Economic, Social and Cultural Council are the most pertinent and relevant to the Committee's work. The Committee will have to work out modalities for co-operation and collaboration with these bodies.

The Peace and Security Council was established to take over the work of the central organ for conflict prevention. It was established by the Protocol on the Peace and Security Council and adopted on 9 July 2002 in Durban. The Protocol came into force on 26 December 2003, when the Republic of Nigeria became the 27th member state to deposit the instrument of ratification. The mandate of this organ is extended to include the promotion of good governance, human rights and international humanitarian law. The AU Acting Legal Counsel proposed that the Committee takes the lead in working with the Peace and Security Council when it eventually comes into force. The Committee would focus on children in situations of armed conflict and could make inputs into disaster management.

The Protocol establishing the Pan-African Parliament was adopted in March 2001 as a Protocol to the Abuja Treaty. At the time of the 3rd session, 23 countries had ratified and Senegal was about to deposit its notice of ratification. The Protocol has since come into force, on 16 January 2004. It will be a consultative and advisory organ for the first five years. The Parliament will advise the Assembly and the Committee can submit topics on children's issues that they would like the Parliament to discuss or highlight.

The Protocol Establishing the African Court on Human and Peoples' Rights was adopted in Ouagadougou in June 1998. Ratification of this Protocol has been very slow, but since the 3rd ordinary session, the Union of the Comoros deposited its ratification instrument and thereby fulfilled the requisite 15 ratifications to enter into force. The Protocol entered into force on 25 January 2004. The African Court has the mandate to indoctrinate the African Charter and the Children's Charter, in addition to other AU human rights instruments. In essence, this means that, once in force, issues arising under the Children's Charter can be litigated and can be judicially enforceable. The Acting Legal Counsel stated that there may be similarities between the work of the Court and that of the Committee, particularly on the interpretation of the Children's Charter. The Committee itself will not be able to give binding judgements; it is considered a 'promotional' body.

The Court of Justice of the AU was provided for by the adoption of a Protocol in Maputo in July 2003. It is not yet in force. It is mandated to deal with the interpretative function of the AU Constitutive Act, which has a significant human rights content, and all other treaties and international law. There may be considerable overlap between the two courts, due to the large number of human rights issues. The African Court of Justice may impact on pending cases before the African Court

on Human Rights. A system needs to be developed to prevent the two courts from conflicting with each other in their work and mandate.

The Economic, Social and Cultural Council (ECOSOCC) is an organ comprising civil society and professional groups, whose statutes are currently being developed. ECOSOCC will have an advisory role.

9 Recommendations from the First and Second Ordinary Sessions

It was recommended that efforts be intensified to increase ratifications of the Children's Charter. This is to be achieved through lobbying ministries, using personalities and making visits to non-ratified countries. The Chairperson is to follow up the request for Regional Economic Communities (RECs) to include popularisation of the Children's Charter on their summit agendas.

The Committee requested to know the status of those African countries that have ratified the ILO Convention 182 on the Worst Forms of Child Labour be made available in order to determine which countries need encouragement to ratify the conventions. Unfortunately the information given to the members on the status of ratification was printed from a site that had not been updated since 9 November 2001 and was not taken from the official ILO website.⁹

The 'Draft Plan of Action to Combat Trafficking in Human Beings, Especially Women and Children' was adopted by the Africa-European Union Follow-up Ministerial Conference in Burkina Faso, November 2002. This plan was still in draft form, as it had not been considered by the Heads of State. The Committee recommended that member states be encouraged to put in place national plans of action to combat trafficking once the draft has been adopted.

Member states are to be requested to prepare national plans for children, taking into account the African Common Position and the UNICEF initiative 'World Fit for Children'.

10 Presentations and discussions on issues affecting children: Polio eradication by 2005

The AU representative presented the AU's activities and campaigns to date on eradicating polio. Global campaigns under the auspices of the WHO, UNICEF and Rotary International had been largely successful, and most continents had successfully eradicated the disease. It was

⁹ The information distributed was accessed from <www.campaignforeducation.org/globalmarchreport/182.html> (accessed 11 November 2003).

mandatory to immunise all children under the age of one in order to eradicate polio. The original goal of eradicating polio in Africa by 2000, 'Kicking polio out of Africa', had not been achieved due to socio-cultural and physical barriers, as well as logistical constraints. The AU believed that 2005 was a realistic goal and would be achieved with continued efforts and commitment from member states. The AU was committed to supporting and monitoring the campaign, as well as ensuring certification when polio had been eradicated.

Recommendations were made to ensure that this objective is achieved: A regional or sub-regional summit had to be held in 2004, involving the Heads of State of Benin, Burkina Faso, Cameroon, Chad, Ghana, Niger, Nigeria, Togo and other countries at risk to discuss challenges and opportunities in the fight against polio transmission. Another recommendation was to encourage all member states in the region to improve performance in national routine immunisation programmes. The Committee members had to play an active advocacy role in the campaign to eradicate polio by 2005.

11 Assessment of the implementation of the recommendations of the First Continental Conference on Children in Situations of Armed Conflict

The International Committee of the Red Cross (ICRC) representative stated that one of the objectives of the Continental Conference on Children in Situations of Armed Conflicts in Africa, Addis Ababa 1997, was to provide the tools to formulate appropriate policies for governments, NGOs, international organisations and civil society to address the issues of conflict and its impact on children. The principal objective had been to encourage member states to ratify the Children's Charter so it could enter into force, which happened in 1999. Since this Conference in 1997, other legal instruments had been adopted: the 1997 Ottawa Convention banning the use of landmines, the ILO Convention on the Worst Forms of Child Labour, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts and the Statute of the International Criminal Court. The problem confronting the Committee and other organs was one of implementing the provisions of these instruments. The ICRC was able to provide technical assistance to member states in implementing these instruments, particularly in the areas of international humanitarian law, child soldiers, landmines and education.

12 The impact of HIV/AIDS on children

A UNICEF representative presented this information. HIV/AIDS posed the greatest threat to survival of Africa and its children. AIDS was killing millions of children, negatively impacting on Africa's economy, decreasing life expectancy in the region, resulting in an unprecedented increase in orphans. The impact of HIV/AIDS led to social disintegration and breakdown; an increase in the number of children who were sick, or caring for the sick; an increase in the number of child-headed households; an incalculable amount of social and psychosocial distress, including dropping out of schools; unavoidable child labour; and an increase in social stigma and abuse of orphaned children.

The UNICEF representative recommended to the Committee that the capacity of families and of the community be strengthened to cope with the devastating effects of the pandemic. Furthermore, governments should respond to the crisis with appropriate policies, and this required monitoring. The Committee needed to undertake a very well-targeted awareness campaign, using the comparative advantage of having access to the Heads of State through the AU Commission.

13 Consideration of the work plan and the funding proposal

A working group was established to consider in detail the contents of the work plan and the funding proposal. The working group comprised three Committee members and one external party.¹⁰ The work plan was redrafted, as there were lots of overlapping issues and the consultative document prepared after the 2nd session was difficult to understand, due to the fact that neither a memorandum of understanding, nor an explanation of calculations was appended. The work plan, drafted in a closed session, was presented to the Committee to deliberate in full in a closed session. It would be adopted at the 4th ordinary session. The work programme of the African Committee could be divided into four components: general; partnerships; resource mobilisation; and the funding proposal.

14 General

The following issues were identified: children in armed conflict; child labour; child trafficking; sexual abuse and exploitation of children;

¹⁰ Dr Assefa Bequele, Mme Polo, Mr Straton Nsanzabaganwa and Ms Amanda Lloyd. The meeting took place at the UNICEF offices in Addis Ababa.

orphans affected and infected by HIV/AIDS; children's rights to education; the formulation of national plans for children where they do not exist; and resource mobilisation. Priority issues were the popularisation of, and attempts to secure more ratifications of the Children's Charter from member states, and reporting by member states.

The implementation of this work programme will require the deepening and widening of partnerships. It will in particular require vigorous leadership and an involvement by Committee members, as well as the support of the AU, UN, national and international NGOs concerned with children's rights and welfare, and governments. Equally important is the need for the African Committee to initiate, establish and reinforce partnerships with RECs, CSOs, community based organisations and the media.

The African Committee will need to mobilise resources in collaboration with African governments, UN agencies and other stakeholders. This activity will involve several other activities, including strategic meetings and seminars and conferences aimed at compiling notes, sharing and exchanging knowledge, experiences and strategies on the way forward in areas of mutual interest within the ambit of child rights and welfare. These include health, education and protection. This involves the Committee updating itself with the above stakeholders' calendars, 'keeping in touch' and continued liaison between members. Furthermore, the Committee will undertake lobbying activities among policy makers, such as presidencies, government ministers, parliamentarians, regional and country level representatives, programme advisers of UN agencies, and representatives of other NGOs and stakeholders. A large number of communication and liaison activities will be required to achieve this end.

15 Activities for 2003–2005

15.1 Popularising the Children's Charter at a local, national and international level

This will be achieved by following up on countries' ratifying and signing of the Children's Charter. The Committee will need to travel in order to raise awareness amongst countries that have not yet signed the Charter. This will include travelling to countries and holding meetings with countries that have not ratified. The Committee will endeavour to build the capacity of member states to implement the Children's Charter and to prepare and submit state reports. The AU, UNICEF and other partners will facilitate the publicity of the DAC theme with the relevant government ministries, focal points and partners, particularly by and during the planning of the celebrations. Committee members are to participate in the DAC celebrations, focusing particularly on those countries that have not yet ratified the Charter. The Committee will raise

awareness on the rights and welfare of the child: the Committee and the AU are to work with member states' focal points, line ministries and community-based organisations.

15.2 Promoting national, sub-regional, regional and international networking on children's rights and welfare

The African Committee is to ensure their active presence and participation in national, sub-regional, regional and international meetings and seminars on the rights and welfare of the child.

15.3 Following up and monitoring the implementation by African governments of their commitment under the Children's Charter

The African Committee is to hold high-level conferences on children's rights and welfare issues, which are to be attended by government policy makers and other country level implementers.

15.4 Advocating and following up on the goals of the African Common Position on Children (ACP), the World Fit for Children and other international commitments

The African Committee is to review the state reports (initial and periodic reports) not only in view of the African Charter but also through closely monitoring state compliance with the goals of other international and continental commitments, such as the ACP. This monitoring will be conducted through appropriate means, such as a continental ministerial conference, and an international policy conference. Particular attention is to be given to the control of HIV/AIDS and other major causes of ill health and the death of children in Africa. The Committee is to follow up and report on the impact of HIV/AIDS and other pandemics affecting children. The Committee is to collaborate with the relevant government ministries, UN Agencies, NGOs and other stakeholders addressing HIV/AIDS-related issues in order to forge partnerships. The Committee will advocate the incorporation of the African Child Right's Agenda in NEPAD's programme and the participation of the Committee in NEPAD's meetings and deliberations.

15.5 Promoting and reinforcing collaboration with the AU and the UN

The Committee will collaborate with the AU Social Affairs Directorate, the AU Commission, and the African Commission, among others, to promote child welfare issues. The Committee will also collaborate with the UN Committee on the Rights of the Child to exchange information on state reporting.

15.6 Supporting the Secretariat of the Committee

The Secretariat to the Committee needs to be strengthened and indeed formally established. To date there is only a temporary secretary, no documentation centre or library and no formal point of contact for further information on the work of the Committee.

16 Day of the African Child 2004

The Committee decided to have 'The African Child and the Family' as the theme for the DAC in June 2004 because the rights of the child can be best protected and realised in the context of a strong, vibrant and harmonious family. The survival of Africans as peoples depends on the extent to which public policy attends to and supports the family.

17 Initial reports of state parties, pursuant to article 43 of the Children's Charter

The Guidelines were forwarded to member states in October, so it was too early to expect any reports to have been submitted. Concerns were raised about the relevant ministries actually receiving the Guidelines. The communication channel was discussed and it was agreed that in addition to the Ministries of Foreign or External Affairs, copies should be forwarded to the Ministries in charge of issues relating to children in member states and to embassies in Addis Ababa. It was agreed that copies of the *note verbale* and the Guidelines would be given to the members for their respective countries. Article 43 of the Children's Charter requires states to submit their initial reports two years after the entering into force of the Charter or two years after ratification, if they acceded to the Children's Charter after it entered into force and, thereafter, every three years. The Committee decided that a list, which includes a time frame for reviewing the reports, should be drawn up. Mme Affa'a Mindzie from the Institute for Human Rights and Development in Africa presented a draft schedule to the members for deliberation.

18 Observer status

The Committee members noted that there was a requirement for NGOs and other organisations to be formally granted observer status for participation in the sessions. The Acting AU Legal Counsel has been charged with drafting a document for the consideration of the Committee at its 4th session.

19 Recommendations from the Third Ordinary Session

The AU Commission should ensure all member states have received the Guidelines for Initial State Reports without delay. It should also prepare a schedule on when each country is to submit a report.

The Chairperson should write a letter to all state parties reminding them to submit their reports; this letter should be supplemented by a letter from the Chairperson of the AU.

Contacts should be made with UN agencies, donor agencies and other institutions to enhance the capacity-building of member states as well as Committee members. Closer co-operation should be promoted between the African Commission and the Committee.

20 Date and venue of the Fourth Ordinary Session

The AU representatives informed the Committee that the Chairperson was unavailable in March 2004 and that she had proposed that the next meeting be held in April 2004. The AU Labour and Social Affairs Commission convenes in April and in May and there will be an Extraordinary Summit on Employment and Poverty Alleviation in Burkina Faso. Thus, the Committee agreed that, as February was too near, it would meet in June 2004 in Addis Ababa. However, as this would result in the Committee not having sufficient time to prepare for the July Summit, the Committee and AU subsequently decided to convene the next meeting the week of 24–28 May 2004 at the AU headquarters in Addis Ababa, Ethiopia.

Recent publications

Manfred Nowak *Introduction to the international human rights regime* Marthinus Nijhoff (2003) 365 pages

Christian Tomuschat *Human rights: Between idealism and realism* Oxford University Press (2003) 333 pages

Frans Viljoen

Professor of law, Centre for Human Rights and Faculty of Law, University of Pretoria

As the United Nations Decade of Human Rights Education (1995–2004) draws to a close, questions are raised and assessments made about its outcome and accomplishments. Whatever the final verdict, two recent publications present very concrete evidence of activity and productivity in the field of international human rights education. The two texts, both published in 2003, are written by eminent human rights educators and significant role players in the international human rights system. (Discussing these two books does not imply that they are the only ones falling into this category — see eg Javaid Rehman *International human rights law. A practical approach*, also appearing in 2003, published by Longman.)

The first is Manfred Nowak's *Introduction to the international human rights regime (Introduction)*. Professor Nowak teaches law at the University of Vienna, and has served as Independent Expert of the Commission on Human Rights to examine the protection of persons from enforced or involuntary disappearance (2001), as chairperson of the European Master's Programme on Human Rights and Democratisation, based in Venice, and as judge of the Human Rights Chamber for Bosnia and Herzegovina, in Sarajevo.

In the 'foreword' to *Introduction*, he also mentions training people for human rights field missions (at xiii). The work is both the result of teaching and is directed at further teaching and training of similar groups. As the target audience is 'readers without legal background or

human rights experience' (at xiii), the work sets out at not being too extensive and to combine theory and practice. In short, it aims to be 'a first introduction to this fairly new multidisciplinary field for students of all faculties' (at xv).

The second text, by Professor Christian Tomuschat, is entitled *Human rights: Between idealism and realism (Human rights)*. Professor Tomuschat teaches law at the Humboldt University in Berlin. He served as a member of the UN Human Rights Committee from its inception, in 1977, to 1982.

In the 'Preface' to his text, he states the aim of the work as being 'an overview of international protection of human rights', with a focus on how 'human rights are enforced, and what they mean in practice for the human being'. Also his text came about as a result of lectures — in his case, to the Academy of European Law of the European University Institute in Florence.

Both texts are the results of teaching, and their aims are broadly similar. As could be expected, then, there are many material similarities and overlaps. Both texts start with a historical overview over human rights; both authors cover the UN system quite extensively, discussing state reporting and individual communications in detail; both refer to the three regional systems of regional human rights protection; in both cases the development of and link with international criminal justice and 'universal jurisdiction' are explored.

However, the organisation and structure in the two texts, as well as the approach to the material, is quite distinct. In essence, *Introduction* is structured according to institutions that play a role in international human rights: the UN, Council of Europe, Organisation of American States, African Union, European Union and others. A detailed discussion of the standards and supervisory mechanisms under each of these regimes is provided. The intention seems to be to give an *exhaustive* overview of all that is available and relevant. As a result, the reader gets a very good 'institutional' picture, but at the expense of an in-depth analysis of similarities, common trends and discussion of substantive provisions.

In contrast, *Human rights* mainly uses a thematic approach, such as 'implementation at the national level' and 'supervision by international tribunals', in which the different experiences are combined. Even those chapters devoted to the 'political bodies' and treaty bodies develop on the basis of a theme-driven narrative, rather than an attempt to provide as complete a picture as possible.

Evidently, both approaches have their advantages and disadvantages, and are informed by their original (and intended) target audience.

An earlier juxtaposition of the authors' respective approaches can be found in the first issue of the *Human Rights Law Journal* appearing in 1980, to which both contributed on the topic of the Human Rights Committee. (See M Nowak 'The effectiveness of the International Covenant on Civil and Political Rights — Stocktaking after the first

eleven sessions of the UN Human Rights Committee' (1980) 1 *Human Rights Law Journal* 136 and C Tomuschat 'Evolving procedural rules: The UN Human Rights Committee's first two years of dealing with individual communications' (1980) 1 *Human Rights Law Journal* 249.) While Nowak provides a more general overview, Tomuschat analyses a few problematic areas in depth.

Differences in approach are also reflected in the different 'methodologies' used. *Introduction* has no footnotes. It contains numerous lists, schemes, graphs, literature lists in 'textboxes'. Mostly, these 'textboxes' are summaries, setting out the discussed material graphically. They resemble teaching aids (such as parts of a Powerpoint presentation). Important words in the text are placed in bold. All this makes the great amount of factual and detailed information easily digestible. *Human rights* is a traditional, scholarly text, with moderate use of footnotes. Its structure is clear and the writing concise.

There are a number of substantive issues that are covered by the one, and not the other of the two texts. As stated in its introduction, *Introduction* speaks specifically to 'field missions'. As a consequence, a thorough overview is provided of mechanisms to *prevent* human rights violations, such as the Field Mission of the UNHCHR in Burundi, and the UN Working Group on Enforced Disappearances. The link between human rights and 'the maintenance of peace and security' (in the UN Charter) is explored in detail. It also deals in great detail with the OSCE. *Human rights*, on the other hand, covers humanitarian law in much more detail, and looks into interesting contentious issues such as civil suits against human rights violators.

Introduction and *Human rights* are two important and complementary texts. *Introduction* succeeds in its aim of providing an updated, comprehensive overview of international human rights. Its accessible style and text features should ensure a wide readership. *Human rights* is a very readable, insightful text that covers most of the important topical debates in the human rights discourse. In an ideal world, human rights practitioners, activists, teachers and trainers should read, and have both of these books on their shelves.



AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

Contributions should preferably be e-mailed to
isabeau.demeyer@up.ac.za

but may also be posted to:

The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria
South Africa
0002



All correspondence, books for review and other communications should be sent to the same address.

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission should not already have been published elsewhere.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- If the manuscript is not sent by e-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, professional qualifications and professional or academic status.
- Authors should supply a summary of their contributions of not more than 300 words.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.

The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them conform with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.

The following general style pointers should be followed:

- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
 - First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
 - Subsequent references to footnote in which first reference was made: eg Patel & Watters (n 34 above) 243.
- 
- 

- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text. Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used.
- Words in a foreign language should be *italicised*.
- Numbering should be done as follows:
 - 1
 - 2
 - 3.1
 - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than thirty words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes):
28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms — 'constitution', but when a specific country's constitution is referred to, capitals are used — 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* for additional aspects of house style.

2003 SUBSCRIPTIONS

Subscription enquiries and orders to:
 JUTA Client Services, JUTA Law, PO Box 24299, Lansdowne 7779, South Africa
 Telephone: (021) 763 3600
 Fax: (021) 761 5861
 E-mail: cserv@juta.co.za

SOUTH AFRICA

R375,00 (14 % VAT included) plus R28,00 postage and packaging: R403,00

REST OF THE WORLD

R328,95 plus R85,00 surface postage and packaging: R413,95
 (approx US \$45; €40; £35 — will be invoiced in Rands)



**THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA**

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see www.chr.up.ac.za or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
Pretoria 0002, South Africa
Tel: (27) 012 420 3810/3034
Fax: (27) 012 362 5125
chr@postino.up.ac.za

Staff

Lizette Besaans

Publications typist

Cherryl-Lee Botterill

Project Officer: Good Governance Programme

Danie Brand

Research Associate; Senior Lecturer in the Faculty of Law

Elwina Daniels

Project Officer: Good Governance Programme

Elize Delpport

Project Manager: Gender Unit

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

Gill Jacot Guillarmod

Senior Programme Manager; Liaison Officer

Boogie Khutsoane

Project Manager: Gender Unit

Magnus Killander

Researcher





Rose Lee

Student Assistant

Meriam Maboya

Financial Officer

David Mmbi

Project Officer: Southern African Student Volunteers

Lebo Mosupye

Financial Officer

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

Harold Meintjes

Acting 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: Good Governance Programme and Environmental Law in Africa Project; Senior 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

Professor of Law, Dickinson School of Law, Pennsylvania State University, USA

Extraordinary Professors

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Mary Robinson

Director, Ethical Globalization Initiative, New York, USA

Board

Kader Asmal

Minister of Education

Duard 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 Constitutional Court of South Africa

Projects and Programmes

African Human Rights Moot Court Competition

Master's Programme (LLM) in Human Rights and Constitutional Practice

Master's Programme (LLM) in Human Rights and Democratisation in Africa

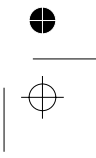
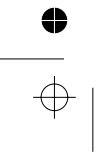
Master's Programme (LLM) in International Trade and Investment Law in Africa

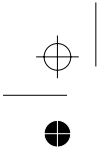
Integrated Bar Project (IBP)

Gender Unit

HIV/AIDS and Human Rights in SADC Research Project (with the Centre for the Study of AIDS, University of Pretoria)

Good Governance Programme

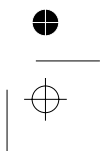
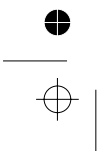




Socio-Economic Rights Research Project
Database on Human Rights in Africa
Environmental Law in Africa Project
Southern African Student Volunteers (SASVO) (with the Centre for
the Study of AIDS)

Regular publications

African Human Rights Law Journal
African Human Rights Law Reports
Human Rights Law in Africa
Constitutional Law of South Africa
Occasional Papers



**CHART OF RATIFICATIONS:
OAU/AU HUMAN RIGHTS TREATIES**

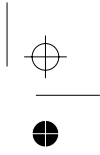
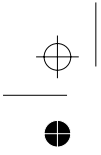
Position as at 31 December 2003

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 December 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	08/07/03	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			23/12/03
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	28/10/03
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	19/11/03

	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	11/12/96	
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	32	15



blank final page

