

# AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 5 No 2 2005



**Editors**

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

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

**Assistant editor**

Annelize Nienaber  
*Senior lecturer, Faculty of Law*

**Publication manager**

Isabeau de Meyer  
*Programme Manager, Centre for  
Human Rights*

**Assisted by**

Magnus Killander, Martin Nsibirwa  
and Morné van der Linde  
*Researchers, Centre for Human  
Rights*

**International editorial advisory  
board**

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

Jean Allain  
*Senior lecturer in public  
international law, Queen's University  
of Belfast, Ireland*

Victor Dankwa  
*Professor of law, University of Ghana*

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  
*Legal counsel, World  
Intellectual Property Organisation*

Pius Langa  
*Chief Justice, Constitutional Court of  
South Africa*

Sandy Liebenberg  
*HF Oppenheimer Chair in Human Rights  
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*

Kate O'Regan  
*Justice, Constitutional Court of South  
Africa*

Fatsah Ouguergouz  
*Secretary of the International Court  
of Justice*

Michael Reisman  
*Myres S McDougal Professor of interna-  
tional law, Yale Law School, USA*

Geraldine van Bueren  
*Professor of international human  
rights law, University of London*

**THIS JOURNAL SHOULD BE CITED AS (2005) 5 AHRLJ**

The *African Human Rights Law Journal* publishes contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in March and October.

# AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 5 No 2 2005





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 ANdtp Services, Cape Town

Typesetting by ANdtp Services  
Printed and bound by MSP Print

# CONTENTS

Editorial . . . . .	v
<b>Articles</b>	
Exploring <i>ubuntu</i> : Tentative reflections by Drucilla Cornell and Karin van Marle . . . . .	195
The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections by Thoko Kaime. . . . .	221
Corporate social responsibility and human rights law in Africa by Daniel Aguirre . . . . .	239
Human rights and the rule of law in Swaziland by Sabelo Gumedze . . . . .	266
A rights-based approach to access to HIV treatment in Nigeria by Ebenezer Durojaye and Olabisi Ayankogbe . . . . .	287
A schematic comparison of regional human rights systems: An update by Christof Heyns, David Padilla and Leo Zwaak . . . . .	308
Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option by Godfrey M Musila . . . . .	321
A rights-centred critique of African philosophy in the context of development by Kwadwo Appiagyei-Atua. . . . .	335
The African Union: Challenges and opportunities for women by Karen Stefiszyn . . . . .	358
A human rights approach to World Trade Organization trade policy: Another medium for the promotion of human rights in Africa by Omphemetse Sibanda . . . . .	387
A dilemma of the twenty-first century state: Questions on the balance between democracy and security by Bernard Bekink . . . . .	406
<b>Recent developments</b>	
The embargo against Burundi before the African Commission on Human and Peoples' Rights (Note on Communication 157/96, <i>Association for the Preservation of Peace in Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia</i> ) by Alain Didier Olinga . . . . .	424

### Editorial

At its fifth meeting in Sirte, Libya, the African Union (AU) Summit decided that the merger of the African Court on Human and Peoples' Rights and the African Court of Justice needs to be completed. It also decided that 'all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalisation of the Registry' (Assembly AU/6(V)). One can only express the hope that the African Human Rights Court, which was already ready to be established early in 2004, should by early 2006 become a reality.

The terms of four members of the African Commission on Human and Peoples' Rights (African Commission) came to an end when the AU Assembly elected their replacements in July 2005. They are Commissioners Dankwa, Chirwa, Chigovera and Johm, all stalwarts in the Commission.

Professor Dankwa served as Chairperson of the Commission from 1999 to 2001, and as Vice-Chairperson between 1995 and 1997. The period of his chairmanship saw a significant improvement in the Commission's jurisprudence. As 'rapporteur', Professor Dankwa had an important role in a number of important decisions, including the celebrated *SERAC* case (Communication 155/96, (2001) AHRLR 60 (ACHPR 2001)). He also served as the first Special Rapporteur on Prisons and Conditions of Detention in Africa, establishing it as one of the Commission's most successful endeavours.

Dr Vera Chirwa succeeded him as Special Rapporteur on Prisons and Conditions of Detention in Africa. Having herself served many years in Malawian prisons, she brought further moral authority, legitimacy and experience to the position. Dr Chirwa was relentless in her promotion of prisoners' rights, and also highlighted the issue of the death penalty in Africa.

Commissioner Chigovera, who previously served on the United Nations' Committee on the Elimination of Racial Discrimination, enriched the African Commission with his experience and technical legal expertise. He was influential in the drafting of normative standards

of the Commission and at the time of his retirement, served as the first Special Rapporteur on Freedom of Expression in Africa.

Commissioner Johm was Vice-Chairperson of the Commission between 2001 and 2003. Her close relations with NGOs enabled her to play a forceful role in the Commission. She advocated for and served as the first Special Rapporteur on Human Rights Defenders in Africa.

The four new Commission members are Ms Peine Alapini-Gansou, Mr Musa Bitaye, Adv Pansy Tlakula and Mr Mumba Malila. Ms Alapini-Gansou is a lawyer and NGO activist in Benin; Mr Bitaye is President of the Bar Association of The Gambia; Adv Tlakula is the Chief Electoral Officer of the Independent Electoral Commission of South Africa; and Mr Malila chairs the Zambian Human Rights Commission. None of the new commissioners therefore fall within the category of serving as member of the executive or diplomatic service of their country of origin, a much criticised feature of earlier appointments. It would appear that the AU's *note verbale* (BC/OLC/66/Vol XVIII, April 2005), issued in respect of membership of the African Commission and calling on states not to nominate government officials, had an impact on the nomination and selection of commissioners.

One of the first issues the new Commission has to deal with is its relationship with the AU institutions, such as the Peace and Security Council and the Economic, Social and Cultural Council. A request of the AU Assembly that the African Commission considers and reports about this aspect has been forwarded some time ago — without any apparent reaction from the African Commission. (See Decision Assembly/AU/Dec 7(II), reiterated at the last session, Assembly/AU/Dec 77(V).) This silence should be terminated as soon as possible.

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: Karin Arts, Evarist Baimu, Kealeboga Bojosi, Daniel Bradlow, Daniel Chirwa, Benyam Dawit, Jacques de Ville, Lourens du Plessis, Willemien du Plessis, Adam Geary, Magnus Killander, Anton Kok, Dino Kritsiotis, Irma Kroeze, Amanda Lloyd, Bronwen Manby, James Michael, Ahmed Motala, Martin Nsibirwa, Marius Pieterse, Ignatius Rautenbach, Solomon Sacco, Jeremy Sarkin, Nsongurua Udombana and David Weissbrodt.





## Exploring *ubuntu*: Tentative reflections

Drucilla Cornell\*

Professor of Political Science, Women's Studies and Comparative Literature,  
Rutgers University, New Jersey, USA

Karin van Marle\*\*

Professor of Law, Faculty of Law, University of Pretoria

### Summary

*This paper reflects the significance of ubuntu in South African constitutional law and proceeds by discussing the complex question of African identity, as this is relevant for the study of African jurisprudence and legal ideals. To show the practical significance of ubuntu and what it might mean jurisprudentially, the authors examine Mokgoro J's recent opinion in the Khosa case and how it could be applied as a principle in that case.*

### 1 Introduction

In March 2004, the *Ubuntu* Project, a project developed out of the Stellenbosch Institute for Advanced Studies, held a one-day conference to discuss the role of *ubuntu* in the new South Africa, and particularly the feasibility of translating *ubuntu* into law. Our article has a modest goal: We seek mainly to articulate the central questions raised in that conference and to deepen the possible significance of those questions for a nuanced constitutional jurisprudence in South Africa.

In this essay we proceed as follows: First, we address the issue of the nature of African philosophy and how an understanding of this relates to debates about *ubuntu*. Central to this discussion is an examination of Derrida's writing on the archive as this relates to the recollection and

---

\* JD (UCLA); SGKCORNELL@aol.com

\*\* LLB (UP), LLM LLD (South Africa); kvanmarl@hakuna.up.ac.za

re-imagination of African *gnosis*. Second, we attempt to expand from this discussion of *gnosis* and explore whether *ubuntu* can be used as a justiciable principle. Third, to show how *ubuntu* might be deployed, both as a founding legal ideal and as a working legal principle, we examine Mokgoro J's opinion in the *Khosa* case.<sup>1</sup>

*Ubuntu* is a controversial value or ideal in South Africa. Philosophers such as Shutte have forcefully argued that *ubuntu* should be adopted as a new ethic for South Africa.<sup>2</sup> On the other hand, critics of *ubuntu* have argued against those who would make *ubuntu* an essential ethical ideal or moral value in the new South Africa. Broadly construed, those criticisms range from the claim that *ubuntu* was once a meaningful value, but now gives nothing to young South Africans, to the claim that *ubuntu* is inherently patriarchal and conservative. Still others argue that *ubuntu* is such a bloated concept that it means everything to everyone, and as a bloated concept it should not be translated into a constitutional principle. Although *ubuntu* was included in the epilogue of the interim Constitution, there have not been many attempts to incorporate *ubuntu* into post-apartheid jurisprudence. Where courts have referred to *ubuntu*, they treated it as a 'uni-dimensional' concept and not as a philosophical doctrine.<sup>3</sup>

The debate over whether or not *ubuntu* can be translated into a justiciable principle turns not only on the definition one gives to *ubuntu*, but also on how and why *ubuntu* can be considered an 'African' or 'South African' value. One panel at the conference focused exclusively on the question of whether *ubuntu* is a South African value, and even more broadly an African value or ideal, and what this would mean for the future of the Constitution. The three panellists agreed that *ubuntu*, or something very close to it, appears in most African languages. It is beyond the scope of this article to try to address the complex ethno-philosophical questions of whether or not *ubuntu* actually represents a key ethical principle or ideal in African philosophy generally. However, we realise, at the very least, that the question of 'what is' and 'what can' constitute an 'African' philosophy lies at the very heart of this discussion. A related question is what role African philosophy, including African political and ethical philosophy, should play in the development of a constitutional jurisprudence for a new South Africa. To help us respond to these questions, we turn to the work of two philosophers, namely Mudimbe and Derrida.

<sup>1</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (*Khosa*).

<sup>2</sup> See eg A Shutte *Philosophy for Africa* (1995), especially ch 10 & 11.

<sup>3</sup> M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moelendorf *Jurisprudence* (2004) 442.

## 2 African *gnosis*: What is African philosophy?

Mudimbe has suggested the word *gnosis* to configure African ethno-philosophy.<sup>4</sup> And why is African philosophy necessarily ethno-philosophy? Mudimbe powerfully argues that the question of what African philosophy is must be pursued through a genealogy of its social and historical origins, including a genealogy of the anthropological methods used to articulate African *gnosis* and the epistemological context in which it has been made possible.

These intellectual explorations must inevitably deal with the troubling social and historical reality that the very question of what constitutes African philosophy cannot be separated from the brutal imposition of colonialism on the continent of Africa. Mudimbe attempts to analyse the complexity of epistemological legitimation. Who, in the last few centuries at least, has been given the right and credentials to write, describe, and produce opinions of what is African philosophy? In addressing this question about right and credentials, we must also grapple with the issue of how African *gnosis*, to use Mudimbe's word, has inevitably and inextricably been bound up with the social scientific constructs of a Western *episteme*. As Mudimbe reminds us, one aspect of colonialism is that it seeks to organise and transform the non-European world through European constructs. But this does not mean that *gnosis* is reducible to European constructs. Mudimbe's definition of *gnosis*, at least, gives us a word that yields a form of knowledge that cannot be reduced to *doxa*, or opinion, or *episteme* understood as a scientific or social scientific construct associated with the so-called modern West. *Gnosis*, as Mudimbe defines it:<sup>5</sup>

... means seeking to know, inquiry, methods of knowing, investigation, and even acquaintance with someone. Often the word is used in a more specialised sense, that of higher and esoteric knowledge, and thus it refers to a structured, common, and conventional knowledge, but one strictly under the control of specific procedures for its use as well as transmission.

There is clearly much more work to be done in terms of the historical genealogy and, indeed, the anthropological investigation into what African philosophy is or can be, and perhaps most importantly what it ethically should be, in the struggle of African nations to define themselves in the purportedly post-colonial world. But for our purposes, at least, we want to accept the postulate that there is a form of knowledge, *gnosis*, that allows us to engage in an ontological, or what Mudimbe calls *anthropou-logos*, hermeneutic which could facilitate investigation into African or South African indigenous systems.

<sup>4</sup> VY Mudimbe *The invention of Africa: Gnosis, philosophy, and the order of knowledge* (1988) 186.

<sup>5</sup> Mudimbe (n 4 above) ix.

But, how does one pick up the project that Mudimbe has started for us? The answer is two-fold. First, there is a sense that we are investigating the way the meaning of values and ideals comes out of an engagement with the past and with interpretation about the meaning of that past as it relates to the configuration of such values and ideals. Second, the South African Constitution has been conceived through different metaphors, one of which is the archive.<sup>6</sup> This metaphor seems to be the best way to grapple with the promise of the Constitution. And so, we begin with a more general consideration of the archive.

### 3 Feverish words and the role of archive

The problem of the 'archive,' and what counts as archival material, haunts all historical and anthropological research and is for obvious reasons important in our exploration of and reflections on *ubuntu*. Derrida argues that what an archive is resists conceptualisation, more appropriately being rendered or configured as an impression. The archive 'impresses' the past on us, and yet the way in which it does so inescapably involves the one who is recording or describing the impression in its transmission as authoritative. What the archive encodes is how the past makes an impression on human beings. It encodes how we are to remember in terms of both an internal memory that constitutes a 'we', and also at the same time in terms of a purportedly legitimating memory for those who are outside the 'we' that is therefore constituted. In his work on the archive, Derrida describes his own use of the word impression instead of concept as follows:<sup>7</sup>

We have no concept, only an impression, a series of impressions associated with a word. To the rigor of the *concept*, I am opposing here the vagueness or the open imprecision, the relative indetermination of such a *notion*. 'Archive' is only a *notion*, an impression associated with a word and for which, together with Freud, we do not have a concept. We only have an impression, an insistent impression through the unstable feeling of a shifting figure, of a schema, or of an in-finite or indefinite process.

However, the disjointedness of the archive takes on a particular meaning in terms of Africa. As Mudimbe shows us in his excellent genealogy of African ethno-philosophy, the recording of this philosophy 'originates' with anthropological testimony about it. There is a central problem with this testimonial as to how African rituals, practices and social encounters are described, namely that the 'impression' made by the 'natives' on the anthropologists are given expression and articulation in terms of Western epistemological schemas. Thus, Africa comes 'to be

<sup>6</sup> See K van Marle 'Constitution as archive', unpublished paper delivered at a workshop on 'Law, time and reconciliation', Glasgow, May 2004; copy on file with the authors.

<sup>7</sup> J Derrida *Archive fever: A Freudian impression* (1996) 29.

invented' by anthropologists and shaped by the changing trends within that discipline.<sup>8</sup>

Mudimbe demonstrates that even the political movements, such as negritude, which have affirmed the uniqueness of African philosophy, only do so through an archive that comes to them from Western anthropologists engaging in a study of a form of knowledge that was primarily oral — passed down in ritual, aphorisms and parables — and therefore not presented as the form of knowledge some today would recognise as the discipline of philosophy. But does this mean that 'something' called African philosophy does not exist? Does this mean, further, that there is no sense in trying to trace the 'geographic of reason'? Not at all. Indeed, we would argue that the opposite is the case, since what have been considered the governing ideas of philosophical reason have now been localised and consigned to the West. Mudimbe offers us a genealogy of how 'African' philosophy 'came to be', and continues to be invented and re-imagined in part through the re-working of its genealogy. His work is exactly that: a genealogy of how African philosophy 'came to be' as ethno-philosophy.

Derrida adds to Mudimbe's explorations a philosophical understanding of how what is true to Africa may be unique in form and therefore have its own unique genealogy, and yet can still present us with the more general dilemma of the archival, which is not simply a problem for Africanists, but for all who engage with the significance, both politically and ethically, with the geography of reason and of the meaning of memory. We can, however, make use of Derrida's obsession (or, to use his word, fever). We see how a past and with it an identity impresses itself upon us so that we inherit that impression as it constitutes us as a 'we'. We also see that the archive is inherently troubled in that it always involves 'us' in interpreting the trait of being, and indeed authorising it as that which is a mark of an identity. The archive in that sense both encircles and marks us, and it is through that encirclement that we endlessly find ourselves in a spiral of reinterpretation that opens out

---

<sup>8</sup> Foucault has captured this dilemma that inheres in the ethno-philosophy of Africa and its inevitable domination by a Western framework as follows: Ethnology has its roots, in fact, in a possibility that properly belongs to the history of the European culture, even more to its fundamental relation with the whole of history . . . *There is a certain position of the Western ratio that was constituted in its history and provides a foundation for the relation it can have with all other societies* . . . Obviously, this does not mean that the colonising situation is indispensable to ethnology: neither hypnosis, nor the patient's alienation within the fantasmatic character of the doctor, is constitutive of psychoanalysis; but just as the latter can be deployed only in the calm violence of a particular relationship and the transference it produces, *so ethnology can assume its proper dimensions only within the historical sovereignty — always restrained, but always present — of European thought and the relation that can bring it face to face with all other culture as well as with itself.* (M Foucault *The order of things* (1973) 377 as cited in Mudimbe (n 4 above) 16 (Mudimbe's emphasis)).

into a future as we continuously reaffirm 'what are' and 'what are not' the authoritative traits of an identity.

Derrida reminds us of the force of remembering any trait of being that we call identity and the consignation that orders the archive:<sup>9</sup>

This archontic function is not solely toponomological. It does not only require that the archive be deposited somewhere, on a stable substrate, and at the disposition of a legitimate hermeneutic authority. The archontic power, which also gathers the functions of unification, of identification, of classification, must be paired with what we will call the power of *consignation*. By consignation, we do not only mean, in the ordinary sense of the word, the act of assigning residence or of entrusting so as to put into reserve (to consign, to deposit), in a place and on a substrate, but here the act of *consigning* through *gathering together signs*. It is not only the traditional *consignatio*, that is, the written proof, but what all *consignatio* begins by presupposing. *Consignation* aims to coordinate a single corpus, in a system or a synchrony in which all the elements articulate the unity of an ideal configuration. In an archive, there should not be any absolute dissociation, any heterogeneity or *secret* which could separate (*secernere*), or partition, in an absolute manner. The archontic principle of the archive is also a principle of consignation, that is, of gathering together.

The archive, then, in a sense shelters and keeps safe the impression of the past, and this act of self-repetition is inevitably a promise to the future, since what is preserved is meant to be preserved, not only for those living, but also for those to come. What is preserved is a confirmation of its significance (using that work deliberately to keynote both meaning and importance):<sup>10</sup>

The injunction, even when it summons memory or the safeguard of the archive, turns incontestably toward the future to come. It orders to promise, but it orders repetition, and first of all self-repetition, self-confirmation in a *yes, yes*. If repetition is thus inscribed at the heart of the future to come, one must also import there, *in the same stroke*, the death drive, the violence of forgetting, *superrepression* (suppression and repression), the anarchive, in short, the possibility of putting to death the very thing, whatever its name, which *carries the law in its tradition*: the archon of the archive, the table, *what* carries the table and *who* carries the table, the subjectile, the substrate, and the subject of the law.

What is known as Africa is inseparable from an ethical and political contest over what African can or should be. That this knowledge is inevitably political and ethical explains the 'heat', or what Derrida calls the 'fever', over how words like *ubuntu* come to be given meaning and significance as part of a tradition that marks both the importance of what is, either or both, African or South African. It is, of course, also a debate over who has the right to name what is African or South African and from where that right comes.

<sup>9</sup> Derrida (n 7 above) 3.

<sup>10</sup> Derrida (n 7 above) 79.

Sheltering, for Derrida, is always a matter of both preserving and of protecting a legacy. This protection, since it can never be complete, carries within it what Derrida calls the 'secret'. But, *gnosis*, as Mudimbe has defined it, is a kind of secret knowledge in a special sense in that it has been accessible at least in certain times and places only by certain people (priests and priestesses for example) with permission to access realms of being and forms of knowledge to which others cannot ascend. There is yet another sense in which *gnosis* is secret, in that it resists translation into the very anthropological language that gave it its being. As Mudimbe explains:<sup>11</sup>

*Gnosis* is by definition a kind of secret knowledge. The changes of motives, the succession of theses about foundation, and the differences of scale in interpretations that I have tried to bring to light about African *gnosis* witness to the vigour of a knowledge which is sometimes African by virtue of its authors and promoters, but which extends to a Western epistemological territory.

Is there anything there that matters as 'Africa'? And who is the 'we' that will decide that question? Those who think that the answer has to be 'no', that there is nothing there that can be identified as African, may have been misled by the wisdom of deconstruction, and therefore may have missed the heart of deconstruction, and even of genealogy. Why? Because they inscribe themselves in a process of denial that is inseparable from the horrifying reality of the colonialism that identified Africa with all that was dark, unthinkable, and only knowable as what should not be for itself and thus must be overcome in the name of civilisation. Our point is to show that the idea of an 'African' philosophy can not be summarily dismissed, which is why we point to some of the most sophisticated thinking on the notion of identity and its connection to the process of archivalisation. For us, the debate over the meaning of *ubuntu* and, more significantly, its identification as both African and South African, is feverish because it is integral to the struggle over what Africa or South Africa can or should 'come to be' in the future. We more than understand the risk of essentialising Africa. But we believe that the only cure for this risk is through the kind of re-evaluation through anthropology and genealogy that Mudimbe calls for. Otherwise we simply fall back into formulations that carry within them the worst aspect of the colonial project: the full-scale trivialising of the traditional mode of life and the spiritual framework of the *African Weltanschauungen*, and denial of the *gnosis* through which we struggle to articulate and interpret its meaning.

<sup>11</sup> Mudimbe (n 4 above) 186.

## 4 The Constitution as archive

Commentators have employed various metaphors to describe the South African Constitution. The image of the Constitution as bridge, as used in the Postamble of the interim Constitution and also further developed, for example, by the late Mureinik<sup>12</sup> and the late Justice Mohamed,<sup>13</sup> has frequently been recalled to stand in service of constitutional claims to reconciliation, healing and unity. Du Plessis chooses three other images in his reflection on the Constitution in the context of reconciliation, memory and justice, namely the Constitution as promise, as monument and memorial. For Du Plessis, a constitution serves the dual function of narration as well as authorship of a nation's history. He relates what he calls 'the potency with which [a constitution] can mould a politics of memory' to 'the authority with which it can shape the politics of the day'.<sup>14</sup> However, he concedes that the Constitution is but one of many participants in telling a nation's history and accordingly also one of many determinants of a nation's future. He explains that the possibility of the Constitution's promise is dependent on how the Constitution deals with memory, thereby drawing a connection between past and future, and, one could say, reasserting the point that future events should also influence constitutional memory.

Du Plessis, like others,<sup>15</sup> focuses on the tensions within the Constitution as a form of redemption. Following the work of Snyman, he describes the Constitution as simultaneously monumental and memorial.<sup>16</sup> Although monuments and memorials share a concern with memory, they differ significantly in the way they remember. Monuments celebrate and memorials commemorate. For example, after a war has been won, a monument will be created, celebrating the heroes and achievements of war. Memorials are created to commemorate the dead. In discussing the Constitution as monument, Du Plessis refers to the Constitution as 'hardly a modest text'.<sup>17</sup> Both interim and final Constitutions make reference and lay claim to the achievement of a

<sup>12</sup> E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31. For a critique on the bridge metaphor, see eg AJ Van der Walt 'Dancing with codes — Protecting developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258.

<sup>13</sup> *AZAPO & Others v President of the Republic of South Africa & Others* 1996 8 BCLR 1015 (CC) (AZAPO).

<sup>14</sup> LM du Plessis 'The South African Constitution as memory and promise' in C Villa-Vicencio (ed) *Transcending a century of injustice* (2000) 63.

<sup>15</sup> See eg H Botha 'Democracy and rights: Constitutional interpretation in a post-realist world' (2000) 63 *Journal of Contemporary Roman-Dutch Law* 561; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

<sup>16</sup> J Snyman 'Interpretation and the politics of memory' (1998) *Acta Juridica* 312.

<sup>17</sup> Du Plessis (n 14 above) 64.



'peaceful transition', to a 'non-racial democracy', to the recognition of the 'injustices of our past', and the honouring of 'those who suffered for justice and freedom in our land'; to the need for healing the 'divisions of the past' and for building a 'united and democratic South Africa'.<sup>18</sup> Du Plessis also refers to the entrenchment of the values of democracy, human dignity, equality and freedom as 'monumental flair'.<sup>19</sup> To conclude his discussion of the Constitution as monument, he refers to some of the Constitutional Court's decisions, most notably *S v Makwanyane*,<sup>20</sup> in which capital punishment was declared unconstitutional. He describes the various decisions as 'imbued with value statements' that not only focused on constitutionalism nationally, but also internationally. Du Plessis continues to argue that, although no one should be cynical about the 'monumental achievements' of the South African Constitution, one should also embrace the 'restrained constitution'. For Du Plessis, the restrained constitution is the constitution as memorial, namely the idea that a written constitutional text cannot alone provide justice, but rather reminds us to strive for justice.<sup>21</sup>

Du Plessis's metaphorical description of the Constitution can be useful in the tentative refiguring of the Constitution through yet another image, Constitution as archive.<sup>22</sup> With reference to the meaning of archive as the place where things commence, the place from which order is given and the place that contains memory, an easy link between archive and Constitution can be made. As the archive traces only particular aspects of the past, the Constitution similarly traces only particular aspects of the South African past and nation. Also, the principles and ideals embodied in the Constitution are already interpretations of the past and the nation's idealised aspirations for the 'new' South Africa. Like the archive cannot fully contain memory, the Constitution cannot encapsulate all that must be remembered of the 'old' South Africa. The Constitution as monument risks the 'death drive' of the Constitution, the drive to destroy all traces without any remainder of what is other to the past of the country it engraves. The Constitution, figured as archive, works against the death drive of the Constitution as monument.

To return to Derrida's work on the archive, Derrida himself reminds us that the word 'archive' has at its root a nomological principle:<sup>23</sup>

But rather the word 'archive' — and with the archive of so familiar a word. *Arkhe*, we recall, names at once the *commencement* and the *commandment*. This name apparently co-ordinates two principles in one: the principle

<sup>18</sup> As above.

<sup>19</sup> As above.

<sup>20</sup> *S v Makwanyane* 1995 3 SA 391 (CC) (*Makwanyane*).

<sup>21</sup> Du Plessis (n 14 above) 65.

<sup>22</sup> Van Marle (n 6 above).

<sup>23</sup> Derrida (n 7 above) 1 (emphasis from original).

according to nature or history, *there* where things *commence* — physical, historical, or ontological principles — but also the principle according to the law, *there* where men and gods *command*, *there* where authority, social order are exercised, *in this place* from which order is given — nomological principle.

As we have seen earlier, Derrida's careful work on the meaning of the archive always shows us that the reality to which the archive testifies is always beyond itself in that it points to a future implicit in the ambiguity of the word itself; implicit in the sense that the command of a *nomos*, an ethical command, is always beyond the simple 'there' that is always purportedly being discovered. Thus, a constitution understood as an archive that always carries within it this ambiguity turns us to a future of struggle in which we confront the inescapability of our responsibility for the meaning we give to the archive as a nomological principle.<sup>24</sup>

One aspect of understanding the Constitution as an archive is that the struggle over the values and ideals of the South African Constitution should be made explicit as crucial to the continuous transfiguration of the social and political reality of the new South Africa. For what is being constituted in the new South Africa, if not a new *nomos* which continuously shapes and reconfigures both the meaning of what is 'new' and 'South African'? This 'new' carries within it a commandment to the moral memory of apartheid which it partially, at least, defines itself against. An interesting feature of the South African Constitution is that it points to this 'new' *nomos* that must be brought into being. Thus, it does not turn, as many other constitutions do, on a past that legitimates its basis. It is explicitly future-oriented and thus purposive in a sense that it seeks to bring the 'new' *nomos* into being. Mokgoro's demand for the ontological transparency of the ideals and values through which this new *nomos* will come into being shows her profound commitment and fidelity to the purposive self-understanding of the South African Constitution. In her concurring opinion in the Constitutional Court's decision to reject the death penalty, Mokgoro J explicitly called for making the values that inform constitutional decision explicit in the decisions themselves. To quote Mokgoro:<sup>25</sup>

In order to guard against what Didcott J, in his concurring judgment, terms the trap of undue subjectivity, the interpretation clause prescribes that courts seek guidance in international norms and foreign judicial precedent, reflective of the values which underlie an open and democratic society based on freedom and equality. By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism. Section 35 seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal

<sup>24</sup> See Cornell *The philosophy of the limit* (1992) 62-90.

<sup>25</sup> *Makwanyane* (n 20 above) para 304.

order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and the internationally accepted values in the cultivation of a human rights jurisprudence for South Africa. However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality.

As Derrida reminds us, the archive is a troubled word, precisely because of the ambiguity inherent in the two meanings of beginning. But this trouble can be good for a constitution understood as an archive of what must be other to the past of apartheid, and that in this other is always a future-oriented affirmation of the very ideals that mark the past as a wrong to be overcome. Mokgoro's call that constitutional decisions make the values and ideals of the Constitution explicit can, at least, turn us back to an understanding of constitutionalism as in service of democratic struggle in which what is constituted is, at least in part, the space for the contest over ideas and values that seek to keep the just promise of the South African Constitution alive. Ideals and values should not be conflated, and the significance of the difference between these terms was debated in the seminar. Values are defined as what are actually liked, prized, esteemed, or approved of by actual groups or individuals. In utilitarianism, for example, values are the basic measure of the worthiness of any moral proposition. Ideals, alternatively, mark a place of irreducibility to what is actually valued or prized. It is this irreducibility that can always demand transformation of current tastes and desires in the name of the horizon which the ideal holds out. Obviously the Constitution understood as archive, which demands that the ethical moment always be recognised, in its commandments would include struggle over both values and ideals. Mokgoro's call for ontological transparency, then, is crucial if the Constitution seeks to redeem the past of apartheid, and yet to do so in such a way as to remember that justice itself is always an ideal to be struggled for, never one that can be realised once and for all even in the best of constitutions.

## 5 *Ubuntu* behind the law

One crucial aspect of 'African' philosophy which is articulated by anthropologists, theologians and philosophers, who disagree on every other aspect of 'African' philosophy, is its focus on metadynamics and the relationship, or active play of forces, as the nature of being. *Ubuntu* in a profound sense, and whatever else it may be, implies an interactive ethic, or an ontic orientation in which who and how we can be as human beings is always being shaped in our interaction with each other. This ethic is not then a simple form of communalism or communitarianism, if one means by those terms the privileging of the commu-

nity over the individual. For what is at stake here is the process of becoming a person or, more strongly put, how one is given the chance to become a person at all. The community is not something 'outside', some static entity that stands against individuals. The community is only as it is continuously brought into being by those who 'make it up', a phrase we use deliberately. The community, then, is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people. In a dynamic process the individual and community are always in the process of coming into being. Individuals become individuated through their engagement with others and their ability to live in line with their capability is at the heart of how ethical interactions are judged.

However, since we are gathered together in the first place by our engagements with others, a strong notion of responsibility inheres in *ubuntu*. Since our togetherness is actually part of our creative force that comes into being as we form ourselves with each other, our freedom is almost indistinguishable from our responsibility to the way in which we create a life in common with each other. If we ever try to bring *ubuntu* into speech, we might attempt to define it as this integral connection between freedom as empowerment, which is always enhanced and indeed only made possible through engagement with other people. Each one of us is responsible for making up our togetherness, which in turn yields a process in which each person can come into their own.

This interactive, ontic orientation reveals how freedom can be understood as indivisible. As Mandela himself wrote: 'Freedom is indivisible. The chains on any one of my people are the chains on all of them. The chains on all of my people are the chains on me.'<sup>26</sup> Without justice and without all of us transforming ourselves so as to be together in freedom, our individuality will be thwarted since we will all be bound, if differently so, in a field of unfreedom. Again to quote Mandela:<sup>27</sup>

A man who takes away another man's freedom is a prisoner of hatred. He is locked behind the bars of prejudice and narrow-mindedness. I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me. The oppressed and the oppressor alike are robbed of their humanity.

Mandela refers to the word 'humanity' as an ideal in that *ubuntu*, as it is associated with justice and freedom, is something to live up to. On the other hand, the dynamic, interactive ethic that *ubuntu* expresses has as much to do with reshaping our humanness through the modality of being together as it does with defining what are, for example, the essential attributes of our humanity that make us moral beings. This understanding that our humanness is shaped in our interactions with

<sup>26</sup> NR Mandela *Long walk to freedom* (1995) 624.

<sup>27</sup> As above.

one another and within a force field created and sustained by those interactions, explains one of the most interesting aspects of *ubuntu*, which is the notion that one's humanness can be diminished by the violent actions of others, including the violent actions of the state.

We can at least make sense of why *ubuntu* was so crucial in the decision rejecting the constitutionality of the death penalty in South Africa. In a society in which the death penalty is allowed, state murder is institutionalised and this form of vengeance becomes part of the field in which we have to operate. Vengeance feeds on itself, whether it is perpetuated by the state or the individual. Freedom as understood by *ubuntu* thinking, then, is not freedom from; it is freedom to be together in a way that enhances everyone's capability to transform themselves in their society.<sup>28</sup> Since *ubuntu* is an ontic orientation within an interactive ethic, it is indeed a sliding signifier whose meaning in terms of a definition of good and bad is always being re-evaluated in the context of actual interactions, as these enhance the individual's and community's powers. In this sense, the ultimate irony may be that it is precisely the bloatedness of *ubuntu*, to use the word of one of its critics, is actually its strength.<sup>29</sup> We do not pretend to be giving the ultimate definition of *ubuntu*, because indeed that would go against the spirit of *ubuntu*, but instead we simply choose to emphasise certain key aspects as these were articulated in the seminars and the interviews conducted by one of the authors. Let us return now to the role *ubuntu* might play in the constitutional jurisprudence of the new South Africa. To do so we raise two further questions.

## 6 *Ubuntu* and the South African Constitution

The first question, which was addressed over and over again in the seminar, is: Who is the 'we' of the nation state of South Africa? The afternoon panel raised this question with particular attention to the inadequate representation of black South African ideals, such as *ubuntu* in the final version of the Constitution. To remind the reader, *ubuntu* appeared in the 1993 Postamble of the Constitution, but was not carried over into the 1996 Constitution. The panellists are not alone in this concern. Moosa argues that:<sup>30</sup>

<sup>28</sup> In a forthcoming article, Cornell will be engaging in a discussion of the integral connection between *ubuntu* and the capabilities approach developed by Amartya Sen. For preliminary thinking by Cornell on the capabilities approach, see D Cornell *Defending ideals: War, democracy, and political struggle* (2004) ch 4.

<sup>29</sup> IJ Kroeze 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* 260.

<sup>30</sup> E Moosa 'Tensions in legal and religious values in the 1996 South African Constitution' in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131.

The omission of *ubuntu* must therefore mean that the Constitution was de-Africanised in the re-drafting process. With that the religio-cultural values of African people are also devalued. Thus the desire to formulate a core legal system which encapsulates the multiple value systems in South Africa was not necessarily accomplished in the final Constitution.

The second question, which is undoubtedly related to the first, is: Can *ubuntu* be operationalised as a legal principle or justiciable right in the South African legal system? Before returning to these questions, we simply want to suggest that debates over *ubuntu* on both sides assume the possibility of an ontological hermeneutic that can interpret the *gnosis* of indigenous systems of law in South Africa, and articulate them so as to begin the debate as to their relative importance within the South African legal system.

Our suggestion here is that the ethnographic or anthropological aspect of work, such as the *Ubuntu Project*, not only includes the interviews conducted by and with young black South Africans as to the meaning and significance of *ubuntu*.<sup>31</sup> Of course, it does include these materials. But there is a broader claim that we also seek to emphasise. Mudimbe, rightfully to our minds, points to a form of anthropological knowledge as inherent in the understanding of what African philosophy and legal theory can be. The attempt to articulate and interpret the meaning of *ubuntu* and the struggle over its political and ethical importance in the new South Africa demand an interdisciplinary inquiry into the conditions that have shaped the meaning of the debate. Anthropology and philosophy in this sense become intertwined at the very foundation at how this debate can take place in the first place.

Obviously, the question of whether African traditions have been adequately addressed in the South African Constitution turns on the possibility of interpreting the meaning of *ubuntu*. As we will see, it also informs whether or not *ubuntu* can be operationalised in constitutional law. There is a deep sense in which we cannot even get to the possibility of addressing the two questions on the role of *ubuntu* and constitutional jurisprudence, unless we have some understanding of how we can articulate and interpret the ethics of an *African* or *South African Weltanschauungen*. Our claim here is that the interdisciplinary approach of the *Ubuntu Project* is necessary for the rethinking of what kind of philosophy African philosophy might be, and that this kind of rethinking of philosophy may be important, not only for African philosophy, but for what philosophy, including political and legal philosophy, should become in the twenty-first century.

<sup>31</sup> Eg, as well as the ethnographic and jurisprudential aspects of the project, there is an activist dimension. A group of young women who were initially conducting interviews in local townships on the meaning of *ubuntu* organised themselves into a committee to found an *ubuntu* women's centre in Khayamandi.

In our discussions in the seminar, the question of the relationship between *ubuntu* and law turned to some degree on the understanding of what a legal principle is. Indeed, Cornell's debate with Sachs J on the question of whether or not *ubuntu* could be operationalised turned on the question of how one defines a legal principle, as well as what principles should be included in constitutional jurisprudence. Sachs has been criticised in his work on human rights for not providing, in his attempt to reconcile competing rights situations, underlying principles of political or ethical morality to support the hierarchy that would allow us to resolve such conflicts as more than a matter of strategy.<sup>32</sup>

Dworkin has famously argued, for example, that we can only reconcile competing rights, and indeed competing principles and ideals, such as liberty and equality that inform most modern legal systems, if we have underlying ethical principles that allow us to configure the way in which those principles, rights and ideals can be understood in relationship to one another. In the case of Dworkin, for example, the constitutional ideals of liberty and equality can only be reconciled if they turn on a deeper level of commitment to both of the two principles making up what he has termed ethical individualism. Those two principles, quoting Dworkin, are as follows:<sup>33</sup>

The first principle is the principle of equal importance: It is important, from an objective point of view, that human lives be successful rather than wasted, and that this is equally important, from that objective point of view, for each human life. The second is the principle of special responsibility: Though we must all recognise the equal objective importance of the success of a human life, one person has a special and final responsibility for that success — the person whose life it is.

Our point here is not to endorse ethical individualism. Indeed, we do not think that ethical individualism provides us with principles adequate to the task of building the new South Africa. But it is important to show that the actual rights in a constitution inevitably implicate deeper principles and that in a case of competing rights we will need to make explicit an appeal to those deeper principles in trying to identify a hierarchy between them. Sachs, like many other judges of the Constitutional Court, defends dignity as the ultimate principle of the Constitution. Although we agree with Sachs's critics that Sachs is not always clear on the relationship between rights and the Constitution and its underlying principles, it was evident in the seminar that Sachs is defending dignitarianism as the fundamental principle of the South African Constitution. Dignity has been defended by the Constitutional Court as not only an underlying principle, but also as a right, and thus dignity

<sup>32</sup> DM Davis 'Deconstructing and reconstructing the argument for a bill of rights within the context of South African nationalism' in P Andrews & S Ellmann (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 194.

<sup>33</sup> R Dworkin *Sovereign virtue: The theory and practice of equality* (2000) 5.

also functions on many different levels in the constitutional jurisprudence of South Africa. The Court in *Dawood* said:<sup>34</sup>

Human dignity . . . informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly, all, other rights . . . Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution; it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

Sachs is certainly willing to have the spirit of *ubuntu* pervade constitutional law and indeed, to the degree it is cited in actual legal cases, recognises that it is a constitutionally cited principle. At least in the seminar he seemed to argue that it would damage *ubuntu* to turn it into a judicial principle or right, although, as we will see shortly, Sachs seems to be rethinking his position on *ubuntu* and constitutional law. Drucilla Cornell responded in a two-fold way. First, she agreed with Sachs that dignity is a crucial principle in the South African Constitution. Broadly construed, dignity is a metaphysical fact of humanity that cannot be lost and yet can be violated. To recognise dignity as a metaphysical fact does not mean that there cannot be wrongs against dignity, because the ultimate wrong to dignity is to refuse to other human beings the status of human. Clearly, in the context of apartheid, South African blacks were denied the status of human. Dignity is a crucial principle and, more specifically, an ever important reminder that skin colour or any other supposedly biological attribute can never be a reason to deny anyone their inclusion in the idea of humanity.<sup>35</sup> But social realities should also not be allowed to undermine the 'truth' of that metaphysical fact. In other words, we never want to make the argument that, because of the social conditions in which someone lives, they could lose their dignity as if it is simply the positive attribute of being a human being that is there or not. Thus, we cannot use dignity in and of itself to call for the promotion of sweeping egalitarian transformation as if there were positive conditions that must be there as part and parcel of requirements of dignity.

This understanding of dignity can help us explain why Immanuel Kant himself never argued for the second and third generational rights

<sup>34</sup> *Dawood & Another v Minister of Home Affairs & Others* 2000 3 SA 936 (CC). See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) (*Certification*) paras 76-8; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) (*Soobramoney*); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*); *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 5 SA 721 (CC) (*TAC*).

<sup>35</sup> For a general discussion of dignity, see the introduction and ch 4 of D Cornell *Between women and generations: Legacies of dignity* (2005).



that are included in the South African Constitution. In Kant, the meta-physical fact of dignity turns on the ideal aspect of our humanity which inheres in humanity, placing itself under the moral law and thus achieving freedom of self-legislation by so doing. Only through such self-legislation do we rise above the determinants of our natural life, and thus a community of self-legislators would, at least on the level of the hypothetical imagination, be able to constitute a moral community as an ideal in which freedom would be a self-limiting principle. By self-limiting principle, we mean my freedom would be limited by your freedom and that we would agree to this limitation because of the moral nature of freedom itself. The social contract ideal in Kant yields an integral relationship between duty and right.<sup>36</sup> My rights are also my duties to you, but my duties to you, since they are limited by the very rights they entail, will never go beyond this one-to-one correspondence between rights and duties. Kant gives us a moral notion of the law of a modern legal system as formed in and through this experiment in the hypothetical imagination of a moral social contract based on maximising the negative freedom of all. *Ubuntu*, as it has been defined by Mokgoro, gives us a very different notion of the founding principle of law and with it a very different notion of rights and responsibility.

## 7 *Ubuntu* as a founding principle of law

To quote Mokgoro J:<sup>37</sup>

*Ubuntu*(-ism), which is central to age-old African custom and tradition, however, abounds with values and ideas which have the potential of shaping not only current indigenous law institutions, but South African jurisprudence as a whole. Examples that come to mind are: The original conception of law perceived not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity; communalism which emphasises group solidarity and interests generally, and all rules which sustain it, as opposed to individual interests, with its likely utility in building a sense of national unity among South Africans; the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach which emphasises retribution and seems repressive. The lawsuit is viewed as a quarrel between community members and not as a conflict; the importance of group solidarity requires restoration of peace between them; the importance of public ritual and ceremony in the communication of information within the group; the idea that law, experienced by an individual within the

<sup>36</sup> For an excellent discussion of Immanuel Kant's defence and elaboration of the ideal of the social contract, see eg 'Immanuel Kant "On the common saying: That may be correct in theory, but it is of no use in practice"' in M Gregor (ed) *Practical philosophy* (1999) 273.

<sup>37</sup> Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal*.

group, is bound to individual duty as opposed to individual rights or entitlement. Closely related is the notion of sacrifice for group interests and group solidarity so central to ubuntu(ism); the importance of sacrifice for every advantage or benefit, which has significant implications for reciprocity and caring within the communal entity.

Clearly, Mokgoro's rendering of the understanding of *ubuntu* as it relates to traditional law gives us a very different conceptualisation of the law than even the one embodied in the Kantian ideal of the social contract. One question that was raised in the seminar was, should *ubuntu*, as defined by Mokgoro, function at the highest level of the legal imaginary, as the material of the experiment in the imagination of what the 'we' of South Africa should be constituted to be. Further, by keeping the emphasis on freedom in *ubuntu*, this other understanding of the founding principle of law could even be inclusive of dignity and explain why dignity is so important in the Constitution of South Africa, without forcing dignity to do more work that it can do, at least when it is grasped as a metaphysical fact, a postulate of reason and not an attribute of persons. We will not try to answer the sweeping nature of that first question. Yet, it is clear that *ubuntu*, as it is defined by Mokgoro, as a founding principle of law, would not have the same kind of one-to-one correspondence of right and duty that it does under social contract theory. Obligation, and even a legally imposed duty, can go beyond that allowable under social contract theory, since the enhancement of a just community is crucial to the freedom of all in that community and for the quality of life more generally. Responsibility could thus entail the acceptance of measures that would be deemed unfair under traditional Western conceptions of the social contract that usually start with fairness, even if they disagree about the content of fairness. Thus, for example, beneficiaries of racism in South Africa could be held to a duty to correct it that might be formally unfair, such that they would be expected, for example, to pay higher electricity bills than blacks. Thus, they would not be treated equally, at least under a so-called neutral theory of equality and fairness. Mokgoro clearly does not want to limit the use of *ubuntu* to a vague spirit that pervades the Constitution. She had forthrightly and correctly argued, to our mind, that the founding principles of the Constitution and the ideals they uphold must be made explicit in actual legal decisions. It is important to remember here our earlier discussion of responsibility and freedom in which the creative power of the individual is both deepened and enhanced by being in a community that takes support for people seriously. This sort of enhancement may not be reduced to any self-interested benefit on the individual level in any immediate sense. The idea is that in a just community the shared force will realise our shared humanity, which is of course a benefit beyond price.

But it is not only its ability to defend a notion of obligation that goes beyond social contract that might make *ubuntu* important. It is also in

its emphasis on the just quality of the community and the enhancement of that just quality that distinguishes *ubuntu* from other notions of community that reduce it to an imagined social contract between already individuated persons. In her opinion, in the *Khosa* case, Mokgoro did not justify her decision through the use of *ubuntu*, yet her conclusions in the case reflect an *ubuntu*-inspired jurisprudence. The fate of the people in this case recalled the following words of Weil's, quoted by Christodoulidis in another context: 'You do not interest me. No man can say these words to another without committing a cruelty and offending against justice.'<sup>38</sup> The facts of the *Khosa* case were a clear example of where the state through the law, through parliamentary legislation, confirmed that claim. The message was that, if you are not a citizen of this country, 'you do not interest me', or at least interest me 'enough', to care for your well-being.<sup>39</sup>

In this decision, the Court had to confront a challenge to a certain provision of the Social Assistance Act 59 of 1992. The applicants in both matters were Mozambique citizens who were permanent residents in South Africa. In the case of the first applicant, the mother, applied for child support grants for her children under the age of seven and another grant, a care dependency grant, for a child aged 12 who suffered from diabetes. The second applicant applied for an old-age grant. The applicants in both matters were denied the grants because they were not citizens of South Africa. In a decision to uphold the validity of an order of the High Court, Mokgoro ruled that the High Court's order should indeed be upheld and the Court itself had the responsibility to read the words 'permanent resident' into the challenged sections of the Social Security Act. The applicants argued that sections 26, 27 and 28 of the Constitution use the word 'everyone' in the first two cases and the words 'every child' in the third case, and that delimiting access to social service grants violated the Constitution on its face in which it is written that everyone is eligible.

Mokgoro obviously could have limited the reach of her decision to the group before her, which were both Mozambicans. There is a tragic past that the South Africa of apartheid rule had with Mozambique. Many of the freedom fighters of the African National Congress, including members of a guerilla army formed by Mandela, fled to Mozambique and based their operations there. The result was an ongoing set of military interventions into Mozambique that violated the integrity of the country and to this day continues to make life in Mozambique difficult. One classic example is that a relatively large amount of

<sup>38</sup> E Christodoulidis 'Reconciliation as potentiality', unpublished paper read at a conference on 'Time, reconciliation and the law', Glasgow, May 2004, copy on file with authors; The quote is from Simone Weil's essay 'On human personality' in R Rees (ed) *Selected essays* 1962 9-34.

<sup>39</sup> As above.

Mozambican land is still heavily mined. The mines were installed by the South African government under apartheid and now those lands are of little industrial or agricultural use. Due to this tragic past, Mokgoro could have made a special exception for Mozambican refugees, but she chose not to rest her decision on that past or the special responsibility that might grow out of it. Instead, she took the message of the Constitution to heart because the relevant sections gave the rights to 'everyone', and that it was this word that demanded interpretation.

There might be something else at play in her decision that is more important than the pure legal discussion — something beyond law and legal language, something beyond rights that Weil captured as follows:<sup>40</sup>

At the bottom of the heart of every human being, from earliest infancy until the tomb, there is something that goes on indomitably expecting, in the teeth of all experience of crimes committed, suffered, and witnessed, that good and not evil will be done to him. It is this above all that is sacred in every human being . . . This profound and childlike and unchanging expectation of good in the heart is not what is involved when we agitate for our rights. The motive which prompts a little boy to watch jealously to see if his brother has a slightly larger piece of cake arises from a much more superficial level of the soul. The word justice means two very different things according to whether it refers to the one or the other level. It is only the former one that matters.

A certain politics and ethics might be at play, a concern with protecting and enhancing lives, striving for a society where no one, but at the very least the state, is not allowed to say 'you do not interest me'. The inspiration for this politics and ethics could be the notion of *ubuntu* at least hinted at in the following excerpt from Mokgoro's judgment:<sup>41</sup>

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.

Mokgoro argues strongly that the grants in all cases should be ordered and that it was not enough to accept the compromise that was offered by the respondents, that they would allow these particular Mozambicans access to the grants. Mokgoro accepted the applicants' argument that the refusal of these grants denied them the right to life and dignity under the Constitution. There is a deep sense in which, for Mokgoro, the humanity of the residents could not be denied because they were not citizens and in that sense her argument, in our mind, rightfully appeals to dignity. To quote Mokgoro again:<sup>42</sup>

<sup>40</sup> S Weil 'Human personality' in Rees (n 38 above) 10; Burns 'Justice and impersonality: Simone Weil on rights and obligations' 1993 49 *Laval théologique et philosophique* 480.

<sup>41</sup> *Khosa* (n 1 above) para 74.

<sup>42</sup> Mokgoro J in *Khosa* (n 1 above) para 47.

This Court has adopted a purposive approach to the interpretation of rights. Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of 'all people in our country', and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word 'everyone' in this section cannot be construed as referring only to 'citizens'.

Mokgoro explicitly rejects the 'American' solution in this problem, which is to treat 'citizens' differently than 'non-citizens'. Indeed, the respondents made the argument that many 'developed' countries, and not just the United States, made distinctions between 'citizens' and 'non-citizens' in the granting of social welfare grants. Mokgoro distinguished her own decision from the US Supreme Court by arguing that the reasonableness by which differentiations and exclusion in legislations are judged in South Africa is a much higher standard of judicial review than the one used by the US Supreme Court, which is based on rationality. In the United States, this rationality standard is used in all cases except those involving suspect classification or in the case of gender, which operates under an intermediate standard of review. But what makes Mokgoro's decision particularly important for us is that she not only emphasises the wrong to the individuals; she also insists that the purposive nature of the South African Constitution is rooted in the promotion of a just community, a just community which again is irreducible to a social contractual understanding of the relationship between rights and duties.

Here we sound again Mokgoro's note that our responsibility to our community is not simply because it protects our entitlements. Instead, we are responsible for the quality of that community and the promotion of a just community becomes a goal for everyone in South Africa, even if it demands assuming what seems to be an unfair imposition of requirements not simply to make up past wrongs, but to achieve a justice that ultimately enhances everyone's power, if power is understood through the ethical force field of *ubuntu*. Again, we are returned to the idea that freedom is indivisible.

We think that the best understanding of her argument, if it proceeds through *ubuntu*, is that permanent residents, through their actual engagements with South Africa, have become a part of the ethical interactions that make up the country and that they, as a result, should be considered part of the promise for justice offered by the Constitution.<sup>43</sup> The purposiveness of the Constitution of South Africa, which explicitly seeks 'to free the potential of each person', is simultaneously working to free the potential of the community toward justice. In this

---

<sup>43</sup> The judgment explicitly declines to address the position of other excluded groups, such as temporary residents, asylum seekers and illegal immigrants, hinting instead that such groups can legitimately be excluded from social assistance benefits. See *Khosa* (n 1 above) para 59.

sense, the purposiveness is about the kind of community the Constitution promotes as integral to the freeing of that potential. A just community for Mokgoro is a strong community, and a strong community strengthened by the capability and potential of individuals, certainly. But by promoting the indivisibility of freedom, the community established keeps itself from being diminished by the denial of humanity to anyone who is thrown in its lot with it. Thus, what is lost in terms of the burden placed on citizens to sustain those who are not citizens is well made up for Mokgoro by the promotion of a just community which is the only kind of community under *ubuntu* that can strengthen all of us together. Here we have a classic example of some citizens having to assume a responsibility, which might seem under a more liberal notion of fairness to be unjust, because they are taking on additional burdens on behalf of others in the community, without receiving any apparent reciprocal benefit. Yet, the situation is viewed as one where assuming such extra burdens is in the end in their moral interest because who they are as free individuals is inseparable from the freedom guaranteed 'to everyone'. Indeed, one can even read Mokgoro's insistence that the Constitutional Court should itself read in the words 'permanent residents' into the challenged sections of the social legislation as an *ubuntu*-inspired understanding of the role of the Constitutional Court.

The Constitutional Court is also responsible in its service as part of South Africa to promote justice for everyone. Thus, the Court should not just relinquish its responsibility to make sure that the change takes place now so that the destitute individuals should get their grants (although of course Mokgoro is very concerned that they do get their grants), but instead the change should be enforced by the Court in its responsibility to bring into being a just and equitable community. If the Court was simply to turn back the legislation to the legislature, not only would the individuals involved be harmed, but the Court would be diminished in its responsibility to be just in the name of the community itself. As we have written, Mokgoro did not use the word *ubuntu* here, but when she writes that extra burdens must be assumed by citizens and that others who do not have those burdens still have equal right to access to social benefits, she is not only promoting a fair community but, as she writes, a caring community. And this close connection between a just and caring community is part and parcel of her understanding of what the *nomos* of the new South Africa demands of its citizens:<sup>44</sup>

At the time the immigrant applies for admission to take up permanent residence, the state has a choice. If it chooses to allow immigrants to make their homes here, it is because it sees some advantage to the state in doing so. Through careful immigration policies it can ensure that those

---

<sup>44</sup> *Khosa* (n 1 above) para 65.

admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times. The category of permanent residents who are before us are children and the aged, all of whom are destitute and in need of social assistance. They are unlikely to earn a living for themselves. While the self-sufficiency argument may hold in the case of immigrants who are viable in the job market and who are still in the process of applying for permanent resident status, the argument is seemingly not valid in the case of children and the aged who are already settled permanent residents and part of South African society.

Crucial to the debate on whether or not *ubuntu* can be operationalised in the Constitution are two questions about constitutionalism itself. As John and Jean Comaroff have written:<sup>45</sup>

The Constitution of the Republic of South Africa, adopted in 1996, has been accorded hallowed status in the formation of the postcolonial polity. Translated into all official languages under the legend 'One *law* for One *nation*' — the italics are in the original — the text is shelved, in many homes, alongside family bibles and books of prayer. Yet, almost from the start, there have been doubts about its ability to constitute either *One Nation* or *One Law*; these italics are ours. Even its comprehensibility has been questioned: a mass-circulation black newspaper in Johannesburg, for example, has referred to it as a Tower of Babel, pointing out that its vernacular versions are utterly opaque — and, hence, babble to those whom it was meant to enfranchise.

Through their careful ethnographic work, the Comaroffs have pointed to how contradictions between the 'one' people of the Constitution and the many peoples of South Africa's indigenous legal systems cannot be reconciled by any of the current ideals of liberal multiculturalism, including the liberal ideals read into the South African Constitution itself. The Comaroffs point to how 'on the ground' struggles are constantly disrupting any easy liberal solution to what they rightly, in our mind, designate as claims to poly-sovereignty: actual claims to self-government in current law being made by different peoples in South Africa. Our first point is that we agree with the Comaroffs, that the Constitution has not and should not be fitted into a liberal mode that belies the complexity of actual struggle, yet simultaneously this should not imply a rejection of constitutionalism altogether. The Comaroffs clearly not only embrace constitutionalism, but they have defended it as a substantive rather than proceduralist form of democratic jurisprudence. The jurisprudence is democratic in that the court is actually participating in the configuration of values and ideals. These values

<sup>45</sup> J & J Comaroff 'Reflections on liberalism, policulturalism and ID-ology: Citizenship and difference in South Africa' *New Social Forms Seminar Series*, University of Stellenbosch Department of Sociology and Social Anthropology (15 August 2003).

and ideals both become embodied in law and also symbolically reinforce visions of what kind of polity the new South Africa hopes to become. Indeed, from the beginning of his work on the tribal legal systems, John Comaroff has emphasised the importance of aesthetically informed political practices of tribal intuitions, including those related to law-making practices, such as community conciliation and the like. Obviously, we need to look more into how the operation of tribal law in South Africa has appealed to a very different notion of law, including the 'law of law' then the one we associate with modern legal systems justified by one version or another of the social contract. What we want to emphasise here is that the Comaroffs continually point us to the importance of remembering that the constant effort to make sense of the Constitution should itself be seen as a political struggle.

In a recent decision, *Port Elizabeth Municipality v Various Occupiers*,<sup>46</sup> the Constitutional Court had to decide whether the municipality acted lawfully when it evicted residents from privately owned land within the municipality. The municipality responded to a petition signed by 1 600 people in the neighbourhood seeking an eviction order from the South Eastern Cape Local Division of the High Court. The High Court granted the order, after which the occupiers took the matter on appeal to the Supreme Court of Appeal. The Supreme Court upheld the appeal and set aside the eviction order. The municipality then applied to the Constitutional Court for leave to appeal against the decision of the Supreme Court. In a decision by Sachs J, the Court did not grant leave to appeal. Sachs placed the question of eviction within a historical context, referring to the 'pre-democratic' era where the law would have responded to illegal squatting in a drastic manner, which led to not only the dignity of black people being assaulted, but also to the creation of large well-affluent white urban areas that co-existed alongside black areas where blacks lived in poverty and insecure social conditions.<sup>47</sup> In a new democratic era under a supreme Constitution with an entrenched Bill of Rights, squatting was decriminalised and evictions were made subject to a number of requirements. A significant feature of the new era is that homeless people must be treated with dignity and respect. However, he added that it is not only the dignity of the poor that is affected when evicted and forcibly removed; the whole society is demeaned by such actions. Sachs argued that courts had a new role to play in balancing illegal eviction and unlawful occupation, that they are called upon to go beyond their 'normal functions, and to engage in active judicial management'.<sup>48</sup> He highlighted the Constitution's

<sup>46</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) (PE Municipality).

<sup>47</sup> PE Municipality (n 46 above) paras 8-10.

<sup>48</sup> PE Municipality (n 46 above) para 36.



requirement that everyone must be treated with 'care and concern' within a society based on human dignity, equality and freedom. He argued that cases must be decided not on generalities, but in the light of their own particular circumstances.<sup>49</sup> With explicit reference to *ubuntu*, he said the following:<sup>50</sup>

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

In this opinion, Sachs seems to have come closer to Mokgoro than he appeared to be in the seminar, in that we can read him to allow *ubuntu* to be an important ethical directive in the sense of the law of law underlying the entirety of the Constitution.

## 8 End remarks

Some contemporary advocates of agonism, a word embraced by Arendt, who argued that we must allow for radical plurality as the very basis of democratic politics, have resisted the ideal of constitutionalism itself as against this agonism. The critique that has become well known is that the law and the Constitution can only carry a poison that induces a kind of sclerosis of the agonal energies of politics.<sup>51</sup> What was raised in the seminar was not this critique of the life dissipating effects of constitutionalism, but instead a recognition that is precisely the depth of the challenge to South African sovereignty: Poly-sovereignty could at least potentially spur new and innovative interpretations of the Constitution.

There is no reason in principle that *ubuntu*, as it is understood as a founding principle of the law of law, cannot be operationalised. What would it mean if both dignity and *ubuntu* were configured together as operational principles as well as founding principles? We want to at least raise the suggestion here that *ubuntu* would not be translated as dignity has into an individual right because it goes beyond the notion of individual entitlement. The legal system of South Africa does not give standing only to individuals who have been harmed, but also to those individuals and communities who want to promote the public good. Therefore, even the idea of standing, so different than the one in the United States, can best be interpreted through *ubuntu*. We understand

<sup>49</sup> PE Municipality (n 46 above) para 31.

<sup>50</sup> PE Municipality (n 46 above) para 37.

<sup>51</sup> See S Wolin Tocqueville *between two worlds: The making of a political and theoretical life* (2003).

that in this essay we are only beginning to think of how *ubuntu* is being operationalised, but we also want to suggest that *ubuntu*, understood as a principle that could be operationalised, might well serve to promote ethically sound interpretations of difficult (at least for traditionally liberal jurisprudences) clauses of the Constitution, such as the limitations clause. After all, the limitations clause imposes a limit on when individuals can pursue their rights. How can we understand that limit? It is difficult to understand that limit, indeed, in the traditional liberal framework, even one inspired by Immanuel Kant, which reduces all rights and duties to a one-to-one correspondence in the social contract. Thus, it at least deserves much more exploration as to how *ubuntu* could be operationalised in the Constitution.

More importantly, it would provide a nuanced jurisprudence that would not only include African or South African values and ideals as important to the new South Africa, as a matter of fairness to those whose ideals have been marginalised, but also because those principles, ideals and values may well provide with solutions to dilemmas in South Africa that are not solvable by liberalism. It could be argued that certain aspects of customary law and features of the African Charter on Human and Peoples' Rights (African Charter) are concrete manifestations of *ubuntu*. Pieterse notes the influence of *ubuntu* in the humanist and collective emphasis in the customary law areas of restorative justice, the extended family, the notion of belonging and property.<sup>52</sup> He also relates the inclusion of social, economic and cultural rights alongside civil and political rights; the inclusion of the right to development; the protection of peoples' rights and the concept of duties in the African Charter to *ubuntu*. These rights, as well as the harmonisation of rights and responsibilities, illustrate the interdependence of individuals and communities and underscore the notion that individual rights cannot be meaningfully exercised in isolation of broader community rights.<sup>53</sup>

Perhaps the most empowering aspect of *ubuntu* is that, by taking its interactive ethic seriously, we should not shy away from the actual attempt to operationalise this powerful ideal because of fears of failure to do so adequately. Indeed, the very spirit of *ubuntu* might suggest to us that, while such failures are to be expected, the true enactment of this sort of ethic is itself constructed through the ongoing participation of the community in such struggles, including failures of operationalisation and efforts to resolve them, to create a new South Africa.

---

<sup>52</sup> Pieterse (n 3 above) 449.

<sup>53</sup> Pieterse (n 3 above) 456-457.

# The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections

*Thoko Kaime\**

Research Associate, Centre for Human Rights, University of Pretoria and  
International Environmental Law Research Centre, Geneva

## Summary

*The Convention on the Rights of the Child has been almost universally ratified. The author argues that its implementation depends to a large extent on the level of cultural legitimacy accorded to children's rights norms in a society. In Africa, children are seen as a valuable part of society. Despite this, cultural practices that are detrimental to children exist, such as female genital mutilation and inappropriate initiation rites. The Convention is underpinned by four principles: non-discrimination, participation, survival and development and the best interests of the child. Each of these principles can come into conflict with cultural practices. However, culture is not static and harmful practices can be overcome. This requires that the reasons for the existence of a practice are clearly understood, that solutions are found in consultation with practising communities and that adequate social support is given to individuals who choose to abandon the practice.*

## 1 Introduction

The near-universal ratification of the Convention on the Rights of the

---

\* LLB (Hons) (Malawi), LLM (Pretoria); [tkaime@ielrc.org](mailto:tkaime@ielrc.org). I am most grateful to Prof Julia Sloth-Nielsen, Dr Danwood Mzikenge Chirwa, Mr Godfrey Odongo and the anonymous reviewers for comments made on earlier drafts of this paper.

Child (Convention or CRC)<sup>1</sup> affirms a shared recognition of the universality of children's rights and indicates increasing support and acceptance by the world community of the need to promote and protect children's rights.<sup>2</sup> Significantly, however, the universalisation of children's rights has not precluded attempts to temper the implementation of CRC with the particular socio-cultural experiences of the diverse societies which have subscribed to its normative framework.<sup>3</sup> The call for 'culturalisation' has been justified in terms of the economic, social, cultural and political diversity that characterises the community of states.<sup>4</sup> It has been argued that an approach which is sympathetic to these differences infuses cultural legitimacy and therefore efficacy to the whole enterprise of children's rights.<sup>5</sup> Cultural legitimacy denotes the quality of being in conformity with the accepted principles or rules and standards of a particular culture. The defining characteristic of cultural legitimacy is the authority derived from internal validity.<sup>6</sup> A culturally legitimate norm, rule or value is respected and observed by members of the particular culture, presumably because it is assumed to bring benefits to the members of that particular culture. The corollary of this is that a rule or norm which does not command adequate legitimacy will not enjoy sufficient observance or support.

In the context of Africa, the desire for culturally appropriate norms has led to calls for a regime of children's rights, not only founded upon CRC, but also informed by African cultural heritage.<sup>7</sup> This approach

<sup>1</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990). CRC has been ratified by every state in the world except the United States of America and Somalia. See Office of the United Nations High Commissioner for Human Rights 'Status of ratifications of the principal international human rights treaties' <http://www.ohchr.org/english/countries/ratification/11.htm> (accessed 12 August 2005).

<sup>2</sup> See B Rwezaura 'Law, culture and children's rights in Eastern and Southern Africa' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 289; M Santos Pais 'A human rights conceptual framework for UNICEF' *Innocenti essays* (1999) 5 <http://www.unicef-icdc.org/publications/pdf/essay9.pdf> (accessed 22 September 2005).

<sup>3</sup> See eg A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 *International Journal of Children's Rights* 333-368; B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838-839.

<sup>4</sup> See F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 214-218, noting that CRC failed to address some issues which were particular to Africa due to the need for consensus. See also JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309.

<sup>5</sup> See generally the essays collected in P Alston (ed) *Best interests of the child: Reconciling culture and human rights* (1994).

<sup>6</sup> See AA An-Na'im 'Problems of universal cultural legitimacy for human rights' in AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 331-336.

<sup>7</sup> Viljoen (n 4 above) 218-219.

decries the trumping of traditional African practices in favour of practices and ideologies perceived or described as non-African. However, the call for a distinctively African approach to the implementation of children's rights calls into question some cultural practices which impact negatively on the rights of children.<sup>8</sup> The challenge, therefore, is how to implement children's rights in a culturally appropriate manner, whilst at the same time ensuring that harmful practices are not protected under the guise of cultural propriety.

This contribution argues that the success of children's rights implementation strategies in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms. It demonstrates that the protection and promotion of children's rights are culturally legitimate goals. However, the implementation of universal norms respecting children's rights within African cultures<sup>9</sup> will in some cases be impeded by practices or values which enjoy cultural legitimacy but are incompatible with the children's rights. It is, therefore, suggested that the general legitimacy accorded to the protection of children within various African societies should be invoked in order to revoke the legitimacy of these deleterious practices. It is submitted that such changes will be achieved only through the adoption of culturally legitimate and acceptable forms of discourse.

## 2 The cultural legitimacy of children's rights within African societies

The fundamental value underlying the International Bill of Rights<sup>10</sup> is the notion of the inherent dignity and integrity of every human being, whether child or adult.<sup>11</sup> All the civil, political and cultural rights recog-

<sup>8</sup> It must be noted that the tension between culture and children's rights is but part of a larger interaction between culture and human rights in general. In this respect, Ibhawoh observes that '[q]uestions remain, however, as to how best to strike the delicate balance between individual human rights standards guaranteed by the state and collective cultural rights claimed by groups'. See Ibhawoh (n 3 above) 843-844.

<sup>9</sup> In this discussion, culture is defined in its widest meaning, that is the 'totality of values, institutions and forms of behaviour transmitted within a society . . . this wide concept of culture covers *Weltauschauung* [world view], ideologies and cognitive behaviour'. See R Preswick 'The place of intercultural relations in the study of international relations' (1978) 32 *Year Book of World Affairs* 251. For other definitions of culture, see AL Kroeber & C Kluckhohn (eds) *Culture: A critical review of concepts and definitions* (1963).

<sup>10</sup> The International Bill of Rights refers to the compendium of documents comprising the Universal Declaration of Human Rights, adopted 10 December 1948, UN GA Res 217 A (III) (1948); International Covenant on Civil and Political Rights (CCPR), adopted 18 December 1966 (entered into force 23 March 1976), UN Doc/A/6316 (1966); and International Covenant on Economic, Social and Cultural Rights (CESCR), adopted 16 December 1966 (entered into force 3 January 1976), UN Doc A/6316 (1966).

<sup>11</sup> See An-Na'im (n 6 above) 356.

nised by the Universal Declaration of Human Rights (Universal Declaration),<sup>12</sup> and elaborated on in the International Covenant on Civil and Political Rights (CCPR)<sup>13</sup> and the International Covenant on Economic, Social and Cultural Rights (CESCR),<sup>14</sup> are the necessary implications or practical manifestation of the inherent dignity and integrity of the human person.<sup>15</sup> The intrinsic value attached to human dignity and the integrity of individuals may be traced throughout the value and belief systems of those cultures that constitute the human race.<sup>16</sup> Thus, all human beings and societies share certain fundamental interests, concerns and values that may be identified and articulated as the framework for a common culture of universal human rights.<sup>17</sup>

In Africa, traditional value systems recognise human dignity and integrity of the individual as fundamental values.<sup>18</sup> The concept of human dignity entails that all humans, by virtue of being human, are entitled to humanity, respect and dignity.<sup>19</sup> These principles and ideals manifest themselves in traditional society's responsibility to provide for the security and survival needs of its members.<sup>20</sup> Although the protection of human dignity is not structured in terms mimicking western human rights discourse, African traditional culture supports the idea and practice of human rights.<sup>21</sup>

In relation to children, the African view of human rights manifests itself in the recognition that children are a valuable part of the society.<sup>22</sup>

<sup>12</sup> Universal Declaration (n 10 above).

<sup>13</sup> CCPR (n 10 above).

<sup>14</sup> CESCR (n 10 above).

<sup>15</sup> Santos Pais (n 2 above) 1, noting that all human rights, civil, political, economic, social and cultural, are inherent to the dignity of every person. See also An-Na'im (n 6 above) 357.

<sup>16</sup> See generally A Pollis 'Cultural relativism revisited: Through a state prism (1996) 18 *Human Rights Quarterly* 316-320, noting that the 'universalisation [of human rights] ... can be located not in rights notions, but in the fact that all societies have conceptions of morality, justice, and human dignity'. See also A Dundes Renteln *International human rights: Universalism versus relativism* (1990).

<sup>17</sup> See AA An-Na'im 'Toward a cross-cultural approach to defining international standards of human rights: The meaning of cruel, inhuman, or degrading treatment or punishment' in AA An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1991) 19.

<sup>18</sup> See generally DM Wai 'Human rights in sub-Saharan Africa' in A Pollis & P Schwab (eds) *Human rights: Cultural and ideological perspectives* (1979) 115.

<sup>19</sup> See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339-346-358; FM Deng 'A cultural approach to human rights among the Dinka' in An-Na'im & Deng (n 6 above) 261-266.

<sup>20</sup> Pollis (n 16 above) 342. See also RA Baah *Human rights in Africa: The conflict of implementation* (2000); PJ Magnarella 'Assessing the concept of human rights in Africa' (2001) 1 *Journal of Human Rights and Human Welfare* 25.

<sup>21</sup> See generally AS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 286.

<sup>22</sup> Armstrong *et al* (n 3 above) 336.

Capturing the essence of such recognition, the Swazi proclaim that *bantfwana bangulimba loya embili*; the Nyanja declare *ana ndiwo tsogolo lathu*; the Banyarwanda insist *abana nibo rwanda rwejo*. Translated literally, these expressions mean that 'children are the future' and they convey the notion that children must be protected and nurtured, else society will die. Thus, African traditional culture recognises the intrinsic worth of children and the need to protect them.

More importantly, however, African culture recognises childhood as a special, precarious and fragile stage of the human being which requires special protection.<sup>23</sup> This perception is translated into the traditional responsibility to provide for the security and survival needs<sup>24</sup> of children and ensure their physical and psychological well-being.<sup>25</sup> The survival and development of children are legitimate goals of traditional society.<sup>26</sup>

Based on the above observations, it is concluded that the protection of children's rights is not a concept alien to traditional African culture. Consequently, international human rights principles relating to the protection of the child find support within the African cultural conception of human rights and the construction of childhood.

### 3 The relationship between culture and children's rights: Problematising the paradox of cultural primacy

Although CRC gives individual rights to children, it also emphasises relationships.<sup>27</sup> Consequently, the survival, development and protection of children are dependent upon their families.<sup>28</sup> This is hardly surprising, considering that the majority of children are nurtured, socialised, developed and trained into adulthood principally within the confines of the family environment, interacting with other social institutions, such as schools and churches.<sup>29</sup> To this end, CRC proclaims

<sup>23</sup> W Ncube 'The African cultural fingerprint? The changing concept of childhood' in Ncube (n 2 above).

<sup>24</sup> Thus, eg, the birth of a child will be greeted with elaborate procedures whereby ancestors who live in the spirit world are called upon to take care of the child as it makes its journey through life. Ceremonies which ensure this protection are conducted throughout the child's life.

<sup>25</sup> See I Kellner 'Under the knife: Female genital mutilation as child abuse' (1993) *Journal of Juvenile Law* 118.

<sup>26</sup> See generally T Lindholm *The cross-cultural legitimacy of human rights: Prospects for research* (1990) 4.

<sup>27</sup> See V LeBlanc 'The implementation of the 1989 Convention on the Rights of the Child and the work of the United Nations High Commissioner for Refugees' in E Verhellen (ed) *Understanding children's rights: Collected papers presented at the First International Interdisciplinary Course on Children's Rights* (1996) 401 404.

<sup>28</sup> It is in recognition of this that CRC deems the family as deserving of the necessary protection and assistance by the state; Preamble CRC para 5.

<sup>29</sup> Ncube (n 23 above) 13.

that the family is the foundation of society and the natural environment for the growth and well-being of its members.<sup>30</sup>

Furthermore, CRC acknowledges the rights and duties of the family to nurture, socialise and develop their children in a manner consistent with local values, customs and traditions.<sup>31</sup> In this regard, CRC stipulates that state parties shall respect and protect the rights, duties and responsibilities of parents or members of the extended family or community, as may be regulated by local custom, in ensuring the proper socialisation of the child in the exercise or enjoyment of the rights recognised by CRC.<sup>32</sup> The Convention further recognises the role of parents and the family in providing appropriate direction and guidance in the exercise by the child of his or her rights, in a manner consistent with the child's evolving capacities.<sup>33</sup> Thus, it is firmly acknowledged within CRC that the family is the first environment where the children are introduced to the values and norms of society.<sup>34</sup>

Significantly, CRC is not alone in emphasising the role of family and culture in the upbringing of children. Africa's own human rights documents have a special place for family and cultural values. Thus, the African Charter on Human and Peoples' Rights (African Charter)<sup>35</sup> not only states that the family is the natural unit of society which shall be protected by the state, but also declares that the family is 'the custodian of moral and traditional values recognised by the community'.<sup>36</sup> The African Charter imposes a duty on the state to assist the family in safeguarding such morals and traditional values.<sup>37</sup>

The appeal to family, tradition and African values is stressed further by the African Charter on the Rights and Welfare of the Child (African Children's Charter),<sup>38</sup> which, apart from reproducing the above provisions of the African Charter in article 18, affirms in its Preamble that the African approach to children's rights takes cognisance of the virtues of African cultural heritage and the values of African civilisation which should inspire and characterise the content of the rights of the African child.<sup>39</sup>

<sup>30</sup> Preamble CRC para 5.

<sup>31</sup> Santos Pais (n 2 above) 5.

<sup>32</sup> Arts 5, 18(1) & 27(2) CRC.

<sup>33</sup> Art 14(2) CRC.

<sup>34</sup> Santos Pais (n 2 above).

<sup>35</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981 (entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 Rev 5.

<sup>36</sup> Art 18(1) African Charter.

<sup>37</sup> Art 18(2) African Charter; Ncube (n 23 above) 13.

<sup>38</sup> African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 (entered into force 29 November 1999) OAU Doc CAB/LEG/24 9/49 (1990).

<sup>39</sup> Preamble African Children's Charter, para 6.



The above analysis demonstrates the consensus that the family is central in the socialisation of children from childhood to adulthood.<sup>40</sup> It is equally recognised that such socialisation shall take place with due regard to each society's cultural context. Thus, according to Mutua, the implementation of CRC within the African context must bear what he terms 'the African cultural fingerprint'.<sup>41</sup>

In view of the foregoing, it is submitted that, under international law, children's rights, family and culture are related in a dynamic and symbiotic relationship intended to achieve the rounded growth and development of the child. However, this happy relationship is endangered when practices which are considered 'cultural' conflict with the standards set by international human rights norms. Significantly, practices inconsistent with CRC, such as son-preference, are often invoked under the pretext of proper cultural upbringing. The question, then, is: What values are to take precedence: cultural values or children's rights?

CRC addresses this conflict in part by providing in article 24(3) that state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.<sup>42</sup> In addition, it has been suggested that a holistic reading of the provisions of CRC indicates that the substantive rights guaranteed under it supersede cultural considerations or practices which negate the essence of the rights.<sup>43</sup> Consequently, under CRC, it is the rights of children that are primary over culture and not *vice versa*.

The African Children's Charter is even more unequivocal with regard to the relationship between culture and children's rights. The African Children's Charter explicitly asserts its supremacy over any custom, tradition, cultural or religious practice inconsistent with the rights and obligations guaranteed under it.<sup>44</sup> This supremacy is elaborated further under article 21(1), which stipulates that:

<sup>40</sup> Ncube (n 23 above) 14.

<sup>41</sup> Mutua (n 19 above) 351.

<sup>42</sup> There are many traditional practices which are harmful to the child, but no one is in doubt that this provision targets female circumcision. During the drafting of CRC, delegates of Canada, the United Kingdom and United States of America were in favour of formulations referring specifically to female circumcision. For a record of the debates, see S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 415-419. See also D Johnson 'Cultural and regional pluralism in the drafting of the United Nations Convention on the Rights of the Child' in M Freeman & P Veerman (eds) *The ideologies of children's rights* (1992) 95 109-110; M Freeman 'The morality of cultural pluralism' (1995) 3 *International Journal of Children's Rights* 1 6.

<sup>43</sup> Ncube (n 23 above) 15.

<sup>44</sup> Art 1(3) African Children's Charter. See also DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157 158; Viljoen (n 4 above) 219.

States parties shall take all appropriate measures to abolish customs and practices harmful to the welfare, normal growth and development of the child and in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

Thus, the approach in international law is to favour those cultural practices which advance the promotion and protection of children's rights and override those cultural practices which are considered deleterious to the protection of children's rights. It is intended that such an approach upholds children's rights, whilst at the same time maintaining the cultural integrity of the societies involved in such practices.<sup>45</sup>

However, such an approach is simplistic and its effectiveness is hampered by some pervasive cultural practices and attitudes which command even more legitimacy than the universal standards for the protection of children. The challenge, therefore, is to find a way to secure a re-evaluation of these competing interests to ensure that legitimacy is bestowed on the values in CRC, as opposed to the harmful practices.

This process calls for a two-stage process: first determining whether the cultural practice in question is consistent with CRC; and, secondly, where the practice is found wanting, finding a suitable method of challenging the practice.

In the following review, I examine the role of general principles regarding children's rights in determining the compatibility of cultural practices with CRC.

#### **4 Determining the compatibility of cultural practices with children's rights: The role of general principles**

Although the rights and duties in CRC cover almost every aspect of the child's life, there are four principles that are so fundamental that they may be considered as underpinning the whole Convention. These include non-discrimination, participation, survival and development and the best interests of the child.<sup>46</sup> Since these are the anchoring principles, it is submitted that the compatibility of cultural practices

<sup>45</sup> See AA An-Na'im 'Cultural transformation and normative consensus on the best interests of the child' (1994) 8 *International Journal of Law and Family* 62 64; lbhawoh (n 3 above) 839 842-843.

<sup>46</sup> The Vienna Programme of Action links and gives equal weight to the principles of non-discrimination, best interests, survival and development and the views of the child in respect of CRC. See Office of the High Commissioner for Human Rights, Fact Sheet No 10 (Rev 1) 'The rights of the child', <http://www.unhchr.ch/html/menu6/2/fs10.htm> (accessed 12 August 2005).

with the promotion and protection of children's rights may be gauged with reference to one or more of these principles.

#### 4.1 Non-discrimination

Article 2 of CRC guarantees every child the enjoyment of the rights set forth in the Convention without discrimination.<sup>47</sup> This provision obligates state parties to ensure to all children within their jurisdictions the rights guaranteed in the Convention.<sup>48</sup> This not only implies that states must prevent discrimination, but also that they must ensure the positive enjoyment of the rights which enable all children to be recognised as equally valuable members of the society. In other words, every child within the state's jurisdiction holds all the rights guaranteed under CRC, without regard to her sex or other status.<sup>49</sup> It is, therefore, submitted that any cultural practice or notion which restricts the exercise or enjoyment of any of the rights set out in the Convention on the basis of the sex or gender of the child is not in conformity with international standards relating to the rights of the child.

Examples of practices that discriminate between girl children and boy children on the basis of their sex include son-preference and female circumcision. With regard to son-preference, Rwezaura notes that the practice is usually a symptom of a deeper form of discrimination that has come to be viewed as part of the community's culture and way of life.<sup>50</sup> Such discrimination manifests itself in the unequal allocation of family resources between the girl child and her brothers. This gender bias often results in the girl child's fettered access to other rights, such as play,<sup>51</sup> health services,<sup>52</sup> educational opportunities<sup>53</sup> and ultimately her career choices.<sup>54</sup> In short, the socialisation of girls to accept an inferior position without question impacts negatively on their potential for development and has life-long repercussions.

Female circumcision, on which a plethora of literature exists,<sup>55</sup> is another cultural practice which is structured along gender lines. Female

<sup>47</sup> See generally Detrick (n 42 above) 67-84.

<sup>48</sup> G van Bueren *The international law on the rights of the child* (1995) 40.

<sup>49</sup> J Kabeberi-Macharia 'Reconstructing the image of the girl child' in Ncube (n 2 above) 47; B Rwezaura 'Domestic application of international human rights norms protecting the rights of the girl child in Eastern and Southern Africa' in Ncube (n 2 above) 28.

<sup>50</sup> Rwezaura (n 49 above) 32.

<sup>51</sup> Art 31 CRC.

<sup>52</sup> Art 24 CRC.

<sup>53</sup> Arts 28 & 29 CRC.

<sup>54</sup> CK Rwezaura 'A path analysis of factors affecting girls' choices and careers in Tanzania' MEd thesis, Brandon University, Canada, 1991 quoted in Rwezaura (n 49 above) 33.

<sup>55</sup> For a sample of the literature, see M Dembour 'Following the movement of a pendulum: Between universalism and relativism' in JK Cowan, M Dembour & RA Wilson (eds) *Culture and rights: Anthropological perspectives* (2001) 56-79;

circumcision is described as 'female genital mutilation' in most human rights literature. However, some scholars are opposed to this description. They argue that the term 'female genital mutilation' implies a value judgment and biases the discussion in favour of those opposed to the practice of traditional forms of 'genital surgery'. They suggest that 'female circumcision' or 'clitoridectomy' is more appropriate because the intention of the practitioners is not to mutilate, but to circumcise.<sup>56</sup> Whilst noting that it makes no difference to the girl child whether she has a clitoridectomy or genital surgery, I will use the term female circumcision in deference to these arguments. The practice is intended to preserve the moral purity of women, ensure the fidelity of wives, enhance feminine hygiene and make the genital area more aesthetically pleasing.<sup>57</sup> Thus, the ritual is carried out on girl children on the basis of their gender.<sup>58</sup> Apart from its discriminatory effects, female circumcision impacts negatively on other rights of the child. These include the right to health,<sup>59</sup> the right to be protected from physical or mental violence or injury<sup>60</sup> and the right to privacy.<sup>61</sup>

Thus, it is clear that, although the above practices are premised on gender discrimination, their impact results in more general violations of the rights of the child. It is, therefore, critical for the success of the children's rights project that cultural practices which discriminate between children must be addressed effectively and eradicated.

## 4.2 Participation

CRC recognises children as autonomous beings and guarantees them participation rights.<sup>62</sup> Thus, the Convention requires that in all matters affecting children, their views must be given due weight in accordance

---

H Lightfoot-Klein *Prisoners of ritual: An odyssey into female genital mutilation in Africa* (1989); H Lewis 'Between Irua and "female genital mutilation": Feminist human rights, discourse and the cultural divide' (1995) 8 *Harvard Human Rights Law Journal* 1; AT Slack 'Female circumcision: A critical appraisal' (1988) 10 *Human Rights Quarterly* 437; A Finder 'De minimis non curat lex: The clitoris, culture and the law (1993) *Journal of Transnational Law and Contemporary Problems* 417.

<sup>56</sup> See I Gunning 'Arrogant perception, world travelling and multicultural feminism: The case of female genital surgeries (1992) 23 *Columbia Human Right Law Review* 189 193; LM Thomas 'Ngaitana (I will circumcise myself): The gender and intergenerational politics of the 1950 ban on clitoridectomy in Meru, Kenya' (1996) 8 *Gender and History* 338-363; Mutua (n 19 above).

<sup>57</sup> See S Simms 'What's culture got to do with it? Excising the harmful tradition of female circumcision' (1993) 106 *Harvard Law Review* 1944 1949.

<sup>58</sup> See J Kabebere-Macharia 'Female genital mutilation and the rights of the girl-child in Kenya' in Ncube (n 2 above) 249 256.

<sup>59</sup> Art 24 CRC.

<sup>60</sup> Art 19(1) CRC.

<sup>61</sup> Art 16(1) CRC.

<sup>62</sup> Chirwa (n 44 above) 160.

with their age and maturity.<sup>63</sup> CRC concretises this requirement by providing children with the right to freely express their opinions.<sup>64</sup> Consequently, it is submitted that cultural practices or notions which prevent the child from expressing his or her views or which do not give due weight to the views of the child must be considered as inconsistent with the rights of the child.

In this respect, it is worth noting that, in many African traditional societies, the autonomy of the child is often heavily constrained.<sup>65</sup> Notions of the child and childhood are generally premised on the idea that it is only adults that know what is best for children.<sup>66</sup> From an early age, children are taught to defer and revere the elderly.<sup>67</sup> Thus, the relationship between children and adults is characterised by enormous 'filial respect and, in turn, is reinforced by the ethic of dominance'.<sup>68</sup>

The denial of participation rights to children results in a paternalistic and problematic construction of child-adult relationships. Such a situation is not conducive to the realisation of the rights enshrined in CRC and only serves to facilitate the continuation of other practices which are harmful to the child.<sup>69</sup> It is submitted, therefore, that practices and notions which have the effect of directly or indirectly impinging on the child's participation rights must be challenged. To this end, the success of the children's rights agenda in Africa depends to a large extent on a reconsideration of the position of children *vis-à-vis* their parents and the development of a culture of listening on the latter's part.

### 4.3 Survival and development

Article 6 of CRC guarantees the child the inherent right to life and

<sup>63</sup> Art 12 CRC.

<sup>64</sup> Art 13 CRC. See also Chirwa (n 44 above) 160.

<sup>65</sup> However, see J Harwin in B Franklin (ed) *The handbook of children's rights: Comparative policy and practice* (1995) 227 230, noting that this aspect is not peculiar to African society. She states that 'in virtually all societies, children's rights to determine their upbringing are extremely limited, particularly in the case of young children'.

<sup>66</sup> See Chirwa (n 44 above) 160, noting that '[c]hildren are normally considered to be deficient in their decision-making capabilities and deserving of protection' and that consequently '[d]ecisions concerning children are often made by a group of male elders'. See also B Rwezaura 'The duty to hear the child: A view from Tanzania' in Ncube (n 2 above) 57; C Himonga 'The right of the child to participate in decision making: A perspective from Zambia' in Ncube (n 2 above) 95.

<sup>67</sup> B Rwezaura 'Changing community obligations to the elderly in contemporary Africa' in JM Eekelaar & D Pearls (eds) *An aging world: Dilemma and challenges for law and social policy* (1989) 113 116.

<sup>68</sup> Rwezaura (n 66 above) 59.

<sup>69</sup> With respect to female circumcision, Kabeberi-Macharia notes emphatically that '[t]he issue of the girl child having a right to decide whether or not she wants to undergo the operation, or expressing her views does not arise'. See Kabeberi-Macharia (n 58 above) 260.

obligates states to ensure to the maximum extent possible the survival and development of the child. The duty on the state to ensure to the maximum extent possible the survival and development of the child emphasises the need to guarantee correlated rights that ensure the enjoyment of the right to life.<sup>70</sup> Amongst these associated rights are the right to enjoy the highest attainable standard of health,<sup>71</sup> and the right to food, water and an adequate standard of living. Since survival is a precondition to the enjoyment of any rights accorded to children, it is submitted that any cultural practices which impact negatively on aspects of the child's survival rights are contrary to CRC.

Thus, practices such as female circumcision, which impact negatively on the child's health rights and hence her survival rights, should be addressed.

#### 4.4 Best interests of the child

Article 3 of CRC emphasises that, in all actions affecting the child, the best interests of that particular child must be a primary consideration. The best interests principle demands that any decision taken in respect of children must be directed at the enhancement of their growth and development. It does not entail the adoption of a paternalistic or know-all attitude on the part of parents or guardians,<sup>72</sup> but rather a careful balancing of the values and interests 'competing for the core of best interests'.<sup>73</sup> These interests include, but are not limited to, the opinions of the child, the needs of the child and the risk of harm.<sup>74</sup> Consequently, cultural practices which threaten or harm the growth and development of the child cannot be said to be in conformity with the best interests principle.

In this regard, it is submitted that cultural practices which perpetuate or are premised on discrimination, or which severely circumscribe the child's participation, cannot be properly permitted to compete for the core of the child's best interests. Similarly, practices which stand in the way of a child's development and growth cannot be described as being in the best interests of the child and these, too, must be eradicated.

The preceding analysis demonstrates that general principles of CRC are crucial in determining the contribution, whether negative or positive, that African cultural values make in the protection and promotion of children's rights. In this regard, it is imperative that these principles

<sup>70</sup> Van Bueren (n 48 above) 303.

<sup>71</sup> Art 24(1) CRC.

<sup>72</sup> Van Bueren (n 48 above) 47, noting that the best interests principle challenges the concept that 'parents are always capable of deciding what is in the best interests of their children'.

<sup>73</sup> Van Bueren (n 48 above) 47.

<sup>74</sup> See generally Detrick (n 42 above) 85-99.

must be worked into the African cultural norms of children's rights so that the determination of compatibility comes from within African cultures themselves, as opposed to externally.

However, it is worth noting that most of the cultural practices which are contrary to the above principles are accepted and legitimate within the various communities in which they are practised. Fortunately for African children, though, these practices are not immutable. It is possible to defrock them of their legitimacy, as such practices are incompatible with the general cultural legitimacy accorded to children's rights. To this end, culturally appropriate interventions for the legitimisation of children's rights and the de-legitimisation of the practices must be resorted to.

## 5 Challenging harmful cultural practices: Process and prospects

Like all societies, traditional African societies are not culturally static, but are 'eclectic, dynamic and subject to significant alteration over time'.<sup>75</sup> They are susceptible to, and respond to, influences by social, economic and political forces. Thus, traditional cultural beliefs are neither monolithic nor unchanging. In fact, one of the apparent paradoxes of culture is the way it combines stability with dynamic continuous change.<sup>76</sup> As Herskovitz correctly observes:<sup>77</sup>

Culture is flexible and holds many possibilities of choice within its framework . . . [T]o recognise the values held by a given people [at any given time] in no way implies that these values are a constant factor in the lives of succeeding generations of the same group.

Thus, culture and cultural practices are not immutable, but are rather inherently responsive to new ideas and ways of doing things suggested by external influences and demanded by internal needs.<sup>78</sup>

The relevance of these observations to the present discussion is that traditional cultural practices which are inimical to the protection of children's rights are not cast in stone. On the contrary, these practices are open to challenge, reformulation and substitution.<sup>79</sup> Consequently, the legitimacy enjoyed by practices such as female circumcision, son-preference or such like is open to challenge and substitution by the universal human rights norms which inform children's rights.

However, it must always be appreciated that the degree of flexibility permitted by a culture and the range of choices which it offers its

<sup>75</sup> Ibhawoh (n 3 above) 841.

<sup>76</sup> An-Na'im (n 17 above) 27. See also GJ Herskovitz *Cultural dynamics* (1964) 4 6.

<sup>77</sup> Herskovitz (n 76 above) 49-50.

<sup>78</sup> Ibhawoh (n 3 above) 841.

<sup>79</sup> An-Na'im (n 45 above) 64.

members are themselves determined and controlled by what An'Naim calls the 'internal criteria of legitimacy'.<sup>80</sup> In other words, the procedures and the substantive arguments adopted to challenge the validity of cultural notions must themselves enjoy acceptance by members of the culture. Thus, in attempting to alter or replace the various cultural practices like the ones we have referred to in this discussion, it is critical that the methods of contestation or challenge do not negate the integrity of the various cultures within which such practices are condoned.

In this respect, it is worth noting that a large part of the debate concerning harmful cultural practices has been conducted in an elitist, top-down manner.<sup>81</sup> This has involved the evaluation of practices without regard to the social context or cultural justifications.<sup>82</sup> Alternatively, where social context and cultural justifications have been taken into consideration, these have been dismissed quickly and easily as misconceptions.<sup>83</sup>

This approach has resulted in the rejection of the processes themselves, thereby forestalling the opportunity for substantive discourse. Thus, for example, the practice of female circumcision has remained prevalent in many African societies, notwithstanding extensive national and international legislation against the practice.<sup>84</sup> This trajectory has not been observed in respect of female circumcision alone, but also in the case of forced marriages, child marriages and gender discrimination.<sup>85</sup> Consequently, the design and implementation of culturally legitimate procedures for eradicating these practices are critical to the success of the children's rights project in Africa.

<sup>80</sup> An-Na'im (n 17 above) 27. See also Ibhawoh (n 3 above) 841.

<sup>81</sup> In literature, this type of discourse has been variously termed 'arrogant perception', 'moral arrogance' 'cultural imperialism' or 'cultural chauvinism'. However, all these colourful expressions refer to what is commonly known as ethnocentrism. Gunning (n 58 above) 189; Mutua (n 19 above) 357.

<sup>82</sup> Freeman (n 42 above) 2-4, reporting on the consternation of some English gentlemen at the idea of child marriage.

<sup>83</sup> Eg, in *In Re Oluloro*, Kendall Warren J suspended the deportation of Lydia Oluloro from the USA on the ground that if returned to her country of citizenship, Nigeria, she would be subjected to female circumcision. In his judgment, Warren was of the opinion that the practice is 'archaic, cruel and dangerous'. It is inconceivable that the mothers who let their daughters undergo female circumcision perceive the practice in the same terms as Kendall. (*In Re Oluloro* is cited in PD Rudloff 'In Re Oluloro: Risk of female genital mutilation as "extreme hardship" in immigration proceedings' (1995) 26 *St Mary's Law Journal* 877).

<sup>84</sup> See V Oosterveld 'Refugee status for female circumcision fugitives: Building a Canadian precedent' (1993) 51 *University of Toronto Faculty of Law Review* 277 299-300, reporting that laws in Egypt, Guinea, Tanzania, Sudan and the Central African Republic prohibiting female circumcision have had little or any effect. See also K Boulware-Miller 'Female circumcision: Challenges to the practice as a human rights violation' (1995) 8 *Harvard Women's Law Journal* 155; Ibhawoh (n 3 above) 894.

<sup>85</sup> Ibhawoh (n 3 above) 848-849, noting the continuation of harmful cultural practices despite their prohibition in African constitutions.



Apart from procedural legitimacy, it is also important that there is substantive legitimacy. Thus, proposed alternatives must be perceived by the societies concerned as relevant to their needs and expectations.<sup>86</sup> In other words, the proponents of change must not only demonstrate that they have a valid claim for change within that particular culture, but they must also adopt arguments and means of presentation which are accepted as internally valid or legitimate.<sup>87</sup>

In this respect, it must be observed that a significant part of the debate surrounding practices harmful to the child has not been structured in African cultural terms, but has rather relied on language and symbols alien to the societies where the condemned practices are sanctioned.<sup>88</sup> The illegitimacy of this approach is evidenced by the resilience of the condemned practices despite the full-fledged attacks against them. Consequently, it is essential that the discourse against harmful cultural practices is structured in a way that does not nurture resistance to cultural change, but is rather designed in a manner that promotes the substitution of harmful practices with notions of children's rights.

A good illustration of the effectiveness of culturally appropriate procedures and arguments is provided by the manner in which some communities in the south of Malawi have attempted to deal with the practice of *fisi* (hyena) during girls' initiation ceremonies. The practice entails that, at the end of formal instruction during the initiation period, the *fisi* goes into the compound where the initiates are ensconced to 'examine' whether they are able to practise the concepts and theories which they have been taught regarding sex and sexuality. Since *afisi awiri sapasula khola limodzi* (two hyenas cannot attack the same kraal), one *fisi* would necessarily administer the examination to all the initiates. Given the prevalence of HIV/AIDS in Malawi,<sup>89</sup> the harmful nature of the practice cannot be gainsaid. Although it is very difficult to get concrete and accurate data regarding the effects of the practice due to the secretive nature of the initiation process, its consequences on the socio-economic fabric of the community are no less dire. Long and cumulative illnesses, such as those associated with HIV infection, not only ravage the patient, but also deplete already meagre resources as poor families attempt to provide care for their sick. Household economic productivity falls because sick children can no longer fulfil their roles and other family members' time is spent in looking after the sick

<sup>86</sup> An-Na'im (n 45 above) 67.

<sup>87</sup> An-Na'im (n 45 above) 68.

<sup>88</sup> I hesitate to call this mode of discourse 'western' or 'eurocentric', although it has frequently been so termed in literature.

<sup>89</sup> At the end of 2001, it was estimated that 15% of Malawians aged between 15 and 49 were HIV positive. See UNAIDS/WHO *Epidemiological fact sheet on HIV/AIDS: Malawi: Update 2002*, [http://www.who.int/emc-hiv/fact-sheets/pdfs/Malawi\\_EW.pdf](http://www.who.int/emc-hiv/fact-sheets/pdfs/Malawi_EW.pdf) (accessed 22 September 2005).

child. These factors only serve to exacerbate the already inadequate support during illness. The impact on the girls themselves is grave. They can no longer continue their education due to ill-health. They have to face discrimination because of the taboos associated with HIV-related illness. For most, the resulting AIDS infection is a slow, agonising and often lonely death.

Consequently, the village elders were approached and advised that the practice must be done away with, as it endangered the lives of many. The elders, however, remained adamant, arguing that the initiation of girls was crucial as nobody wants an 'untrained' wife. They argued further that the marriages of women who had not been 'properly trained' frequently ended in divorce and that nobody 'wanted a wife they were sure to divorce a few years down the line'. These arguments were met with the response that a divorced wife was better than a dead wife or, worse still, no wife at all (because all the girls had died from HIV/AIDS). To emphasise this point, it was contended that the whole initiation process was directed at ensuring a happy family life and this ideal would be shattered if the wife fell sick or died during the marriage.

Conceding the logic of these arguments, the elders relented and advised the women who manage the initiation ceremonies that examinations by *fisi* were no longer necessary. Although there are reports that the practice continues in some communities, a lot of *afisi* have lost their jobs. It is unlikely that these results would have been achieved if the elders were told that the practice was 'archaic, cruel and dangerous'<sup>90</sup> or that it was contrary to the provisions of CRC to expose children to this kind of harm.

The preceding analysis may lead some to question whether international norms respecting the rights of the child have any place in the eradication of harmful practices when so much depends on the internal dynamics of those cultures which observe practices inimical to the growth and development of the child. The obvious answer is that international norms, appropriately presented, constitute a substantive challenge to the legitimacy of the practices which are harmful to children. They are the alternatives to be utilised in the process of cultural change towards a greater respect for children's rights. Without the articulation of these international norms, there would be no alternatives to female circumcision, son-preference or like practices.

These norms already enjoy support within African societies by virtue of the way the protection of children is viewed. The incorporation of these new ideals is, therefore, a struggle for greater protection than is currently available. Admittedly, the process is not easy, given the

---

<sup>90</sup> See n 81 above.

deep-rooted nature of most of these practices.<sup>91</sup> However, the adoption of correct procedures and the formulation of legitimate arguments should demonstrate the need to expand current ideas about children and childhood within African societies and should prove instrumental in bringing about cultural change which advances the struggle for children's rights.

## 6 Conclusion

The acceptance by African states of international standards on the promotion and protection of children's rights is the first step towards the eradication of practices and beliefs harmful to children. However, there is a need to concretise the aspirations embodied in these standards through the implementation of programmes, projects and other interventions which result in positive norm change. In this regard, governments, practitioners, academics and community members should take heart in the fact that traditional African values generally support children's rights. However, it must also be appreciated that there are some practices which militate against the implementation of children's rights within the African cultural context. These practices cannot be eradicated by a simple process of legislation of alternative norms. There is a need for an appropriately structured internal discourse directed at the re-evaluation, reformulation and replacement of values. This process, it is submitted, must be done in a manner which is neither culturally offensive nor results in the loss of African cultural integrity.

There are several practical steps which may be taken to ensure that international standards promote the eradication of harmful cultural practices, such as female genital mutilation, inappropriate initiation rites and others. Firstly, cultural values and the reasons for the existence of a practice must be clearly and adequately understood before embarking on a programme of eradication.

Secondly, governments and civil society need to design 'original' interventions against the practices. By this it is meant that the solutions towards achieving eradication must be sourced and drawn up in consultation with practising communities, as opposed to being merely copied from outside standards. In this regard, governments and children's rights practitioners must be aware that the mere cloning of external legislation or standards formulated in other contexts has a greater chance of failing than those that are grounded and localised.

---

<sup>91</sup> Eg, female circumcision is described as a '2000 year-old practice' in some literature. See B Breitung 'Interpretation and eradication: National and international responses to female circumcision' (1996) 10 *Emory International Law Review* 657 658.

Thirdly, governments and children's rights practitioners must be alive to the fact that individuals or families who choose to abandon an entrenched practice in favour of the alternative view in support of children's rights may face considerable hostility from other members of their own community. Consequently, adequate social support for these individuals and their families must as a matter of course be built into any intervention model or programme.

Finally, it must be appreciated that eradicating deep-rooted cultural practices and customs cannot be achieved through the adoption of one method or policy stance. There is need for multi-sectoral approaches and collaboration. Such a stance avoids duplication and strengthens intervention efforts. This, therefore, calls for constant dialogue and collaboration between government, community members, local leaders, non-governmental agents and, of course, children in changing attitudes and beliefs for better protection of children's rights.

# Corporate social responsibility and human rights law in Africa

*Daniel Aguirre\**

Lecturer in International Relations and Human Rights Law, European Inter-University Centre for Human Rights and Democratisation, Venice

## Summary

*This article investigates corporate social responsibility and its importance for human rights law. It outlines the international trend of multinational corporations to conform to human rights and other international law standards set by the international community. Corporations, especially multinationals, are increasingly responsible for human rights on the African continent. The author stresses that, while multinational corporations must accept responsibility for their increased power and privilege in international law, the prime responsibility remains that of the state to protect and fulfil human rights.*

## 1 Introduction

Many within the international community are confused by the concept 'corporate social responsibility', believing it to be referring to merely good business ethics. It is apparent that different countries and organisations in Africa are at varying stages of understanding and engaging with the concept and practice of corporate social responsibility. However, the concept is increasingly important, particularly in the area of human rights law. Corporate social responsibility (CSR) refers to the trend by multinational corporations (MNCs) to conform to the wishes of the international community. This paper outlines the developments in the attempt since the 1970s to regulate these powerful organs of

---

\* BA (Hons) (Waterloo, Canada), LLM (Irish Centre for Human Rights); PhD Fellow (Irish Centre for Human Rights) Daniel.AGUIRRE@NUIGALWAY.IE

society. In doing so, it examines the foundations for an evolving legal framework, which has gained momentum due to the international community's outrage at blatant violations by MNCs of human rights, particularly in the African context. It presents CSR as a vital first step in this evolution, representing a compromise which reveals that MNCs recognise their position of influence. With this influence must come responsibility for human rights and development.

CSR is concerned with how a company runs its core business, interacts with its business partners and how it invests in its host communities.<sup>1</sup> However, great confusion surrounds the exact definition, with many insisting CSR is voluntary and concerned only with the corporation's direct sphere of influence. Meanwhile, others insist on legal accountability and CSR extending to a wider sphere of influence. The problem with vague definitions is that they allow those who have vested interests to adapt the trendy CSR acronym to whatever activity they prefer. Likewise, corporations can be held responsible in the media for failing to enact CSR when the activities in question are clearly outside of their area of responsibility. Rather than searching for a universally applicable definition, it is more productive to think in terms of the purposes of corporate responsibility. These are: to act as a prerequisite for investment in developing countries; to help overcome market inefficiencies and gaps in governance; and to provide a means for public and private sectors to co-operate in order to overcome social challenges. Moreover, CSR may become essential for the retention of a corporation's licence to operate in the future.

This voluntary regime of self-regulation has increased the awareness within the international community of the problems it addresses and

---

<sup>1</sup> A good definition for CSR is as follows: (a) The basic 'non-negotiables' — obey the law and stay in business: taking the actions necessary to remain a viable business entity and to protect legal licence to operate in order to avoid major fines, litigation, reputation damage and, in serious cases, even imprisonment of executives; in short, being profitable and legally compliant; (b) the complex non-negotiables — manage risk and minimise harm; protecting existing corporate value and reputation, managing risks and protecting societal license to operate; clear standards on corporate governance, implementation of internationally accepted standards on human and environmental safety in company processes and products and identification of new risks that may have a material effect on corporate value, such as climate change, HIV/AIDS and security risks; (c) the 'negotiables' — create positive solutions beyond what is required by law, risk management and protection of short-term value, 'going beyond business as usual', creating new societal value as well as corporate value and taking a leadership position on crucial development issues; it involves delivering creative and innovative solutions to practical problems and projects or to public policy issues; in short, taking actions that are not required by law or to stay in business, but which have beneficial impacts for host countries and communities, as well as the company. See *Human rights and the private sector: An International Symposium Report* (Novartis Foundation for Sustainable Development and The Prince of Wales International Business Leaders Forum) [http://www.stiftung-novartis.com/pdf/symposium\\_human\\_rights\\_report.pdf](http://www.stiftung-novartis.com/pdf/symposium_human_rights_report.pdf) (accessed 31 August 2005).

has allowed a greater consensus on regulation to be forged. Shareholders and chief executive officers should be commended for their efforts to change business attitudes. CSR should provide a complement to the developing framework of enforceable international law. This paper concludes, however, that human rights promotion, protection and realisation remain the responsibilities of states under international law and should not be allowed to be completely shifted to the private sector. A combination of voluntary initiatives, directly binding regulation on MNCs and the adherence by states to their duties under international law, are the only ways to ensure the realisation of a human rights-based development in Africa. The international community is rapidly moving towards the allocation of legal duties to MNCs. On 13 August 2003, the United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>2</sup> These norms embody a crystallisation of international law concerning corporations. In this case, it is very important to maintain the distinction between human rights law put forward by the Universal Declaration of Human Rights (Universal Declaration), and the market-friendly approach to human rights<sup>3</sup> that is apparent in CSR discourse.

## 2 The African context of corporate social responsibility

International business in Africa has a poor record for social responsibility. There is certainly no shortage of examples of corporate complicity in political corruption, environmental destruction, labour exploitation and social disruption in the last century. However, international business is necessary to bring capital investment, job creation, skills transfer, infrastructure development, knowledge sharing and social responsibility programmes to Africa. The private sector is crucial and well-positioned towards making a positive contribution towards improving social conditions in Africa.

Corporate social responsibility in Africa involves a full spectrum of issues concerning business responsibility and its interaction with human rights law. Many questions prevail. When does involvement in governance become an intrusion on the political process? How are local

---

<sup>2</sup> Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>3</sup> U Baxi *The future of human rights* (2002) 153.

cultural traditions to be prioritised in reference to global standards and policies? How far do companies' responsibilities extend in dealing with HIV/AIDS? How can business avoid creating a culture of dependency? Are Western ideas of ethics appropriate in African societies that have their own, often different, sets of values? Issues concerning CSR, such as poverty, governance, corruption, labour and human rights standards and business ethics are prevalent in human rights and business discourse. However, they appear to be facts of everyday life in many African countries and a part of the daily business routine.

Academia has an important contribution to make in examining the complexities of corporate responsibility in Africa. Its discourse must include both the positive and negative consequences of corporate involvement in developing nations. The pursuit of social, economic and cultural development must be highlighted at all times. However, academic institutions and researchers focusing specifically on corporate responsibility in Africa remain few.

MNCs attract concern in Africa, as they are active in the most dynamic sectors of the economy. They control employment, capital and technology. This gives them tremendous influence on development. However, this influence can be utilised in a positive or negative manner. Many MNCs have been accused of disregarding the development of human rights in Africa. They have been implicated in abuses such as child labour, discrimination, unsafe working conditions, repression of trade unions and collective bargaining, of limiting technology transfer, and environmental destruction.<sup>4</sup> This affects marginalised and impoverished groups disproportionately and exacerbates prominent human rights concerns in the African context.<sup>5</sup>

<sup>4</sup> D Weissbrodt & M Kruger 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 97 *American Journal of International Law* 901.

<sup>5</sup> Some examples from the large amount of literature concerning human rights in Africa include SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2003) 5 *Yale Human Rights and Development Law Journal* 177; A Aidoo 'Africa: Democracy without human rights?' (1993) 15 *Human Rights Quarterly* 703; A Armstrong *et al* 'Uncovering reality: Excavating women's rights in African family law' (1993) 7 *International Journal of Law and the Family* 314; NKA Busia Jr 'The status of human rights in pre-colonial Africa: Implications for contemporary practices' in E McCarthy-Arnolds *et al* (eds) *Africa, human rights, and the global system* (1994); R Carver 'How African governments investigate human rights violations' (1988) *Third World Legal Studies* 161; S Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79; W Langley 'The rights of women, the African Charter, and the economic development of Africa' (1987) 7 *British Columbia Third World Law Journal* 215-21; J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa' (1997) 26 *California Western International Law Journal*; J Oloka-Onyango & S Tamale "'The personal is political", or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691; J Oloka-



The rapid expansion of global markets and the dominance of MNCs are the key features of globalisation in Africa. This phenomenon resulted from the movement towards deregulation, privatisation and market liberalisation as centrally-run economies adapt to market-based policy. Before this, regulation was considered economically and socially beneficial.<sup>6</sup> Nowadays, African nations are to develop within a system that affords them little control over public economic policy making.

The consensus on beneficial regulation unravelled in the 1970s with the rise of a neo-liberal theory, proclaiming that such regulation impeded the smooth functioning efficiency of the free-market.<sup>7</sup> Proponents of this position insisted that the free market would provide equality, growth and improved living conditions more efficiently and effectively in Africa. The neglect of human rights would be temporary and be worthwhile as the long-term growth of the economy would raise living standards for all. The result was massive deregulation. Regulation was replaced with a system of voluntary ethical compliance and free markets.

The shift to voluntary regulation of global trade is a direct result of the rise of corporate power in the 1980s. Voluntary private codes are considered attractive to the powerful MNCs who dominate the agendas of the world trade and development organisations.<sup>8</sup> Corporations were the driving force behind vast increases in profits and economic growth. However, the global economy, unfettered, has increased national and international inequalities in Africa. This had a negative impact on sustainable development and human rights law development on the continent. Furthermore, the apartheid regime in South Africa attracted the world's attention to the practice of corporations profiting within that regime. It is in this context that the world witnessed a renewed outpouring of support for CSR. During the 1990s, every sector of the international community to some degree recognised the responsibility and impact of private operations on the enjoyment and realisation of

---

Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review*; B Rwezaura 'Concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82; M Shaw 'International law and intervention in Africa' (1984) 8 *International Relations* 341; SI Skogly 'Structural adjustment and development: An agenda for change' (1993) 15 *Human Rights Quarterly* 751.

<sup>6</sup> B Hepple 'Papers on the joint Japan-US-EU project on labour law in the 21st century: A race to the top? International investment guidelines and corporate codes of conduct' in (1999) 20 *Comparative Labour Law and Policy* 353.

<sup>7</sup> S Deakin & F Wilkinson *Labour standards — Essential to economic progress* (1996) 1.

<sup>8</sup> N Kearney 'Corporate codes of conduct: The privatised application of labour standards' in S Picciotto & R Mayne (eds) *Regulating international business beyond liberalisation* (1999) 239.

human rights.<sup>9</sup> A subject basically unheard of has vaulted to the top of the agenda within human rights law discourse and even in boardrooms of MNCs. Faced with this scenario, the international community had to find ways, other than binding regulation, to persuade business to become socially responsible. The CSR movement was born.

Human rights disasters in Africa garnered publicity for the problems associated with MNC activity and human rights.<sup>10</sup> However, only as a global civil society emerged in the 1990s did the international business community concede responsibility and accept that human rights are not the sole concern of governments. Human rights are rapidly entering the mainstream corporate agenda due to increasing demands of civil society, ethical investors and demands from the knowledgeable and sceptical public for accountability and transparency.<sup>11</sup> Unfortunately, the lack of institutional capacity among organs of civil society, especially indigenous African non-governmental organisations (NGOs), has created a barrier in the development of a concept and practice of CSR that is relevant to Africa. While the NGOs played a critical, even a leading, role in some cases in the struggle for independence from colonialism and apartheid, their post-independence role has been reduced. African civil society suffers from a complex set of social, political and economic circumstances that have greatly reduced access to material, technical and information resources. This problem must be addressed in order to develop CSR initiatives that are useful in the African context.

The renewed support for the interdependence of all human rights has brought the full range of human rights to the table when addressing global trade and CSR. The outcome has been a piecemeal attempt at accountability, with civil society calling for legal liability, while governments and MNCs cling tightly to the voluntary nature of CSR. Despite this anti-regulation position, MNCs have increasingly adopted these CSR initiatives, such as private voluntary codes of conduct designed to regulate their own behaviour. This movement towards accountability is generally a reaction to the tremendous pressure from civil society and anger over exploitation in Africa. Global communication has ensured public knowledge of human rights abuse and has resulted in demands

---

<sup>9</sup> See, generally, 'The realisation of economic, social and cultural rights: The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter' *Report of the Secretary-General, UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities* UN Doc E/CN4/Sub2/1996/12 (1996).

<sup>10</sup> For a plethora of examples, see: Human Rights Watch Publications: Africa [http://www.hrw.org/doc/?t=africa\\_pub](http://www.hrw.org/doc/?t=africa_pub) (accessed 31 August 2005).

<sup>11</sup> D Kinley 'Human rights as legally binding or merely relevant?' in S Bottomley & D Kinley (eds) *Commercial law and human rights* (2002) 69.

for responsibility.<sup>12</sup> Companies want to appear to be morally responsible in order to avoid negative publicity, and even worse, boycotts. The result has been the rapid growth of CSR initiatives.

### 3 Changing business attitudes

The development of CSR indicates that the international business community accepts their responsibility for more than just the bottom line of profit maximisation. Many leading companies now understand the strategic value of a robust CSR strategy that is translated into tangible action programmes and taken to the forefront of commercial transactions. Greater human rights responsibility leads to sustainability in emerging markets in Africa.<sup>13</sup> They are the engines of growth in the modern economy and have direct and indirect effects on the enjoyment of human rights. MNCs have accepted responsibility through participation in national and international CSR schemes, the adoption of private codes of conduct and through positive involvement with local communities. In doing so, MNCs have taken the first steps towards fulfilling their roles as influential organs of society in the absence of binding regulation.<sup>14</sup>

Many corporations now make reference to various social issues, including human rights and sustainable development in their policy or codes of conduct.<sup>15</sup> This is in sharp contrast to the traditional corporate ethos that was dominated by Friedman's premise that 'the one and only social responsibility of business is to increase profits'.<sup>16</sup> Giants such as General Electric have recognised that 'these times will not allow for companies to remain aloof and prosperous while the surrounding communities decline and decay'.<sup>17</sup> Instead of sticking to an insular

<sup>12</sup> K Piepel 'The ethics deficit in corporate trade: Social labelling and codes of conduct' in (1999) *Trocaire Development Review* 170.

<sup>13</sup> A large-scale study of evidence from developing countries found that emerging market companies gain financially from stability. IFC (International Finance Corporation) Sustainability, ethos institute, groundbreaking report challenges conventional wisdom on role of business in emerging markets, Press Release 02/0098 (17 July 2002) <http://www.sustainability.com/news/press-room/DevelopingValue-press-release.pdf> (accessed 31 August 2005).

<sup>14</sup> Kearney (n 8 above) 239.

<sup>15</sup> For examples relevant to Africa, see 'Shell: General business principles' <http://www.shell.com/static/media-en/downloads/sgbp.pdf> (accessed 31 August 2005); Coca Cola Africa 'Reinventing business in Africa' <http://www.africa.coca-cola.com/> (accessed 31 August 2005); British Petroleum 'Code of conduct' [http://www.bp.com/liveassets/bp\\_internet/globalbp/STAGING/global\\_assets/downloads/C/coc\\_en\\_full\\_document.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/C/coc_en_full_document.pdf) (accessed 31 August 2005).

<sup>16</sup> M Friedman 'The social responsibility of business is to increase its profits' *New York Times Magazine* 13 September 1970.

<sup>17</sup> J Welsh 'A CEO forum: What corporate social responsibility means to me; Wanted teachers and leaders' (1992) 81 *Business and Society Review* 88.

view, corporations have recognised the interdependence between them and the community. They realise the critical importance of obeying human rights law and achieving sustainable development.

Corporate reputation has become an important but increasingly fragile commodity in the era of global communication and increased consumer activism.<sup>18</sup> This bolsters a company's public image as well as their ability to attract and retain good employees.<sup>19</sup> Consumers are increasingly aware of the human rights records of corporations. Boycotts have become a more abundant tool of consumer activism.<sup>20</sup> Moreover, financial institutions, investment banks, credit-rating agencies, insurers and pension funds all recognise the potential for companies with poor human rights records to negatively affect the value of their investments.<sup>21</sup> Furthermore, in the absence of a good human rights environment, which is typical in Africa, the situation can deteriorate to one in which the company is forced to abandon its operations. This phenomenon has frequently occurred in Africa.<sup>22</sup> Pressure is building on business to respond before they are compelled to respond.<sup>23</sup>

Additionally, a good human rights environment promotes worker productivity, opens markets, promotes stability through the rule of law and promotes international trade. Major MNCs recognise the value of human rights discourse. Private CSR initiatives, such as the

<sup>18</sup> C Fombrun *Reputation: Realising the value from the corporate image* (1996) 10.

<sup>19</sup> See CL Avery 'Business and human rights in a time of change' (Amnesty International Report 2000), <http://www.business-humanrights.org/Avery-Report.htm> (accessed 31 August 2005); see also United Nations High Commissioner for Human Rights 'Business and human rights' <http://www.unhchr.ch/global.htm> (accessed 31 August 2005).

<sup>20</sup> See RJ Liubicic 'Corporate codes of conduct and product labelling schemes: The limits and possibilities of promoting international labour rights standards through private initiatives' (1998) 30 *Law and Policy in International Business* 111; NE Zelman 'The Nestle infant formula controversy: Restricting the marketing practice of multinational corporations in the third world' (1990) 3 *Transnational Law* 697.

<sup>21</sup> See D Doane 'Taking flight: The rapid growth of ethical consumerism' (2001) [http://www.neweconomics.org/gen/z\\_sys\\_publicationdetail.aspx?pid=88](http://www.neweconomics.org/gen/z_sys_publicationdetail.aspx?pid=88) (accessed 31 August 2005); FTSE Good Index Series raises the hurdle on human rights, FTSE News and Views, [http://www.ftse.com/about\\_ftse/newsandviews/humanrights.jsp](http://www.ftse.com/about_ftse/newsandviews/humanrights.jsp) (accessed 31 August 2005).

<sup>22</sup> For background, see, generally, Amnesty International 'Nigeria: A travesty of justice: Secret treason trials and other concerns' (26 October 1995) <http://www.amnestyusa.org/regions/africa/document.do?id=2F6789997B756A3B802569A50071588E> (accessed 31 August 2005); Press Release, Amnesty International, Nigeria 'Are human rights in the pipeline?' (9 November 2004) <http://web.amnesty.org/library/print/ENGAFR440312004> (accessed 31 August 2005); Bloomberg 'Unrest has big impact on Nigeria oil output' *International Herald Tribune* 11 June 2004 <http://www.ihl.com/articles/524461.html> (accessed 31 August 2005) (stating 'Shell group may have to quit onshore production in Nigeria . . . because of escalating civil strife').

<sup>23</sup> Kinley (n 11 above) 72.

Publish What You Pay campaign,<sup>24</sup> the Extractive Industry Transparency campaign<sup>25</sup> and the Global Reporting Initiative,<sup>26</sup> provide frameworks of best practice for such endeavours.

CSR is defined by the Conference Board of Canada,<sup>27</sup> an independent CSR monitor, as involving human resource issues such as diversity in hiring practices; environmental issues such as management of greenhouse gas emissions; community issues such as use of local suppliers in procurement; human rights issues such as consideration of human rights practices in investment and procurement; and governance issues such as whether the company audits its social and environmental practices and whether it has a formal code of ethics.<sup>28</sup> However, CSR may also involve responsibility within their 'sphere of influence' for human rights; abiding by the law in letter and spirit, not just the bare minimum. This could mean institutionalising the value of attaining and maintaining higher standards. Moreover, it could imply the recognition of an interactive existence with society, which implies contributing to the global community as well as extracting from it.<sup>29</sup>

The approach to human rights realisation promoted by CSR is one of a 'race to the top'. This concept advances the theory that the operations of MNCs that utilise the various CSR initiatives provide better human rights standards than domestic firms in African nations. Their advanced technological, managerial and operational techniques should result in a spill-over of best practice to these domestic firms. This vast international MNC production chain employs 73 million people. This chain provides links for new human rights regulation to occur through engagement within and between MNCs and African countries.<sup>30</sup> Furthermore, the discerning glare of an active Western civil society that accompanies large MNCs ensures that they cannot act with impunity in Africa. Companies will be forced to adopt models of best practice or risk costly damage to their reputation. Corporate social responsibility, says the US Council for International Business (USCIB), is 'good

<sup>24</sup> Publish What You Pay Campaign <http://www.publishwhatyoupay.org/> (accessed 31 August 2005).

<sup>25</sup> 'Extractive industry transparency' [http://www.transparency.org/pressreleases\\_archive/2003/2003.06.17.Statement\\_g8\\_revenues.html](http://www.transparency.org/pressreleases_archive/2003/2003.06.17.Statement_g8_revenues.html) (accessed 31 August 2005).

<sup>26</sup> Global Reporting Initiative <http://www.globalreporting.org/> (accessed 31 August 2005).

<sup>27</sup> Conference Board of Canada <http://www.conferenceboard.ca/> (accessed 31 August 2005).

<sup>28</sup> J McFarland 'Start spreading the good news, conference board tells business: Many companies not publishing the progress in corporate social responsibility practices' *Globe and Mail* 27 May 2004 B5.

<sup>29</sup> MK Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999) 20.

<sup>30</sup> Hepple (n 6 above) 350.

business' helping to maintain 'the competitiveness of companies over time and in highly diverse parts of the world'.<sup>31</sup>

## 4 The legal dynamic concerning regulation

### 4.1 The gap in international law

The traditional approach to human rights law regulates the conduct of states towards individuals within its jurisdiction. In this context, the state is the only duty-bearer. This doctrine was relevant at a time when international business and economic interdependence was less prominent. Although there has been an emphasis on individual responsibility for serious human rights abuses, insufficient attention has been allocated to MNCs. This is unacceptable, as MNCs are some of the most powerful non-state actors in Africa in the field of human rights development.<sup>32</sup> Since international business is mobile enough to avoid stringent national regulations or influential enough to persuade against the adoption of such regulation, the traditional doctrine no longer appropriately regulates the international community. The international community is pushing for legal responsibility in line with the ability to affect human rights.<sup>33</sup> MNCs are international entities which transcend national jurisdictions in terms of economic resources and decision-making responsibility. MNCs have ignored the international legal system.

The vast economic and geographic expansion of global trade led by MNCs poses further difficulties for regulation and accountability. Famously, MNCs have now become larger economies than most African states. One outstanding example is that of General Motors having larger revenues than all but seven nations.<sup>34</sup> International and national law must adapt effectively if there is to be any hope of regulating an increasingly dynamic globalised world. Inherently, the law is evolutionary and is formed in reaction to the needs of the international community. This is intrinsically problematic when dealing with the MNCs' extraordinary influence. National laws that concern corporations are often watered down in order to attract essential MNC investment.<sup>35</sup> It is difficult to garner consent for the regulation of MNCs. International

<sup>31</sup> United States Council for International Business, Position Paper on Codes of Conduct (1998) <http://www.uscib.org/index.asp?documentID=1358> (accessed 31 August 2005).

<sup>32</sup> Weissbrodt (n 4 above) 901.

<sup>33</sup> M Robinson Second Global Ethic Lecture, University of Tübingen, Germany (21 January 2002) <http://www.ireland.com/newspaper/special/2002/robinson> (accessed 31 August 2005).

<sup>34</sup> In 1998-1999, only the United States, Germany, Italy, the United Kingdom, Japan, France and the Netherlands had larger revenues than General Motors. See Global Policy Forum 'Comparison of revenues among states and TNCs' <http://www.globalpolicy.org/soecon/tncstat2.htm> (accessed 31 August 2005).

<sup>35</sup> C Stone *Where the law ends. The social control of corporate behaviour* (1975) 95.

law, although a key avenue for defining the role and responsibility of MNCs within society, has been overwhelmed by the free market doctrine, relegating it to a marginal role.<sup>36</sup> However, law is continuously evolving and over the last 30 years has begun to reflect and answer the concerns of society. This has implications for the CSR movement, which is rapidly becoming mandatory business practice. Moreover, it seems as though the human rights aspects of CSR are moving towards accountability. It is therefore within the best interest of MNCs operating in Africa to implement an operational policy that includes the norms of international law.

## 4.2 The development of regulation

The international community began to react at the domination and seeming unaccountability of MNCs in the 1970s as major scandals began to surface.<sup>37</sup> With the emergence of the New International Economic Order,<sup>38</sup> put forward by the leaders of newly independent developing nations in Africa, came political impetus for binding regulation. It was these developing nations that were shouldering the brunt of corporate human rights abuse and social irresponsibility. The United Nations (UN) created a Commission on Transnational Corporations (UNCTC),<sup>39</sup> responsible for binding regulations on MNCs, stating that 'transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate'.<sup>40</sup> Moreover, it prohibited discrimination while ensuring that MNCs did not interfere with domestic politics and respected fundamental human rights.<sup>41</sup> The UNCTC issued drafts in 1978,<sup>42</sup> 1983,<sup>43</sup> 1988<sup>44</sup> and 1990.<sup>45</sup> However,

<sup>36</sup> Addo (n 29 above) 9.

<sup>37</sup> A notable example is the ITT interference with the government in Chile. Kinley (n 11 above) 27.

<sup>38</sup> See Declaration on the Establishment of a New International Economic Order, GA Res 3201 (S-VI), UN GAOR, 6th Special Session Agenda Item 6, 2229th plen mtg 1, UN Doc A/RES/3201 (S-VI) (1974); see also Programmes of Action on the Establishment of a New International Economic Order, UN GAOR *Ad Hoc* Comm 6th Session 2229th Mtg, UN Doc A/RES/3202 (S-IV)(1974).

<sup>39</sup> Economic and Social Council Resolution 1913 (LVII) (5 December 1974).

<sup>40</sup> See Development and International Economic Co-operation: Transnational Corporations, UN Economic and Social Commission, 2nd Session, Agenda Item 7(d) 1, UN Doc E/1990/94 (1990).

<sup>41</sup> S Joseph 'Taming the Leviathans: Multinational enterprises and human rights' (1999) 46 *Netherlands International Law Review* 181.

<sup>42</sup> CTC Transnational corporations: Codes of conduct, formulations by the Chairman, UN Doc E/C 102/8 (1978).

<sup>43</sup> CTC Draft Code of Conduct on Transnational Corporations, UN Doc E/1983/17/rev 1 (1983).

<sup>44</sup> CTC Draft Code of Conduct on Transnational Corporations, UN Doc E/1988/39/add 1 (1988).

<sup>45</sup> CTC Draft Code of Conduct on Transnational Corporations, UN Doc E/1990/94 (1990).

despite years of debate, these never materialised before the voluntary era took hold.<sup>46</sup>

Simultaneously, the Organisation for Economic Co-operation and Development (OECD) issued a set of voluntary Guidelines for Multinational Corporations which were a follow-up to the International Chamber of Commerce's Guidelines for International Investment.<sup>47</sup> They are designed to strike a balance between national interests and foreign direct investors. The guidelines affirm that every country, subject to international law, has the right to determine the conditions under which MNCs operate within its jurisdiction. They spell out guidelines for a wide range of MNC activity, mostly commercial, but with some relating to human rights, such as collective rights, freedom of association and labour and environmental conditions.<sup>48</sup> The Guidelines represented supplementary standards of behaviour of a non-legal and non-binding nature.<sup>49</sup> However, the Guidelines are now almost three decades old and are considered standard practice for corporate operations.

The International Labour Organisation (ILO)'s Tripartite Declaration of Principles Concerning Multinational Enterprises<sup>50</sup> addresses the social conduct of governments, workers and employers organisations and MNCs. The Declaration calls on all parties to respect national law and regulation, to give consideration to local practices and to obey relevant international legislation.<sup>51</sup> These principles deal specifically with human rights issues, such as employment equality, treatment and security, the conditions of work, including wages, working conditions, safety and health, as well as industrial relations, such as freedom of association and the right to organise and to collective bargaining. The guidelines of conduct in these areas are informed mainly by the relevant ILO Conventions, which apply to states only. However, they can be applied to MNCs through the Declaration's Framework of

<sup>46</sup> B Stephens 'The amorality of profit: Transnational corporations and human rights' (2002) 20 *Berkeley Journal of International Law* 64.

<sup>47</sup> Organisation for Economic Co-operation and Development 'Guidelines for multinational enterprises 21 June 1976' (1976) 15 *International Legal Materials* 969. The OECD updated these guidelines in 2000. For the current version, see OECD 'Guidelines for multinational enterprises (31 October 2001) <http://www.oecd.org/> (accessed 31 August 2005) (OECD Guidelines).

<sup>48</sup> R Blanpain 'Review of the OECD Guidelines for Multinational Enterprises: Possible revisions of the chapter on employment and industrial relations' in R Blanpain (ed) *Multinational enterprises and the social challenges of the XX1st century* (2000) 37.

<sup>49</sup> Blanpain (n 48 above) 31.

<sup>50</sup> ILO 'Tripartite declaration concerning multinational enterprises and social policy <http://www.ilo.org/public/english/standards/norm/sources/TNC.htm> (accessed 31 August 2005).

<sup>51</sup> JM Diller 'Social conduct in transnational enterprise operations: The role of the ILO' in Blanpain (n 48 above) 20.



Voluntary Compliance.<sup>52</sup> This tripartite system has become a measurement of CSR accepted by all members.

The increased interest in the responsibility of corporations declined as the developed world witnessed unprecedented economic growth. Global trade was at the forefront, with the MNC as its locomotive. The only type of controls concerning CSR put forward against private interests were centred on politically acceptable conflict situations, such as Northern Ireland and South Africa. The most renowned of these early concepts were the Sullivan Principles,<sup>53</sup> which constituted an attempt to regulate corporations in South Africa during apartheid, and the MacBride Guidelines in Northern Ireland.<sup>54</sup> However, corporations in the rest of Africa continued to operate with human rights impunity and out of the view of civil society.

Rapid economic growth came with a price. Massive inequality and exploitation were a direct result of unbridled neo-liberal economic policy. The backlash against this unfair development led to the rise of an active, global civil society, which advocated the regulation of the world's economy in order to ensure social equality, human rights and sustainable development. This movement culminated in the now infamous 'Battle of Seattle' in 1998, at which thousands of protesters from all walks of life voiced their disapproval of the prevailing system. The international community responded in kind as human rights discourse and environmental regulation surged to the top of the political agenda. Once again, a concerted effort to regulate human rights responsibilities within the global trade system was underway.

An important recognition of CSR development was the launch of the UN's Global Compact.<sup>55</sup> It has come to represent the embodiment of the voluntary CSR regime. It lists some of the world's largest and most influential companies as members. It has two key aims. First, the Global Compact attempts, through a multi-stakeholder dialogue approach, to identify problems and find solutions. Second, it attempts to reinforce dialogue through examples and identifying best practice, while providing outreach networks for action at the country, regional or sectoral level. This initiative is an offspring of the failed efforts of the UN to provide a system of direct binding regulation. However, the multi-sta-

<sup>52</sup> As above.

<sup>53</sup> 'Sullivan Principles for US corporations operating in South Africa' (1985) 24 *International Legal Materials* 1496 (citing 'The (Sullivan) Statement of Principles' (Fourth Amplification), 8 November 1984).

<sup>54</sup> *MacBride Principles* <http://www1.umn.edu/humanrts/links/macbride.html#principles> (accessed 31 August 2005).

<sup>55</sup> UN Secretary-General Kofi Annan Address at the World Economic Forum in Davos, Switzerland (31 January 31 1999), UN Doc SG/SM/6448 (1999); UN Secretary-General Kofi Annan 'A compact for the new century' <http://www.un.org/globalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (accessed 14 April 2001).

keholder approach in voluntarily endorsing the Global Compact's principles has helped to create a standard of what the international community considers customary practice. The Global Compact's nine principles in the areas of human rights, labour and the environment enjoy universal consensus, being derived from the Universal Declaration, the ILO's Declaration on Fundamental Principles and Rights at Work, as well as the Rio Declaration on Environment and Development. The nine principles concern human rights, labour standards and the environment.<sup>56</sup> The Global Compact has helped to increase awareness of the concept of corporate social responsibility around the world. It is an innovative, consent-based response to the challenges of globalisation and is founded on universally recognised values.

There is a broad set of regional CSR guidelines and regulations. The European Union (EU) and the North American Free Trade Area (NAFTA) both set out well-established principles for conduct within their jurisdictions. The EU has enacted plenty of legislation governing the conduct of MNCs within its territory. Such initiatives include the Maastricht Agreement on Social Policy of 1991, the Treaty of Amsterdam of 1997,<sup>57</sup> as well as the initiatives taken by the European Parliament.<sup>58</sup> The Council of Europe has been active in this field as well, with plenty of updates to the European Social Charter of 1961.<sup>59</sup> North America is also covered by NAFTA that includes a Labour Side Agreement of 1993, which ensures the promotion of domestic laws within NAFTA.<sup>60</sup> However,

<sup>56</sup> The nine principles are:

*Human Rights*

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence.

Principle 2: make sure that they are not complicit in human rights abuses.

*Labour Standards*

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.

Principle 4: the elimination of all forms of forced and compulsory labour.

Principle 5: the effective abolition of child labour.

Principle 6: eliminate discrimination in respect of employment and occupation.

*Environment*

Principle 7: Businesses should support a precautionary approach to environmental challenges.

Principle 8: undertake initiatives to promote greater environmental responsibility.

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

<sup>57</sup> The Treaty of Amsterdam, 2 October 1997, entered into force on 1 May 1999 <http://www.eurotreaties.com/amsterdamtreaty.pdf> (accessed 31 August 2005).

<sup>58</sup> Blanpain (n 48 above) 46.

<sup>59</sup> European Social Charter <http://conventions.coe.int/treaty/en/treaties/html/035.htm> (accessed 31 August 2005).

<sup>60</sup> North American Free Trade Agreement [http://www.nafta-sec-alena.org/DefaultSite/legal/index\\_e.aspx?CategoryID=42](http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?CategoryID=42) (accessed 31 August 2005).

European business is also guided by the EU's standards for operation in the developing world.<sup>61</sup> International trade and aid agreements have begun to adopt 'social clauses'. They are standard features in many bilateral and multilateral agreements and almost all EU agreements.<sup>62</sup>

By contrast, the control of corporate activity in Africa remains under-developed. Human rights protection is fully integrated into the objectives of the Constitutive Act of the African Union.<sup>63</sup> This is based on state responsibility to protect and fulfill the African Charter on Human and Peoples' Rights (African Charter), but does not directly provide for regulation of corporations. The regional economic organisations<sup>64</sup> are extremely dependent upon fostering investment in order to promote much needed economic growth. This position makes the regulation of corporations difficult. The New Partnership for Africa's Development (NEPAD) was implemented in 2002,<sup>65</sup> endorsing the NEPAD Progress Report and Initial Action Plan (Action Plan).<sup>66</sup> This encouraged the adoption of the Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG)<sup>67</sup> and the accession to the African Peer Review Mechanism (APRM).<sup>68</sup> The APRM would promote adherence to the fulfilment and protection to the commitments contained in the Declaration. It was put forward that human rights are central to NEPAD as it was incorporated into the AU structure.<sup>69</sup> The dual objectives of this Action Plan are to eradicate poverty and the fostering of socio-economic development through good governance.<sup>70</sup> This notion transcends the World Bank model of merely economic management and includes responsibility for the protection of interdependent human rights as well as democratisation. The APRM, which is voluntary, includes limited areas of corporate governance.<sup>71</sup> It focuses on the

<sup>61</sup> Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, European Parliament, Resolution A4-0508/98.

<sup>62</sup> Kinley (n 11 above) p.31.

<sup>63</sup> Arts 3(g), (h), (k) & (n) AU Constitutive Act.

<sup>64</sup> Regional economic organisations concentrate on creating conditions conducive to economic growth through liberalisation. See eg Arab Maghreb Union (AMU) <http://www.maghrebarabe.org/> (accessed 31 August 2005); the Common Market for Eastern and Southern Africa <http://www.comesa.int> (accessed 31 August 2005); East African Community; Economic Council of Central African States (ECCAS); Economic Community of Western African States (ECOWAS); Southern African Development Community (SADC).

<sup>65</sup> Assembly/AU Doc AHG/Decl1 (1).

<sup>66</sup> Doc AHG/235 (XXXVIII).

<sup>67</sup> Doc AHG/235 (XXXVIII) Annex I.

<sup>68</sup> Doc AHG/235 (XXXVIII) Annex II.

<sup>69</sup> Doc AHG/235 (XXXVIII) paras 3(a)-(1).

<sup>70</sup> Doc AHG/235 (XXXVIII) para 5.

<sup>71</sup> The African Peer Review Mechanism (APRM) 38th ordinary session of the Assembly of Heads of State and Government of the OAU (8 July 2002, Durban, South Africa AHG/235 (XXXVIII)).

responsibility of member states to uphold the principles. This allows for the continuation of the problems concerning the relative influence of corporations on developing states and regulation. For this reason, the African corporate monitoring regime is insufficient.

The global economic and development regulatory bodies have adopted limited human rights agendas for the conduct of business. The World Bank,<sup>72</sup> the Asian Development Bank,<sup>73</sup> the International Monetary Fund<sup>74</sup> and the World Trade Organisation (WTO) have all addressed the main issues relevant to development, economic growth and human rights, which invariably address the role of corporations. This acknowledgment helps to build a case for their universal recognition. Further proof of the significance of human rights to the international community concerning global trade and corporations was the end of the OECD's Multilateral Agreement on Investment (MAI), which failed to be adopted due to concerns over unregulated investment and human rights.<sup>75</sup>

Private codes of conduct have become key elements in the debate over improving international labour standards and upholding international human rights. The ILO defines such codes as 'a written policy, or statement of principles, intended to serve as a basis for a commitment to particular enterprise conduct'.<sup>76</sup> Initiatives have been promoted by individual corporations and on the industry-wide level.<sup>77</sup> There is an important role for these private codes of conduct to play in Africa. However, corporate codes of conduct are often extremely limited in human rights terms. Often they make only rhetorical reference to human rights discourse or contain no reference at all.<sup>78</sup>

In an ideal situation, corporate codes of conduct would play a complimentary role to international regulation, supplementing

<sup>72</sup> World Bank Group issue brief: Development, human rights and judicial reform <http://www.worldbank.org> (accessed 31 August 2005).

<sup>73</sup> Asian Development Bank <http://www.adb.org/documents/> (accessed 31 August 2005).

<sup>74</sup> See eg IMF Fact Sheet, The IMF's poverty and growth facility (1 September 2000) <http://www.imf.org/external/np/exr/facts/prgf.htm> (accessed 31 August 2005); also see IMF Fact Sheet, Social dimensions of the IMF's policy dialogue (30 March 2000) <http://www.imf.org/external/np/exr/facts/social.htm> (accessed 31 August 2005).

<sup>75</sup> Kinley (n 11 above) 32.

<sup>76</sup> ILO Working Party on the social dimensions of the liberalisation of international trade, November 1998, ILO, 1998, No 26 11.

<sup>77</sup> See eg the proliferation of apparel, mining and petroleum industry codes available at Bureau of National Affairs, Inc Voluntary 'Model Business Principles' Issued by the Clinton Administration, 26 May 1995, Daily Rep. For Executives, 31 May 1995, <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/usmodel.htm> (accessed 31 August 2005). See also Kimberley Process Certification Scheme <http://www.kimberley-process.com:8080/site/content/KPCS.pdf> (accessed 31 August 2005).

<sup>78</sup> For examples of prominent company codes of conduct in Africa, see n 15 above.

implementation and enforcement mechanisms with private initiatives.<sup>79</sup> These codes could be the catalysts for a new regime of human rights protection that penetrates the corporate veil. Until then, they should at least serve as guidelines for industry best practice and of performance evaluation.<sup>80</sup> Codes could indicate a tacit acknowledgment of human rights responsibility. They could promote awareness and acceptance of international responsibility and can end some of the worst forms of abuse. If implemented properly, they may foster an environment conducive to human rights protection, which is a step in the right direction.<sup>81</sup>

These initiatives demonstrate that governments and international business are taking the issue of regulating the international economy seriously with regard to factors other than increasing economic profit.<sup>82</sup> These agreements all attempt to ensure that certain standards of behaviour are maintained despite the lack of regulation. All of these initiatives indicate a recognition of the MNC's significant role in international trade, domestic economies and social welfare. The increased influence of MNCs on domestic policy has ensured that they must recognise their role in promoting human rights as well as favourable economic conditions. MNCs and the international community have indicated corporate responsibility for human rights, related to the power and influence that they wield through the initiatives outlined above. These various initiatives, however, failed to bind all businesses to follow minimum human rights standards.<sup>83</sup>

The failure of the CSR movement to ensure human rights accountability has resulted in a renewed interest for regulation as displayed by

<sup>79</sup> Diller (n 51 above) 26.

<sup>80</sup> WM Hoffman *et al* *Emerging global business ethics* (1994) 94.

<sup>81</sup> ICFTU-ITS Paper 'Labour and business in the global market' in Blanpain (n 48 above) 109.

<sup>82</sup> Eg, see discussions on CSR and human rights in the following forums relevant to Africa: African Business Roundtable <http://www.abrnet.org/> (accessed 31 August 2005); Sustainable futures <http://www.nbi.org.za/sustainablefutures/> (accessed 31 August 2005); African Investor <http://www.africaplc.com/> (accessed 31 August 2005); H Daly & J Cobb *For the common good* (1989); International Business and Law Forum (IBLF) *Business and poverty: Bridging the gap* (2002) <http://www.iblf.org> (accessed 31 August 2005); IBLF & WBCSD (2004) *A business guide to development actors* <http://www.wbcsd.org> (accessed 31 August 2005); CK Prahalad & A Hammond 'Serving the world's poor, profitably' (2002) 80 *Harvard Business Review* 48-57; SAGA (2004) *A nation of givers?* Johannesburg SAGA <http://www.donors.org.za> (accessed 31 August 2005); Trialogue *Corporate social investment handbook*. (2004); UNDP & IBLF (2004) *Business and the millennium development goals: A framework for action* [http://www.undp.org/business/docs/mdg\\_business.pdf](http://www.undp.org/business/docs/mdg_business.pdf) (accessed 31 August 2005); WBCSD *Doing business with the poor* (2004) <http://www.wbcsd.org> (accessed 31 August 2005).

<sup>83</sup> Weissbrodt (n 4 above) 903.

the UN Norms for Business.<sup>84</sup> Some notable initiatives included the UN Special Task Force's recommendations regarding human rights law<sup>85</sup> and the human rights code for business,<sup>86</sup> adopted by the UN Sub-commission on the Promotion and Protection of Human Rights. Mary Robinson, the then acting High Commissioner for Human Rights, presented *Business and Human Rights: A Progress Report*<sup>87</sup> at the Davos World Economic Forum, outlining necessity, challenges, opportunities and achievements of corporate human rights protection by promoting accountability and responsibility for business.<sup>88</sup> Progress was made in this regard by the 1995 Copenhagen World Summit for Social Development Report<sup>89</sup> and the UN Development Programme's *Human Development Report 2000*.<sup>90</sup>

The UN Human Rights Norms for Business (Norms)<sup>91</sup> represents a major step forward in the process of establishing a common global framework for understanding the responsibilities of business enterprises with regard to human rights. These Norms are the first non-voluntary initiative accepted at an international level in any capacity.<sup>92</sup> The Working Group of the Sub-Commission for the Promotion and Protection of Human Rights developed these through an open process of consultation over a period of nearly four years with governments, businesses, NGOs and unions.<sup>93</sup> They provide coherence to human rights obligations of non-state economic actors. The Norms do not create new legal obligations, but simply codify and restate existing obligations under international law as they apply to transnational corporations.<sup>94</sup> The

<sup>84</sup> See, generally, D Weissbrodt 'The beginning of a sessional working group on transnational corporations within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' in M Kamminga & S Zia-Zarifi *Liability of multinational corporations under international law* (2000) 119-38.

<sup>85</sup> Report of the Task Force of the Executive Committee on Economic and Social Affairs of the United Nations (Final Version UN Geneva, 21 January 1999) 6; [http://www.discerningtoday.org/members/Analyses/new\\_international\\_financial\\_architecture.htm](http://www.discerningtoday.org/members/Analyses/new_international_financial_architecture.htm) (accessed 31 August 2005).

<sup>86</sup> n 2 above.

<sup>87</sup> Available at the UNHCHR website <http://www.unhcr.ch/busines.htm> (accessed 31 August 2005).

<sup>88</sup> Report of the United Nations High Commissioner for Human Rights, E/1999/96 (UN, Geneva 29 July 1999).

<sup>89</sup> Copenhagen + 5 Review: 24th special session of the United Nations General Assembly (Geneva 26 June to 1 July 2000) <http://www.un.org/esa/socdev/geneva2000/index.html> (accessed 31 August 2005).

<sup>90</sup> United Nations Development Programme *Human Development Report 2000* <http://www.undp.org/hdro/HDR2000.html> (accessed 31 August 2005).

<sup>91</sup> Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (n 2 above).

<sup>92</sup> Weissbrodt (n 4 above) 903.

<sup>93</sup> Weissbrodt (n 4 above) 904-908.

<sup>94</sup> On the definition of transnational corporations in this regard, see Weissbrodt (n 4 above) 908-910.

Norms clearly state that companies have only responsibilities 'within their respective spheres of activity and influence'. By bringing together voluntary initiatives, universal human rights law and labour standards, the Norms have set a solid foundation for binding law to develop. It is difficult to seriously oppose these Norms if companies and governments are already in principle adhering to the Norms through other initiatives. The Norms have been welcomed and encouraged by NGOs involved in human rights advocacy. They have already begun to use the Norms as a benchmark for accountability and a measurement of human rights compliance for businesses.<sup>95</sup>

The Secretary-General of the UN has appointed a Special Representative on the issue of human rights and transnational corporations and other business enterprises.<sup>96</sup> The creation of this mandate was requested by the UN Commission for Human Rights in its resolution 2005/69, and approved by the Economic and Social Council on 25 July 2005. The mandate includes identifying and clarifying standards of corporate responsibility and accountability with regard to human rights. An interim report presenting views and recommendations for consideration by the Commission on Human Rights is due at its 62nd session in 2006 and a final report in 2007. All of this points towards further development of legal responsibility for MNCs.

Aside from this development, domestic legal systems have begun to adapt to the threats to human rights posed by a lack of international law. It is now accepted that MNCs violate international law when they directly violate or are complicit in contravening international law applicable to individuals.<sup>97</sup> Principles that apply to individuals clearly regulate MNCs. The concepts outlined above apply to corporations (legal persons),<sup>98</sup> as well as private individuals (natural persons).<sup>99</sup> This complements the widespread recognition of corporate accountability in domestic legal systems.<sup>100</sup> When taking into consideration that international law has been applied to corporations since the Nuremberg Tribunals,<sup>101</sup> the case for corporate as well as individual regulation through international law seems solid. So far, there has not been a

<sup>95</sup> Weissbrodt (n 4 above) 907.

<sup>96</sup> UN Doc SG/A/934 (28/07/2005).

<sup>97</sup> JJ Paust 'Human rights responsibilities of private corporations' (2002) 35 *Vanderbilt Journal of International Law* 803.

<sup>98</sup> Various international and national documents use the terms 'juridical person', 'legal person', 'juristic persons' and 'corporations' to refer to the organisations recognised as having legal status. A Clapham 'Liability of non-state actors: Lessons from the International Criminal Court in Addo (n 29 above) 152 n 24.

<sup>99</sup> Addo (n 30 above) 8-9.

<sup>100</sup> It is a general principle of law that corporations are subject to domestic law. Paust (n 97 above) 803.

<sup>101</sup> Clapham (n 98 above) 160-71.

single case in the US holding that a corporation is 'legally incapable of violating the law of nations'.<sup>102</sup>

Moreover, the English courts have relaxed *forum non conveniens* rules in certain cases, allowing for plaintiffs to bring cases against British corporations in England rather than in the place where the violation took place.<sup>103</sup> This has opened the door for numerous cases concerning health and labour standards.<sup>104</sup> This has drawn international attention and has permanently damaged some MNCs' reputations. The directors of MNCs must sacrifice short-term profits in order to build stable local communities that enjoy human rights. The value of accepted universal regulation is obvious, in that it could help avoid nasty situations such as the ones previously mentioned, where the TNC's reputation is dragged through the mud.

### 4.3 International law formulation

The developments outlined in the previous section made the international community aware of the issue. However, the significance of these developments lies in the formulation of international law. The inclusion of human rights law in national, bilateral, regional and international agreements between states and international organisations legitimises human rights law and sets valuable precedents in the field. This is especially so when they refer to established human rights instruments. Furthermore, such agreements recognise the primacy of human rights law over domestic and other forms of international law. The legal basis for the development of human rights norms applicable to corporations derives from their sources in treaty and customary international law.<sup>105</sup> The UN has developed a plethora of declarations, codes, conventions and treaties that interpret general human rights obligations based on articles 55 and 56 of the Charter of the United Nations. The most prominent is the Universal Declaration of Human Rights (Universal

<sup>102</sup> *Presbyterian Church of Sudan v Talisman Energy Inc* 244 F Supp 2d 308-309.

<sup>103</sup> R Meeran 'The unveiling of transnational corporations: A direct approach' in Addo (n 18 above) 162.

<sup>104</sup> Eg, see: *Ngcobo & Others v Thor Chemical Holdings Ltd* TLR 10 November 1995; *Sithole & Others v Thor Chemical Holdings Ltd & Another* TLR 15 February 1999; *Connelly v RTZ* [1996] 2 WLR 251; *Lubbe & Others v Cape PLC*; *Afrika & 1539 Others v Cape PLC* [1999] A No 40; *Mphahlele & 336 Others v Cape PLC* [1999] M No 146.

<sup>105</sup> For similar examples of such draft norms, see International Law Commission Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on its Sixth Session in [1954] 2 Year Book of the International Law Commission 150, UN Doc A/CN.4/SER.A/1954/Add.1; Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its 53rd Session, UN GAOR, 56th Sess, Supp No 10 at 43, UN Doc A/56/10 (2001).



Declaration).<sup>106</sup> One of the principle obligations of the UN Charter is that states observe international human rights law standards, recognised in article XXI of the General Agreement on Trade and Tariffs (GATT), now enshrined in WTO regulations.<sup>107</sup>

When the developments as outlined in this paper are viewed holistically, it is apparent that the drive for CSR is simultaneously developing a framework for international law on the subject. The evolving nature of international law ensures that mutually agreed upon norms become customary and binding over time. Although the evolution and interpretation of customary and treaty law are complex subjects, the concept of the differentiation between hard and soft law is informative in the context of evolving norms for MNCs. While hard law creates legally binding regimes, soft law begins as recommendations but may evolve into custom. A plethora of universally agreed upon voluntary instruments and associations,<sup>108</sup> when combined with universal human rights law applied over time, become a solid indicator of what behavior constitutes customary practice regarding MNCs. Voluntary initiatives may be necessary for consensus in the present, but over time, those voluntary norms will become law. Stephens draws an analogy as follows:<sup>109</sup>

It is interesting to note, however, that the United Nations at the time of its foundation made a similar 'peace with power' with surprising results, drafting an aspirational human rights code that has since evolved into a powerful human rights platform. The Universal Declaration of Human Rights was drafted as a non-binding document because the States belonging to the United Nations refused to agree to binding norms.

<sup>106</sup> Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN GAOR 3d Sess, (Resolutions, part 1) 71, UN Doc A/810 (1948).

<sup>107</sup> See H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995/96) 25 *Georgia Journal of International and Comparative Law* 287.

<sup>108</sup> Prominent non-treaty human rights instruments include the Standard Minimum Rules for the Treatment of Prisoners, ESC Res 663 C (XXIV) and 2076 (LXII) (May 13, 1977); the Declaration on the Rights of Disabled Persons, GA Res 3447 (9 December 1975); the Code of Conduct for Law Enforcement Officials, GA Res 34/169 (17 December 1979); the Declaration on the Right to Development, GA Res 41/128 (4 December 1986); the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, GA Res 43/173 (9 December 1988); the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res 1989/65 (24 May 1989); the Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133 (18 December 1992); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135 (18 December 1992); the Declaration on the Elimination of Violence Against Women, GA Res 48/104 (20 December 1993); the Vienna Declaration and Programme of Action, UN Doc A/CONF 157/23 (1993); and the Beijing Declaration and Platform for Action, UN Doc A/CONF 177/20 & Add 1 (1995).

<sup>109</sup> Stephens (n 46 above) 68.

While the Universal Declaration was originally a manifesto with primarily moral authority, half a century later, the document is considered binding.<sup>110</sup> What is significant about this development is that the regulations concerning global trade and human rights are no longer confined to academic theory, but are appearing in domestic judgments, views and comments of international human rights courts and committees and even the manifestos of corporations. Nevertheless, no one predicts treaty norms regarding human rights standards and MNCs in the near future. There is nowhere near consensus internationally for such a development. The Norms are an indication of the formulation of soft law.<sup>111</sup> Such a first step is required for consensus building and eventual codification. This process often takes years to complete. However, the sources of the Norms applicable to business commend great respect. This is certainly an indication of the direction that the international community is heading regarding this issue.

## **5 Human rights law and corporate social responsibility**

The advance of regulation through CSR initiatives has been welcomed. However, it remains paramount that human rights discourse is not left to the private sphere alone. The UN Commission on Human Rights and, particularly, the Sub-Commission on the Promotion and Protection of Human Rights, remain adamant in their criticism of progress in terms of human rights and globalisation.<sup>112</sup> The Commission on Human Rights and the Sessional Working Group on the Working Methods and Activities of Transnational Corporations<sup>113</sup> stressed the relationship between transnational corporations and the state. The Commission recalled the fact that the international covenants on human rights and the Declaration on the Right to Development established that states are the primary duty bearers of human rights and that each state needed to regulate foreign investment within its jurisdiction through the horizontal application of human rights law. The International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) are ratified by the majority of African states. They impose obligations on African governments to regulate the conduct of MNCs within their jurisdiction in order to

---

<sup>110</sup> See Hannum (n 107 above) 287 317-39.

<sup>111</sup> Weissbrodt (n 4 above) 914.

<sup>112</sup> See 'Globalisation and its impact on the full enjoyment of human rights' 15 August 2001, E/CN.4/Sub2/2000/13.

<sup>113</sup> UN Doc E/CN4/Sub.2/2002/13 15 August 2002 para 12.

uphold the principles contained within them.<sup>114</sup> CSR and direct regulation binding corporations under human rights law should only be used as a complimentary system to the established international human rights law incorporated and enforced domestically.

CSR has been formulated in human rights terms concerning the legal liability of business entities, and not in terms of human rights responsibilities.<sup>115</sup> However, human rights law, particularly in developing states, requires positive obligations. Positive obligations are essential to the fulfilment of economic, social and cultural rights, which are of vital importance to African peoples.<sup>116</sup> Human rights law must not only be promoted, but it must be protected and fulfilled as well. Few argue against MNC responsibility for human rights law. Nevertheless, it is ethically controversial as to whether MNCs are the correct agents for the protection and fulfilment of human rights law. Perhaps their responsibility is only limited to their sphere of influence.<sup>117</sup> This sphere certainly does not correspond with universal human rights law. Moreover, it is questionable whether human rights law is even the correct framework for CSR discourse.

CSR has evolved from corporate philanthropy to social responsibility, minimising the negative side-effects of MNC activity.<sup>118</sup> From there it has engulfed concepts of sustainable development and good governance.<sup>119</sup> Despite the rapid advance of such language and its value to business ethics discourse, it does not directly relate to or address fundamental human rights law responsibility. It is founded upon voluntarism and minimal duties for the private sphere. The danger with including human rights discourse, but not necessarily law, within CSR initiatives is that rights and entitlements can become factors of production. Such a development may have consequences for the interdependence and universality of human rights laws. Therefore, CSR should not be the basis of human rights development in African states.

Development in Africa must be facilitated, utilising existing international human rights law implemented and enforced nationally. CCPR

<sup>114</sup> As above.

<sup>115</sup> P Muchlinski *Multinational enterprises and the law* (1995) 592-97.

<sup>116</sup> 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* 177.

<sup>117</sup> Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) art 1.

<sup>118</sup> L Bomann-Larsen & O Wiggen 'Towards improved business practices: Implementing the principles of double effect' in L Bomann-Larsen & O Wiggen (eds) *Responsibility in world business: Managing harmful side-effects of corporate activity* (2004) 273.

<sup>119</sup> S Zadek *The civil corporation: The new economy of corporate citizenship* (2001).

and CESCR have been ratified by the majority of these states.<sup>120</sup> They impose an obligation on state parties to regulate in order to uphold the principles contained within them. Moreover, the Declaration on the Right to Development is directly applicable to the African context and maintains that the prime duty bearer for human rights law is the state.<sup>121</sup> The UN Committee on Economic, Social and Cultural Rights is clear that the realm of state responsibility extends not only to the actions of agents of the state, but also to third parties over whom the state has or should have control.<sup>122</sup> Africa has formulated extensive human rights law. States should concentrate their efforts on fulfilling the obligations entailed within that body of law.

The case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,<sup>123</sup> before the African Commission on Human and Peoples' Rights (African Commission or Commission), provides an excellent example of state responsibility. Significantly, the Commission concluded that collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.<sup>124</sup> The Commission determined that governments are expected to respect, protect, promote, and fulfill human rights. Moreover, according to the Commission, '[t]hese obligations universally apply to all rights and entail a combination of negative and positive duties'.<sup>125</sup> The Commission found that the Nigerian government had failed to fulfill these obligations guaranteed by the African Charter on Human and Peoples' Rights (African Charter).<sup>126</sup>

These obligations were elaborated on by the Commission. The duty to respect human rights entails refraining from interference with the 'enjoyment of all fundamental rights'.<sup>127</sup> The protection of rights

<sup>120</sup> One hundred and forty-six states have ratified the International Covenant on Economic, Social and Cultural Rights as of 2 May 2003. See <http://www.unhchr.ch/pdf/report.pdf> (accessed 31 August 2005).

<sup>121</sup> Declaration on the Right to Development (41/128) of 4 December 1986, art 10.

<sup>122</sup> M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 113.

<sup>123</sup> (2001) AHRLR 60 (ACHPR 2001).

<sup>124</sup> n 123 above, para 68.

<sup>125</sup> n 123 above, para 44 (citing A Eide 'Economic, social and cultural rights as human rights' in A Eide et al (eds) *Economic, social and cultural rights: A textbook* (1995) 21.

<sup>126</sup> Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5. Nigeria was found to have violated the right to non-discrimination (art 2); the right to life (art 4); the right to property (art 14); the right to health (art 16); the right to housing (implied in the duty to protect the family, art 18(1)); the right to food (implicit in arts 4, 16 & 22); the right of peoples to freely dispose of their wealth and natural resources (art 21); and the right of peoples to a 'general satisfactory environment favourable to their development' (art 24). The violations were the result of actions involving the Nigerian National Petroleum Development Company (NNPC) in a consortium with Shell Petroleum Development Corporation (SPDC).

<sup>127</sup> n 123 above, para 45.

requires legislation and provision of effective remedies to ensure that rights holders are protected 'against other subjects' and 'political, economic and social interferences'.<sup>128</sup> Human rights law promotion requires actions such as 'promoting tolerance, raising awareness, and ... building infrastructures'.<sup>129</sup> The fulfilment of human rights law requires the state to enact policy and take action toward the actual realisation of rights. This may even include the provision of 'basic needs, such as food or resources that can be used for food (direct food aid or social security)'.<sup>130</sup>

The African Commission came to the important conclusion that the Nigerian government was in breach of its obligation to protect its peoples from damaging acts done by private parties contrary to the African Charter.<sup>131</sup> Nigeria therefore could be held accountable under international law for failing to ensure that private actors and state actors together provide a setting in which human rights-based development can be achieved. To prove this substantive law connection, the plaintiffs cited the cases of *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,<sup>132</sup> *Velasquez Rodriguez v Honduras*<sup>133</sup> and *X and Y v Netherlands*.<sup>134</sup> Governments must take action to uphold, protect and promote human rights as part of a domestic rights-based development process. They must ensure an environment conducive to the fulfilment of human rights commitments by regulating the activities of private parties that affect the enjoyment of these rights in order to ensure a rights-based development of society. This requires the maintenance of the governmental regulatory function in the face of mounting pressure to deregulate and remove economic decision making from domestic jurisdiction. Voluntary initiatives and CSR, while beneficial in their own right, cannot fill this developing regulatory void.

## 6 Conclusion

CSR has played a positive role in the development of a legal framework for human rights regulation in the private sphere. Additionally, it has raised awareness throughout the international community about this problem. CSR can be an excellent complement to a system of human rights regulation that is enforceable in either domestic or international

<sup>128</sup> n 116 above, para 46.

<sup>129</sup> n 116 above, para 46.

<sup>130</sup> n 116 above, para 47.

<sup>131</sup> n 116 above, paras 57-58.

<sup>132</sup> (2000) AHRLR 66 (ACHPR 1995).

<sup>133</sup> *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, judgment of 19 July 1988, Series C, No 4.

<sup>134</sup> *X & Y v the Netherlands* 91 ECHR (1985) (Ser A) 32.

courts. CSR will help ensure that MNCs have the tools at their disposal to avoid such litigation. Moreover, it can afford governments knowledge on what is acceptable international practice.

Unfortunately, some members of the international community would prefer that compliance with such a system remained on a voluntary basis. They claim that the many positive contributions MNCs make are overlooked or purposely ignored. The evidence is clear that MNCs have helped raise living standards around the world, for some. MNCs have acted as engines of development and growth through the economic activity they generate, their transfer of technology and skills, and improved labour, health, safety, and environmental conditions.<sup>135</sup> Proponents of voluntarism insist that, taken together, the voluntary regime initiatives provide an adequate standard for business. However, this influential lobby does not recognise the problems related to the implementation, monitoring and enforcement of such a voluntary regime. There is a real danger that this type of regulation can be used as a public relations scheme, while business as usual is conducted in practice. For companies legitimately interested in CSR, a universal set of regulations and guidelines would only be beneficial. Such progressive MNCs would not lose their competitive advantage in the short run to companies who cut corners in terms of human rights responsibility.

Most businesses now recognise that CSR is vital for long-term sustainable growth. Many MNCs have become public relations proponents of human rights after suffering major controversies resulting from human rights-related disgraces. Shell, Nike and Rio Tinto now readily cite the Universal Declaration in their corporate policies. Shell, in doing so, provides an excellent example of the detrimental effects of civil instability and political uncertainty on investment, reputation and operations. They advocate the use of their commercial leverage to promote social as well as financial ends.<sup>136</sup> Nike claims to actively engage with NGOs to aid in human rights matters such as development and employment initiatives.<sup>137</sup>

The primary responsibility for human rights law must remain with states. The involvement of civil society in human rights realisation is similarly paramount. However, the dynamic world economic system has altered the power balance and international law must adjust in order to regulate for the good of the international community. MNCs must accept responsibility for their increased power and privilege, afforded through law. A creature of law, such as a multinational limited

---

<sup>135</sup> United States Council for International Business Position Paper on Codes of Conduct, 1998 <http://www.uscib.org/index.asp?documentID=1358> (accessed 31 August 2005).

<sup>136</sup> See The Shell Report 1998 under 'Issues and dilemmas' <http://www.shell.com/download/2872/pages/issues06.html> (accessed 31 August 2005).

<sup>137</sup> See <http://www.nikebiz.com/labor/faq.shtml> (accessed 31 August 2005).

liability corporation, must be subject to the very international law that creates it. The ability of states to implement and enforce human rights law must be strengthened.

This human rights law scenario is similar to the environmental struggle with corporations one generation ago. No one would have anticipated environmental issues being discussed in the boardrooms of the international business community 20 years ago. However, they are very much a part of daily business. Today human rights law is in a similar formative phase within the international business community. Trends point to its inevitable development along parallel lines. It is time for human rights advocates and civil society to work with the business community within the established and enhanced framework of the international community and solve these pressing issues. The prominence of this concern within human rights discourse, and indeed the international community in general, indicates the gravity of the matter. All of the international community, including corporations, but with the primary focus on states, must live up to its responsibility to regulate through international law for the good of society as a whole. In that regard, human rights must be the basis for the development of an equitable and just society. CSR is an important step in such a process, but is not the panacea to the problem.

# Human rights and the rule of law in Swaziland

Sabelo Gumedze\*

Lecturer in Law, University of the Witwatersrand, Johannesburg, South Africa

## Summary

*The article begins by discussing the political landscape of Swaziland and explains the tensions between traditional and modern forms of government in the country. It proceeds to look at the involvement of the monarchy in entrenching its authority and the impact that this has had on the doctrine of separation of powers in the country. The article investigates the fact that the ratification of numerous international human rights instruments has not had much impact on human rights adherence Swaziland. It also assesses the impact of the absolute power of the Swazi King on other organs of state responsible for upholding human rights, such as the judiciary. A discussion of constitutional developments in Swaziland follows. Finally, the author addresses the principle of the 'rule of law' and how this applies to Swaziland.*

## 1 Introduction

Africans have long dreamt of a just and prosperous continent governed by the rule of law . . . Democratic roots are becoming firmer, and the rule of law is now understood as the *sine qua non* for stability and development. Just as the quest for justice motivated many past African causes, so let it govern the continent's future.<sup>1</sup>

Among those Africans who have long dreamt of a just and prosperous continent governed by the rule of law are the people of Swaziland. The

---

\* BA, LLB (Swaziland), LLM (Pretoria), Dip Int'l Protection of Human Rights (Åbo); gumedzes@law.wits.ac.za

<sup>1</sup> Statement by the UN Secretary-General Kofi Annan to the All-Africa Conference on Law, Justice and Development, delivered by Hans Corell, United Nations Legal Counsel and Under Secretary-General for Legal Affairs, in Abuja, Nigeria, 4-7 February 2003. See UN Press Release SG/SM/8597 <http://www.un.org/News/Press/docs/2003/sgsm8597.doc.htm> (accessed 27 February 2003).



Swazi people are arguably still far from realising this dream. As Swaziland remains the last absolute monarchy in sub-Saharan Africa, serious concerns regarding respect for human rights and the rule of law remain an unfortunate reality. This is so, regardless of the promulgation of the new Swaziland Constitution (Constitution).<sup>2</sup> Pressure from the international community<sup>3</sup> has, among other things, forced Swaziland to set up a new constitutional dispensation which is, however, critiqued in this article. The Swaziland Constitution is viewed as a smokescreen that is used by Swazi authorities solely to dispel the perception that not all is well in Swaziland. This article maintains throughout that not all is well in the tiny Kingdom.

A respect for human rights and the rule of law are necessary for peace and stability in any society, and Swaziland is certainly no exception. Thatcher argues that 'our abiding commitment to the rule of law is the very bedrock of our civilization'.<sup>4</sup> Tracing the rule of law in the Universal Declaration of Human Rights (Universal Declaration) of 1948, Glendon argues that 'it is common place that long lists of rights are empty words in the absence of a legal and political order in which rights can be realised'.<sup>5</sup> One might add that such a legal and political order should be one that embraces democratic principles in order to ensure that the principles of human rights and the rule of law are protected.

This contribution seeks to explore the relationship between human rights and the rule of law and to discover ways in which the latter may be realised by invoking the former. In this regard, Swaziland shall be used as a case study. Firstly, the political landscape of Swaziland is mapped. Secondly, Swaziland's King's Proclamation to the Nation of 1973 is discussed as laying the foundation as the initial source of blatant disregard for human rights and the rule of law. Thirdly, the human rights question as it pertains to Swaziland is elaborated upon. Fourthly, the interconnectedness between human rights and the rule of law is discussed. Fifthly, the relevance of the African human rights system to Swaziland is discussed, and finally a conclusion is drawn.

---

<sup>2</sup> The Constitution of the Kingdom of Swaziland Act 1 of 2005.

<sup>3</sup> See eg the following Amnesty International Reports: Human rights at risk in a climate of political and legal uncertainty (AI Index: AFR 55/004/2004) <http://web.amnesty.org/library/index/engaf550042004>; Swaziland: Constitution Bill and rule of law 'deal' fail to protect human rights (AI Index: AFR 55/008/2004) <http://web.amnesty.org/library/index/engaf550082004>; Swaziland: Judges' stand supports human rights (AI Index: AFR 55/009/2004) <http://web.amnesty.org/library/index/engaf550092004> (accessed 29 August 2005).

<sup>4</sup> M Thatcher 'Follow the leader' (Spring 2000) *American Outlook* 23.

<sup>5</sup> MA Glendon 'The rule of law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern Journal of International Human Rights* 67 <http://www.law.northwestern.edu/journals/JIHR/v2/5> (accessed 12 June 2005).

## 2 Swaziland's political landscape in a nutshell

Swaziland remains trapped between a traditional and modern form of government. This has resulted in a conflict between the application of democratic principles and the preservation of Swazi law and custom. These include traditional norms and values that have informed the Swazi way of life since time immemorial. The Kingdom has a non-party system and has electoral procedures based on Swazi custom. The political system is based on the *Tinkhundla* system of government, which is a system of local government organisation that allows for local representatives nominated at centres known as *tinkhundlas*, to be local spokespersons in the national parliament.<sup>6</sup>

Consequently, Swaziland is faced with the ever-increasing pace of globalisation, which advocates a multi-party democracy, a notion which remains remote to Swaziland's political and constitutional dispensation. The *tinkhundla* system of government does not accommodate political parties, presenting an inroad in so far as the enjoyment of the freedom of political association is concerned. Unfortunately, the Constitution clandestinely endorses this three decade-long hostility towards multi-party democracy. Section 79 of the Swaziland Constitution provides as follows:

The system of government for Swaziland is a democratic, participatory, *tinkhundla*- based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.

The use of the words 'democratic, participatory . . . system' is illusory, as the system does not allow the participation of political parties, one of the foundations of democracy. The absence of effective participation of political parties in the political field indicates that political parties in Swaziland remain outsiders in so far as governing of the country is concerned. Esterhuysen maintains that, with a population of one million, it is a powerful elite with a staunch traditional-oriented outlook which dominates Swazi society.<sup>7</sup> The Constitution does not change this. Section 5(1) of the Constitution provides that the succession of King and *Ingwenyama* (Majesty) is hereditary and governed by the Constitution and Swazi law and custom. Most of what is referred to as 'Swazi law and custom' remains unwritten and dictates that the King rules the country in council, which forms part of the so-called 'power elite'. This is not to mention the many princes and princesses, who are

<sup>6</sup> SB Gumede 'Swaziland' in C Heyns (ed) *Human rights law in Africa* (2004) 1580.

<sup>7</sup> P Esterhuysen (ed) *Africa A-Z: Continental and Country Profiles* (1998) 332. The current Swazi monarch, King Mswati 111, boasts of the highest number of wives, one of which was referred to by a former *Sunday Times* editor, Bheki Makhubu, as a 'high school dropout'. See *BBC News* 7 August 2000 <http://news.bbc.co.uk/1/hi/world/africa/870231.stm> (accessed 13 August 2004).

very influential in governing the country. In addition to this, section 233(1) of the Constitution provides that the 'chiefs are the footstool of *iNgwenyama* and *iNgwenyama* rules through the chiefs'. Chiefs also form part of the so-called 'power elite', prone to abuse in the name of the King. Thus, Swaziland has been described by Fabricius as 'a very different political experiment, a medieval absolute monarch trying to survive along a modern democracy'.<sup>8</sup>

### 3 The Swaziland's King's Proclamation to the Nation of 1973

The main cause of the disrespect for human rights and the rule of law in Swaziland dates back to 12 April 1973, when King Sobhuza II,<sup>9</sup> the father of the current monarch, issued the King's Proclamation to the Nation No 12 of 1973 (Proclamation), declaring that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him. The Proclamation was to become the supreme law of Swaziland until 2005.<sup>10</sup>

This position was, together with other laws, affirmed through Decree No 1 of 1981 and Decree No 1 of 1987. The latter decree was an endorsement by the current monarch, King Mswati III, immediately after he took the throne. With the advent of the new Constitution, this position was modified in that the Constitution is now the 'supreme law of Swaziland and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void'.<sup>11</sup>

The Proclamation killed the sacred doctrine of the separation of powers within the Kingdom. More importantly, from its inception, the Proclamation proved to be a gross violation of the Swazi people's right to determine how they wanted to be governed and this affected the smooth functioning of the judiciary, which was no longer independent as the Monarchy had assumed judicial powers as well. On the latter, it is important to note that a respect for the rule of law flourishes where the judiciary is independent. Where the judiciary's independence is interfered with, the opposite is true.

While the coming into force of the new written Constitution is to be welcomed, whether this event will change the *status quo* for the better remains uncertain. It is premature to judge the effectiveness or other-

<sup>8</sup> P Fabricius 'Is Africa shrugging off an imported democracy: Distressing signs of return to authoritarian roots' *The Star* 27 April 2001 8.

<sup>9</sup> King Sobhuza II was succeeded by King Mswati III in 1986 following his death in 1982.

<sup>10</sup> If any other law is inconsistent with the Proclamation, that other law shall, to the extent of the inconsistency, be null and void.

<sup>11</sup> See sec 2(2) of the Constitution.

wise of the new Constitution, especially in so far as human rights and the rule of law are concerned. One remains cynical for obvious reasons, one of which is the challenge presented by the blending of institutions of Swazi law and custom with those of an open and democratic society based upon human rights, freedoms and the rule of law.

#### 4 The human rights question

Despite the existence of international human rights norms and standards, which most African countries acknowledge,<sup>12</sup> no other continent in the world lacks a respect for human rights in the way the African continent does. Of note is the fact that Swaziland is a state party to the African Charter on Human and Peoples' Rights (African Charter), having ratified it on 15 September 1995, just over two decades after the Independence Constitution was repealed. Ratifying the African Charter has not changed anything in so far as a respect for human rights is concerned.<sup>13</sup> Swaziland is also a member of the African Union (AU), the Constitutive Act whereof provides, as one of its objectives, for the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.<sup>14</sup>

Most recently, Swaziland became a state party to two key human rights treaties, namely, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR), having ratified both on 26 June 2004. On 26 April 2004, Swaziland also became a state party to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These developments should be viewed, though critically, as positive steps in the right direction. It still remains to be seen how far Swaziland will go to effectively implement the provisions of these treaties.<sup>15</sup> The Bill of Rights does not provide for any socio-economic rights. The wisdom of acceding to CESCR and giving emphasis only to civil and political rights in the Constitution is confusing, to say the least.

In terms of article 1 of the African Charter, state parties to the African Charter 'shall recognize the rights, duties and freedoms' enshrined therein and 'shall undertake to adopt legislation or any other measures

---

<sup>12</sup> This is done through ratifying and acceding to most international human rights instruments.

<sup>13</sup> This point will be canvassed in greater detail and supported by the recent decision of the African Commission on Swaziland.

<sup>14</sup> See art 3 Constitutive Act of the African Union.

<sup>15</sup> Interestingly, Swaziland ratifies all these treaties without any reservation.

to give effect to them'. Hopkins argues that, as a consequence of ratifying the African Charter, it seems that states must do no more than give effect to the rights contained therein and they are totally free to decide for themselves on how they wish to do this.<sup>16</sup> As a matter of fact, Swaziland is in no way near this path with its total disrespect of human rights and the rule of law.

The disrespect of both human rights and the rule of law is linked to Swaziland's failure to embrace modern democratic principles, which ensures the respect for both human rights and the rule of law. Jaichand argues that, in order to advance human rights, one needs to approach courts.<sup>17</sup> The courts referred to by Jaichand are not just courts, but courts of justice. In terms of the Constitution, '[j]ustice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution'.<sup>18</sup> The Constitution does not, however, insulate the judiciary from interference by the monarch or those acting on his behalf. It must be noted that the Constitution has not changed the King's status that much. In terms of the Constitution, the monarch has executive,<sup>19</sup> legislative<sup>20</sup> and, arguably, judiciary<sup>21</sup> powers. In so far as judicial powers are concerned, the Constitution provides that such power vests in the judiciary, which is a fact that is vociferously challenged. The Constitution further provides that:<sup>22</sup>

Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions.

This cannot be reconciled with the fact that the King remains the traditional head of the Swazi state, enjoying legal immunity from legal suit or process as the King.<sup>23</sup> In the event that the King interferes with judges or judicial officers, as has been the case during his reign (and his predecessor's reign), the Constitution does not provide any effective safeguards for

<sup>16</sup> K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 237.

<sup>17</sup> V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR International Journal on Human Rights* 127.

<sup>18</sup> Sec 138.

<sup>19</sup> Sec 64(1) of the Constitution provides that 'the executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution'.

<sup>20</sup> Sec 106(a) of the Constitution provides that, subject to the provisions of the Constitution, 'the supreme legislative authority of Swaziland vests in the King-in-Parliament'. Here again the King features in so far as the legislative power is concerned.

<sup>21</sup> Sec 140(1) of the Constitution provides that 'the judicial power of Swaziland vests in the Judiciary' and 'an organ or agency of the Crown shall not have or be conferred with final judicial power'.

<sup>22</sup> Sec 141(2).

<sup>23</sup> Secs 228(1) & 2.

the insulation of the judiciary from such unscrupulous interferences as the King's authority cannot be challenged in a court of law.

The Constitution endorses the position prior to its promulgation:<sup>24</sup>

The King and *iNgwenyama* has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights, prerogatives and obligations in terms and in the spirit of this Constitution.

Over and above this, the King remains the Commander-in-Chief of the Defence Force, Police Force and the Correctional Services.<sup>25</sup> Such absolute power is likely to be abused. In fact, the powers of the King are not delimited in any way. The introduction of the 'Swazi law and custom' aspect to the King's rights, prerogatives and obligations does not make the Constitution supreme. In fact, this causes Swazi law and custom to be in competition with the Constitution. It may well be argued that the Constitution is in fact subject to 'Swazi law and custom', which is mostly unwritten. The meaning of 'the spirit of this Constitution' is yet to be defined by the Swazi courts. Assuming the King goes beyond what is within the 'spirit of this Constitution' in exercising the rights, prerogatives and obligations stated therein or any other law, such an exercise cannot be challenged, since in terms of section 11 of the Constitution:

The King and *iNgwenyama* shall be immune from —

- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceeding.

Even Swazi custom does not allow anyone to challenge the King's orders. Under the guise of Swazi law and custom, therefore, it is not unlikely that the King may interfere with the judiciary and will be immune from any suit. Assuming there is a chieftaincy or boundary dispute, in terms of section 231(3) of the Constitution, the *Liqogo*, that is the advisory council appointed by the King, 'traditionally advises *iNgwenyama* on disputes in connection with the selection of *tikhulu* (chiefs) boundaries of chiefdoms ...' In the event that the King makes a decision that has been canvassed and decided by the judiciary, which is in terms of section 39(2) of the Constitution having 'jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as may by law be conferred on it', it will not be possible to challenge the King's decision in a court of law as he is immune, or as it were, above the law in terms of the Constitution.

## 5 The institution of the Monarchy put to the test

Tracing the painful history of Swaziland, the initial setback of what

<sup>24</sup> Sec 4(4).

<sup>25</sup> Sec 4(3).

seemed to be a flourishing democracy happened as a result of the decision in the case of *Bhekindlela Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer*.<sup>26</sup> In the *Ngwenya* case, the Swaziland Court of Appeal struck down the deportation order of Mr Bhekindlela Ngwenya, an opposition party member and member of parliament, as unconstitutional. Soon thereafter, a joint meeting of both houses of parliament declared that the Independence Constitution was unworkable. Subsequently, the then King of Swaziland, Sobhuza II, repealed the Independence Constitution, dissolved parliament and banned all political parties, including the ruling Imbokodvo National Movement, all political activities and meetings. This was done through the King's Proclamation to the Nation, Decree No 12 of 1973 (1973 Decree). Some of the provisions of this Decree deserve express mention here.

For example, paragraph 12 of the Proclamation provides as follows:

No meetings of political nature and no procession or demonstration shall be held or take place in any public place unless with the prior consent of the Commissioner of Police; and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration is directly or indirectly related to political movements or the riotous assemblies which may disturb peace or otherwise disturb the maintenance of law and order.

Paragraph 13 of the Proclamation provides as follows:

Any person who forms or attempts or conspires to form a political party or who organizes or participates in any way in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding six months.

Interestingly, the abovementioned provisions are arguably still part of Swaziland's contemporary legal order. Section 268(1) of the Constitution provides that 'the existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution'. This means that the King still retains all executive, legislative and, arguably, judicial powers because, save for the judicial power, nothing in the Constitution states otherwise.

While on one hand, respect for the rule of law cannot exist without a strict adherence to democratic principles, on the other, stability and development cannot be achieved without democracy and the rule of law. Hence, the respect for human rights remains a pipe dream despite the new Constitution. Piechowiak rightly argues that 'the contemporary state based on a respect for human rights is usually characterised as a *democratic state governed by the rule of law* . . .'.<sup>27</sup>

<sup>26</sup> 1970-1976 SLR 119 & 123.

<sup>27</sup> M Piechowiak 'What are human rights? The concept of human rights and their extra-legal justification' in R Hanski & M Suksi *An introduction to the international protection of human rights. A textbook* (1999) 10 (my emphasis).

Thus the application and enforcement of human rights are crucial components of a respect for the rule of law in a democratic state. Swaziland cannot be said to embrace such. Respect for the rule of law is not only a domestic concern because its denunciation is a threat to the international community. It should not be denied to its citizens under the guise of the principle of sovereignty. Shumba asserts forcefully and rightly that 'sovereignty should never become a sanctuary for dictatorship and human rights violations *and the blatant disregard of the rule of law*'.<sup>28</sup> Unfortunately, Swaziland does seem to be a sanctuary for dictatorship and human rights violations where blatant disregard of the rule of law is common place.

Experience has shown that African states calling themselves 'democratic' or boasting of a written constitution guaranteeing human rights mislead in many respects. Mangu summarises this in the following words:<sup>29</sup>

In most African countries, democracy, constitutional state and rule of law remain castles in the air, just a conventional 'costume' to attend international conferences in New York, London, Paris, Rome, Geneva or Brussels, to win some economic and financial aid from the West. The 'costume' is put off once the meetings are over or financial assistance obtained.

While Swaziland has a written Constitution and also joins the 'bandwagon' of those states calling themselves democracies, under the *tinkhundla* system of government and the current political landscape, it cannot satisfy the definition of a democracy, unless of course the concept of democracy is redefined. Section 1 of the Constitution boastfully provides that 'Swaziland is a unitary, sovereign, democratic Kingdom'. If the rule of law is a 'conventional costume' in most African countries, as suggested by Mangu, then, surely, peace and stability will remain a pipe dream in Africa. On Swaziland's ratification of the African Charter, Hlatshwayo posed the very important question of whether there was really a genuine need for the adoption of a bill of rights now that Swaziland had, among other things, ratified the African Charter, or whether she was working towards a constitution that will have a bill of rights simply because it is the most fashionable thing to do in order to secure international acceptability.<sup>30</sup> The latter statement is not far from the truth, and the Constitution as it stands is a true indictment to this fact. The only salvation to this unfortunate situation is for Africa, and Swaziland in particular, to adopt a 'human rights approach' in the

<sup>28</sup> G Shumba 'A critical reflection on the 2002 presidential election in Zimbabwe' (2002) 2 *African Human Rights Law Journal* 331 (my emphasis).

<sup>29</sup> AM Mangu *Human rights theories and practices: A selection of summaries of lectures* (African Human Rights Camp, October-November 2000, Rustenburg, South Africa) 1.

<sup>30</sup> N Hlatshwayo 'Forging a practicable bill of rights for the recognition and protection of fundamental human rights: A preliminary enquiry' in C Okpaluba *et al Human rights in Swaziland: The legal response* (1997) 81.



realisation of the most 'long dreamt aspiration' of being governed by the rule of law. As to which extent Swaziland can take this right direction remains to be seen. So far, the future remains bleak.

In its most recent report, Amnesty International raised serious concerns that<sup>31</sup>

[b]y the end of June [2004] there was still no breakthrough towards acceptance by the government of the Court of Appeal rulings of November 2002. As all the judges of the Court of Appeal had resigned in protest at the time, the country remained without a Court of Appeal.

In the case of *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government*,<sup>32</sup> the Court of Appeal of Swaziland ordered that all persons who were forcefully removed from their homes as a result of their failure to pay allegiance to Prince Maguga, one of King Mswati's brothers, through a removal order by the Minister of Home Affairs, Prince Sobandla, yet another of King Mswati's brothers, were to be allowed to return to their homes. Notwithstanding this judgment, the Swaziland government prohibited these persons from returning to their homes. Reacting to this judgment, amongst others, the then Prime Minister of Swaziland, Dr Sibusiso Dlamini, stated the following:<sup>33</sup>

Government does not intend to recognise the two judgments of the Court of Appeal . . . The government does not accept the judgment of the Court of Appeal in respect of the actions of the Commissioner of Police and his officers who acted properly and in accordance with Swazi law and custom. The nation shall not allow itself a situation of lawlessness that could definitively lead to bloodshed if the evicted persons were to be allowed to return to the areas concerned. Therefore the judgment in this regard will not be obeyed. The government agencies responsible for implementing the Court of Appeal judgment have, therefore, been instructed not to comply with it . . . This statement should not be viewed as interference with or contempt for the rule of law. It should be acknowledged that we are currently in a transitional stage and government's position on the above issues will be addressed in the new Constitution.

When one analyses the above statement, especially the part that reads 'the government does not accept the judgment of the Court of Appeal', it is clear that the Court of Appeal was disregarded in Swaziland. This is made worse by the fact that King Mswati III has up to today never disassociated himself from this statement by the former Prime Minister. This unfortunate statement led to the Court of Appeal judges resigning *en masse*. This created a serious gap in the Swaziland justice system. For

<sup>31</sup> Amnesty International 'Swaziland: Human rights at risk in a climate of political and legal uncertainty' <http://web.amnesty.org/library/index/engafrr550042004> (accessed 13 August 2004).

<sup>32</sup> Unreported Appeal Case No 40/2000.

<sup>33</sup> As cited in the report of the ICJ/CIJL, *Swaziland: Fact-finding mission to the Kingdom of Swaziland*, 10 June 2003 14-15, using BBC monitoring of *Radio Swaziland*, 28 November 2002, 16:12 GMT.

almost two years, Swaziland did not have a Court of Appeal, the highest court of that land. The Court of Appeal later reconvened and is now operational. One is inclined to conclude that, despite the existence of a Constitution, history is likely to repeat itself. As to when this will happen, time will tell.

## 6 Human rights and the rule of law

The relationship between human rights and the rule of law in relation to the case of Swaziland is of critical importance in addressing the shaky ground upon which the kingdom is currently resting. Ahmed El-Obaid and Appiagyei-Atua argue that, during the time that the OAU was established, human rights in Africa were to be peoples' rights in that, for instance, freedom was seen as national freedom as opposed to individual freedom.<sup>34</sup> While this statement was important at the time, that is, during the era of decolonisation, the time has come for Africa (Swaziland included) to give special attention to individual freedoms over and above national freedom. National freedom is pointless without individual freedom.

A careful scrutiny of the Bill of Rights as contained in the Constitution shows that a lot of individual rights are not guaranteed. As already mentioned above, emphasis is put on civil and political rights, also restricted by the Constitution. To name but a few examples, the right to life is guaranteed in so far as it is not in pursuance of an execution of a sentence of a court;<sup>35</sup> the freedom of conscience is guaranteed in so far as it does not concern abortion, which remains unlawful;<sup>36</sup> the right to equality before the law does not take into account sexual orientation and marital status as being part of the grounds of discrimination;<sup>37</sup> and the right to freedom of assembly and association is guaranteed in so far as it is within the confines of the so-called 'democratic, participatory, *tinkhundla*-based system' of government, thus shutting out multi-party democracy<sup>38</sup> within a 'sovereign democratic Kingdom'.<sup>39</sup>

Seen against this background, the relationship between human rights and the rule of law in Swaziland will be approached in the following

<sup>34</sup> E Ahmed El-Obaid & K Appiagyei-Atua 'Human rights in Africa — A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 827.

<sup>35</sup> Sec 15(1). Sec 15(2) states that the death penalty shall not be mandatory. This means that it is not abolished. See also sec 18(1) of the Constitution which guarantees that the dignity of every person is inviolable.

<sup>36</sup> Sec 14(1)(b) read together with sec 15(5) of the Constitution.

<sup>37</sup> Secs 20(1) & (2). The grounds that are listed are gender, race, colour, ethnic origin, tribe, birth, creed or origin, social or economic standing, political opinion, age or disability.

<sup>38</sup> See sec 79 read together with sec 25 of the Constitution.

<sup>39</sup> Sec 1.

manner: Firstly, the starting point is to establish a sound understanding of the rule of law, tracing it from Professor Dicey. One must, however, be careful when interpreting the meaning of the rule of law. Like any other principle of law, its meaning is capable of different interpretations. Secondly, the concept of human rights will be explored. The development of human rights law as a response to the devastations of World War II will be traced. Thirdly, the African human rights system, under which Swaziland falls in so far as its human rights and the rule of law are concerned, will be discussed.

## 7 The rule of law

Dicey,<sup>40</sup> who popularised the idea of the rule of law, summarised the rule of law into three heads. Firstly, that no man could be punished or lawfully interfered with by authorities except for breaches of law. This means that all government actions must be authorised by law. Swaziland presents a dilemma in this regard due to its unwritten Swazi law and custom. If such authority of government actions were to be derived from unwritten laws, to what extent can the rule of law flourish? Secondly, no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land.<sup>41</sup> Again, Swaziland presents a dilemma in that the King is, according to the Constitution, above the law, even though in terms of section 2(2) of the Constitution, he has the 'right and duty at all times to uphold and defend this Constitution'. How then can the rule of law prevail? Thirdly, there is no need for a bill of rights because the general principles of the Constitution are the result of judicial decisions determining the rights of the private person.

In respect of Swaziland, where the King retains all legislative, executive and, arguably, judicial powers, it is very difficult to assert that the rule of law has a good basis for existence. As argued above, the King retains these powers. Commenting at Swaziland's draft Constitution, the report by the International Bar Association noted that<sup>42</sup>

[t]he draft Constitution muddies distinction between the royal, executive and legislative functions of the King, potentially at the expense of the promotion of the rule of law which is an expressed aim in the Preamble.

This argument still holds under the final Constitution.

One main problem encountered in Dicey's interpretation of the rule of law is that, no matter how unjust or unfair the 'law' can be, both the

<sup>40</sup> AV Dicey *Introduction to the law of the constitution* (1865) 188.

<sup>41</sup> Under this head, it may be argued that even monarchies are and should not be above the law.

<sup>42</sup> International Bar Association *Striving for democratic governance: An analysis of the draft Swaziland Constitution* (2003) 17.

government and the governed must strictly adhere to it. Having a law in place does not necessarily mean that the law will protect the rights of the governed; neither does it mean that the government's actions will be legitimate for the simple reason that it is prescribed in the law. A constitution with a bill of rights guaranteeing human rights and freedoms, which Dicey disapproves of, is today seen as the best approach to instilling a culture of democracy within a society. In fact, a bill of rights is only workable if it is justiciable. Justiciability goes beyond the enforcement of the provisions of a bill of rights. It requires state organs, including the King in the case of Swaziland, to refrain from interfering with the courts in the pursuit of upholding the rights provided therein. This approach is also related to the principle of constitutionalism,<sup>43</sup> as government's limitation should be guided by a constitution providing for the principle of separation of powers together with a respect for human rights and freedoms, the latter being enshrined in a bill of rights.

According to the Declaration of Delhi, the International Commission of Jurists recognised that the rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed, not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.<sup>44</sup> The rule of law is described by Li as 'a condition of government in which the supremacy of democratically made laws, equality before law, procedural justice and effective constraints on government arbitrariness all exist'.<sup>45</sup> From this, it may be argued that only a government which embodies democratic principles can respect the rule of law. Li further states that one core meaning of the rule of law is 'limitation', that is, the law has to place certain limits on what the government can do and prescribe how the government conducts its business.<sup>46</sup>

This 'limitation' is only found where the principle of constitutionalism is upheld, constitutionalism being a 'system of institutional arrangements designed to empower and limit the government, at the same time forming an institutional foundation for the rule of law'. Li argues that the only time-tested way for the rule of law to be respected is in a

<sup>43</sup> According to Henkin, constitutionalism means the government to be constituted shall be constrained by the Constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes, as quoted by PJJ Olivier 'Constitutionalism in the new South Africa' in RA Licht & B de Villiers (eds) *South Africa's crisis of constitutional democracy* (1994) 19.

<sup>44</sup> See Declaration of Delhi of 1959 [http://www.icj.org/article.php3?id\\_article=3088&id\\_rubrique=11](http://www.icj.org/article.php3?id_article=3088&id_rubrique=11) (accessed 17 September 2004).

<sup>45</sup> B Li 'Constitutionalism and the rule of law' in B Li & L Zhou *Perspectives* [http://www.oycf.org/Perspectives/5\\_043000/what\\_is\\_rule\\_of\\_law.htm](http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm) (accessed 17 September 2004).

<sup>46</sup> As above.

constitutional structure that includes separation of powers, checks and balances and judicial independence.<sup>47</sup> The separation of powers, checks and balances and judicial independence should not only be worth the paper upon which they are stipulated, but should for practical purposes be essential in the smooth functioning of an open society based upon human rights and a respect for the rule of law.

In this context, the rule of law should be seen as a state's application and adherence to the law in accordance with international human rights law. While the law is to be applied by the government, both the government and the governed must adhere to the law. The greater responsibility lies with the government, because the governed are more vulnerable to any abuse of power. Even a greater responsibility lies with the King who is, as experience taught us, prone to the exercise of power beyond what is within 'acceptable limitations' in a democratic state. Ideally, any law applied by the government and adhered to by the governed, should be in accordance with international human rights law. This is one of the reasons for ratifying and acceding to international human rights instruments.

This brings this discussion to the question as to the nature of human rights law. The starting point would be an understanding of the meaning of human rights before venturing into its 'law' component.

## 8 Human rights

Piechowiak argues that, in the most general sense, human rights are understood as rights which belong to any individual as a consequence of being human, independently of acts of the law.<sup>48</sup> In this sense, Piechowiak argues that the enjoyment of human rights is independent of the law. This view, however, is impractical because it ignores the fact that law is the best means by which human rights can be enforced. Hence we have a plethora of human rights instruments comprising what is today known as human rights law. Making human rights a law adds a binding effect to a respect of human rights.

In Swaziland, there is a misconception that any human rights advocacy is contrary to Swazi culture. This is evidenced by the authorities' hostile attitude to the culture of human rights, which has become the contemporary phenomenon. It is for this reason that the Preamble to the Constitution talks of a need 'to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of our nation'.

---

<sup>47</sup> As above.

<sup>48</sup> Piechowiak (n 27 above) 3.

Drzewicki contends that each human right constitutes a specific kind of normative standard and a public law relationship between human beings and public authorities, aimed at the most fundamental human values and needing protection against excessive interference by public authorities.<sup>49</sup> This is otherwise known as the vertical dimension. Human rights law, therefore, seeks to make those universally acceptable normative standards binding to both the state and the individual. Without a written constitution providing for fundamental human rights, it is difficult to see a human rights culture flourishing in any state. Swaziland is now a step ahead with the coming into force of its written Constitution, yet still distant from achieving a maximum, effective and workable human rights culture. While the relationship between individuals is excluded from the classic concept of human rights, which focuses on the interaction between the state and the individual, Drzewicki argues that human rights law has integrated certain aspects of the relationship between private parties.<sup>50</sup> This is otherwise known as a horizontal dimension.

The development of human rights law can be traced back to the formation of the UN in response to the atrocities of World War II. Drzewicki<sup>51</sup> divides the levels of universal international human rights law into four stages, namely:

- The first stage, being 1945-1948, began with the adoption of the United Nations Charter (UN Charter)<sup>52</sup> and ended with the proclamation of the Universal Declaration.<sup>53</sup> Being part of the UN, having joined on 24 September 1968, Swaziland is indeed part of the comity of nations that embrace the concept of international human rights, forming part of the broad spectrum of international law. Section 236(1)(2) of its Constitution provides that 'Swaziland shall conduct its international affairs directly or through officers of the government in accordance with the accepted principles of public or customary international law'. More importantly, section 61(1)(c) of the Constitution provides that, in its dealings with other nations, Swaziland's government shall 'promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means'. This, therefore, affirms Swaziland to be among the nation states that have openly and willingly declared a duty to promote and protect human rights in accordance with international

---

<sup>49</sup> K Drzewicki 'Internationalization of human rights and their juridization' in Hanski & Suksi (n 27 above) 27.

<sup>50</sup> As above.

<sup>51</sup> Drzewicki (n 49 above) 33.

<sup>52</sup> 1945.

<sup>53</sup> 1948.

norms and standards, having due regard to the UN Charter provisions.

- The second stage, 1949-1966, is the codification of the programme set out in the Universal Declaration into CESC<sup>54</sup> and CCPR.<sup>55</sup> Swaziland should be applauded for not missing the opportunity of being a state party to these two important covenants. However, acceding to these instruments is one thing; implementing them is another. The challenge for Swaziland lies in the latter. The Constitution will provide a good basis for such implementation and respect for the rule of law provides a vehicle with which such implementation can be achieved.
- The third stage, being 1967-1989, was characterised by the adoption of multiple conventions and protocols, and the initiation of a whole set of implementation measures that serve to guarantee and control the observance of recognised human rights, the entering into force of CEDAW,<sup>56</sup> CAT<sup>57</sup> and the Convention on the Rights of the Child (CRC).<sup>58</sup> In so far as this stage is concerned, save for the Optional Protocol to CCPR, Swaziland should be further applauded for having acceded to all these instruments, though at a very late stage. Again the question of implementation remains a challenge.
- The fourth stage, being 1989 to the present, is characterised by a wider acceptance of the supervisory mechanisms of the UN. Another notable development during this period is the World Conference of Human Rights,<sup>59</sup> which sought to adjust the UN to old and new challenges. As part of its social objectives, Swaziland shall in terms of section 60(1) of the Constitution 'guarantee and respect institutions which are charged by the state with responsibility for protecting and promoting human rights and freedoms by providing those institutions with adequate resources to function effectively'.

Parallel to the development of human rights law was the establishment of the three regional human systems, namely the European, American and the African human rights systems. In this way, human rights law became universally accepted and began to have a binding effect upon member states. For our purposes, therefore, international human rights law should be seen as universally acceptable normative standards regulating and binding the relationship between states, the state and the

---

<sup>54</sup> 1966.

<sup>55</sup> 1966.

<sup>56</sup> 1979.

<sup>57</sup> 1984.

<sup>58</sup> 1989.

<sup>59</sup> 1993.

individual, and individuals *inter se*, in accordance with international human rights treaties. Next I will consider international human rights law within the African human rights system.

## 9 The African human rights system

The African Charter<sup>60</sup> is the principal regional instrument providing for international human rights law within the African human rights system. The Charter was adopted under the auspices of the Organization of African Unity (OAU), now the African Union (AU),<sup>61</sup> which comprises 53 member states. Being the foundational human rights instrument within the African human rights system, the African Charter provides for civil and political rights<sup>62</sup>; economic, social and cultural rights;<sup>63</sup> for peoples' rights;<sup>64</sup> and lastly, for state<sup>65</sup> and individual<sup>66</sup> duties.

The African Charter establishes the African Commission on Human and Peoples' Rights (African Commission) under article 30 of the Charter, to promote and protect human and peoples' rights in Africa. As already mentioned above, Swaziland is a member state of the AU. So far, the African Commission is the only operational and effective enforcement mechanism within the African human rights system. The African Court on Human and Peoples' Rights<sup>67</sup> was established to complement the protective mandate of the African Commission. Swaziland is, however, not party to the Protocol establishing the Court.

Let us now explore the ways in which the rule of law is guaranteed in the African Charter.

One of the most glaring features of the Charter's provisions are the so-called 'claw-back' clauses, according to which rights and freedoms are exercised or denied in accordance with law. These are expressed in the following phrases: 'previously laid down by law',<sup>68</sup> 'subject to law

<sup>60</sup> OAU Doc OAU/CAB/LEG/67/3/Rev 5.

<sup>61</sup> The African Union is established by the Constitutive Act, signed on 12 June 2000 and entered into force on 26 May 2001. The first Summit of the AU was held in South Africa in July 2002.

<sup>62</sup> Arts 2-13 African Charter.

<sup>63</sup> Arts 14-18.

<sup>64</sup> Arts 19-24.

<sup>65</sup> Arts 1, 25 & 26.

<sup>66</sup> Arts 27-29.

<sup>67</sup> Established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol), which came into force on 25 January 2004, thirty days after the deposit of the 15th instrument of ratification in accordance with article 34 (3) of the Protocol.

<sup>68</sup> Art 6 African Charter.



and order',<sup>69</sup> 'within the law',<sup>70</sup> 'provided he abides by the law',<sup>71</sup> 'in accordance with the provisions of the law',<sup>72</sup> and 'in accordance with the provisions of appropriate laws'.<sup>73</sup>

The mere reference to the 'law' cannot be said to ensure respect for the rule of law. What if the law is in violation of human rights? Should individuals blindly respect the law which suppresses their freedoms? In fact, the above-named phrases tend to 'take away with the left hand that which it has given with the right hand', in the sense that they make the Charter's rights subject to limitations imposed by domestic law.<sup>74</sup> At face value, this renders the rights and freedoms in the Charter useless to the individual.

In so far as these phrases are concerned, the African Commission has reasoned that to allow national or domestic law to supersede or override the international law of the Charter, would be to defeat the whole purpose of the rights and freedoms enshrined in the Charter. The position is that international human rights standards must always prevail over contradictory national law, and any limitation of the rights of the Charter must be in conformity with the provisions of the Charter.<sup>75</sup> Therefore, in order for the principle of the rule of law to be respected, the laws of the state concerned must be in accordance with international human rights standards as provided for in international human rights treaties.

The Charter does embody the rule of law as qualified by the interpretation of the African Commission. Our definition for the rule of law, being 'the application and adherence to the law in accordance with international human rights', is therefore accommodated within the Charter provisions. Without a respect for universally acceptable international normative standards, the rule of law cannot be said to exist.

As mentioned above, the African Charter specifically provides in article 1 that member states of AU shall recognise the rights, duties and freedoms enshrined in the Charter. More importantly, article 1 obliges member states to 'undertake to adopt legislative or other measures to give effect' to the rights, duties and freedoms enshrined in the Charter. This means that every legislative measure, in the form of 'law', must give effect to the provisions of the Charter. It is only through adhering to this provision that the rule of law can effectively be adhered to.

---

<sup>69</sup> Art 8.

<sup>70</sup> Art 9.

<sup>71</sup> Arts 10 & 12.

<sup>72</sup> Art 13.

<sup>73</sup> Art 14.

<sup>74</sup> EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 63.

<sup>75</sup> See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

The rule of law also requires a state that is a party to an international instrument to submit to its enforcement mechanism and also to carry out or enforce that enforcement mechanism's decision. It is quite disturbing to note that, in the case of *Lawyers for Human Rights v Swaziland*,<sup>76</sup> the only case against Swaziland so far, the African Commission said:<sup>77</sup>

In making this decision on the merits, the African Commission would like to point out that it is disappointed with the lack of co-operation from the Respondent State [Swaziland]. The decision on the merits was taken without any response from the State. As a matter of fact, since the communication was submitted to the Commission and in spite [of] several correspondences to the state, there has not been any response from the latter on the matter. Under such circumstances, the [African] Commission is left with no other option than to take a decision based on the information at its disposal.

This is a serious indictment for a state calling itself a 'democratic Kingdom'. It reflects badly on its own people and on Africa as a whole. The question that may be posed here is whether a state that does not co-operate with an enforcement mechanism established under an international human rights treaty that is binding upon it can be said to be serious in respecting human rights and the rule of law. The above quote gives an indication of where Swaziland is going, despite the adoption of the new Constitution. If the meaning of the word 'binding' is misplaced in international law, then, surely, Swaziland has effected that misplacement. The above-mentioned case is, however, beyond the scope of this work, yet very pertinent to the article under discussion.<sup>78</sup>

## 10 Conclusion

From this discussion, it is very clear that there is a very close relationship between human rights and the rule of law. In order for Swaziland to be seen to respect the rule of law, she has to embrace human rights in a comprehensive manner. So far, Swaziland has failed to undertake the necessary measures to give effect to the provisions of the African Charter as required by article 1 of the Charter. The African Commission's condemnation in the *Lawyers for Human Rights* case hits the nail on the head and exposes Swaziland's hypocrisy in so far as embracing human rights and respect for the rule of law are concerned. Thus, Mugwanya argues that virtually all African states have been and continue to be the

<sup>76</sup> Communication 251/2002, *Lawyers for Human Rights v Swaziland* adopted by the African Commission on Human and Peoples' Rights at its 37th ordinary session held in Banjul, The Gambia, from 27 April to 11 May 2005.

<sup>77</sup> Para 41.

<sup>78</sup> Among other things, the decision of the case dealt with the question of whether or not the King's Proclamation to the Nation of 1973 was in violation of the African Charter.

most egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa.<sup>79</sup> In so far as Swaziland is concerned, one cannot agree more with Mugwanya's observation.

While earlier scholars saw the existence of the rule of law as a product of democracy and constitutionalism, it is now argued that, with the development and globalisation of human rights, the rule of law is a direct product of the respect of international human rights. Even democracy and constitutionalism exist only where human rights are respected. In the Swaziland Constitution, it is stated that one rationale behind the drafting of the Constitution is that<sup>80</sup>

[i]t has become necessary to review the various constitutional documents, decrees, laws, customs and practices so as to promote good governance, the rule of law, respect for our institutions and the progressive development of the Swazi nation.

With the gradual transformation of human rights into law, a respect for human rights is binding on all nations and individuals. Besides adhering to the provisions of the African Charter, the IBA report states that Swaziland has a number of general obligations with respect to human rights, which would apply to its present rule of law crisis. These include the Harare Commonwealth Declaration, 1991, wherein Swaziland pledged to work towards 'democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government'.<sup>81</sup>

Respecting the rule of law is now part of respecting international human rights law. It is also a gateway towards peace and stability in any society, as the enjoyment of peace and stability is dependent upon the respect for international human rights law as provided for in international human rights treaties. Human rights and the rule of law face the same challenges in Africa. While their goals remain interdependent and interrelated, the application and enforcement of international human rights law remain crucial components for the respect for the rule of law.

Udombana argues that Africa is yet to achieve a true democracy that will guarantee, even minimally, the rule of law and human rights.<sup>82</sup>

<sup>79</sup> GW Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268.

<sup>80</sup> See the Preamble of the Constitution of Swaziland.

<sup>81</sup> See art 9 of the Harare Commonwealth Declaration, 1991. <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=34457&int1stParentNodeID=20596&int2ndParentNodeID=20723> (accessed 17 September 2004).

<sup>82</sup> NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1236.

This, however, should not be a justification for Swaziland to compromise respect for human rights and the rule of law. Below are Thatcher's words of wisdom:<sup>83</sup>

Our abiding commitment to the rule of law is the very bedrock of our civilisation. It is what makes all else possible, from the flowering of the arts to the steady advance of the sciences. The idea that men must govern themselves not by the arbitrary commands of a ruler but by their own considered judgment, is the means whereby chaos is replaced by order. Balanced by the peaceful resolution of differences, the rule of law and the institutions of representative democracy are what stand between civilization and barbarism. It is through law-governed liberty that mankind has been able to achieve so much.

---

<sup>83</sup> Thatcher (n 4 above) 23.

# A rights-based approach to access to HIV treatment in Nigeria

*Ebenezer Durojaye\**

Attorney, Centre for the Right to Health, Lagos, Nigeria

*Olabisi Ayankogbe\*\**

Lecturer, Nigerian Law School, Lagos, Nigeria

## Summary

*This article focuses on the right to health under international and regional human rights instruments and issues affecting access to HIV/AIDS treatment in Nigeria. Although the Constitution of Nigeria does not recognise the right to health, Nigeria has ratified international and regional human rights instruments which guarantee the right to health as a fundamental human right. Arguing that access to treatment is a fundamental right, the authors focus on factors militating against access to treatment in Nigeria, such as the high cost of drugs, poor facilities in the health care sector, lack of respect for patients' rights, and stigma and discrimination associated with HIV/AIDS. A comparative analysis with other countries, such as South Africa, and possible suggestions for the way forward are then made.*

## 1 Introduction

For millions of people living with HIV/AIDS (PLWHA) worldwide, access to treatment is of utmost importance. Of the over 39 million PLWHA in the world, only a handful have access to treatment. Most PLWHA are found in sub-Saharan Africa — a continent that is already weakened by severe poverty, a wide-spread lack of education and the presence of other diseases. Millions of people are faced with death from opportunistic infections, such as tuberculosis, pneumonia, meningitis or other

---

\* LLM candidate (Free State); ebenezer1170@yahoo.com

\*\* LLM (Lagos); bisayanks@yahoo.com. The authors are grateful to Prof Charles Ngwena of the University of the Free State for his inspiration and suggestions during the preparation of this article.

severe diseases which their immune systems are unable to fight against.<sup>1</sup> Already millions have died as a result of these diseases. Most of the deaths could have been avoided had the appropriate drugs and needed expertise to monitor the diseases been available. Undoubtedly, providing treatment to PLWHA is an essential aspect of mitigating the impact of the epidemic on our society.

Access to treatment in the context of HIV/AIDS relates to the presence of care, the provision of painkillers, treatment of opportunistic infections and the availability of anti-retroviral drugs (ARVs), which help in suppressing the effect of the virus on the immune system. Although these drugs do not cure HIV/AIDS, they dramatically improve the rates of mortality and morbidity, prolong lives, improve quality of life, revitalise communities and transform perceptions of HIV/AIDS from a plague to a manageable chronic disease.<sup>2</sup>

However, as important as these drugs are, it is sad to note that in resource-limited countries, the majority of people who need them hardly ever have access to them. According to the World Health Organisation (WHO), most of the over 30 million PLWHA in developing countries do not have access to these drugs. The WHO states further that, of the six million people in dire need of anti-retroviral drugs in the developing world, only about 230 000 people have access, half of whom are from Brazil.<sup>3</sup> But this situation is not limited to anti-retroviral drugs alone. It is also true that in developing countries, access to mere palliative care and vitamins, which help in the treatment of opportunistic infections, is denied to the majority of people. Thus, millions of lives continue to be wasted to HIV/AIDS in developing countries, especially in sub-Saharan Africa.

In developing countries, access to HIV/AIDS treatment is difficult due to various reasons, such as the lack of political will or commitment, poor economic conditions and a lack of appropriate distribution mechanisms. Aside from these problems, two other important factors stand out: a lack of infrastructure in health care institutions such as inadequate health facilities, a lack of beds and laboratories, a lack of qualified personnel, poor funding and the high cost of anti-retroviral drugs and other medications occasioned by patent rights enjoyed by manufacturers of drugs in developed countries.<sup>4</sup> Also, discriminatory attitudes of health care workers to PLWHA often contribute to a lack of access to treatment. This situation therefore has raised critical issues as to the right to health of PLWHA, as guaranteed under international and regio-

---

<sup>1</sup> PANOS *Beyond our means? The cost of treating HIV/AIDS in the developing world* (2000).

<sup>2</sup> World Health Organisation *Scaling up anti-retroviral therapy in resource-limited settings. Guidelines for a public health approach* (2002).

<sup>3</sup> As above.

<sup>4</sup> See PANOS (n 1 above).

nal human rights instruments, including the domestic laws of countries. In a human rights context, access to treatment places legal obligations on states to ensure easy access to health facilities and goods, including essential drugs, particularly life-saving drugs, to treat pandemics such as HIV/AIDS. It is the aim of this paper to reaffirm that health is a human right and that the denial of access to treatment is a violation of human rights recognised by human rights instruments.

This article focuses on the right to health under international and regional human rights instruments and on issues affecting access to HIV/AIDS treatment in Nigeria. We will argue that access to treatment is a fundamental right and investigate factors militating against access to treatment in Nigeria, such as the high cost of drugs, poor facilities in the health care sector, lack of respect for patients' rights, and stigma and discrimination associated with HIV/AIDS. A comparative analysis with other countries, such as South Africa, will be undertaken.

## 2 The right to health

This right has been recognised ever since the birth of the United Nations (UN) in 1945. The Charter of the UN urges state parties to respect rights to a higher standard of living and solutions to international health problems.<sup>5</sup> Article 25(1) of the Universal Declaration of Human Rights (Universal Declaration) provides that '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'.<sup>6</sup> Although the Universal Declaration is not a treaty, it has been widely accepted as an authoritative document on human rights worldwide. In short, some of the norms set out in the Universal Declaration constitute part of customary international law.<sup>7</sup> However, it has been held that the right to health is 'insufficiently definite to constitute rules of customary international law'.<sup>8</sup>

The International Covenant on Economic Social and Cultural Rights (CESCR), in which appears the most comprehensive provision on this issue, provides as follows:<sup>9</sup>

---

<sup>5</sup> Art 55 Charter of the United Nations.

<sup>6</sup> Universal Declaration of Human Rights, GA Res 217 A (III) (10 December 1948).

<sup>7</sup> JP Humphrey 'The Universal Declaration of Human Rights: Its history, impact and juridical character' in BG Ramcharam (ed) *Human rights: Thirty years after the Universal Declaration* (1979) 21 28.

<sup>8</sup> *Flores v Southern Peru Copper Corporation* US Court of Appeal Second Circuit 343 F 3d 140 (2003).

<sup>9</sup> Art 12 CESCR, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

- 1 The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- 2 The steps to be taken by States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

This provision is wide and all-embracing, placing an obligation on state parties to ensure that they take active steps towards realising the contents of the provision. It is similar to that contained in the Preamble to the Constitution of the WHO.<sup>10</sup> The Constitution of the WHO gives a comprehensive and detailed explanation of the nature of the right to health:<sup>11</sup>

Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of all human beings without distinction as to race, colour, and religion.

In addition to these instruments, article 24 of the Convention on the Rights of the Child (CRC)<sup>12</sup> and article 12 of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>13</sup> contain important provisions on the right to health.

Recently, the UN Committee on Economic Social and Cultural Rights (Committee on ESCR) explained that:<sup>14</sup>

The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

It is to be noted that the right to health is linked to other rights such as the right to life, human dignity and freedom from discrimination. Leary

<sup>10</sup> The Constitution of the WHO was adopted by the International Health Conference, New York, 19-22 June 1945; opened for signature on 22 July 1946 by the representatives of 61 states; 14 UNTS 185.

<sup>11</sup> As above.

<sup>12</sup> Convention on the Rights of the Child, GA Res 25 (XLIV), UN GAOR Supp No 49 UN Doc A/RES/44/25 1989.

<sup>13</sup> Convention on the Elimination of All Forms of Discrimination Against Women, GA Res 54/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/46 1980.

<sup>14</sup> The Right to the Highest Attainable Standard of Health, UN Committee on ESCR General Comment No 14, UN Doc E/C/12/2000/4 para 38.



argues that the right to health presupposes that fundamental principles of human rights, such as dignity, non-discrimination, participation and justice are relevant to issues of health care and health status.<sup>15</sup> Thus, a denial of treatment to a person because of his or her HIV status will have an impact on his or her right to human dignity, right to non-discrimination and right to life.<sup>16</sup> In the Vienna Declaration and Programme of Action of 1993,<sup>17</sup> it is reaffirmed that all human rights are universal, interdependent, interrelated and indivisible. The UN Human Rights Committee suggested that the right to life in article 6 of the International Covenant on Civil and Political Rights (CCPR) should not be given a narrow interpretation, but should be seen to affect other rights, such as the right to housing, food and medical care.<sup>18</sup> Mann notes that nearly every article contained in human rights documents has the propensity to impact upon the enjoyment of the right to health.<sup>19</sup>

The content of the right to health is summarised by the General Comment No 14 of the UN Committee on ESCR in this way:<sup>20</sup>

[T]he right to health must be understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.

It identifies four key elements of the right, namely, availability, accessibility (including affordability), acceptability and quality.<sup>21</sup> Availability relates to making health facilities and goods available in sufficient quantities. Accessibility has four important aspects, namely, non-discrimination, physical accessibility, economic accessibility and information accessibility. Acceptability relates to the provision of health services that are culturally and ethically acceptable to all, while quality implies that health services of good quality must be provided for all.

In addition to the various international treaties mentioned above, the right to health is contained in regional human rights instruments. For example, the African Charter on Human and Peoples' Rights (African Charter),<sup>22</sup> in its article 16, provides that everyone has the right to enjoy the best attainable state of physical and mental health. Similar provisions exist in the European Social Charter and the Additional Protocol to

<sup>15</sup> V Leary 'The right to health in international human rights law' (1994) 1 *Health and Human Rights* 27.

<sup>16</sup> General Comment No 14 (n 14 above).

<sup>17</sup> Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 ch III.

<sup>18</sup> 'The right to life' UN GAOR Human Rights Committee 37th session Supp No 40.

<sup>19</sup> JM Mann *et al* 'Health and human rights' (1994) 1 *Health and Human Rights* 6-23.

<sup>20</sup> General Comment No 14 (n 14 above) para 9.

<sup>21</sup> n 14 above, para 12.

<sup>22</sup> African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>23</sup>

At the domestic level, provisions on the right to health exist in about 60 national constitutions, though many of them as directive principles,<sup>24</sup> thereby rendering the right to health non-justiciable.

### 3 Human rights and access to treatment

It is generally agreed that access to treatment is an integral part of the right to health. A lack of access to medication, especially life-saving medication, will adversely affect a person's physical and mental well-being. Besides, it has been held that a deportation of a person at an advanced stage of AIDS to his or her country of origin, where access to treatment will not be assured, amounts to cruel, inhuman and degrading treatment.<sup>25</sup> The UN Committee on ESCR observes that:<sup>26</sup>

The right to health is closely related to and dependent upon the realisation of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

The Committee on ESCR further states that the right to health has imposed upon nations obligations to respect, protect and fulfil the right. It explains that the obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect the right requires states to take measures that prevent third parties from interfering with the right, while the obligation to fulfil the right requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health. This should include a comprehensive national health policy aimed at realising the right to health and efforts to enable the citizens to enjoy the right to health.<sup>27</sup>

<sup>23</sup> Art 11 European Social Charter and art 10 Protocol to the American Convention on Human Rights.

<sup>24</sup> See The Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, Report of the Special Rapporteur, P Hunt, submitted in accordance with Commission Resolution 2002/31 UN ESCOR 59th session UN DOC ECN 6/2003/58 (2003).

<sup>25</sup> *D v United Kingdom* (1997) 24 EHRR 423 European Court of Human Rights.

<sup>26</sup> General Comment No 14 (n 14 above) para 3.

<sup>27</sup> n 14 above, para 36.

In addition, the International Guidelines on HIV/AIDS and Human Rights in its revised guidelines 6 provides as follows:<sup>28</sup>

States should enact legislation to provide for the regulation of HIV related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information and safe and effective medication at an affordable price.

States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV/AIDS prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV/AIDS and related opportunistic infections and conditions.

Recently, some decisions of domestic courts seem to support the assertion that a denial of the right to health may impact negatively on the right to life. For example, the Indian Supreme Court held that a denial of the right to emergency medical care constitutes a violation of the right to life guaranteed under the Indian Constitution.<sup>29</sup> Also, the Supreme Court in Costa Rica held that a denial of access to life-saving medication for people infected with HIV/AIDS infringes their right to life.<sup>30</sup>

It is clear from the above that a denial of access to treatment to a PLWHA will be tantamount to a violation of the right to life and other human rights recognised under international and regional human rights instruments.

Despite this array of laws on the right to health, PLWHA still encounter violations of their rights, particularly with regard to access to treatment in many developing countries. The right to health, being a part of social and economic rights, faces the challenges, under domestic laws, of non-justiciability and a lack of resources. A failure to respect the human rights of PLWHA causes them to run underground, thereby avoiding treatment or seeking help when they need it, thus conversely fuelling the spread of the epidemic within a society.

## 4 The situation in Nigeria

### 4.1 Background

The first clinical case of HIV was reported in Nigeria in 1986.<sup>31</sup> Ever since this, the epidemic has ravaged the country relentlessly. The pre-

<sup>28</sup> Adopted at the Third International Consultation on HIV/AIDS and Human Rights (Geneva 25 July 2002), organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

<sup>29</sup> *Pachim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37.

<sup>30</sup> *Alvarez v Caja Costarricense de Seguro Social Exp 5778-V-97 No 5934-97*, cited by AE Yamin in 'Not just a tragedy: Access to medication as a right under international law' (2003) 21 *Boston University International Law Journal* 370.

valence rate has risen from a mere 1,8% in 1991 to 5% in 2003, translating to about 3,7 million infected persons, mostly affecting people between the ages of 15 and 29.<sup>32</sup> In the early stages of the epidemic in the country, like in many other countries on the continent, there was an element of fear and denial exhibited by the government of the day. This made it impossible for proper action to be taken to address the epidemic. It must be admitted, though, that this inaction on the part of government was due mainly to political instability, a lack of political will and a lack of awareness. Coupled with this are the lack of reliable data, a lack of funding, the lack of participation by PLWHA and the inability of the legal system in the country to address the epidemic. All these factors contributed to insufficient advocacy and awareness-raising, and a public perception that HIV/AIDS was not significant.<sup>33</sup>

However, with the coming into power of a democratic government in 1999, things began to change for the better. The Obasanjo regime initiated bold steps to combat the spread of the epidemic. The steps taken include the setting up of the National Action Committee on AIDS (NACA), a body made up of representatives from government, NGOs, the private sector and PLWHA. This body is charged with the responsibility of managing government response to HIV/AIDS. The government also started one of the most ambitious ARV programmes in Africa by providing treatment for about 12 000 people at a highly subsidised price. Notwithstanding, some of the challenges faced by PLWHA as regards access to treatment include discrimination by health care providers, poor or no facilities in the health sector, the exorbitant cost of drugs due to patent rights and the lack of a proper legal framework.

## 4.2 Legal and policy framework on access to treatment in Nigeria

Nigeria has ratified most of the international and regional human rights instruments mentioned above. In addition, Nigeria incorporated into her domestic law the African Charter by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Law.<sup>34</sup> The Nigerian Constitution of 1999 does not recognise the right to health as a justiciable right,<sup>35</sup> unlike the Constitution of South Africa, which ade-

<sup>31</sup> National Action Committee on AIDS: Situation Analysis Report on STIS/HIV/AIDS in Nigeria March 2000, <http://www.nigeria-aids.org> (accessed 5 March 2005).

<sup>32</sup> Federal Ministry of Health Report on National Surveillance on HIV/AIDS and STIS in Nigeria (2003).

<sup>33</sup> Situation Analysis Report on STIS/HIV/AIDS in Nigeria (n 31 above.)

<sup>34</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Law Cap 10 Laws of the Federation 1990.

<sup>35</sup> See sec 6(6) of the Nigerian Constitution 1999, which provides that all rights, including the right to health, listed in ch 2 of the Constitution, shall not be made justiciable.

quately guarantees social and economic rights, including the right to health.<sup>36</sup> Section 17 of the Nigerian Constitution is the only section that deals with or makes mention of health and medical facilities. Section 17(1) provides that the social order is founded on ideals of 'freedom, equality and justice', whereas section 17(3)(d) provides that the state shall direct its policy towards ensuring that 'there are adequate medical and health facilities for all persons'.

However, this section is part of chapter 2 of the Constitution (Fundamental Objectives and Directive Principles of State Policy), which is non-justiciable. Moreover, the fact that under Nigerian law, an international treaty cannot be enforced unless it has been incorporated into the local law makes it difficult for the various provisions on the right to health contained in different international instruments to have force in the country.<sup>37</sup> However, under chapter 4 of the same Constitution, a number of fundamental human rights, such as the right to life, human dignity, privacy, association, liberty and freedom from discrimination, are guaranteed. As mentioned earlier, all these rights are important in safeguarding the right to health and access to treatment for PLWHA.

Apart from this general provision, no other legislation has a provision relating to HIV/AIDS in Nigeria.

Though there exists the National Policy on HIV/AIDS,<sup>38</sup> the HIV/AIDS Emergency Action Plan (HEAP),<sup>39</sup> the National Reproductive Health Policy,<sup>40</sup> the Draft Policy on HIV/AIDS and Workplace and others, these documents are not strictly adhered to or implemented.

The National Policy on HIV/AIDS contains provisions suggesting that access to treatment will be made available to PLWHA in the country. The policy provides as follows:

The government will work towards ensuring that all persons in the country shall have access to the quality of health care that can adequately treat or manage their conditions, including the provision of anti-retroviral medication.

It further states the following:

- (i) Cost-effective and affordable care shall be made accessible to all people with HIV related illnesses including access to anti-retroviral therapy.
- (ii) The use of ARV shall be under medical supervision and shall be governed by established effective guidelines. This will be updated regularly with the result of the research.
- (iii) A cost-effective drug list for the management of HIV/AIDS shall be developed and incorporated into Nigeria's essential drug list.

<sup>36</sup> See sec 27 of the Constitution of South Africa Act 108 of 1996.

<sup>37</sup> See sec 12 of the Nigerian Constitution 1999, which provides that a treaty only has force in the country if the National Assembly has enacted it into law. It is only the African Charter that has been so enacted.

<sup>38</sup> Launched in August 2003.

<sup>39</sup> Launched in 2000.

<sup>40</sup> Launched in 2000.

- (iv) Sale of ARVs shall be provided solely under strict medical supervision.

Nigeria is not wanting in policy formulation. Rather, the proper implementation of these policies has been a major problem. Also, many of the policies lack enforceability under Nigerian law. For instance, the National Policy declares that mandatory HIV testing is illegal, but fails to state what will happen to culprits of such acts. The HEAP program is fraught with a lack of clarity of purpose and incoherent strategies.

This gap in policy formulation in the country is a reminder to us that the country needs the enactment of appropriate legislation to address the human rights issues raised by HIV/AIDS. The lack of legislation on HIV has made it almost impossible to redress human rights violations experienced by PLWHA.

Although Nigeria has an anti-retroviral therapy programme, this is not without obstacles. There are problems concerning a lack of treatment literacy on the part of health care workers and patients. Many doctors have placed patients on ARV therapy without knowing their viral load. Also, there have been cases where patients have had to stop taking the drugs simply because they were uncomfortable. This could have serious implications for the health of the patient. The fact that there are no clear-cut guidelines for the administration of ARV in the country is worsening this situation. There have been instances where ARV drugs are bought over the counter in public places. Also, there have been cases where PLWHA experienced shortages of the drugs. All these factors, coupled with the fact that there are only a few centres where one may obtain drugs, have marred the ARV programme.

### **4.3 Factors limiting access to treatment in Nigeria**

The following factors are often regarded as barriers to access to HIV/AIDS treatment in Nigeria:

#### **4.3.1 Discrimination in health care institutions**

It is well known that many PLWHA who seek medical attention in public and private hospitals have been subjected to various forms of human rights violations. Experience has shown that in hospitals, medical attention is often refused to PLWHA. PLWHA are stigmatised and made to suffer discrimination from health care providers. It has been observed that the principle of non-discrimination is important to human rights thinking and practice and that under international law, all people should be treated equally and given equal opportunities.<sup>41</sup> Research carried out by the Physicians for Human Rights, Boston, United States,

---

<sup>41</sup> S Gruskin & D Tarantola 'Health and human rights' in R Detels & R Beaglehole (eds) *Oxford textbook on public health* (2001).

Policy Project, the Futures Groups International and the Centre for the Right to Health, Lagos (PHR/TFG and CRH) in about four states in Nigeria,<sup>42</sup> revealed unethical and discriminatory practices against PLWHA by health care providers. About 48% of professionals expressed their belief that PLWHA could not be treated effectively in their facility. Another 10% was reported as refusing to care for PLWHA; while 65% had observed other health care workers who refused to care for PLWHA. The research further revealed that 10% indicated that they had refused PLWHA admission to a hospital. Also, some 40% agreed that a person's HIV status should be confirmed by his or her appearance. Eby, a PLWHA, tells us:<sup>43</sup>

Everybody in that hospital, from the doctor to the cleaner, knew I had HIV. Some of them come to my room masked, gloved, and gowned, as if HIV flies in the air. No matter their fear, I cannot forgive them for keeping me on the delivery couch unattended for over two hours after my delivery because no one was willing to suture my episiotomy and clean my baby and me up. My mother did the cleaning, and my episiotomy was never sutured. I paid dearly with recurrent infection and heavy antibiotics. I feel very bitter about the way I was treated.

Many of the human rights instruments mentioned above contain non-discrimination provisions on the ground of sex, race, religion, political belief or other status. It is recognised that, within the international human rights framework, discrimination is a breach of a government's human rights obligations.<sup>44</sup> The Committee on ESCR has noted that a state will fail in its obligation under the Covenant if it fails to guarantee access to health care services and goods to all on a non-discriminatory basis.<sup>45</sup> While it is admitted that not all discrimination amounts to a violation of human rights, it is widely agreed that adverse discrimination, such as denying treatment to an individual based on HIV status, will result in a human rights violation. Gruskin and Taratonla note that:<sup>46</sup>

Adverse discrimination occurs when a distinction is made against a person which results in their being treated unfairly or unjustly. In general, groups that are discriminated against tend to be those that do not share the characteristics of a dominant group within the society.

Although most human rights instruments do not specifically prohibit discrimination based on health status, the UN Human Rights Commission explained that the phrase 'other status' contained in human rights

<sup>42</sup> An unpublished research report conducted in 2002 in four states, namely Abia, Gombe, Kano and Oyo.

<sup>43</sup> Centre for the Right to Health *HIV/AIDS and human rights. Experiences of people living with HIV/AIDS in Nigeria* (2000).

<sup>44</sup> RB Bilder 'An overview of international human rights law' in H Hannum (ed) *Guide to international human rights practice* (1992) 3-18.

<sup>45</sup> General Comment No 14 (n 14 above).

<sup>46</sup> Gruskin & Tarantola (n 41 above).

instruments applies to health status, particularly HIV status.<sup>47</sup> It is noted that, though section 42 of the Nigerian Constitution does not include the phrase 'other status', article 2 of the African Charter, which has been incorporated into Nigerian law, forbids discrimination on 'other status'. The implication of this would seem to be that Nigeria is bound to prevent discrimination based on HIV status. The Commission has further noted that access to medication in the context of pandemics, such as HIV/AIDS, is one fundamental element for achieving progressively the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>48</sup>

In its General Comment No 14, the Committee on ESCR states that states have an obligation to 'ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups'.<sup>49</sup> According to the UN General Assembly Special Session on HIV/AIDS in its Declaration of Commitment, states are enjoined to ensure respect for the human rights of all, including PLWHA, and that states should take steps to eliminate all forms of discrimination associated with HIV/AIDS in their countries.<sup>50</sup> While it is agreed that the Declaration is not legally binding on states, it is no doubt a highly respected and universally acceptable resolution, having been issued by the UN General Assembly. The South African Constitutional Court has held that a denial of employment to a person based solely on HIV/AIDS status, without proof of incompetence, amounted to unfair discrimination contrary to the South African Constitution.<sup>51</sup>

There is no doubt that the responsibility of government under international law includes ensuring equal protection under the law, as well as guaranteeing access to medical care for all, regardless of health status. The denial of treatment to PLWHA is a violation of their recognised human rights guaranteed under the Nigerian Constitution and other human rights instruments which the country has ratified. In addition, discrimination hinders PLWHA from seeking treatment when in dire need, and even prevents people from knowing their status, thereby fuelling the spread of the epidemic within a particular society.

#### 4.3.2 Poor facilities

The health care system in Nigeria is grossly underfunded and understaffed and suffers from acute problems, including a scarcity of materi-

---

<sup>47</sup> Commission on Human Rights Resolutions 1995/44 of 3 March 1995 & 1996/43 of 19 April 1996.

<sup>48</sup> Commission on Human Rights Resolutions 2001/33 of April 2001.

<sup>49</sup> General Comment No 14 (n 14 above) para 45.

<sup>50</sup> UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2 June 2001.

<sup>51</sup> *Hoffman v South African Airways* 2000 11 BCLR 1235 (CC).



als and an inadequacy of infrastructure, contributing to the overall bad behaviour of health care workers.<sup>52</sup> Just like in other developing countries, Nigeria's health professionals are poorly paid and work long hours, experiencing equipment shortages and obsolete facilities.<sup>53</sup> Poor funding has led to a state of total decay in the health care sector. Nigeria's life expectancy has declined from 53 years in 1990 to 50 years in 2002. The increasing prevalence of HIV/AIDS has exacerbated this decline.<sup>54</sup>

Often medical attention is not available to everyone in the developing world due to the appalling condition of the health sector. Because government spending on the health sector is often very limited, goods such as gloves, syringes, drugs and the like are not available. Research conducted by PHR/TFG and CRH (mentioned earlier) revealed that in most of the health facilities visited, adequate provisions such as gloves, disposable injections, overalls and such were lacking. It was estimated that Nigeria allocated a mere 2,5% of her total budgetary spending in the year 1998 to the health sector.<sup>55</sup> In a country where there are about 3 000 patients to a doctor, this amount is ridiculously low.<sup>56</sup> Although it is admitted that spending on health has increased in recent times, the margin is still small compared to the need of the health care sector. During the African Leaders Forum on HIV/AIDS in Abuja, it was agreed that at least 15% of the total budget of countries in Africa be devoted to the health sector in order to combat the HIV epidemic.<sup>57</sup> Many African countries, including Nigeria, have not lived up to this commitment.

Part of the obligations of a state under international law is to fulfil the right to health by ensuring that adequate resources are spent on the health sector to guarantee access to health services and goods for all. According to the Committee on ESCR, a state in which a significant number of its citizens are denied access to medical care is failing in its obligation under the Covenant.<sup>58</sup> While it is recognised that the issue of resources is important in Nigeria, where the majority of its citizens live below the poverty level, this may not be a justification for an inability to meet her core obligations under the Covenant.<sup>59</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights state that the realisation of rights

<sup>52</sup> UN System in Nigeria: Nigeria Common Country Assessment (2001) xix.

<sup>53</sup> As above.

<sup>54</sup> See Federal Ministry of Health *HIV/AIDS: What it means for Nigeria* (2002).

<sup>55</sup> PANOS *Patent, pills and public health: Can TRIPS deliver?* (2002).

<sup>56</sup> As above.

<sup>57</sup> Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases by African leaders April 2001 OAU/SPS/ABUJA/3.

<sup>58</sup> The Nature of State Parties' Obligations Committee on ESCR General Comment No 3, 5th session UN Doc E/1991/23 Annex III.

<sup>59</sup> General Comment No 14 (n 14 above) para 47.

under the Covenant, based on maximum available resources, obliges state parties to ensure minimum subsistence rights for everyone, regardless of the level of economic development in a given country.<sup>60</sup> This position was further stressed in the Maastricht Guidelines, where it was said that 'resource scarcity does not relieve states of certain minimum obligations in respect of the implementation of economic, social and cultural rights'.<sup>61</sup>

HIV/AIDS has further stretched the already weak health system of the country. Inadequate bedding, drugs and personnel are common in private and public hospitals in Nigeria. This makes it difficult for PLWHA to seek medical attention or even get good medical attention when the need arises. The right to health requires that medical services of good quality be provided to all.<sup>62</sup> Thus, many lives that could have been saved are lost to a lack of medical attention. As stated above, there is an obligation upon a state to guarantee the human right to health of their citizens in accordance with international human rights treaties which they have ratified.<sup>63</sup> Thus, any state which fails to ensure the availability of adequate facilities in the health care sector, is failing in its duties and obligations under international law.

#### 4.3.3 The high cost of drugs

Access to HIV/AIDS treatment has been very difficult in Nigeria and many developing countries because of the high cost of medication. Anti-retroviral drugs can ensure PLWHA a normal life for a considerable number of years. The truth remains that many PLWHA in Nigeria and Africa do not have access to these drugs. Many deaths resulting from AIDS-related complications in Africa could have been avoided by access to anti-retroviral drugs. The Trade Related Aspect of Intellectual Property Rights (TRIPS agreement) of the member states of the World Trade Organisation (WTO) allows for strong protection of patent rights over manufactured drugs. This in turn has led to the high cost of drugs for PLWHA in Nigeria and other developing countries.

The TRIPS agreement, which members of the WTO are to incorporate into their domestic legislation, allows for exclusive rights over patented drugs for a period of 20 years.<sup>64</sup> Many of the manufacturers who enjoy patent rights over pharmaceutical products are from developed countries. They justify the existence of patents by the need for research and

<sup>60</sup> Limburg Principles E1991/23, annex III.

<sup>61</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reprinted in (1998) 20 *Human Rights Quarterly* 691.

<sup>62</sup> See General Comment No 14 (n 14 above).

<sup>63</sup> As above.

<sup>64</sup> See arts 28 & 33 of the Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPS Agreement).

development. But drug patents, especially patents over HIV/AIDS drugs, lead to a monopoly. high costs, thus hindering access to these drugs. In 2003 alone, about two and half million people died of AIDS-related illness in sub-Saharan Africa.<sup>65</sup> Perhaps many of these deaths could have been avoided had there been access to life-saving drugs. In some developing countries, people spend as much as US \$300 per month on drugs.<sup>66</sup> For a country like Nigeria, the minimum monthly spending on HIV drugs is about US \$200.<sup>67</sup> Only a handful of infected persons are able to afford this. Women and children are worst hit, as the numbers of infections and deaths among them continue to rise. Mother-to-child-transmission of HIV could have been reduced easily but for a lack of access to anti-retroviral drugs.

The TRIPS agreement is a serious obstacle to the fulfilment of obligations under international human rights law, particularly those obligations contained in CESC. Chapman argues that, for intellectual property rights to qualify as widely accepted universal human rights, its regime and implementation must be consistent with other internationally recognised human rights.<sup>68</sup> In one of its statements, the Committee on ESCR notes:<sup>69</sup>

[A]ny intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other rights set out in the Covenant is inconsistent with the legally binding obligations of the State party.

Similarly, the UN High Commissioner for Human Rights expressed concerns about the negative implication of strict patent rights on access to medications and the enjoyment of the right to health.<sup>70</sup>

Although the TRIPS agreement allows some flexibility, compulsory licensing, parallel importation and exceptions while incorporating the agreement into domestic legislation, not many countries of the developing world have been able to take advantage of this. This is due to a lack of expertise or political will on the part of governments. Where some of these countries have indicated their willingness to invoke the exceptions (for instance South Africa and Brazil), they have often faced serious opposition from developed countries that benefit from the

<sup>65</sup> UNAIDS AIDS Epidemic Update Report December 2003.

<sup>66</sup> 'Zimbabwe: High costs hamper access to ARVs' *Plus News* 9 January 2005 <http://www.irinnews.org/AIDSreport> (accessed 9 September 2005).

<sup>67</sup> G Kombe *et al* *Scaling up anti-retroviral treatment in the public sector in Nigeria: A comprehensive analysis of resource requirements* (2004).

<sup>68</sup> AR Chapman 'The Human rights implications of intellectual property protection' (2002) 5(4) *Journal of International Economic Law* 861.

<sup>69</sup> Human rights and intellectual property issues: Statement by the Committee on Economic, Social and Cultural Rights EC.12/2001/15 26 November 2001 para 12.

<sup>70</sup> The impact of the Agreement on Trade Related Aspects of Intellectual Rights on Human Rights: Report of the High Commissioner ECN 4/Sub/2/2001/13 27 June 2001.

patents on drugs. A strict patent regime, as suggested by TRIPS, is an impediment to access to HIV/AIDS treatment and a threat to the right to life guaranteed under international and regional human rights instruments. Yamin notes:<sup>71</sup>

The duty to provide access to life-saving or life-sustaining medications would not only clearly seem to fall within these expanded notions of obligations deriving from the right to life, but has also explicitly challenged international human rights bodies to draw together conceptually the rights of life and health.

At the Ministerial Meeting of the WTO in Doha, it was resolved that the TRIPS agreement 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all'.<sup>72</sup>

Today, in some developing countries efforts are made to ensure the provision of anti-retroviral drugs to PLWHA, but this is just for few people. With the exception of Brazil — where ARVs are available for free to virtually all PLWHA — other countries are only meeting the needs of a small percentage of infected persons. For example, in Nigeria, the government's ambitious ARV programme is catering merely for the needs of about 12 000 PLWHA out of about 3,7 million people infected. The lack of care and support, including treatment for PLWHA, hinders prevention programmes on HIV/AIDS and fuels the stigma associated with the epidemic. During the African Union meeting in Maputo, 2003, African leaders, realising the importance of access to HIV treatment as a way of combating the spread of the epidemic, resolved that they would<sup>73</sup>

ensure that all opportunities for scaling up treatment for HIV/AIDS are pursued energetically and creatively and 'seek' partnerships with international donors, civil society business sector and people living with HIV/AIDS, in order to extend effective care, support and treatment to the maximum number of people . . . made vulnerable by HIV/AIDS.

Not many countries in Africa have explored this avenue.

#### 4.3.4 HIV testing and confidentiality

In private and public hospitals in Nigeria, there exists a lack of respect for patients' rights. Patients are not expected to question the actions of health care providers. With the advent of HIV/AIDS, the situation deteriorated as testing is conducted without informed consent and patient confidentiality is breached. Women are often worse off. Many women attending antenatal programmes in Nigeria have reportedly been sub-

<sup>71</sup> Yamin (n 30 above) 337.

<sup>72</sup> The 4th Ministerial Meeting of the World Trade Organization, Doha, Qatar, 20 November 2001 WTO Doc No WT/MIN(01)/DEC/2 (2001).

<sup>73</sup> Maputo Declaration on Malaria, HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Assembly /AU/DECL 6(II) para 4.

jected to mandatory testing for HIV, contrary to their wishes. This is a violation of recognised human rights guaranteed under the Nigerian Constitution and the African Charter.

The PHR/TFG and CRH research revealed that over 50% of health professionals reported obtaining informed consent for HIV testing half of the times or fewer. Of these, 27% indicated that they never obtained informed consent for HIV tests. Similarly, 54% reported that, regardless of consent, routine HIV testing of all patients scheduled for surgery always took place at their facilities, and 50% reported such routine HIV testing of all women attending antenatal care clinics.<sup>74</sup> This point is buttressed by a personal experience:<sup>75</sup>

I have registered for antenatal in a private hospital near my house. I was told to do an HIV test as part of the routine test. I refused, and they bluntly told me they cannot take my delivery if I do not take the test. I went to a government health centre. They filled out a form for blood test; I read it but there was nothing indicating HIV test so I went for the test. During my next visit, I was worried when the midwife told me that I have to go to the teaching hospital for special management. She would not explain why, rather she gave me a letter. Out of curiosity I read it on my way home and learnt that I had tested HIV positive. My world crashed on my face. I locked myself up and cried for weeks.

Mandatory testing for HIV without informed consent denies patients the opportunity of pre- and post-test counselling, a very crucial aspect of the HIV/AIDS prevention programme. As noted earlier, it is also a violation of the right to privacy, bodily integrity and freedom from degrading and inhuman treatment, all guaranteed under chapter IV of the Nigerian Constitution. When testing is targeted at pregnant women attending antenatal clinics, as shown from the situation in Nigeria, it becomes an act of discrimination forbidden under the Constitution and international human rights instruments. It is noted that article 12 of CEDAW enjoins state parties to the Convention to ensure access to health care services to women without discrimination.

In many health care institutions, the HIV status of a patient is made known to others without the consent of the infected person. Information regarding patients is not properly kept. In most cases, the HIV status of a patient, especially a woman, is revealed to her partner without her knowledge. Employees going for medical treatment at their employer-owned hospital complained of unethical practices on the part of the hospital. The hospital sends the results of their test to their employers without them knowing the outcome of the test.

Practices such as these contravene the right to privacy under section 37 of the Constitution and other international and regional human

---

<sup>74</sup> See unpublished Report (n 31 above).

<sup>75</sup> Centre for the Right to Health (n 43 above).

rights instruments that Nigeria has ratified.<sup>76</sup> Moreover, it is against the ethics of the medical profession.<sup>77</sup> The Committee on CEDAW, in its General Recommendation No 24, stated that states should take measures to ensure that health services to women are made acceptable.<sup>78</sup> The Committee explains further:<sup>79</sup>

Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilisation, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity.

The loss of privacy and confidentiality in the context of HIV/AIDS fuels stigma and discrimination. The International Guidelines on HIV/AIDS summarise it in this way:<sup>80</sup>

The individual's interest in his/her privacy is particularly compelling in the context of HIV/AIDS, firstly, because of the invasive character of a mandatory HIV test and, secondly, because of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status is disclosed. The community has an interest in maintaining privacy so that people will feel safe and comfortable in using public health measures, such as HIV/AIDS prevention and care services. The interest in public health does not justify mandatory HIV testing or registration, except in case of blood/organ/tissue donations where the human product, rather than the person, is tested before use on another person. All information on HIV sero-status obtained during the testing of donated blood or tissue must also be kept strictly confidential.

In the South African case of *Jansen van Vuuren v Kruger* (popularly called the *McGeary* case), the South African court held as unethical and a breach of duty of confidentiality a disclosure by a doctor to his colleague of the HIV status of his patient without the consent of the patient.<sup>81</sup>

Negative actions and unethical practices on the part of health care workers may cause PLWHA to avoid seeking medical information or attention, even when in dire need, thus denying them the opportunity to receive treatment and to prevent death. It is crucial that in combating the spread of HIV, the suggestion given by the International Guidelines on HIV be heeded.

<sup>76</sup> See art 4 African Charter; art 17 International Covenant on Civil and Political Rights (CCPR) adopted 16 December 1966 GA Res 2200 (XXI) UN Doc A/6316 (1966) 999 UNTS 171 (entered into force 23 March 1976).

<sup>77</sup> See the Code of Dental and Medical Practitioners in Nigeria (revised edition 1995), which forbids disclosure of information obtained from a patient to a third party without the consent of the patient.

<sup>78</sup> General Recommendation No 24 Women and Health (art 12) 2 February 1999.

<sup>79</sup> n 78 above, para 22.

<sup>80</sup> Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996), Report of the Secretary-General, E/CN 4/1997/37 Annex 1.

<sup>81</sup> 1993 4 SA 842 (A).

## 5 The South African experience

South Africa has one of the highest HIV/AIDS prevalence rates in the world. In 2003 it was estimated that about five million people were living with HIV/AIDS in South Africa.<sup>82</sup> The South African Constitution of 1996<sup>83</sup> contains elaborate provisions on social and economic rights, such as rights to housing, social security, health and others. In particular, section 27 of the Constitution deals with the right to health care and access to treatment. An equality clause is also contained in section 9 of the Constitution. This section states that everyone is equal before the law and that no one should suffer discrimination as result of sex, race, gender, marital status, ethnic or social origin, colour, sexual orientation, age, disability and so on.

The South African Constitutional Court held in *The Government of RSA and Others v Grootboom and Others*<sup>84</sup> that the social and economic rights contained in the South African Constitution are as important as civil and political rights and therefore should be accorded similar respect and enforceability. In this case, the respondents had brought an action under section 26 of the Constitution, dealing with the right to access to housing, claiming that the government had been in breach of this provision. The Constitutional Court held that the South African government had an obligation under international law and the Constitution to ensure the protection of the right to housing by taking reasonable steps to guarantee this right. The Court further said that it was not enough for the government to claim that it had made laws or taken measures towards the realisation of this right. Such laws or measures must be reasonable and protect the rights of those in urgent need.

In South Africa legislation has been enacted to address HIV/AIDS-related issues. Among these are the Employment Equity Act, dealing with HIV discrimination in the workplace;<sup>85</sup> the Occupational Health Safety Act, which enjoins employers to ensure safety in the workplace and observe universal precaution in the workplace; the Compensation for Occupational injuries and Disease Act,<sup>86</sup> which governs the right to compensation for workers that get infected in the workplace due to HIV/AIDS status; the Promotion of Equality and Unfair Discrimination Act,<sup>87</sup> which deals with all forms of discrimination in the country and particularly HIV/AIDS-related discrimination.

---

<sup>82</sup> UNAIDS (n 65 above).

<sup>83</sup> Constitution of South Africa Act 108 of 1996.

<sup>84</sup> 2000 11 BCLR 1169 (CC).

<sup>85</sup> Sec 5 Act 55 of 1998.

<sup>86</sup> See Act 130 of 1993.

<sup>87</sup> See Act 4 of 2000.

In addition to this, there are policies in existence such as the National Policy on Testing, which forbids mandatory testing without informed consent;<sup>88</sup> the National Patients' Rights Charter,<sup>89</sup> which requires all health workers to treat patients with respect, regardless of their disease or condition. There is also the Health Professional Council of South Africa's Guidelines, which require all HIV testing to be done with prior informed consent of patients.

Recently, the Constitutional Court was called upon to make a pronouncement on the right of PLWHA to access treatment. In the case of *Minister of Health v Treatment Action Campaign (TAC)*,<sup>90</sup> an action was filed by the TAC against the South African government for failing to provide Nevirapine (ARV) for the prevention of mother-to-child-transmission of HIV in public hospitals, contrary to section 27 of the South African Constitution. The government argued that it was not obliged to make this drug available due to the huge financial implications of doing so, and that the safety of the drug had not been ascertained. The Court held that evidence abounds of the safety and efficacy of the drug and that the refusal of the government to make it available in public health institutions was a violation of the right to access to health care. Furthermore, the Court held that the actions of the South African government were in violation of the right to life of mothers and children who may benefit from the drug. It ordered the South African government to make the drugs available at public hospitals at no cost.

This is a landmark decision by the Court, as it recognises access to treatment as a human rights issue. There are indeed great lessons to be learnt from the situation in South Africa. As we have seen, there appears to be an enabling environment where the rights of PLWHA are protected. Moreover, the willingness of the judiciary to promote the rights of PLWHA is commendable and can be emulated by Nigerian courts.

## 6 Conclusion

From the above, it is clear that access to HIV treatment is by no means easy in Nigeria. Many factors, including stigma and discrimination, poor funding of the health sector, a lack of respect for patients' rights, the high cost of medication, a lack of political will and a lack of an enabling environment, all exacerbate the problem of access to treatment in Nigeria. Though the Nigerian government is making efforts to ensure access to HIV treatment in the country, such efforts have not been adequate, neither have they recognised access to treatment as a

---

<sup>88</sup> Published by the Department of Health in 2000.

<sup>89</sup> Developed by the Department of Health in 1999.

<sup>90</sup> 2002 5 SA 721 (CC).



human rights issue. Since Nigeria has ratified numerous international human rights instruments that recognise the right to health as a fundamental right, the government must ensure that it respects, protects and fulfils this right. One of the ways of doing this is by guaranteeing access to treatment for all, particularly PLWHA.

Access to HIV treatment may not be realisable unless an enabling environment, where the human rights of every citizen, including people infected or affected by HIV, are respected. Therefore it is high time that the Nigerian government enacts appropriate legislation to address the issue of stigma and discrimination associated with HIV. Furthermore, training for health care providers, which emphasises a respect for human rights, is essential to ensure that patients seeking treatment or information on HIV are treated with respect and guaranteed of their rights. As Nigeria prepares to amend her patent law in line with her obligations under the TRIPS agreement, it is stressed here that such an amendment must be done in accordance with the country's obligations under international human rights treaties. Moreover, flexible options such as parallel importation, compulsory licensing and others available under TRIPS must be explored.

We would like to emphasise that, unless the international community is committed to the various declarations and resolutions made with regard to access to HIV medication, nothing will be achieved. Unless the richest countries of the world are sincere and committed to contributing to the global fund on HIV/AIDS, tuberculosis and other diseases, millions of people will be denied access to treatment. Unless governments all over the world, particularly in developing countries, introduce favourable policies on HIV/AIDS and exhibit a political will to execute them, millions of people will continue to die.

## A schematic comparison of regional human rights systems: An update

Christof Heyns\*

David Padilla\*\*

Leo Zwaak\*\*\*

### Summary

*There are three regional systems for the protection of human rights; namely, the African, Inter-American and European systems. This contribution provides a comparative overview of their salient features and focuses on key procedural and institutional aspects of these systems.*

Regional systems for the protection of human rights have become an important part of the international system for the protection of human rights, and a rich source of jurisprudence on human rights issues, also on the domestic level. This contribution, taking the form of a schematic exposition, attempts to make possible an easy comparison of the most salient features of the three systems in existence today in terms of the institutions involved and the procedures followed.<sup>1</sup> Except where otherwise indicated, it sets out the situation in respect of the African, Inter-American and European systems as it was at the end of 2005. The usual order in which these systems are presented is reversed, to emphasise that none of these systems necessarily sets the norm.

Where two dates are provided behind the name of a treaty, the first one indicates the date when the treaty was adopted, the second the date when it entered into force.

---

\* Director and Professor of Human Rights Law, Centre for Human Rights, University of Pretoria. Responsible for the framework, compiling the information and for the part on the African system. The assistance of Magnus Killander and Yonas Gebreselassie is gratefully acknowledged.

\*\* Former Assistant Executive Secretary of the Inter-American Commission on Human Rights and Fulbright Professor, Centre for Human Rights, University of Pretoria. Responsible for the information on the Inter-American system. The assistance of Lilly Ching is gratefully acknowledged.

\*\*\* Senior researcher and senior lecturer at Utrecht University and the Netherlands Institute of Human Rights (SIM). Responsible for the information on the European system. The assistance of Desislava Stoitchkova is gratefully acknowledged.

<sup>1</sup> This is an updated version of C Heyns, W Strasser & D Padilla 'A schematic comparison of regional human rights systems' (2003) 3 *African Human Rights Law Journal* 76. We would like to pay tribute to Wolfgang Strasser who recently passed away.

	AFRICAN	INTER-AMERICAN	EUROPEAN
Regional organisations of which the systems form part	Organisation of African Unity (OAU), replaced by the African Union (AU) in July 2002 (53 members)	Organisation of American States (OAS) (35 members), established in 1948	Council of Europe (CoE) (46 members), established in 1949
General human rights treaties which form the legal base of the systems	<p>African Charter on Human and Peoples' Rights (1981/86) 53 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998/2004), 21 ratifications</p> <p>The Protocol entered into force in January 2004 and the process is underway to establish the Court. The AU Summit has taken a decision in July 2004 to merge the African Human Rights Court with the African Court of Justice. The entries below are based on the 1998 Protocol.</p>	<p>Charter of the OAS (1948/51), 35 ratifications, read together with the American Declaration on the Rights and Duties of Man (1948)</p> <p>American Convention on Human Rights (1969/78), 24 ratifications (21 states accept the compulsory jurisdiction of the Court)</p>	<p>Convention for the Protection of Human Rights and Fundamental Freedoms (1950/53), 45 ratifications, and 13 additional protocols, the Eleventh Protocol created a single court (1994/98)</p>

	AFRICAN	INTER-AMERICAN	EUROPEAN
Specialised additional protocols and other prominent instruments that are part of/supplement the systems	<p>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969/74), 45 ratifications</p> <p>African Charter on the Rights and Welfare of the Child (1990/99), 37 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005) 13 ratifications (15 ratifications required)</p>	<p>Inter-American Convention to Prevent and Punish Torture (1985/87), 16 ratifications</p> <p>Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988/99), 13 ratifications</p> <p>Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990/91), 8 ratifications</p> <p>Inter-American Convention on Forced Disappearances of Persons (1994/96), 10 ratifications</p> <p>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994/95), 31 ratifications</p> <p>Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities (1999/2001), 15 ratifications</p>	<p>European Convention on Extradition (1957/60), 46 ratifications</p> <p>European Convention on Mutual Assistance in Criminal Matters (1959/62), 45 ratifications</p> <p>European Social Charter (1961/65), 27 ratifications</p> <p>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987/89), 45 ratifications</p> <p>Framework Convention on the Protection of National Minorities (1995/98), 36 ratifications</p> <p>European Social Charter (revised) (1996/99), 19 ratifications</p> <p>Convention on Human Rights and Biomedicine (1997/99), 19 ratifications</p> <p>European Convention on Nationality (1997/2000), 13 ratifications</p>

	AFRICAN	INTER-AMERICAN	EUROPEAN
Supervisory bodies in respect of general treaties	Court: yet to be established Commission: established in 1987	The Court was established in 1979. The Commission was established in 1960 and its statute was revised in 1979.	A single Court was established in 1998, taking over from the earlier Commission and Court.
Supervisory bodies based	Court seat: to be determined (will be in the East Africa region) Commission: Banjul, The Gambia, but often meets in other parts of Africa	Court: San Jose, Costa Rica. In May 2005 the Court held its first extraordinary session (in Paraguay). Commission: Washington DC, but also occasionally meets in other parts of the Americas	Strasbourg, France
Case load: Number of individual communications per year	An average of 10 cases per year have been decided by the Commission since 1988; 13 cases during 2000, four during 2001, three during 2002, 13 during 2003 and 11 during 2004.	Court: Until 2003 the Court decided on average 4-7 cases per year. In 2004 the Court issued 15 judgments. By October 2005 11 judgments had been notified. Also one advisory opinion on average per year. Commission: 100 cases decided per year. Total number of cases pending at the moment: 1 000	The Court decides thousands of cases per year, with the case load rapidly increasing. In 2004 the Court delivered: 21 191 decisions (1 566 chamber decisions including two decisions of the Grand Chamber, one of which concerned the first ever request by the Committee of Ministers for an advisory opinion, and 19 625 committee decisions); 718 judgments (including 15 judgments of the Grand Chamber); At the end of 2004, 78 000 applications were pending before the Court. Communications lodged: 44 100

	AFRICAN	INTER-AMERICAN	EUROPEAN
Case load: Number of inter-state complaints heard since inception	Commission: One case admitted	Court: 0 Commission: 0	Court: 13
Contentious/advisory jurisdiction of Courts	Contentious and broad advisory	Contentious and broad advisory	Contentious and limited advisory
Who able to seize the supervisory bodies in the case of individual complaints	<p>Court: After the Commission has given an opinion, only states and the Commission will be able to approach the Court. NGOs and individuals will have a right of 'direct' access to the Court where the state has made a special declaration.</p> <p>Commission: Not defined in Charter, has been interpreted widely to include any person or group of persons or NGOs</p>	<p>Court: After the Commission has issued a report only states and the Commission can approach the Court. As from 2001, the Commission sends cases to the Court as a matter of standard practice.</p> <p>Commission: Any person or group of persons, or NGO</p>	Any individual, group of individuals or NGO claiming to be a victim of a violation
Number of members of the supervisory bodies	Court: will have 11 members Commission: 11	Court: 7 Commission: 7	Equal to the number of state parties to the Convention (45)
Appointment of members of the supervisory bodies	Judges and Commissioners are elected by the AU Assembly of Heads of State and Government.	Judges and Commissioners are elected by the General Assembly of the OAS.	The Parliamentary Assembly of the CoE elects judges from three candidates proposed by each government. There is no restriction on the number of judges of the same nationality.

	AFRICAN	INTER-AMERICAN	EUROPEAN
Meetings of the supervisory bodies	Court: Regularity of sessions to be determined  Commission: two regular two-week meetings per year. Three extraordinary sessions have been held.	Court: four regular meetings of two to three weeks per year (one extraordinary session in 2005)  Commission: two regular three-week meetings per year and one or two short special sessions	The Court is a permanent body.
Terms of appointment of members of the supervisory bodies	Judges will be appointed for six years, renewable only once, only the President full-time.  Commissioners are appointed for six years, renewable, part time.	Judges are elected for six-year terms, renewable only once, part time.  Commissioners are elected for four-year terms, renewable only once, part time.	Judges are elected for six-year terms, renewable, full-time.
Responsibility for election of chairpersons or presidents	The President is to be elected by the Court (two-year term).  The Commission elects its own Chairperson (two-year term).	Court: The President is elected by the Court (two-year term).  Commission: The Chairperson is elected by the Commission (one-year term).	The President is elected by the Plenary Court (three-year term).
Form in which findings on merits are made in contentious cases; remedies	Court: Will render judgments on whether violation occurred, orders to remedy or compensate violation.  Commission: Issues reports which contain findings on whether violations have occurred and sometimes makes recommendations.	Court: Renders judgments on whether violation occurred, can order compensation for damages or other reparations.  Commission: Issues reports which contain findings on whether violations occurred and makes recommendations.	Declaratory judgments are given on whether a violation has occurred; can order 'just satisfaction'.

	AFRICAN	INTER-AMERICAN	EUROPEAN
Permission required from supervisory bodies to publish their decisions	Court: No Commission: Requires permission of the Assembly. In practice permission has been granted by the Assembly as a matter of course. However, in 2004 the publication of the Activity Report was suspended due to the inclusion of a report on a fact-finding mission to Zimbabwe to which the government claimed it had not been given the opportunity to respond. Permission to publish the report was given in January 2005.	Court: No Commission: No	No, decisions and judgments are public.
Power of supervisory bodies to issue interim/provisional/ precautionary measures	Court: Will have the power Commission: Yes	Court: Yes Commission: Yes	Yes
Primary political responsibility for monitoring compliance with decisions	Executive Council and Assembly of the AU	General Assembly and Permanent Council of the OAS	CoE Committee of Ministers
Country visits by Commissions	A small number of fact-finding missions and a larger number of promotional country visits	95 on-site fact-finding missions conducted so far	N/A



	AFRICAN	INTER-AMERICAN	EUROPEAN
Commissions have own initiative to adopt reports on state parties	Yes, occasionally following fact-finding missions	Yes, 56 country reports and six special reports adopted so far	N/A
State parties required to submit regular reports to the Commissions	Yes, every two years	No	N/A
Appointment of special rapporteurs by the Commissions	Thematic rapporteurs: Extra-judicial killings; prisons; and women, freedom of expression, human rights defenders, refugees and displaced persons Follow-up committee on torture (Robben Island Guidelines) Working groups: economic, social and cultural rights; indigenous people or communities Country rapporteurs: None	Thematic rapporteurs: Freedom of expression; prison conditions; women; children; displaced persons; indigenous peoples; migrant workers; human rights defenders; Afro descendants and racial discrimination Country rapporteurs: Each OAS member state has a country rapporteur drawn from the Commission members.	N/A
Clusters of rights protected in the general treaties	Civil and political rights as well as some economic, social and cultural rights, and some "third generation" rights	Civil and political; socio-economic rights in the Protocol	Civil and political, also education

	AFRICAN	INTER-AMERICAN	EUROPEAN
Recognition of duties	Yes, extensively	In the American Declaration but not in the American Convention	No, except in relation to the exercise of freedom of expression
Recognition of peoples' rights	Yes, extensively	No	No
Other bodies which form part of the regional systems	Committee of Experts on the Rights and Welfare of the Child monitors compliance with the African Charter on the Rights and Welfare of the Child		CoE Commissioner for Human Rights (established in 1999): Monitors and promotes human rights in member states; may undertake country visits; assists member states (only with their agreement) to overcome human rights-related shortcomings.
Approximate number of staff	Court: To be determined Commission: 22 permanent staff members (Secretary to the Commission, seven legal officers, financial/administrative manager, support staff (finance, administration, public relations, documentation officer, librarian)). At the end of 2005 the Commission also had five legal interns.	Court: 15 lawyers, 3 administrative employees, 1 librarian, 1 driver and 1 security guard. Total 26 persons Commission: 24 budgeted posts (2 non-lawyer professionals, 15 lawyers, 8 administrative employees) plus 6 contract lawyers, 8 administrative contract employees, 1 contract part-time librarian, 6 fellows lawyers. Total 45 persons	As of 30 June 2005, total registry staff approximately 348 of which 187 permanent (including 76 lawyers) and 161 on temporary contracts (including 78 lawyers)

	AFRICAN	INTER-AMERICAN	EUROPEAN
Physical facilities	Court: To be determined Commission: Two floors used as offices	Court: Own building Commission: Offices in General Secretariat facilities. 16 individual offices, 1 library, 1 conference room, filing room, 43 computers in total for the Court and Commission	Five storey building with two wings (16 500 m2), two hearing rooms, five deliberation rooms, library, approximately 600 computers
Annual budget	Court: To be determined The budget for a session of the Commission is roughly US\$ 200 000.	Court: US\$ 1.39 million Commission: US\$ 2.78 million and US\$ 1.28 million in external contributions The Court and Commission's combined budget of US\$ 4.1 million is 5.4% of the total budget of the OAS of US\$ 76.2 million	41 million Euros The Court's budget is approximately 20% of the CoE core budget.
Other regional human rights fora whose work draws upon/overlaps with the systems	The African Peer Review Mechanism (APRM) of the New Partnership for Africa's Development (NEPAD) reviews human rights practices as part of political governance.		European Union (EU): Membership of the CoE and adherence to the European Convention on Human Rights are prerequisites for membership of the EU. The Convention constitutes general principles of European Union law.

	AFRICAN	INTER-AMERICAN	EUROPEAN
			European institutions with roles that affect human rights, and which draw upon the Convention, include: The European Council, the Council of the European Union, the European Commission, the European Parliament, the European Court of Justice and the European Ombudsman.  Organisation for Security and Co-operation in Europe (OSCE): Although its standards do not impose enforceable international legal obligations as they are mostly of a political nature, it draws heavily upon the principles of the European Convention. It does provide for a multilateral mechanism for the supervision of the human rights dimension of its work.
Official websites	<a href="http://www.achpr.org">www.achpr.org</a> <a href="http://www.africa-union.org">www.africa-union.org</a>	<a href="http://www.corteidh.or.cr">www.corteidh.or.cr</a> <a href="http://www.cidh.org">www.cidh.org</a>	<a href="http://www.echr.coe.int">www.echr.coe.int</a>
Other useful websites	<a href="http://www.chr.up.ac.za">www.chr.up.ac.za</a> <a href="http://www.issafrica.org">www.issafrica.org</a> <a href="http://www1.umn.edu/humanrts/regional.htm">www1.umn.edu/humanrts/regional.htm</a>	<a href="http://www.iidh.ed.cr">www.iidh.ed.cr</a>	<a href="http://www.coe.int">www.coe.int</a>

Sources (other than websites) where decisions are published	AFRICAN	INTER-AMERICAN	EUROPEAN
	<p>Annual Activity Reports <i>African Human Rights Law Reports</i> published by the Centre for Human Rights, University of Pretoria and the Institute for Human Rights and Development in Africa, Banjul, The Gambia</p>	<p>Court: Annual report, decisions series, precautionary measures volume, yearbook (with Commission)  Commission: Annual report, country reports, rapporteur reports, yearbook (with Court), CD-Rom</p>	<p>Since 1996, the official European Convention law reports are the <i>Reports of Judgments and Decisions</i>, published in English and French.  Prior to 1996 the official law reports were the <i>Series A Reports</i>. The <i>Series B Reports</i> include the pleadings and other documents.  From 1974, selected European Commission decisions were reproduced in the <i>Decisions and Reports Series</i>.  The <i>European Human Rights Reports</i> series includes selected judgments of the Court, plus some Commission decisions.  Decisions and judgments are also available on-line on the Court's official website through the HUDOC database at <a href="http://www.echr.coe.int/Eng/Judgments.htm">www.echr.coe.int/Eng/Judgments.htm</a>. The contents of HUDOC are also accessible via CD-ROM and DVD.</p>

	AFRICAN	INTER-AMERICAN	EUROPEAN
Commonly cited secondary sources on system	M Evans & R Murray (eds) <i>The African Charter on Human and Peoples' Rights</i> Cambridge UP, 2002 C Heyns (ed) <i>Human Rights Law in Africa</i> Martinus Nijhoff, 2004 F Ouguerouz <i>The African Charter on Human and Peoples' Rights : A comprehensive agenda for human rights</i> Kluwer Law International, 2003	T Buergenthal & D Shelton <i>Protecting Human Rights in the Americas</i> NP Engel Publishers, 1995 F Martin <i>et al</i> (eds) <i>International Human Rights Law and Practice</i> Kluwer, 1997	P van Dijk & GJH van Hoof <i>Theory and Practice of the European Convention on Human Rights</i> Kluwer, 1998 C Ovey & RCA White <i>Jacobs and White, the European Convention on Human Rights</i> Oxford UP, 2002 M Boyle, DJ Harris & C Warbrick <i>Law of the European Convention on Human Rights</i> Butterworths, 1995 <i>Yearbook of the European Convention on Human Rights</i> Kluwer
Some relevant academic journals	<i>African Human Rights Law Journal</i> <i>East African Journal of Peace and Human Rights</i>	<i>Revista del Instituto Interamericano de Derechos Humanos</i> (articles in English and Spanish)	<i>European Human Rights Law Review</i> <i>Human Rights Law Journal</i> <i>Netherlands Quarterly of Human Rights</i> <i>Revue universelle des Droits de l'Homme</i>

# Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option

Godfrey M Musila \*

Doctoral Research Fellow, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC)

## Summary

*This paper considers the question of the criminal responsibility of child soldiers for atrocities committed in armed conflict. It highlights the innovation introduced in international criminal law by the Statute of the Special Court for Sierra Leone, which permits the prosecution of children aged 15 and above. In viewing child soldiers not only as perpetrators but also as victims of human rights abuses, it argues that the existing mechanisms of criminal sanction for human rights violations that focus on punishment of the perpetrator are inadequate and that elements of restitutive justice, which are already asserted to a limited extent in recent developments in international human rights law regarding juvenile justice, should be included in the criminal prosecution process. Such an approach would satisfy the minimum requirements of justice while ensuring that child soldiers, who are often themselves the victims of human rights abuses, are appropriately sentenced.*

## 1 The use of child soldiers: An African dilemma?

The use of child soldiers has been an issue of global concern in recent decades.<sup>1</sup> From Asia to the Americas, from the Middle East to the Balkans, and to the many conflicts in Africa, both internal and interna-

---

\* LLB (Hons) (Nairobi), LLM (Pretoria), PhD Candidate (Witwatersrand); musila79@yahoo.co.uk. This article is based on a paper presented at the Human Rights Conference during the 14th African Human Rights Moot Court Competition on 9 September at the University of Johannesburg, South Africa.

tional, various warring parties continue to recruit and to deploy children in the conduct of hostilities. The extent to which children are used in combat appears to be escalating, with estimates putting worldwide numbers of child soldiers at 300 000, of which more than half are in Africa.<sup>2</sup> A 1996 expert report by Graça Machel to the United Nations (UN) Secretary-General considered the increasing use of child soldiers as an 'alarming' global trend.<sup>3</sup>

On the African continent, child soldiers are, or have been, engaged in fighting in most of the conflicts witnessed in a number of countries: Angola, the DRC, Mozambique and Sudan.<sup>4</sup> Perhaps the most well-known case involving the forceful use of child soldiers is Uganda, where the Lord's Resistance Army (LRA), made up almost entirely of 12 000 children abducted from their families, has achieved global infamy in this regard.<sup>5</sup> It holds the record for fielding the world's youngest 'combatant' – a five year-old.<sup>6</sup>

The participation of children in armed conflict poses the question of accountability at the end of war. Some hold the view that, irrespective of age, any child involved in the commission of war crimes should be tried and punished.<sup>7</sup> On the other hand, there are those who assert that, since child soldiers are indeed who they are — children — efforts should focus on rehabilitation rather than retribution.<sup>8</sup> Whereas there is merit in each of these approaches — one focusing on impunity and the other underscoring the limited culpability of children — this paper argues that one cannot possibly take an absolutist stance on this, as child soldiers, though guilty of crimes, are themselves victims. As argued below, the inadequacies inherent in the punitive-oriented criminal justice model necessitate that a restorative element be emphasised

<sup>1</sup> See Amnesty International report 'Child soldiers: Criminals or victims?' <http://web.amnesty.org/library/Index/ENGIOR500022000?open&of=ENG-364> (accessed 10 August 2005). For further information on the use of child soldiers worldwide, see the website of the Coalition to Stop the Use of Child Soldiers <<http://www.child-soldiers.org>> (accessed 31 August 2005).

<sup>2</sup> See DM Amann 'Calling children to account: The proposal for a Juvenile Chamber in the Special Court for Sierra Leone' (2001) 29 *Pepperdine University Law Review* 171.

<sup>3</sup> Impact of Armed Conflict on Children: Report of the expert of the Secretary-General, Ms Graça Machel, submitted pursuant to General Assembly Resolution 48/157 P 34 UN Doc A/51/306, 51st session, item 108 of the provisional agenda (1996) (Machel report).

<sup>4</sup> Maputo Declaration on the Use of Children as Soldiers (22 April 1999) <http://chora.virtualave.net/maputo-declaration.htm> (accessed 10 August 2005).

<sup>5</sup> PW Singer 'Talk is cheap: Getting serious about preventing child soldiers' (2004) 37 *Cornell International Law Journal* 561 572. See also M Barber 'Child soldiers: A growing concern on foreign battlefields' *Seattle Post Intelligencer* 8 April 2002.

<sup>6</sup> Barber (n 5 above).

<sup>7</sup> See C Reis 'Trying the future, avenging the past: The implications of trying children for participation in armed conflict' (1997) 28 *Columbia Human Rights Review* 629 635, commenting on the involvement of children in the Rwandan genocide.

<sup>8</sup> Amman (n 2 above) 167 185 178.



in any approach to establish the accountability of this special category of perpetrators for atrocities.<sup>9</sup>

## 2 The criminal justice model

The current model of international criminal law, like most domestic criminal processes, is largely premised on retribution, as it focuses on the criminal responsibility of perpetrators, rather than on the concerns and rights of victims. This approach is rationalised by the fact that criminal acts are considered first as wrongs against the entire society — either the state or the international community.<sup>10</sup> Accordingly, the state has at the national level ‘abrogated’ to itself the responsibility of punishing those whose conduct is considered criminal although such conduct may, as in the case of criminal assault, directly affect the physical integrity of the victim.<sup>11</sup> While there have been criminal justice system reforms since the 1970s in a number of countries, the victim’s place in the process remains peripheral.<sup>12</sup> Furthermore, international criminal processes have not benefited from these developments. The Rome Statute of the International Criminal Court (ICC) prepares the ground for progress in this regard.<sup>13</sup>

The retributive paradigm of criminal justice permeated into international criminal law. Since the International Military Tribunal at Nuremberg,<sup>14</sup> the trials of persons responsible for war crimes and other international crimes such as genocide and crimes against humanity before international tribunals such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), have consis-

<sup>9</sup> See the next section.

<sup>10</sup> On the retributive paradigm of domestic criminal law, see, generally, H Strang *Revenge: Victims and restorative justice* (2002) and DW van Ness ‘New wine and old wineskins: Four challenges of restorative justice’ (1993) 4 *Criminal Law Forum* 251.

<sup>11</sup> A Ashworth ‘Some doubts about restorative justice’ (1993) *Criminal Law Forum* 277 299.

<sup>12</sup> There have been legislative reforms in countries such as Germany, the United Kingdom and the United States of America to shift the paradigm towards restorative justice in order to address, among others, the interests of the victim in the criminal process. See with respect to the USA the Victims Protection Act (1982), the Victims of Crime Act (1984) and the proposed addition to the Sixth Amendment, aimed at legislating the right of victim participation at all levels of the criminal process. See also WT Pizzi & W Perron ‘Crime victims in German courtrooms: A comparative perspective on American problems’ (1996) 32 *Stanford Journal of International Law* 37 on the ‘*Nebenklage* procedure’, through which victims are regarded as third parties in a criminal case.

<sup>13</sup> The Rome Statute introduces innovation that permits victims greater participation in the Court’s process and the right to restitution. See eg arts 53, 54, 75 & 153 Rome Statute.

<sup>14</sup> Tribunal established by the Allied Powers to try major Nazi war criminals after World War II.

tently been justified by the fact that the perpetration of such crimes jeopardises international peace and security.<sup>15</sup> As such, the recognition of, and concern for, victims of such crimes have been incidental issues. While there have been complementary national processes such as the one in Rwanda that have been more sensitive to victims,<sup>16</sup> the tribunals' concern for victims has been limited to the context of their service to the criminal process as witnesses.<sup>17</sup>

The criminal model of justice is inadequate in a number of respects. While prosecutions are desirable or in some cases imperative,<sup>18</sup> they inadequately address victims' concerns, namely the right to truth and reparation for harm suffered.<sup>19</sup> International criminal law, as currently structured, is also ill-suited for the child perpetrator. Whilst international criminal trials since Nuremberg have provided for fair trial guarantees for perpetrators,<sup>20</sup> it has not contemplated a child perpetrator within the context of the trial itself and sentencing. Indeed, such trials have only targeted those considered to bear the largest responsibility for atrocities.<sup>21</sup> This is perhaps one reason why the innovative proposal to prosecute children as young as 15 before the Special Court for Sierra Leone (SCSL) deserves scrutiny to explore options for accountability.<sup>22</sup>

Recent international responses to atrocities have seen favour for 'hybrid' tribunals established by agreement between the UN and relevant governments in Sierra Leone and Timor-Leste (formerly East Timor).<sup>23</sup> These mechanisms combine international and domestic elements in their composition, structure and mandates. Recourse to hybrid tribunals can, and indeed have, facilitated the deployment of domestic options for restorative justice mechanisms, hand in hand with the pursuit of criminal justice often emphasised by international players. In the

<sup>15</sup> See eg UN Security Council Resolution 955 (1994) of 8 November 1994 on the establishment of the ICTR and Resolution 827 (1993) of 25 May 1993 on the establishment of the ICTY, both of which justify Security Council action by its powers under ch VII of the UN Charter relating to international peace and security. See also the recent SC resolution 1593 (2005) referring Darfur for investigation by the ICC.

<sup>16</sup> On *gacaca* and victims, see M Goldstein-Bolocan 'Rwandan *gacaca*: An experiment in transitional justice (2005) *Journal of Dispute Resolution* 355 363.

<sup>17</sup> Witness protection units created within these tribunals (ICTR) and (ICTY) do not focus on victims' concerns in their capacity as victims, but as witnesses.

<sup>18</sup> International law imposes an obligation to prosecute at least the most serious crimes. See R Aldana-Pindell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1399 1438.

<sup>19</sup> Aldana-Pindell (n 18 above) 1402.

<sup>20</sup> See eg art 16 Nuremberg Charter, art 20 ICTR Statute, art 21 ICTY Statute and art 67 Rome Statute.

<sup>21</sup> See art 1 Nuremberg Charter, art 1 ICTR Statute and art 1 ICTY Statute.

<sup>22</sup> This is irrespective of the fact that the prosecutor of the SCSL has initially indicated that he will not indict former child soldiers. See further ahead.

<sup>23</sup> This breaks with the tradition of the ICTR and ICTY which were established pursuant to Security Council powers under ch VII of the UN Charter.

case of Sierra Leone, for example, the operation of the Truth and Reconciliation Commission (TRC) side by side with the SCSL, has permitted the Sierra Leonean government an option for restorative justice through the TRC in a country in dire need of truth and reconciliation.<sup>24</sup> Traditional or indigenous mechanisms have also been used in post-conflict societies to complement criminal processes.<sup>25</sup>

It is asserted that the retributive paradigm of international criminal law (save to a limited extent where mixed tribunals are deployed) is narrow in perspective, not only because it solely highlights the criminal liability of the perpetrator, but also because even in its focus on the perpetrator, it does not differentiate the disparate kinds of perpetrator that may require special attention.<sup>26</sup> There is also a lack of consistency among institutions that enforce international criminal law. Whereas the SCSL is mandated to try children between 15 and 18 years, the ICC will not try such children.

### 3 The concept of restorative justice

By restorative justice is meant a concept of justice that seeks to take into account the interests of all parties in a criminal prosecution: the state, offenders and victims, or, in the case of international justice, the international community, perpetrators and victims. Although there is uncertainty regarding remedies in international law,<sup>27</sup> restorative justice may be understood as an umbrella term encompassing a number of processes and mechanisms through which offenders' and victims' concerns are articulated and addressed, including restitution, compensation, participation and rehabilitation.<sup>28</sup> Sarnoff notes that there is no single definition of restorative justice as the concept encompasses several principles.<sup>29</sup> Crime consists of more than a violation of criminal law

<sup>24</sup> See, generally, W Schabas 'Conjoined twins of justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *Journal of International Criminal Justice* 1082-1099. See further arguments on its relevance to accountability of child soldiers.

<sup>25</sup> See further ahead for a discussion on Rwandan *gacaca*.

<sup>26</sup> See G van Bueren *The international law on the rights of the child* (1995) 197-198, discussing the place of 'status offenders' in domestic law.

<sup>27</sup> See D Shelton *Remedies in international law* (1999) 4. On problems of terminology, see also L Zedner 'Reparation and retribution: Are they reconcilable? 1994 *Modern Law Review* 228-234.

<sup>28</sup> Strang (n 10 above) 44. See also A Morrison & G Maxwell *Restorative justice for juveniles* (2000) and D Roche *Accountability in restorative justice* (2003) 3, who state that four values are contained in restorative justice: personalism, reparation, participation and reintegration.

<sup>29</sup> S Sarnoff 'Restoring justice to the community: A realistic goal?' (2001) 64 *Federal Probation* 33-35.

and defiance of government authority. Crime disrupts victims, communities and offenders. The primary goals of restitution are the repair of harm and healing of victim and community. The victim, community and offender should all participate in determining the outcome of crime.

Applying this to the international plane, restorative justice would entail that, while the interests of the international community of international peace and security achieved partly by punishing perpetrators are met, victims' and perpetrators' interests are factored into the international criminal law adjudicative process. As noted above, the use of hybrid tribunals can permit a measure of justice that meets the ends of retribution for certain classes of crimes and restoration of victims and society. As discussed below, such mechanisms can be usefully deployed in difficult cases, requiring the establishment of accountability of child soldiers for crimes committed in war.

#### 4 Normative gap in the responsibility of children in international criminal law

One important question in this debate on the accountability of child soldiers is whether children can be tried at all, especially for international crimes. While international criminal law has been quiet on this until the Statute of the SCSL mandated the Special Court to try children as young as 15 years,<sup>30</sup> domestic penal law provides for the prosecution of children for crimes. Since international human rights law relating to children does not prescribe this, the minimum age at which one is deemed to be criminally responsible varies from one jurisdiction to another.<sup>31</sup>

With regard to human rights instruments, fair trial guarantees in human rights instruments, such as the African Charter on Human and Peoples' Rights (African Charter), do not prescribe *who* may or may not be tried in terms of age, but rather under *what* conditions persons accused of crimes may be tried.<sup>32</sup> The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) do not preclude the prosecution of children of *whatever* age. It is recognised, however, that children can be tried in accordance with domestic penal laws. These instruments therefore provide special protection for children within such processes.

<sup>30</sup> Art 7 Statute of the Special Court.

<sup>31</sup> See I Cohn & GS Goodwill-Gill *Child soldiers: The role of children in armed conflict* (1999) 7, noting that various national laws set this at different ages.

<sup>32</sup> Arts 6 & 7 African Charter & art 14 CCPR.

In particular, CRC<sup>33</sup> and the African Children's Charter,<sup>34</sup> as complemented by other more detailed non-binding norms, set standards on juvenile justice and require states to ensure that<sup>35</sup>

[e]very child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

While children can be prosecuted under domestic law, the responsibility in international law for atrocities committed by child soldiers focuses on those who recruit and use children as soldiers in armed conflicts. Various human rights, as well as humanitarian law standards, proscribe the recruitment and use of children in armed conflict. While the African Children's Charter prohibits the recruitment and direct use in hostilities of children,<sup>36</sup> CRC pegs this at 15 years. It provides that 'States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities'.<sup>37</sup> The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict enjoins states to ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces and to raise the age of voluntary recruitment to 18.<sup>38</sup> This is intended to 'contribute effectively to the implementation of the principle that the best interests of the child are the primary consideration in all actions concerning children'.<sup>39</sup>

The African Children's Charter breaks new ground in so far as it extends the scope of international humanitarian law as it applies to children to situations of internal strife and tensions that are ordinarily regulated by domestic law.<sup>40</sup> Although commentators disagree over the utility of instruments that raise the minimum age for recruitment to 18, it can be posited that human rights law has progressed with

---

<sup>33</sup> Art 40.

<sup>34</sup> Art 17.

<sup>35</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) adopted by General Assembly Resolution 40/33 of 29 November 1985 at <http://www.ohchr.org/english/law/beijingrules.htm#wp1020026> (accessed 11 August 2003).

<sup>36</sup> See arts 22 & 2 African Children's Charter. In terms of art 2, a child is a person who has not attained the age of 18.

<sup>37</sup> Art 38(2).

<sup>38</sup> See arts 2 & 3 Optional Protocol to CRC, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

<sup>39</sup> See Preamble Optional Protocol to CRC.

<sup>40</sup> Art 22(3); see Van Bueren (n 26 above) 12.

regard to the minimum age at which non-voluntary recruitment is permissible and thus offers greater protection to children.<sup>41</sup>

The above provisions of CRC and the African Children's Charter regarding armed conflict and child soldiers represent international law of the child as a point of convergence of human rights law and humanitarian law.<sup>42</sup> Various standards of humanitarian law complement the proscriptions on recruitment and use of children in armed conflict.<sup>43</sup> The complementarity of these two bodies of law is meant to enhance protection of children at all times.

In terms of humanitarian law, protection for the child in situations of international armed conflicts, Additional Protocol I, which supplements the Geneva Conventions of 1949 in this regard, requires parties to the conflict to take all feasible measures in order that children under the age of 15 do not take direct part in hostilities and, in particular, refrain from recruiting them into their armies.<sup>44</sup> Additional Protocol II to the Geneva Conventions of 1949, which governs internal conflicts, provides similarly regarding recruitment into armed forces or groups.<sup>45</sup> This prohibition is a total one<sup>46</sup> and relates to forced as well as voluntary enlistment, and participation by the children in hostilities.<sup>47</sup> The Rome Statute of the ICC makes it a war crime to recruit, forcefully or voluntarily, and to use children under the age of 15 in hostilities.<sup>48</sup>

Additionally, the International Labour Organisation (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, in terms of which 'child'

<sup>41</sup> See C Jesseman 'The protection and participation rights of the child soldier: An African and global perspective' (2001) 1 *African Human Rights Law Journal* 148, who disagrees, noting that the Optional Protocol to CRC, which effects the raise in age to 18, is framed permissively and that children under 18 years continue to be recruited.

<sup>42</sup> See Van Bueren (n 26 above) 349, noting that CRC is an unusual treaty because it is expressly concerned both with the principles of international human rights treaty law and the application of international humanitarian law. At least in relation to children, the two can no longer be seen as distinct bodies of law.

<sup>43</sup> For these references, see arts 22(1) & (3) African Children's Charter and arts 38(1) & (4) CRC which enjoin states to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

<sup>44</sup> Art 77(2) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I) 16 *International Legal Materials* 1391.

<sup>45</sup> Art 4(3)(c) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (AP II) 16 *International Legal Materials* 1442.

<sup>46</sup> Reis (n 7 above) 641.

<sup>47</sup> See Y Sandoz *et al* (eds) *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (1987) 4557, noting that this means to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.

<sup>48</sup> Art 8(e)(vii) Rome Statute.

applies to all persons under the age of 18,<sup>49</sup> regards forced or compulsory recruitment of children for use in armed conflict as one of the worst forms of labour<sup>50</sup> and requires states to take measures to eliminate the practice.<sup>51</sup>

To attain accountability for human rights violations committed in conflicts where the majority are children, it is important to get out of the mould that only those who recruit and use children should be punished.

## 5 Child soldiers as victims

Child soldiers may generally be considered victims of war. More specifically, as participants who have been involuntarily recruited, they have to serve as objects of the recruiters and protagonists of war. By focusing on those who recruit children, international law reflects the view that children involved in armed conflict are themselves victims. Accordingly, it can be sustained that child soldiers who participate in conflict contrary to these provisions do not forfeit special protections under the law.<sup>52</sup>

Reports from countries in conflict, such as Sierra Leone and Uganda, indicate that such children often go through processes of indoctrination and severe abuse intended to maintain control over them. Stories have been told of a friend or family member killed in full view of them in order to instill fear and to gain total submission from the child.<sup>53</sup> Although a child may get a sense of security by volunteering into an army, their recruitment into war, either voluntary or otherwise, can never be said to be in their best interest as their development is affected negatively. How 'voluntary' this is, is itself questionable. Rather than being forced by someone to join, the hardships of war serve as an agent of force.<sup>54</sup> In fact, where the child is forcibly recruited, their right to participate in the making of decisions that affect them is at issue.<sup>55</sup>

---

<sup>49</sup> Art 2 ILO Convention 182.

<sup>50</sup> Art 3(a) ILO Convention 182.

<sup>51</sup> Art 7 ILO Convention 182.

<sup>52</sup> Reis (n 7 above) 643.

<sup>53</sup> See Amnesty International reports on Uganda 'Breaking the Lord's commands: The destruction of childhood by the Lord's Resistance Army' (AI Index AFR 59/01/97) of September 1997 and Sierra Leone 'Sierra Leone: Childhood, a casualty of conflict' (AI Index: AFR 51/69/00) of August 2000.

<sup>54</sup> Machel report (n 3 above).

<sup>55</sup> Jesseman (n 41 above) 145.

## 6 Bringing children to justice: Sierra Leone and the promise of a 'restorative model' of international criminal law

While child soldiers are victims of circumstances in which they find themselves and should therefore be treated as such, they have been responsible for some of the worst breaches of international law. Serious cases of rape, murder and other gross violations committed by children in the course of war in places like Sierra Leone and Uganda are well documented.<sup>56</sup> As argued above, punishment-oriented mechanisms are ill-suited to establish accountability for this class of perpetrator. The restorative justice approach is more suited to establish the accountability of such children because such children must continue to be regarded as beneficiaries of special protections attributable to their vulnerable status.

As noted, the SCSL, established to try war-related crimes in Sierra Leone, authorises the prosecution of children. This is in recognition of the fact that children formed the bulk of combatants in Sierra Leone's civil war and have been responsible for some of the worst atrocities committed in that conflict. Before this, there was no international standard that expressly provided for the prosecution of children for international crimes.<sup>57</sup> The statutes for the *ad hoc* international criminal tribunals — ICTY and ICTR — have no provision on age. Accordingly, no children have been indicted by either tribunal. Rwanda released *en masse* thousands of detainees who were minors at the time they were involved in the 1994 genocide, despite the fact that Rwandan domestic law recognises criminal culpability of children of 14 and above.<sup>58</sup> The Rome Statute of the ICC expressly forbids prosecution of individuals younger than 18 years of age when they were alleged to have committed a crime within the court's jurisdiction.<sup>59</sup>

The novelty of the idea that children could be called to account in such tribunals raised opposing concerns. While non-governmental organisations (NGOs) argued that such moves would undermine rehabilitation efforts,<sup>60</sup> ordinary Sierra Leoneans, in whose minds the

<sup>56</sup> See Amnesty International (n 1 above).

<sup>57</sup> See Amann (n 2 above) 178, noting that the inclusion of juveniles within the jurisdiction of a tribunal adjudicating international humanitarian law, under the auspices of an international organisation is, to be sure, novel.

<sup>58</sup> See Reply to Country Report on Rwanda at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN004655.pdf> (accessed 11 August 2005).

<sup>59</sup> Art 26 Rome Statute.

<sup>60</sup> Eg, Human Rights Watch recommended that the Special Court focuses on adult offenders rather than prosecution of children younger than 18 in light of the children's inherent immaturity and forced abduction into the armed conflict.



memory of atrocities was still fresh, insisted that no alleged perpetrator should be exempt from prosecution.<sup>61</sup>

Given these opposing concerns, there is a need for an approach that meets the minimum standards of accountability, while recognising that child soldiers are themselves victims of armed conflict. Such an approach could be applied, not only to Sierra Leone, but in other places where the responsibility of children for atrocities is in issue. While the seriousness of atrocities committed by child soldiers causes them to be regarded as perpetrators rather than victims, the fact that most have been forcibly and illegally recruited presents a moral dilemma.<sup>62</sup> Indeed, the UN proposal entailed in the Statute of the SCSL attempts to deal with this moral problem.

The *raison d'être* of the Court is 'to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone'.<sup>63</sup> It has been suggested that the position of authority of the accused and the gravity or massive scale of the crimes committed serve as indicators of 'greatest responsibility' for purposes of prosecution under the statute.<sup>64</sup> This leaves open the possibility of trying children who held positions of authority in warring forces and those who distinguished themselves in the commission of gross violations. This nevertheless may have been mooted by the position taken by the Prosecutor of the SCSL that he would not indict children and that he will focus on those with command authority in the various parties to the conflict.<sup>65</sup>

The prosecution of children should further be guided by the imperative that 'the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability'.<sup>66</sup> This recommendation is a rehash of muted development at international law entailed in CRC and other non-binding instruments.<sup>67</sup>

There is merit, though, in the assertion that the criteria for commencing proceedings against an individual imply that children are not likely to be targets of prosecution by the Special Court because of their junior status in the various armies. Thus far, none of those indicted by the SCSL is a child. They are all members of the high command in armies of

<sup>61</sup> Amann (n 2 above) 174.

<sup>62</sup> See A Tejan-Cole 'The Special Court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Law Journal* 107 117.

<sup>63</sup> Art 1 Statute SCSL.

<sup>64</sup> I Zarifis 'Sierra Leone's search for justice and accountability of child soldiers' (2002) 9 *Human Rights Brief* 18 20.

<sup>65</sup> See 'Sierra Leone's Special Court: Will it hinder or help?' <http://allafrica.com/stories/200211210289.html> (accessed 15 October 2005).

<sup>66</sup> Art 15 Statute SCSL.

<sup>67</sup> n 35 above.

various warring parties.<sup>68</sup> Despite the wide definition of who may be tried, the prosecutor seems to have adopted a narrower view. Whereas this conforms with the desire to punish at least those with the greatest responsibility, this approach leaves unattended the other classes of people, among them children, who deserve to be tried - those who may have committed atrocities while acting entirely voluntarily, and were in control of their actions. This may send a mixed message of 'softness' on impunity.

## 7 Balancing trials with restorative justice

It should be a general rule that all perpetrators should be held accountable for atrocities, irrespective of their age, with minors being brought before appropriate fora such as truth commissions, enabled to order the transfer of children who in its view ought to face trial. It is suggested that this be modeled on the relationship between domestic courts and *gacaca* tribunals in Rwanda.

In terms of the law governing *gacaca* courts,<sup>69</sup> offenders are classified into four categories: (1) the most serious offenders, being planners, organisers, instigators, those in positions of administrative authority and sexual offenders; (2) persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death; (3) persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person; and (4) persons who committed offences against property. Suspects in all categories, except those in category (1), may make a confession in terms of the law and thus benefit from reduced sentences.<sup>70</sup> Those convicted of crimes in category 4 are liable to pay civil damages accordingly negotiated with the victims and with the involvement of the community. Community service also applies.<sup>71</sup> It has been noted that by blending retributive and restorative approaches in an innovative way, *gacaca* courts represent a unique opportunity to seek justice in an open, accessible and participatory fashion.<sup>72</sup> Although

<sup>68</sup> Those who have been indicted are so far: five alleged leaders of the former Revolutionary United Front; three alleged leaders of the former Armed Forces Revolutionary Council, three alleged leaders of the former Civil Defence Forces and former President of Liberia, Charles Taylor, who is exiled in Nigeria. See <http://www.sc-sl.org> (accessed 10 August 2005).

<sup>69</sup> Art 2 Organic Law on the Organisation of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990.

<sup>70</sup> Arts 5, 6, 8 & 9 Organic Law.

<sup>71</sup> Art 14(c) Organic Law.

<sup>72</sup> Goldstein-Bolocan (n 16 above) 355.

the Organic Law does not specifically mention children over 13 years as they are criminally liable under Rwandan law, the elements of restorative justice incorporated in the concept of *gacaca* as a 'community court', and in the sentencing process, better address the accountability of children than the formal courts.

In unique circumstances, where a court operates alongside a truth and reconciliation commission, such as in Sierra Leone, the TRC could serve the function of *gacaca* courts in Rwanda in determining the cases involving child soldiers, whom in its view ought to face trial before the SCSL. It is unfortunate that the Sierra Leonian TRC, which has since completed its work, did not do much in this regard.

The guiding standard that all can face trial is of extreme importance. Whereas there is merit in considering children as persons of reduced culpability, it is submitted that this standard is too general. As noted by Amnesty International, there may be examples of young commanders of units who may commit atrocities, acting willingly and without coercion, and who may force other children to commit such acts. It is submitted that where an individual can be held responsible for his or her actions, failure to bring them to justice will perpetuate impunity and lead to a denial of justice to the victims.<sup>73</sup> An approach that embraces restorative justice would incorporate the interests of victims that demand at least the trial of those responsible for atrocities as well as those of child soldiers, who we consider a special category of victims.

With regard to Sierra Leone, the Statute applies human rights standards on juvenile justice by prescribing special protection mechanisms for juveniles in the event that they are tried. It notes that children between the ages of 15 and 18 shall be treated in accordance with international human rights standards specific to the rights of the child, and<sup>74</sup>

[s]hall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

Additionally, custodial sentences are not applicable to minors, and the SCSL is required to make orders limited to a range of rehabilitative measures: care, guidance, and supervision orders; community service orders; counselling; foster care; correctional, educational and vocational training programmes; approved schools; and, as appropriate, any disarmament, demobilisation and reintegration programmes of

<sup>73</sup> See Amnesty International 'Recommendations on the draft Statute of the Special Court', stating that the rights of victims demand no less than the prosecution of those responsible for atrocities and that to do otherwise results in impunity. Report available at [http://www.essex.ac.uk/armedcon/story\\_id/000143.html](http://www.essex.ac.uk/armedcon/story_id/000143.html) (accessed 31 August 2005).

<sup>74</sup> Art 7 Statute SCSL.

child protection agencies<sup>75</sup> within a range of protective measures the court should take during such a trial.<sup>76</sup>

## 8 Conclusion

Whilst the novelty of trying children in an international criminal tribunal presents difficult problems and moral dilemmas regarding accountability, there is ample guidance in the law to direct the development of appropriate principles. This paper argued that entrenching a restorative element in international criminal law presents an opportunity to deal with child perpetrators. Although the SCSL may never get the opportunity to decide on the issue, a new avenue is presented by the Rome Statute of the ICC, which requires the ICC to develop principles to operationalise restorative justice, through which the concerns and rights of victims will be given effect.<sup>77</sup> This opens an avenue to increase the visibility of victims in the processes of the ICC, but also to develop jurisprudence relating to victims and thus provide guidance for other tribunals, both national and international.

---

<sup>75</sup> Zarifis (n 64 above) 25.

<sup>76</sup> These include trial by a juvenile chamber, privacy rights and the requirement that judges and the staff of the prosecutor's office are expected to have prior experience in juvenile justice.

<sup>77</sup> Art 75 Rome Statute.

## A rights-centred critique of African philosophy in the context of development

*Kwadwo Appiagyei-Atua\**

Former Bank of Ireland Post-Doctoral Research Fellow, Irish Centre for Human Rights, National University of Ireland-Galway, Galway, Ireland

### Summary

*The author discusses two schools of African philosophy: the holistic and the contemporarist. The holistic school looks into the past and present to find solutions to Africa's contemporary problems, while the contemporarist school looks at a Western standard of philosophy and ideas of civil society, human rights and development. The contemporarist school does not incorporate the cultural past of African traditions into African philosophy. The emphasis put by the contemporarist school on science and technology and rights as the originators of development is questionable. The author supports the holistic school in which African proverbs form part of African philosophy. The author uses Akan proverbs to illustrate how these are part of an African philosophy of human rights. Modern African philosophy should be diverse in outlook, but have a common core in the traditions that African societies have in common. In using African philosophy in the African rights struggle, it must become a tool that can be used by the oppressed, the deprived and the marginalised to regain their status in the development structures of their countries. The language of rights should be used as a tool for development, unmasking the disempowering effect of enjoying abstracted civil and political rights disconnected from the struggle for economic justice.*

---

\* LLB (Hons) (Legon, Ghana), BL (Accra), LLM (Halifax), NS, DCL (Institute of Comparative Law, McGill University, Montreal, Quebec, Canada); appiagyeiatua@yahoo.fr

## 1 Introduction

African philosophy and African scholarship on human rights seem to have gone their separate ways. This is despite the fact that both discourses developed in response to the biased, ethnocentric philosophical and anthropological writings of European scholars that led to a distortion of the traditional African reality.<sup>1</sup>

This paper seeks to link both discourses and define a common agenda for them: How may a practical application of both contribute towards the attainment of development in Africa? Thus, the importance of establishing the African philosophy-African rights nexus is founded on the central contention that the exercise of rights holds the key to the attainment of sustainable holistic development in Africa. In supporting the existence of an African philosophy, African and Africanist writers have described the use of African philosophy as a deconstructive and reconstructive tool to 'decolonise the African mind' and empower Africans.<sup>2</sup> Yet, there has been no systematic attempt to articulate the discourse as a deconstructive and reconstructive tool in the language of rights; more importantly, in an African notion of rights.

It is important to place the debate on the existence of African notions of rights within the framework of the controversies surrounding African philosophy and to chart a shared path. The reasons are, amongst others, that the conception of rights is located in philosophical constructs, and that philosophy in turn is shaped by the particular historical

<sup>1</sup> For a detailed study of such Euro-centric perspectives, see, among others, the works of Montesquieu *De l'esprit des lois* XXI 2 in *Oeuvres complètes* (1951) Vol II 602-603; A Smith *Lectures on jurisprudence* (1978); GWF Hegel *Philosophy of right* trans TM Knox (1967); J Hampden Jackson *Marx, Proudhon and European socialism* (1951); L Levy-Bruhl *Les fonctions mentales dans les sociétés inférieures* (1910); *La mentalité primitive* (1960). For critique, see J Berting 'Technological impacts on human rights: Models of development, science and technology and human rights' in CG Weeramantry (ed) *The impact of technology on human rights: Global case studies* (1993) 13; EC Eze 'The colour of reason: The idea of "race" in Kant's anthropology' in EC Eze *Postcolonial African philosophy: A critical reader* (1997) for an in-depth analysis of Kant's philosophy on race; OA Ladimeji 'Nationalism, alienation and the crisis of ideology' (1974) 46 *Transition* 40; T Asad 'Introduction' in T Asad (ed) *Anthropology and the colonial encounter* (1973) 9; G LeClerc *Anthropologie et colonialisme* (1972); J Banaji 'Crisis in British anthropology' (1970) 64 *New Left Review* 71; P Forster 'Empiricism and imperialism: A review of the new left's critique of social anthropology' in A Talal (ed) *Anthropology and the colonial encounter* (1973) 23; EW Count *This is race: An anthology selected from the international literature on the races of man* (1950).

<sup>2</sup> T Serequeberhan 'African philosophy: The point in question' in T Serequeberhan (ed) *African philosophy: The essential readings* (1991) 3.

experiences and cultures of a people.<sup>3</sup> Therefore, it can be said that rights and philosophy are located in the same domain - the mentalities of the people, their institutions, values, traditions and history. Equally important is the fact that the two discourses have a symbiotic relationship: philosophy is shaped by the experiences of people, expressed in diverse ways; especially through public debate, discussion and agitation. Such a debate is made possible through the exercise of rights and freedoms such as the rights to freedom of assembly, association and expression.

Thus, in view of the cultural, historical and conceptual relationships that exist between discourses on African philosophy and rights, there is a need to make a conscious and deliberate attempt to link these two issues, or to use one to help gain insights into the other<sup>4</sup> and relate that to the current African realities, which are encapsulated in the development question.

## 2 The holistic and contemporary schools of African philosophy

The debate over the existence of an African philosophy progresses through several stages and, in the view of Oruka, has crystallised into four trends. These are ethnophilosophy,<sup>5</sup> philosophical

<sup>3</sup> See P Ricoeur 'Preface' in P Ricoeur (ed) *Philosophical foundations of human rights* (1986), who states that 'underlying the relationships between the experience of human rights and the opportunities available for promoting these rights, in different communities, there exist philosophical foundations that deserve a clear assessment' (original emphasis). Quashigah also argues that '[r]ights are therefore not concepts that are to be conceived of *in vacuo* but must be studied with regard to the background of the particular community'. K Quashigah 'The philosophic basis of human rights and its relations to Africa: A critique' (1992) 2 *Journal of Human Rights Law and Practice* 22 38. See also P Hountondji 'The master's voice — The problem of human rights in Africa' in Ricoeur (above) 319.

<sup>4</sup> Shivji raises such a criticism in his book I Shivji *The concept of human rights in Africa* (1989). However, it is my contention below that he does not address the issue fully.

<sup>5</sup> Ethnophilosophy engages in locating African philosophy in 'ethnology, linguistics, psychoanalysis, jurisprudence and sociology and study of religions' of the people: in their mythical-religious conceptions, and lived ritual practices of ethnic Africans. See P Tempels *Bantu philosophy* (1959) and Serequeberhan (n 2 above) 17. The term 'ethnophilosophy' is attributed to Towa who describes the methodology involved thus: Their approach is, in all respects, neither philosophical nor ethnological, but ethno-philosophical. The ethnophilosopher engages in an objective exposition of the beliefs, myths, rituals, and then, abruptly, this objective exposé is changed into a profession of metaphysical faith, without a concern for, or a refutation of Western philosophy, neither to provide a reason on which to found an African thought. In a sense, ethnophilosophy in one breath betrays both ethnology and philosophy. Ethnology describes, exposes, explains, but does not involve itself (at least not explicitly) in analysing the validity of what it describes and explains. It also betrays philosophy because the basis for allowing it to make a choice between various

agacity<sup>6</sup> (represented by Oruka himself, who argues a self-described middle position between ethnophilosophy and professional philosophy), national ideological philosophy (represented by Nkrumah, Sekou Toure, Nyerere, Senghor, Césaire and Fanon) and professional philosophy,<sup>7</sup> including Hountondji, Towa, Wiredu, Bondurin, Serequeberhan and others.<sup>8</sup>

These four trends, however, may be compressed for present purposes into two schools, the holistic and contemporarist schools. I categorise the proponents of a traditional African philosophical thought as the holistic school, in the sense that they adopt the stance of looking into the past and the present to find solutions to Africa's contemporary problems.<sup>9</sup> The opponents of a notion of traditional African philosophical thought are labelled the contemporarist school as they adopt a self-negational approach towards their cultural past. This school looks to contemporary solutions founded on an adoption of 'the spirit of Europe'.<sup>10</sup>

Thus, two questions divide the two schools. First, is there a traditional African philosophical thought that should be accepted as part of cur-

---

opinions is above all the idea of belonging or not belonging to African tradition. But a philosophical expose is always an argumentation, a demonstration or a refutation (unofficial translation by author) (M Towa *Essai sur la problématique philosophique dans l'Afrique actuelle* (1971) 31). It is contended that one can identify two types of African ethnophilosophers: the academic and the political (although Hountondji founds his categorisation on whether the writer builds his concept of philosophy on religion or not). The former includes A Kagame 'La philosophie bantou-rwandais de l'être' in A Smet *Cahiers philosophiques africains* (1972) No 2 294 and W Abraham *The mind of Africa* (1962). The latter includes LS Senghor *Liberté I. Négritude et humanisme* (1964).

<sup>6</sup> Mainly to do with conceiving and offering ideas that transcend the prevailing ideas of wisdom, and customs and traditions.

<sup>7</sup> This group mainly falls into and composes the contemporarist school. See details below.

<sup>8</sup> See H Odera Oruka 'Four trends in African philosophy' in A Diemer (ed) *Philosophy in the present situation of Africa* (1981).

<sup>9</sup> Gyekye represents this school in this work. See K Gyekye *An essay on African philosophical thought: The Akan conceptual scheme* (1987). Others include O Yai 'Theory and practice in African philosophy: The poverty of speculative philosophy. A review of the work of P Hountondji, M Towa et al' (1977) 2 *Second Order* 2; O Owoyomela, 'Africa and the imperative of philosophy: A sceptical consideration' (1987) 30 *African Studies Review* 79; K Arhin *Traditional rule in Ghana: Past and present* (1985); C Potholm *The theory and practice of African politics* (1979). See also GBN Ayittey *Indigenous African institutions* (1991). Oruka's 'philosophic sagacity' expresses the view that traditional African societies have concepts of philosophy which were promoted and preserved mainly through elders who were considered sages and thinkers. See HO Oruka 'Sagacity in African philosophy' in Serequeberhan (n 2 above) 47 51.

<sup>10</sup> Hountondji, Wiredu, Towa, Fanon and others. The 'spirit of Europe' (*l'esprit de l'Europe*) is the original idea of Towa. See Towa (n 5 above); K Wiredu *Philosophy and an African culture* (1980). Fanon's approach is influenced by his analysis of the negative role of ethnicity in numbing the liberation struggle. See F Fanon *Black skin, white masks* (1967).



rent African philosophy? Second, how should philosophy be employed to solve contemporary African problems?

### 3 A critique of the contemporarist discourse

At first glance, the contemporarist school seems to offer a more systematic approach to using philosophy as a tool to deal with Africa's problems. Therefore, when seeking the relevance of African philosophy to the ordinary person, it is important to start from the contemporarist perspective.

The contemporarist school is, in the first place, credited with having developed a critical analysis of European perspectives on philosophy that sidelined African ideas of philosophy. Secondly, this school set about to delineate different notions of African philosophy and to come to the conclusion that they are not true philosophy, but rather a mix of philosophy and something else, hence its critique of ethnophilosophy, nationalist political philosophy, and so on. Thirdly, it rightly undertook a critical diagnosis of the problems facing Africa. However, the end product, or the solutions they recommend to the problems of Africa, seem fanciful and unfeasible. Thus, while the contemporarist school has chalked some remarkable achievements in putting African philosophy on the map, there are fundamental pitfalls in their analyses which divert the discourse of African philosophy from the crucial perspective of asserting its capability to be employed as a deconstructive and reconstructive tool, thus rendering them disempowering.

Among the difficulties with the contemporarist perspective is the fact that it narrows the principal component of their work to examining 'what is philosophy' and, consequently, what is 'African philosophy'.<sup>11</sup> In seeking to tackle the question of what is philosophy, they end up falling into the same trap as that of the nationalist ethnophilosophers, by letting Western philosophy dictate the terms of what should constitute 'philosophy properly so-called'.<sup>12</sup> They fail to realise, as Langley

<sup>11</sup> P Hountondji *African philosophy: Myth and reality* (1996) 48.

<sup>12</sup> Interestingly, Hountondji, for instance, does not see anything wrong with Hegel's philosophy of history, rather praising his work and all others who have taken the form of a system, as 'erudite philosophies, well informed about the history of philosophy'. It can be said that Hountondji also becomes an accomplice with latter-day Western critics of African philosophy like Horton, etc, who adopt similar standards of criticism against nationalist ethnophilosophy. Indeed, Horton and others use the same analysis of African tradition to criticise African ethnophilosophers. See R Horton 'Traditional thought and the emerging African philosophy department: A comment on the current debate' (1977) VI *Second Order, An African Journal of Philosophy* 64. See also H Glickman 'Dilemmas of political theory in an African context: The ideology of Julius Nyerere' in J Butler & AA Castagno (eds) *Boston University papers on Africa* (1967) 196.

argues, that these methodologies are defined in such a way as to suit a particular culture's interest:<sup>13</sup>

Two variants of the 'tradition of intellectualising' we mentioned earlier are attempts on the part of the commentator or historian to look for systematic treatment of political ideas, or to insist on the coherence of political ideas as paradigms of explanation — we begin to look for 'central themes', 'inner coherence', 'ideas scattered within the theory' and whether such ideas 'can express further ideas' (implying that we can, like magicians, make them do so), and so on . . . The trouble about these approaches is that we come to the writings of an author, or of a political leader, with preconceived notions about models, systems, concepts, 'classic questions of political theory' etc; we bustle about as judges, condemning here, giving absolution there, according to what we have already decided we ought to find in these works or speeches. It is then regarded as a matter of ideological, professional or exegetical urgency that an African ideologue ought to have his utterances arranged within some system, must be 'coherent', etc.

African philosophy is thus consigned and confined to accepting Western standards of philosophy and ideas of civil society, human rights and development. The contemporarist approach, therefore, is antithetical towards the development of an indigenous African notion of rights. The use of a Western standard of philosophy to determine whether 'African philosophy' has come of age implies that the same insensitive yardstick would be used in measuring human rights in the African context.

Another contemporarist flaw relates to the scope of the content of philosophy. The quandary in which the contemporarist approach places itself is that it does not incorporate the cultural past of African traditions into its content of African philosophy. It limits the focus to the effects of the colonial and post-colonial experience, interrogating the experience that has shaped life and brought misery and hardship to the African.

Related to this is another contemporarist flaw, which relates to the direction this approach adopts in using philosophy to find solutions to Africa's problems. First, it is worth noting that, to find lasting solutions to the problem of development, the solutions offered should be culture-based or should have a deep cultural context. UNESCO argues as follows:<sup>14</sup>

It is not surprising . . . that in the second half of the twentieth century culture has increasingly come to be seen as crucial to human development. We understand better not just that culture can be a mechanism for, or an obstacle to, development, but that it is intrinsic to sustainable human development itself because it is our cultural values which determine our goals and

<sup>13</sup> A Langley *Ideologies of liberation in black Africa 1856-1970* (1979) 15.

<sup>14</sup> Preface to UNESCO 'Recognising culture: A series of briefing papers on culture and development' [http://www.unesco.org/culture/development/briefings/html\\_eng/foreword.shtml](http://www.unesco.org/culture/development/briefings/html_eng/foreword.shtml) (accessed 31 August 2005).

our sense of fulfilment. Development processes which fail to recognise this, which simplistically divide people's resources from their aspirations, or their health from how they feel, struggle to produce lasting improvements in people's lives. Instead, we have to engage with development in the context and through the medium of human cultures.

It is therefore expected that any analysis of African philosophy should be related to Africa's cultural past in a bid to use philosophy to address Africa's problems. Irele contends that the concern of philosophy is 'the improvement of the quality of life on our continent . . . a concern of a very practical order', which makes 'the technical and theoretical debate about African philosophy . . . turn, in reality, most essentially upon the question of intellectual direction to give, in this day and age, to a continent beset by a multitude of problems'.<sup>15</sup> The major problem, or the milieu in which the multitude of problems are located, is forcefully and vividly painted by Hountondji:<sup>16</sup>

On one side, there is a force — a brute, blind, savage force, a direct heir to colonial violence — trying to dictate to the minds and hearts of all; on the other, there are the bare hands of men and women so exploited and mystified that they make themselves active accomplices of their executioners: This is as close as you can get to a true description of the real face of contemporary Africa, behind the ideological folklore and the carnival variety of political 'colours', of official labels, and the divisive 'options' which nearly always turn out to be no more than superficial verbalisms.

In the light of these grave concerns, the contemporarists argue that the way out is to destroy Africa's traditional idols 'which is the only option available to open the way for embracing and assimilating the spirit of Europe, the secret of its power and victory over us'.<sup>17</sup> And that means adopting 'the European concept of philosophy that goes hand in hand with this [European] science and technology and by developing free and critical thinking on the subject of our present realities'.<sup>18</sup> Towa justifies this stance thus:<sup>19</sup>

<sup>15</sup> A Irele in Hountondji (n 11 above) xiv.

<sup>16</sup> Hountondji (n 11 above) 170.

<sup>17</sup> Author's own translation. The original French version reads thus: 'qui seule permettra d'accueillir et d'assimiler l'esprit de l'Europe, secret de sa puissance et de sa victoire sur nous' (Towa (n 5 above) 52).

<sup>18</sup> Hountondji (n 11 above) 172. Fanon's work, however, strongly rejects this particular approach towards development for Africa.

<sup>19</sup> Author's own translation. The original French version reads: 'Parce que la philosophie européenne, en raison de sa parenté étroite avec la science et la technologie, semble être à l'origine de la puissance européenne, elle nous aidera à opérer la révolution des mentalités qui conditionne l'édification de notre propre puissance; en révélant le savoir philosophique conceptuel comme seul fondement de l'universalité et du dialogue sur l'Absolu, elle nous fournit des indications précieuses pouvant orienter nos efforts pour surmonter les divisions africaines fondées sur la diversité de confessions religieuses fanatiques et mettre sur pieds une unité africaine politique aux dimensions de notre temps. Quant à la liberté qui constitue un des principes les plus essentiels de la philosophie européenne, elle rencontre directement le sens même de notre projet: une Afrique libre dans un monde libéré.' Towa (n 5 above) 68.

Due to its close relationship with science and technology, European philosophy seems to be linked to the source of European power and it will help us to undergo the mental revolution which is responsible for the strengthening of our own power. By exposing the conceptual philosophical knowledge as the only foundation of universality and of dialogue regarding the Absolute, it gives us some important signposts which have the capacity to direct our attention towards overcoming the divisions in Africa, influenced by the diversity of fanatic religious beliefs. This way, we will be in a position to initiate a common African policy that is related to the circumstances of our time. With regard to freedom, which is one of the fundamental principles of European philosophy, it directly dovetails with the direction of our own project: a free Africa in a liberated world.

Irele argues also for the adoption of Western philosophy, though through a more cautious approach. He contends that, although Africans have suffered greatly from the derogatory insults of the Enlightenment:<sup>20</sup>

[W]e must separate the ideals of universal reason and equality from their historical implementation. We must, as it were, trust the tale and not the teller, for though the messenger be tainted, the message need not be.

Eze's criticism of Irele is directed at the separation of the 'ideal' from the way it has been practised:<sup>21</sup>

Furthermore, to speak of ideals or ideas as universally neutral schemes or models which we historically perfectly or imperfectly implement obscures the fact that these ideals and ideas are already part and parcel of — ie, always already infused with historical practices and intentions out of which ideals are, in the first place, constituted as such — judged worthy of pursuit. Ideals do not have meaning in a historical vacuum.

It is not only because the Enlightenment model was used to enslave and exploit Africa that it should be rejected as a basis for African philosophy. The analysis should go beyond that and establish that science and technology alone (often the indicators of 'Enlightenment') have not been the source of Europe's strength, but in addition to that, the type of political and economic ideologies adopted to support science and technology. Part of this ideology is the discourse and praxis of human rights. The defect in the Western notion of rights which was exploited against African peoples was that human rights was rooted in Western culture only and has been spread through the impact of Western civilisation. For this reason, it could be, and was argued, that until the civilising mission was accomplished, colonised peoples were not fit to exercise and enjoy rights. Thus, for Africans, it was not until independence was attained that the departing colonialists 'saw it fit' to incorporate human rights provisions into the constitutions of African states.<sup>22</sup>

<sup>20</sup> A Irele 'Contemporary thought in French-speaking Africa' in A Mosley (ed) *African philosophy: Selected readings* (1995) 296. See Eze (n 1 above) 12.

<sup>21</sup> Eze (n 1 above) 12-13.

<sup>22</sup> See further analysis of this debate below.

The flourishing of human rights in Western Europe contributed significantly to development. Nabudere attributed 'the rapid developments' and 'great advances'<sup>23</sup> to the rise of the natural sciences. But the natural sciences flourished as a result of the free-thinking environment which reigned at the time through the exercise of the right to academic freedom and freedom of thought.<sup>24</sup> Following this analysis, one would agree with Eide that 'individual freedom was essential [as well] for the functioning of the new patterns of ownership and production (economic liberalism)'.<sup>25</sup> However, it must be noted that these positive aspects of the exercise and enjoyment of rights in relation to development possess their own inherent contradictions. In spite of the superficially noble goals of the Enlightenment, some of the theories that were formulated, such as the social contract theory and some liberal economic theories,<sup>26</sup> were tailored largely to suit the interests of the ruling class of the time.<sup>27</sup> McPherson makes us aware of the underlying reason for the enjoyment of individual rights under capitalism. According to him, the classical liberal theory was dedicated to 'the individual right to unlimited acquisition of property, to the capitalist market economy, and hence to inequality, and it was feared that these might be endangered by giving votes to the poor'.<sup>28</sup> In fact, the origins of liberal theory, like the liberal state itself, were not at all democratic; much of it was expressly anti-democratic.<sup>29</sup>

The conclusion from this brief excursion into Enlightenment thinking is that human rights were selectively enjoyed and exercised. Individual freedoms were promoted for the sake of the middle class,<sup>30</sup> those who could afford higher education, fill management positions and engage in

<sup>23</sup> D Nabudere *The political economy of imperialism: Its theoretical and polemical treatment from mercantilist to multilateral imperialism* (1977) ii.

<sup>24</sup> This environment emerged through the contribution of the then emerging middle class to the destruction of the monopoly of power then exercised by the church and the mercantile imperialists whose interests lay in landed feudalism; Nabudere (n 23 above).

<sup>25</sup> A Eide 'Linking human rights and development: Aspects of the Norwegian debate' in I Brecher (ed) *Human rights, development and foreign policy: Canadian perspectives* (1989) 9.

<sup>26</sup> A Smith *An inquiry into the nature and causes of the wealth of nations* (1904) (first published 1776). Also, see J Locke *The two treatises on government*, particularly his analysis on property in the Second Treatise; J-J Rousseau *The social contract and discourses* (1913) trans GDH Cole; Hegel (n 1 above).

<sup>27</sup> However, it must be noted that social contract theory is only an ahistorical, mythical concept formulated to rationalise the basis of individual freedoms *vis-à-vis* the authority of the state.

<sup>28</sup> CB McPherson 'Politics: Post-liberal democracy?' in R Blackburn (ed) *Ideology in social science* (1976) 19.

<sup>29</sup> S Gardbaum 'Law, politics and the claims of community' (1992) 90 *Michigan Law Review* 685.

<sup>30</sup> Quashigah (n 3 above) 31ff.

research.<sup>31</sup> The poor slaves, serfs and others who constituted the working class were effectively left out of the rights exercise. For them, like the economic gains of capitalism, the exercise of rights was to 'trickle down' ultimately, but not imminently.

This historical snapshot calls into question the emphasis placed by the contemporarist school on science and technology and rights exercise as the originators of development in Europe. It is probably an illusion to replay the same evolution in Africa as in Europe of two centuries ago.

Hountondji and Towa view the effect of imperialism negatively and propose ways of countering it with the power of Europe as the source of that same imperialism. However, they fail to realise that it was imperialism that helped to ensure the scientific and technological development of Europe. Until Europe made contact with the East around the 1500s, it was 'often inferior, never superior, in extensive powers ... Most innovations which proved to have great implications for extensive power (notably gunpowder, the mariner's compass and printing) came from the East.'<sup>32</sup> This disproves the argument of the contemporarists that European science and technology were equivalent to power. Rather, it was power acquired from other sources that helped put science and technology in place in Europe.

Moreover, the flourishing of an ambiance of rights and emerging democracy also helped to build this power and to foster science and technology. But due to the selective manner in which rights and democracy were exercised, these concepts, in practice, could not sustain the achievements of science and technology. For example, the low pay offered workers, based on a strict application of Bentham's 'starvation avoidance' theory, made it impossible for them to acquire strong purchasing power to acquire the goods produced by their own labour. The concentration of wealth in the hands of the merchant class, and its consequent fetter on industrialisation, is one of the reasons that led to imperialist 'adventures' abroad to find markets outside Europe. Part of the mission was to amass illegal fortunes.<sup>33</sup> It was also to acquire cheap labour and raw materials<sup>34</sup> in order to help speed up the industrial revolution and to integrate the entire world in a global capitalist economy.

European power was consolidated through the slave trade, colonialism and neo-colonialism, and it continues through post-Cold War globalism. If Towa asserts that Africa can attain this capitalist power along

---

<sup>31</sup> Berting (n 1 above) 24.

<sup>32</sup> M Mann 'European development: Approaching a historical explanation' in J Baecher *et al* (eds) *Europe and the rise of capitalism* (1988) 6 7.

<sup>33</sup> Nabudere (n 23 above) 30.

<sup>34</sup> GWF Hegel *The essential writings* ed F Weiss (1974) 282-283.

the same lines in this age, it should be obvious from the above analysis that Africa is more than four centuries late. The idea of mirroring European development patterns in Africa is therefore an anachronistic concept, and mere wishful thinking.

It must also be noted that the high hopes that engendered the industrial model of development have not been realised. Economists are still grappling with how to articulate the best developmental concept. The United Nations Development Programme (UNDP) has, for example, identified three crises linked to the neo-classical economic blueprint that goes with the industrialist model of development: the crisis of the state, the market and science.<sup>35</sup> These crises have been occasioned by the adoption of a linear mode of development that is, *inter alia*, anti-traditional, ahistorical and physical capital-based.<sup>36</sup> Thus, Mehmet warns:<sup>37</sup>

[B]oth the universality and the scientific attributes of Western economics are myths. In place of universality, meaning here universally shared values and tastes, there is Western cultural specificity whereby European economic history is taken for granted as universally valid for theory construction.

It becomes obvious, in light of the above, that capitalism thrives on the development of a few nations and the underdevelopment of others.<sup>38</sup> Thus, even if it were possible to attain this type of capitalist power in Africa, it is politically naïve to believe that it will be possible for the Western world to relinquish or, at best, share its power with Africa. It would amount to digging one's own grave.<sup>39</sup> If, on the other hand, by reference to the 'spirit of Europe', Towa meant only that Africa should 'borrow' current European philosophy, science and technology, then the contemporarists' suggestions are redundant. Indeed, the West itself has been willing to let Africa inherit its philosophy since time immemorial, as part of the imperialist power strategy to disempower Africa. This is in fulfilment of the Eurocentric mission: a Western-centred world view which seeks to project the interest of Western states at the expense of

<sup>35</sup> UNDP *Sustainable human development: From concept to operation. A guide to the practitioner*. A UNDP Discussion Paper 6.

<sup>36</sup> n 35 above, 12.

<sup>37</sup> O Mehmet *Westernising the third world: The eurocentricity of economic development theories* (1995) 6. See also W Sachs (ed) *The development dictionary: A guide to knowledge as power* (1992).

<sup>38</sup> Mehmet (n 37 above).

<sup>39</sup> Paradoxically, the contemporarists' two-point view on finding the panacea to Africa's problems — co-operation, science and technology — is no different from the stance of Africa's post-independence leaders at the time of independence. They also had high hopes that through economic co-operation and the adoption of science and technology, they would catch up with the West by attaining in ten years what it took the Europeans centuries to attain and in so doing be in a position to rub shoulders or share power with them. The only thing that separates the two approaches is that the ideological basis of African leaders was 'African philosophy' or ideology and the contemporarists' is 'European philosophy'.

others, while at the same time seeking to justify this world view by ethical norms that proclaim universal benefits to all.<sup>40</sup> In this regard, it is pertinent to quote Chatterjee:<sup>41</sup>

The provincialism of the European experience will be taken as the universal history of progress; by comparison, the history of the rest of the world will appear as the *history of lack, of inadequacy — an inferior history*. Appeals will be made all over again to philosophies produced in Britain, France and Germany. The fact that these doctrines were produced in complete ignorance of the histories of the other parts of the world will not matter: They will be found useful and enlightening.

The contemporarists, unfortunately, fall prey to this trap, as predicted by Chatterjee.<sup>42</sup>

#### 4 A case for the holistic school

Gyekye details certain aspects of African philosophy which meet what he calls a universal or common criteria of assessing what constitutes philosophy. Gyekye argues that philosophy is generally premised on three key concepts: epistemology, metaphysics and logic, all of which are present in African philosophy.<sup>43</sup>

Gyekye contends, in arguing for a distinct African philosophy, that philosophy 'responds at the conceptual level to the fundamental problems posed at the given epoch'.<sup>44</sup> An Akan proverb affirms this point, that proverbs are created, based on real fact situations. In other words, proverbs arise out of the experiences of people and are philosophical in that they represent the collective wisdom of wise people and are accepted as part of the people's culture, as their way of life.<sup>45</sup> This view is denied by the contemporarists, who contend that a philosophical tradition is only beginning to develop in Africa.<sup>46</sup> But to deny African peoples philosophical thought is to imply that they are unable to reflect on or conceptualise their experiences.<sup>47</sup> According to Gyekye, people who have studied proverbs have described them as 'situational', that is, they arise from certain social situations. One may add that they not only

<sup>40</sup> Mehmet (n 37 above) 8.

<sup>41</sup> Mehmet (n 37 above) 6. See also Sachs (n 37 above) (my emphasis).

<sup>42</sup> Thus, Hountondji, eg, denies African thought as philosophical simply on the grounds of its inability to keep a diary or write a *memoire* on the intellectual debates or thought that informed the *result* or *conclusion* of a philosophical idea. He argued that the *result* or *conclusion* is therefore impoverished and unphilosophical. Hountondji (n 11 above) 105; also Wiredu (n 10 above) 48 49.

<sup>43</sup> Gyekye (n 9 above) especially ch 1.

<sup>44</sup> Gyekye (n 9 above) 39.

<sup>45</sup> Gyekye (n 9 above) 18.

<sup>46</sup> Serequeberhan (n 2 above) 21.

<sup>47</sup> As above.



arise from social, but also from political, economic and religious circumstances. Since philosophy (at least in the African traditional sense) concerns itself with situational issues and human problems, it goes without saying that it should be grounded in the cultures, experiences and mentalities of the people who produce it, in order for it to persist and shape behaviour. Gyekye therefore suggests that<sup>48</sup>

[t]he starting points, the organising concepts and categories of modern African philosophy be extracted from the cultural, linguistic, and historical background of African peoples, if that philosophy is to have relevance and meaning for the people, if it is to enrich their lives.

One can locate the cultural component of the Akan notion of rights in the above analysis. The importance attached to freedom is expressed in the Akan proverb that 'if you deny me the right to express myself, you are a murderer'. The principle of equality is expressed in proverbs such as 'The mosquito, however tiny, is a significant part of the animal kingdom.'<sup>49</sup> Busia also makes reference to an Akan proverb which illustrates the importance attached to life:<sup>50</sup> 'It is man that counts. I call upon gold, it does not answer. I call upon my drapery, there is no answer. It is man that counts.' The relationship between rights and duties is also expressed in the proverb:<sup>51</sup> 'It is your responsibility to see to my welfare in my old age after I helped raise you up.'

But philosophy does not look to the past only. While looking to the past to find what may be contrary to the accepted norms of the community, philosophy may find a norm no longer relevant due to changed circumstances. Philosophy then defines new courses of action for the community in the light of past thought and traditions.

Akan traditional society exhibited this process in the creation and development of norms, beliefs and traditions. The confusion of the contemporarists is caused by their inability to differentiate amongst

<sup>48</sup> n 46 above, 42.

<sup>49</sup> As above. Interpretation expanded without deviating from the core meaning.

<sup>50</sup> KA Busia *The position of the chief in the modern political system of the Ashanti: A study of the influence of contemporary social changes on Ashanti political institutions* (1951) 35.

<sup>51</sup> This is in the sense of parent-child responsibilities, but it is also applicable in the individual-community context. See above for similar expressions. Some other proverbs in traditional Akan thought that embody and express its notion of rights include the following: 'One head cannot make a decision.' This proverb symbolises the importance attached to joint decision making, participatory government, respect for freedom of expression and contempt for dictatorship. A similar proverb in a Malawian dialect says that 'a river without rocks cannot hold water' and 'one head cannot carry a roof'. Also: 'Power is as fragile as an egg. When held too tightly it breaks; if loosely, it might fall and break.' This symbol/proverb signifies the fragile nature of political power and the importance of power-sharing. Another proverb also expresses the need to consider individual rights and interests *vis-à-vis* community interests and needs: 'Two-headed crocodiles fight over food that goes to a common stomach because each relishes the food in its throat.'

those who create philosophical thought in a typical African society. Contemporarists, as well as the Western critics of African ethnophilosophy, have come to these crossroads because they are not able to distinguish between collective thought and collective decision making. The former is done by individuals within the community and the latter by the whole community. In each case, though, it is typically an individual who introduces an idea, which is then debated and endorsed by the people.

In Akan culture, old people usually, but not exclusively, are known for proposing innovative, wise ideas. They are considered to be sage, because Akans believe that old age connotes wisdom. A symbol that expresses this is called 'I heard it and kept it.' Thus, the one who has heard a lot is the one who has kept a lot, and that is an older person. Hence, this related proverb which is in the form of a question:<sup>52</sup> 'If the potsherd claims to be old, what of the potter that moulded it?' Collective decision among the Akans comes about through debate at the village assembly, involving various groups or associations.<sup>53</sup> Thus, though the elderly were always considered to be wise, they were not allowed to impose their thoughts and views on the rest of society, because the Akans believe that 'he who claims to know all knows nothing'. Therefore, everybody was given the opportunity to consider the views of the elderly and to see if they agree with it. Consensus seeking was thus a typical form of decision making,<sup>54</sup> though it was at times difficult to find a common agreement in the collective decision-making process.<sup>55</sup> But since it is such collective decision making which acts as the foundation of the development of collective thought, it becomes binding, the people having already taken part in its formulation. The proverb or folktale therefore becomes a means of preserving decision making in a simplified and compressed format for posterity. It becomes part of oral tradition. Later, it would behove the aged who took part in the formulation of the decision or who inherited the proverb from the

<sup>52</sup> But it was not always the case that wisdom was attributed to old age. As noted above, Akans also believe that the one who is well-travelled can also be considered a wise person due to the experiences he or she acquires as a result.

<sup>53</sup> This forms the Akan community's notion of 'civil society' and the use of freedom of expression to form public opinion.

<sup>54</sup> K Wiredu 'Democracy and consensus in African traditional politics: A plea for a non-party polity' in Eze (n 1 above) 303.

<sup>55</sup> Thus, the idea of African political ethnophilosophers — a view which, ironically, is shared by Wiredu — that the notion of consensus making involved the absence of opposition was false. Differences did exist and were recognised and respected, and illustrated in proverbs such as 'even the tongue and teeth do fight at times', and also *Funtummireku ne Denkyemmireku won afuru bom onso woddi a na wo ko* ('Funtummireku and Denkyemmireku are two crocodiles with one stomach, yet when they eat they fight').

original creators to explain the wisdom in the proverb and the circumstances that led to its formation.

This aspect of proverb formation within a conceptual framework involves the relating of concrete circumstances to an empirically and logically explanatory scheme.<sup>56</sup> In the Akan context, it was an empirical scheme, as it was based on experience. If a decision or norm becomes outdated, it is changed through the same process of public opinion or the direct enunciation of a proverb by a sage. This process is what Oruka refers to as philosophical sagacity:<sup>57</sup>

Some sages go beyond mere sagacity and attain a philosophic capacity. As sages they are versed in the beliefs and wisdom of their people. But as thinkers, they are rationally critical and they opt for or recommend only those aspects of the beliefs and wisdoms which satisfy their rational scrutiny. In this respect they are potentially or contemporarily in clash with the die-hard adherents of the prevailing common beliefs. Such sages are capable of conceiving and rationally recommending ideas offering alternatives to the commonly accepted opinions and practices. They transcend the communal wisdom. They are lucky if people recognise this special gift in them. Then they are treated with special respect and their suggestions peacefully and positively reform the people.

Thus, Wiredu's contention that the thought or idea coming from the sage and thinker is imposed on the rest of society simply because it comes from an elderly person cannot hold. Wiredu's view is informed by his conclusion that African traditional society was authoritarian. It is true that certain African political systems were authoritarian,<sup>58</sup> but to make such a sweeping generalisation as Wiredu's is unfounded. Even in societies where the political system was democratically decentralised, such as the Akan, which Wiredu studied, he nevertheless comes to the conclusion that the society was authoritarian.<sup>59</sup> Wiredu fails to differentiate between the varying structures that constitute the Akan political system, for example the national, village, family and individual levels.<sup>60</sup> At each level of this structure, the practice of 'authoritarianism' was different. It was prevalent at the level of the family. It was here that adults had greater say than children. Among adults, the views and interests of men were privileged over those of women. However, when talking of proverbs becoming a shared heritage, such development occurred at the community or state level and became a community asset that was not 'imposed' in an authoritarian manner. In support

<sup>56</sup> Langley (n 13 above) 8.

<sup>57</sup> Oruka (n 8 above) 51.

<sup>58</sup> Potholm (n 9 above) ch 1. Also Ayittey (n 9 above).

<sup>59</sup> Wiredu (n 10 above) 2-5, esp 4.

<sup>60</sup> This can be compared to Hegel's analysis of a three-tier composition of the ethical life as composed of the family, civil society and the state. See details below.

of the respect that was accorded to freedom of expression, at least with the set-up of the Council of Elders in the Akan society, Busia writes:<sup>61</sup>

The members of a traditional council allowed discussions, a free and frank expression of opinions, and if there was disagreement, they spent hours, even days if necessary, to argue and exchange ideas till they reached unanimity. Those who disagreed were not denied a hearing, or locked up in prison, or branded as enemies of the community. The traditional practice indicated that the minority must be heard, and with respect and not hostility.

The situation is no different in the evolution of Western philosophical thought. In Greek philosophy, Plato delineated the philosopher king whose main job was to eat, enjoy life and think for the people. His enlightened thoughts became binding on the people as law.<sup>62</sup> The same process in essence applies to the works of all Western philosophers. Locke was an individual thinker, but his thoughts on the state of nature and natural rights were embraced by the people of his time and even imported to America, where it was whole-heartedly accepted and became the *agent provocateur* in the struggle for independence. Also, that even the ancient Greek states, the cradle of modern democracy, did not tolerate the expression of views that were considered to be destructive to religion, morality and the city. The trial and sentence to death of Socrates is an outstanding example. The situation was no different in Rome and England.<sup>63</sup> Therefore, Wiredu's critique of authoritarian imposition of thought is not supported.

Coming back to Gyekye, the conclusion he reaches regarding the existence of African philosophy is that one can differentiate between traditional and modern African philosophy. He argues that the thinker — the creator of philosophy — perforce operates on the diffuse and inchoate ideas of the cultural milieu. However, for modern African philosophy to be African and have a basis in African culture and experience, '[it] must have a connection with the former, the traditional'.<sup>64</sup> Gyekye then concludes that there is an African philosophy based on the fact that there are certain core qualities that unite Africans.<sup>65</sup> He identifies these qualities as relating to the beliefs, customs, traditions, values, socio-political institutions and historical experiences of African societies.<sup>66</sup>

While this conclusion is important, it does not talk of Africa's contemporary experience as playing a part in uniting a concept of African philosophy. In my view, the experiences that unite Africa in the colonial and post-colonial eras are more than those that unite Africa at the pre-

<sup>61</sup> See Ayittey (n 9 above) 240-241.

<sup>62</sup> See Plato *The republic* (1974). See C Colliard *Les libertés publiques* (1972) 330.

<sup>63</sup> See Colliard (n 62 above) 330.

<sup>64</sup> Gyekye (n 9 above) 11-12.

<sup>65</sup> As above, esp ch 12.

<sup>66</sup> As above.

colonial level.<sup>67</sup> I base this view on the effect of the infliction of the 'spirit of Europe' on Africa. This infliction includes the re-designation of the boundaries of traditional political systems in a haphazard manner and massing differing socio-political communities together to form the modern African nation state. By such a capricious act, colonialism was able to reduce Africa's plurality to 53 states today. Another reason relates to the motive that drove the colonialist agenda. Although executed in various styles by different European colonial states and in different colonies by the same colonial power, the rationale for the introduction of colonialism was the same, namely to exploit the people and their resources. Therefore, talking of a common African philosophy, I would argue that one may have to recognise plural traditional African philosophies, such as the Akan, and a modern African philosophy that is diverse in outlook,<sup>68</sup> but united by the experiences mentioned above.

In sum, my position is that the holistic tradition represents a more realistic exposition of African philosophy and offers a better chance of using philosophy to address Africa's problems. The final question is as to the role Akan philosophy may play in the promotion and protection of rights in Africa. This question is relevant in view of the prevailing fact that the gateway to development is through the exercise and enjoyment of rights.

## 5 Conclusion: The role of African philosophy in the African rights struggle

A critical reflection of the general project of African philosophy indicates that its principal goal is to critique European philosophy and to assert the existence (or emergence)<sup>69</sup> of an African philosophy. This is reflected in Outlaw's notion of the deconstructive challenge facing African philosophy which, according to Serequeberhan, is 'aimed at unmasking these European residues [in the form of its educational,

<sup>67</sup> It is my contention that each political tradition would have a concept of philosophy which would differ from another. I believe that it is out of this observation that Hountondji talks about internal pluralism in Africa generated by confrontation, etc. As we learn below, different political systems and the concept of human rights developed due to the severing of allegiance by disaffected people over an oppressive system and/or ruler and separating to set up their own system. Thus, eg, among the Akans there is a proverb *Obi nsi ne ho hene* ('no one imposes himself on the people as chief'). This proverb will not apply in a stateless or 'headless' community which does not have a chief. Thus, in each of the political environments, the political philosophy will differ. Likewise, in the context of rights discourse, the stateless society will not concern itself with political rights such as the right to vote. Their legal philosophy in that context would thus also be different. Even within the same political system, divergent views held by different interest groups forming 'civil society' are discernible.

<sup>68</sup> Oruka (n 8 above).

<sup>69</sup> In the case of the contemporarists.

political, juridical, and cultural institutions] in modern Africa that still sanction — in the guise of science and enlightenment — the continued subordination and intellectual domination of Africa'.<sup>70</sup>

On the other hand, the 'reconstructive challenge' aims at 'critically revitalising — in the context of the modern world — the historico-cultural possibilities of the broken African heritage'.<sup>71</sup> In sum, the discourse of African philosophy is 'indirectly and historically linked to the demise of European hegemony (colonial/neocolonial) and is aimed at fulfilling/completing this demise'.<sup>72</sup> In its indigenised form, African philosophy also concerns itself with 'class struggle'<sup>73</sup> and empowerment of the oppressed:<sup>74</sup>

The deeper issue is one with much higher stakes: It [the question of African philosophy] is a struggle over the meaning of 'man' and 'civilised human', and all that goes with this in the context of the political economy of the capitalised and Europeanised Western world.

However, no concrete and comprehensive concepts have yet been formulated in African philosophy to launch the project of emancipating the people from the clutches of the global economic system and from the appendages of this system that parade as the local representatives of the people. What is crucial is a conceptualisation of a realistic, down-to-earth application of concepts of African philosophy which is rooted in the diverse African traditional political systems.

The major contribution of the contemporarists is the constructive and comprehensive critique they have offered against the local ruling group who sits comfortably on the dependence structures of African states. The contemporarists reject 'the conception of philosophy as an ideological comment on politics'.<sup>75</sup> The latter approach represents the stance of African political ethnophilosophers whose 'discourse has lost its critical charge, its truth':<sup>76</sup>

Yesterday it was the language of the oppressed, today it is discourse of power. Formerly a romantic protest against European pride, it is now an ideological placebo. The function of ethnophilosophy has changed: it is no longer a possible means of demystification but a powerful means of mystification in the hands of all those who have a vested interest in discouraging intellectual initiative because it prompts not living thoughts in our people but simply pious rumination of the past.

This is as far as the contemporarists are prepared to go in involving

<sup>70</sup> Serequeberhan (n 2 above) 22.

<sup>71</sup> As above.

<sup>72</sup> n 70 above, 22-23.

<sup>73</sup> It is my contention, however, that the concept of 'class struggle' is not indigenously African.

<sup>74</sup> L Outlaw 'African "philosophy": Deconstructive and reconstructive challenges' in G Floistad (ed) *African philosophy* Vol 5 *Contemporary philosophy: A new survey* (1987).

<sup>75</sup> Hountondji (n 3 above) xiv.

<sup>76</sup> n 75 above, 171.

African philosophy in political discourse. Their next step, unfortunately a *faux pas*, is to use African philosophy as 'the "handmaid" of science and (unfettered) modernisation'.<sup>77</sup> This approach, which is devoid of a political contextual analysis, presents an obstacle to the implementation of the 'scientistic'<sup>78</sup> project itself. The means of dismantling the stumbling block in order to facilitate the use of science as a stepping stone to development has a political dimension to it. This is expressed in the frustrated reaction of Wamba, which prompts him to ask:<sup>79</sup>

But, how is science related or articulated to politics? What stand does Hountondji take on this debate? What position does he hold in the ideological struggle around the problem of science and technology?

Keita seems to extend the trend of thought of the contemporarists to use African philosophy to promote the natural and social sciences. He argues:<sup>80</sup>

Its [African philosophy's] function should be to help in the imparting of knowledge of the natural and social world and to assist in the constant discussion of the optimal set of value judgments and cultural assumptions that social individual must make to take the fullest advantage of the sum of scientific knowledge available.

The usefulness of Keita's methodological approach is that it is more broad-based than that of the rest of the contemporarists. However, it is elitist and overly 'academic', allowing no room for the role of the ordinary person in the struggle to reconstruct Africa. In relation to this critique, it is worth quoting Wamba again:<sup>81</sup>

The African philosopher is now neither an organic intellectual of the masses of African people who resist imperialism (a possible meaning of the term African philosopher), nor quite exactly an organic intellectual of imperialism (which is also a possible meaning of the term philosopher in Africa).

African philosophy must move beyond this to be used as a tool by the oppressed, the deprived and the marginalised to regain their status in the development structures of their countries. The question of developing a practical political as well as legal philosophical framework within each major traditional African political system that the popular sectors can identify with and utilise is what should preoccupy African philosophy at present. The next fundamental step is thus to embrace the language of rights and to use it as a tool for development. That is, the deconstructive challenge of African philosophy should be geared towards an unmasking of the disempowering effect of enjoying

<sup>77</sup> Serequeberhan (n 2 above) 21.

<sup>78</sup> Serequeberhan (n 2 above) Introduction xvii at xix.

<sup>79</sup> W dia Wamba 'Philosophy in Africa: Challenges of the African philosopher' in Serequeberhan (n 2 above) 211-230.

<sup>80</sup> L Keita 'Contemporary African philosophy: The search for a method' in Serequeberhan (n 2 above) 132-146.

<sup>81</sup> Wamba (n 79 above) 230.

abstracted civil and political rights disconnected from the struggle for economic justice.

In this regard, Shivji comes closest to arguing for a reconceptualisation and revolutionisation of rights by detaching oneself from the dominant discourse of rights embodied in the ideological Western construct of civil and political rights. The weak link in Shivji's analysis, however, is that, while the contemporarists look to Western Europe, he looks to Eastern Europe and adopts a narrow and outdated Marxist discourse of rights as the key to organising the people to attain development. This is not unexpected since, like the contemporarist school of African philosophy, he turns his back to Africa's cultural past which depicts the rights struggles of the common people in the form of debates, revolts and separation from a tyrannical leader or majority group. Nonetheless, Shivji's categorisation of the 'working people' — all people who do not belong to the *compradorial* (bourgeois) — is broad enough and usefully applicable to the African situation.

The failure to locate human rights in African culture seems to be resolved in Quashigah's work.<sup>82</sup> Quashigah analyses the emergence of the concept of human rights in the Western world through the application of the methodologies of philosophical idealism and philosophical materialism. He concludes that, if the Western concept of human rights was so developed, then:<sup>83</sup>

The irresistible inference is therefore that each and every human society, whatever its stage of development, from absolute primitivity to modern statehood, logically recognises some rights which could be rightly termed human rights. The concept of human rights is, therefore, not alien to African societies; if anything at all, it is absent only in any articulated philosophical form.

This analysis was not done in the context of evolving an African concept of human rights. It was only to counter the notion of human rights being inherently Western. Also, Quashigah falls into the same trap as the contemporarists by not recognising the fact that the concept of human rights as expressed in proverbs, folklores, and so on, is philosophical.

The role of developing an indigenous African human rights philosophy falls to two members of the contemporarist school, Hountondji and Wiredu.<sup>84</sup> While Wiredu dwells on Africa's past cultural experience to evolve an Akan conception of rights, Hountondji digs into the colonial and post-colonial periods of Africa. On the historico-colonial front, Hountondji analyses and denounces the violence done to Africans in

<sup>82</sup> Quashigah (n 3 above).

<sup>83</sup> n 82 above, 30.

<sup>84</sup> See Hountondji (n 3 above) and Wiredu (n 54 above).



the name of development for Western Europe and disputes Western European claims to being the repository of human rights.<sup>85</sup>

Supposing that the facts invoked are correct, and that the power of the West was consistently built upon violence, why should the pattern build their power on the same basis and develop along the same lines? On the contrary, should not the terms of the argument be reversed, so as to see in this disregard for human beings an indication that the European roads to development are unacceptable?

The role of philosophers in this regard is limited to an interest in examining the ideological discourse that those in power use to justify their acts, or even to pass for defenders of liberty, when in reality all that they do is to trample on human dignity.<sup>86</sup> Finally, Hountondji recognises human rights in the daily struggles of the people and contends as follows:<sup>87</sup>

Nothing sensible or pertinent can be said about human rights if one ignores this daily, universal fact of revolt . . . [O]nly by remaining silent about this commonly experienced fact, or by considerably reducing its implications, is it possible to make human rights an invention of Western culture.

It is therefore lamentable that, after taking such a strong stance on human rights in the African context, Hountondji should turn back and endorse 'the spirit of Europe' and its science as the gateway to Africa's development.<sup>88</sup>

What remains undone in this theorising is the conceptualisation of this notion of rights as a tool for development: What is the proper relationship between rights and development? All along African leaders and Western development agencies have emphasised the negative relationship approach to development, and at best, its counterpart, the passive relation approach. The negative relationship approach postulates that development can be attained in the absence of human rights by the ordinary people who produce the economic wealth of a nation. The negative relationship approach further assumes that it is through the process of development that human rights will naturally begin to flourish. In other words, human rights are a by-product of a rising standard of living. This approach suggests that people must forgo their human rights, at least temporarily, in order for development to gather speed. So civil and political rights are impossible luxuries because they destabilise a fragile developing state economy. Only at some future developed stage will the full exercise of rights be justified and permitted. The passive relationship approach ignores questions of human rights until the eruption of war or communal violence, or the sinking of the population into a state of profound demoralisation

<sup>85</sup> Wiredu (n 54 above) 326.

<sup>86</sup> Wiredu (n 54 above) 325.

<sup>87</sup> Wiredu (n 54 above) 320.

<sup>88</sup> Towa (n 5 above) 52.

(demoralisation being perhaps the only alternative to resistance or violence in the face of ruthless, top-down capitalist development). A passive relationship is employed when the smooth progress of escalating exploitation is disrupted or is likely to be disrupted by these events and political leaders and their financiers make pious appeals to a respect for human rights. A respect for human rights becomes necessary in this respect in order to appease the demands of a population that has previously been denied these rights.

Negative and passive relationship approaches to human rights and development regard development to be more important than the individual human person, separate from those who tread the economic and political corridors of power. The ordinary producer is seen as 'human capital', 'just another part of the production process, without reference to inherent rights or dignity,' and forced to produce goods for the world economy.<sup>89</sup>

Assuming a negative relationship between human rights and development results in an inability to maintain high levels of production over time. The exercise of these rights involves the full and unhindered participation in the process of development, including the right to work, and the right to favourable working conditions. To safeguard these, one also requires the right to form trade unions or farmers' co-operatives. To ensure that these rights can operate, the rights to freedom of association and assembly, to freedom of thought, opinion and expression are also demanded. It is clear that, if the population is to be the engine for development, these rights are neither luxuries nor can they follow on promised improvements in the standards of living. They are the very conditions for successful development. Participatory and proprietary rights are also to be guaranteed. They encompass decision making, identification of needs and types of projects to meet those needs, implementation, evaluation, sharing the benefits of development and protecting these benefits. Assuming a negative relation between rights and development ultimately leads to the population being seen as a negative factor in development.

For rights to be meaningful to oppressed and disenfranchised peoples, they need to be defined as socio-economic and political claims and entitlements which are exercised and enjoyed by human beings as human beings so as to enable the realisation of potentials, the utilisation of capacities and performance of duties that will lead to the meeting of needs and the attainment of development.<sup>90</sup> They need to be exercised

<sup>89</sup> ICHRDD *Human rights: APEC's missing agenda* (1997) 12. However, the force that the author has in mind here is the threat of physical force.

<sup>90</sup> For a detailed analysis on African conceptions of human rights, see K Appiagyei-Atua 'Contribution of Akan philosophy to the conceptualisation of African notions of human rights' (2000) 33 *Comparative and International Law Journal of Southern Africa* 165.

as the power to create and achieve and to overcome all stumbling blocks standing in the way of development, but not as the power (by the ruling class) over the people.

Thus, the way out for African peoples is to use the exercise of rights as a tool to confront the development agenda that Western governments claim to have for Africa and other developing countries. One can only use rights as a tool to achieve fundamental democratic change if one is able to appreciate the hidden agenda behind the human rights rhetoric of governments and become conscientised about how rights exercise can be used to promote self and community development. Fortunately, Africans have a guide in their history, allowing them to appreciate the intentions of Western governments and corporate interests for Africa, and their culture as a guide on how to use rights exercise as an effective tool to attain the goal of sustainable holistic development.

Adopting African notions of rights and integrating them into the international human rights law discourse will not make African leaders any less responsible for their human rights commitments at the international level, as the universalists fear. The goal is not to allow oppressive leaders or captive intellectuals to formulate 'African concepts' of rights. It is important not just to replace one master's voice with another. Rather, African ideas of rights should be formulated by a voice representing the experiences of the deprived and oppressed. It needs to be derived from their pre-colonial, colonial and post-colonial experiences.

# The African Union: Challenges and opportunities for women

Karen Stefiszyn\*

Researcher, Centre for Human Rights, Faculty of Law, University of Pretoria;  
Assistant, Africa Programme, United Nations-affiliated University for Peace

## Summary

*This paper provides an overview of the various structures of the African Union in terms of the challenges and opportunities they present for women's rights advocacy. The following structures are discussed in relation to the African Union's declared commitment to gender equality as one of its governing principles: the Assembly of the Union; the Executive Council; the Commission; the Pan-African Parliament; the African Court of Justice; the Economic, Social and Cultural Council; the Peace and Security Council; the African Commission on Human and Peoples' Rights; and the African Court on Human and Peoples' Rights. The discussion reveals that women are unrepresented or under-represented in the main decision-making bodies of the African Union. Recommendations are offered for advocacy to remedy the present imbalance and to advance women's rights generally.*

## 1 Introduction

Gender inequality in Africa is entrenched in all societal structures, from the Assembly of the African Union (AU) to the family and everything in between. Attitudes that women are unequal and inferior to men permeate society. Manifestations of these attitudes are apparent in the following realities: Customary laws relating to marriage, family and land ownership discriminate against women and deny them fundamental human rights. The consequences of gender inequality are evident in the greater prevalence of HIV/AIDS amongst women than men, a fact highly associated with sexual violence. Women suffer disproportio-

---

\* BA (Western Ontario), MSt (Oxford); karen.stefiszyn@up.ac.za; cuba@lantic.net. This article is an edited version of the author's dissertation submitted for the Master of Studies degree in international human rights law at the University of Oxford.

nately in wars created by men. Women sacrifice their lives in childbirth. In many cases their reproductive organs were traditionally mutilated at a young age or they were forced into marriage as a child, raped and impregnated, and their bodies were physically unable to meet the demands of labour. Women maintain a low economic status, largely attributable to the undervaluation of their work. Women and girls in Africa are becoming a growing commodity for sex trafficking bought and sold as slaves. Girl children are often denied education or at best not encouraged in school, perpetuating a cycle of poverty and inequality. Finally, but not exhaustively, women are still generally excluded from decision-making bodies at local, regional and international levels, inhibiting their ability to affect policies that perpetuate the above-mentioned manifestations of inequality.

According to Charlesworth<sup>1</sup>

[w]e must work to ensure that women's voices find a public audience, to reorient the boundaries of mainstream human rights law so that it incorporates an understanding of the world from the perspective of the socially subjugated.

Could the AU be an audience for African women's voices? The AU has enshrined its commitment to gender equality in article 4(I) of the Constitutive Act of the AU (Constitutive Act or Act).<sup>2</sup> It has initiated the process of gender mainstreaming<sup>3</sup> in its various organs and has included important provisions regarding women in protocols subsequent to the Act. As Kofi Annan has noted: 'Increasingly, Africans understand that their continent cannot develop unless its women exercise real power.'<sup>4</sup> In July 2004, the AU adopted the Solemn Declaration on Gender Equality in Africa (Gender Declaration),<sup>5</sup> and in so doing, reaffirmed their commitment to continue, expand and accelerate

<sup>1</sup> H Charlesworth 'What are "women's international human rights?"' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 58-76.

<sup>2</sup> Constitutive Act of the African Union CAB/LEG/23.15 (26 May 2001) reprinted in C Heyns (ed) *Human rights law in Africa* (2004) 181-187.

<sup>3</sup> In accordance with the United Nations Committee on Economic, Social and Cultural Rights' agreed conclusions 1997/2, gender mainstreaming refers to the 'process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is gender equality' in 'Gender mainstreaming: An overview' Office of the Special Advisor on Gender Issues and Advancement of Women UN New York (2002) <http://www.un.org/womenwatch/osagi/pdf/GMS-Overview.pdf> (accessed 1 November 2004). See also R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 152-156.

<sup>4</sup> Press Release SG/SM/9408AFR/991 <http://www.un.org/News/Press/docs/2004/sgsm9408.doc.htm> (accessed 15 December 2004).

<sup>5</sup> Solemn Declaration on Gender Equality in Africa Assembly/AU/Decl 12 (III) Rev 1 (2004).

efforts to promote gender equality at all levels.<sup>6</sup> Most significantly, it adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)<sup>7</sup> in July 2003. Furthermore, the promotion of women in all activities is a stated priority of the New Partnership for Africa's Development (NEPAD).<sup>8</sup>

This paper explores the AU's commitment to gender equality and argues that, through strategic capitalisation of the current regional framework, significant opportunities for the advancement of African women's rights exist. An overview of the African regional framework will be provided. Following a brief background section, each structure of the AU is discussed from a gender perspective. These are the Assembly, the Executive Council, the AU Commission, the Pan-African Parliament, the African Court of Justice, the Economic, Social and Cultural Council, the Peace and Security Council, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights. NEPAD and the sub-regional organisations are not examined in this paper, although they are further important entry points for gender advocacy.<sup>9</sup> Challenges and opportunities for women's rights advocacy are presented with corresponding recommendations for capitalisation of the AU's commitment to gender equality. The conclusion will focus, generally, on challenges for gender advocates in advancing women's rights in Africa.

<sup>6</sup> n 5 above, para 5.

<sup>7</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66 6/Rev 1 (2003).

<sup>8</sup> New Partnership for Africa's Development (2001) (NEPAD) para 67 reprinted in Heyns (n 2 above) 187-212.

<sup>9</sup> One of the two long-term objectives of NEPAD, Africa's major economic development initiative, is to promote the role of women in all activities. One entry point for gender advocacy within NEPAD is the African Peer Review Mechanism (APRM), created by the NEPAD Declaration on Democracy, Political, Economic, and Corporate Governance (NEPAD Declaration), where states agree to periodic peer reviews, an assessment of their performance in areas of political and economic governance. Gender advocates can ensure states' fulfilment of their obligations and commitments with respect to women's rights are a component of the peer review process through, eg, the provision of information to the African Peer Review Team, including statistics and concrete examples of action and inaction on behalf of the government. Sub-regional organisations have made commitments to gender equality, which increase the leverage for lobbying when added to national, regional and international obligations concerning women's rights. Where women's rights activists are unable to attend important regional level meetings, such as the Assembly Summits, due to financial resources, they may be able to complement the regional advocacy efforts within their sub-region. The greatest challenge is to co-ordinate policies regarding gender and work towards consistency between the AU and the sub-regions.

## 2 Background

The AU replaced the Organization of African Unity (OAU) in 2001 and, despite accompanying cynicism,<sup>10</sup> the transition has also created hope by means of new opportunities for improving the culture, or lack thereof, of human rights on the continent. Established in 1963, the OAU prioritised the struggles against colonialism and apartheid. Despite the important human rights implications inherent in each of those goals, human rights as defined by international treaties, such as those comprising the International Bill of Rights, were not on its agenda for close to 18 years of its existence. The rights of women were also not prioritised. Under the OAU, Africa witnessed countless failures in the areas of peace, good governance, the rule of law and, consequently, respect for human rights. The AU offers hope for a new African human rights legacy.

One objective of the AU is the promotion and protection of 'human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments'.<sup>11</sup> This includes the Women's Protocol, as an extension of the African Charter, and the United Nations (UN) Convention on the Elimination of Discrimination Against Women (CEDAW) as a human rights instrument, ratified by almost all African states.<sup>12</sup> Human rights are a thread running through the list of objectives that are outlined in the Constitutive Act of the AU. For example, regional unity and solidarity, socio-economic integration, peace and security, democratic principles, globalisation, sustainable development, living standards and health are all issues of central importance to the AU.<sup>13</sup> The Charter of the UN and the Universal Declaration of Human Rights (Universal Declaration) are also given prominence.<sup>14</sup>

The same thread continues through the list of principles by which the AU shall function. 'Respect for democratic principles, human rights, the rule of law and good governance' are amongst the list of principles, as is the promotion of gender equality.<sup>15</sup> Equally significant is the principle of 'participation of the African peoples' in the activities of the AU. Read with the gender equality principle and the Preamble to the Act, whereby the 'need to build a partnership between governments and all segments of civil society, in particular women . . .' is expressed, the

<sup>10</sup> See eg N Udombana 'Can the leopard change its spots? The African Union Treaty and human rights' (2002) 17 *American University International Law Review* 256.

<sup>11</sup> Art 3(h) Constitutive Act (n 2 above).

<sup>12</sup> Somalia and Sudan are the only two African states that have not ratified CEDAW.

<sup>13</sup> Arts 3(a), (c), (f), (g), (i), (j), (k) & (n) Constitutive Act.

<sup>14</sup> Art 3(e) Constitutive Act.

<sup>15</sup> Arts 4(m) & (l) Constitutive Act.

AU is welcoming women's rights advocates to advance their agenda in co-operation.

The Constitutive Act lists nine organs of the AU in article 5. They are the Assembly of the Union, the Executive Council, the Pan-African Parliament (PAP), the Court of Justice, the Commission (the Secretariat), the Permanent Representatives Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council (ECOSOCC) and the Financial Institutions. Provisions were made for the establishment of others<sup>16</sup> and accordingly, the Peace and Security Council (PSC) has since been added.<sup>17</sup> Each organ has been conceived to implement the objectives of the Constitutive Act mindful of its underlying principles. In other words, each organ has a promotional and protective human rights mandate to be carried out in accordance with gender equality. However, even if African leaders intend to ultimately surprise cynics with effective implementation of the AU's objectives, African women would be unwise to leave such entirely in their hands, especially in light of the fact that outside the Commission of the AU, there are currently few women representing the interests of half of the African population.

An understanding of the functions of each mechanism, particularly with regard to potential entry points for human rights advocacy, is necessary to empower gender activists to capitalise on the enshrined commitments of the AU and hold African leaders accountable to their stated objectives and principles. Where doors are closed to women in one organ, windows are often open in another.

### 3 Organs of the African Union

#### 3.1 The Assembly of the African Union

The Assembly is the 'supreme organ of the Union',<sup>18</sup> composed of Heads of States and Government.<sup>19</sup> It meets once a year in ordinary session and it can meet in extraordinary session.<sup>20</sup> Its main functions, all of which have potential to impact women's rights, include to determine the common policies of the AU; to receive, consider and take decisions on reports and recommendations from the other organs of the AU; and to monitor the implementation of policies and decisions of the AU, as well as to ensure compliance by all member states.<sup>21</sup>

<sup>16</sup> Art 5(2) Constitutive Act.

<sup>17</sup> Decision on the Establishment of the Peace and Security Council of the African Union ASS/AU/Dec 3(1) (2002).

<sup>18</sup> Art 6(2) Constitutive Act.

<sup>19</sup> Art 6(1) Constitutive Act.

<sup>20</sup> Art 6(3) Constitutive Act.

<sup>21</sup> Art 9 Constitutive Act.



As there are no female Heads of States in Africa, representation on the Assembly is entirely male. Inevitably, the Assembly will not be an entry point for women's participation as decision makers until women become Heads of States and Government. Therefore, advocacy efforts for increased women's political participation nationally, guided by the Beijing Platform of Action,<sup>22</sup> must continue with vigour. In the meantime, incorporation of the gender perspective into the most pressing issues of continental concern via the Assembly of the AU is challenging and reliant on strategic lobbying, such as the identification and lobbying of gender-sensitive Heads of States, recognisable through constitutionally enshrined commitments to gender equality and women's participation in national politics, for example.<sup>23</sup> The challenge of sensitising men to women's concerns is exacerbated by the lack of resources generally available to women's networks.<sup>24</sup> Greater financial resources would assist them in order to meet and strategise in advance of the annual Assembly Summit and, subsequently, to facilitate lobbying efforts at the summits.

However, despite these discouraging obstacles and to the credit of successful lobbying by gender advocates, two extraordinary breakthroughs have already been achieved. In Maputo in 2003, the Assembly adopted the Women's Protocol and, in Addis Ababa in 2004, they adopted the Gender Declaration whereby they agreed to several concrete, time-limited actions to address specific issues, including gender-based violence, HIV/AIDS, women in peace processes and education. In doing so, the Assembly has proven a willingness to respond to pressure from African women to heed their concerns. Future advocacy towards ratification of the Protocol and its subsequent implementation and adherence to the commitments in the Declaration must build on these successes.

### 3.2 The Executive Council

The Executive Council (Council), responsible to the Assembly,<sup>25</sup> is composed of Ministers of Foreign Affairs who meet twice a year in ordinary

<sup>22</sup> Beijing Declaration and Platform for Action Fourth World Conference on Women A/CONF177/20 and A/CONF177/20/Add1 (1995) (Beijing Platform for Action) paras 181-195.

<sup>23</sup> 'From OAU to AU and NEPAD: Strategies for African women' Report of the Regional Strategy Meeting on Women's Political Participation and Gender Mainstreaming in the African Union and its Specialised Mechanisms Nairobi, 2003 (From OAU to NEPAD) 36 <http://www.femnet.or.ke/documents/au.pdf> (accessed 10 September 2004).

<sup>24</sup> M Wandia 'African Union and NEPAD: Briefing paper on the challenges and opportunities for African women' 6 <http://awdf.org/lib/pdf/femnetpaper.pdf> (accessed 10 September 2004).

<sup>25</sup> Art 13(2) Constitutive Act.

session.<sup>26</sup> It was established with a broad mandate. It is to co-ordinate and take decisions on policies in areas of common interest to the member states,<sup>27</sup> and to consider issues referred to it by the Assembly. It is also empowered to monitor the implementation of policies, decisions and agreements adopted by the Assembly,<sup>28</sup> several of which are relevant to African women, such as the Gender Declaration and the Women's Protocol. Significantly, the Executive Council is required to ensure the promotion of gender equality in all programmes of the AU.<sup>29</sup>

Few African women hold the ministerial position within the Foreign Affairs Office and are, therefore, generally restricted from this forum other than through external lobbying efforts. Article 10 of the Constitutive Act does provide for governments to designate Ministers or authorities other than the Minister of Foreign Affairs to the Executive Council.<sup>30</sup> As it is no longer uncommon in several African states for women to hold ministerial positions, this is one way, albeit not the most accessible one, for more women to find themselves on the Executive Council. As with the Assembly, advocacy efforts must focus on women's participation nationally in politics. In the meantime, the Executive Council remains one of the organs less receptive to women as decision makers.

### 3.3 The Commission

The Commission is the Secretariat of the AU<sup>31</sup> and, as such, has numerous functions. These include representing the AU and defending its interests,<sup>32</sup> implementing decisions taken by other organs,<sup>33</sup> promoting integration and socio-economic development,<sup>34</sup> ensuring the promotion of peace, democracy, security and stability,<sup>35</sup> and ensuring the mainstreaming of gender in all programmes and activities of the AU.<sup>36</sup>

The Commission is composed of a Chairperson, a Deputy Chairperson, and eight commissioners, all of whom act as 'international officials

<sup>26</sup> According to art 10(2) of the Constitutive Act, any member state may request an extraordinary session which must be approved by two-thirds of all member states.

<sup>27</sup> Art 13(1) Constitutive Act.

<sup>28</sup> Art 13(2) Constitutive Act.

<sup>29</sup> Rules and Procedures of the Executive Council (2002) Rule 5(1) & (u).

<sup>30</sup> According to art 10(1) of the Constitutive Act, other Ministers or authorities designated by the governments of member states may participate on the Executive Council in lieu of the Minister of Foreign Affairs.

<sup>31</sup> Art 20(1) Constitutive Act.

<sup>32</sup> Art 3(2)(a) Statutes of the Commission of the African Union ASS/AU/2(I)-d (2002).

<sup>33</sup> Art 3(2)(c) Statutes of the Commission of the African Union.

<sup>34</sup> Art 3(2)(p) Statutes of the Commission of the African Union.

<sup>35</sup> Art 3(2)(r) Statutes of the Commission of the African Union.

<sup>36</sup> Art 3(2)(cc) Statutes of the Commission of the African Union.

responsible only to the Union'.<sup>37</sup> Each commissioner is elected to be responsible for a particular portfolio.<sup>38</sup> The commissioners are appointed regionally,<sup>39</sup> and at least one commissioner from each region shall be a woman.<sup>40</sup> There are five female commissioners at present, rendering the Commission the first organ of the AU to achieve gender parity.

In recognition of gender issues as cross-cutting through all the portfolios of the Commission, the Commission has established the Women, Gender and Development Directorate (Gender Directorate),<sup>41</sup> whose functions include monitoring, gender mainstreaming, advocacy, performance tracking, gender training, capacity building, research, communication and networking.<sup>42</sup> Winnie Byanyima, a Ugandan parliamentarian and experienced gender activist internationally, is the Director of the Gender Directorate and is assisted by two professional staff. In order to fulfill its mandate, the Gender Directorate will have to depend heavily on co-operation with civil society and respective gender advocates must embrace the opportunity for partnership. In order to facilitate such partnerships, there is a need to create a database, accessible to all AU organs, of gender-focused civil society organisations (CSOs), which highlights their areas of specialisation and corresponding experts.<sup>43</sup> This would be an invaluable asset throughout all the structures of the AU and for gender advocates. The establishment of the Gender Directorate can significantly contribute to the capacity of the AU to mainstream gender, provided it focuses on strategic issues and acts as a catalyst rather than holding the overall responsibility for gender mainstreaming.<sup>44</sup> Furthermore, the member states of the AU must ensure adequate financial and human resources are directed to the Gender Directorate in order for it to fulfill its mandate.

Another important platform for women's voices provided for within the Commission is the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA). The purpose of the CSSDCA, among other functions, is 'to serve as a policy development forum that would enable productive interface among policy organs of the AU and the elaboration and advancement of common values and

<sup>37</sup> Art 4(1) Statutes of the Commission of the African Union.

<sup>38</sup> The portfolios are peace and security, political affairs, infrastructure and energy, social affairs, human resources, science and technology, trade and industry, rural economy and agriculture, and economic affairs.

<sup>39</sup> Art 6(2) Statutes of the Commission of the African Union.

<sup>40</sup> Art 6(3) Statutes of the Commission of the African Union.

<sup>41</sup> Art 12(3) Statutes of the Commission of the African Union.

<sup>42</sup> Description of the Gender and Development Directorate [http://www.africa-union.org/Structure\\_of\\_the\\_Commission/depWOMEN,%20GENDER%20AND%20DEVELOPMENT.htm](http://www.africa-union.org/Structure_of_the_Commission/depWOMEN,%20GENDER%20AND%20DEVELOPMENT.htm) (accessed 11 December 2004).

<sup>43</sup> Wandia (n 24 above) 7.

<sup>44</sup> Gender mainstreaming (n 3 above) 25.

goals',<sup>45</sup> and 'to serve as a bridge to link and bring civil society into the mainstream of activities and decision making within the African Union'.<sup>46</sup> A Civil Society Officer has been appointed within the CSSDCA to, *inter alia*, strengthen civil society partnerships with the AU Commission, and to facilitate civil society participation in the AU. Gender advocates can capitalise especially on the CSSDCA's roll as a monitoring and evaluation mechanism for the AU<sup>47</sup> to pressure member states from within the AU, rather than as an external lobby group only.

The Commission has taken steps to fulfill its mandate in ensuring gender mainstreaming in all programmes and activities of the AU. However, experience in the UN has proven that gender mainstreaming is a long-term process that requires explicit ongoing attention, resources and political capital.<sup>48</sup> Civil society must assume an important monitoring role in this respect.

### 3.4 The Pan-African Parliament

The Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament<sup>49</sup> entered into force on 14 December 2003 and has been ratified by almost all member states of the AU. The Pan-African Parliament held its inaugural session in Addis Ababa in March 2004 before moving to its permanent home in South Africa, where it has already held its second session.<sup>50</sup> According to the Preamble, its establishment was 'informed by a vision to provide a common platform for African peoples and their grass-roots organisations to be more involved in discussions and decision making on the problems and challenges facing the continent'.<sup>51</sup> The Preamble further states the determination of the member states to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.<sup>52</sup> Gender advocates need no further invitation to advance their agenda within the Pan-African Parliament.

<sup>45</sup> Description of CSSDCA [http://www.africa-union.org/Structure\\_of\\_the\\_Commission/depCcssda.htm](http://www.africa-union.org/Structure_of_the_Commission/depCcssda.htm) (accessed 11 December 2004).

<sup>46</sup> As above.

<sup>47</sup> As above.

<sup>48</sup> Gender mainstreaming (n 3 above) 25.

<sup>49</sup> Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament EAHG/3(V) (2001) (Pan-African Parliament Protocol) reprinted in Heyns (n 2 above) 212-217.

<sup>50</sup> The second session of the PAP was held on 16 September 2004.

<sup>51</sup> Preamble Pan-African Parliament Protocol.

<sup>52</sup> As above.

The current female president of the PAP, Gertrude Mongella, stated at her inauguration:<sup>53</sup>

To my sisters in Africa, the struggle we started years ago, which resulted in the abolition of slavery, colonialism, and the dismantling of apartheid, is now bearing fruit; we now see the practical implementation of equality.

Unlike the Assembly of the AU, where women must lobby male decision makers for the promotion and protection of their rights, women are decision makers within the PAP. The Parliament is composed of five representatives from each member state, at least one of whom must be a woman.<sup>54</sup>

The functions and powers of the PAP are broad and, as such, are open to the permeation of a women's rights agenda, particularly in light of the expressed objective to promote the principles of human rights. For example, one function of the PAP is to examine, discuss or express an opinion and make recommendations on any matter pertaining to human rights, democracy, good governance and the rule of law.<sup>55</sup>

With an understanding of this mandate, women's rights advocates can ensure that their concerns reach scrutiny in a prominent forum where women carry political weight. The PAP is further entrusted to 'work towards the harmonisation or co-ordination of the laws of member states.'<sup>56</sup> Accordingly, gender advocates can advise members of the PAP with respect to the co-ordination of legislation to advance implementation of CEDAW and the Women's Protocol upon its entry into force. Recommendations concerning the attainment of the objectives of the AU can also be made by the Parliament.<sup>57</sup> For example, the Parliament can recommend that member states ratify the Women's Protocol without delay. The President of the PAP has been lobbied by a coalition of civil society members in this respect.<sup>58</sup>

The potential for resonance of women's voices within the PAP is weakened by article 2, whereby 'the Pan-African Parliament shall have consultative and advisory powers only'.<sup>59</sup> The Protocol does envisage full legislative powers ultimately, by amendment.<sup>60</sup> Advocacy strategies

<sup>53</sup> B Lop 'Pan-African Parliament: Windows of opportunity for gender equality in Africa?' *REDI News* 25 March 2004 <http://www.sardc.net/Editorial/Newsfeature/04250304.htm> (accessed 10 October 2004).

<sup>54</sup> Art 4(2) Pan-African Parliament Protocol.

<sup>55</sup> Art 11(1) Pan-African Parliament Protocol.

<sup>56</sup> Art 11(3) Pan-African Parliament Protocol.

<sup>57</sup> Art 11(4) Pan-African Parliament Protocol.

<sup>58</sup> 'Africa: PAP President petitioned to urge African governments to ratify Protocol on the Rights of Women in Africa' *Pambazuka News* 21 October 2004 <http://www.pambazuka.org/index.php?issue=179> (accessed 15 December 2004).

<sup>59</sup> Art 2(3)(i) Pan-African Parliament Protocol.

<sup>60</sup> Art 2(3) Pan-African Parliament Protocol.

must include lobbying for this amendment and also for amendment to the Parliament's inadequate gender quota of 20%.

### 3.5 The Court of Justice<sup>61</sup>

The Protocol of the Court of Justice of the AU,<sup>62</sup> not yet in force,<sup>63</sup> 'shall be the principal judicial organ of the Union'.<sup>64</sup> Its judgments will be binding and the Assembly may take measures, such as sanctions, to ensure compliance with a judgment of the Court.<sup>65</sup> It shall have jurisdiction over a wide range of matters, including the interpretation, application or validity of AU treaties and all subsidiary legal instruments adopted within the framework of the AU.<sup>66</sup> Access to the Court by third parties, such as non-governmental organisations (NGOs), who are most likely to advocate on behalf of African women, is conditional on state consent,<sup>67</sup> a notable obstacle. The Protocol of the Court of Justice of the AU provides for equal gender representation in the election of judges.<sup>68</sup>

The African Court of Justice is an important entry point for women, not least due to its requirement for gender equality in the election of judges. African women must seize every platform available to impact regional decision making and, where the platforms are not yet available, the situation must be remedied. While women's rights activists are currently waging a passionate campaign, discussed below, for the ratification of the Women's Protocol, they must not overlook the imperative to lobby states to also ratify the Protocol to the African Court of Justice.

### 3.6 The Economic, Social and Cultural Council

The Statutes of the Economic, Social and Cultural Council (ECOSOCC) of the AU<sup>69</sup> entered into force upon adoption by the Assembly in July

<sup>61</sup> A decision has been made to integrate the African Court on Human and Peoples' Rights and the Court of Justice into one court. As the practical implementation of the decision is still under consideration by the Chairperson of the Commission and a Protocol for the united court does not yet exist, this paper approaches the African Court of Justice and the African Court on Human and Peoples' Rights according to their present Protocols.

<sup>62</sup> The Protocol of the Court of Justice of the African Union (2003) (Protocol of the Court of Justice).

<sup>63</sup> Eight countries have ratified the Protocol as of 1 September 2005.

<sup>64</sup> Art 2(2) Protocol of the Court of Justice.

<sup>65</sup> Arts 51 & 52(2) Protocol of the Court of Justice, read with art 23(2) Constitutive Act.

<sup>66</sup> Art 19(1)(b) Protocol of the Court of Justice.

<sup>67</sup> Art 18(1)(d) Protocol of the Court of Justice.

<sup>68</sup> Art 7(3) Protocol of the Court of Justice.

<sup>69</sup> Statutes of the Economic, Social and Cultural Council of the African Union, Experts/PRC/ECOSOCC Statutes/Rev5 (2004) (ECOSOCC Statutes).

2004, and ECOSOCC has been operational since March 2005. It is a result of 'the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples'.<sup>70</sup> Accordingly, it provides numerous entry points for gender advocacy. Although it is an advisory body only, 'the power of ECOSOCC lies in the fact that, as a structure of the Union, it has the "right to be heard" and its submissions taken into account'.<sup>71</sup>

In conformity with the objectives of the AU, the objectives of ECOSOCC include to forge partnerships with all segments of civil society;<sup>72</sup> promote the participation of civil society in the implementation of the policies and programmes of the AU;<sup>73</sup> promote a culture of good governance and human rights;<sup>74</sup> and promote a culture of gender equality.<sup>75</sup> The functions of ECOSOCC are broadly stated and, as such, can be influenced by gender advocates assuming their representation on the Council. For example, it is entrusted to undertake studies and submit recommendations in accordance with a recommendation from any other organ of the AU or 'as it deems necessary'.<sup>76</sup> The equal representation of women on ECOSOCC will greatly increase the likelihood of gender mainstreaming into the studies to be undertaken.

ECOSOCC is composed of 150 CSOs,<sup>77</sup> drawn from national, regional, continental, and diaspora levels plus others nominated by the Commission.<sup>78</sup> Election of the members, other than those nominated by the Commission, shall ensure 50% gender equality.<sup>79</sup> Aside from a General Assembly, a Standing Committee and a Credentials Committee, Sectoral Cluster Committees will form part of the structure of

<sup>70</sup> n 69 above, Preamble.

<sup>71</sup> K Sturman & J Cilliers 'ECOSOCC bringing peoples' power to the African Union?' (2003) 12 *African Security Review* <http://www.iss.org.za/pubs/ASR/12No1/Esturman.html> (accessed 19 September 2004).

<sup>72</sup> Art 2(2) ECOSOCC Statutes.

<sup>73</sup> Art 2(3) ECOSOCC Statutes.

<sup>74</sup> Art 2(5) ECOSOCC Statutes.

<sup>75</sup> Art 2(6) ECOSOCC Statutes.

<sup>76</sup> Art 7(2)(3) ECOSOCC Statutes.

<sup>77</sup> Art 4(1) ECOSOCC Statutes. Art 3(2) defines CSOs as the following: social groups such as those representing women, children, the youth, the elderly and people with disability and special needs; professional groups such as associations of artists, engineers, health practitioners, social workers, media, teachers, sport associations, legal professionals, social scientists, academia, business organisations, national chambers of commerce, workers, employers, industry and agriculture as well as other private sector interest groups; non-governmental organisations; community-based organisations; voluntary organisations; and cultural organisations.

<sup>78</sup> Arts 4(1)(a)-(d) ECOSOCC Statutes.

<sup>79</sup> Art 4(2) ECOSOCC Statutes.

ECOSOCC.<sup>80</sup> Entrusted to formulate opinions and provide inputs into the policies and programmes of the AU,<sup>81</sup> along with the preparation and submission of advisory opinions and reports of ECOSOCC,<sup>82</sup> the Sectoral Committees create space for ample input from gender advocates. All the Sectoral Cluster Committees have the potential to influence women's rights directly or indirectly including, in particular, those concerned with peace and security, political affairs, social affairs and health, rural economy and agriculture, economic affairs, and women and gender. The Women and Gender Committee, for example, can advise the AU regarding gender mainstreaming in all its activities in accordance with its principle of gender equality.

Considering the advisory mandate of ECOSOCC, the necessity of understanding the intricate structure of the AU in its entirety becomes increasingly apparent. For example, the Women and Gender Committee of ECOSOCC should collaborate with the Women, Gender and Development Directorate of the Commission as well as with the Executive Council. The latter are both entrusted to ensure gender mainstreaming in all activities of the AU and both hold powers greater than those of an advisory nature. Given that the PAP is also mandated to make recommendations to the Assembly, efforts towards gender mainstreaming could be further consolidated.

ECOSOCC is a welcome development in the AU as a forum for African women to advance their rights and influence the activities of the AU accordingly. Most importantly, ECOSOCC provides an opportunity for women's voices outside of the more political structures, such as the Commission and the PAP, and opens doors to a greater diversity of participants. An illiterate, rural woman involved in a community-based organisation (CBO), for example, could theoretically be nominated to ECOSOCC and such should be encouraged in order to truly build partnerships between governments and the peoples of Africa as intended. In order for women to influence the activities of the AU and advance their agenda, organisations focused on women's rights must lobby vigorously for membership. It would be a missed opportunity to find a Council representative of 150 CSOs where none have a mandate focused exclusively on women's rights. Lobbying efforts must then turn to those CSOs with other interests. Noble as their concerns may be, gender advocates must sensitise them to their own agenda and the interdependency of women's rights with all other continental struggles for which civil society may be advocating. As such, the chances of mainstreaming gender into all issues undertaken by ECOSOCC will be increased.

---

<sup>80</sup> Art 8(1) ECOSOCC Statutes.

<sup>81</sup> Art 11(1) ECOSOCC Statutes.

<sup>82</sup> Art 11(2) ECOSOCC Statutes.



### 3.7 The Peace and Security Council

Given that 24 African states are engaged in conflict to varying degrees,<sup>83</sup> the Peace and Security Council of the AU is of vital importance. It entered into force on 26 December 2003, having been established 'as a standing decision-making organ for the prevention, management and resolution of conflicts'.<sup>84</sup> In order to 'facilitate timely and efficient response to conflict and crisis situations in Africa',<sup>85</sup> it 'shall be supported by the Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund'.<sup>86</sup> These are established within the Protocol. The Peace and Security Council shall be composed of 15 member states,<sup>87</sup> elected according to the principle of equitable regional representation and according to specified criteria that must be met.<sup>88</sup> As representation on the Peace and Security Council shall be at the level of Permanent Representatives, Ministers or Heads of State and Government, there is no assurance of gender equality, or even gender representation, within the decision-making body of the Council. The sub-heading 'Chairmanship' under article 8 suggests that a woman holding a position on the Council was not even considered at the time of drafting. Furthermore, in article 11, whereby the composition of the Panel of the Wise is described, there is no requirement that any of the five 'highly respected African personalities' be women.<sup>89</sup>

Women are recognised in the Protocol as vulnerable victims of conflict. The Preamble recognises that 'conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope'. Article 14 stipulates that the 'Peace and Security Council shall assist vulnerable persons, including children, the elderly, women and other traumatised groups in the society'. The Beijing Platform for Action notes that 'the equal participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security'.<sup>90</sup> The Preamble of the African Women's Protocol recalls 'United Nations Security Council Resolution 1325 (2000) on the Role of Women in Promoting Peace and Security'

<sup>83</sup> As of 1 September 2005, CrisisWatch No 21 International Crisis Group <http://www.icg.org/home/index.cfm?id=3056&l=1> (accessed 1 September 2005).

<sup>84</sup> Art 2(1) Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002) (Peace and Security Protocol).

<sup>85</sup> As above.

<sup>86</sup> Art 2(2) Peace and Security Protocol.

<sup>87</sup> Art 5(1) Peace and Security Protocol.

<sup>88</sup> Art 5(2) Peace and Security Protocol.

<sup>89</sup> Art 11(2) Peace and Security Protocol.

<sup>90</sup> Beijing Platform for Action (n 22 above) para 135.

and article 10 of the same Protocol articulates women's right to peace. It says: 'Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.' While no one would argue that women are not vulnerable during conflict, women must also be recognised as potential leaders in peace processes.

There are a few open windows. Article 8 of the Protocol, concerning procedures, provides for the invitation to participate in open meetings by any CSO involved in, or interested in, a conflict or situation under consideration by the Peace and Security Council. It further provides for informal consultations between the Council and civil society.<sup>91</sup>

Article 12 outlines the establishment of a continental early warning system 'in order to facilitate the anticipation and prevention of conflicts'.<sup>92</sup> It states that the Commission of the AU shall collaborate with, among others,<sup>93</sup> relevant NGOs.<sup>94</sup> There are women's NGOs in Africa whose sole mandate concerns peace,<sup>95</sup> and as such would be valuable collaborators, particularly in the provision of information regarding gender-sensitive indicators, such as rape and other gender-specific human rights violations, which are often prevalent in societies prone to conflict.<sup>96</sup>

Article 13, with respect to an African Standby Force, indicates that the civilian and military personnel of national standby contingents will be trained on international humanitarian law and international human rights law, with particular emphasis on the rights of women and children.<sup>97</sup> The Commission shall co-ordinate the training courses and, in this respect, the Women and Gender Directorate within the Commission must assert a pertinent role and appeal to women's organisations for experts to form an integral part of training facilitation.

Article 20 is the most important. African women must take full advantage of the invitation for<sup>98</sup>

[n]on-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to participate actively in

<sup>91</sup> Art 8(10)(c) Peace and Security Protocol.

<sup>92</sup> Art 12(1) Peace and Security Protocol.

<sup>93</sup> The UN, its agencies, other relevant international organisations, research centres and academic institutions.

<sup>94</sup> Art 12(3) Peace and Security Protocol.

<sup>95</sup> Eg, Mano River Peace Movement, a network of NGOs in West Africa, and Femmes Africa Solidarité based in Geneva and Dakar.

<sup>96</sup> E Piza-Lopez & S Schmeidl 'Gender and conflict early warning: A preliminary framework' (July 2002) Geneva: Swiss Peace Foundation with International Alert 13 [http://www.peacewomen.org/resources/Early\\_Warning/implementingB25.html](http://www.peacewomen.org/resources/Early_Warning/implementingB25.html) (accessed 24 October 2004).

<sup>97</sup> Art 13(13) Peace and Security Protocol.

<sup>98</sup> Art 20 Peace and Security Protocol.

the efforts aimed at promoting peace, security and stability in Africa. When required such organizations may be invited to address the Peace and Security Council.

Rather than waiting for their invitation to address the PSC, women's organisations and civil society, generally, would be wise to model the NGO Working Group on the UN Security Council (NGO Working Group), which has created its own means for participation in the UN Security Council. The NGO Working Group, founded in 1995, is a group of about 30 NGOs working in fields related to Security Council matters.<sup>99</sup> It organises weekly private and off-the-record briefings with Security Council delegates in order to influence their thinking on policy matters through the provision of information, experience and expertise.<sup>100</sup> Women's organisations in the NGO Working Group were integral in the inception and adoption of UN Security Council Resolution 1325.<sup>101</sup> In this respect, international co-operation by means of capacity building and technical assistance could be solicited to organise a similar working group. Experience could be shared for the benefit of co-operation between the Peace and Security Council and African civil society, particularly women's organizations, in order to influence gender mainstreaming.

Unfortunately, however, a NGO working group in Africa would be more difficult to facilitate due to accessibility to the PSC meetings, held in Addis Ababa. Scarce financial resources will be required in order for women's groups to attend in order to meet with its delegates. As with the Assembly, when African men meet to set and implement the African agenda with respect to issues of concern to all Africans, they do so with all expenses paid, often in extravagance. African women, however, in these cases, must fundraise through all available means, and subsequently, send only a small delegation to attempt to influence the final decisions.

Article 20 can be broadly interpreted. CSOs are invited to participate in the efforts aimed at promoting peace, security and stability in Africa. The efforts are not specified as those relating to the PSC. Arguably, article 20 is an invitation for women's groups to participate in the efforts of the AU, the African Commission, NEPAD, and the sub-regional organisations, all of which are involved in the promotion of peace, security and stability. In this respect, with an amount of creative strategising, the opportunities to advance women's rights as they relate to peace and security are more significant than is structurally evident. Studies must be

---

<sup>99</sup> NGO Working Group on the Security Council Information Statement, 2004 <http://www.globalpolicy.org/security/ngowkgrp/statements/current.htm> (accessed 12 December 2004).

<sup>100</sup> As above.

<sup>101</sup> F Hill 'NGO perspectives: NGOs and the Security Council' (2002) 1 *Disarmament Forum* <http://www.unidir.ch/pdf/articles/pdf-art9.pdf> (accessed 12 December 2004).

undertaken, documentation compiled based upon which, reports must be drafted and disseminated widely in the above-mentioned structures. This will assist to facilitate consideration by decision makers of the often overlooked gender implications of conflict in all stages, from early warning to post-conflict.

While opportunities do exist to include women's voices into the decision-making processes, the PSC is lacking a policy and plan for gender mainstreaming. Other organs of the AU, such as the Executive Council and the Commission entrusted with co-ordinating gender mainstreaming and ensuring gender equality, must seek co-operation from civil society and address this with urgency. An important advocacy tool in this respect is UN Security Council Resolution 1325,<sup>102</sup> which addresses the impact of war on women, and women's contributions to conflict resolution and sustainable peace. It should be promoted and disseminated by women's organisations, particularly those concerned with peace and conflict, in order to guide facilitation of gender mainstreaming into all the activities of the AU related to peace and security.

## 4 The African regional human rights system

### 4.1 The African Commission on Human and Peoples' Rights

The African Commission was inherited by the AU from the OAU and is the implementing mechanism for the African Charter<sup>103</sup> and the Women's Protocol.<sup>104</sup> Eleven elected commissioners, currently of which the Chairperson and four others are female, serving in their personal capacity,<sup>105</sup> are entrusted with the African Commission's promotional and protective mandates. Primarily, although not exclusively, the adoption of resolutions on human rights issues and the appointment of Special Rapporteurs on thematic issues, of which one is the rights of women in Africa, are intended to promote the African Charter, while an individual communications procedure is provided for to protect the rights within.<sup>106</sup> Furthermore, state parties are obligated to submit bi-annual reports to the African Commission,<sup>107</sup> a measure that cuts across its promotional and protective mandates.<sup>108</sup> There

<sup>102</sup> United Nations Security Council Resolution 1325 on Women, Peace and Security S/RES/1325 (2000).

<sup>103</sup> Art 30 African Charter on Human and Peoples' Rights OAU/CAB/LEG/67/3/Rev5 (1996), reprinted in Heyns (n 2 above) 134.

<sup>104</sup> Art 26 Women's Protocol.

<sup>105</sup> Art 31 African Charter.

<sup>106</sup> Arts 47-59 African Charter.

<sup>107</sup> Art 62 African Charter.

<sup>108</sup> F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns (n 2 above) 385 421.

are several opportunities to capitalise on available entry points for women's rights advocacy within the African Commission. These include promoting the adoption of gender-related resolutions, co-operation with the Special Rapporteur on the Rights of Women in Africa, bringing communications to the African Commission, and participating in the reporting procedure.

The core of the African regional human rights system is the African Charter, adopted by the OAU in 1981.<sup>109</sup> All member states of the AU are party to the African Charter and, thus, subject to the African Commission. The African Charter has two Protocols, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights<sup>110</sup> and the Women's Protocol. The former has entered into force,<sup>111</sup> while the latter is awaiting the required 15 ratifications.<sup>112</sup> As extensive academic commentary exists<sup>113</sup> on the African Charter, the following overview will be brief and focused on the relevance of the African Charter to women. Within the multi-generational norms included in the Charter and its distinctive inclusion of individual duties, women are inadequately addressed. Article 2 of the African Charter prohibits distinction on the basis of sex to be entitled to the enjoyment of the rights in the Charter and article 3 guarantees equality before the law and equal protection of the law. Article 18, concerning the family, ensures 'the elimination of every discrimination against women' and also ensures the 'protection of the rights of the women and the child as stipulated in international declarations and conventions'. The grouping of women with children is generally perceived by women's rights advocates as patronizing, while the consideration of women within the context of the family 'which is the

<sup>109</sup> Other components of the African human rights system are the African Committee on the Rights and Welfare of the Child, which implements the African Charter on the Rights and Welfare of the Child, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (the Bamako Convention).

<sup>110</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT (III) (1998) (African Human Rights Court Protocol).

<sup>111</sup> The African Human Rights Court Protocol entered into force on 15 January 2004.

<sup>112</sup> Thirteen countries have ratified the Women's Protocol as of 1 September 2005.

<sup>113</sup> See eg M Hansungule 'The African Charter on Human and Peoples' Rights: A critical review' (2000) 8 *African Yearbook of International Law* 265; C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679; M Mutua 'The African human rights system: A critical evaluation' Background Paper to the UNDP 2000 Human Development Report 5 [http://hdr.undp.org/docs/publications/background\\_papers/MUTUA.PDF](http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF) (accessed 29 September 2004), M Mutua 'The Banjul Charter: The case for an African cultural fingerprint' in A An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002).

custodian of morals and traditional values recognised by the community'<sup>114</sup> is problematic, considering that certain traditional African values conflict with women's rights. The overall unsatisfactory consideration of women's rights in the African Charter, in part, motivated the drafting of the Women's Protocol.

The Women's Protocol has been welcomed as the 'missing link in the African Charter's protection of women'.<sup>115</sup> Despite the struggle ahead for its ratification and implementation, the adoption of the Women's Protocol is a monumental achievement for women's rights activists. The Protocol addresses rights of concern to African women. It prohibits harmful traditional practices, for example, such as female genital mutilation and outlines measures to accompany legislation towards its eradication.<sup>116</sup> It addresses marriage, including polygamy and the choice of matrimonial regime.<sup>117</sup> Economic and social welfare rights<sup>118</sup> and group rights, such as the right to a healthy and sustainable environment,<sup>119</sup> the right to peace<sup>120</sup> and the right to development,<sup>121</sup> are also addressed. The inclusion of reproductive rights, including the right to abortion in specified cases,<sup>122</sup> is particularly innovative as is the inclusion of widow's rights,<sup>123</sup> the right to inheritance,<sup>124</sup> and special protection for the elderly and disabled.<sup>125</sup>

The Protocol is commendable, not least for its recognition of the limitations of legislative prescriptions alone and its provision, therefore, of a holistic approach to women's rights. Article 2, for example, requires state parties to

[c]ommit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of

<sup>114</sup> Art 18(2) African Charter.

<sup>115</sup> G Ndirangu & S Karmal (eds) *The African Union Protocol on the Rights of Women in Africa: Not yet a force for freedom* (August 2004) campaign pamphlet published jointly by Equality Now, African Women's Development and Communications Network (FEMNET), Oxfam GB, CREDO for Freedom of Expression and Associated Rights, and Fahamu.

<sup>116</sup> Art 5 Women's Protocol.

<sup>117</sup> Art 6 Women's Protocol.

<sup>118</sup> Art 13 Women's Protocol.

<sup>119</sup> Art 18 Women's Protocol.

<sup>120</sup> Art 10 Women's Protocol.

<sup>121</sup> Art 19 Women's Protocol.

<sup>122</sup> Art 14(2)(c) Women's Protocol. The specified cases are sexual assault, rape, incest, and 'where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus'.

<sup>123</sup> Art 20 Women's Protocol.

<sup>124</sup> Art 21 Women's Protocol.

<sup>125</sup> Arts 22 & 23 Women's Protocol.

harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Similar provisions with regard to public education and other social-based actions appear throughout the Protocol, thus enhancing its utility as a tool for gender advocates.

Largely attributable to a relentless campaign by women's organisations and networks, 13 out of a required 15 states have ratified the Women's Protocol since its adoption.<sup>126</sup> The ratification campaign is a remarkable example of the resolve of African women and a model for advocacy, which can be carried over towards the Protocol's future implementation. Model components include, for example, the formation of a coalition of organisations from Africa and abroad to implement the ratification campaign, thus accruing the benefits that accompany strength in numbers. The coalition has prepared a petition and is gathering signatures on-line and, innovatively, via text messages through cellular phones, in recognition of the fact that more Africans can access a cellular phone than a computer. Another model component of the campaign has been the strategic lobbying of key regional actors, such as Heads of States at the latest AU Heads of States Summit in Addis Ababa, ambassadors, and the President of the Pan-African Parliament. The campaign is also being waged at national levels with effective use of the media, awareness and sensitisation workshops, and co-operation with the Special Rapporteur on the Rights of Women of the African Commission.<sup>127</sup>

In 2004, at the 35th ordinary session of the African Commission, the Commission adopted its first resolution concerning women's rights, entitled the 'Situation of Women and Children in Africa'.<sup>128</sup> Mention was given to the persistence of harmful traditional practices, widespread poverty, the stigmatisation of women with HIV/AIDS, and the need for states to ratify the Women's Protocol. Stronger resolutions are required whereby these issues and others are addressed in detail individually, rather than as part of a general situation alongside children, another vulnerable group with often related, but unique, needs and concerns. Unfortunately, these types of resolutions are difficult to secure due to the highly political nature of the African Commission, despite the independence of the commissioners. While the presence of five female commissioners, including the Chairperson, inspires hope for an increased prevalence of women's rights-related resolutions, unanimity

<sup>126</sup> As of 1 September 2005.

<sup>127</sup> Ndirangu & Karmel (n 115 above).

<sup>128</sup> African Commission on Human and Peoples' Rights, Resolution on the Situation of Women and Children in Africa (2004) 35th ordinary session of the African Commission on Human and Peoples' Rights <http://www.fidh.org/IMG/pdf/Resolutions35CADHPa.pdf> (accessed 29 October 2004).

is required for the adoption of resolutions. Thus, the aversion of even one commissioner from, or allied with, a less progressive state concerning women's rights can prevent the adoption of a resolution. Mindful of the inevitable politics surrounding the consideration and adoption of resolutions, gender advocates must strategise accordingly. For example, drafting must include diplomacy. Likely opponents and allies within the African Commission must be identified and lobbied. Ultimately, as NGOs may often be perceived as a nuisance, the respective allies should lobby the opponents. Finally, publicity, via the media in particular, must be used to its full potential. Civil society and the AU must monitor any resulting changes in the situation and continue to exert pressure. The PAP and ECOSOCC, in particular, are well placed in this respect as platforms for women's voices and due to their advisory mandate.

Out of over 300 communications received by the African Commission, none have touched upon women's rights directly.<sup>129</sup> There is a need to develop the jurisprudence of the African Commission in this respect. Several reasons for the underutilisation of this entry point can be deduced. First, NGOs have simply not brought communications concerning issues of concern specifically to women to the African Commission.<sup>130</sup> As the majority of African women, particularly in the rural areas, remain unaware of the existence of the African Charter and thus unaware of how it can assist their plight, it is up to NGOs to solicit relevant cases to advance before the Commission.

The admissibility requirements for communications<sup>131</sup> are cumbersome, particularly concerning the exhaustion of remedies, as women often have difficulty accessing local courts for a variety of reasons. Another reason for the gap in jurisprudence, with respect to women's rights, is the respective inadequacy of the African Charter. Many violations affecting women are perceived as irrelevant to the communications procedure, as they do not correspond directly with a provision in the African Charter. While, arguably, all violations of women's rights as articulated in the Women's Protocol can be alleged under the African Charter, a significant amount of legal manoeuvring would be required by the litigants, which likely acts as a deterrent. Domestic violence is one example of a violation, which *prima facie* does not correspond to a Charter provision. Arguably, however, domestic violence can constitute torture.<sup>132</sup> Accordingly, a violation of article 5 of the African Charter can

<sup>129</sup> R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 208.

<sup>130</sup> As above.

<sup>131</sup> Art 56 African Charter.

<sup>132</sup> For an elaboration of the argument that domestic violence can constitute torture, see eg R Copelon 'Intimate terror: Understanding domestic violence as torture' in Cook (n 1 above) 116-152 and H Charlesworth *et al* 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 628-630.



be alleged by a groundbreaking NGO prepared to put forward the argument, although none have seized the opportunity to advance the African Commission's jurisprudence in this respect. Once the Women's Protocol enters into force, advocates will undoubtedly feel more empowered, and indeed will be, to capitalise on the communications procedure. Finally, the majority of decisions<sup>133</sup> which have been seized by the African Commission to date, reflect one of the main criticisms of international law from a feminist perspective in that it is designed to protect members of society from public violations, whereas the majority of violations against women occur in the private sphere.<sup>134</sup>

In pursuance of this particular avenue for advocacy, a clear strategy must be devised beforehand whereby prospective cases are carefully considered before the actual submission is made. As the broad goal is the advancement of women's rights, cases must be selected with regard to their potential value as regional and international precedents. A successful decision accompanied by effective publicity could have far-reaching positive repercussions for African women. A potential strategy to employ, in this respect, would be to select an issue first and then recruit the respective complaints. For example, the responsibility of the state arising out of human rights violations perpetrated by individuals and women's enjoyment of economic, social and cultural rights are two general areas in which the substantive law of human rights, as it particularly affects women, needs development.<sup>135</sup>

A revolutionary challenge for African women's NGOs to undertake would be to bring gender-related communications to the African Commission that would reveal the existence of a series of serious or massive violations, as provided for under article 58 of the African Charter. If the African Commission opines that a series of serious and massive violations does exist, it shall draw these cases to the attention of the Assembly of Heads of State and Government, whereby they may request the African Commission to undertake an in-depth study.<sup>136</sup> The well-

<sup>133</sup> The African Commission has recognised the responsibility of the state for the actions of non-state actors in the following communications: *Commission Nationale Des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) paras 20-22; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 50; *Malawi African Association & Others v Mauritania* (2000) AHRLR 147 (ACHPR 1999) paras 134, 140; *The Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 57 & 58.

<sup>134</sup> See eg Charlesworth *et al* (n 132 above) 625.

<sup>135</sup> A Byrnes 'Enforcement through international law and procedures' in Cook (n 1 above) 189 217.

<sup>136</sup> Arts 58(1) & (2) African Charter.

documented<sup>137</sup> systemic rape of women in the Darfur region of Sudan, for example, is rife for implementation of article 58.

However, gender advocates must not be hasty and use the communications procedure for political statements or publicity alone while risking the loss of the case, which could have detrimental effects in the long run. As Byrnes observes:<sup>138</sup>

Losing a case at the international level may impede prospects for political and legal change at the national level, since a government may claim that the changes advocated are not required by international law.

Given the favourable ratio of the commissioners and the increased sensitisation to women's rights, provided by the adoption of the Women's Protocol, the chances of favourable decisions, if based on strong, strategic communications, are greater than ever. It is time for gender advocates to tread this unexplored path and capitalise on the communications procedure as an opportunity for advancing women's rights.

The African Commission has three Special Rapporteurs, one of which is on the Rights of Women in Africa.<sup>139</sup> As women's rights gain prominence on the regional agenda, so does the importance of the Special Rapporteur increase. However, her mandate is difficult to carry out with limited financial and human resources. It includes encouraging and working with NGOs in the field of promotion and protection of women's rights and serving as a link between the Commission and inter-governmental and non-governmental organisations at regional and international levels, in order to harmonise the initiatives on the rights of women.<sup>140</sup> She receives no funding from the African Commission and holds other responsibilities as a commissioner on the African Commission and as a full-time public servant in Mozambique.

<sup>137</sup> See eg United Nations Commission on Human Rights 'Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights' (7 May 2004) UN Doc E/CN4/2005/3 and Amnesty International 'Darfur: Rape as a weapon of war: Sexual violence and its consequences' (19 July 2004) AI Index AFR 54/076/2004.

<sup>138</sup> Byrnes (n 135 above) 200.

<sup>139</sup> The other two are the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions and the Special Rapporteur on Prisons and Conditions of Detention in Africa.

<sup>140</sup> The other components of his or her mandate are to: carry out a study on the situation of the human rights of women in Africa; to draw up guidelines on the drafting and examination of state parties' reports on the rights women in Africa; to ensure or make a follow-up on the implementation of the Charter by state parties. In this vein, the Special Rapporteur will prepare a report on the situation of violations of women's rights and propose recommendations to the Commission; to assist African governments in the development and implementation of their policies of promotion and protection of women's rights in Africa; to collaborate with Special Rapporteurs from the UN and other regional systems; 'Draft Terms of Reference for the Special Rapporteur on the Rights of Women in Africa' reprinted in Heyns (n 2 above) 601-602.

Co-operation by civil society with the Special Rapporteur is an under-utilised means to advance women's rights despite its prevalence in her mandate. This is due to a lack of awareness by civil society of her mandate or lack of means mutually to initiate co-operative initiatives.

In recognition of the dire need to provide the Special Rapporteur with technical assistance to enable her to carry out her mandate, the Centre for Human Rights at the University of Pretoria in South Africa has an agreement to collaborate with the African Commission to support the Special Rapporteur.<sup>141</sup> The Centre for Human Rights will collect information and documentation, facilitate networking, conduct research and produce material. Penal Reform International provides similar co-operation as is being offered by the Centre to the Special Rapporteur on Prisons and Conditions of Detention in Africa with notable success,<sup>142</sup> thus setting an inspiring precedent.

The Special Rapporteur has the political access to amplify women's voices, especially in forums where they otherwise remain whispers. For example, the Special Rapporteur reports to the African Commission, the contents of which then becomes part of the African Commission's report to the Assembly.<sup>143</sup> Gender advocates, subsequently, have access to the Assembly via the Special Rapporteur if first the entry point is recognised, and then capitalised upon. Most importantly, information must be provided to the Special Rapporteur in order to ensure women's issues of greatest concern are included in her report. This will be even more important once the Women's Protocol enters into force in order to work towards its implementation.

The reporting procedure under article 62 of the African Charter, whereby state parties are required to submit bi-annual reports to the African Commission, must also be maximised for gender advocacy. While states are required to include women's rights in their reports under the African Charter,<sup>144</sup> the Women's Protocol explicitly reinforces this obligation.<sup>145</sup> Women's NGOs must ensure they are aware, in advance, of which states are to report at the African Commission session. They can then mobilise to place pressure on the respective governments to prepare a report for delivery. Use of the media in this respect could be constructive where overdue reports, in particular, should be highlighted. They can also lobby the relevant officials in

<sup>141</sup> Centre for Human Rights 'Providing technical support to the Special Rapporteur on the Rights of Women in Africa', on file with author.

<sup>142</sup> J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 260.

<sup>143</sup> Draft Terms of Reference (n 140 above).

<sup>144</sup> Guidelines for National Periodic Reports Under the African Charter Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988 para 5 in Heyns (n 2 above) 507.

<sup>145</sup> Art 26 Women's Protocol.

person and, if necessary, offer technical assistance in the drafting of the report. The preparation of shadow reports is most enlightening for the commissioners as, not surprisingly, issues are raised that are often absent in the government reports. While the reporting procedure has always been an important entry point for advocacy, the Women's Protocol, through its comprehensive list of rights and prescriptions for state actions, now requires much more detailed reporting from states whereby they must indicate the legislative and other measures undertaken for the full realisation of the rights in the Protocol.<sup>146</sup>

While opportunities for advancing women's rights through the African Commission have always existed, they have not been effectively translated into advocacy. The inadequacy of the African Charter to address women's concerns is likely to account for this. The current climate, however, with the ratio of female commissioners and the adoption of the Women's Protocol, should inspire gender advocates to lobby for the adoption of pertinent resolutions, to submit individual communications regarding violations of women's rights, to strengthen partnerships with the Special Rapporteur, and to participate in the reporting procedure.

#### 4.2 The African Court on Human and Peoples' Rights

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force on 15 January 2004. The Court is to 'complement the protective mandate of the African Commission on Human and Peoples' Rights'.<sup>147</sup> Cases and disputes submitted to it concerning the interpretation and application of the African Charter, its own Protocol and any other relevant human rights instrument will fall under the Court's jurisdiction.<sup>148</sup> This includes the Women's Protocol, also to be interpreted by the Court.<sup>149</sup>

Although article 12(2) refers to adequate gender representation in nominating and electing judges, the Protocol does not ensure gender equality in the composition of judges. While this does demonstrate progress from the African Charter, where there is no reference to gender representation concerning the nomination of commissioners, the reference to 'adequate gender representation' is vague and relative to those submitting the ballot. The Assembly, who elects the judges, must be entrusted to elect 50% female judges according to the AU's principle of gender equality. State parties to the Protocol propose candidates for

---

<sup>146</sup> As above.

<sup>147</sup> Art 2 African Human Rights Court Protocol.

<sup>148</sup> Art 3(1) African Human Rights Court Protocol.

<sup>149</sup> Art 27 Women's Protocol.

the office of judge of the Court.<sup>150</sup> They must do so in accordance with the Guidelines for Nomination and Election of Judges to the African Court on Human and Peoples' Rights whereby 'States Parties should encourage the participation of civil society, including professional, academic and women's groups, in the processes of selection of nominees'.<sup>151</sup> Accordingly, gender advocates must ensure eligible female judges are brought to the attention of the relevant parties during the selection process. Subsequent to elections, efforts must then focus on sensitising all the judges to the provisions of the Women's Protocol.

Another weakness in the Protocol, from a gender perspective, is article 5(3), read with article 34(6), regarding access to the Court. Relevant NGOs can only institute cases directly before the Court if the concerned state has made a separate declaration accepting the Court to receive cases by NGOs. As NGOs are most likely to advocate on behalf of African women, this is a serious obstacle in advancing women's rights through the Human Rights Court. Gender advocates must lobby states directly to accept the competence of the Court to receive individual communications and lobby the other organs of the AU, such as the Commission, the Executive Council and the PAP, to encourage states to make the necessary declaration.

Given the African Commission's weakness in enforcement, the significant manifestation of the complementary nature of the Court to the African Commission is the binding nature of the Court's judgments on states.<sup>152</sup> States that do not comply with the Court's judgments may arguably be subject to sanctions by the Assembly.<sup>153</sup> The Human Rights Court could finally provide the necessary 'teeth' to the African human rights system in time for the entry into force of the Women's Protocol, ultimately leading to strengthened prospects for implementation. In theory, in a truly gender mainstreamed AU, the Human Rights Commission, informed by civil society in co-operation with the Special Rapporteur on Women, may bring a case before the Human Rights Court against a state who, despite having ratified the Women's Protocol, has failed to protect women in armed conflicts, for example. If that state is found to be in violation of the Protocol and does not comply, the AU may subject that state to sanctions.

<sup>150</sup> Art 12 African Human Rights Court Protocol.

<sup>151</sup> *Note Verbale* Commission of the African Union 'Guidelines for Nomination and Election of Judges to the African Court on Human and Peoples' Rights' BC/OLC/66 5/8/Vol V (2004).

<sup>152</sup> Art 30 African Human Rights Court Protocol.

<sup>153</sup> Art 23(2) of the Constitutive Act (n 2 above) states: '[A]ny member state that fails to comply with the decisions and policies of the Union may be subjected to other [than as listed in art 23(1)] sanctions . . .' Arguably, a decision of the African Court on Human and Peoples' and Rights is a decision of the Union.

## 7 Conclusion

The overview of women's participation in the AU structures reveals that women are absent or inadequately represented within the main policy-making mechanisms, namely the Assembly of the AU, the Executive Council and the Peace and Security Council. 'Without the active participation of women and the incorporation of women's perspective at all levels of decision making, the goals of equality, development and peace cannot be achieved.'<sup>154</sup> The Commission, with equal gender representation, is administrative. ECOSOCC provides for equal representation of women in its composition, but its powers are advisory only. A woman leads the PAP, but it only has a 20% quota for women and is also an advisory body. The AU's commitment to gender parity in all its organs remains unfulfilled.

Although gender equality is a principle of the AU, the reality is that patriarchy remains highly institutionalised in all African systems, and rarely are those who benefit from the *status quo* eager to witness its evolution. It is now in the hands of African women and men to wage a multifaceted struggle formulated around the various available entry points for gender advocacy and, in so doing, maximise the opportunities presented by the AU's commitment to gender equality. Components of the struggle may include claiming the existing political space for women as decision makers within the AU and creating space where it does not currently exist, advocating for ratification of the Women's Protocol and the African Court of Justice, and increased and more effective engagement with the African Commission.

Despite the favourability of the regional political structures to endeavours towards gender equality, significant general challenges exist aside from those already highlighted. First, gender mainstreaming is a complex process and many political leaders and even gender activists are confused as to what gender mainstreaming actually means.<sup>155</sup>

It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.

In other words, contrary to common perceptions, gender mainstreaming is not complete once women are simply welcomed participants in traditionally male-dominated structures. The lack of understanding of how gender perspectives can be identified and addressed remains one

<sup>154</sup> Beijing Platform for Action (n 22 above) para 181.

<sup>155</sup> UN Committee on Economic, Social and Cultural Rights agreed conclusions 1997/2 (n 3 above).

of the most serious constraints.<sup>156</sup> While advocating for a critical mass of female participants in the AU, the greater challenge is to maximise the opportunities created once women within the various mechanisms hold power. Policies and programmes, along with corresponding activities, must ultimately reflect the experiences and needs of women and men. This has yet to materialise beyond lip service in the AU.

Another challenge in the midst of advancing women's rights is the proliferation of mechanisms within the AU. As Heyns pertinently observes:<sup>157</sup>

The current proliferation of mechanisms means that there is a lack of focus of resources and effort, with the result that none of them might be in a position to make any difference.

The structural proliferation within the AU does not necessarily assist advocacy efforts. While the various organs each represent a forum for gender advocacy in varying degrees, efforts to capitalise on the opportunities presented by each will inevitably stretch human and financial resources that are already limited within civil society. For example, several organisations have formed a coalition for the campaign to ratify the Women's Protocol and the campaign is being vigorously waged. Due to capacity restraints, it would be difficult, if not impossible, to wage an equally enthusiastic campaign for the other remaining Protocol not yet in force, the Protocol for the African Court of Justice. The Gender Directorate within the Commission, the Peace and Security Council, the African Commission and other structures of the AU welcome co-operation from civil society and in some cases depend upon it. Researching issues, compiling information and preparing reports much needed for the infiltration of the gender perspective in all activities of the AU would alone require several full-time civil society-based advocates. Lobbying efforts are unsustainable on all fronts, given the overwhelming nature of issues to be addressed, and the forums within which to address them, nationally, sub-regionally, regionally and even internationally. Moreover, there is a lack of critical mass in gender-based organisations knowledgeable of the structures and their corresponding entry points.<sup>158</sup> However, the challenges created by the proliferation of mechanisms in Africa are not insurmountable if, combined with other strategies, issue-based priorities are identified and advocated for within structures most likely to correspond to their advancement.

Finally, the greatest challenge to gender equality in Africa is articulated by Chinkin.<sup>159</sup>

<sup>156</sup> Gender mainstreaming (n 44 above).

<sup>157</sup> Heyns (n 113 above).

<sup>158</sup> African Union and NEPAD (n 24 above).

<sup>159</sup> C Chinkin 'Women's human rights in the 21st century: Challenges and opportunities' lecture, University of Oxford (July 2004), on file with author.

As is all too evident from the continuing and widespread gross violations of women's human rights, legal norms and new legal institutions do not of themselves denote change. They must be accompanied by the internalisation of a human rights culture within the particular contexts of diverse societies and the development of a mindset that rejects the different forms of adverse treatment meted out to women worldwide.

The Women's Protocol recognises the need to modify the social and cultural patterns of conduct of women and men, as does CEDAW. The advocacy priorities identified so far must be accompanied by the Protocol's recommended activities of education, information and communication locally, in co-operation with government stakeholders, towards this end.

Are we, activists for women's rights, concerned Africans, and citizens of an increasing globalised world, to see the glass half empty or half full? The reality is discouraging. However, the introductory argument stands. The regional climate for the advancement of women's rights is more favourable than ever. The AU's commitment to gender equality, the historical achievement of gender parity in the African Commission and the goal to extend that precedent to all organs of the AU, the various institutional commitments to gender mainstreaming, and those to co-operate and build partnerships with civil society, and the adoption of the Gender Declaration and the Women's Protocol, are all revolutionary indications that Africa can transform the oppression under which women live. Arguably, only a decade ago, such initiatives would have been inconceivable. Women such as Gertrude Mongella, the President of the Pan-African Parliament, are models of empowered women, and are beginning to dispel perceptions that women belong in servitude in the private sphere. Africa will one day see its first female head of state. The Women's Protocol will enter into force and fierce advocacy efforts leading to such indicate that state parties will not escape pressure to implement its provisions. The period of time required for the attainment of gender equality in Africa is impossible to predict, but there is no question that it is less than it was before the inception of the AU.



# A human rights approach to World Trade Organization trade policy: Another medium for the promotion of human rights in Africa

*Omphemetse Sibanda\**

Associate Professor, Department of Criminal and Procedural Law, University of South Africa

## Summary

*In this article, the author examines the human rights approach to trade policy within the framework of the World Trade Organization. In this regard, the author outlines the rationale and the basis for the assertion that the World Trade Organization should embrace the human rights approach. The author argues that such an approach to trade policy can play a vital role in the promotion of a human rights culture in Africa. African countries seem to be increasingly embracing a human rights approach to trade and are also party to bilateral trade arrangements, which emphasises the need for a good relationship between international trade and human rights.*

## 1 Introduction

This article examines a human rights approach to trade policy within the framework of the World Trade Organization (WTO).<sup>1</sup> The crux of this article is that a human rights approach to trade policy, though mainly through residual reference and/or the application of public inter-

---

\* BJuris, LLB (Vista), LLM (Georgetown), LLD International Economic Law Candidate, University of North West; sibanos@unisa.ac.za

<sup>1</sup> The World Trade Organization was created by the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement) 1994 *International Legal Materials* 114-1152. The WTO Agreement covers not only the WTO as an institution, it also covers all the Uruguay Round agreements (associated agreements) attached to it as annexures.

national law, can play a vital role in the promotion of a human rights culture in Africa.<sup>2</sup> In particular, part 2 of this article outlines the rationale and the basis for the assertion that the WTO should embrace a human rights approach. This includes an examination of the aims and objectives of the WTO. It also includes the examination of the role played by Dispute Settlement Body (DSB)<sup>3</sup> panels and the Appellate Body of the WTO in the trade-human right debate. The settlement of trade disputes under the WTO framework generally is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The role played by the DSB is important. The DSB can be seized with a dispute that carries both a trade and a non-trade aspect. It may also be that the human rights aspect of the dispute is equally important or indispensable to the just adjudication of the trade dispute.<sup>4</sup> In part 3 I examine, as examples, some provisions of associated agreements (covered agreements) of the WTO, and how their mainly exceptions-based approach to non-trade issues can pave the way for an expanded accommodation and understanding of human rights in the WTO. Associated agreements are agreements containing principles and procedures which WTO members must follow when developing and imple-

<sup>2</sup> This study, therefore, does not embark on a general discussion of the WTO trade and human rights link. For a general discussion on trade and human rights, see E Petersmann *Time for integrating human rights into the law of worldwide organisations — Lessons from the European integration law for global integration law* Monnet Working Paper 7/01; E Petersmann 'From "negative" to "positive". Integration in the WTO: Time for mainstreaming human rights into WTO law' (2000) 37 *Common Market Law Review* 1363; AE Appleton 'The World Trade Organization: Implications for human rights and democracy' (2000) 29 *Thesaurus Acroasium* 415; M Cohn 'The World Trade Organization: Elevating property interests above human rights' (2001) 29 *Georgia Journal of International and Comparative Law* 247; P Stirling 'The use of trade sanctions as an enforcement mechanism for basic human rights' (1996) 11 *American University Journal of International Law and Policy* 1; SH Cleveland 'Human rights sanctions and the World Trade Organization' in F Francioni (ed) *Environment, human rights and international trade* (2001); AH Qureshi 'International trade and human rights from the perspective of the WTO' in F Weiss *et al* (eds) *International economic law with a human face* (1998); R Howse & M Mutua 'Protecting human rights in a global economy: Challenges for the World Trade Organization' International Center for Human Rights and Democratic Development: Policy Paper (2000) <http://www.ichrdd.ca/English/commndoc/publications/globalization/WtoRightsGlob.html> (accessed 31 August 2005).

<sup>3</sup> The DSB is established under art 2 of Annex 2 of the Agreement Establishing the World Trade Organization: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It has the responsibility of administering DSU rules and procedures. It also issues Panel Reports and Appellate Body Reports, oversees the implementation of rulings and recommendations and authorises appropriate relief measures.

<sup>4</sup> TJ Schoenbaum 'WTO dispute settlement: Praise and suggestions for reform' (1998) 47 *International and Comparative Law Quarterly* 647 653 is of the view that art 11 of the DSU, by allowing panels to 'make such other findings' as will assist in the dispute resolution, gives 'implied powers' for the WTO dispute settlement bodies to 'decide all aspects of a dispute'.

menting trade standards. In part 4 I briefly discuss the issue of the use of economic sanctions to enforce human rights under WTO law.

This article makes specific reference to the WTO regime because of several reasons: The bulk of African nations are currently members of the WTO;<sup>5</sup> all WTO members have undertaken obligations under international human rights law, to be observed and discharged; characteristically the WTO has a framework which gives it the capacity or the potential to broadly influence the promotion of human rights in Africa. Whilst on this point, we should perhaps acknowledge that there has been some resistance against the consideration of human rights issues within the WTO.<sup>6</sup> It has been argued that the WTO should be confined to its traditional objective of regulating trade amongst nations.<sup>7</sup> It has also been argued, and debatably, that the WTO is not adequately equipped to deal with human rights issues.<sup>8</sup>

<sup>5</sup> Not less than 44 African countries are members of the WTO. Eight African countries enjoy observer status. See *Understanding the WTO: Members and observers* [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed 23 August 2005).

<sup>6</sup> This has been despite the fact that the correct reading of the actual WTO agreements does not preclude members from introducing measures that are directed at preserving non-trade issues or values such as human rights.

<sup>7</sup> In fact, this stereotypical view of the WTO has led to it being criticised as the 'nightmare of human rights'. This, in my view, is an absurd and unjustifiable over-criticising of the WTO. See *Report: Expert Group of the Sub-Commission on Human Rights*, 15 June 2000 E/CN.4/Sub2/2000/13. Trade liberalisation cannot continue to restrict WTO members from regulating the protection of human rights where possible. The need to protect human rights may be important as a check and balance to trade liberalisation.

<sup>8</sup> The argument is based on the general lack of human rights expertise of the WTO adjudicators. It is indeed true that adjudicators of the WTO DSB may lack expertise in human rights law. Eg, since the inception of the WTO, the Appellate Body adjudicators have mainly been persons with 'demonstrable expertise in law, international trade law and the subject matter of the WTO agreements generally', as required by art 17(3) of the DSU. Their background and academic qualifications and experience suggest a lack of expertise in non-trade areas, such as environmental law and human rights. Be that as it may, their lack of 'human rights expertise' does not prevent the WTO DSB from dealing with human rights issues. In fact, they are well equipped to deal with such issues. Pursuant to art 13 of the DSU, they are allowed to have recourse to 'seek information and technical advice from individuals or body' with necessary skills and expertise to help resolve the matter before the DSB, or may consult with 'any relevant source'. See, generally, C Ehlermann 'Six years on the bench of the World Trade Court — Some personal experiences as a member of the Appellate Body of the WTO' (2002) 36 *Journal of World Trade* 605, where he gives an account of the use of experts in the WTO DSB. Prof Ehlermann is one of the original seven Appellate Body members. Other original members are Mr Baccus of the United States; Justice Feliciano of the Philippines; Mr Muro of Uruguay; Dr El-Naggar of Egypt; Prof Matsushita of Japan; and the late Mr Beeby of New Zealand.

Interestingly, the initial resistance against the presence of human rights issues in the WTO framework was largely from developing countries, including some African nations. Apparently there were fears that human rights-related measures in the WTO framework will lead to disguised protectionist tendencies.<sup>9</sup> However, the position seems to have changed. African countries appear increasingly to be embracing a human rights approach to trade. Musungu gives an illuminating account of this change in the African context.<sup>10</sup> According to Musungu, several African regional and sub-regional economic treaties, such as the African Economic Community (AEC), the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA) 'make specific reference to human rights'.<sup>11</sup> Some of these treaties, such as the Southern African Development Community Treaty (SADC Treaty), commit members to human rights and constitutionalism.<sup>12</sup> African countries are also party to trade arrangements with countries in the developed world, emphasising the need for a good relationship between international trade and human rights. These arrangements include the Cotonou Agreement and the United States African Growth and Opportunity Act (AGOA).<sup>13</sup> The reference to human rights in trade arrangements by African countries is a remarkable achievement in the endeavour to promote human rights in Africa. This achievement can have a greater effect if the WTO system and processes were utilised to influence the protection and promotion of human rights in its member states. In Africa, issues such as pandemics,<sup>14</sup> poverty, lack of food security,<sup>15</sup> exploitation of

<sup>9</sup> See the Ministerial Conference of the World Trade Organization (Singapore Ministerial Declaration), adopted 13 December 1996, reprinted in (1997) 36 *International Legal Materials* 218, on the argument by developing countries that labour standards within the WTO framework may be used for 'protectionist purposes'. The validity of the protectionist argument diminishes when considering the fact that the WTO members are enjoined to use WTO exceptions to their trade obligation in good faith. Pursuant to art 26 of the Vienna Convention, the WTO always requires its members to discharge their duties and obligations 'in good faith'. The good faith application of obligations may curtail human rights-related protectionism.

<sup>10</sup> See, generally, SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 88 92-96.

<sup>11</sup> Musungu (n 10 above) 92.

<sup>12</sup> As above.

<sup>13</sup> See generally Musungu (n 10 above) 93-95.

<sup>14</sup> See S Gumede 'HIV/AIDS and human rights: The Role of the African Commission on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 181-183.

<sup>15</sup> See O Sibanda 'The WTO and the troubled agriculture liberalisation programme' (2003) *Codicillus* 19 20-22.

resources<sup>16</sup> and child labour<sup>17</sup> are often directly and/or indirectly human rights issues.<sup>18</sup> Furthermore, these issues are influenced by globalisation initiatives and trade liberalisation.

The human rights approach to trade that is evident in some African trade arrangements seems to be losing favour with some traditional users of trade policy to enforce human rights. These nations, such as the United States, appear to selectively resist the human rights approach within the trade context. This, for example, was evident from the South African case of *Pharmaceutical Manufacturers' Association and Others v The President of the Republic of South Africa*.<sup>19</sup> The case deals with access to life-saving HIV/AIDS drugs by the government of South Africa, through measures consistent with WTO rules.<sup>20</sup> A group of pharmaceutical companies, under the flagship of the Pharmaceutical Manufacturers' Association of South Africa, took the government to the Pretoria High Court over the constitutionality of proposed amendments to the Medicines and Related Substances Act 101 of 1965.<sup>21</sup> This resulted in the April 1999 listing of South Africa by the United States under the 'Watch List', pursuant to of section 301 of the Trade Act of

<sup>16</sup> See O Sibanda 'Integrating Africa into the World Trade Organization: Constrains and challenges facing the African Union and the New Partnership for Africa's Development' (2004) 45 *Codicillus* 47 57-58.

<sup>17</sup> See O Sibanda 'South Africa's children in labour pains: Is it not time to prescribe corporate social responsibility?' in C Okpaluba (ed) *Law and the contemporary South African society* (2004) 97 98.

<sup>18</sup> The case of the Ogoni people, *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) ACHPR 60 (ACHPR 2001), which came before the African Commission on Human and Peoples' Rights, was evidence of how multinational companies abuse human rights. This included the right to health and the right to a clean and safe environment, as recognised in the African Charter on Human and Peoples' Rights.

<sup>19</sup> The South African case of *Pharmaceutical Manufacturers' Association & Others v The President of the Republic of South Africa & Others* Case No 4183/98. See C Ngweni 'AIDS in Africa: Access to health care as a human right' (2002) 15 *South African Public Law* 1 24-25; M Foreman 'Beyond our means: The cost of treating HIV/AIDS in the developing world' (2000) <http://www.panos.org.uk/PDF/reports/Beyond%20Our%20Means.pdf> (accessed 2 September 2002).

<sup>20</sup> In particular Annex 1C of the WTO Agreement: The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), 1869 UNTS 229 reprinted in (1994) 33 *International Legal Materials* 81.

<sup>21</sup> Through the Medicines and Related Substances Control Amendment Act 90 of 1997. In this case, a group of pharmaceutical companies and the Pharmaceutical Manufacturers' Association of South Africa sought to prevent the President of the Republic of South Africa and the Minister of Health from amending the country's patent law, making HIV/AIDS drugs more accessible. For extensive discussions of the case, see generally JM Berger 'Tripping over patents: AIDS, access to treatment and the manufacturing of scarcity' LLM thesis, University of Toronto, 2001; J Collins 'The pharmaceutical companies versus AIDS victims: A classic case of bad vs good? A look at the struggle between intellectual property rights and access to treatment' (2001) 29 *Syracuse Journal of International Law* 7.

1974.<sup>22</sup> The Clinton administration thus regarded South Africa as a country that does not adequately and effectively protect American drug patents.<sup>23</sup> The new Act gave the South African Minister of Health 'sweeping authority to abrogate patent rights for pharmaceutical products',<sup>24</sup> according to the United States.

## 2 Rationale and basis for human rights protection in the World Trade Organization

### 2.1 The changed *raison d'être* of the World Trade Organization

Unlike its predecessor, the 1947 General Agreement on Trade and Tariffs (GATT 1947)<sup>25</sup> that had a purely trade *raison d'être*, the WTO's

<sup>22</sup> Trade Act of 1974, Pub L93-618, 93 Stat 144, 236. Sec 301 is a tool used by the United States to deal with laws, policies, practices or measures of foreign governments or institutions that are inconsistent with the provisions of trade agreements to which the United States is a party, or that 'deny' benefits to the United States under such agreements. For more information on sec 301, see generally JH Bello & AF Holmer 'Section 301, recent developments and proposed amendments' (1988) 35 *Federal Business News and Journal* 68; R Hudec 'Retaliation against "unreasonable" foreign trade practices: The new section 301 and GATT nullification and impairment' (1975) 59 *Minnesota Law Review* 461; KB Thatcher 'Section 301 of the Trade Act of 1974: Its utility against alleged unfair trade practices by Japanese government' (1987) 81 *Northwestern University Law Review* 492.

<sup>23</sup> South Africa was later in the same year removed from the Watch List's Section 301, mostly after pressure was brought to bear on the United States by groups such as Consumers International, Health Action International and Act Up! See International Intellectual Property Institute (IIPI) Report — 2000: 'Patent protection and access to HIV/AIDS pharmaceuticals in sub-Saharan Africa' (IIPI Patent Report) 16, a report prepared for the World Intellectual Property Organization. Interestingly, on 10 May 2001, the Clinton Administration issued an executive order entitled 'Access to HIV/AIDS pharmaceuticals and medical technology' <http://ofcn.org/cyber.serv/teledem/pb/2000/may/msg00089.htm> (accessed 11 May 2000), which introduced the policy of non-intervention in patent laws of beneficiary sub-Saharan countries, including South Africa, that regulated and promoted access to HIV/AIDS pharmaceuticals and technologies consistent with TRIPS. Such designated sub-Saharan countries may thus produce or import generic HIV/AIDS drugs without fear of trade sanctions. Note that on 27 May 2003, the Bush Administration announced the signing of the Congressional 'HIV/AIDS Act', which allowed the use of over US\$ 15 billion over a period of five years to combat HIV/AIDS in developing countries, possibly to allay fears that it will revoke the Clinton Administration's HIV/AIDS Act.

<sup>24</sup> GG Yerkey 'USTR says South Africa agrees to provide WTO-consistent patent protection for drugs' (1999) 16 *International Trade Report* (BMA) 1541.

<sup>25</sup> The General Agreement on Trade and Tariffs (GATT 1947), 55 UNTS 1867, is one of the Bretton Woods institutions established immediately after the Second World War. It operated as both a trade regulation institution and a general agreement on trade after the failure of the intended International Trade Organization (ITO). For more on the ITO and GATT 1947 and its double image, see generally Havana Charter for the Establishment of the International Trade Organization, UN Document E/Con2/78 (1948) reproduction in UN Document ICITO/1/4 (1948); M Meier 'The Bretton

objectives go far beyond trade and commercial growth. The Preamble of the WTO Agreement states its objectives as:

raising standards of living and ensuring full employment by expanding the production of and trade in goods and services . . . in accordance with the principles of sustainable development, seeking both to protect and preserve the environment . . . in a manner consistent with . . . needs and concerns at different levels of economic development.

Although the Preamble does not explicitly refer to 'human rights,' my view is that the Preamble gives credence to the theory that the recognition and consideration of some human rights issues are integral to liberalised trade. In fact, the Preamble states objectives that may relate to human rights, such as socio-economic rights. For instance, 'raising the standard of living' and 'development' are values that fall within the purview of human rights. Good living standards and development are human rights.

## 2.2 The Dispute Settlement Body and the human rights approach

The WTO Appellate Body held in *United States — Standard for Reformulated and Conventional Gasoline*<sup>26</sup> (*Reformulated Gasoline (AB)*) that multilateral trade can no longer be considered in 'clinical isolation' from other disciplines and rules of international law.<sup>27</sup> In *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtles (AB))*<sup>28</sup> the Appellate body further held that maintaining the WTO's trade objective is 'necessarily a fundamental and pervasive premise underlying the WTO Agreement', but not an absolute one. Neither is it an 'interpretive rule' to be employed in the 'appraisal' of disputes.<sup>29</sup> What can be discerned from these is that WTO functions can no longer be viewed as purely trade related.

---

Woods Agreement — 7 Years After' (1971) 39 *Stanford Law Review* 235 237; R Hudec *The GATT legal system and the world trade diplomacy* (1975) 48-45; JH Jackson *Restructuring of the GATT system* (1990).

<sup>26</sup> *United States — Standard for reformulated and conventional gasoline (Reformulated Gasoline (AB))*, WT/DS2/9, 20 May 1996.

<sup>27</sup> n 26 above, 18. See also G Marceau 'WTO agreements cannot be read in clinical isolation from public international law', paper at the World Bank seminar on International Trade Law, 24-25 October 2000. Art 3(2) of the Uruguay Round Understanding on Rules and Procedures Governing Settlement of Disputes (DSU), Annex 2, WTO Agreement, also requires that the WTO agreements and its associated agreements be interpreted, taking into account customary rules of interpretation, such as those embodied in the Vienna Convention.

<sup>28</sup> *The United States — Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtles (AB))*, WT/DS58/AB/R, 15 October 1998.

<sup>29</sup> *Shrimp-Turtles (AB)* para 116.

The institutional culture of the WTO and of its predecessor, GATT 1947, created a stereotyped free trade perspective of global trade, and helped establish an incorrect view that WTO dispute settlement bodies are jurisdictionally limited to considering non-trade concerns.<sup>30</sup> This incorrect view can no longer be maintained in the light of similar rulings by the DSB, such as *Reformulated Gasoline (AB)* and *Shrimp-Turtles (AB)*. When seized with a dispute that concerns a trade and a human rights aspect, the DSB should be able to at least consider such dispute without discarding the human rights aspect of it. This conclusion is subject to the relevant provisions of the WTO and its associated agreements.

Article 3(3) of the DSU calls for the prompt settlement of disputes in 'situations in which a member considers that any benefits accruing to it directly or indirectly under the covered agreement are being impaired by measures taken by another member'. If the case is brought before the DSB, in terms of article 4(4) of the DSU, a complaining party is required to identify clearly the measures or matters at issue, and indicate the legal basis for the complaint. Pursuant to article 23(1) of the DSU, the DSB is confined to DSU rules and procedures in settling disputes. Article 22(1) provides:

When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or impairment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

In light of the peremptory nature of article 23(1), read with other articles of the DSU, such as articles 1(1), 7(2), and 11, the DSB may have recourse only to WTO rules as contained in its covered agreements as the applicable law.<sup>31</sup> This is further confirmed by articles 3(2) and 19(1) of the DSU, which prohibit the DSB from adding to or diminishing the rights and obligations in WTO agreements. In relation to our study, this seems to suggest that the DSB is precluded from ruling purely on human rights issues. Otherwise the dispute should be a trade dispute with human rights elements pursuant to WTO provisions and exceptions.<sup>32</sup> The DSB cannot demand or even suggest that members change their laws to bring them into conformity with non-WTO norms, unless they could relate such suggestions to compliance with a provision of a covered agreement.<sup>33</sup> In brief, reference or recourse to

<sup>30</sup> See G Marceau 'Conflicts of norms and conflicts of jurisdiction' (2001) 35 *Journal of World Trade* 1081; JP Trachtman 'The domain of WTO dispute resolution' (1999) 40 *Harvard International Law Journal* 333.

<sup>31</sup> See R Howse 'Human rights in the WTO: Whose rights, what humanity? Comment on Petersmann' (2002) 13 *European Journal of International Law* 651.

<sup>32</sup> Howse (n 31 above) 17.

<sup>33</sup> As above.



public international law, such as human rights law, is only of residual nature. The residual approach to human rights law should be subject to the normative hierarchy of public international law.<sup>34</sup>

The argument on the residual recourse to public international law may also stem from the fact that the WTO is a self-contained regime. As correctly put by Howse, the WTO system is a *lex specialis* system,<sup>35</sup> which applies only to WTO disciplines. Simma describes a self-contained regime as a regime<sup>36</sup>

which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally applied at the disposal of an injured party.

As a self-contained system, the WTO has greater powers than many international bodies, including the United Nations (UN): It has full executive authority<sup>37</sup> over its associated agreement; possesses the elements of the legislative authority, which it exercises by compelling members to establish new laws that conform to WTO rules.<sup>38</sup>

### 3 Human rights-related provisions in the World Trade Organization

Trade and human rights, though conceptually divergent and having evolved separately and in parallel, are fundamentally coexistent and

<sup>34</sup> This would mean that the areas of human rights law recognised as customary international law, *erga omnes*, or as of general application, will normally prevail, or that WTO rules should be interpreted and applied as consistent with them. See generally Howse & Mutua (n 2 above).

<sup>35</sup> Howse (n 31 above) 22.

<sup>36</sup> B Simma 'Self-contained regimes' (1985) 16 *Netherlands Yearbook of International Law* 111 117.

<sup>37</sup> Note that the executive authority of WTO is bestowed on its Ministerial Conference. The Ministerial Conference, which heads WTO's institutional structure, is composed of international trade ministers from all member countries. In terms of art 4(1) of the WTO Agreement, the Ministerial Conference is tasked with carrying out the functions of the WTO. The Ministerial Conference enjoys supreme authority, including the authority to 'take decisions on all matters under any Multilateral Trade Agreement. As the governing body of the WTO, the Ministerial Conference is responsible for the strategic direction of the WTO. When the Ministerial Conference is not in session, its functions are performed by the General Council in terms of art 4(2) of WTO Agreement. In addition to the interim exercise of the functions of the Ministerial Conference, the General Council is also responsible for overseeing the day-to-day business and management of the WTO. The General Council may also convene as the DSB and the Trade Policy Review Body (TPRB). The DSB oversees the implementation and effectiveness of the dispute resolution mechanisms of all the WTO agreements. The primary responsibilities of the General Council, when sitting as the DSB, are to establish dispute settlement panels, adopt panel and the Appellate Body reports, maintain the surveillance of implementation of ruling and recommendations, and authorise appropriate remedies or relief measures.

<sup>38</sup> See generally the DSU.

practically complementary. WTO agreements have provisions that deal with, among others, public health and prison labour. Notable, for example, are article 2, read with the Preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),<sup>39</sup> article 27(2), read with article 27(1) of the Agreement of Trade-Related Aspects of Intellectual Property (TRIPS), article XIV(a) of the General Agreement on Trade in Services<sup>40</sup> (GATS), article XXIII(2) of the Agreement on Government Procurement (AGP),<sup>41</sup> and, most importantly, article XX of GATT. These provisions, although exception-based, take the form of WTO 'soft law' or 'soft rules' on human rights.

Article XX<sup>42</sup> of GATT states in part that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries. . . , or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the product of prison labour.

In almost similar terms as GATT, GATS article XIV states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health.

GATS article XIVbis further states:

- 1 Nothing in this Agreement shall be construed:
  - (c) to prevent any member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The Agreement on Government Procurement states:

- 23.2 Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent

<sup>39</sup> Annex 1A of the WTO Agreement.

<sup>40</sup> Annex 1B of the WTO Agreement.

<sup>41</sup> Annex 4(b) of the WTO Agreement.

<sup>42</sup> See L Bartels 'Article XX of GATT and the problem of extraterritorial jurisdiction' (2002) 36 *Journal of World Trade* 353 for a discussion on GATT art XX and human rights. Note that in terms of art 3 of the Agreement on Trade-Related Investment Measures (TRIMS), '[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this agreement'.

any Party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to products or services of handicapped persons, of philanthropic institutions or of prison labour.

The SPS Agreement states:

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail or a disguised restriction on international trade;

Hereby agrees as follows:

- 2.1 Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with provisions of this Agreement.
- 2.2 Members shall ensure that any sanitary and phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, based on scientific principles and is not maintained without sufficient scientific evidence, except as provided by paragraph 7 of article 5.
- 2.3 Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

TRIPS states that:

- 27.2 Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided such exclusion is not made merely because the exploitation is prohibited by their law.

### 3.1 Justification<sup>43</sup> for the use of human rights exceptions in the World Trade Organization

#### 3.1.1 Public morality

Based on moral principles, the WTO should be able to deal with relevant human rights issues where necessary.<sup>44</sup> There are many trade-related activities which have moral dimensions that should not be

<sup>43</sup> The words 'defences', 'justification' and 'exceptions' are used interchangeably throughout this article.

<sup>44</sup> Positivists such as John Rawls and Jagdish Bhagwati would disagree. In support of the argument that trade should not deal with human rights issues, they argue that legal obligations, which largely characterise the multilateral trading system, should be divorced from moral obligations.

separated from human rights. For instance, the use of unlawful child labour, and the export and import of the products of such child labour create a moral ground to resist the use of such activities. The global moral obligation enjoins the world community to take dissuasive measures against such processes and methods of production. Child labour involves the violation of fundamental labour rights, which are human rights worthy of protection.<sup>45</sup> Like child labour, prison labour may also be subsumed under the broader 'public morals' exception.<sup>46</sup>

As Charnovitz states correctly, the public morality defence is one of the 'uncharted' arguments within the WTO. This is despite the fact that this general exception has been in existence since its drafting by the United States in 1947.<sup>47</sup> There is a case still to come before the WTO that deals specifically with this exception. Therefore, the interpretation and application of the 'public morals' exception may open a Pandora's box and generate many questions and debates.<sup>48</sup> The questions considered by Charnovitz are: Whose morals and what morals are covered?<sup>49</sup> Should the term 'public morality' be understood as meaning

<sup>45</sup> See S Bal 'International free trade agreement and human rights: Reinterpreting article XX of GATT' (2001) 10 *Minnesota Journal of Global Trade* 62 78-79; C Feddersen 'Focus on substantive law in international economic relations: The public morals of GATT's article XX(a) and "conventional rules" of interpretation' (1998) 7 *Minnesota Journal of Global Trade* 75 77.

<sup>46</sup> GATT art XX(e). It has been argued that the public morality exception subsumes 'public order' exception, which is found in GATS art XIV(a); Agreement on Procurement art 2; and TRIPS art 27(2), or that the latter should be read as broadening the former in terms of meaning and context. See generally S Charnovitz 'The moral exception in trade policy' (1998) 38 *Virginia Journal of International Law* 689. The fine reading of these agreements, particularly GATS art XIV(a), concludes otherwise. The footnote to 'public order' in GATS art XIV(a) states that 'public order' exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'. This implies that a 'public order' defence may only be invoked in extreme circumstances. The emphasis on extreme circumstances suggests that the understanding of 'public morality' and 'public order' cannot be the same, nor can 'public morality' subsume 'public order'. However, nothing prevents a member from using the 'public morals' exception in order to justify a measure that falls within the 'public order' exception but for the requirements.

<sup>47</sup> Charnovitz (n 46 above) 690. Charnovitz provides a thought-provoking and an intellectually stimulating writing of the public moral exception in the WTO agreements. He also provides a historical account of the public moral exception in commercial field starting with the stillborn 1922 Genoa Conference Draft Agreement on the Reduction of Import and Export Prohibitions.

<sup>48</sup> For more on the application and interpretation of the 'public morals' exception, see Feddersen (n 45 above) 27.

<sup>49</sup> Charnovitz (n 46 above) 700.

universal morality or as having a uniform international standard?<sup>50</sup> Is it domestic morality (inwardly directed), or international morality (outwardly directed), which would involve imposing morality on the exporting country?<sup>51</sup>

### 3.1.2 Public health and the protection of human life

Closely related to the public morals defence is the safety and protection of human life and health defence. Many measures may fall under the rubric of the protection of the life and/or health of humans. These may include measures such as domestic food safety, labelling<sup>52</sup> and compulsory licensing of pharmaceutical patents as recognised under article 31 of TRIPS.

The DSB, for example, dealt with food safety exceptions to trade obligations by member states in the *Beef Hormone* case,<sup>53</sup> the first WTO food safety case. The case arose out of a complaint by the United States (and Canada) against the 1987 measures by the European Community (EC), affecting livestock fed with growth hormones and their meat. Relying on the SPS Agreement, the EC imposed a ban on the importation of hormone-treated beef. The SPS agreement allows the implementation of measures in order to protect human life or health

<sup>50</sup> Charnovitz (n 46 above) 694 & 716-718. There can be no crystallisation of the 'public morals' concept into a universal sense. Morality will always differ from one jurisdiction to the other. For instance, the traditional African (South African) concept of *ubuntu*, which translates into humanness, has now evolved into a morality yardstick with constitutional implications, including the promotion of human good, mutual respect and fairness. Thus, in *S v Makwanyane* 1995 3 SA 391, the concept of *ubuntu* played a critical role in the Constitutional Court's invalidating the death penalty as a sentence for the new constitutional South Africa. The Constitutional Court said the following about *ubuntu*: '*Ubuntu* translates as "humanness". In its fundamental sense, it translates as "personhood" and "morality". Metaphorically it expresses itself in *umuntu ngumuntu ngabantu*, describing the importance of group solidarity' (*per* Mokgoro J). 'An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own respect, for the dignity of every person is integral to this concept. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*' (*per* Langa J). The move towards a universal morality is complicated by morality used either descriptively or normatively.

<sup>51</sup> It would be inwardly directed morality if one was to follow the *United States — Restriction of Tuna, (Tuna-Dolphin I)* 16 August 1992, GATT BISD (39th Supplement), and outwardly directed morality if one was to follow cases such as the *United States — Restrictions on Imports of Tuna (Tuna-Dolphin II)*, (1994) 33 *International Legal Materials* 839 and the *Shrimp-Turtles (AB)*.

<sup>52</sup> See AE Appleton 'The labelling of GMO products pursuant to international trade rules' (2000) 8 *New York University Environmental Law Journal* 566, discussing product labelling pursuant to the SPS Agreement and the TBT Agreement.

<sup>53</sup> EC Measures Concerning Meat and Meat Products (*Beef Hormones (AB)*), WT/DS26/AB/R (16 January 1998) modifying and reversing in part the Panel report in EC Measures Concerning Meat and Meat Products (*Beef Hormones (P)*) WT/DS26/USA (18 August 1997).

within the territory of member states from risk due to the intake of certain foods, beverages or foodstuffs; or the protection from risk arising from arising from disease carried by animals, plants or products thereof. The ruling represented the Appellate body's acknowledgment that such measures may be taken to further the legitimate objective of human health and safety.<sup>54</sup>

### 3.2 The application and interpretations of human rights exceptions

The criterion for the application of the grounds stated above emanates from a number of WTO Dispute Settlement Body<sup>55</sup> (DSB) cases on exceptions. Though the DSB reports do not create precedents or 'subsequent practice' within the meaning of article 31(3)(b) of the Vienna Convention on the Law of Treaties,<sup>56</sup> they may be taken into account because of their persuasive value and because they create a 'legitimate expectation' to be seriously considered.<sup>57</sup> Given the virtual similarity of the stated provisions of GATT, GATS, TRIPS, SPS Agreement and the Agreement on Government Procurement, GATT interpretation would be directive in the application and interpretation of human rights-related measures.<sup>58</sup>

If previous WTO DSB reports are anything to go by, a member relying on the WTO Agreement's public morals, public order and protection of human life exceptions to achieve the broader aim of the protection of

<sup>54</sup> Note that the European Community failed because, in accordance with the precautionary principle, it did not meet a certain minimum scientific risk assessment justification for its ban, and there was no scientific evidence presented that the EC measure was just a protectionist ploy. See *Beef Hormone (AB)* 98 para 245. See also SPS Agreement art 2(2) read with art 5. For more on the SPS Agreement, its application and the EC Beef Hormone dispute, see generally K Mueller 'Hormonal imbalance: An analysis of the hormone treated beef trade dispute between the United States and the European Union' (1997) 1 *Drake Journal of Agricultural Law* 9; IP Steward & RW Johnson 'The SPS Agreement of the World Trade Organization and the international trade of dairy products' (1999) 54 *Food and Drug Law Journal* 55; DE MacNiel 'The first case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's hormone beef' (1998) 39 *Virginia Journal of International Law* 89.

<sup>55</sup> The Dispute Settlement Body (DSB) is established under art 2 of the DSU.

<sup>56</sup> The Appellate body in *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (India Pharmaceuticals (AB))*, WT/DS50/AB/R 19 December 1997 (adopted 16 January 1998) para 7.30 held that: 'Panels are not [legally] bound by previous decisions of panels or the Appellate Body even if the subject matter is the same.'

<sup>57</sup> See *Japan — Taxes on Alcoholic Beverages (Japan Taxes (AB))*, WT/DS8/AB/R 4 October 1996 (adopted 1 Nov 1996) para 13; *European Economic Community — Restrictions on Imports of Dessert Apples (Dessert Apples)*, BISD 36S/93 (adopted 22 June 1989) para 121.

<sup>58</sup> On the interpretation of GATS's exceptions, see PB Yu *Human rights and the WTO Agreement in trade in services* (2001) <http://www.antenna.nl/~foei/trade/humanrights.-doc> (accessed 11 July 2003).

human rights, will generally have to pass a three-pronged test.<sup>59</sup> The test comprises the elements of necessity and of non-discrimination and non-trade restriction, resonating in almost all of the WTO agreements referred to above. Firstly, it will have to be satisfied that the trade-related human rights measure employed falls within the range of policies in the particular WTO agreement. Secondly, that the measure is 'necessary' to fulfil the human rights objective. Thirdly, that the measure is in conformity with the *chapeau* or preamble of the relevant agreement, if the agreement has such.<sup>60</sup>

### 3.2.1 Elements of the three-pronged test

#### *Policy nature and scope of the measure*

The policy underlying the trade measure should fall within the range of policies of the covered agreement. This calls for several questions to be answered. For example, if using a 'public morals' exception, it may be necessary to answer a question as to which human rights fall under 'public morals' and whether such morals are inwardly directed or outwardly directed. According to Charnovitz, if, for example, one was pleading public morality, religion and compulsory or child labour would be among the range of considerations underlying such a trade-impacting measure.<sup>61</sup>

#### *Necessity*

Exceptions mentioned in the WTO agreements above require that measures taken must be 'necessary'. The word 'necessary' entails that the measure must be essential, but not 'indispensable' or 'inevitable'.<sup>62</sup> This is a balancing initiative requiring proportionality between trade and non-trade measures taken. Past WTO/GATT decisions favoured the least restrictive approach in determining if the measure is necessary. The use of the exception had to 'entail the least degree of inconsistency'

<sup>59</sup> Based on cases such as *Reformulated Gasoline (AB)*.

<sup>60</sup> The three-pronged test can generally be divided into two parts. The first part is the provisional phase consisting of the clauses in the exceptions. The second part is the final phase consisting of the *chapeau* or introductory paragraph (or preamble) of the entire provisions.

<sup>61</sup> Charnovitz (n 46 above) 729-730.

<sup>62</sup> In *Korea — Various Import Measure on Fresh, Chilled and Frozen Beef, (Korea-Beef)* WT/DS161/AB/R, WT/DS169/AB/R (adopted 10 January 2001), paras 161-164 held that a not 'indispensable' measure may be 'necessary'.

with core obligations of WTO agreements.<sup>63</sup> Following the *Korea-Beef* case, there is now a move to a less restrictive<sup>64</sup> and evolutionary approach. The approach is supplemented with reasonableness and a proportionality test.<sup>65</sup> It requires the weighing and balancing of some serious factors that give content to 'necessary'. The factors to be weighed and balanced include, but are not limited to:<sup>66</sup>

the contribution made by the measure to the enforcement of the law or regulation at issue, the importance of the common interests<sup>67</sup> or values protected and the accompanying impact of the law or regulation on imports or exports.

The DSB will have to determine if a less restrictive or restrictive measure was available in the circumstances. It should be determined if a WTO member could 'reasonably be expected' to have employed an alternative WTO/GATT consistent or less inconsistent measure.<sup>68</sup> A less restrictive approach means that a measure with 'intense or broader restrictive effects' on trade is likely to be considered necessary.<sup>69</sup> Simply, a WTO member wanting to advance a human rights defence must show how necessary its actions are to human rights. This it will do by demonstrating the necessity of the law or measure taken to protect human rights; demonstrating the need to use trade-related measures to do so; and satisfying the WTO that such trade-related or trade-impacting measure is the least of the restrictive measures to be taken.<sup>70</sup>

It is worth noting the absence of the 'necessary' qualification in GATT article XX(e) on prison labour, which is present in a similar provision in the Agreement of Government Procurement. GATT Article XX(e) only requires that the measure be 'relating to' products of prison labour. WTO/GATT bodies have given differing interpretations to the words

<sup>63</sup> *Tuna-Dolphin II* para 5.35. The *Tuna-Dolphin II* was never adopted by the GATT due to the 'positive adoption' system applicable under the 1947 GATT dispute settlement system, as opposed to the 'reverse consensus' or 'automatic'/'deemed' adoption system now applicable under the WTO. The WTO has discarded the GATT 1947 diplomatic approach to dispute settlement for a more legalistic approach. On reports adoption of GATT/WTO, see generally C Reitz 'Enforcement of the General Agreement on Tariffs and Trade' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 555; WJ Davey 'Dispute settlement in GATT' (1987) 11 *Fordham International Law Journal* 51.

<sup>64</sup> However, the 'public order' exception seems to require a least-restrictive approach.

<sup>65</sup> According to J Neumann J & E Turk 'Necessity revisited: Proportionality in World Trade Organization law after *Korea Beef*, *EC- Asbestos* and *EC-Sardines*' (2003) 37 *Journal of World Trade* 199 210, the reasonableness test was first introduced in the WTO jurisprudence by the Appellate body in *Korea-Beef*.

<sup>66</sup> n 62 above, para 164.

<sup>67</sup> According to the Appellate body, *Korea-Beef (AB)* para 162: 'The more vital or important the common interest is, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.'

<sup>68</sup> n 62 above, para 166.

<sup>69</sup> n 62 above, para 63.

<sup>70</sup> See UNEP/ISSD *Environment and trade — Handbook* (2000) 29.



'relating to'. Applying GATT article XX(g), which only requires that the measure be 'relating to' conservation, the GATT Panel has held that the term 'relating to' in GATT XX(g) means 'primarily aimed at'.<sup>71</sup> The WTO Panel in *Reformulated Gasoline (P)* explained 'primarily aimed at' as analogous to 'necessary' or 'essential'.<sup>72</sup>

The Panel ruling in *Reformulated Gasoline(P)* was revised by the Appellate Body. Reluctant to read 'necessary' into 'relating to', the Appellate Body held that the term 'relating to' means 'primarily aimed at'.<sup>73</sup> It further held that 'primarily aimed at' does not mean 'necessary' or 'essential'.<sup>74</sup> 'Relating to' should be interpreted as requiring the existence of a 'substantial relationship' between the measure and the goal.<sup>75</sup>

### *Meeting the chapeau requirements*

Once the human rights-related measure or human rights-related law passes the provisional determination test, it must pass requirements in the *chapeau* (or the preamble) of the agreement, if there is one.<sup>76</sup> The *chapeau* addresses how the law should be applied.

The requirements that should be satisfied are whether, in its application, the measure or law is 'arbitrarily discriminatory'; 'unjustifiably discriminatory'; or 'constitutes a disguised restriction on trade'. The DSB is yet to define these terms. The WTO Appellate body, in *Reformulated Gasoline (AB)*, called for a complementary 'side-by-side' reading of the words 'arbitrarily discriminatory'; 'unjustifiably discriminatory'; or 'disguised restriction' in international trade, since they 'impart meaning to one another' and considerations for determining discrimination are relevant for determining a disguised restriction.<sup>77</sup> According to the Appellate body, 'disguised restriction' also includes 'disguised discrimination'. In addition, 'disguised restriction' is a comprehensive term that may include restrictions which 'amount to arbitrary or unjustifiable discrimination'.<sup>78</sup>

<sup>71</sup> *Tuna-Dolphin II* paras 521-522.

<sup>72</sup> *United States — Standards for Reformulated and Conventional Gasoline (Reformulated Gasoline (P))*, WT/DS2/R, 29 January 1996, para 6.40.

<sup>73</sup> As above.

<sup>74</sup> As above.

<sup>75</sup> As above.

<sup>76</sup> Some of the requirements that appear on the *chapeau* (or in the preamble) as in GATT, the SPS Agreement and GATS, may be found ingrained in the actual provisions of the agreement, as is the Agreement on Government Procurement, TRIPS.

<sup>77</sup> *Reformulated Gasoline (AB)*, para 629. However, see AE Appleton 'GATT Article XX's Chapeau: A disguised 'necessity' test?: The WTO Appellate Body's ruling in *United States — Standards for Reformulated and Conventional Gasoline* (1997) 6 *Review of European Community and International Environmental Law* 131 135-136, criticising this conflation of terms approach.

<sup>78</sup> *Reformulated Gasoline (AB)*, para 629.

The *chapeau* requirements are good faith requirements for invoking the exceptions, ensuring that a member's 'assertion' of a right that 'impinges' on the field covered by [a] treaty obligation' is exercised reasonably.<sup>79</sup> These are requirements of 'even-handedness in the imposition of restrictions'.<sup>80</sup> The trade-related human rights measure must satisfy the requirement of the *chapeau*.

#### 4 Enforcement of human rights obligations through World Trade Organization sanctions

In 2.2 above, we mentioned that the WTO is a self-contained entity. One of the characteristics of the WTO as a self-contained entity is its ability to demand compliance from its members, to force compliance with the WTO law where necessary by means of economic sanctions.<sup>81</sup> The question to consider is whether economic sanctions can be used to enforce human rights under the WTO framework. The answer is simply no. As it currently stands, the WTO sanctions regime cannot be used to enforce human rights violations, except in as far as compliance with such human rights primarily discharges the obligation to conform to WTO law. Here we may talk about the exceptional use of sanctions to enforce human rights under WTO law.<sup>82</sup> What complicates the general use of trade sanctions under WTO law is that human rights covenants do not mandate the trade sanctions against countries that violate their human rights standards. I agree with Leebron that it would not be advisable for the WTO to recognise and extra-legally use trade sanctions to enforce human rights instruments.<sup>83</sup>

#### 5 Conclusion

This study examined the human rights approach to trade policy in the WTO. It transpired that the primary objective of the WTO is to pursue economic efficiency and the development and harmonisation of trade relations. Its agreements primarily carry trade obligations. However,

<sup>79</sup> See *Shrimp-Turtles* (AB) para 158 read with para 184, interpreting art XX of GATT.

<sup>80</sup> *Reformulated Gasoline* (AB) 20-21. See J Waincymer 'Reformulated Gasoline under reformulated WTO dispute settlement procedure: Putting Pandora out of the *chapeau*' (1996) 18 *Michigan Journal of International Law* 141 146.

<sup>81</sup> See DSU arts 22 & 23.

<sup>82</sup> See Howse (n 31 above) 34 39.

<sup>83</sup> DW Leebron 'Linkages' (2002) 96 *The American Journal of International Law* 5 22.

these objectives have been re-stated<sup>84</sup> in the broadest terms so that they may be stretched, in an evolutionary manner, to other necessary non-trade issues, such as human rights.<sup>85</sup> We also indicated that regard to human rights in the WTO is mainly exception-based. This is due to several reasons, including that the WTO is a self-contained system, which was designed for covered agreements. However, the exception-based approach to human rights, though dismissed by Mehra as 'inadequate, unreliable and designed to promote *ad hocism* in policy making', is now more important than ever in the human rights evolution in WTO jurisprudence.<sup>86</sup> The institutionalisation of the human rights approach in the WTO trade policy can greatly contribute to the promotion and respect of human rights by members, particularly members from the African continent.

---

<sup>84</sup> The principal objectives of GATT 1947, like that of the WTO, are the raising of the standard of living, ensuring full employment, expanding production and trade, and allowing the optimal use of the world's resources. However, the WTO objectives have been broadened to include sustainable development in both trade in goods and services.

<sup>85</sup> The exceptions have effectively been used in the protection of the environment and also in facilitating the debate on the trade-environment link. See Waincymer (n 59 above); RF Housman & DJ Zaelke 'The collision of the environment and trade: The GATT Tuna/Dolphin Decision' (1992) 22 *Environmental Law Reporter* 1026; S Yoshida 'Yellow Tuna Fishery and Dolphin conversation: International free trade meets environmentalism' (1998) 21 *Environs Environmental Law and Policy* 163; PI Hansen 'Transparency, standards of review, and the use of trade measures to protect the global environment' (1999) 39 *Virginia Journal of International Law* 1016; JH Jackson 'World trade rules and environmental policies: Congruence or conflict?' (1992) 49 *Washington & Lee Law Review* 1227; TJ Schoenbaum 'International trade and protection of the environment: The continuing search for reconciliation' (1997) 91 *American Journal of International Law* 268; *Shrimp-Turtles (AB)*; *Reformulated Gasoline (AB)*.

<sup>86</sup> M Mehra 'Human rights and the WTO: Time to take on the challenge' [http://www.wtowatch.o/HUMAN\\_RIGHTS\\_AND\\_THE\\_WTO\\_TME\\_TO\\_TAKE\\_ON\\_THE\\_C.h](http://www.wtowatch.o/HUMAN_RIGHTS_AND_THE_WTO_TME_TO_TAKE_ON_THE_C.h) (accessed 18 July 2003).

## A dilemma of the twenty-first century state: Questions on the balance between democracy and security

*Bernard Bekink\**

Senior Lecturer of Public Law, Faculty of Law, University of Pretoria; Practising attorney of the High Court of the Republic of South Africa

### Summary

*Across the globe, states face acts of terrorism and violent crimes. The terror attacks upon the United States of America were a wakeup call to the modern world regarding the protection of its security and citizens. In response, many states have opted to enact anti-terrorism laws aimed at combating terrorism and protecting their people. These laws are controversial since they seem to limit widely accepted fundamental rights. Many regard them to be Orwellian in nature, compromising democratic progress and individual freedoms. However, states have specific duties and responsibilities towards their citizens, one being to protect and shield them from public and private violence. To achieve this, a state has to balance its tasks of providing security and ensuring democracy. Achieving such a balance is not easy, more often than not creating a dilemma for the twenty-first century state.*

---

\* BLC LLB LLM (Pretoria); bernard.bekink@up.ac.za. Parts of this research was presented at the annual international conference of the International Bar Association, Auckland, New Zealand during October 2004.

## 1 Introduction

If the aim of life in an oligarchy<sup>1</sup> is to become as rich as possible, that insatiable craving would bring about the transition to democracy in this way: Since the power of the ruling class is due to its wealth, they will not want to have laws restraining prodigal young men from ruining themselves by extravagance: They will hope to lend these spendthrifts money on their property and buy it up, so as to become richer and more influential than ever. We can see at once that a society cannot hold wealth in honour and at the same time establish a proper self-control in its citizens. One or the other must be sacrificed. In an oligarchy, then, this neglect to curb riotous living sometimes reduces to poverty men of a not ungenerous nature. They settle down in idleness, some of them burdened with debt, some disfranchised, some both at once; and these drones are armed and can sting. Hating the men who have acquired their property and conspiring against them and the rest of society, they long for a revolution.<sup>2</sup>

The passage above, taken from Plato's *Republic*, resembles to a certain degree the ethos of many twenty-first century democracies. Notwithstanding the achievements of human evolution, the modern world finds itself in a state of turmoil and chaos. Almost all states are faced with increasing acts of terrorism and crime. This has resulted in the global use of the phrase 'the war on terror'.

Since the beginning of time, humans have been faced with crime, unlawful conduct and acts of violence. Human history consists of times of war and times of peace. The twentieth century and beginning of the twenty-first century may be classified as a time of war. During the twentieth century, the world witnessed two world wars, the Vietnam War, the Falklands War, the Gulf War, continuous hostilities between Israel and Palestine and also various other wars and acts of terrorism. These culminated in what will probably be remembered as the worst act of terrorism the world has seen to date. On 11 September 2001, four passenger planes were hijacked in the USA and were used as weapons against various targets, including the Pentagon and the World Trade Centre in New York.<sup>3</sup>

Since the 'September 11th' attacks, the world has experienced a noticeable upsurge in acts of violence and terror.<sup>4</sup> From a legal perspective, this new hostile environment has created many legal questions and

---

<sup>1</sup> Meaning, a government by a small (elite) group of people, according to the *Collins Concise Dictionary* (2001).

<sup>2</sup> Words of the famous Greek philosopher and political thinker, Plato, in his work *The Republic*, as quoted in W Ebenstein *Great political thinkers: Plato to the present* (1969) 62.

<sup>3</sup> It is hard to imagine a more devastating act of terror. Probably only a nuclear attack would surpass the attacks of 11 September 2001.

<sup>4</sup> The most notable are the Bali bombing in 2001, the Madrid bombing in 2004, the Beslan school siege in Russia in 2004, and a continuous suicide bombing spree in Iraq and in Israel.

also caused a rethinking of accepted constitutional principles and values. The world over, countries have enacted or are in the process of enacting sweeping counter-terrorism laws. These laws often create tension between established legal rules and principles, on the one hand, and new measures created to prevent acts of terrorism, on the other.<sup>5</sup> The question is often asked: How should states protect their citizens, on the one hand, and allow nationals the full entitlements of their human rights and the law, on the other? Put differently, how should states balance the basic democratic rights of their people but simultaneously maintain and ensure security for the people and the state itself? Should governments be allowed to restrict and limit fundamental rights in an effort to protect the public and curtail the escalating tendencies of violence? It is the purpose of this contribution to evaluate these questions and to add to the continuous debate regarding the search for a balance between democracy and security. A new South African Act, named the Protection of Constitutional Democracy Against Terrorism and Related Activities Act,<sup>6</sup> will be briefly referred to in this context. It is also important to emphasise that the balance between democracy and security is not only relevant to the so-called first world countries, but that many third world countries, particularly those on the African continent, are similarly confronted with the need to find a compromise between state security and individual autonomy.<sup>7</sup>

It is a fundamental purpose of a state to protect the well-being of its citizens and to ensure a specific expression of freedom, while not harming other groups.<sup>8</sup> Present-day South Africa is also confronted by the legal paradox mentioned above. How should the state ensure and protect the general public and itself against the onslaught of international terrorism, but still be flexible enough to ensure a true and democratic government in which various universally accepted human rights and freedoms are protected and promoted? Under its new constitutional dispensation, South Africa has created a democratic form of govern-

---

<sup>5</sup> The most publicised anti-terror laws have been enacted in the USA and UK. See eg the Patriot Act of the USA. Many other countries have followed suit and have taken drastic measures to cope with the increase in public violence. There are also reports which state that, after the recent Beslan school siege, the Russian parliament is considering tight restrictions on travel rules, freedom of the press and restrictive visa requirements. Stricter punishment for acts of terror is also proposed. Some countries are even considering a lifting the moratorium on the death penalty and allowing the confiscation of property belonging to terrorists or their families. For more on this, see <http://www.guardian.co.uk/international/story> (accessed 29 September 2004). 33 of 2004.

<sup>6</sup>

<sup>7</sup> The African continent has also experienced serious incidents of terrorism. Examples of such incidents are the USA embassy bombings in Tanzania and Kenya during 1998, as well as a more recent bombing of a holiday resort in Egypt.

<sup>8</sup> See DW Jordaan 'The open society' (2001) 64 *Journal of Contemporary Roman Dutch Law* 108 where he refers to Popper's 'The open society and its enemies' Vol I (1950) Pref IX fn 13.

ance which is often referred to as an 'open society'.<sup>9</sup> This open society is under threat because of national and international acts of terrorism and violence. In 2000, the then Minister of Safety and Security of South Africa, Mr Steve Tshwete, suggested certain amendments to the Constitution in order to allow what many perceived to be draconian anti-terrorism laws. In essence, it was suggested that the proposed laws should permit certain state institutions, for example, the general law enforcement agencies, to ignore certain constitutional rights and safeguards in their fight against crime. It was also suggested that the Constitution should be amended so as to allow for the detention of terror suspects for more than 48 hours without access to legal representation.<sup>10</sup> Opponents to the proposals stated that protection against terrorism should not be achieved through processes whereby human rights and accepted constitutional principles, such as the rule of law and democracy, are ignored. They argued that the restriction of human rights and founding constitutional principles may easily lead to other unlawful methods of state action, such as illegal interrogation practices and unreasonable limitations to personal freedom.<sup>11</sup> In order to achieve a balance between the two competing interests, that of the state and society against the fundamental rights of an accused terrorist, it is important to determine the basic rights and obligations of a state *per se*, and also to determine which lawful safeguards have been created to protect the individual against unreasonable state actions.

## 2 The general rights and obligations of a state

The duty on a state to protect its citizens is not a new concept and can be traced back to the origins of Germanic constitutional history.<sup>12</sup> During the first relationships between *liegemen* and landlords/*paterfamilias*, predating the Magna Carta, it was accepted that the *paterfamilias* had a duty to protect his *liegemen*. This was the time period of the allegiance relationship whereby people undertook an oath of allegiance and military support to the *paterfamilias* in a time of war and also to perform

<sup>9</sup> The term 'open society' refers to a stage in the development of humanity whereby the world has created a global state/super state, which is inclusive of all people of the world. This global state is then based on religious notions such as love and dignity for all. A closed society, in contrast, is a society that includes only a segment of humanity and excludes all others. See also J White 'Open democracy: Has the window of opportunity closed?' (1998) 115 *South African Law Journal* 66.

<sup>10</sup> These proposals are comparable to current practices in other countries in the world. Eg, the USA is detaining hundreds of people in Quantanoma Bay, Cuba, without trial or right to legal representation.

<sup>11</sup> See Editorial 'Terrorism, crime and the rule of law' (2000) March *De Rebus* 5.

<sup>12</sup> See G Carpenter *Introduction to South African constitutional law* (1987) 29.

certain duties in peacetime. In return for such favours and allegiance, the *paterfamilias* had to protect the members of the 'family' during times of war and peace.<sup>13</sup> This relationship, which was the origin of the feudal system of government, also formed the basis for the development of the relationship between the king and his people. Under early British constitutional law, the Crown had to protect its people in return for their allegiance. Although the duty on the state to protect its citizens was initially weak, it became stronger as the constitutional relationship between the Crown and the *populus* developed. It was only during the nineteenth century when the first law enforcement agencies were formally created, specifically to fulfil the state's duty of protection towards its citizens.<sup>14</sup> Today, the duty of the state to protect its people has developed into a generally accepted responsibility. Many constitutional systems have even opted to record such a responsibility formally in their distinctive constitutional legal systems.<sup>15</sup> However, the state is not only required to protect the well-being of its people, but also to ensure other privileges such as a democratic government, the maintenance of law and order and the protection of the basic fundamental human rights of all people. However, this diversity in the duties and obligations of the state towards its citizens can create a situation where the protection and fulfilment of one duty lead to the limitation or curtailment of other rights or duties. This creates a dilemma for the state, as it is called upon to determine which right or duty should be preferred over another. In order for the state to make such a determination, it must weigh up all relevant factors and must balance the circumstances of each case to determine whether the protection of one right or duty over another is reasonable and justifiable. Such a balancing act requires both a consideration of the law as well as a determination of what the general public interest demands.

### **3 The protection of the right to freedom and security of the person and other basic fundamental rights under the South African Constitution of 1996**

The Constitution of the Republic of South Africa protects the right of citizens to be protected by the state as well as many other constitutional principles and values and also many universally accepted fundamental

<sup>13</sup> Carpenter (n 12 above) 28.

<sup>14</sup> See G Carpenter 'The right to physical safety as a constitutionally protected human right' (1998) *Suprema lex: Essays on the Constitution presented to Marinus Wiechers* 141, where she makes reference to Sir Robert Peel's establishment of a permanent law enforcement agency the so-called Peelers or Bobbies in Britain.

<sup>15</sup> See eg sec 12 of the Constitution, read together with sec 7.



rights.<sup>16</sup> Under the founding provisions and the Preamble to the Constitution, it is stated, *inter alia*, that the Republic is one sovereign, democratic state, founded on the values of human dignity, equality and the advancement of human rights and freedoms. The Constitution also aims to lay the foundation for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by the law.<sup>17</sup> The Constitution is proclaimed as the supreme law of the state and any law or conduct inconsistent with the Constitution is invalid. All obligations imposed by the Constitution must be fulfilled.<sup>18</sup>

The Constitution further incorporates an extensive Bill of Rights in which various rights and obligations are entrenched. The Bill of Rights confirms itself as a cornerstone of democracy and it enshrines the rights of all people in the country. The basic democratic values of human dignity, equality and freedom are again specifically affirmed. A significant provision in the Constitution pertaining to this contribution is the obligation set out in the Constitution that the state must respect, protect, promote and fulfil the rights set out in the Bill of Rights.<sup>19</sup> However, rights are not absolute and are subject to limitations contained or referred to in the specific limitation clause or where so provided in the Bill of Rights.<sup>20</sup> Rights in the Bill of Rights apply to all law and bind the state in all branches. The rights also apply horizontally and bind a natural or a juristic person if applicable, and after taking into account the nature of the right and the nature of any duty imposed by the right.<sup>21</sup> In respect of security issues, the Bill of Rights protects various important rights, such as the right to equality,<sup>22</sup> the right to human dignity,<sup>23</sup> the right to freedom and security of the person,<sup>24</sup> privacy,<sup>25</sup> freedom of religion, belief and opinion,<sup>26</sup> freedom of expression, including, *inter alia*, the freedom of the press and other media,<sup>27</sup>

<sup>16</sup> See in general ch 2 of the Constitution.

<sup>17</sup> Refer to sec 1 read in conjunction with the Preamble to the Constitution.

<sup>18</sup> See sec 2 of the Constitution. There is thus a clear responsibility on the state to fulfil its constitutional obligations. This position is also confirmed under sec 7 of the Bill of Rights.

<sup>19</sup> See sec 7(2) of the Constitution. There is thus a positive obligation on the state with regard to the fundamental rights set out in the Bill of Rights.

<sup>20</sup> See sec 7(3) together with sec 36 of the Constitution.

<sup>21</sup> Secs 8(1) & (2) of the Constitution.

<sup>22</sup> Sec 9.

<sup>23</sup> Sec 10.

<sup>24</sup> Sec 12.

<sup>25</sup> Sec 14.

<sup>26</sup> Sec 15.

<sup>27</sup> Sec 16. The right to freedom of expression, however, is internally modified in that the right does not extend to propaganda for war, incitement of imminent violence and the advocacy of hatred. See secs 16(2)(a)-(c).

freedom of association,<sup>28</sup> freedom of movement and residence,<sup>29</sup> freedom of property,<sup>30</sup> access to information,<sup>31</sup> just administrative action,<sup>32</sup> access to courts<sup>33</sup> and various entitlements relating to the capacity as an arrested, detained and accused person.<sup>34</sup>

As was stated above, the rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom. The determination of reasonableness and justifiability is done by taking into account all relevant factors, including five specified criteria.<sup>35</sup> The Bill of Rights also provides that a state of emergency may be declared in terms of an Act of parliament and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and also when such a declaration is necessary to restore peace and order.<sup>36</sup> Finally, the Constitution confirms that, when the Bill of Rights is interpreted, a court, tribunal or forum must promote the values that underlie an open and democratic society, must consider international law and may consider foreign law.<sup>37</sup>

Under the Constitution, it is the responsibility of the executive authority to implement legislation, to develop and implement policy and to prepare and initiate legislation.<sup>38</sup> The Constitution also lays down certain principles which govern national security in the Republic.<sup>39</sup> Various

---

<sup>28</sup> Sec 18.

<sup>29</sup> Sec 1.

<sup>30</sup> Sec 25.

<sup>31</sup> Sec 32.

<sup>32</sup> Sec 33.

<sup>33</sup> Sec 34.

<sup>34</sup> See sec 35 which, eg, affords to right to remain silent and to be brought before a court as soon as reasonably possible, but not later than 48 hours after an arrest. See secs 35(1)(b)(i) & (d)(i).

<sup>35</sup> Refer to secs 36(1)(a)-(e). The factors are: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose and finally if the limitation is the less restrictive means to achieve the purpose.

<sup>36</sup> See sec 37(1) of the Constitution. Various other procedural requirements are also laid down. See secs 37(2)-(8) of the Constitution. It should be noted that certain rights are non-derogable, even during a state of emergency. Refer to the table of non-derogable rights set out in sec 37 of the Constitution.

<sup>37</sup> See sec 39(1)(a)-(c) of the Constitution. When legislation is interpreted or when the common law or customary law is developed, then every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Sec 39(2).

<sup>38</sup> Sec 85(2) of the Constitution.

<sup>39</sup> See secs 198(a)-(d) of the Constitution. The principles include that any South African citizen is precluded from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation and also that national security must be pursued in compliance with the law, including international law.

security services are established, which must act in accordance with the law and international law.<sup>40</sup> The importance of international law in this regard should be emphasised. When legislation is interpreted, every court must prefer any reasonable interpretation that is consistent with international law.<sup>41</sup> The Constitution concludes by determining that all constitutional obligations must be performed diligently and without delay.<sup>42</sup>

In light of the constitutional obligations of the South African state to protect its citizens, sections 11 and 12 of the Bill of Rights are most relevant to this investigation and should be considered in more detail. Section 11 states that everyone has the right to life, while section 12 reads as follows:

- (1) Everyone has the right to freedom and security of the person, which includes the right —
  - (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) ...
  - (c) to *be free from all forms of violence from either public or private sources*;<sup>43</sup>
  - (d) not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right —
  - (a) ...
  - (b) to security in and control over their body; and
  - (c) ...

From the wording of the Constitution, there should be no doubt that the right to physical safety of a person is a constitutional fact. Apart from the fact that such a right is regarded as a long established right of impeccable provenance, the obligation to respect and ensure the safety of persons rests mainly on the state and to a limited extent on each individual. It thus has both vertical and horizontal operation.<sup>44</sup>

The realisation of the right to physical safety seems further to require a positive action by the state.<sup>45</sup> In general, the enforcement of rights is dependent on the existence of a legal system and mechanisms for enforcement thereof. It would seem that the sub-sections under section 12 should be classified as civil and political rights and are directly

<sup>40</sup> See ch 11 of the Constitution.

<sup>41</sup> Sec 233 of the Constitution.

<sup>42</sup> Sec 237 of the Constitution.

<sup>43</sup> My emphasis.

<sup>44</sup> See Carpenter (n 14 above) 142.

<sup>45</sup> For support of this position, see M Pieterse 'The right to be free from public or private violence after Carmichele' (2002) 119 *South African Law Journal* 29. According to Pieterse, sec 12(1)(c) seems to create positive duties which are enforceable directly against both the state and private individuals. The extent of such duties is at the very least an obligation to refrain from violent behaviour.

enforceable.<sup>46</sup> Such a claim could also be possible in instances where the state or one of its agencies have not prosecuted a criminal or has allowed a dangerous criminal to escape and cause further harm.<sup>47</sup> It is, however, obvious that the state and its organs cannot possibly be held liable for all harm that can befall members of the general public. Liability and responsibility should only be attributed if specific legal criteria have been met. Although an individual's right has been infringed, such an aggrieved party must still show that the state had a duty to act positively in order to protect such a right. One must also remember that individual rights are not absolute and that they are confined according to the law, including the Constitution, and other factors such as the rights of other persons or even the public in general.<sup>48</sup> A balancing of rights is thus often called for.<sup>49</sup>

From the wording of section 12 it is suggested that section 12 requires both substantial and procedural guarantees. Substantive reasons are needed to justify a limitation of someone's freedom and procedural requirements must be met when a person's freedom is taken away.<sup>50</sup> Substantive reasons further require a rational connection between a deprivation of freedom and some objectively determinable purpose.<sup>51</sup> It is evident from section 12(1)(c) that there is a duty on the

<sup>46</sup> This view is supported by Carpenter (n 14 above) 144. The writer mentions that the right is couched in very specific and positive terms and would thus entail more than just a negative protection thereof. She also argues that the extent of the right goes further than the common law right to physical integrity, and that it should be possible under the right to sue the state in cases where the state failed to protect an individual against violent deeds of burglars, criminals and terrorists. See also the case of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC). In the *Rail Commuters* case, the Constitutional Court held that both Metrorail and the Commuter Corporation bore a positive obligation in terms of the South African Transport Services Act 9 of 1989 and the Constitution to ensure that reasonable measures were in place to provide for the security of rail commuters. See paras 84C-D 403.

<sup>47</sup> A case in point is eg the case of *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC). See also *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) and *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA). According to the *Carmichele* judgment, it was confirmed by the Court that sec 12(1)(c) entails an obligation to refrain from violence and that reasonable steps should be taken to prevent a violation of the right.

<sup>48</sup> It is a generally accepted rule that the government is to act in the interest of the public at large. The public interest should always be at the centre of state actions.

<sup>49</sup> See Carpenter (n 14 above) 144.

<sup>50</sup> Refer to the cases of *S v Coetzee* 1997 3 SA 527 (CC) and also *De Lange v Smuts NO* 1998 3 SA 785 (CC).

<sup>51</sup> An example of such a rational connection is police investigations or 'stop and search' operations. In such instances, there should be a balance between a restriction of a right and also the deprivation of a right. If the threshold balance is too high, then people are unprotected against arbitrary police action, but if it is too low then it creates a situation of ineffective law enforcement. For more details, see De Waal *et al The Bill of Rights handbook* (2001) 252. Compare also Chaskalson *et al Constitutional law of South Africa* (1999) Revision Service No 5 ch 39-31.

state to protect people against state violence and private violence. Such protection may even be achieved through violent means, where necessary, to quell or discourage violent conduct. Since the South African Constitution supports the principle of non-excessiveness, a proportional balance must be struck between the use of force and the harm at hand. The least violent means must be employed.<sup>52</sup>

In essence, there seems to be two mechanisms whereby the state potentially may be held accountable for a failure to protect an individual's right to physical safety. The first mechanism is obtaining a mandamus against the state, requiring it to act. A mandamus is a remedy whereby a public authority may be forced to perform a duty that rests on it. The remedy of a mandamus is, however, somewhat flawed, as the authority cannot be told exactly how to perform its duties or responsibilities. The exercise of public functions falls within the realm of policy and under executive authority. For another branch of government authority, such as a judicial body, to tell the state how to act, may be contrary to the principle of separation of powers.<sup>53</sup> The second mechanism is holding the state liable for individual harm through delictual liability. Traditionally, such liability was dependent on the existence of a duty of care on the state.<sup>54</sup> The state must always act reasonably. It is not always easy to establish when it is reasonable to act, and this should be determined in light of the facts of the matter as well as in what the public regards as reasonable. Under South African law, both sections 12(1)(c) and 205(3) strongly indicate that there rests a positive duty on the state to act.<sup>55</sup>

In accordance with the general principles of the law of delict, and in order to establish liability for failure to protect a constitutional and

<sup>52</sup> See sec 36 of the Constitution and also sec 13 of the South African Police Service Act 68 of 1995.

<sup>53</sup> According to South African law, the principle of separation of powers is constitutionally recognised and protected. Refer also to the cases of *Soobramoney v Minister of Health, KZN* 1998 1 SA 765 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Pharmaceutical Manufacturers of SA In re: Ex parte the President of the RSA* 2000 2 SA 674 (CC) and also *SAAPIL v Heath* 2001 1 SA 883 (CC).

<sup>54</sup> For more on this, see the case of *Minister of Justice v Ewels* 1975 3 SA 590 (A). See also J Neethling *et al The law of delict* (2002) ch 3 for a comprehensive discussion of state liability under the South African private law.

<sup>55</sup> This view is also shared by other commentators. See Carpenter (n 14 above) 151, where she confirms that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and also to uphold and enforce the law. She further states that the ideas that the police are bound only to protect the public at large and that individuals have a claim to protection only in specific circumstances, do not seem to be consistent with the constitutional provisions. Even protection under the equality clause could provide strong constitutionally required action on the state to act. State action should protect all and may not discriminate between citizens. Unequal protection by security services would be unconstitutional and thus invalid. See secs 2 & 9 of the Constitution.

common law right to security, the plaintiff must prove all the elements of such delictual liability.<sup>56</sup> Of these elements, proving a breach of the duty and showing causation will be the most difficult to accomplish. The trick in every case seems to be to determine what is reasonable in the circumstances.<sup>57</sup> Reasonableness is not only required under the common law, but also under the new constitutional order. Section 36 of the Constitution provides that the rights entrenched in the Bill of Rights may only be limited in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of equality, freedom and human dignity.

Various factors are used to determine the test of reasonableness and justifiability.<sup>58</sup> Under the Constitution, it is the burden of the applicant to show that he or she has indeed a right and that such a right has been encroached upon. The other party or respondent, usually the state, then has to show that the limitation was reasonable and justifiable.<sup>59</sup> Under the common law, it is the burden of proof of the plaintiff to show that all the delictual requirements have been met. There is thus a significant difference between a legal action based upon delict, and one based upon the Constitution. Under the Constitution, the burden of proof is on the state to show that a limitation of the right to security was reasonable and justifiable. This reversal of the burden of proof of reasonableness and justifiability is of significant benefit to an applicant and thus requires special attention when a prospective litigant is deciding on which legal basis to establish his or her case.<sup>60</sup> On the issue of *mens rea*, it is suggested that the state should justify its actions or inactions, depending on the circumstances of the matter. In this respect, it must be said that there can never be exact predetermined rules that prescribe what must be done in every possible circumstance.<sup>61</sup>

A further important aspect is the fact that the state is normally vicariously liable for the actions of its officials. However, legal requirements

---

<sup>56</sup> The elements are the existence of the right, the existence of a duty to protect, the breach of that duty, causation, fault and finally damage or injury.

<sup>57</sup> Carpenter (n 14 above) 153.

<sup>58</sup> See secs 36(1)(a)-(e) of the Constitution.

<sup>59</sup> For more on this, see De Waal *et al* (n 51 above) 29-30.

<sup>60</sup> See Carpenter (n 14 above) 155 who also supports this view. In rebuttal, the state could then argue factors such as lack of knowledge of danger, the measure of foreseeability, feasibility and practical and financial capabilities. Refer also to Pieterse (n 45 above) 37.

<sup>61</sup> Political decision making and policy directives are mostly decisive in such instances. The government is often called upon to make value judgments in order to balance the various interests that could be at hand. Carpenter refers to a paradox in such circumstances, as a decision to make an arrest, for example, is subject to judicial scrutiny and review, while a decision not to arrest or not to act may often go unnoticed. Under-enforcement could also easily lead to selective enforcement.

to establish vicarious liability are not as simple as they often seem, and strict requirements must be met before such liability is confirmed.<sup>62</sup>

A court will usually not substitute its opinion for that of the repository of a discretionary power. If a discretion was exercised lawfully, thus also reasonably, regardless of whether the end result was right, a court should not tamper with such a decision.<sup>63</sup>

In light of the abovementioned factors, there should be little doubt that all states share a significant responsibility to ensure and protect the well-being of their citizens. In an effort to fulfil such a responsibility, many states have opted to enact detailed laws to regulate and control public violence and various forms of terrorism. South Africa is a good example of such a state, where recently, specific new legislative requirements have been enacted into law.

#### **4 New legal measures in South Africa directed at ensuring proactive protection of the right against violence and terrorism**

In 2000, South Africa started with an initiative to review statutory laws and common law relating to security and the criminalising conduct constituting terrorism and related activities. Since the existing offence of terrorism contained in section 54(1) of the Internal Security Act<sup>64</sup> related only to terrorism in respect of the South African government or population, it was deemed to be inadequate. The threat of international terrorism was often found to be directed at foreign targets such as embassies or foreign citizens. There was also a worldwide trend to create specific legislation directed at terrorism, based on international instruments relating to terrorism. Although existing laws could be amended, the government decided to enact a new omnibus Act addressing the issues of terrorism and international violence on a broader basis. This new Act is known as the Protection of Constitutional Democracy Against Terrorism and Related Activities Act.<sup>65</sup>

The new Act aims at providing measures to prevent and combat terrorist and related activities, to provide an offence of terrorism and

---

<sup>62</sup> For recent confirmation of the requirements of vicarious liability, see the cases of *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 2 SA 34 (CC); *Bezuidenhout NO v Eskom* 2003 3 SA 83 (SCA) and also *K v Minister of Safety and Security* 2005 3 SA 179 (SCA).

<sup>63</sup> Refer also to the case of *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC), where the Constitutional Court concluded that [even] the Constitution does not protect litigants from wrong decisions. Reasonable minds could well differ on the correct outcome of similar or even identical cases.

<sup>64</sup> 15 of 1982.

<sup>65</sup> 33 of 2004. The Act came into effect in May 2005.

other offences associated or connected with terrorist activities, to give effect to international instruments dealing with terrorist and related activities and also to provide measures to prevent and combat the financing of terrorist and related activities.<sup>66</sup> The Act reiterates that the Republic of South Africa is a constitutional democracy in which various fundamental rights are protected and that terrorist and related activities undermine such rights and values. Furthermore, and since terrorism has become an international problem, the government of the Republic of South Africa committed itself to prevent and combat terrorist and other related activities. Such actions are in fulfilment of the state's national and also international legal obligations.<sup>67</sup>

The Act creates a new terrorism offence. Any person who engages in a terrorist activity is guilty of the offence terrorism.<sup>68</sup> According to the definitions in the Act, the engagement in a terrorist activity includes the commission, performance, carrying out, facilitation of, participation or assistance in, the contribution to or even the planning of a terrorist activity. Terrorist activity is subsequently defined as, *inter alia*, any act committed in or outside the Republic which involves the use of violence by any means or method, the release into the environment or exposing the public to dangerous, harmful organisms, toxic chemicals or even biological agents that endanger life, could cause risk to the health and safety of the public, damage to property or the disruption of essential services.<sup>69</sup> According to section 3, various offences associated or connected with terrorist activities are established. The Act also provides for so-called convention offences. Such offences refer to offences created in the fulfilment of the Republic's international obligations dealing with terrorism in general, and also offences referred to in section 56(1)(h) of the Nuclear Energy Act,<sup>70</sup> referred to in sections 2(1) and (2) of the Civil Aviation Offences Act.<sup>71</sup> Other convention offences include (a) offences associated or connected with financing specified offences; (b) offences relating to explosive or other lethal devices; (c) offences relating to hijacking, destroying or endangering the safety of a fixed platform; (d) offences relating to the taking of a hostage; (e) offences relating to the causing of harm to internationally protected persons; (f) the hijacking of aircraft; and (g) the hijacking of a ship or the endangering

<sup>66</sup> Refer to the long title of the Act to confirm the overall aims of the Act.

<sup>67</sup> Such obligations include the state's regional or international instruments, such as the Convention on the Prevention and Combating of Terrorism, adopted by the African Union in 1999, to which the Republic of South Africa has become a party by ratification on 7 November 2002.

<sup>68</sup> See sec 2 of the Act.

<sup>69</sup> Refer to the complete definition of terrorist activity set out in sec 1 of the Act.

<sup>70</sup> 46 of 1999.

<sup>71</sup> 10 of 1972.



of the safety of maritime navigation.<sup>72</sup> Finally, the Act provides for so-called other offences, such as the harbouring or concealment of persons that have committed specified offences; the failure to report the presence of persons suspected of intending to commit or having committed any related terrorist activity; offences relating to hoaxes or even the threat, attempt, conspiracy or inducement of another person to commit a terrorist-related offence.<sup>73</sup>

It should be of interest to note that, not only are individual terrorist activities prohibited, but that an entity under the Act also includes members of a syndicate, gang or even organisation or association. Since the aim of the Act is to protect civil society and proper law enforcement, it falls under the ambit of the Minister responsible for safety and security. Not only are positive terrorist activities regulated, but also failures or omissions. The Act also determines that a political, philosophical, ideological, racial, ethnic, religious or any other similar motive shall not be considered as a justifiable defence of any terrorist activity.<sup>74</sup>

According to section 15 of the Act, the jurisdiction of the South African courts was broadened in respect of terrorist offences. Particular provisions of the Criminal Procedure Act<sup>75</sup> and the Extradition Act<sup>76</sup> are applicable to the prosecution of terrorist activities under the Act. No prosecution under chapter 2 of the Act may, however, be instituted without the written authority of the National Director of Public Prosecutions.<sup>77</sup> Severe penalties are prescribed for persons who are convicted of offences mentioned in the Act. Penalties differ from life imprisonment to fines up to R100 million.<sup>78</sup> The Act also provides for the forfeiture of property to the state when such property has been used in the commission of an offence.<sup>79</sup>

In conclusion, the Act provides for specific investigating powers and freezing orders.<sup>80</sup> A judge may, with a view to preventing a terrorist or related activity on written request and under oath by a police official of, or above, the rank of director, issue a warrant for the cordoning off and stopping and searching of vehicles and persons. This provision does not

---

<sup>72</sup> See secs 4-10 of the Act respectively.

<sup>73</sup> See secs 11-14 of the Act respectively.

<sup>74</sup> See sec 1 definitions.

<sup>75</sup> 51 of 1977.

<sup>76</sup> 67 of 1962.

<sup>77</sup> Refer to sec 16 of the Act.

<sup>78</sup> See secs 18(a)-(f) of the Act. A court can also order a person to reimburse another party for expenses incurred incidental to the relevant activity. Offenders are furthermore jointly and severally liable for expenses incidental to any terrorist activity. See secs 18(2)(a)-(c) of the Act.

<sup>79</sup> Secs 19(1)(a)-(b) of the Act.

<sup>80</sup> See secs 22-23 of the Act.

affect the rights of police officials or other law enforcement officers to use any other power in any other law in respect of the cordoning off or search or seizure of persons or property.<sup>81</sup>

Generally, the new South African Act provides a powerful tool to the state in its obligation to combat terrorism and to protect the well-being of South African citizens and their property. Although various safeguards have been included in the Act, it is submitted that some measures surpass certain rights protected under the Constitution and the Bill of Rights in particular. Although the scope of this research does not allow for an in-depth and comprehensive discussion of all possible conflicts of interest between the new security law and the South African Constitution, possible conflicts are highlighted as follows:

- (a) Arrested, detained or accused persons under the new Terrorism Act could potentially find themselves in a situation where they are treated differently from others within the territory of South Africa, and could possibly argue that their rights to equal treatment before the law and equal protection and benefit of the law are limited.<sup>82</sup>
- (b) People accused of terrorism may also argue that their dignity and right to freedom and security of their persons are encroached upon if they are deprived of their freedom arbitrarily or on unjust grounds.<sup>83</sup>
- (c) Many limitations on the right to privacy are possible.<sup>84</sup>
- (d) Members of specific communities who express themselves on religious grounds and who belong to certain organisations may claim that their rights to religion, belief and opinion, freedom of expression, assembly and association are limited or threatened.<sup>85</sup>

<sup>81</sup> See secs 24(1)-(5) of the Act.

<sup>82</sup> See sec 9(1) of the Constitution.

<sup>83</sup> See to secs 10 & 12 of the Constitution. Detention without trial is also prohibited under sec 12(1)(b) read with sec 35 of the Constitution.

<sup>84</sup> See secs 14(a)-(d) of the Constitution. Private home searches, seizure of property or infringement of private communications are possible examples of privacy infringements.

<sup>85</sup> See secs 15, 16, 17 & 18 of the Constitution. In England, new proposals have been tabled in July to August 2005 to restrict certain religious speeches and to ban people from belonging to certain prohibited organisations. Note again that the South African Act specifically states that religious or other motivations shall not be regarded as a justifiable defence for any defined terrorism activity. See n 74 above. It should also be noted that any expression to promote propaganda for war or the incitement of imminent violence is an internal limitation on a persons right to freedom of expression. See secs 16(2)(a)-(c) of the Constitution.

- (e) Aspects concerning the right to citizenship, freedom of movement and residence and freedom of trade and occupation may also be relevant.<sup>86</sup>
- (f) The deprivation of property and the freezing and confiscation of bank accounts are also possible confrontational aspects.<sup>87</sup>
- (g) Finally, various legal disputes may occur, based on the rights of access to information, just administrative action, access to courts and the rights of an arrested, detained and accused persons.<sup>88</sup>

Whether such measures will survive constitutional scrutiny will depend on the circumstances of each case and whether such measures are regarded as reasonable and justifiable limitations of one or more rights protected under the Bill of Rights.<sup>89</sup>

## 5 Conclusion

It is a well-known fact that many democratic systems in the world are under siege and threat of international terrorism and violence. There seems to be no exceptions to who is targeted and affected. Many supporters of acts of terror try to justify their actions by social, religious and also economic reasons. Terrorism is often supported because of the progress of first world economies, while many other second and third world countries are becoming poorer and poorer. It must, however, be stated that acts of terrorism will not bring about positive change for any country, but will lead to more restrictions and more suffering to those who can afford it the least. Violence creates violence.<sup>90</sup>

In order to cope with the ever-escalating circle of violence and terror, many states are implementing drastic and often invasive plans of action to protect their own existence as well as the safety and well-being of their citizens. Often, the measures undertaken by such states are seen to be over excessive and unnecessary.<sup>91</sup> The counterargument to this is that many societies will take the law into their own hands if their states do not take action to protect their rights and freedoms. In this regard,

<sup>86</sup> See secs 20, 21 & 22 of the Constitution. Possible unreasonable deportations of foreign nationals or restrictions on movement or residence can easily occur.

<sup>87</sup> See sec 25 of the Constitution.

<sup>88</sup> Secs 32, 33, 34 & 35 of the Constitution. Denying someone the right to be brought before a court of law within 48 hours after an arrest is an obvious example. See sec 35(1)(d)(i) of the Constitution.

<sup>89</sup> Refer to the limitation procedures set out in sec 36 of the Bill of Rights.

<sup>90</sup> Evaluate again the passages quoted from Plato's *Republic* in Ebenstein (n 2 above) 62.

<sup>91</sup> See eg the following reports: 'Tougher anti-terror laws proposed in Britain' [http://news.bbc.co.uk/2/hi/uk\\_news/](http://news.bbc.co.uk/2/hi/uk_news/) (accessed 9 December 2004); 'House arrest without trial to be rushed through' <http://www.telegraph.co.uk> (accessed 28 February 2005); and 'Judge warns of Orwellian terrorism laws' *Sydney Morning Herald Online* <http://www.smh.com.au/news/anti-terror-watch> (accessed 11 December 2004).

there is a perception in the world today that the rights of law-abiding citizens are ignored, while the rights of criminals enjoy more primacy. This situation is often referred to as a crisis of social order.<sup>92</sup> Many citizens feel that the protection of fundamental rights is only of value in a civilised state and not in a country where crime and terror are rampant and where human life is cheap. People depend on their rights and the protection of the law, not because of principle but because of self-interest. In this regard, it was said jokingly in the past that a conservative is a liberal who has just been mugged, while a liberal is a conservative who has just been arrested.<sup>93</sup>

From the above, it is evident that the modern state finds itself in a serious dilemma. On the one hand, the state has a clear obligation and duty to protect the safety and well-being of its citizens. On the other, the state must also protect and safeguard core principles such as the rule of law, the protection of fundamental rights and a genuine democratic order. A balance of these two interests is often difficult to achieve. When stricter laws are implemented to deter and address terrorism, for example, many other fundamental rights are limited or even taken away. The modern state thus find itself in a position where the state is 'damned if it takes action, and it is damned if it doesn't'.<sup>94</sup> From a legal point of view, this situation can create significant challenges. Notwithstanding the consequences, the modern state cannot adopt a casual or even cavalier attitude towards its duty to ensure public and personal safety. It is submitted that the state owes a duty to its citizens who, through the system of a democratic order, have put the state in existence. It is therefore argued that the state must take the necessary action in order to protect itself and its people.<sup>95</sup> Every state should seek a balance between security and democracy. Although security is of paramount importance, it should not be achieved through excessive and undemocratic mechanisms. Basic legal and constitutional principles, such as the rule of law, the protection of fundamental rights and a truly democratic order should be maintained. In respect of democracy, it should be emphasised that democracy does not only mean majority decision making, but indeed such decision making within a system where other pre-determined safeguards and limitations

---

<sup>92</sup> See Carpenter (n 14 above) 139 where she refers to the address given by Justice E Cameron at the Alan Paton award ceremony in 1997 in South Africa, as was reported in *The Sunday Times* 8 June 1997 21.

<sup>93</sup> Carpenter (n 14 above) 139. The reference clearly illustrates the view that victims of crime feel that the law only protects the baddies, while the baddies are again aggrieved that the government is bullying them and that the law and legal system are only accessible to the rich and powerful.

<sup>94</sup> Carpenter (n 14 above) 159.

<sup>95</sup> Democracy ultimately does not only refer to the protection of individual rights but, more so, the principle itself will not suffice in a world if it is made redundant through the acts of terrorism and criminal intentions.

have been set. In this respect, democracy encapsulates more than just public and personal safety. It also includes aspects such as the protection of generally accepted fundamental rights, free political expression, freedom of the press and information, due process of the law and an independent judiciary.

In order to deal effectively with terrorism, special state action is required. The higher the threat is, the higher the level of pro-active state actions required. In such instances, it would seem to be part of the democratic order to take all necessary actions, even to limit other legal entitlements, in order to protect a state's own existence and the well-being of its civil society. The state is called upon to make a value judgment, in light of all the relevant and prevailing circumstances, in order to determine the right course of action. However, there are limits to what a state may do in the name of combating terrorism.<sup>96</sup> A democratic state should always remind itself that it does not have a *carte blanche* mandate to act as it sees fit.<sup>97</sup> The state must ensure action that is reasonable and justifiable in the relevant circumstances in order to fulfil its duties and responsibilities, but it should guard strongly against creating a system of governance, where the state itself, under the cover of combating crime and terrorism, is ultimately breaking down the very pillars of a democratic society.

Finally, it is submitted that the legal requirements, as are set out in the new South African Protection of Constitutional Democracy Against Terrorist and Related Activities Act, do indeed take significant steps towards protecting the South African public against attacks of terrorism and public violence. However, the extent to which the new Act, together with the Constitution, will balance the competing interests of security and democracy will ultimately depend on political insight, judicial oversight and the relevant circumstances of each particular situation.<sup>98</sup> Let us hope that such circumstances will be limited to only a few instances, if any at all.

---

<sup>96</sup> Limitations on the right to freedom of movement, search and seizure procedures, visa control and identification confirmation are acceptable examples in this regard.

<sup>97</sup> Entitlements, such as the right to a fair trial, access to courts, legal representation and the protection against cruel and inhuman treatment should not be encroached upon.

<sup>98</sup> It has been suggested that extraordinary steps and powers are required in extraordinary situations. The bigger the scale and threat of security breaches, the more extensive counter measures seem to be permissible.

## **The embargo against Burundi before the African Commission on Human and Peoples' Rights (Note on Communication 157/96, *Association for the Preservation of Peace in Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*)**

*Alain Didier Olinga, HDR*

Lecturer at the Institute for International Relations (IRIC), University of Yaoundé II, Cameroon

### **1 Introduction**

The African Commission on Human and Peoples' Rights (African Commission) should be lauded for placing the 1981 African Charter on Human and Peoples' Rights (African Charter) firmly on the road to effectiveness, departing from what had initially been considered the organised ineffectiveness of 1981,<sup>1</sup> with a quantitatively respectable<sup>2</sup> and qualitatively ever richer jurisprudence.<sup>3</sup> Nevertheless, one cannot fail to express the opinion that much remains to be refined in the Commission's interpretative procedures, particularly when it gives a

---

<sup>1</sup> See AD Olinga 'L'effectivité de la Charte africaine des droits de l'homme et des peuples/The effectiveness of the African Charter on Human and Peoples' Rights' (2000) *Afrique* 1996.

<sup>2</sup> See Institut pour les Droits Humains et le Développement/Institute for Human Rights and Development, 'Compilations des décisions sur les communications de la Commission Africaine des Droits de l'Homme et des Peuples/Compilations of the decisions on the communications of the African Commission on Human and Peoples' Rights' Dakar, April 2002 463.

<sup>3</sup> See F Ougergouz 'Les mécanismes continentaux de protection de la personne humaine en Afrique — Gros plan sur la Charte Africaine des Droits de l'Homme et des Peuples/Continental protection mechanisms for the human person in Africa — A close-up of the African Charter on Human and Peoples' Rights' (2001) 10 *L'Observatoire des Nations Unies* 103-139.

ruling on a contentious issue. The ideology of constructive dialogue, which it operates under, and its twin tasks of promoting and protecting human rights seem to influence the quality of its jurisprudence. The balancing act, often rather difficult to follow, between the political procedure of promotion and the more technical procedure of protection, results in atypical jurisdictional interpretations. Such, in my opinion, is the case of the decision of the African Commission on the legality in terms of the African Charter of the embargo passed in 1996 against Burundi by its neighbours. This decision was taken in May 2003 on a communication introduced in September 1996.<sup>4</sup> At the time of the decision, the political context had completely changed, the embargo had been lifted and there was no evidence that its initial effects were still being felt. The decision thus appears to be pointless, 'moot', according to the English expression, or simply declaratory; a political rather than a legal decision, the appropriateness of which is doubtful. Below a detailed account of the facts of the case is given.

On 25 July 1996, Major Pierre Buyoya overthrew elected Burundian President Sylvestre Ntombantunganya in a *coup d'état*. On 31 July 1996, during a summit held at Arusha in Tanzania, the states of the region decided to impose an embargo on Burundi, with the intention of denouncing the *coup d'état* and ensuring the promotion of democracy, justice and the rule of law. The Security Council of the United Nations (UN), in its Resolution 1072 (1996), and the Organisation of African Unity (OAU) subsequently approved this embargo decided on at the sub-regional level. This embargo was denounced by a non-governmental organisation (NGO), the Association for the Preservation of Peace in Burundi (ASP-Burundi), before the Commission. Indeed, on 18 September 1996, ASP-Burundi submitted a communication to the Commission pointing out that the embargo violated three documents, namely the African Charter itself, the OAU Charter and Resolution 2625 (XXIV) of 24 October 1970 of the UN General Assembly. More specifically, it was alleged that it violated article 4 of the Charter (the embargo prevented the importation of essential goods such as fuel required for the purification of water and for the preservation of drugs; and the embargo prevented the exportation of tea and coffee, the country's only sources of revenue), article 17 (the embargo prevented the importation of school materials), article 22 (the embargo denied Burundians access to means of sea and air transport), article 23(2)(b) (Tanzania, Zaire and Kenya were alleged to shelter and give their support to terrorist militia) and, finally, it violated articles 3(1), (2) and (3) of the OAU Charter (interference in the internal affairs of Burundi). The communication therefore

<sup>4</sup> The communication is included in the Commission's 17th Annual Activity Report, as *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*. The text of this report is not yet available on the Commission's website ([www.achpr.org](http://www.achpr.org)).

mentions violations both of human and peoples' rights, as well as 'rights of the state'. Coming from an NGO, this seems *a priori* curious.

On 6 April 1997, the states that had instituted the embargo had relaxed it somewhat by excluding from its field of application school materials, foodstuffs, construction material, medical supplies, agricultural produce and inputs. However, at its 24th session, the Commission decided to address a communication to the serving President of the OAU, requesting that the states concerned find means to reduce the effects of the embargo, while specifying that this should not in any way prejudice the in-depth examination of the case. The meaning of this procedure is not clear. Was it a provisional measure? In this case the Commission should have been more specific in its demands and specified the effects to be reduced. Does a request to reduce the effects of the embargo not imply that the effects of the said embargo violate, as such, the provisions of the Charter? Whatever the Commission may say, this is a question of pre-judgment in which the roles of promotion and protection are confused. How could the Commission request states to reduce the effects of an embargo ratified by a resolution of the Security Council, without at the same time prompting a finding that they are in violation of their international obligations? Should the obligations in accordance with the African Charter take precedence over those in accordance with the UN Charter? The tabled communication requested that the states concerned be ordered, among other things, to pay damages. The examination of the case by the Commission, at the admissibility stage and at the in-depth analysis stage, brought to light, beyond the final assessment of non-violation of the Charter, two elements on which it would be advisable to dwell: the question of the *locus standi* of ASP-Burundi before the Commission, a question resolved in a most unsatisfactory manner, and the weakness of the Commission's arguments regarding the substance of the matter.

## **2 Unsatisfactory handling of the question of the *locus standi* of ASP-Burundi before the Commission**

For a proper understanding of the importance of this question, it should be recalled that communications based on the African Charter may be from member states in accordance with articles 47 to 54, or from individuals or NGOs in accordance with articles 55 to 59. Even if, when a state acts by virtue of article 49 of the Charter, principles of procedure are similar to those for communications from a state and 'other' communications, there are two distinct procedures, clearly and separately codified by the Rules of Procedure of the Commission. It follows that a communication from a state cannot be transformed into a communication from an individual. Conversely, a communica-



tion from an individual cannot conceal a communication from a state. On the other hand, the rights that the African Commission guarantees are both human rights and peoples' rights. If it is understandable that a state, an individual or an NGO may apply to the Commission to safeguard the rights of an individual, is it conceivable that a state, an individual or an NGO may apply to the Commission to guarantee the rights of the 'people of any other state' (article 23(2)(b) of the Charter)? *A priori*, one cannot perceive in the system of the Charter any impediment prohibiting this possibility. To think otherwise would be to deprive the peoples' rights in the Charter of their potential effectiveness. And yet, to admit this hypothesis would be to politicise considerably the Pan-African system for the protection of rights. What is at stake is the fate of the peoples' rights contained in the Charter, from the point of view of effectiveness. This was the embarrassing situation that confronted the Commission when it examined the admissibility of the communication in question. Was it a communication from a state or from an individual? The Commission dealt with this question in paragraphs 63 to 66 of its decision. In paragraph 63, the Commission states that it had

[t]o resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of articles 47-54 of the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a class action. In the interests of the advancement of human rights, this matter was not rigorously pursued, especially as the respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under article 56.

This standpoint is not satisfactory. If the Commission firmly concluded that ASP-Burundi, although formally an NGO, 'represented' in all respects 'the interests of the military regime of Burundi', then the logical conclusion ought to have been that it was Burundi directly that was the party instituting proceedings and not an undercover-NGO. If the legal link of representation was established, then the legal conclusion should have been implacable, namely, articles 47 to 54 of the Charter should have been applied. The applicability of these articles was all the more logical since, on the one hand, states can 'have themselves represented before the Commission' (article 51(2) of the Charter) and, on the other hand, communications from states are in no way against the interest of the promotion of human rights. Even if it has been the practice of the Commission to receive communications from NGOs, it has never received any communications from an NGO representing, 'in all respects', the interests of a given government. The question of the nature of a communication (from an individual or from a state) is an essential preliminary question, and even one of a public nature for the

Commission. This may not be treated in a lenient manner, for it would allow a situation in which NGOs accredited by the Commission could, in fact, be 'screens' for governments, risking the discrediting of civil society in Africa, in spite of NGO dynamism in the area of human rights, particularly in Africa. This was also probably the first time that an NGO was in collusion with a government in such an obvious way.

The notion of a 'class action' evoked by the Commission to describe the procedure of ASP-Burundi is intriguing in more ways than one. Is this a new category in the system of the Charter and, if so, what could be its legal basis, beyond an 'interest in the promotion of human rights'? Whatever the case may be, it must be said that the system of the Charter has developed procedures for communications from states and from individuals. It would be problematic to do away with these without valid justification, allowing NGOs to become involved, in the name of governments, in procedures directed against other states, making use of the platform provided by the African Commission. Every type of communication has its own set of requirements, and the Commission cannot create a situation in which communications that are in principle from individuals, but in practice from states, escape from the requirements governing the admissibility of communications from states. This will encourage contempt for the Charter.

Having decided that the communication will be handled as an individual communication, the Commission states that the provisions of articles 56(5) and (6)<sup>5</sup>

are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state respondents herein. This is yet another indication that this communication appropriately falls under Communications from States (articles 47-54).

This statement adds to the confusion. Would there be situations which, by nature, are not subject to the rule of exhausting internal channels of appeal? The end of this statement could lead one to believe that communications from states are not compelled to adhere to the rule of exhausting internal channels of appeal. The Commission has not, it would seem, had the courage to follow this idea to its logical conclusion, by inquiring whether complaints about violations of the rights of people-states could reasonably be submitted to the condition of exhausting domestic remedies. The Commission will not be able to avoid this question for much longer.

The Commission's conclusion on the issue of admissibility is disconcerting. Normally, according to the Commission, the communication ought to be treated as a communication from a state, and that<sup>6</sup>

[d]rawing from general international law and taking into account its man-

<sup>5</sup> Para 65 of the Decision.

<sup>6</sup> Para 66 of the Decision.

date for the protection of human rights as stipulated in article 45(2), the Commission takes the view that the communication deserves its attention and declares it admissible.

Because nothing indicates that an examination of the communication on the basis of a complaint from a state would have precluded admissibility, the wording of the communication is in itself detrimental to the Charter system. Nobody knows from what general international law the Commission drew its inspiration here. For a system that is still finding its way, it is imperative not to depend on such generalities. Is the Commission's protective mandate a sufficient reason, when the intention was to conduct this aspect of its mandate in accordance with rules contained in the Charter? The mandate cannot authorise ignorance of the precise procedures to aid its achievement. The Commission, in my opinion, bypassed the system prescribing the admissibility of communications from individuals. To say that a request 'deserves attention' means nothing in particular. Does it follow that communications declared inadmissible are those posing problems that do not deserve the Commission's attention? In short, the exercise of the protective mandate has procedural constraints that the Commission must include at all the stages of deliberation. 'Class action' cannot become a category of appeal exempt from the admissibility requirements of other communications. The Commission's desire to take cognisance of the situation at all costs does not appear to be at all justified by the in-depth analysis. This is on the whole rather disappointing.

### 3 A superficial analysis of the substance of the matter

Before considering the analysis of the Commission regarding the substance of the matter, it must be stressed that, although ASP-Burundi specified alleged violations, the Commission did not reply to them in any detail. The complainant claimed, with supporting arguments, that the embargo violated articles 4, 17(1), 22 and 23(2)(b) of the African Charter. Since the Commission had decided that the request deserved its attention, one would have expected a detailed study of these allegations. However, this did not happen. An introductory note, in which the Commission could have resolved the question of the legal sources cited by the complainant, notably the OAU Charter, the UN Charter and Resolution 2625 of 24 October 1970, could also have been interesting. Was the Commission competent to examine the allegations in any way directly?<sup>7</sup> This question should have been settled, preventing the Commission from dealing with problems that do not concern it. The Com-

<sup>7</sup> As for the OAU Charter, one can reason *a contrario* that if art 56 of the Charter demands that communications be 'compatible', among other things, with the provisions of the said Charter, this is because it is a document that can be applied by the Commission, as well as being a standard of reference for the control exercised by the Commission, at least in the admissibility stage. For the other texts, the situation is problematic.

mission then proceeded to deal with the question as to the legality of the embargo, the question of the proportionality of the effects of the embargo and the question of interference in the affairs of Burundi. The first and third questions are closely linked, because it is by alleging interference in the domestic affairs of Burundi that the very principle of the embargo, and thus its legality, is questioned.

The Commission considered the embargo against Burundi to be legitimate, as it was based on the provisions of the UN and OAU Charters, it had respected the procedures appropriate to the case, and its objective was legitimate. The embargo, according to the Commission, 'is based' on the provisions of chapters VII and VIII of the UN Charter regarding 'Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' and 'Regional Agreements', 'in the sense that the military *coup d'état*, which deposed the democratically elected government, constituted a threat to, indeed a breach of, the peace in Burundi and the region' (paragraph 70). In 1996, at the time of the events under consideration, Africa had not yet started to express condemnation of governments that came into power by unconstitutional means, as became the case from 1999 and with the adoption of the African Union (AU)'s Constitutive Act. This is probably why the Commission failed to consider the embargo legitimate based on the principle of democratic interference, but rather on motivations of collective security. The Commission, however, did not demonstrate sufficiently in what way the *coup d'état* of Major Buyoya constituted a 'threat' to or a 'breach' of the peace in the region, unless one accepts in this regard the statement in paragraph 77 according to which

[i]t is self-evident that Burundians were in dispute among themselves and the neighbouring states, under the supervision of the OAU and the UN, had a legitimate interest in a peaceful and speedy resolution of the dispute.

The Commission noted further that the actions of the authors of the embargo, dictated by the principles of the UN and the OAU, were initiated during a summit of the states of the Great Lakes Region; and that the resolution to impose the embargo was subsequently ratified by the competent authorities of the two organisations. Its conclusion was therefore implacable, and legally correct in my view, that<sup>8</sup>

[n]o breach attaches to the procedure adopted by the states concerned. . . . The endorsement of the embargo by resolution of the Security Council and of the summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

As a result, any allegation of abusive interference in the affairs of Burundi falls away (paragraph 78).

Since the legality of the embargo was recognised, the fundamental question that remained and that could have affected the legitimacy of

---

<sup>8</sup> Para 72 of the Decision.

the action, was whether the sanctions were excessive and disproportionate, whether they were indiscriminate and went beyond their legitimate purpose. In this regard, the Commission expressed a position of principle which should serve as a future guide:<sup>9</sup>

Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of.

To put it plainly, the embargo should be 'selective' and not penalise the most vulnerable. After establishing this principle, the analysis of the Commission is less pertinent. Evading the concrete grievances set out in the claim, it notes<sup>10</sup>

that the sanctions imposed against Burundi were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and the situation was monitored regularly.

If one sets aside the targeting of specific goods and monitoring the effects of the sanctions mentioned above, the Commission's decision does not result from a detailed analysis of the case. The communication evoked the violation of articles 4, 17, 22 and 23 of the Charter. Were the social needs of the most vulnerable populations compromised so that a violation of the Charter could be decided? Did the sanctions target the main perpetrators of the *coup d'état*? This analysis was not done. The communication claimed that the tempering of the embargo remained theoretical and was not followed by concrete results. Was the Commission satisfied with an abstract examination? In my opinion, this is a grave oversight. Incidentally, a quotation from the report of the Secretary-General of the OAU submitted in June 1998 at the 68th session of the Council of Ministers is rather damning of the Commission:<sup>11</sup>

... besides their political, economic and psychological impact, they (the sanctions) continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results ... It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target.

Certainly, in May 2003, on the occasion of the decision, 'the matters complained of here have now been largely resolved. The embargo has been lifted ...' However, does the lifting of the embargo at an unspe-

<sup>9</sup> Para 75 of the Decision.

<sup>10</sup> Para 76 of the Decision.

<sup>11</sup> The report established therefore that the sanctions were more harmful to the most vulnerable levels of the population than to those who were the intended target, the political group that had perpetrated the *coup d'état*. This group was enriching themselves from the embargo, whereas the poor were getting progressively poorer. By the yardstick of the criteria released by the Commission itself, the legitimacy of the embargo was being called into question. CM/2034 (LXVIII), 68th ordinary session of the Council of Ministers, Ouagadougou, 1-6 June 1998.

cified date erase its consequences, including those that would have constituted a violation of the Charter?

As the accusation applies to article 23(2)(b) of the Charter, which compels member states to prohibit 'their territories from being used as a base for subversive or terrorist activities directed against the people of another state, a signatory of the present Charter', a factual examination was imperative for the Commission to ensure respect for the Charter. This was not done.

Finally, the Commission finds that 'the respondent states are not guilty of a violation of the African Charter on Human and Peoples' Rights'. It notes the entry into force of the Arusha Agreement for Peace and Reconciliation in Burundi, and the efforts of the respondent states in the communication aimed at restoring a lasting peace and, more strangely, welcomes the entry into force of the AU's Constitutive Act, particularly in so far as it censures states that come to power by unconstitutional means. This terminology is typical of the political resolutions adopted by the Commission<sup>12</sup> and is out of place in a decision on a contentious issue. An in-depth legal analysis was stifled and reinforced the impression that it would have been better to strike this interpretation off the roll, rather than to arrive at a pointless decision. The length of time before a finding was made, showing little concern for the right of the parties to have their case examined within a reasonable time, and the inadequate interpretation does not contribute to the coherence and pertinence of the final findings of the Commission.

---

<sup>12</sup> See AD Olinga 'Les resolutions de la Commission Africaine des Droits de l'Homme et des Peuples. Une tentative de systématisation/The Resolutions of the African Commission on Human and Peoples' Rights. An attempt at systematisation' (2002) 1 *Afrique Juridique et Politique*, Revue du CERDIP.

## 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 & Walters (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; sees. 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.

## **2005 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**

R410,00 (14 % VAT included) plus R56,00 postage and packaging: R466,00

## **REST OF THE WORLD**

R359,65 plus R98,85 surface postage and packaging: R458,50



**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](http://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](mailto:chr@postino.up.ac.za)

**Staff**

**Lizette Besaans**  
Publications Typist

**Yolanda Booyzen**  
Webmaster

**Cherryl-Lee Botterill**  
Project Officer: Good Governance Programme

**Danie Brand**  
Research Associate; Senior Lecturer in the Faculty of Law

**Elize Delpont**  
Project Manager: Gender Unit

**Isabeau de Meyer**  
Programme Manager: LLM (Human Rights and Constitutional Practice); Administrator

**Loretta Feris**  
Research Associate; Associate Professor in the Faculty of Law

**Michelo Hansungule**  
Professor of Human Rights Law; Academic Co-ordinator: LLM (Human Rights and Constitutional Practice)

**Christof Heyns**  
Director; Professor of Human Rights Law

**Gill Jacot Guillarmod**  
Senior Programme Manager; Liaison Officer

**Magnus Killander**  
Researcher

**Caryn Laka**

Project Assistant: Good Governance Programme

**Emily Laubscher**

Financial Officer

**Mzi Memeza**

Programme Co-ordinator: LLM (International Trade and Investment Law in Africa)

**Martin Nsibirwa**

Programme Manager: LLM (Human Rights and Democratisation in Africa) and African Human Rights Moot Court Competition

**Sarita Pienaar-Erasmus**

Deputy Financial Manager

**Charmaine Pillay**

Deputy Financial Manager

**Harold Meintjes**

Acting Financial Manager

**Jérémie Munyabarambe**

Programme Officer: LLM (Human Rights and Democratisation in Africa); Moot

**Karen Stefizsyn**

Researcher

**Norman Taku**

Assistant Director

**Morné van der Linde**

Senior Researcher; Project Manager: Environmental Law in Africa Project

**Carole Viljoen**

Office Manager; Project Manager: Integrated Bar Project

**Frans Viljoen**

Professor of AIDS and Human Rights Law, Centre for Human Rights and Centre for the Study of AIDS

**John Wilson**

Project Assistant: LLM (Human Rights and Democratisation in Africa)

**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, Realising Rights, New York, USA

**Board****Kader Asmal**

Member of Parliament

**Duand 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 (with the Centre for the Study of AIDS)
- Good Governance Programme
- Socio-Economic Rights Research Project
- Database on Human Rights in Africa
- Environmental Law in Africa Project
- Law of Africa Project (with the Faculty of Law)

**Regular Publications**

- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *Human Rights Law in Africa* (English and French)
- *Constitutional Law of South Africa*

## CHART OF RATIFICATIONS : AU HUMAN RIGHTS TREATIES

Position as at 31 July 2005

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 July 2005)

	African Charter on Human and Peoples Rights	OAU Conven- tion 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 Estab- lishment 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	28/06/04	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	02/04/04	18/03/04	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		14/08/00
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75	10/06/05	25/08/04
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	04/02/04
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 Conven- tion 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 Estab- lishment of an African Court on Human and Peoples' Rights
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Madagascar	09/03/92		30/03/05	
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	17/07/04
Namibia	30/07/92		23/07/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03
Sahrawi Arab Democratic Rep.	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	
<b>TOTAL NUMBER OF STATES</b>	53	45	37	21